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The "Cape Town Approach": A New Method of Making International Law

MARK J. SUNDAHL*

The use of multilateral treaties in the field of international commercial law has been in a state of steady decline. Traditional treaty law has been gradually replaced in recent years by softer methods of making international law, such as the use of restatements and model laws. Some scholars even claim that treaty law is dead or dying. This Article explains how the Cape Town Convention on International Interests in Mobile Equipment (which entered into force on March 1, 2006) provides an innovative approach to the creation of treaties that promises to revive the status of treaties in international law. The "Cape Town approach" to treaty formation is characterized by a novel use of protocols that brings new flexibility to the treaty structure. This Article examines the Cape Town Convention's use of protocols and explores the potential of the "Cape Town approach" as a new tool for making international law.

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INTRODUCTION

The field of international commercial law has in recent years turned away from traditional treaty law and has moved increasingly toward “softer” methods of harmonizing commercial law around the world. Some commentators have even claimed that treaty law, with respect to commercial issues as well as other areas of law, is dead or dying.¹ The “softer” methods that have begun to take the place of treaties include model laws and restatements that promote uniformity among domestic legal systems by providing guidelines for the creation of national laws.² However, these soft approaches to harmonization are inferior to treaty law in the sense that they serve

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merely as recommendations for the reform of national law and do not constitute binding law that guarantees uniformity. In contrast, a multilateral treaty creates a uniform system of law that all states party to the treaty are required to enforce. The decline of treaties in the area of commercial law has resulted from the extreme difficulty of reaching agreement among various nations regarding rules that would govern commercial transactions. The great rift between the common law and the civil law has foiled attempts at global harmonization and many of the treaties that have been concluded now languish due to a failure to achieve broad ratification by the family of industrial nations.  

This dismal outlook for the future of treaty law was recently brightened by a new method of structuring treaties that was created in the process of drafting the Cape Town Convention on International Interests in Mobile Equipment (hereinafter referred to as the Cape Town Convention), which entered into force on March 1, 2006.  

This novel method of forming treaties, which I shall refer to as the “Cape Town approach,” promises to rescue treaty law from its current malaise by introducing greater flexibility into the structure of treaties which can facilitate the resolution of disputes that threaten to stall a treaty negotiation.

The Cape Town Convention, drafted under the auspices of UNIDROIT, imposes a new legal regime for the creation and enforcement of “international interests” in highly mobile, ultra-expensive goods, specifically, aircraft, trains, and space assets. These “international interests” include security interests, the interest  

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5. Cape Town Convention, supra note 4, art. 2(2)–(3).
of a lessor under a lease agreement, and the interest of a seller under a title reservation agreement. The convention’s impressive achievement in harmonizing this area of commercial law has been celebrated widely in existing literature. However, little attention has been given to what is perhaps the more important contribution of the Cape Town Convention to the field of international law, namely, the convention’s innovative structure which promises to have a profound effect on the future formation of international law.

The Cape Town Convention’s structure is unique with respect to the unparalleled use of supplementary protocols. The convention consists of a base convention that will operate in conjunction with three (and perhaps even more) protocols. The base convention contains the bulk of those fundamental rules that are common to all industries covered by the convention. However, the base convention is also subject to industry-specific protocols that contain rules applicable to a particular industry. This unique structure provided the flexibility needed to respond to the idiosyncratic needs of the different industries involved in the drafting of the convention. As described in greater detail below, such flexibility is a radical departure from traditional approaches to treaty formation because it promotes specialization of the law and speed of implementation while sacrificing, to some degree, the traditional goal of uniformity.

Existing publications regarding the Cape Town Convention were generally written during the convention’s drafting process by those involved in the negotiations in order to inform the legal world about the status of the project and to voice various views concerning outstanding issues that were being debated in the course of the negotiations. These articles frequently call attention to the

6. Id. art. 2(2).
7. The Cape Town Convention was ground-breaking in other respects as well, such as the degree to which private industry was involved in the drafting process, and the unparalleled primacy placed on commercial expediency over the more traditional approach of harmonization (which is guided by the idea of drafting a treaty representing a common ground, or compromise, between the common law and civil law systems). See Sandeep Gopalan, Harmonization of Commercial Law: Lessons from the Cape Town Convention on International Interests in Mobile Equipment, 9 LAW & BUS. REV. AM. 255, 268 (2003).
9. Descriptive publications written by principal figures in the drafting of the Cape Town Convention include the following: Martin J. Stanford, Completion of a First Draft of UNIDROIT’s Planned Future Convention on International Interests in Mobile Equipment, 2 UNIF. L. REV. 274 (1996); Roy Goode, Transcending the Boundaries of Earth and Space:
innovative features of the Cape Town Convention, such as the unprecedented involvement of industry in the drafting process. However, little has been written about the convention’s innovative use of protocols, which was heralded as the convention’s “most striking” innovation by Sir Roy Goode, who authored the official commentary on the Cape Town Convention. Nor has any commentator yet explored the potential effect that this new technique for structuring treaties (hereinafter referred to as the “Cape Town approach”) may have on the future of international law in a greater sense. This Article fills this gap in existing scholarship by...
providing a thorough analysis of the mechanics of the Cape Town approach while exploring its potential as a new tool for making international law.

The first part of this Article provides a brief history of the Cape Town Convention and describes the events leading to the invention of the Cape Town approach. Part II describes the mechanics of the Cape Town approach and compares the Cape Town Convention's use of protocols to the traditional manner in which protocols have been employed by treaties. Part III evaluates the advantages and disadvantages of the Cape Town approach to making international law. Finally, Part IV explains how the Cape Town approach can be applied in future treaties by first enumerating the six essential features of the Cape Town approach and then describing the circumstances under which the Cape Town approach should be adopted. This final section also provides several illustrative examples of how the Cape Town approach can facilitate the creation of treaties in such disparate areas as criminal law, environmental law, and civil procedure.

I. THE CAPE TOWN CONVENTION AND THE INVENTION OF THE "CAPE TOWN APPROACH"

The Cape Town Convention is the most recent achievement in a long-standing movement to create a modern and uniform international law of secured transactions. The goal of creating a uniform legal regime for the creation of security interests had for many years proved elusive due to the sharp differences in domestic laws and the implication of sensitive public policy issues. However, the novel approach to treaty law that was taken by the drafters of the Cape Town Convention overcame many of the difficulties that had defeated earlier attempts at harmonization in this area of the law. The following sections provide a concise history of prior attempts to harmonize the law of secured transactions and describe the events leading to the invention of the groundbreaking Cape Town approach. This history is essential for understanding why the Cape Town approach was adopted and how it can aid in the creation of future treaties.

Therefore, the term "Cape Town approach" is used in this Article to refer to the unique base convention/protocol structure found in the Cape Town Convention. For a more detailed discussion of the traditional uses of protocols, see infra Part III.A.
A. Previous Efforts to Harmonize the Law of Secured Transactions

A progressive law of secured transactions is an essential component of a modern economy. Without a modern secured transactions law, the capital required to support economic growth would not be available since financial institutions are reluctant to make loans that are not adequately secured on the debtor's assets. Although the history of secured transactions has old roots in both the civil law and the common law in the form of a chattel mortgage, charge, pledge, or hypothecation, and, later, in the more sophisticated form of conditional sales and title retention agreements, the traditional approach to security interests in personal property has been forced to undergo significant revision in order to meet the requirements of modern finance. Among these requirements is the need for (1) a non-possessory security interest, (2) clear priority rules coupled with a public registration system to establish priority, (3) prompt enforcement measures for the creditor marked by the ability of the creditor to take possession of and sell the collateral upon the debtor's default without a court order, and (4) the ability of a secured creditor to enforce a security interest despite the debtor's bankruptcy. Article 9 of the Uniform Commercial Code (UCC) in the United States is the prime example of a modern statutory law of secured transactions that embodies these principles. Article 9 was perhaps the most revolutionary of the nine articles in the UCC. Rather than simply codify the common law, the drafters freed themselves from the strictures of tradition and drafted a new law that contemplated the practical needs of the American commercial system. The resulting statute reduced uncertainty for financiers by way of its clear "first to file or perfect" priority rule and granted powerful remedies to creditors to enable them to swiftly foreclose on collateral in the event of default. Although decried by some as creditor-friendly, the statute encouraged financial institutions to make loans and grant credit, unleashing a stream of capital that contributed to the American post-war boom in the 1950s.

