# INDEPENDENT EXPERT OPINION

Concerning the application of the Convention on International Interests in Mobile Equipment and its Aircraft Protocol under Chapter 11 of the U. S. Bankruptcy Code involving a non-US debtor

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We have been retained by the Aviation Working Group[1] (AWG) to express our independent expert opinions concerning the application of the Convention on International Interests in Mobile Equipment (Convention),[2] which is generally known as the Cape Town Convention, and the Protocol thereto on Matters Specific to Aircraft Equipment (Protocol),[3] together with the Convention referred to herein as the CTC, under U.S. law in a hypothetical case under Chapter 11 of the U.S. Bankruptcy Code (Bankruptcy Code).[4] The AWG has requested our independent expert opinions in view of the circumstances (discussed in more detail below) regarding a likely increased incidence of litigation involving the CTC's effect in U.S. insolvency proceedings.

Our respective qualifications and experience relevant to our opinions expressed here are summarized on Annex A to this opinion.[5]

## I. Statutory and Treaty Background

*Cape Town Convention and Aircraft Protocol*

In 2001 the government of South Africa hosted a Diplomatic Conference in Cape Town, jointly sponsored by UNIDROIT and the International Civil Aviation Organization,[6] which

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[1] AWG is a not-for-profit entity that comprises major aviation manufacturers, leasing companies and financial institutions. It was formed, at the request of UNIDROIT, in 1994 to contribute to the development of the CTC. *See infra* note 2. AWG chaired the group that prepared the first draft of the Protocol and was active through the development and negotiation of the CTC. *See generally* https://awg/aero (background on AWG). With information from its global legal network, AWG publishes a country index assessing and scoring compliance by State parties to the CTC with its terms, https://ctc-compliance-index.awg.aero.

[2] International Institute for the Unification of Private Law (UNIDROIT), Convention on International Interests in Mobile Equipment (Convention), http://www.unidroit.org/instruments/security-interests/cape-town-convention. Citations to the Convention are to "Conv. Art. ___."

[3] UNIDROIT, Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Protocol), http://www.unidroit.org/instruments/security-interests/aircraft-protocol. Citations to the Protocol are to "Prot. Art. ___."

[4] 11 U.S.C. §§ 101 *et seq*. Our opinions expressed here apply as well in a case under Chapter 15 of the Bankruptcy Code. *See also infra* note 34 (discussing application of CTC to case under Chapter 15).

[5] In the case of Professor Mooney, and by way of full disclosure, that experience includes his role as a member and position coordinator for the United States during the development and negotiation of the CTC (including at preliminary meetings, governmental expert meetings, and the Diplomatic Conference).

[6] Sixty-eight States and fourteen international organizations participated in the Diplomatic Conference. Diplomatic Conference to Adopt Mobile Equipment Convention and an Aircraft Protocol, Acts and Proceedings, 707, 727 – DCME DOC. No. 64, https://www.unidroit.org/english/publications/acts2006capetown.pdf [hereinafter Diplomatic Conference Acts].

produced the Convention and the Protocol. The Convention contains the basic legal regime for secured financing and leasing of certain types of equipment and the Protocol contains specialized provisions necessary to adapt the CTC to the financing and leasing of aircraft and aircraft engines. The Convention cannot apply on a stand-alone basis; it can apply only in connection with a protocol covering a specific type of equipment.[7] Although the Convention and the Protocol are to be treated as one instrument,[8] "[t]o the extent of any inconsistency between the Convention and the Protocol, the Protocol shall prevail."[9]

The CTC establishes an international legal system for the creation and registration of certain "international interests"[10] (including personal property security interests and leases) in "aircraft objects"[11]—large airframes, aircraft engines, and helicopters. The goal of these instruments is to facilitate efficient asset-based financing. In addition to conventional security interests, the scope of the "international interest" also embraces the interests of a lessor and a conditional seller of an aircraft object.[12] At the time the CTC was conceived and during its development, the manufacturers of commercial aircraft equipment expected to sell, and airlines worldwide expected to buy, trillions of dollars' worth of products. But local domestic legal regimes in many States were inadequate to support secured, asset-based financing. Without needed law reforms, some worthwhile transactions would not take place and others would be completed only with higher financing costs. In some cases, financings could go forward only with the support of the sovereign credit of states in which airlines were based. The CTC provided the necessary reforms.[13]

