

UNIDROIT 2001
Study LXXIIJ – Doc. 8
(Original: English)

UNIDROIT
INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
=====

SPACE WORKING GROUP
(Evry Courcouronnes, 3/4 September 2001):

REPORT

(prepared by the UNIDROIT Secretariat)

Rome, December 2001

I. INTRODUCTION

(a) Background to the session

1. - Pursuant to the decision taken at the session of the Space Working Group held in Rome on 19 and 20 October 2000 (cf. Study LXXIIJ – Doc. 2, § 21), the Space Working Group met, at the kind invitation of Arianespace, at the Headquarters of Arianespace in Evry Courcouronnes, near Paris, on 3 and 4 September 2001. The main business of the Space Working Group on this occasion was to consider further the text of the preliminary draft Protocol to the draft UNIDROIT Convention on International Interests in Mobile Equipment (hereinafter referred to as the *draft Convention*) on Matters specific to Space Property (hereinafter referred to as the *preliminary draft Protocol*) as revised by Mr Peter D. Nesgos, co-ordinator of the Space Working Group, with the assistance of Mr Dara A. Panahy, so as to implement the amendments agreed at the previous session of the Space Working Group and communicated by Mr Nesgos to the President of UNIDROIT on 30 June 2001 (cf. Study LXXIIJ – Doc. 6), in particular the key policy issues that had been left open at its previous session.

2. - Additional matters on the table were, first, consideration of such comments as the Space Working Group might usefully make as regards the satisfactoriness of the provisions of the draft Convention from the point of view of their application to space property, with a view to the diplomatic Conference for the adoption of the draft Convention and the draft Protocol thereto on Matters specific to Aircraft Equipment (hereinafter referred to as the *draft Protocol*) due to be held in Cape Town from 29 October to 16 November 2001 (hereinafter referred to as *the diplomatic Conference*), secondly, consideration of the best means of organising the educational campaign to market the preliminary draft Protocol among suppliers of, and lenders against space property that the Space Working Group had advocated at its previous session (cf. Study LXXIIJ – Doc. 5, §§ 8 and 16) and, thirdly, the interaction of the Space Working Group and the industry expertise that it represented with the future intergovernmental consultation process on the preliminary draft Protocol, starting with the first working meeting of the *ad hoc* consultative mechanism of the United Nations Committee on the Peaceful Uses of Outer Space (U.N./COPUOS), set up by that Committee at its 44th session, held in Vienna from 6 to 15 June 2001, that was to be held in Paris on 10 and 11 September 2001.

(b) Opening of the session

3. - The session of the Space Working Group was opened by Mr Nesgos at 9.45 a.m. on 3 September 2001. Mr Nesgos took the chair. Mr Claude Dumais, Senior Legal Counsel, Arianespace, welcomed participants, drawing attention to the long-term importance of the draft Convention and the preliminary draft Protocol for space financing. He was elected Co-chairman of the session. Mr Nesgos expressed the Space Working Group's gratitude to Arianespace, and to Mr Dumais in particular, for generously offering to host the session.

4. - The session was attended by the following experts:

Experts designated by intergovernmental Organisations

Mr Gabriel LAFFERRANDERIE

Legal Adviser, *European Space Agency, Paris*

Mr Martin J. STANFORD

Principal Research Officer, *International Institute for the Unification of Private Law (UNIDROIT), Rome*

Experts designated by international non-governmental Organisations

Ms Anna Maria BALSANO	Legal Department, European Space Agency, <i>Paris / International Institute of Space Law</i>
Mr Marcello GIOSCIA	Partner, Studio Legale Ughi & Nunziante, <i>Rome / United Nations and other World Organisations Standing Committee (UNWOC) of the International Bar Association</i>
Mr Peter D. NESGOS	Partner, Milbank, Tweed, Hadley & McCloy LLP., <i>New York / Co-ordinator, Space Working Group</i>
Mr Bradford Lee SMITH	Senior Intellectual Property Counsel, Intellectual Property Department, Alcatel, <i>Paris / International Institute of Space Law</i>

Representatives of international commercial aerospace and financial communities and others

Ms Darcy BEAMER-DOWNIE	In House Counsel, Airclaims Limited, <i>London</i>
Mr Dennis L. BEKEMEYER	Sidley, Austin, Brown & Wood, <i>Seattle, Washington</i>
Mr Jacques BERTRAN DE BALANDA	Partner, Banking Department, Lovells, <i>Paris</i>
Ms Florence BESSIS	Director, Financing and Investment Department, Arianespace, <i>Evry</i>
Mr Tom BUDGETT	Director, Leasing & Tax based Finance, ANZ Investment Bank, <i>London</i>
Mr Philippe CLERC	Adjoint affaires spatiales industrielles et institutionnelles, Département Espace et Aéronautique, Direction de la Technologie, Ministère de la Recherche, <i>Paris</i>
Mr Claude H. DUMAIS	Senior Legal Counsel, Arianespace, <i>Evry</i>
Mr Hermann ERSFELD	Department IC2, Space Infrastructure Division, Astrium G.m.b.H., <i>Bremen</i>
Mr John B. GANTT	Counsellor at Law, Mizrack & Gantt, <i>Washington, D.C.</i>
Mr Michael GERHARD	Legal Adviser, Project Administration and Controlling, German Aerospace Centre (D.L.R.), <i>Cologne</i>
Mr Robert W. GORDON	Vice President, Space & Defense, Boeing Capital Corporation, <i>Long Beach, California</i>

