

## **Overview of the current situation regarding the preliminary draft Space Property Protocol and its examination by COPUOS**

*Martin J. Stanford* \* / *Alexandre de Fontmichel* \*\*

### **I. — BACKGROUND TO, AND STATUS OF THE PROJECT**

UNIDROIT's overall project for the development of a new international regimen governing the taking of security in high-value mobile equipment is made up of a number of individual projects. To date priority has been given to completion of the future Convention on International Interests in Mobile Equipment, designed to carry the general rules applicable to all the different categories of mobile equipment, and the future Protocol on Matters specific to Aircraft Equipment, designed to carry the special rules needed to address the special characteristics of aircraft equipment, that is airframes, aircraft engines and helicopters. The reason why priority has been accorded to these elements of the project has to do with the impatience of the aviation industry to see the Convention in force at the earliest possible opportunity and thus to benefit from the important new opportunities for secured financing that it represents without having to wait for the other interest groups, such as the space industry, to reach the same level of industry consensus as regards the form of the special rules that will be needed to adapt the rules of the Convention to their special needs.

A diplomatic Conference for the adoption of the current draft Convention and the current draft Aircraft Protocol is to be held in Cape Town from 29 October to 16 November 2001. This means that the way is now somewhat clearer for UNIDROIT to push forward with greater urgency on the other Protocols under preparation. Foremost among these Protocols is that on Matters specific to Space Property.

Another of the reasons why UNIDROIT has held back from pushing this Protocol forward more rapidly to date has been the desire of its Space Working Group to develop broader industry consensus for the novel provisions proposed in the preliminary draft Space Property Protocol which it has been preparing over the last two years. It is obviously desirable for an international instrument likely to have such a major impact on international space finance practice to have behind it broad industry support. At the same time, given the equally novel implications for Governments of the commercialisation of space in general, it is equally important to be sure that what UNIDROIT is proposing will be acceptable to them too, not least when seen in the context of the existing rules applicable to space.

A further reason which has induced caution on the part of UNIDROIT has to do with the fact that the future Protocol is designed to be underpinned by an international registry in which international interests in space property may be registered. In creating a new international registry for space property, UNIDROIT was naturally conscious of the

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\*\* Associate Research Officer, UNIDROIT.

international registry for space objects already existing under the terms of the 1975 Convention on Registration of Objects launched into Outer Space. One of the thoughts that has exercised the minds of the Space Working Group has been the relationship between the two international registries. But, most of all, UNIDROIT has been anxious first to ascertain the most appropriate body to exercise the very important functions of Supervisory Authority for the future international registry in respect of space property.

The debate that has taken place on this issue in the context of the preparation of the draft Convention and the draft Aircraft Protocol has highlighted the importance of the body to exercise these functions for the future credibility of the international registration system. This is why it was felt important that the International Civil Aviation Organization (I.C.A.O.) should exercise these functions for the international registry in respect of aircraft equipment. On 22 November 2000 the Council of I.C.A.O. agreed in principle that I.C.A.O. should exercise these functions. It is significant that the Intergovernmental Organisation for International Carriage by Rail (O.T.I.F.) has also indicated its keenness to exercise similar functions in connection with the international registry in respect of railway rolling stock. Both UNIDROIT and the Space Working Group tend in principle to believe that the equivalent intergovernmental body best suited to exercise these functions in the space context would be the United Nations, in particular since the aforementioned 1975 Registration Convention was concluded under the auspices of that Organisation.

## **II. — REASONS FOR DEVELOPMENT OF THE PROPOSED NEW INTERNATIONAL REGIMEN**

The raising of the necessary finance for space activity has always caused special problems in view of the astronomical sums of money involved. Whereas up until ten years ago most of the customers for such finance were either governmental or intergovernmental agencies or large multinationals or blue-chip companies with a long credit history and well able to offer security over the entirety of their assets, the ever-growing trend towards the commercialisation of space that is being witnessed nowadays has brought with it a change in the profile of the typical customer for space finance. Such customers will now increasingly be start-up companies with no real credit history and no assets to offer as collateral other than a satellite.

Such satellites will typically be commercial communications satellites each of which will have an estimated value of U.S.\$ 75 million and launching costs that may well be in excess of that sum. It is anticipated that more than 1,000 commercial communications satellites, valued at over U.S.\$ 5 billion and projected to generate well over U.S.\$ 500 billion in revenues, will be launched over the next decade. This clearly represents a unique opportunity for asset-based financing.