The progressive nature of Article 9 stands in sharp contrast to the law of secured transactions elsewhere in the world. Although some countries, such as Australia and New Zealand, have adopted similar statutes, many jurisdictions around the world retain a traditional approach to secured transactions that fails to incorporate one or more of the four fundamental principles of asset-backed finance. For example, German law does not provide for the public registration of security interests for purposes of establishing priority and giving notice to prospective creditors of existing security
interests. In India, although the judge-made law gives creditors the nominal right to enforce a non-possessory security interest (known as a hypothecation) without a court order, the reality is that a court order is still generally required and the ensuing litigation can cause sufficient delay so as to destroy the practical value of a security interest. This difficulty in creating and enforcing security interests in personal property is a problematic area of commercial law not only in India, but in many other developing countries as well.

This dismal state of secured transactions law on the global level has had the sad result of slowing the flow of capital and limiting the ability of entrepreneurs outside the United States to raise capital. In order to improve this situation, efforts have been made on three fronts to modernize the law of secured transactions around the world. These efforts have involved the creation of multilateral treaties, the promulgation of model laws, and the independent reform of domestic law. Although these projects have brought some successes, particularly in the area of aircraft finance, the history of international secured transactions law is dotted with failures and has yet to produce a comprehensive solution.

First, separate efforts have been made by the European Economic Community, the United Nations Commission on International Trade Law (UNCITRAL), the International Civil Aviation Organization (ICAO), and the United Nations to create multilateral treaties facilitating secured transactions. A binding international treaty that has been broadly ratified around the world is the holy grail of international secured finance because it brings with it the greatest level of harmonization. The European attempt was intended to harmonize the law of secured transactions among European Union Member States by requiring that a security interest created in one state be recognized and enforced in a second state as if it were a security interest of an analogous type created in the second state. Although a draft convention was created in 1970, the project was terminated due, in part, to the addition of the United Kingdom as a Member State, which made the convention’s analogy approach

Likewise, UNCITRAL made an ill-fated attempt to achieve the lofty goal of drafting a broad international convention that would apply to a wide variety of collateral. The UNCITRAL project stretched on for thirteen years (from 1968 through 1980), but this attempt at creating a global law of secured transactions was eventually "abandoned as being unattainable." The International Civil Aviation Organization (ICAO) enjoyed greater success with the Geneva Convention on the International Recognition of Rights in Aircraft, which currently boasts of having eighty-seven states as parties. However, the Geneva Convention only applies to security interests in aircraft. Moreover, the effort has been of limited value since a considerable number of important industrial countries, including Canada, Australia, Japan, and the United Kingdom, have refused to ratify the convention, thus making the enforcement of security interests in aircraft that land in those states less certain. Finally, the United Nations oversaw the creation of the International Convention on Maritime Liens and Mortgages, opened for signature in 1993, which created a reliable international legal regime for the enforcement of security interests in ships. However, this convention has also suffered from a poor ratification record.

Second, certain organizations have undertaken a softer approach to harmonization by means of a model law of secured transactions which could be either adopted "as is" by a country or, alternatively, used as a template for developing a country's legal regime. In 1994, the European Bank for Reconstruction and Development promulgated a Model Law on Secured Transactions intended for use by Central and Eastern European countries that were in the process of modernizing their commercial laws. This model law has been utilized successfully by various states in their efforts to reform their economy. A model law on secured transactions has
also been published by the Organization of American States for use by the countries of Latin America.\textsuperscript{26}

Third, certain countries have taken independent steps to modernize their laws, as is the case in Mexico, which adopted a new secured transactions law in May of 2000.\textsuperscript{27} This new law introduced modern concepts of secured finance to Mexico, such as non-possessory security interests, non-judicial foreclosure on collateral, and a centralized registration system.\textsuperscript{28}

\textbf{B. The Creation of the Cape Town Convention}

The aspiration to create a multilateral international treaty on secured transactions was revived in 1988 in the wake of the diplomatic conference held in Ottawa for the signing of the UNIDROIT Convention on International Financial Leasing and the UNIDROIT Convention on International Factoring.\textsuperscript{29} It was at this time that T.B. Smith, QC, the Canadian member of the UNIDROIT Governing Council, proposed that UNIDROIT explore the feasibility of harmonizing the law of secured transactions with respect to mobile equipment.\textsuperscript{30} In response to Mr. Smith’s proposal, Professor Ronald Cuming of the University of Saskatchewan prepared a preliminary report investigating the commercial need for an international convention for secured transactions.\textsuperscript{31} After the Cuming Report gave a preliminary indication of the need for such a convention, UNIDROIT established a Restricted Exploratory Working Group to undertake a more in-depth analysis of the economic benefit that would flow from harmonizing the law of secured transactions.\textsuperscript{32}

\begin{itemize}
\item \textsuperscript{26} Model Inter-America Law on Secured Transactions for Latin America, Organization of American States website at http://www.oas.org/DIL/CIDIP-VI-securedtransactions_eng_home.htm.
\item \textsuperscript{27} Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley General de Títulos y Operaciones de Crédito, del Código de Comercio y de la Ley de Instituciones de Crédito, Diario Oficial de la Federación [D.O.], 23 de Mayo de 2000 (Mex.); see also Decreto por el que se reforman y adicionan diversas disposiciones del Código Civil para el Distrito Federal en Materia Común y para toda la República en Materia Federal, del Código Federal de Procedimientos Civiles, del Código de Comercio y de la Ley Federal de Protección al Consumidor, D.O., 29 de Mayo de 2000 (Mex.) (revising the method of registering security interests).
\item \textsuperscript{29} Gopalan, supra note 7, at 256.
\item \textsuperscript{30} Id.; see also Goode, supra note 12. at 3; Cuming 2000, supra note 9, at 1093.
\item \textsuperscript{32} Id.
\end{itemize}
When the Working Group’s report predicted that considerable economic benefits would flow from a new convention, UNIDROIT formed a Study Group to create the initial draft of an international convention that would both modernize and harmonize the law of secured transactions with respect to a narrow band of collateral for which there existed a pressing need for such a convention.\(^3\) This group of asset categories initially included airframes, aircraft engines, helicopters, oil rigs, containers, railway rolling stock, registered ships, and space assets.\(^4\) These assets were selected because they shared two distinct characteristics: first, these assets require enormous levels of capital investment, and second, they are mobile and tend to move through multiple jurisdictions in the ordinary course of business (of course, in the case of space assets, the equipment typically travels outside of all earth-bound jurisdictions). The ultra-expensive nature of these assets demands a progressive secured transactions law that facilitates raising capital for the purchase or lease of such assets. A uniform international legal regime would also serve to reduce the legal complexity that creditors face when required to comply with the differing secured transactions laws of multiple jurisdictions. Moreover, the types of collateral to be covered by the convention are not assets that would be held by consumers or small businesses, thus avoiding the contentious public policy issues that arise with respect to enforcing security interests against vulnerable parties.\(^5\)

In organizing the project to create this new international convention, UNIDROIT took a highly progressive and practical approach to making international law by granting private industry a central role in the drafting process. The aviation industry, in particular, had a strong voice in the negotiations through the

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33. UNIDROIT Study LXXII—Doc.2, at 7 (1989). For subsequent studies regarding the economic impact of the Cape Town Convention with respect to the aviation industry, see Anthony Saunders & Ingo Walter, Proposed UNIDROIT Convention on International Interests in Mobile Equipment as Applicable to Aircraft Equipment through the Aircraft Equipment Protocol: Economic Impact Assessment, 23 AIR & SPACE L. 339 (1998); Anthony Saunders et al., The Economic Implications of International Secured Transactions Law Reform: A Case Study, 20 U. PA. J. INT’L ECON. L. 309 (1999). It was necessary to limit the convention to certain high-value categories of collateral due to the likelihood that a convention which embraced a broader spectrum of assets would create drafting problems and diplomatic hurdles that would likely prevent the successful completion of the project. Gopalan, supra note 7, at 263.

34. Stanford 1999, supra note 9, at 244.

35. See McGairl, supra note 16, at 462. Note, however, that broad public policy issues continue to pose diplomatic challenges to the adoption of the Cape Town Convention, particularly with respect to space assets (i.e., satellites) that are integral to the operation of public health and education programs, such as India’s tele-medicine and tele-education systems. Some parties are concerned that the Cape Town Convention will allow creditors to seize these assets and interfere with the related public programs.
International Air Transport Association (IATA), an industry group representing approximately 265 airlines, and an Aviation Working Group (AWG), which was composed of representatives from the giants of aviation manufacturing and finance and was co-chaired by The Boeing Company and Airbus. In the beginning of the process, the AWG and the IATA worked with the representatives of the space, railway, and other industries in an attempt to craft a single convention that would serve the needs of all the industries. This first phase of the drafting process continued for eight years until, in 1996, the process stalled due to the difficulty of creating a single set of rules that would meet the different needs of the various types of collateral involved and conform to the customary practices of the different industries.