Ms Catherine KESSEDJIAN	Professeur de droit européen des affaires et de droit international privé, Université de Paris II (Panthéon-Assas), <i>Paris</i>
Mr Souichirou KOZUKA	Professor of Law, Faculty of Law, Sophia University, <i>Tokyo</i>
Mr Michel LAFFAITEUR	Chargé de mission, Direction des relations internationales, Centre National d'Etudes Spatiales (CNES), <i>Paris</i>
Ms Martine LEIMBACH	Adjointe au Responsable de l'Unité Financement Structuré à la Direction juridique, Groupe Crédit Lyonnais, <i>Paris</i>
Mr Alfons A.E. NOLL	Of Counsel, Baker & McKenzie, <i>Geneva / Former Legal Adviser, International Telecommunication Union</i>
Mr Rolf OLOFSSON	Partner, White & Case Advokat AB, <i>Stockholm</i>
Mr Francesco Saverio POLITO	Studio Legale Associato Porcelli & Tamborra, <i>Bari</i>
Ms Susanne REIF	c/o German Aerospace Centre (D.L.R.), <i>Cologne</i>
Mr Olivier M. RIBBELINK	Department of Research, T.M.C. Asser Instituut, <i>The Hague</i>
Mr Zine SEKFALI	Head of Legal Affairs, BNP Paribas Structured Finance, <i>Paris</i>
Mr Alain STEVIGNON	Senior International Counsel, Legal Department, Alcatel Space Industries, <i>Nanterre</i>
Mr Manish THAKUR	Managing Director, Technology, Investment Banking, S.G. Cowen Securities Corporation, <i>New York</i>
Mr Thierry THORIN	Service juridique, Centre National d'Etudes Spatiales, <i>Toulouse</i>
Mr H. Peter VAN FENEMA	Adjunct Professor of Law, McGill University, c/o Jonker c.s. Advocaten, <i>Amsterdam</i>
Mr Cedric WELLS	Legal Adviser, La Réunion Spatiale, G.I.E. d'assurances et de réassurances, <i>Paris</i>

Mr Paul ZERMATI

Head of Legal Department, Arianespace, *Evry*

Ms Valérie ZINCK

Centre National d'Etudes Spatiales/Astrium, *Le Plessis-Robinson*

In addition, Mr Alexandre de Fontmichel, of the Bureau du droit européen et international en matière civile et commerciale in the Service des Affaires européennes et internationales of the French Ministry of Justice, attended the session as an observer, on behalf of Mr Bruno Sturlèse, Head of the same Bureau and member of the UNIDROIT Governing Council.

5. - The Space Working Group adopted the draft agenda, which is reproduced as an Appendix to this report, noting, however, that the work of the *ad hoc* informal consultative mechanism of U.N./COPUOS referred to under item No. 6(i) of that draft agenda would not end with the working meeting to be held in Paris on 10 and 11 September 2001 but would continue right up to the 41st session of the Legal Subcommittee of U.N./COPUOS, to be held in Vienna in April 2002, on which occasion it was due to submit its report to the Legal Subcommittee.

6. - The Space Working Group was seized of the following materials:

(1) Draft agenda (Study LXXIIJ – S.W.G., 4th session, W.P. 1);

(2) Draft [UNIDROIT] Convention on International Interests in Mobile Equipment (DCME Doc No. 3);

(3) Preliminary draft Protocol to the draft [UNIDROIT] Convention on International Interests in Mobile Equipment on Matters specific to Space Property, as established by a working group, organised, at the invitation of the President, by Peter D. Nesgos, Esq., with the assistance of Dara A. Panahy, Esq., at the conclusion of its third session, held in Seal Beach, California on 23 and 24 April 2001 (Study LXXIIJ – Doc. 6);

(4) Space Working Group (Seal Beach, California, 23/24 April 2001): report (prepared by the UNIDROIT Secretariat) (Study LXXIIJ – Doc. 5);

(5) Draft UNIDROIT Convention on International Interests in Mobile Equipment/preliminary draft Protocol on Matters specific to Space Property: comments on the relationship between the draft Convention and the preliminary draft Protocol and existing international space law (submitted to the United Nations Office for Outer Space Affairs by the Space Working Group);