By almost any measure the CTC has proved to be one of the most successful international commercial instruments ever, and certainly the most important one dealing with secured transactions and leasing. The United States ratified the CTC in 2004 and the CTC entered into force on March 1, 2006.[14] There was broad support within the U.S. government and among important stakeholders in the United States for the development, ratification, and promotion of the CTC, primarily influenced by the enormous potential economic impact of its widespread

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[7] Conv. Arts. 2(2); 49(2).
[8] *Id.* Art. 6(1).
[9] *Id.* Art. 6(2).
[10] Conv. Art. 1(o) (defining "international interest").
[11] Prot. Art. I(2)(c) (defining "aircraft objects").
[12] Conv. Arts. 1(i) (defining "creditor"), (o) (defining "international interest"; 2 (scope of international interest).
[13] In many respects these instruments follow the approach of Uniform Commercial Code (UCC) Article 9 on secured transactions and Article 2A on leasing, in effect in every state of the United States, as well as various personal property security acts in effect in the provinces of Canada. The conformity of the CTC to the general approach to secured credit in North America is no accident: the U.S. delegation sought this result throughout the process.
[14] UNIDROIT, Convention on International Interests in Mobile Equipment (Cape Town, 2001) – States Parties, https://www.unidroit.org/instruments/security-interests/cape-town-convention/states-parties/; UNIDROIT, Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Cape Town on 16 November 2001) – States Parties, https://www.unidroit.org/instruments/security-interests/aircraft-protocol/states-parties/ [hereinafter Protocol – States Parties].

adoption. That optimism was borne out: the Convention has now been adopted by the European Union and 86 Contracting States,[15] 83 of which have adopted the Protocol.[16]

We refer in this opinion to the Official Commentary to the CTC, an authoritative source for the interpretation of the treaty.[17] Resolution No. 5 of the Diplomatic Conference, based on a formal proposal by the United States,[18] authorized and requested the preparation of the Official Commentary.[19] The Resolution reflected the need for the commentary and recognized the increasing use of such commentaries for modern commercial law instruments.[20]

*Remedies on Insolvency: Protocol Articles XI and XXX*

The role of insolvency law—specifically, its interaction with the enforcement of interests created under the CTC—arises in Protocol Article XI ("Remedies on insolvency").[21] To understand the import of this article, it is necessary first to understand a cognate provision of the Bankruptcy Code. As is well known in the commercial world, the Bankruptcy Code famously applies an automatic stay to halt all creditor enforcement actions upon filing a petition for relief.[22] Secured creditors and lessors may move to lift the stay to enable them to enforce their rights only under limited statutorily specified circumstances, such as, for example, lack of adequate protection.[23] Absent such judicial dispensation, a secured creditor or lessor in bankruptcy is barred from enforcing its property rights in aircraft equipment (or any collateral) during the proceeding.

Congress, however, carved out exceptional treatment for security interests in and leases of large commercial aircraft and engines operated by U.S. certificated air carriers. Under section 1110 of the Bankruptcy Code, secured lenders against and lessors of aircraft have an absolute statutory entitlement to relief from the stay (in the absence of specified curative debtor actions)

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[15] *Id.*

[16] *Id.*

[17] *See* ROY GOODE, OFFICIAL COMMENTARY TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT 1 (5th ed. 2022) (hereinafter OFFICIAL COMMENTARY).

[18] *See* Draft Resolution Relating to the Official Commentary to the Convention and the Aircraft Protocol (presented by the United States), Diplomatic Conference Acts, *supra* note 6, at 291.

[19] Final Act of the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol held under the join auspices of UNIDROIT and ICAO at Cape Town from 29 October to 16 November 2001, Resolution No. 5, https://www.unidroit.org/wp-content/uploads/2023/02/Dipl-Conf-Resolutions-CTC.pdf.

[20] *Id.*

[21] Prot. Art. XI. As explained in the Official Commentary:

> Work in advance of the diplomatic Conference identified this provision as the single most significant provision economically. If the sound legal rights and protections embodied in the . . . [CTC and Protocol] are not available in the insolvency context, they are not available when they are most needed. . . . Article XI, as modified in the subsequent governmental negotiations, is the result of that work.

OFFICIAL COMMENTARY, *supra*, note 17, ¶ 5.60. *See also* Prot. Art. XII (insolvency assistance).

[22] 11 U.S.C. § 362(a).