It was at this juncture that the creation of the Cape Town Convention took its most interesting turn. Frustrated by the delay in the drafting process, the AWG asked for the IATA's assistance in modifying the process to allow the aircraft industry to move forward independently. Boeing and Airbus, the two co-chairs of the AWG, were eager to put the convention in place for the clear purpose of enabling their customers to more easily raise the funds needed to purchase the new generation of passenger aircraft that are coming onto the market. At that time, Boeing was in the final stages of developing its new 787 Dreamliner which utilizes a new light-weight construction system that promises to revolutionize the fuel efficiency of passenger aircraft.


37. Clark, supra note 9, at 3-4.

38. Id. at 4-5; Cuming 2000, supra note 9, at 1094–95. The nature of the registry where international interests would be registered in order to establish the priority of the creditor's claim was one such issue that required different solutions with respect to each asset class. See Unidroit News, 2 UNIF. L. REV. 308, 310 (1997). With respect to this issue, the aviation industry had a specific need to preserve the domestic registration systems that were already established for registering aircraft. Id. In order to allow for each industry to create a registration system suitable to its needs, the Cape Town Convention states that each equipment-specific protocol will establish its own registry and administrative procedures for registration. Cape Town Convention, supra note 4, art. 17. Regarding other provisions eventually incorporated into the Aircraft Protocol in response to the peculiar needs of the aviation industry, see Gopalan, supra note 7, at 266–67.

39. E-mail from Jeffrey Wool, Partner, Perkins Coie LLP, to Mark J. Sundahl, Assistant Professor of Law, Cleveland-Marshall College of Law (Aug. 22, 2005, 11:33:59 EST) (on file with author); see also Clark, supra note 9, at 5; Stanford 1999, supra note 9, at 244; Goode, supra note 9, at 58.
of commercial aircraft, while Airbus was building the largest (and most expensive) airliner in history: the 555-seat A380 which has an average price of $292 million. The convention would encourage banks and investors to finance the purchase of these planes, thus enabling Boeing and Airbus to recoup the high costs of developing these new flying machines.

In response to Boeing's request, Lorne Clark, then General Counsel to the IATA, proposed a solution to the stalled negotiations. Specifically, Mr. Clark proposed that each industry proceed independently with the drafting of an industry-specific protocol that would supplement a base convention. This proposal was incorporated into a memorandum, submitted jointly by the AWG and the IATA to the UNIDROIT Secretariat on December 16, 1996, recommending the adoption of this novel protocol structure in order to allow industries the flexibility to develop at their own pace rules that were responsive to the needs of their particular industry. The proposal was adopted by the UNIDROIT Study Group during its third session held in Rome in January 1997. In light of the importance of this proposal for understanding the origin and purpose of the Cape Town approach, and because the memorandum is not readily available, the text containing this recommendation is reproduced here:

Work on the proposed Convention over the last several years, as well as a realistic assessment of what is likely to be required to produce a commercially acceptable Convention, reveal the following in our view. First, there is a need for specific rules applicable to different types of equipment (e.g., rules

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41. It has been projected that the world's airlines intend to spend trillions of dollars over the next several years as they replace their aging fleets. Charles W. Mooney, Jr., The Cape Town Convention: A New Era for Aircraft Financing, 18 AIR & SPACE L. 4, 4 (2003). Boeing alone expects to sell 3500 787 Dreamliners over the next twenty years for an approximate aggregate price of $400 billion. The Boeing Company website, http://www.boeing.com/commercial/7e7/programfacts.html (last visited Feb. 6, 2006). If broadly ratified, the Cape Town Convention could save customers billions of dollars in financing costs. Saunders et al., supra note 33, at 340.

42. Clark, supra note 9, at 5.

43. Id.

44. AWG/IATA Memo, supra note 12, at 1-2.

45. Unidroit News, supra note 38, at 308, 312.
that (a) reflect specific industry consensus on particular points and/or customary industry financing techniques and (b) are needed to coordinate with other international instruments applicable to one type of equipment but not others). Second, there is a need to organise and encourage appropriate industry and specialised regulatory contribution to the project. Third, it is essential to ensure that potential Contracting States have the opportunity to adopt and ratify the proposed Convention on an equipment-specific basis (rather than, broadly, with respect to all equipment). Fourth, it is important to anticipate the possibility that different industries may require different timetables to reach a sufficient level of consensus to render the Convention commercially and politically acceptable and to put in place a framework which will provide flexibility should this be the case.

Our first recommendation, therefore, is that the format of the proposed legal instrument be modified such that the same is comprised of a base/umbrella agreement which sets forth the basic legal framework applicable to all categories of equipment ("base/umbrella Convention") accompanied by equipment-specific protocols, established from time to time, each of which contains rules specifically applicable to a particular category of equipment covered by the proposed Convention ("protocols"). Once a protocol enters into force, which it would do without reference to other protocols, it shall automatically incorporate the base/umbrella Convention, i.e., signature and ratification of a protocol both include the base/umbrella Convention, and is not conditioned on or linked to signature and/or ratification of any other protocol.⁴⁶

In a footnote to this text, the AWG and IATA predicted that the protocol relating to aircraft would be the first protocol to be completed:

It is also evident that the level of emerging consensus in the air transport industry is well ahead of that in other industries at this stage. We have separately suggested, therefore, that the initial protocol to be

⁴⁶. AWG/IATA Memo, supra note 12, at 1–2 (footnotes omitted).
developed (which may serve as an example for other industries) and adopted diplomatically be the aircraft equipment protocol.\footnote{Id. at 2 n.1.}

This new technique for crafting international law would allow the different industries to proceed at their own pace and, perhaps more importantly, would allow each industry to draft rules that were tailored to their specific needs.\footnote{Id. at 2 n.1.} Although this base convention/protocol approach was eventually adopted, the issue was hotly contested. While the majority of the parties involved in the drafting process favored the protocol approach, others supported a

\footnote{47. The unique use of protocols by the Cape Town Convention is not the only feature of the convention that expedited the successful negotiation of the treaty. The convention also makes use of alternate provisions, “opt-in” provisions and “opt-out” provisions, in order to overcome diplomatic opposition to certain problematic rules. An “opt-out provision” is a provision that automatically applies unless a declaration is made. Goode, supra note 12, at 29. In contrast, an “opt-in provision” will only apply if a declaration is made. Id. These features of the Convention and protocols allow contracting states to weigh the commercial benefits of certain policy-laden provisions against the public policies relating to such issues and then, in some cases, choose to reinforce public policy (over promoting commercial efficiency) by making a reservation with respect to a problematic provision or “opting out” of the provision by means of a simple declaration. For example, a rule providing for the prompt enforcement of a security interest upon the debtor’s insolvency would conflict with the policy espoused by many states to shield the assets of a bankrupt company from grasping creditors. Because this conflict might prevent many states from ratifying the protocols, each of the three protocols provide that the article governing the enforcement of a security interest upon insolvency will only apply if a state “opts-in” to the provision by making a declaration. Aircraft Protocol, supra note 4, art. XI(1); Space Protocol, supra note 8, art. XI(1); Rolling Stock Protocol, supra note 8, art. IX(1). Moreover, if a state does choose to “opt-in” to the insolvency article, the article allows the state to choose, by means of a declaration, between alternative articles: the “harder” alternative requires the state to either (1) allow the secured party to take possession within a stated time period or (2) require the debtor merely to give notice to the secured party that all defaults will be cured, while the “softer” alternative allows the creditor to take possession of the collateral only in accordance with applicable domestic law (which may not permit the prompt enforcement of a security interest upon insolvency). Aircraft Protocol, supra note 4, art. XI; Space Protocol, supra note 8, art. XI; Rolling Stock Protocol, supra note 8, art. IX. This first alternative is clearly the more creditor-friendly provision, and thus the more commercially expedient choice. However, if a state’s public policy commitment to the protection of ailing companies is greater than the perceived benefit of granting strong repossession rights to the creditor, the state can choose the second alternative. If this option were not granted, a debtor-friendly state may decide to forego ratification. Therefore, the alternate provisions, while perhaps resulting in the sacrifice of commercial efficiency, allows for broader ratification of the protocol. In addition, these insolvency remedies will only apply if the contracting state has made a declaration to opt in to the article. As a result, a state can choose not to undertake any obligations with respect to the enforcement of a security interest after the debtor has become insolvent. The great flexibility of the protocols with respect to these insolvency provisions recognizes the important public policy issues surrounding the treatment of bankrupt companies. See Wool, Commercial Orientation, supra note 9, at 92 (explaining that “[f]ew, if any, areas of commercial law are more policy-laden than insolvency law”). Ultimately, this flexibility was built into the protocols in order to avoid the catastrophic result that states might refuse to ratify a protocol that promoted commercial efficiency over more debtor-friendly public policies.}
unitary approach pursuant to which a separate stand-alone treaty would be drafted for each asset class. The parties favoring a unitary approach were concerned that a multi-instrument structure would result in an instrument of unacceptable complexity. In the end, a compromise was reached: although the convention would employ a bifurcated structure utilizing multiple protocols, a consolidated text would also be created for each protocol (consolidating the provisions of the base convention and the appropriate protocol) in order to make the applicable rules easier to comprehend.