(6) Preliminary draft Protocol to the draft [UNIDROIT] Convention on International Interests in Mobile Equipment on Matters specific to Space Property (as established by a working group, organised, at the invitation of the President, by Peter D. Nesgos, Esq., with the assistance of Dara A. Panahy, Esq., at the conclusion of its third session, held in Seal Beach, California on 23 and 24 April 2001): comments by Hoyt L. Davidson, Esq. (Managing Director, Investment Banking, Credit Suisse First Boston, New York) (Study LXXIIJ – S.W.G., 4th session, W.P. 2);

(7) Draft UNIDROIT Convention on International Interests in Mobile Equipment (as submitted by the UNIDROIT Governing Council for adoption to a diplomatic Conference, to be held in Cape Town from 29 October to 16 November 2001) and preliminary draft Protocol to the draft [UNIDROIT] Convention on International Interests in Mobile Equipment on Matters

specific to Space Property (as established by a working group, organised, at the invitation of the President, by Peter D. Nesgos, Esq., with the assistance of Dara A. Panahy, Esq., at the conclusion of its third session, held in Seal Beach, California on 23 and 24 April 2001): comments by the International Telecommunication Union (Study LXXIIJ – S.W.G., 4th session, W.P. 3);

(8) Preliminary draft Protocol to the draft [UNIDROIT] Convention on International Interests in Mobile Equipment on Matters specific to Space Property (as established by a working group, organised, at the invitation of the President, by Peter D. Nesgos, Esq., with the assistance of Dara A. Panahy, Esq., at the conclusion of its third session, held in Seal Beach, California on 23 and 24 April 2001): comments by Alfons A.E. Noll, Esq. (of Counsel, Baker & McKenzie, Geneva) (Study LXXIIJ – S.W.G., 4th session, W.P. 4);

(9) Preliminary draft Protocol to the draft [UNIDROIT] Convention on International Interests in Mobile Equipment on Matters specific to Space Property (as established by a working group, organised, at the invitation of the President, by Peter D. Nesgos, Esq., with the assistance of Dara A. Panahy, Esq., at the conclusion of its third session, held in Seal Beach, California on 23 and 24 April 2001): comments by Carlos Hernando Rebellon Betancourt, Esq.

II. CONSIDERATION OF THE REVISED TEXT OF THE PRELIMINARY DRAFT PROTOCOL (Study LXXIIJ – Doc. 6)

(a) *Introductory remarks*

7. - In introducing the business of the session, *Mr Nesgos* suggested that this session should be seen as complementing at the European level what had already been accomplished at the North American level by the previous session, held in Seal Beach, California, and as part of a programme designed to bring the Space Working Group's efforts to the attention of all parts of the world, with the following step being envisaged as a session in Asia.

8. - He then introduced the amendments that had been made to the preliminary draft Protocol (cf. Study LXXIIJ-Doc. 4) in the wake of the Seal Beach session.

In the preamble he drew attention to the small change introduced in the fourth clause and the introduction of a new fifth clause, this last to underline the importance of the proposed new international regimen for commercial space financing.

In Article I he noted, first, the elaboration of the defined term "associated rights" for the purposes of the preliminary draft Protocol so as to cover those tangential rights that were both related and integral to the physical property that constituted space property (cf. Article I(2)(a)), secondly, the deletion of the elaboration of the defined term "proceeds," encompassing income or revenue derived from space property, on the ground that it was better to adhere to the narrower, more operative definition provided by the draft Convention, and, thirdly, the reordering and streamlining of the definition of "space property," including the movement of the definition of "associated rights" into a separate sub-paragraph (cf. Article I(2)(f)). He also drew attention to the expanded footnote relating to the definition of "space property" drafted to take account of the discussions at the previous session of the Space Working Group. In particular this raised the issue whether the type of property to be encompassed should be broadened, to include State-owned property intended to be commercially financed in whole or in part, with a view to

enabling the preliminary draft Protocol to make a more useful contribution to the development of space financing.

Minor changes had been made to Article V in order to bring it into line with the draft Protocol.

In Article VII additional criteria for the identification of space property (in the case of separately identifiable components forming a part of the space property or attached to, or contained within the space property and in respect of space property launched into space) had been introduced (cf. Article VII(iv) and (v)).

The terms of the remedy granted under Article IX(2) had been broadened so as to permit the relevant access and command codes also to be placed into escrow with any agreed escrow agent and at any time after the creation of an international interest. A footnote had moreover been added to these provisions to reflect the discussions on this subject at the previous session of the Space Working Group.

The provisions of Article IX(6)(b) designed to grant a public safety exception in respect of the default remedies of the draft Convention/preliminary draft Protocol on an opt-out basis had been deleted so as not to dissipate clarity as regards the creditor's remedies.

Article XII had been streamlined with a view to eliminating duplications that had existed in the previous working draft.

Similar amendments had been made to Article XVIII(1) as those that had been made to Article VII. These reflected the fact that the manufacturer's serial number would not work alone as a search criterion for the breadth of assets intended to be covered by the term "space property."