[23] *See, e.g., id.* § 362(d)(1).

that allows them to know with certainty that they will be able to enforce their interests upon the expiration of a fixed statutory waiting period of 60 days.[24] Section 1110 is premised upon the commercial airline industry raising special circumstances for secured credit and leasing. For example, airlines face high fixed capital costs in an equipment-heavy industry. They also often operate on thin margins and are highly sensitive to general economic cycles. Section 1110 entices lenders and lessors to provide secured financing for and leases of aircraft equipment in this environment by assuring them that if the debtor goes into bankruptcy and does not cure the relevant defaults, the creditor will be forestalled at most 60 days—not the possibly indeterminate length of time that could attend the formulation and confirmation of a general Chapter 11 plan—before being able to seize and repurpose the subject aircraft.

During the negotiations that resulted in the CTC, differences of opinion arose whether an insolvency rule similar to section 1110's fixed waiting period before automatic stay relief would be desirable for aircraft equipment subject to an insolvency proceeding. The result was a compromise. Under Protocol Article XI, Contracting States are given the option to declare that they will be bound by the terms of either one of two alternatives: Alternative A, which is based on a section 1110-like waiting period system (discussed in more detail below), or Alternative B, which affords considerable discretion to the court in whether and when to grant relief from the stay in an insolvency proceeding. (A substantial majority of the states making a declaration under Article XI have adopted Alternative A.)[25] States also have a third option: to make no declaration under the Protocol and thus leave the applicability of the insolvency stay to aircraft equipment—including any waiting-period rules for that stay's automatic termination—governed by domestic insolvency law.

In more detail, Alternative A of Protocol Article XI provides that upon the occurrence of an "insolvency-related event,"[26] the debtor or insolvency representative must either (1) cure all defaults (other than the opening of insolvency proceedings) and agree to perform relevant future obligations or (2) give possession of an aircraft object to the relevant creditor by the earlier of (*i*) a "waiting period" (à la Bankruptcy Code Section 1110) specified in the declaration by the Contracting State that is the debtor's "primary insolvency jurisdiction" (PIJ, which is found at the "centre of the debtor's main interests" or COMI)[27] and (*ii*) the date when the creditor would

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[24] For background on section 1110, see Gregory Ripple, *Special Protection in the Air[line Industry]: The Historical development of Section 1110 of the Bankruptcy Code*, 78 NOTRE DAME L. REV. 281 (2002).

[25] Of the 83 Contracting States that have adopted the Protocol, 59 have declared the applicability of Alternative A, only one (Mexico) has declared for Alternative B, and the remaining 23 states have made no declaration under Article XI. Protocol – States Parties, *supra* note 14.

[26] Prot. Art. I(2)(m) (defining "insolvency-related event" as including commencement of an insolvency proceeding).

[27] *See* Prot. Art. 1(2)(n), defining "primary insolvency jurisdiction" as:

> the Contracting State in which the centre of the debtor's main interests is situated, which for this purpose shall be deemed to be the place of the debtor's statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise.

be entitled to possession if Article XI did not apply (i.e., under domestic insolvency law, which independently may have established a waiting period, such as the Bankruptcy Code's section 1110).[28] The parties retain freedom of contract prior to the occurrence of an insolvency-related event to exclude the application of Article XI to their transaction altogether (but not in part), and following the occurrence of an insolvency-related event to waive or modify the waiting period and other applicable terms of Article XI.[29]

Protocol Article XXX(3) and Article XXX(4) specify the way in which Protocol Article XI is to be applied in the case of a cross-border insolvency proceeding. Under Article XXX(3), a Contracting State "*may . . . declare that it will apply* the entirety of Alternative A or Alternative B of Article XI" and specify in the declaration the types of proceedings to which the declaration will apply and the applicable waiting period.[30] Although Article XXX(3) gives a Contracting State the option ("may declare") to pronounce a declaration concerning Article XI, if that elective declaration is made, Article XXX(4) is mandatory for every Contracting State: "The courts of a Contracting State *shall apply* Article XI in conformity with the declaration made by the Contracting State which is the primary insolvency jurisdiction."[31] Article XXX(4) "is designed to prevent forum shopping with a view to selection of the . . . Contracting State whose declaration is most indulgent to the debtor."[32] As the Official Commentary further and comprehensively explains with respect to the requirement under Article XXX(4):