Following the adoption of the bifurcated approach, UNIDROIT reorganized the drafting process: UNIDROIT was to oversee the drafting of the base convention while an Aircraft Protocol Group (APG) was formed to draft the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (hereinafter the Aircraft Protocol). The APG consisted of the AWG and the IATA, but also included the intergovernmental ICAO, which joined the project at this point for the first time. In 1991, both a base convention and the Aircraft Protocol were completed and were submitted for signature at the diplomatic conference convened for this purpose in Cape Town. Thus, the protocol approach succeeded in “breaking the logjam” and allowing the convention to be completed with respect to the first category of assets.

II. THE MECHANICS OF THE CAPE TOWN CONVENTION

The Cape Town Convention’s use of protocols is unparalleled in the history of international treaties. This section explores the internal mechanics of the Cape Town Convention to better understand how the Cape Town approach functions. However, in order to highlight the innovative nature of the Cape Town Convention’s use of protocols, a brief description of the traditional types of protocols is first provided.

49. See Cuming 2000, supra note 9, at 1100–01; see also Wool, Commercial Orientation, supra note 9, at 90 & n.55.
50. Cuming 2000, supra note 9, at 1100–01.
51. Id.
52. See Aircraft Protocol, supra note 4; see also Clark, supra note 9, at 5.
53. Goode, supra note 12, at 3; Clark, supra note 9, at 5. The ICAO is an intergovernmental organization responsible for creating the technical standards applicable to the aviation industry. Further information regarding the ICAO can be found on the organization’s website at http://www.icao.int.
A. The Traditional Use of Protocols

The Vienna Convention on the Law of Treaties contemplates the possibility that a treaty may consist of multiple instruments, as is indicated in Article 2 which defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." In fact, the use of a secondary instrument that supplements a core treaty, generally referred to as a "protocol," is a common feature of international law. Therefore, the use of protocols by the Cape Town Convention is not unusual in itself. What is revolutionary about the Cape Town Convention is the unprecedented manner in which its protocols are used and the relationship of its protocols with the base convention.

Prior to the Cape Town Convention, protocols have fallen into one of four traditional categories: protocols of signature, protocols of amendment, optional protocols, and protocols to a framework convention. As we will see in the next section, the protocols created in conjunction with the Cape Town Convention do not fall within any of these categories, but instead constitute a new type of protocol.

The first type of traditional protocol is the protocol of signature. This type of protocol is presented for signature simultaneously with the main treaty (hence its name) and is generally used to address certain understandings, details, and technical matters that are not appropriate for the main instrument. This type of protocol aids in the elegant composition of a treaty by eliminating the confusion that may result from including certain detailed technical matters in the base treaty. For example, a signature protocol was used to extend the protections against criminal activity found in the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation to criminal activity on oil and gas platforms. Since the types of crimes committed on oil platforms differed from those committed on ships, it would have been unwieldy to draft a single instrument that embraced both situations. By

56. The crimes against ships include the additional actions of interfering with navigation instruments or supplying erroneous information to a ship which interferes with navigation. See Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, arts. 3(1)(e)–(f), Mar. 10, 1988, 1678 U.N.T.S. 221.
addressing platforms separately, the task of drafting the treaty was simplified. A protocol of signature may also be used when the parties wish, for the purpose of clarity, to make a statement about the main instrument in a separate document. 57 This was the purpose of the Protocol of Signature to the Convention relating to the Development of Hydraulic Power Affecting More than One State, which only stated the single understanding that the provisions of the convention did not alter certain existing international obligations of the signatories. 58

The second type of protocol, a protocol of amendment, is used to delete, modify, or otherwise change the provisions contained in the base convention. 59 A classic example of this type of protocol is the Protocol Amending the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships. 60 This protocol amended the base convention by changing the method of calculating the liability limits applicable to the owners of sea-going ships with respect to personal injury claims and property damage. 61 Additional examples of protocols of amendment include the Protocol Relating to an Amendment to the Convention on International Civil Aviation and the Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage. 62

The third type of protocol, known as an optional protocol, provides for obligations that supplement the obligations contained in the base convention. An optional protocol differs from a protocol of amendment in that it generally creates obligations that are additional to the existing obligations under the base convention, rather than deleting or altering existing provisions contained in the base convention. One such example of an optional protocol is the Protocol to the American Convention on Human Rights to Abolish

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59. Some sources recognize yet another type of protocol, the supplementary protocol, which serves to supplement, rather than amend, the text of an existing treaty. See, e.g., United Nations Treaty Reference Guide, supra note 58. However, the distinction is not helpful or necessary since an amendment to a treaty can just as easily consist of the addition of supplemental text as well as the revision of existing treaty language.
61. Id. art. 2.
the Death Penalty.\textsuperscript{63} Whereas the American Convention on Human Rights only restricts the application of the death penalty to the most serious crimes, the optional protocol gives signatories the opportunity to undertake the more restrictive obligation to refrain entirely from execution.\textsuperscript{64} Other examples of optional protocols include the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.\textsuperscript{65}

The fourth traditional type of protocol is used in conjunction with a framework convention and serves to provide more detailed obligations to the general obligations set forth in the framework convention (hereinafter referred to as a framework protocol). In this type of treaty, protocols serve an essential function in providing substance to existing treaty obligations and the framework convention typically expressly anticipates the formation of such protocols.\textsuperscript{66} The most famous example of this framework approach is the United Nations Framework Convention on Climate Change (FCCC) which has been supplemented by the Kyoto Protocol.\textsuperscript{67} The FCCC, which addresses the reduction of greenhouse gases, sets forth, among other things, the general requirement that industrial countries establish national policies "with the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon

\textsuperscript{63} Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, 29 I.L.M. 1447.

\textsuperscript{64} Id. art. 1; American Convention on Human Rights: "Pact of San Jose, Costa Rica" art. 4, Nov. 22, 1969, 1144 U.N.T.S. 123.


\textsuperscript{66} For example, Article 19(3) of the Convention on Biological Diversity states that the parties:

dioxide and other greenhouse gases." The subsequent Kyoto Protocol is a far more detailed instrument that establishes precise limits on the emission of greenhouse gases. Other examples of treaties that adopted the framework structure include the Vienna Convention for the Protection of the Ozone Layer (supplemented by the Montreal Protocol on Substances that Deplete the Ozone Layer) and the Convention on Biological Diversity (with its accompanying Protocol on Biosafety).

B. The Cape Town Convention

We now turn to the text of the Cape Town Convention to examine more closely its unique use of protocols. The unusual relationship between the Cape Town Convention and its supplementary protocols arises from three innovative provisions. First, Article 6, Section 2 of the base convention states that, with respect to a particular type of asset, the provisions of the protocol relating to such asset will trump any inconsistent provision contained in the base convention. Second, Article 49 provides that the base convention will only enter into force with respect to a particular state when that state has acceded to both the base convention and a protocol and, moreover, the base convention will only enter into force for that state with respect to that category of assets covered by such protocol. Third, Article 6, Section 1 states that the base convention and an individual protocol "shall be read and interpreted

68. FCCC, supra note 67, art. 4(2)(a).
69. See, e.g., Kyoto Protocol, supra note 67, art. 3(1) (stating that "[t]he Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B . . .").
71. Article 6, Section 2 reads as follows: "To the extent of any inconsistency between this Convention and the Protocol, the Protocol shall prevail." Cape Town Convention, supra note 4, art. 6(2).
72. Article 49, Section 1 reads as follows:
This Convention enters into force on the first day of the month following the expiration of three months after the date of the deposit of the third instrument of ratification, acceptance, approval or accession but only as regards a category of objects to which a Protocol applies:
(a) as from the time of entry into force of that Protocol;
(b) subject to the terms of that Protocol; and
(c) as between States Parties to this Convention and that Protocol.
Id. art. 49(1).
Together, these three provisions create an unprecedented type of international convention. The convention itself has no life of its own, but only enters into force when a state ratifies a protocol. This represents a more intimate (indeed, an inseparable) integration of the base convention and protocol than has been seen in framework treaties such as the FCCC. It is unparalleled that a convention cannot itself enter into force until one of its protocols does so. In other words, all base conventions created before the Cape Town Convention have had a life of their own and could operate without a subsequent protocol. Even a framework convention, which relies heavily on its protocols to give substance to its obligations, can enter into force before its protocols are created (although the resulting obligations remain rather thin until they are supplemented by protocols). A further distinction can be made between a framework convention and the Cape Town Convention: although both a framework convention and the Cape Town Convention anticipate and rely on the creation of protocols, the Cape Town Convention also anticipates that its protocols will contain provisions inconsistent with those of the base convention. Moreover, the Cape Town Convention expressly grants the protocols supremacy over any inconsistent terms in the base convention. In contrast, a framework convention is intended to operate harmoniously with protocols that supplement, but do not override, the provisions contained in the convention.