Chapter V dealing with the relationship between the draft Convention/preliminary draft Protocol and other Conventions had been modified in two ways. First, a footnote had been added to the chapter as a whole indicating the difference between the concept of "jurisdiction and control" employed in Article VIII of the 1967 United Nations Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Equipment, including the Moon and Other Celestial Bodies (hereinafter referred to as *the Outer Space Treaty*) and the concept of "jurisdiction" employed in the draft Convention. Secondly, a new Article XX *bis* had been introduced as a topic for discussion. While the draft Convention/preliminary draft Protocol were not *intended* to affect a State's liability under the 1972 United Nations Convention on International Liability for Damage Caused by Space Objects (hereinafter referred to as *the Liability Convention*), the question had been raised whether, failing such a provision, there could be scope for conflict between the latter and the former. However, he wondered whether such a provision might not rather be a source of ambiguity.

The new footnote to Article XXII(1) was designed to reflect the conclusion that had been reached at the previous session of the Space Working Group regarding the desirability of a low threshold of ratifications/accessions for the entry into force of the proposed new international regimen.

The new footnote to Article XXIV was designed to reflect the conclusion that had been reached at the previous session of the Space Working Group regarding the desirability of due

consideration being given to the idea of a single opt-in Annex regimen from which Contracting States would be able to choose, like a menu.

9. - Finally, Mr Nesgos introduced the comments that had been submitted to the Space Working Group for consideration. Those of Mr Hoyt L. Davidson (Study LXXIIJ – S.W.G., 4th session, W.P. 2) raised the question whether orbital positions and radio-frequency spectrums should be capable of being the subject of international interests under the proposed new international regimen. The comments submitted by the International Telecommunication Union (Study LXXIIJ – S.W.G., 4th session, W.P. 3) embodied the conclusions reached by that Organisation as regards the compatibility of the draft Convention/preliminary draft Protocol with the I.T.U. Constitution, Convention and Radio Regulations. The comments submitted by Mr Alfons A.E. Noll (Study LXXIIJ – S.W.G., 4th session, W.P. 4) contained both substantive proposals regarding the preliminary draft Protocol, in particular the introduction of a new Article in Chapter V indicating that the provisions of the draft Convention and the preliminary draft Protocol were not intended to affect those of the I.T.U. Constitution, Convention and Radio Regulations, and proposals for bringing the final provisions of the preliminary draft Protocol into line with the provisions of the 1969 Vienna Convention on the Law of Treaties (hereinafter referred to as *the Vienna Convention*). The comments submitted by Mr Carlos Hernando Rebellón Betancourt concerned in particular the relationship between public international space law and the private law regimen envisaged under the draft Convention/preliminary draft Protocol.

(b) General remarks

10. - Whilst it was clear that the States that would in due course be negotiating the preliminary draft Protocol would be free to contemplate, where appropriate, amendments to the draft Convention, in the same way as had been done in the draft Protocol, it was felt that it would be important to ensure that nothing was done at the diplomatic Conference in respect of the draft Convention that would have the effect of impairing the freedom of the States negotiating the preliminary draft Protocol to take account of the special features of the regimen governing outer space.

11. - It was recognised that it would be particularly important to secure agreement in Article 2(3)(c) of the draft Convention on the most appropriate term to be employed in respect of the assets that were the subject of the preliminary draft Protocol.¹

12. - In general, it was agreed that, whilst it was clearly intended that a Protocol should be able to amend the future Convention in respect of the category of equipment covered thereby, it was desirable that it should be made more clear in the draft Convention that, to the extent of any inconsistency between the Convention and a Protocol, the latter prevailed.²

13. - It was also agreed that the terms employed in the preliminary draft Protocol, in particular the term “Contracting State,” should be brought into line, where appropriate, with the Vienna Convention and that the attention of the diplomatic Conference should be drawn to the need to bring the Final Provisions of the draft Protocol into line with the same Convention.³

¹ Cf. also § 14, *infra*.

² Cf. also § 21, *infra*.

³ Cf. also § 20, *infra*.

(c) Re title and preamble

14. - It was agreed that the term “space assets”⁴ was to be preferred to “space property”, in particular in view of the reference to “ownership” of objects launched into outer space in Article VIII of the Outer Space Treaty and the proprietary connotations of the term “property” in Civil law terminology. Other terms, such as “space equipment,” were rejected as being unduly restrictive.

15. - It was agreed that the words “hereinafter referred to as the Convention” should be inserted in brackets after the title of the draft Convention in the second clause of the preamble

16. - It was agreed that the fourth clause of the preamble should be redrafted to read as follows:

“MINDFUL of the established principles of space law, including those contained in the public international space treaties of the United Nations”.

(d) Re Article I

17. - Concern was expressed regarding the absence from the definition of a “separately identifiable object” provided in Article I(2)(f)(i) of objects launched on the high seas and/or from a submarine. It was suggested that the language of Article I(2)(f)(i) be reformulated to accommodate such objects, for example by replacing the words “that is on the ground” by the words “wherever located”.