> [I]f there are insolvency proceedings in a non-COMI Contracting State related to an aircraft object [that is] subject to the jurisdiction of that State the courts of that State *must* apply the Alternative of Article XI selected by a declaration of the Contracting State of the primary insolvency jurisdiction to the type of insolvency proceeding selected, and with the time-period selected, by the declaration of the Contracting State of the primary

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As explained in the Official Commentary, "this will almost always be the place of incorporation or formation." OFFICIAL COMMENTARY, *supra*, note 17, ¶ 5.15. The rebuttable presumption imposed by the definition "is not lightly displaced." *Id.* As further explained:

> [W]here the activities of the debtor at the statutory seat are confined to administrative matters such as the holding of board meetings or the maintenance of records and the main business dealings with creditors are transacted from offices in a different Contracting State then it is that State that will be the COMI (*i.e.*, "centre of the debtor's main interests") and hence the primary insolvency jurisdiction.

*Id.* The Official Commentary paragraph 3.131 outlines the specific application of the COMI test in the context of the CTC with respect to an airline as follows:

> [W]here the debtor transacts business from more than one State . . . it is the State from which the debtor deals with Cape Town creditors that is the COMI State. . . . In the case of an airline other primary factors normally visible to creditors are the place where the debtor is licensed, supervised or otherwise regulated as an airline or the place where the majority of its staff dealing with its aircraft operations are based.

[28] Prot. Art. XI(2), Alternative A. For further explanation of the duties of the debtor or insolvency representative, see OFFICIAL COMMENTARY, *supra*, note 17, ¶¶ 5.62-5.67.
[29] Prot. Art. IV(3); OFFICIAL COMMENTARY, *supra*, note 17, ¶ 5.27.
[30] Prot. Art. XXX(3) (emphasis added).
[31] *Id.* Art. XXX(4) (emphasis added).
[32] OFFICIAL COMMENTARY, *supra*, note 17, ¶ 3.155 (emphasis added).

> insolvency jurisdiction. This is so whether or not insolvency proceedings have been commenced or another insolvency-related event has occurred in the COMI Contracting State . . . Article XXX(4) requires such a non-COMI Contracting State to apply Article XI in conformity with the declaration made by the COMI Contracting State, and not to merely follow interpretations or carry into force orders made by the courts of the COMI Contracting State . . . even . . . where the COMI Contracting State fails to adhere to its own declaration . . . .[33]

In other words, every Contacting States is obligated to implement the waiting period that the debtor's PIJ establishes by a declaration under Protocol Article XI Alternative A. This approach constrains possible forum-shopping maneuvers of a debtor (say, by trying to file for insolvency outside of its PIJ or by parking its aircraft objects in a state outside its PIJ as it files for insolvency in the PIJ, hoping to avail itself of that other state's debtor-friendlier bankruptcy law). Assuming the forum state for an insolvency proceeding is a Contracting State, under Protocol Article XXX(4) its courts must apply the waiting period in a declaration made by the debtor's PIJ, not its own state's waiting period (if any), and not even the PIJ's domestic insolvency law's waiting period (if any) if that law provides a longer waiting period than the one declared by the PIJ under Alternative A of Article XI.

## II. Opinion: The courts of the United States are obligated to apply Protocol Article XI Alternative A in conformity with the declaration of the debtor's primary insolvency jurisdiction without further legislation or implementation by the United States.

Our opinions expressed here address the application of Protocol Articles XI and XXX, and other relevant provisions of the CTC, in an assumed hypothetical case (Airline Chapter 11) commenced under Chapter 11 of the Bankruptcy Code in which the debtor (*X* Airline) is a commercial airline whose primary insolvency jurisdiction (State *X*) is not the United States and is a Contracting State under the CTC.[34] State *X* has made a declaration under Article XXX(3) of the Protocol that (*i*) it will apply the entirety of Alternative A of Article XI, (*ii*) Alternative A will apply to all types of insolvency proceedings, and (*iii*) specifies the time period required by Article XI as 60 days.

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[33] *Id.* ¶ 3.136 (emphasis added).

[34] While this opinion is focused on a case under Chapter 11 of the Bankruptcy Code, the provisions of the CTC and the Official Commentary apply equally to a case under Chapter 15, with the result that a U.S. court would be required to apply the declaration made by the PIJ [state] to an aircraft object subject to the U.S. court's jurisdiction, whether or not doing so would be consistent with rulings rendered by the court in the main proceeding. *Id.;* 11 U.S.C. § 1503 ("To the extent that this chapter [15] conflicts with an obligation of the United States arising out of any treaty or other form of agreement to which it is a party with one or more other countries, the requirements of the treaty or agreement prevail."). As to the primacy of the CTC over the Bankruptcy Code more generally, *see infra* note 35 .