The end result of this unique protocol structure is that the aircraft, space, and rail industries are each able to create a protocol specific to their respective industries which will operate in conjunction with the base convention to form a set of rules that govern security interests with respect to that particular industry. The rules will consist of those provisions located in the base convention as supplemented (or modified) by the provisions contained in the relevant protocol. In effect, the Cape Town Convention will ultimately create three separate legal regimes for the three asset categories. This end result appears not to differ significantly from what would have been achieved had three separate stand-alone treaties been negotiated. In fact, the planned creation of three consolidated texts that will merge the provisions of the base convention with each protocol will give the impression that three separate treaties are the end result. However, it is important to realize that the three consolidated texts will share those provisions

73. Id. art. 6(1).
74. Regarding the issuance of a consolidated text that merges the Cape Town Convention and the Aircraft Protocol, see GOODE, supra note 12, at 343.
contained in the base convention to the extent that those provisions are not modified by the protocols. Therefore, despite the creation of three separate legal regimes, a high degree of uniformity is maintained among the three rule sets. This ability to maintain a substantial level of uniformity—while still permitting certain rules to be tailored to the specific needs of different industries—is the great achievement of the Cape Town Convention.

III. THE ADVANTAGES AND DISADVANTAGES OF THE CAPE TOWN APPROACH

The Cape Town approach possesses a number of advantages that make treaty negotiation more likely to succeed. In addition to providing added flexibility and speed, this new approach also allows for the increased specialization of the law to meet the needs of particular industries. Ultimately, these benefits of the Cape Town approach promise to revive the use of treaties in international law, which has given way to softer forms of law, such as model laws and restatements. Of course, these benefits bring with them certain risks as well, such as reduced efficiency and a greater fragmentation of the law than is seen in traditional treaties. These advantages and disadvantages of the Cape Town approach are discussed in greater detail in the following sections.

A. Advantages of the Cape Town Approach

The following paragraphs explore the ten advantages of using the Cape Town approach to structuring a treaty. These beneficial features do not merely facilitate the formation of treaties, but also assist with the delicate diplomatic task of achieving broad ratification of the treaty after its formation.

First, the Cape Town approach brings greater flexibility to treaty negotiations by allowing controversial provisions to be addressed in multiple protocols. This has the salutary effect of reducing the possibility that the negotiations will fail due to a deadlock over a controversial provision. Under the traditional “straightjacket” approach to international law (which requires one set of rules to govern all matters that come within the scope of the treaty), negotiations will stall when a single set of rules cannot be devised to meet the needs of all participants in the negotiation process. The Cape Town approach solves this problem by allowing parties to take different approaches to controversial provisions.
through the use of multiple protocols.\textsuperscript{75} Although some degree of uniformity is sacrificed when different approaches to controversial issues are permitted within the framework of the single convention, a lethal deadlock over these controversial issues will also be avoided and the treaty project will ultimately be saved.

Second, the Cape Town approach promotes uniformity across the sectors that are subjects of the various protocols, while at the same time providing the above-mentioned flexibility.\textsuperscript{76} Although it is true that the protocols allow for a divergence of rules between the various protocols, the special rules contained in the protocols that accommodate the idiosyncratic needs of a particular industry should ideally be restricted only to those few rules that are necessary for the proper operation of the treaty with respect to that particular industry. Apart from these few special rules contained in the protocols, the fundamental rules contained in the base convention should be respected by the various protocols and therefore provide a uniform foundation of international law. However, due to the controlling nature of the protocols, this uniformity cannot be absolutely guaranteed unless the base convention limits the protocols' supremacy in the event of a conflict. If no such limitations are built into the base convention, the drafters of a protocol will have the freedom to modify any provision of the base convention.

Third, the Cape Town approach results in the speedier implementation of the treaty because those parties who are in agreement with respect to all treaty provisions can move forward to complete a protocol governing their obligations without having to wait for the objecting parties to agree to the terms. The objecting parties are also free to create their own protocol (or protocols, depending on how many diverging interests are represented at the negotiating table). This allows for international law to be created on a faster timetable, at least with respect to those sectors that can successfully agree on the terms of their protocol. In the negotiation of the Cape Town Convention, the aircraft industry took advantage of this benefit by quickly completing the aircraft protocol while the

\textsuperscript{75} This advantage of the Cape Town approach was the main motivating purpose behind its development in the context of the Cape Town Convention. By shifting the controversial provisions to the industry-specific protocols, the impossible task of reaching agreement with respect to each type of collateral was avoided. The provision regarding the applicability of the convention to outright sales (as opposed to security and lease interests) was one such controversial provision that was removed to the protocols. \textit{See}, \textit{e.g.}, Aircraft Protocol, \textit{supra} note 4, art. III; \textit{see also} S. Masuda, Revised Draft Articles of a Future UNIDROIT Convention on International Interests in Mobile Equipment: Comments, UNIDROIT Study LXXII—Doc. 32 add. 1 (Jan. 1997).

\textsuperscript{76} \textit{See} Stanford 1999, \textit{supra} note 9, at 244.
space and rail industries were still in the early stages of drafting their respective protocols. The space and rail industries are still in the process of finalizing their protocols.

Fourth, the Cape Town approach promotes "hard" international law by avoiding the "softening" of the law that results when parties are forced to compromise in order to reach agreement on a controversial provision. When using the Cape Town approach, compromise is avoided because parties (or groups) that do not agree on a provision can simply reserve that provision for the protocols specific to each group. In a commercial law treaty, commercial efficiency is sometimes best served when each industry is subject to rules that have been tailored to its practices. The Cape Town Convention allows these industry-specific rules to be placed in the industry-specific protocols, and thus avoids the danger of sacrificing commercial efficiency in the course of devising a single uniform rule on which all parties can agree.

Fifth, the decision to employ the Cape Town approach prevents the duplicative efforts that would result if different sectors were to negotiate separate treaties. The creation of separate treaties is another technique that could have been used to permit the aircraft industry to proceed on its own when the unitary approach to the Cape Town Convention broke down. However, the negotiation of three separate treaties to govern the air, space, and rail industries would have been much more complicated than negotiating a base convention and separate protocols. The Cape Town approach is more efficient because the provisions in the base convention, which constitute the great majority of the rules, only need to be negotiated once. Thus, the parties need not "reinvent[ ] . . . the wheel" by being forced to negotiate these fundamental provisions separately in individual treaties. While the protocols will still be negotiated separately, they contain far fewer provisions than a full treaty and therefore negotiations should be short.

Sixth, the initial protocol can serve as a model for the drafting of subsequent protocols. Thus, subsequent protocols can be drafted quickly by using earlier protocols as templates. A related

77. According to Goode, the use of industry-specific protocols allowed the aviation industry to move more quickly toward the establishment of the new legal regime without needing to wait for the other industries to reach agreement regarding the provisions applicable to their industries. Goode, supra note 9, at 58.


79. The drafters of the Cape Town Convention’s Space Protocol clearly benefited from using the Aircraft Protocol as a model instrument, as evidenced by the Space Protocol’s
advantage is that working groups engaged in the drafting of subsequent protocols can learn from practical experiences gained from the application of protocols that have already entered into force.

Seventh, the success of an earlier protocol may serve to convince other industries to join in the convention. For example, if the Cape Town Convention meets with great success by spurring the flow of capital in the air, space, and rail industries, other industries, such as the shipping or oil platform industries, may decide to draft their own protocol in order to share in the convention’s benefits.

Eighth, the Cape Town approach facilitates the diplomatic task of persuading reluctant states to ratify the convention. This advantage of the Cape Town approach results from the fact that the base convention does not enter into force until a protocol is also ratified. Thus, a reluctant state may be more amenable to ratifying the base convention as a gesture of good will since ratification of the convention would not impose any real obligations on the state until a protocol was also signed. Once a party to the base convention, the reluctant state, although not yet subject to any obligations, would nevertheless become more deeply involved with the treaty process and therefore become more likely to move forward in collaboration with other states. In other words, the ratification of the base convention would be a risk-free step forward for a reluctant state that may eventually lead to the second step of ratifying a protocol with binding obligations.