18. - The Space Working Group again considered the relative merits of an expansive or restrictive concept of “space assets”. It noted that the coverage of such assets in Article I(2)(f) represented a compromise that had been made on a mixture of practical and theoretical grounds. Some assets had well defined regimes, that is space assets and associated rights, and lent themselves as a result to coverage by the proposed new international regimen; other assets did not have such well defined regimes, for instance ground installations, and should therefore be left to be dealt with by the applicable law. The principal focus of the concept of “space assets” embodied in the proposed new international regimen was accordingly on tangible assets.

In view of the difficulty that typically arose in the identification of components forming a part of, attached to, or contained within a space asset (as opposed to the space asset itself), such as transponders or equipment located on a space station (as opposed to the space station itself), for the purpose of the taking of security, only components capable of separate identification were covered by the proposed new international regimen.

19. - Opinions were divided as to the desirability of maintaining the reference to a “celestial body” in Article I(2)(f). On the one hand, it was pointed out that, under the Outer Space Treaty, outer space currently included celestial bodies and that it was important that the preliminary draft Protocol be in line on this point, as on others, with the international space treaties. On the other hand, the point was made that the definition of “space assets” needed to embody an autonomous concept and therefore to be as complete as possible. It was also noted that it could not be excluded that States might in future decide to confer a separate status on a celestial body. One solution suggested was that the term “celestial body” be qualified, by words such as “as defined in the Outer Space Treaty”. It was finally decided that it be placed in square

⁴ It was agreed that this term should be rendered in French by the term “biens spatiaux”.

brackets for the time being, thus leaving the question to be resolved by Governments at the appropriate moment.

20. - It was agreed that the term “Contracting State” in Article I(2)(e) and elsewhere in the preliminary draft Protocol should, where appropriate, be changed to “State Party” to bring it into line with the Vienna Convention.

(e) Re Article II(1)

21. - In the context of its consideration of Article II(1), the Space Working Group noted that Article 47 of the draft Convention, whilst originally intended to regulate the relationship between the latter and each Protocol *in a general manner*, in particular to affirm the controlling nature of a Protocol in relation to the category of equipment covered thereby, had, by virtue of its location in the Final Provisions of the draft Convention, where it dealt only with the *entry into force* aspects of the question, inadvertently forfeited its original general purpose. The Space Working Group considered that a new interpretation provision spelling out the nature of this relationship, that is in terms of the primacy of each Protocol over the future Convention as regards a specific category of equipment, was therefore needed among the general provisions of the draft Convention, especially for the guidance of the judges who would in due course be called upon to apply the future instruments. It was agreed that the rightful place of the rule embodied in Article 47(2), dealing with the interpretation of the future Convention and each Protocol, would then also be in the new provision. It was also agreed that this new provision should spell out the fact that, where on a given issue the particular Protocol was silent or referred to the Convention alone, as in Article VI of the draft Protocol, the Convention alone applied.

22. - It was suggested that States should have to become Parties to both the Convention and the relevant Protocol and that it should not suffice for States simply to become Parties to the Protocol, as had been suggested by some. It was further suggested that this requirement should be spelled out in each Protocol.

(f) Re Article IV

23. - In the context of its discussion of this provision, and in particular the broad measure of freedom of contract recognised thereunder to parties, the Space Working Group noted that this reinforced its conclusions regarding the need for the relationship between the draft Convention and each Protocol to be clarified in the general provisions of the former.⁵

(g) Re Article V(3)

24. - The question was raised whether the “contract of sale” referred to in Article V(3) should be read as including the terms and conditions of such a contract as well as any possible amendments thereto. It was pointed out that documents were not intended to be registrable under the proposed international registration system: only such minimal information as the names of the parties, their contact details, the nature of the registration (that is whether of an international interest or a contract of sale), its duration and a description of the asset concerned was intended to be registered.

(h) Re Article VI

⁵ Cf. § 21, *supra*.

25. - It was agreed that the words “and this Protocol” should be added after the word “Convention” in Article VI.

(i) Re Article VII

26. - It was agreed that the word “[d]escription” in the heading of Article VII should be replaced by the word “identification”. In addition, three amendments were agreed to the text of Article VII. It was agreed, first, that, in the case of separately identifiable components forming a part of a space asset or attached to, or contained within a space asset referred to under Article VII(iv), the words “adequate description” should be changed to “general description,” in order to bring them into line with the equivalent language of Article VII(iii), and, secondly, that in this case a general description should be required not only of the principal space asset but also of the separately identifiable component and, finally, that the words “if the space property has been launched into space” should be deleted from Article VII(v).

27. - It was suggested that the name and address of the person registering a space asset as a space object under the 1975 United Nations Convention on Registration of Objects Launched into Outer Space (hereinafter referred to as *the Registration Convention*) should also be required as an element of its description under Article VII, with a view to ensuring the transparency of States’ rights and obligations. This point of view was not, however, shared, on the ground that this was not the purpose of Article VII, which was rather to provide a sufficient amount of information concerning the space asset to enable a creditor’s rights to be recognised when the future International Registry was searched and not to deal with questions of State liability. While the registration of a space object that had been launched into Earth orbit or beyond was an indisputable obligation of the launching State under the Registration Convention, it was doubted whether it would be reasonable to expect creditors when registering an international interest to check the details of launching as recorded by the launching State. It was moreover feared that to incorporate such a reference in Article VII might be to introduce an element of confusion.