*The obligations of the courts of the United States under Protocol Article XXX(4) are clear and unambiguous.*

As explained above, the obligation of a court of the United States under Protocol Article XXX(4) to apply the declaration of another Contracting State concerning Article XI is mandatory. The clear language of paragraph (4) does not admit of exceptions. It follows that a court of the United States having jurisdiction over an *X* Airline Chapter 11 case must apply Article XI Alternative A in conformity with the declaration of State *X*. Indeed, this treaty obligation would override any inconsistent provision of the Bankruptcy Code.[35]

*The Convention and the Protocol are self-executing treaties and the obligations of the United States courts under these instruments require no further legislation or implementation.*

The clarity of the Protocol's unqualified statement in Article XXX(4) of a Contracting State's obligations with respect to its courts leaves no question that this obligation applies directly to the Contracting States and should require no further discussion. Yet we are aware that there has not yet been robust development of judicial experience with the CTC in the United States. Indeed, the recent pandemic reduced the demand for commercial aircraft globally, resulting in a commercial environment where the interests of both the creditors and debtors in the context of multiple pending and threatened airline bankruptcies were best served by consensual agreements, rather than strict enforcement of a creditor's possessory and other rights under the CTC.[36] Now, however, aircraft demand has returned sufficiently that creditors in current disputes may be more likely to assert vigorously their treaty rights to repossess leased aircraft and reallocate defaulted aircraft collateral and leased aircraft equipment. The scarcity of U.S. case authority outside[37] and inside[38] bankruptcy applying the CTC means few domestic courts have

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[35] The primacy of the CTC over the Bankruptcy Code is due to the "last-in-time" rule. "If . . . [a] later treaty is self-executing, then . . . [an] earlier statute is considered abrogated under domestic law to the extent it actually conflicts with the new international agreement. This is known as the 'last-in-time' rule." CHIMÈNE KEITNER, INTERNATIONAL LAW FRAMEWORKS 288 (5th ed. 2021). The Bankruptcy Code has been in effect in the United States since 1978. Pub. L. 95-598, Nov. 6, 1978, Title I, Enactment of Title 11 of the United States Code. The United States ratified the CTC in 2004 and the instruments entered into force on March 1, 2006. *See supra* note 14 and accompanying text.

[36] We are informed that the typical disposition in such bankruptcy proceedings has been either a full reservation of rights with respect to the CTC by all parties or a stipulation applying Alternative A subject to mutually agreed terms.

[37] For a rare case applying the CTC outside bankruptcy, see BOC Aviation Ltd. v. AirBridgeCargo Airlines, 669 F.Supp.3d 204, 220 (S.D.N.Y.2023) (holding that court had jurisdiction based on CTC to issue order for possession of the subject aircraft based on Article 13(1) of Convention and Article X(5) of Protocol). *See also* Wells Fargo Equipment Finance Inc. v. Sea Horse Marine, Inc., Civ. No. 12-305 (D. Minn. Feb. 29, 2012) (compelling debtor to deliver possession of aircraft object to creditor under the CTC).

[38] For a rare case applying the CTC inside bankruptcy, see In re JPA No. 111 Co. and JPA No. 49 Co., No. 21-12075 (DSJ) (Bankr. S.D.N.Y. March 25, 2022) (order applying Convention

had occasion to consider the CTC's scope and effect, which may raise the potential for parties to exploit this unfamiliarity in the expected rise of cases. For example, we are informed that in connection with a Chapter 11 case in the United States of a non-U.S. airline, representatives of the debtor suggested informally that the CTC, including Protocol Article XXX(4), does not apply because the CTC has not been fully implemented by legislation in the United States.[39] Thus, although it may seem unnecessary, further analysis in this opinion may be helpful to dispel any suggestion that the CTC has yet to become effective in this country.