Ninth, the Cape Town approach facilitates the diplomatic process of ratification by giving a state the option to ratify protocols selectively rather than being faced with the “all or nothing” choice that a state faces when considering a single-instrument treaty. For example, in the context of a commercial law treaty, when faced with a single-instrument treaty that would require the state to adopt a new legal regime with respect to all commercial industries, the state may refuse to ratify the convention if the new law is problematic with respect to any one industry. On the other hand, the Cape Town approach allows a state to “test the waters” by first ratifying only a single protocol that governs a single industry. If this experiment is successful, the state may then proceed to ratify other protocols covering other industries and thereby expand its participation in the convention. To take the Cape Town Convention as an example, if the Aircraft Protocol succeeds in invigorating the airline industry in adoption of the Aircraft Protocol provisions regarding insolvency. Aircraft Protocol, supra note 4, art. XI; Space Protocol, supra note 8, art. XI.

80. Stanford 1999, supra note 9, at 248.
81. Id.
India and leads to a growth in that sector of the Indian economy, the Indian legislature may be more willing to ratify the Space Protocol in the hopes of seeing similar growth in that industry and may even entertain the idea of reforming its domestic secured transactions law with respect to all commercial sectors.

Finally, the Cape Town approach has the advantage of promoting the clear and elegant presentation of legal principles in the base convention. This opportunity to state clearly the fundamental principles of law in the base convention is made possible by the fact that the complexities that clutter and cloud the basic legal principles will generally be addressed in the various protocols, thus permitting the base convention to stand out as a stark statement of fundamental legal principles. This clarity of language makes the convention more easily understood by private parties involved in structuring a transaction that relies upon the convention. The clear presentation of legal principles in the base convention may also facilitate the prompt and consistent enforcement of the convention in court due to the lack of any ambiguity or complexity that may confuse or prolong the judicial process.

B. Disadvantages of the Cape Town Approach

The unique structure of the Cape Town Convention was invented to resolve the disputes and complexities that arose in the course of the drafting process. The protocol approach adopted by the Cape Town Convention succeeded in resolving these disputes and brought with it the additional advantages described above. However, despite the many advantages of the Cape Town approach, there are also a number of potential disadvantages that must be taken into account before deciding to apply this approach in the creation of future treaties.

First, the argument can be made that the use of multiple protocols causes greater complexity and fragmentation of the law. The primary goal of international commercial law is to harmonize laws across borders so that the complexity, and hence the cost, of transnational business transactions is reduced. This complexity results not only in commercial inefficiency, but may also prevent states from ratifying the multi-instrument convention if their representatives have difficulty navigating it. Although the Cape Town approach achieves the goal of harmonizing domestic laws with

82. Goode, supra note 9, at 58.
83. Cuming 2000, supra note 9, at 1101.
respect to a particular industry covered by a single protocol, it also creates the potential for a lack of harmonization between the different protocols since the drafters of each protocol have the freedom to create rules that differ from those rules found in the other protocols. Fortunately, this danger of fragmentation has not been realized in the Cape Town Convention’s protocols. The differences between the protocols are limited to those that are demanded by the idiosyncratic nature of the different types of assets. For example, the draft Space Protocol contains a provision for placing command codes in escrow so that the secured party can obtain the codes upon the debtor’s default in order to gain control of a satellite in orbit. Such a provision has no place in the Aircraft Protocol. As another example, the Aircraft Protocol contains an idiosyncratic provision stating that an “interest in an aircraft engine shall not be affected by its installation on removal from an aircraft.” The only divergence among the protocols that has the potential for creating undesirable complexity is that the different institutions have been chosen for the registry of the international interests with respect to the three asset categories. An international interest in an aircraft will be registered with the ICAO, while international interests in rolling stock and space assets will be filed with another registrar. This lack of uniformity is defensible since, at least with respect to the Aircraft Protocol, the registries have existing ties to the related industries and may therefore be the most suitable candidate for serving as registrar. Moreover, this lack of uniformity does not create any significant inefficiencies, since there is no great cost or complexity in identifying the proper place to register an international interest in the particular asset class. In most cases, a creditor will not be faced with the task of filing an international interest in an aircraft and a locomotive, but will be concerned with only one type of high-value collateral. However, if the number of protocols expands significantly.

84. Space Protocol, supra note 8, art. IX.
85. Aircraft Protocol, supra note 4, art. XIV(3).
86. Article 16(2) of the Cape Town Convention states that “[d]ifferent international registries may be established for different categories of object an associated rights.” Cape Town Convention, supra note 4, art. 16(2). Pursuant to Article XVII(1) of the Aircraft Protocol, the conference adopting the Cape Town Convention and Aircraft Protocol issued a memorandum inviting the ICAO to serve as the registrar for international interests in airframes, aircraft engines, and helicopters. Aircraft Protocol, supra note 4, art. XVII(1); see also Resolution No. 2 of the Diplomatic Conference, in GOODE, supra note 12, at 343. On June 2, 2004, the ICAO announced the selection of Aviareto, an Irish firm, to establish and maintain the registry. Aviareto Selected to Establish International Registry System for Interest in Aircraft, ICAO News Release, June 2, 2004, available at http://www.icao.int/icao/en/hr/2004/pio200406_e.pdf. UNIDROIT has asked the United Nations to serve as registrar for international interests in space assets. Space Protocol, supra note 8, at xiii n.26.
in the future to cover a broader variety of assets, each with its own
registry, the inefficiencies could begin to mount. Imagine, for
instance, if a creditor took a security interest in all assets of a debtor
and, in order to establish the priority of the creditor’s interest, the
creditor was required to file his interest with a dozen different
offices. However, since there are no limits placed on the extent to
which a protocol may diverge from the rules set forth in the base
convention, the potential exists that future protocols will not
necessarily conform closely to previously-drafted protocols and will
diverge in a more significant way from the other protocols.

Second, although the Cape Town approach can allow for the
prompt completion of the initial protocol, the negotiation of
additional protocols can significantly delay the completion of the
entire project. For example, the Aircraft Protocol was quickly
completed, but the protocols to the Cape Town Convention with
respect to space assets and rolling stock are still in their preliminary
stages, and it is not clear when (or if) these protocols will be
finalized. The argument could be made that the impetus provided by
the aircraft industry for implementing the convention would have
better served the project as a whole if the protocol approach had not
been used. If a single-instrument approach had been retained, the
aircraft industry would have pressured the space and railway
industries to reach agreement on the outstanding issues so that the
convention could be completed and the aircraft industry could begin
to benefit from the new law. By breaking the convention into
separate protocols, this impetus provided by the aircraft industry was
lost and, although the aircraft industry was put on the fast track
toward completion of their protocol, the space and railway industries
were left to proceed at a slower pace. On the one hand, this can be
viewed as beneficial in that the space and railway industries were
given time to carefully craft protocols that were tailored to their
specific needs. However, the loss of the sense of urgency provided
by the aircraft industry could also be seen as depriving the other
industries of the motivation needed to complete their negotiations
and realize the benefits of the convention.

Third, the drafting of each protocol provides an opportunity to
renegotiate each provision of the base convention which may result
in lengthy negotiations and a further lack of uniformity among the
protocols. This risk arises from that provision of the Cape Town
Convention that allows the terms of each protocol to override any
provision of the base convention. 87 Although the purpose of the base

87. Cape Town Convention, supra note 4, art. 6(2). However, Herbert Kronke,
Secretary-General of UNIDROIT, has reported that there was an unwritten “awareness”
THE "CAPE TOWN APPROACH"

convention is to provide a collection of fundamental rules which are only to be modified to the extent necessary in order to meet the special needs of the specific class of collateral addressed in each protocol, this purpose will not necessarily be respected by the parties to protocol negotiations, who may see each protocol as an opportunity to renegotiate one or more of the fundamental provisions contained in the base convention. This could, in theory, lead to the renegotiation of all provisions contained in the base convention every time a new protocol is drafted. Obviously, this opportunity to renegotiate every provision could result in lengthy negotiations that would nullify any procedural efficiencies gained in the application of the Cape Town approach. If a protocol adopts provisions that depart significantly from those of the base convention and other protocols, further fragmentation of the law would also result.