28. - In the context of the Liability Convention, moreover, it was stressed that the future International Registry would better permit States to evaluate their potential liability under that Convention, by reason of the enhanced transparency that it would provide.

29. - The view was taken that the elements of the description of space assets listed in Article VII were probably as exhaustive as could currently be achieved. It was suggested that one possible alternative solution for the future would be to create different categories of space asset, each with its own separate requirements of identification, and to review such lists from time to time.

(j) Re Article VIII(2)

30. - The Space Working Group voiced hesitations as to the appropriateness of Article VIII(2) on a number of grounds, including its conformity to the rules of private international law. The fear was also expressed that the two paragraphs of this Article might not be consistent with one another as regards a partial choice of law. It was accordingly agreed to place Article VIII(2) in square brackets in its entirety for the time being with a view to its being given further consideration. It was furthermore feared lest the words “or, where that State comprises several territorial units, to the domestic law of the designated territorial unit” might make it difficult for States having a federal structure to become Parties to the future Protocol and it was therefore agreed to place the words in question in additional square brackets.

(k) Re Article IX

31. - It was explained that nothing in Article IX(2) would oblige a State to forego the application of its domestic export control rules concerning the transfer of technology. This was implicit in the provisions of Article IX(4).

32. - The Space Working Group feared lest limiting the application of Article IX(4) to “technical information” might be viewed by States as being overly restrictive. It was therefore agreed to place these words in square brackets with a view to their being given further consideration.

33. - A propos of footnote 7 to Article IX(6)(b)(ii), it was stressed that inclusion of a public safety exception to the default remedies provisions of the preliminary draft Protocol could significantly undermine the prospects of attracting financing for projects like the *Galileo* project. It was agreed once again that such a public safety exception should not therefore have a place in the preliminary draft Protocol and that a State’s solution to the problem should be to pay the creditor, in one way or another. A query was however raised as regards the compatibility of the solution chosen with the responsibility undertaken by the International Mobile Satellite Organization’s in respect of the residual obligations of the former International Maritime Satellite Organization.

(l) Re Article X

34. - Even though it was stressed that Article X was intended to be only an optional provision of the preliminary draft Protocol, the fear was nevertheless expressed that to provide a certain number of calendar days for the granting of speedy relief (cf. Article X(2)) and for the making available of remedies (cf. Article X(6)(a)) might prove to be detrimental to the chances of States becoming Parties to the future Protocol, by being seen as an unwarranted interference in their judicial systems. It was agreed that this was a matter in respect of which it would be important to monitor the solutions to be adopted at the diplomatic Conference. It was agreed that this was something that might usefully be reflected in footnote 8.

(m) Re Article XI

35. - The view was expressed that acceptance of Alternative A would create problems for those States which had mandatory rules making it difficult for the insolvency administrator to give possession of space assets to the creditor, as a result of which such States would have no choice but to go for Alternative B.

36. - It was suggested that consideration be given to altering the term “possession” employed in Article XII to the terms “possession or control” in order to take account of the specificity of space assets and to bring it into line with Articles 7(1)(a) and 9(a) of the draft Convention.

(n) Re Article XII

37. - The question was raised as to whether the words “on the territory of which the space asset is to be launched or from the space facilities of which it was to be launched” would not be better in Article XII(i) than the words “in which the space property is situated”. It was

explained that such an amendment was unnecessary in so far as the current wording was precisely designed to cover the situation where the space asset was situated on earth and not in space.

38. - The question was raised as to whether Article XII should not have a special rule for those space assets situated on the high seas. The view was taken that such a case was already dealt with under Article XII(iv).

39. - The question was raised whether the word “is” was not to be preferred to the words “may be” in Article XII(ii).

40. - It was agreed that Article XII(iv) should begin with the word “otherwise” on the ground that the States referred to in Article XII(i), (ii) and (iii) also had a close connection with the space asset.

41. - It was agreed that the words “the law of the Contracting State” in Article XII should be amended to read “the law of that Contracting State”, in order to reflect the fact that the Contracting State in question was the same as the Contracting State referred to at the beginning of this Article.

42. - It was agreed that it would not be necessary or appropriate for Article XII to refer to the State having “jurisdiction and control” under Article VIII of the Outer Space Treaty, given the quite different purposes of the two provisions.

43. - The Space Working Group discussed whether one or other of the two phrases “in accordance with the law of that Contracting State” and “to the maximum extent possible” appearing in Article XII should be deleted. It was nevertheless agreed that both phrases should be maintained for the time being for reasons of business efficacy.

(o) Re Article XV

44. - It was noted that the question as to whether it would be appropriate for the Secretary-General of the United Nations to act as Supervisory Authority of the future international registration system for space assets was currently under consideration by the *ad hoc* consultative mechanism of COPUOS.