As the Supreme Court stated in its most recent opinion addressing the question whether a treaty is "self-executing," *Medellin v. Texas,* the touchstone is intent:

> The foregoing interpretive approach—parsing a treaty's text to determine if it is self-executing—is hardly novel. This Court has long looked to the language of a treaty to determine whether the President who negotiated it and the Senate that ratified it intended that the treaty automatically create domestically enforceable federal law.[40]

A leading treatise on international law concurs and elaborates on how to determine whether a treaty is intended to be self-executing:

> Perhaps the best guide is whether the treaty provision mandates specific action and clearly manifests an intent by the parties—including the ratifying President and the approving Senate—to be binding as a matter of domestic law without further congressional action. Once a U.S. court decides whether a treaty provision is self-executing, this resolves many questions regarding its domestic effect. If it is self-executing, the provision is part of the "law of the land" under the supremacy clause and can be applied directly in domestic proceedings.[41]

The Supreme Court instructs to examine the text for mandatory language. For example, the *Medellin* Court held that "the phrase 'undertakes to comply' . . . is not a directive to domestic courts . . . [because] [i]t does not provide that the United States 'shall' or 'must' comply. . ." When the text of a treaty is clear and unambiguous courts must apply the text and "have no power to insert an amendment."[42] In contrast to the vaguer treaty at issue in *Medellin*, Protocol Article XXX(4) is clear and unambiguous: "courts of a Contracting State *shall apply* Article XI."[43] The Protocol contains no conditions or exceptions to that obligation.

In addition to the obligatory language of the text, the intention of the United States to adopt the CTC as a self-executing treaty is manifest. On November 5, 2003, the President of the

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Articles 8 and 9 to sale of aircraft). *See also* In re Bristow Group Inc., No. 19-32713 (DRJ), Order Granting Debtor's Motion to Approve Term Sheet (S.D. Tex. Sept. 23, 2019) (recognizing application of CTC).

[39] We have found no cases in which the effectiveness of the CTC has been questioned.

[40] Medellin v. Texas, 552 U.S. 491, 492-93 (2008) (citing Foster v. Neilson, 27 U.S. 253 (1829)).

[41] KEITNER, *supra* note 35, at 287.

[42] Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989).

[43] Prot. Art. XXX(4) (emphasis added). Indeed, the obligations under the CTC are not just mandatory, but peremptory. "The Convention applies to the exclusion of otherwise applicable law where the two conflict." OFFICIAL COMMENTARY, *supra*, note 17, ¶¶ 2.10-2.11.

United States, under cover of his Letter of Transmittal,[44] submitted the CTC to the United States Senate for its advice and consent, along with a Letter of Submittal consisting of a report by the Department of State, including a Chapter-by-Chapter Summary of the CTC.[45] The report addressed directly the issue of implementation: "No implementing legislation is required, except for technical amendments to certain authorities of the FAA relating to the filing of interests in registries through the FAA, discussed below. Otherwise, the UCC will apply, and no changes to the Code are required."[46] (The technical amendments to the FAA statutes were necessary to accommodate the declaration by the United States under the Protocol for the FAA to be a designated entry point for transmitting to the International Registry information required for registration of international interests,[47] and for the FAA to accept and act on an irrevocable deregistration and export request authorization.)[48]

Additionally, "[t]he reasonable view of the Executive Branch concerning the meaning of an international treaty ordinarily merits respect" from the Court,[49] and "the Court has traditionally considered as aids to a treaty's interpretation its negotiating and drafting history *(travaux préparatoires)* and the postratification understanding of the contracting parties."[50] As noted above, the Department of State, supported by other federal agencies, clearly took the view that no further implementation was required for the Convention and the Protocol beyond the technical amendments.[51] Indeed, the technical amendments that relate to registration of international interests through the FAA as a transmitting entry point would have been

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[44] President of the United States, Letter of Transmittal to the Senate, Convention on International Interests in Mobile Equipment and Protocol to Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, S. TREATY DOC. No. 108-10 (Nov. 5, 2003), https://www.congress.gov/108/cdoc/tdoc10/CDOC-108tdoc10.pdf [hereinafter CTC Transmittal].

[45] *Id.* at V.

[46] *Id.* at XII.

[47] *See* Conv. Art. 18(5) (Protocol may provide for Contracting State to designate entry point or points for transmission of information necessary for registration with International Registry and to specify any requirements to be satisfied before such transmission); Prot. Art. XIX (Contracting State may designate an entry point or points for transmission of information to International Registry, with certain exceptions); OFFICIAL COMMENTARY, *supra*, note 17, ¶¶ 4.147-4.149; 5.89-5.94; 49 U.S.C. § 44107(e) (designation of FAA Civil Aviation Registry as entry point for registration in International Registry and conditions to registration through the entry point).