Fourth, just as the Cape Town approach provides the benefit of the "building block" effect whereby an initial protocol can serve as a model for subsequent protocols and thus lead to the speedy expansion of international law, this "building block" approach could have negative effects as well. As seen in the three protocols to the Cape Town Convention, the provisions contained in the protocols are remarkably similar. It is clear that the working groups for both the Rolling Stock Protocol and the Space Protocol relied heavily on the Aircraft Protocol as a model. As mentioned above, this carries certain benefits, such as promoting uniformity and speeding the expansion of international law by preventing the need for each protocol to reinvent the wheel. However, when using the prior protocol as a model for subsequent protocols, danger also lies in the possibility that a flawed provision contained in the initial protocol will be adopted into those subsequent protocols. This risk will be reduced as time passes between the adoption of protocols, since such passage of time will allow for the detection of flawed provisions contained in the initial protocol. Nevertheless, working groups should not hesitate to improve upon the provisions of previous protocols (and should certainly avoid placing excessive trust in the

among the parties to the Cape Town Convention that the protocols "were not intended to override the Convention as a whole, but that the Convention instructed users to look for equipment-specific details in the Protocols." Report of the Third Joint Session of the Sub-Committee of the ICAO Legal Committee and the UNIDROIT Committee of Governmental Experts, UNIDROIT DCME Doc. IP/5 1 (2001), available at http://www.unidroit.org/english/conventions/mobile-equipment/preparatorywork/jointsession3/report1-report.pdf. As discussed below, limitations on a protocol's ability to override the base convention should in certain cases be included in the text of the convention.

88. Jeffrey Wool makes a similar point when he warns that softening the terms of the Aircraft Protocol might create an undesirable commercial law precedent. Wool, Commercial Orientation, supra note 9, at 91.
infallibility of previous protocols).

Fifth, it may be more difficult to accumulate a clear body of case law with respect to a treaty that utilizes the Cape Town approach. This lack of clarity will result from the fact that case law will be divided among issues governed by multiple protocols and it is not clear whether a court’s interpretation of one protocol should necessarily guide a later court’s interpretation of another protocol. In order to avoid being bound by a prior decision regarding another protocol, a court may argue that each protocol, when read together with the base convention as a single instrument, constitutes a law that is separate and distinct from the law that results from the reading of the base convention together with another protocol.

Sixth, any amendment to the base convention will be complicated by the fact that the drafters of such an amendment would have to take into account its effect on each of the protocols. The amendment of a single provision of the base convention may affect each of the protocols in a different manner. For example, imagine that the Cape Town Convention were amended (1) to allow for the creation and enforcement of a security interest in all governmental licenses relating to the debtor’s operation of the collateral and (2) to prohibit any protocol from overriding this new provision. This would permit a secured creditor to sell the debtor’s license to operate an aircraft, locomotive, or satellite upon the debtor’s default regardless of any provision in the protocols that might conflict with these amendments.89 Such amendments would raise markedly different policy issues with respect to the Aircraft, Rolling Stock, and Space Asset Protocols. While the free transferability of governmental licenses with respect to aircraft and rolling stock does not raise serious issues of national security, the case is different with respect to space assets. Without exception, states are sensitive to the ability of a foreign person to utilize satellites to broadcast media to their population due, at least in part, to concerns of political propaganda and the possibility of resulting political unrest. National security issues also arise from the use of satellites with remote sensing capabilities which could be used to photograph military installations. Finally, many countries rely on satellite systems to operate vital public services such as air-traffic control, sea navigation, or tele-medicine services. Therefore, the transfer of a satellite that is used for such public programs to a creditor, along with the license to utilize the satellite, could threaten to disrupt these

89. In fact, Article 2 of the Preliminary Draft of the Space Protocol reserves to domestic law the transferability of governmental licenses needed for the operation of space assets. Space Protocol, supra note 8, art. VII(3).
The "Cape Town Approach" important services. This example illustrates how an amendment to the base convention could have radically different implications for different protocols and how the process of amendment may therefore become more complicated than would ordinarily be the case under a traditional treaty structure.

Finally, the periodic review conferences that commonly take place to monitor the operation of international treaties would be more complicated for those treaties that employ the Cape Town approach. This increased complexity of the review process would arise from the need to review the operation of each protocol independently as well as the operation of the treaty as a whole. As mentioned above, each protocol, when read together with the base convention, constitutes, in effect, a separate "treaty," and each such "treaty" will have unique successes and difficulties resulting from their differing provisions as well as the differing needs of the sectors that they address. Any problems that arise could stem either from an individual protocol or from the base convention. Therefore, it would be advisable to have separate review conferences for each protocol (attended by the parties affected by such protocols) as well as a joint review conference for the examination of the base convention. It would be logical to hold the protocol reviews prior to the review of the base convention so that by the time of the general review session, the attendees of the protocol review sessions would have already reached some consensus regarding existing flaws and whether such flaws lie in the base convention as opposed to the individual protocols.

IV. The Broader Application of the Cape Town Approach

The remainder of this Article discusses how the Cape Town approach can be applied in the creation of treaties concerning various areas of law. Although this new method of making international law was invented in order to solve the particular problems that had arisen in the context of the Cape Town Convention, there is no reason to restrict the Cape Town approach to the area of secured transactions, or even to commercial law. In fact, those who in the future are faced with the task of creating a treaty should consider the Cape Town approach when selecting a treaty structure, particularly if the area of law with which they are dealing involves unusual complexities or particularly challenging diplomatic hurdles.

90. In order to protect against the disruption of vital public services, an Article XVI(3) is under consideration which would allow a state by declaration to limit the enforcement of remedies with respect to space assets used for such public services.
The first of the following sections sets forth the six structural features that are required (or recommended) for a treaty that employs the Cape Town approach. Although some of these features do not appear in the Cape Town Convention, their inclusion in future conventions is recommended for the reasons provided below. The second section describes those circumstances under which it is advisable to employ the Cape Town approach and provides illustrative examples of how the Cape Town approach might be applied in various areas of law.

A. The Six Features of the Cape Town Approach

The following six features are required (or strongly recommended) for a treaty that adopts the Cape Town approach. In addition to a description of each feature, the rationale for including the feature will be provided as well as a citation to model language in the Cape Town Convention (when such language exists).

1. The base convention should contain all provisions that can be agreed upon by all parties, while all controversial provisions that are unlikely to gain support from all parties (without suffering substantial dilution through negotiated compromise) should be removed to the protocols. This basic feature of the Cape Town approach promotes uniformity across industries by gathering certain provisions in the base convention, while at the same time allowing for flexibility by permitting each industry to adopt its own approach to certain issues in its protocol.

2. The base convention should not come into force for a party until that party has ratified both the base convention and a protocol. When a party ratifies both the convention and a protocol, the convention will only enter into force with respect to the ratified protocol. This is another basic feature of the Cape Town approach that makes it possible to move certain provisions to the protocols. It is necessary to postpone the base convention's entry into force until a protocol is also ratified because the base convention alone will not be able to operate in isolation (since provisions that are essential to the operation of the convention are likely to be contained in the protocols). Article 49 of the Cape Town Convention provides model language for a provision to ensure this delay of the base convention's

91. A treaty employing the Cape Town approach may include additional features beyond those listed here, such as "opt-in" provisions or alternative provisions, in order to introduce even greater flexibility to the treaty. However, such provisions are beyond the scope of this Article.
entry into force.  

3. The protocol and the base convention should be interpreted as a single instrument, and, in the event of a conflict between the base convention and a protocol, the protocol must control. This feature allows for a tremendous amount of flexibility between protocols since the tailoring of each protocol to the needs of its sponsors is not restricted by any existing provisions contained in the base convention. Article 6 of the Cape Town Convention may serve as a template for a provision that establishes the controlling nature of the protocols. As discussed above, the drafters of a base convention may choose to limit the controlling nature of the protocols by identifying certain essential provisions of the base convention and prohibiting the protocols from contradicting these essential provisions. Such limitations must be carefully crafted. On the one hand, the identification of supreme principles that cannot be infringed by industry-specific protocol provisions will ensure a greater degree of uniformity across all industries. On the other hand, there is a danger that thus curtailing the primacy of the protocols will destroy the very flexibility that the Cape Town approach promises. In order to ensure the success of future protocols, the base convention must have sufficient flexibility to permit the drafters of future protocols to create provisions that benefit the special needs of the relevant industry. The Cape Town Convention takes a liberal approach to the primacy of the protocols by imposing no restrictions on the ability of the protocols to override the base convention, unless the directive in Article 5(1), stating that when interpreting the convention “regard is to be had to its purposes as set forth in the preamble,” is viewed as limiting the primacy of the protocols that is established by Article 6.