(p) Re Article XVIII

45. - It was noted that Article XVIII would need to be amended to bring it into line with Article VII as amended.⁶

(q) Re Article XIX

46. - Article XIX(1), and in particular the words “and, if the other conditions to such jurisdiction or enforcement have been satisfied, shall be effective to confer jurisdiction and permit enforcement, as the case may be,” were seen by more than one member of the Space Working Group as raising conceptual difficulties. It was noted that of the two different types of waiver referred to in Article XIX(1) that relating to enforcement was particularly important for financing purposes but that it was necessary to have both immunities waived for financing facilities to be granted. It was pointed out that in France, however, it would be quite impossible to enforce against State assets. In these circumstances, it was agreed that the words “and, if the

⁶ Cf. § 26, *supra*.

other conditions to such jurisdiction or enforcement have been satisfied, shall be effective to confer jurisdiction and permit enforcement, as the case may be” should be placed in square brackets for the time being, in order to permit the monitoring of developments in respect of the corresponding provisions of the draft Protocol.

47. - It was further agreed that the words “in accordance with Article VII” should be added at the end of Article XIX(2), in order to indicate that the description referred to there was that contemplated in Article VII.

(r) Re Article XX

48. - It was agreed that Article XX would need to be amended, in order to clarify the fact that the future Convention on International Interests in Mobile Equipment as applied to space assets was intended to supersede the UNIDROIT Convention on International Financial Leasing, first, only as regards the subject-matter of the preliminary draft Protocol, that is, space assets, and, secondly, only as between States Parties to both Conventions. It was suggested that it might accordingly be reformulated along the following lines:

“The Convention as applied to space assets shall supersede the 1988 UNIDROIT Convention on International Financial Leasing, in respect of the subject-matter of this Protocol, as between States Parties to both Conventions.”

49. - It was suggested that in the body of Article XX the words “opened to signature at Ottawa on 28 May 1988” should be added after the title of the UNIDROIT Convention on International Financial Leasing and the date “1988” immediately preceding that title should be deleted in order to bring the language of this Article into line with normal treaty drafting. However, it was pointed out that this would not be desirable in the interests of consistency of language as between the draft Convention and the preliminary draft Protocol: first, the equivalent phrase employed throughout the draft Convention and the draft Protocol (“signed at ... on ...”) already featured in Article 45 of the draft Convention and, secondly, the draft Convention and the preliminary draft Protocol were, under Article 47(2) of the draft Convention, to be read and interpreted together as a single instrument.

(s) Re Article XX bis

50. - Serious reservations were expressed as to the appositeness of maintaining Article XX *bis*. On the one hand, the view was expressed that it might be perceived as invidious that Chapter V of the preliminary draft Protocol dealt with only one of the United Nations treaties on outer space and not with others, nor indeed with the I.T.U. Convention and Radio Regulations. On the other, it was suggested that the scope of this Chapter should only be to regulate the relationship between the future Convention as applied to space assets and an existing international instrument to the extent that there were potential conflicts between the two: otherwise, by reason of the inferences that judges might draw from the inclusion of such a provision in the preliminary draft Protocol, it could end up causing more problems than it would solve. In these circumstances, it was agreed that Article XX *bis* should be deleted.

(t) Re Chapter VI

51. - As already mentioned, ⁷ the Space Working Group decided that the language of the preliminary draft Protocol should, in all respects, be brought into line with the provisions of the Vienna Convention. This was particularly true of Chapter VI. It was explained that the provisions of this Chapter had been modelled on the corresponding provisions of the draft Protocol, which, it was noted, had however, failed to conform to the Vienna Convention in many respects. It being noted that the traditional set of comprehensive final provisions to be embodied in the draft Convention was due to be drawn up shortly after the session, it was agreed that those responsible for its preparation should pay especial attention to ensuring that it too was, in all respects, in line with the provisions of the Vienna Convention. Particular assistance in this respect was to be found in the comments submitted to the session by Mr Alfons A.E. Noll (*op. cit.*). It was moreover recalled that the drawing up of final provisions was traditionally the prerogative of the plenipotentiaries gathered at a diplomatic Conference. In the circumstances, it was agreed that Chapter VI as a whole should be placed in square brackets for the time being.

III. CONSIDERATION OF THE DRAFT CONVENTION (DCME Doc No. 3)

52. - In considering the preliminary draft Protocol in relation to the draft Convention, the Space Working Group noted a number of areas in which the draft Convention might still be improved. Some of these have already been adverted to, namely the need to replace the term “space property” by the term “space asset” in Article 2(3)(c) and the desirability of carving out of Article 47 of the draft Convention a new general provision clarifying the relationship between the future Convention and each future Protocol. ⁸

In addition, the Space Working Group, noting that the proposed international registration system was designed to be an “open” system, wondered whether the term “confidentiality” employed in Article 17(1)(c) was the most apt term to be used in that context and, if not, whether it should not be deleted.