[48] *See* Prot. Art. IX(1) (de-registration and export of aircraft); Pub. L. 108-297, § 2, 118 Stat. 1095 (Aug. 9, 2004) (requiring FAA to issue regulations relating to cancellation of registration under CTC); 14 C.F.R. § 47.47(a) (provision for irrevocable deregistration and export request authorization recognized under the CTC).

[49] El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 156 (1999) (citing Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S.176, 184-85 (1952)).

[50] *Id.* at 167 (citing Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996))..

[51] *See supra* note 46 and accompanying text.

nonsensical had the substantive provisions on the effects of registration not been effective under U.S. law.[52]

In its report, the Department of State underscored that it was not the only division of the Executive Branch supporting the adoption of the CTC and enthusiastic for its immediately binding effect:

> Key federal agencies concerned with civil aviation and U.S. exports, including the FAA, EXIM Bank, and the Departments of Transportation, Commerce and State were fully involved in negotiation of the Convention and in preparation for its implementation. U.S. signature and ratification was endorsed by these agencies in a recommendation made in October 2002 by the Interagency Group on International Aviation (IGIA), administered by the Federal Aviation Administration (FAA).[53]

Moreover, postratification understandings of other U.S. stakeholders clearly contemplate the binding nature of the substantive provisions of the Convention and the Protocol. For example, we understand that closing opinions given by counsel in connection with aircraft financing and leasing transactions for civil aircraft of the United States, and those given in connection with transactions involving aircraft of nationalities of other Contracting States, are based in part on the Convention and the Protocol and the priority provisions of those instruments.[54]

Finally, as a matter of policy, the United States had a strong interest in the widespread adoption of the CTC that evidenced its intent to be bound. To be sure, it did not make a declaration under Protocol Article XXX(3) for the application of Article XI, but that is because it did not need to: it already has a fixed waiting period applicable in insolvency proceedings under section 1110 of the Bankruptcy Code.[55] But section 1110 has a loophole—it only applies to

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[52] *See, e.g.,* Conv. Art. 29 (priority rules based in part on registration and timing of registration of interests); Prot. Art. XIV (same).

[53] S. TREATY DOC. No. 108-10, *supra* note 44, VI.

[54] *See* Legal Advisory Panel of the Aviation Working Group, Practitioner's Guide to the Cape Town Convention and the Aircraft Protocol, Annex D: Annotated Form of Cape Town Convention/Aircraft Protocol Legal Opinion 172 (March 2023), https://awg.aero/wp-content/uploads/2023/03/Practitioners-Guide-2023.pdf:

> *[Form of Cape Town Convention Closing Opinion]*
> . . . .
> [A]n international interest . . . has been registered with the International Registry in accordance with the Convention . . . as of [the date and time of registration . . . ]
> . . . .
> No further registration is required or advisable under the Convention for . . . the international interest constituted by the [Lease][Security Agreement] . . . to be effective against third parties.

[55] 11 U.S.C. § 1110; *see* S. TREATY DOC. No. 108-10, *supra* note 44, XII ("The United States made no declaration regarding Protocol Article XI . . . [because] existing United States law,

domestic airlines.[56] It does not apply to a foreign airline debtor. This left the United States exposed to the very sort of insolvency forum shopping that the CTC was designed to prevent. Were it not for the obligations of a U.S. court under Protocol Article XXX(4), a foreign airline debtor could evade the application of the declaration to apply Alternative A made by the debtor's own PIJ by commencing a Chapter 11 proceeding in the United States, unaffected by section 1110. Accordingly, it was essential for the United States to be bound by the provisions of the CTC for it to block the adverse effects of such forum shopping and to enjoy the full benefits of the CTC.[57] Thus, the intent of the United States as a matter of policy was to be bound by the Convention immediately, not defer treaty obligation until some later point upon the implementation of enacting legislation.