4. The base convention should provide for the creation of a consolidated text for each protocol. This text will present the reader with a comprehensible compilation and reconciliation of the provisions contained in the base convention and the relevant protocol. A consolidated text will ameliorate one of the flaws of the Cape Town approach, namely, the risk that confusion will result from the use of multiple instruments. The Cape Town Convention does not explicitly call for the creation of consolidated texts, although Article 6(1)—which requires that the convention and each protocol be read as a single instrument—suggests that a consolidated text

92. Cape Town Convention, supra note 4, art. 49.
93. Id. art. 6.
94. Id. art. 5(1).
would be desirable.95

5. The base convention should require that all protocols be adopted pursuant to a fast-track procedure in order to avoid the risk, discussed above, that lengthy negotiations will precede the creation of each protocol.96 One possibility for such a fast-track procedure would consist of the following three-step process.97 First, the supervisory authority (such as UNIDROIT, in the case of the Cape Town Convention) would organize a working group to create a draft of the new protocol. Second, the draft would be circulated for comments to all states that are parties to the base convention. Finally, after any comments had been incorporated into the final version of the protocol, accession to the protocol would take place by means of a simple "opt-out" mechanism: any state that was already party to the base convention would automatically accede to the new protocol provided that the state makes no objection within a stated period of time.98

The risk of using such a fast-track procedure is that a new protocol may include provisions that override essential, heavily-negotiated provisions contained in the base convention and states may object to an accelerated process that may result in a state's automatic accession to a protocol that contains undesirable provisions. In order to guard against this possibility, the base convention could establish a dual-track procedure for the adoption of future protocols.99 The default approach would be the fast-track procedure described above. However, in the event that a protocol conflicted with an "essential provision" of the base convention, a full-blown diplomatic conference could be called in order to consider the merits of the protocol prior to signature by those states that wished to accede to the protocol. In order for this dual-track procedure to work, the base convention would have to list certain "essential provisions" that, if contradicted by a future protocol, would prevent the fast-track adoption of the protocol. Of course, this approach assumes that the protocols are permitted to override these "essential provisions" in the first place. As discussed above, the

95. Id. art. 6(1).
96. Professors Chinkin and Kessedjian have proposed using a fast-track procedure for the adoption of protocols to the Cape Town Convention for precisely this reason. Chinkin & Kessedjian, supra note 9, at 326-27. The Rail Working Group has also championed this proposal for a "streamlined" process for the adoption of future protocols. Comments on Article 49 of the Draft Convention, UNIDROIT DCME Doc. No. 37, 1 (2001).
97. Chinkin & Kessedjian, supra note 9, at 326-27.
98. Id. Of course, other non-party states can accede by signing the base convention and the new protocol.
99. Id.
Drafters of the base convention may choose to curtail the ability of protocols to trump certain provisions of the convention. If such a limitation is placed on the controlling nature of the protocol, a fast-track procedure could be the exclusive method of adopting new protocols, since the violation of essential principles found in the base convention would not be permitted.

The Cape Town Convention adopted a moderately expedited procedure for the adoption of future protocols but did not adopt the "opt-out" procedure proposed by Professors Chinkin and Kessedjian. The procedure first calls for UNIDROIT to create a working group to prepare a preliminary draft of a new protocol. UNIDROIT must then communicate the draft to all signatories of the convention (as well as other interested states and organizations) and invite these parties to participate in the preparation of the final protocol. Once the "competent bodies" of UNIDROIT deem the draft "ripe for adoption," a diplomatic conference will be convened for its adoption.

6. The base convention should provide that periodic conferences for the review of each protocol should be held prior to any conference for the general review of the base convention. As discussed above, the existence of multiple protocols would make it difficult to carry out a review of the base convention together with all protocols at a single conference. By holding the review conferences for the individual protocols reviews first, the attendees of the protocol-specific conferences could focus on the issues relevant to the particular protocol and then raise any concerns relevant to the base convention at the main review conference.

B. When Should the Cape Town Approach be Applied?

The discussion to this point has focused primarily on the application of the Cape Town approach to treaties dealing with commercial law. However, there is no reason why the Cape Town approach cannot be employed to form treaties in other areas, such as environmental, insolvency, and criminal law. This section describes the circumstances under which the adoption of the Cape Town approach would benefit the negotiation of a treaty, regardless of the area of law concerned.

100. Cape Town Convention, supra note 4, art. 51.
101. Id. art. 51(1).
102. Id. art. 51(2)–(3).
103. Id. art. 51(4).
Participants in a treaty negotiation should consider using the Cape Town approach in the event that their initial attempt to create a single-instrument treaty has stalled because they are unable to reach agreement on certain controversial provisions. This failure to reach agreement may stem from a variety of reasons, such as different legal philosophies, conflicting public policies, or different practical needs. When such an impasse is reached, the parties should analyze whether the controversial provisions could be moved out of the base convention to multiple protocols, each providing a different approach to the problematic provisions. In the context of the Cape Town Convention, one such problematic provision was the designation of a registrar for the recording of security interests. Each of the industry groups involved in the treaty process wanted an entity from its industry to serve as the registrar. This issue, among others, led to the likelihood that the formation of a unitary treaty would not be feasible (or would at least be significantly delayed). The Cape Town approach provided a solution by allowing the identity of the registrar to be addressed separately in each of the industry-specific protocols.

As seen in the Cape Town Convention, industry-specific protocols may aid in the negotiation of treaties concerning commercial law. However, industry-specific protocols can also be utilized in the employment of the Cape Town approach to treaties concerning other areas of law. Assume, for example, that the negotiation of a hypothetical treaty regarding environmental law has reached an impasse because the different industries subject to the treaty vary in their tolerance of restrictions on the emission of pollutants. In order to resolve this conflict, the treaty could utilize protocols that set forth different obligations for each industry regarding the release of pollutants into the environment. In another example, a treaty regarding labor standards could benefit from industry-specific protocols if certain industries objected to certain proposed labor standards, such as limiting an employee’s workweek to forty hours. If, for the sake of argument, the apparel industry staunchly opposed a forty-hour workweek, while other industries were willing to accept this standard, separate protocols could be created to impose a lesser standard on the apparel industry’s operations worldwide. Although this would create some fragmentation in the law and result in weaker standards for the apparel industry, the treaty process would be salvaged.

Although the Cape Town approach lends itself to industry-specific protocols, protocols could be used in other ways to resolve disputes over controversial provisions. For example, the negotiations of a treaty regarding criminal law may stall if experts drafting the treaty are unable to agree on certain rules, such as whether juveniles
were to be tried as adults. The experts in homicide law might argue that juveniles should be tried as adults, while the experts in drug offenses might take the opposite view. If these experts disagreed on a sufficient number of such issues and the prospect of a unitary treaty covering all crimes was dim, separate protocols could be created for each crime. These separate protocols would allow the treaty process to move forward more quickly by avoiding the need to reach agreement on the controversial issues, such as the treatment of juveniles. Each crime-specific protocol could contain its own rule regarding these issues. Similarly, crime-specific protocols may be appropriate for a criminal law treaty if agreement cannot be reached regarding the definition of crimes. While agreement on the definitions of piracy, homicide, and drug trafficking may be resolved in the treaty negotiations, the definition of terrorism or other crimes may evade agreement. Rather than halt the drafting process until all parties agree on the definition of every crime, separate protocols could be created for each crime, thus allowing the treaty to enter into force with respect to those crimes for which a protocol can be successfully negotiated.

In yet another example of how the Cape Town approach could be applied in a different area of law, a treaty for the harmonization of civil procedure could employ protocols that apply different procedural rules to different types of actions in the event that a unitary set of rules covering all actions was not attainable. Separate protocols could conceivably be created for consumer actions and actions involving merchants. These protocols could contain different rules regarding discovery, the right to cross-examination, burden of proof, or other issues that may demand different approaches, depending on the special policy issues that arise in consumer actions. For example, consumers may be given a broader right to conduct pre-trial discovery than would a corporate plaintiff in light of the need to protect consumers from potential abuse at the hands of corporate merchants.

As these examples indicate, the first prerequisite for the successful application of the Cape Town approach is the feasibility of creating separate protocols in a manner that will have the desired effect of resolving whatever disputes are preventing the creation of a unitary treaty. However, the beneficial application of the Cape Town approach also requires that all principals in a treaty negotiation agree on a substantial number of provisions that will make up the body of the base convention. If agreement cannot be reached on a significant number of provisions, the base convention will be thin and any hope of achieving a reasonable degree of uniformity will be lost. Without a robust base convention, the Cape Town approach will result in
nothing more than a series of independent treaties in the form of protocols that are tied together by a weak base convention. In such a case, there is little benefit to using the Cape Town approach since the same result could be achieved simply by negotiating separate treaties. The beauty of the Cape Town approach is that it provides the flexibility needed to save a stalled treaty negotiation, while still preserving a meaningful level of uniformity through the common provisions contained in the base convention. In order to maximize this uniformity, the drafters of a treaty employing the Cape Town approach should expend every effort to devise uniform rules to govern as many issues as possible, while allowing only the most controversial provisions to be moved to the protocols for special treatment. If applied in this manner, the Cape Town approach promises to be a useful tool for resolving the disputes that threaten the successful formation of a treaty.