Although certain international instruments, for instance the 1988 UNIDROIT Convention on International Financial Leasing, contain provisions that may affect creditors' interests in space property, none of these instruments effectively deal with the international registration, recognition and enforcement of security rights in such property. Neither do the 1967 Outer Space Treaty nor the 1975 Registration Convention.

Representatives of the space sector, whether satellite manufacturers, launch services providers, satellite operators or financial institutions, represented on the UNIDROIT Space Working Group are all agreed as to the great benefits to be derived from a uniform,

predictable and commercially-oriented regimen governing the taking of security in space property of the kind contemplated by the future Convention and Space Protocol. First, it will increase the willingness of financiers to lend funds for commercial space transactions. Secondly, the cost of such transactions, whether measured in terms of financial, legal or insurance costs, will as a result be much reduced in proportion to the consequential reduction in the financial risk at present incidental to such transactions.

The increased availability of asset-based financing for space-related ventures and the reduced cost of such financing that are likely to result from the proposed UNIDROIT regimen may be expected to bring particular benefits for the new type of customers for satellite services, particularly in those developing countries and countries with economies in transition which currently have such limited access to such financing possibilities.

### **III. — RECENT DEVELOPMENTS CONCERNING THE PRELIMINARY DRAFT PROTOCOL**

A number of initiatives have been launched over the past year by the UNIDROIT Secretariat and the Space Working Group with a view to getting the preliminary draft Space Property Protocol into shape to be submitted to the UNIDROIT Governing Council at its 80<sup>th</sup> session, to be held in Rome from 17 to 19 September 2001. These initiatives have been conceived essentially with a view to ensuring the early transmission of the preliminary draft Protocol to Governments for consideration by governmental experts.

#### **A. Presentation of the preliminary draft Protocol to COPUOS**

First, at the invitation of the United Nations Office for Outer Space Affairs, the UNIDROIT Secretariat has put before the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space and COPUOS itself a proposal that COPUOS, as the body that has to date been responsible for the development of international space law, should include consideration of the preliminary draft Protocol as a single issue discussion item on the agenda of the 40<sup>th</sup> session of the Legal Subcommittee. This proposal was put before the Legal Subcommittee at its 39<sup>th</sup> session, held in Vienna from 27 March to 7 April 2000, and before COPUOS at its 43<sup>rd</sup> session, held in Vienna from 7 to 16 June 2000. The idea behind this proposal was, on the one hand, to enable the UNIDROIT Governing Council when it comes to consider the preliminary draft Protocol to be sure that this is not seen as creating problems for the existing body of space law, whether at the international level or otherwise, and, on the other hand, to get an idea as to the possibility of the United Nations acting as the Supervisory Authority of the future international registry for space property. This proposal seemed particularly timely in the light of the recommendation issued by UNISPACE III for the organisation of "effective and focused joint forums" on the subject of "security of ownership". UNIDROIT's proposal was in the event taken up by the Government of Italy and a number of other Governments as a result of which the Legal Subcommittee will indeed be considering the draft Convention and the preliminary draft Protocol at its 40<sup>th</sup> session, to be held in Vienna from 2 to 12 April 2001.<sup>1</sup> The Secretariats of UNIDROIT and the Office for Outer Space Affairs were moreover asked to prepare a joint background paper to assist the Legal Subcommittee in its deliberations.

<sup>1</sup> Cf. Postscript, *infra*, p. 74.

**B. Convening of back-to-back meetings of the Space Working Group and a restricted informal group of experts**

*(i) Background*

Secondly, in October 2000 UNIDROIT convened in Rome back-to-back meetings of the Space Working Group and an *ad hoc* restricted informal group of experts to consider, first, the outstanding issues left open in the current working draft of the preliminary draft Space Property Protocol (prepared in January 2000 by Mr Peter D. NESGOS (*Milbank, Tweed, Hadley & McCloy*, New York), co-ordinator of the Space Working Group, with the assistance of Mr Dara A. PANAHY (*Milbank, Tweed, Hadley & McCloy*, Washington, D.C.)) and, secondly, the question of the relationship of the preliminary draft Protocol with the existing body of space law. The meeting of the informal group of experts was held first, on 18 and 19 October 2000, so as not only to enable Space Working Group members to participate but also to enable the Space Working Group at its subsequent meeting, held on 19 and 20 October 2000, to decide as to the most appropriate means of implementing the recommendations of the group of experts.