*Treatment of the CTC as a self-executing treaty is consistent with precedent and established U.S. practice in comparable private international law treaties to which the United States is a party.*

That the CTC is a self-executing treaty is wholly consistent with long-standing executive and congressional practice on private-law treaties. As the CTC is both a transnational commercial law treaty and an aviation law treaty, two sub-categories of the wider category of private-law treaties, the similar approach of the United States to its ratification of leading treaties in each of these sub-categories is highly instructive. The United States ratified, and in each case did not adopt legislation to give effect to, the Convention on Contracts for the International Sale of Goods (CISG),[58] a major transnational commercial law treaty, and the Convention for International Carriage by Air (Montreal Convention),[59] a major aviation law treaty.[60] These two treaties are worded and structured much like the CTC, were produced by the same and similar

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specifically 11 U.S.C. Section 1110, will continue to apply, which is substantially equivalent to Alternative A of Protocol Article XI.").

[56] 11 U.S.C. §1110(a)(3)(A)(i).

[57] *See supra* note 32 and accompanying text; S. TREATY DOC. No. 108-10, *supra* note 44, XII ("[T]he United States notes the importance attached to declarations applying Alternative A of Protocol Article XI in attracting financing in aircraft transactions.").

[58] United Nations Convention on Contracts for the International Sale of Goods, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf.

[59] Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention), https://www.iata.org/contentassets/fb1137ff561a4819a2d38f3db7308758/mc99-full-text.pdf.

[60] The Montreal Convention consolidated and updated the various treaties grouped together as the "Warsaw System." The United States became a party to the Montreal Convention, in substantial part, by ratifying the Hague Protocol. As with the Montreal Convention, the United States viewed the Hague Protocol as self-executing. No legislation was needed or adopted by the United States in connection with the Hague Protocol. *See* Report to accompany Treaty Doc. 106-45 and Treaty Doc. 107-14, S. EXEC. REP. 108-8, 2-3 (more particularly under *Continuity of Applicable Warsaw Precedents*) (2003), https://www.govinfo.gov/content/pkg/CRPT-108erpt8/html/CRPT-108erpt8.htm.

international organizations, and are likewise relied upon as directly applicable law that prevails over conflicting law.

The State Department's Letter of Submittal and Senate report for the CISG made clear that no federal implementing legislation was required.[61] Executive and congressional materials for the Montreal Convention are equally clear that no legislation was required, including to create direct legal rights.[62] Courts have taken the same approach, stating or assuming the CISG[63] and the Montreal Convention[64] directly create legal rights without legislation. We are aware of no cases reaching or assuming the opposite conclusion. In short, courts justifiably recognize the self-executing nature of CISG and the Montreal Convention, and there is no reason why the CTC would be treated any differently.

## III. Conclusion

The United States had both the motivation and intention to become a party to the CTC and to become bound by its provisions—not to defer the question of obligation to a later point in time and congressional preference. It took the necessary and sufficient steps to achieve this result.

Accordingly, the courts of the United States, including courts having jurisdiction over the Airline *X* Chapter 11 hypothetical bankruptcy case (or over any other case under the Bankruptcy Code), are obligated to apply Protocol Article XI Alternative A in conformity with the declaration of State *X* without further legislation or implementation by the United States.

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[61] President of the United States, Letter of Transmittal to the Senate, United Nations Convention on Contracts for the International Sale of Goods, S. TREATY DOC. NO. 98-9 (Sept. 21, 1983), http://awg.aero/wp-content/uploads/2024/04/11.-UN-CISG-Statement-of-President.pdf. The Senate report relating to the CISG accepts both the President's Letter of Submittal and the Foreign Relations Committee report without amendments, thereby confirming the self-executing nature of the Convention. *See* Report to accompany Treaty Doc. 98-9, S. EXEC. REP. 99-20, 1 (Sept. 15, 1986), http://awg.aero/wp-content/uploads/2024/04/UN-CISG-Exec.-Comm.-Report.pdf.

[62] President of the United States, Letter of Transmittal to the Senate, United Nations Convention for the Unification of Certain Rules for International Carriage by Air, S. TREATY DOC. NO. 106-45, 3,6 (Sept. 6, 2000), https://www.congress.gov/106/cdoc/tdoc45/CDOC-106tdoc45.pdf.

[63] In Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1027 (2d Cir. 1995) (applying CISG and noting district court's holding below and parties' agreement that CISG is "a self-executing agreement"); Forestal Guarani S.A. v. Daros Int'l, Inc., 613 F.3d 395 (7th Cir. 2010) (CISG's primacy and self-executing nature is taken as given).

[64] *See, e.g.,* El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999); Chan v. Korean Air Lines Ltd., 490 U.S. 122 (1989).

## ANNEX A

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