Whereas the Space Working Group is an *ad hoc* industry group entrusted by the President of UNIDROIT with the task of preparing a preliminary draft Space Property Protocol capable of being laid before the UNIDROIT Governing Council, the group of experts also included experts designated by a small number of UNIDROIT member Governments, that is, Argentina, Belgium, France, Germany, Italy, the Russian Federation, Sweden and the United States of America, that had manifested particular interest in this aspect of UNIDROIT's project, in particular at the time of its presentation to COPUOS. It was considered especially useful to hear the views of a select number of governmental experts in view of the imminence of the consideration of the preliminary draft Protocol by the members of the Legal Subcommittee of COPUOS and the importance attaching to the question of the relationship between the future Protocol and the existing body of space law. The two meetings were also attended by representatives of interested international Organisations, such as the European Centre for Space Law, the International Bar Association and the United Nations Office for Outer Space Affairs as well as representatives of the Aviation Working Group, the counsels of which have played such a vital part in shaping the draft Aircraft Protocol. The meetings were also attended by representatives of such major players in the world aerospace industry and finance community as Alcatel, Arianespace, Astrium, the Boeing Company, Crédit Lyonnais, EADS and Lockheed Martin. Practising lawyers from major law firms also brought their special expertise in the field of space finance to bear on the discussions. The group of experts was chaired by the French expert, Mr Olivier TELL, of the Ministry of Justice, head of the French delegation attending the governmental experts meetings on the draft Convention and the draft Aircraft Protocol. The deputy chairman of the group of experts was one of the two experts designated by the Swedish Government, Mr Niklas HEDMAN, of the Ministry of Foreign Affairs, Sweden's representative on COPUOS.

*(ii) Principal issues considered during the meetings*

The first purpose of the meetings was to discuss those aspects of the preliminary draft Protocol which had intentionally been left open by the Space Working Group with a view in particular to obtaining the views of those involved in space finance.

(a) Sphere of application

*(α) Substantive sphere of application*

The principal such question concerned the substantive sphere of application of the future Protocol, that is, whether it should apply to a broader or a narrower range of types of space property.

The essential factor involved here was whether or not to go for a coverage that would anticipate future developments in the commercialisation of space, such as the likelihood of space crystals and the like being manufactured in space and the desirability or otherwise of contemplating the possibility of secured financing of such activities under the regimen of the Protocol, or rather to play it safe and simply contemplate those items of space property already identifiable as space property. This then raised the question as to whether the proposed new international regimen should contemplate, in addition to such items of space property, also those associated rights which are so vital for the implementation of a space financier's security rights in such property. The restricted informal group of experts in particular considered the case of those access codes necessary for such a party to be able to take control of such property as well as all those authorisations and licences necessary for the operation of such property.

The restricted group of experts took the view, as regards these questions, that a distinction needed to be drawn as between tangible property and intangible rights associated therewith. It came down in favour of covering all tangible space property, that is, including items that may not even at present exist but which may be envisaged as being capable of benefitting from the new international regimen in due course, such as therefore property that may be manufactured in space. On the other hand, as regards intangible rights, it decided that the criterion for coverage should be the extent to which the inclusion of such rights would not encroach on either general national law regimes governing such rights or those special mandatory rules of national law prohibiting their transfer. This delimitation was particularly inspired by a concern not to interfere with the already highly developed intellectual property regimes already in place in many States and the desirability of not causing unnecessary future difficulty for the acceptability of the new regimen on the part of States preferring to keep their national regimes in this regard as well as by recognition of the absolute need to safeguard national security policy, concerning in particular the use of space property for military purposes.

An additional point concerning the substantive sphere of application of the future Protocol concerned the moment in time from which an individual item of space property was to be considered suitable for coverage. One significant player in the manufacturing of space property represented at the meeting of the group of experts suggested, for example, that his company probably would not need to have the possibility of securing the financing of space property under construction under the proposed new regimen in that they already had satisfactory solutions in this regard. It is important to note, however, that, this point of view was not shared by those representing those financial interests responsible for lending funds for the construction of such property in advance of, and during the construction thereof. What conclusion should be drawn from this difference of view? In so far as property under construction was intended to be launched into space, it was considered legitimate that such property should in principle be capable of being covered but only where States at the moment of their acceptance of the Protocol decided that this was what they wanted. It

was felt that this would enable States to take a decision in the light of the specificities of their national practice and policies.

*(β) Territorial sphere of application*

As regards the question of the territorial sphere of application of the future Protocol, it was clear that the special solution that had been taken in the draft Aircraft Protocol, namely that of the State of registration as the relevant connecting factor, was not generally available for the different categories of space property to be covered by the future Protocol, some items of which would not at present be subject to registration. The group therefore also looked at the possibility of taking the launching State as the appropriate connecting factor but this was finally discarded, it being considered that, given the number of different States that could be considered as the launching State in respect of a single operation, such a connecting factor would introduce an unacceptable degree of complexity into the question of the future Protocol's application. For the time being then the only criterion for the future Protocol's territorial application will be that provided under the draft Convention itself, namely the State in which the debtor is situated.

*(b) Default remedies*

The next question after that of the substantive and territorial sphere of applications to which the group of experts devoted special attention was that of the enforcement of the creditor's remedies in the special context of property that will normally be located in space. The basic remedies granted to creditors under the draft Convention are all predicated on the idea that they will be capable of being exercised directly by means of repossession. Whilst it is clearly theoretically quite possible for a creditor to engage a bailiff to repossess such property, quite apart from the considerable, if not astronomical sums of money that would be involved, it has to be borne in mind that, once such property is returned to earth, its value will depreciate extremely rapidly unless special measures are taken, measures that I understand also to involve the disbursement of enormous quantities of money. For these reasons the intention of the Space Working Group has all along been that the concept of repossession in the context of an orbiting satellite should be understood in the sense of constructive repossession. The idea here is to enable such a creditor to be able to exercise his Convention remedies by taking control of the relevant tracking, telemetry and command facilities.

The group of experts pinpointed the importance that would attach to the future Protocol taking care to address the susceptibilities of the State on the territory of which the relevant ground facilities would be located. It was agreed that it would be necessary for the Protocol to find solutions in this regard that would offer a balanced regimen as between the legitimate requirements of the creditor, on the one hand, and the legitimate concerns of the State on which the ground facilities were located, on the other. It was significant that it was essentially concern for the situation of this State that persuaded the group of experts as to the undesirability of including such ground facilities among the types of property to be qualified as space property for the application of the Protocol. It was agreed that it would not be feasible to purport to grant a creditor real rights over such ground facilities for these purposes and that a solution should rather be sought through granting him the right to use of the facilities in question for the limited purposes required.

One issue that attracted particular attention in the course of the group of experts' discussion of the creditor's enforcement of his remedies in the case of space property showed the importance of making due allowance for those public policy grounds on which certain States would oppose the creditor's enforcement of these remedies. It is perhaps illustrative to give a few examples of the different types of public policy defences that were referred to. A State might, for instance, object to a transfer of property rights in space property on the ground that such property belonged to that State, involved military technology of essential importance to that State's security or was vital in order to guarantee certain public services. Another public policy-type defence that was considered, which would not however necessarily be invoked by a State alone, concerned whether the proposed new use of the property after the transfer of the property rights therein would be consistent with the duties laid down by the relevant provisions of the 1992 International Telecommunication Union Convention and Constitution.

In this regard the group of experts decided that one solution for items of space property that were State property and/or involved a military/security dimension would be to permit States to opt out of the application of the future Protocol in respect of such property. However, it was recognised that the effect of invoking such a solution would certainly not enhance the chances of attracting the desired sort of secured finance. Another less radical solution was accordingly envisaged. This would permit a State invoking a public policy defence to compensate the creditor for his loss.

(c) International registration system

One of the most important issues debated concerned the international registration system to underpin the future Protocol. As has already been mentioned, one element of this equation must necessarily be the existing United Nations international registry set up under the 1975 Registration Convention. The group of experts saw absolutely no risk of confusion between the two registries in view of their quite separate functions. The other element of this equation is of course the identification of the body considered best fitted to exercise the all-important functions of Supervisory Authority of the future international registration system for space property. The consensus reached by the group of experts in this regard was that it was essential, even more so in the special context of a system intended to apply in respect of interests created over property that was essentially intended to operate in space, for these functions to be exercised by an intergovernmental Organisation. The general feeling was that the most appropriate body to be entrusted with this task, should it be so inclined, would, in view of its sponsorship of the space law treaties, be the United Nations. The question nevertheless arose as to whether such functions would be compatible with that Organisation's existing status, in particular the privileges and immunities that have been conferred upon it – the draft Convention, it should be recalled, only recognised the functional immunity from liability of the Supervisory Authority. The group concluded that this should not prove to be a major problem in so far as the international registration system placed liability for loss resulting from errors and omissions of the Registrar or a system malfunction in the first place on the Registrar himself.

With aircraft equipment it is agreed that the registration search criterion should be essentially that of the manufacturer's serial number. With space property the answer is not so obvious. By including intangibles in the sphere of application of the future Protocol and by virtue of the very diverse range of the different types of space property to be covered, it

was recognised that the search criterion that was sufficient for aircraft equipment would not be sufficient for all the different types of property intended to be covered by the future Protocol. It will therefore be necessary to allow for the possibility of multiple search criteria.

(d) Insolvency

One issue was considered to be of such complexity that it was better left to be dealt with by a special working group of the Space Working Group. This was the case of the insolvency regimen proposed under the future Protocol, modelled heavily on that proposed in the draft Aircraft Protocol.

(e) Relationship of the preliminary draft Protocol to existing space law

The other area of the group of experts' inquiry was the extent to which the provisions of the future Protocol were to be considered consistent with the existing body of space law, whether national or otherwise. As has already been mentioned, the group's considered conclusion was that the planned international registry for space property should not prove in any way incompatible with the existing United Nations registry for space objects. A fundamental issue, however, to which the group gave particular attention was the way in which a transfer of property rights in space property under the future Protocol would impact on the principle of a State's retention of jurisdiction and control over a space object launched into outer space where such object is carried on the registry of that State under Article VIII of the Outer Space Treaty. The group concluded that this should be seen rather as raising a question for the continuing workability of the said principle in the light of the developments that were to be expected to flow from the commercialisation of space than as indicating any shortcoming of the new regime provided for the financing of space property under the future Protocol.

A similar conclusion was reached by the group of experts regarding the relationship of the future Protocol and the unqualified principle of a launching State's liability under Article II of the 1972 Convention on the International Liability for Damage caused by Space Objects. But then this is already an issue under examination by the United Nations Committee on the Peaceful Uses of Outer Space.

The group also decided to set up a working group to examine in a general way – that is, in addition to the specific United Nations treaties already referred to – the relationship between the future Protocol and all those international law instruments the subject-matter of which was in some way related to the future Protocol. This working group will, for instance, thus be able not only to look at all the space law treaties adopted under United Nations auspices but also the relevant international instruments adopted under the auspices of the International Telecommunication Union and the draft Convention on Assignment of Receivables under preparation by the United Nations Commission on International Trade Law (UNCITRAL).

**IV. – POSTSCRIPT**

**A. *Consideration of the preliminary draft Protocol by COPUOS***



Pursuant to the decision taken at the aforesaid 43<sup>rd</sup> session of COPUOS, the draft Convention and the preliminary draft Protocol were considered at the 40<sup>th</sup> session of the Legal Subcommittee. On that occasion great interest was manifested in the two future international instruments. With a view to facilitating an early response to UNIDROIT it was agreed to create an *ad hoc consultative mechanism*, acting under the auspices of the Legal Subcommittee, to review further the issues thrown up during the Legal Subcommittee's consideration of the draft Convention and the preliminary draft Protocol and to report back to the Legal Subcommittee at its 41<sup>st</sup> session. It is anticipated that at least one meeting of this mechanism will be held and the French Government indicated its willingness to host such a meeting in Paris in the second week of September 2001. It was agreed that UNIDROIT should be invited to participate in the work of this mechanism and there was recognition of the desirability of industry expertise being channelled into these efforts via inclusion of representatives of the Space Working Group on UNIDROIT's delegation.

***B. Final meetings of the Space Working Group prior to the submission of the preliminary draft Protocol to the UNIDROIT Governing Council***

At the invitation of the Boeing Company, the most recent session of the Space Working Group was held in Los Angeles on 23 and 24 April 2001. On this occasion the shape of the preliminary draft Protocol to be submitted to the UNIDROIT Governing Council was agreed upon and a revised text will be transmitted to UNIDROIT by the end of June 2001. A further session of the Space Working Group will be held in Paris, at the invitation of Arianespace, at the beginning of September 2001, both to discuss the revised text to come out of the Los Angeles session and to prepare for the projected Paris meeting of the mechanism set up under the auspices of the Legal Subcommittee of COPUOS.

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