It also expressed concern that Article 35 of the draft Convention would not permit the use of the additional types of monetary and non-monetary associated rights proposed in the preliminary draft Protocol, associated rights that might be integral to the inherent value of the space assets to which they related. It was pointed out that this was a matter of considerable commercial significance for space financing, especially by reason of the importance for a satellite operator who was already operating other satellites in space of being able to pledge such rights as the revenue stream derived from the leasing of transponders on those satellites as collateral for the financing of a third satellite that it needed to procure.

It was agreed that all these points should be brought to the attention of the diplomatic Conference by the Space Working Group.

53. - In addition, it was agreed that the Space Working Group should strongly urge the diplomatic Conference to uphold the dual Convention/Protocol structure endorsed by both the three UNIDROIT/International Civil Aviation Organization (I.C.A.O.) Joint Sessions and the I.C.A.O. Legal Committee at its 31st session, especially with a view to permitting the economic benefits of the future Convention to be extended within a reasonable time to space assets.

54. - It was further agreed that the Space Working Group should urge the diplomatic Conference to take especial care when finalising the future Convention to ensure that the

⁷ Cf. §§ 13 and 20, *supra*.

⁸ Cf. §§ 12, 14 and 21, *supra*.

maximum flexibility be left to those whose task it would be to negotiate the preliminary draft Protocol at the intergovernmental level, in particular given the specificity of all activities carried out in outer space and the uniqueness of the law relating thereto.⁹

55. – It was also agreed that the Space Working Group should urge the diplomatic Conference in framing the provisions of the future Convention governing the Supervisory Authority not to do anything that might prejudice the ability of the United Nations to act as Supervisory Authority for the future international registration system in respect of space assets.

IV. ORGANISATION OF FUTURE WORK

(a) *Interaction with the future intergovernmental consultation process, and in particular the U.N./COPUOS ad hoc consultative mechanism*

56. - The Space Working Group was brought up to date on the work underway within U.N./COPUOS in relation to the draft Convention and the preliminary draft Protocol.¹⁰ It was recalled that UNIDROIT's and the Space Working Group's initiative in approaching the United Nations Office for Outer Space Affairs had stemmed from their assessment that the United Nations might, in principle, be considered the most appropriate body to exercise the functions of Supervisory Authority for the future international registration system in respect of space assets. The principal purpose of the proposed new international regimen for space assets was to facilitate the use of asset-based financing for such assets, and in particular thereby to decrease the cost of space financing, and the Space Working Group had concluded at its previous session that there was nothing in the draft Convention or the preliminary draft Protocol that was inconsistent with existing space law.¹¹ However, the Space Working Group naturally recognised the continuing application of the rules of space law to the extent that the type of assets covered by the preliminary draft Protocol were present in a space environment.

57. - It was recalled that the special procedure that had been agreed to by U.N./COPUOS with the setting up of the *ad hoc* consultative mechanism was due to last one year¹² and to terminate with the submission of its report to the Legal Subcommittee of COPUOS at its April 2002 session. After the working meeting, due to take place in Paris, at the invitation of the Government of France, a week after the session of the Space Working Group, it was probable that a second meeting would take place in Rome in early 2002, at the invitation of the Government of Italy. Those attending such meetings would be essentially the representatives of Governments.

The terms of reference of the *ad hoc* consultative mechanism were to review the draft Convention and the preliminary draft Protocol from the point of view of their compatibility with existing space law and, if necessary, to propose such changes, if any, that it might feel to be necessary to ensure that the draft Convention and the preliminary draft Protocol were entirely consistent with existing space law and thus with the existing obligations of States Parties to the United Nations treaties on outer space. It was not the intention of U.N./COPUOS to embroil itself in commercial financing law.

⁹ Cf. § 10, *supra*.

¹⁰ Cf. § 2, *supra*.

¹¹ Cf. Study LXXIII-Doc. 5, § 12.

¹² Cf. § 5, *supra*.

58. - It was stressed that, during its review of the draft Convention and the preliminary draft Protocol, it would be most important for U.N./COPUOS to take full account of the views of the international space community.

59. - The view was expressed that it was important not to underestimate the hesitations that the United Nations would inevitably have at the idea of assuming the functions of Supervisory Authority for the future international registration system in respect of space assets. The United Nations only tended to agree to exercise such functions on the basis of the recovery of its costs.

(b) Undertakings relating to the diplomatic Conference

60. - It was agreed that every effort should be made to ensure that Mr Nesgos represented the Space Working Group at the diplomatic Conference. The Space Working Group felt that it was essential that its interests should be represented by one of its number and not by representatives of other Organisations, in particular so as to ensure that there was someone on hand specifically to deal with those aspects of the draft Convention important for space assets.¹³

61. - The Space Working Group requested the representative of UNIDROIT to bring to the attention of the competent bodies of that Organisation the urgent need for it to assume greater responsibility, in particular at the financial level, for the activities of the Space Working Group, as a body that it had brought into being. The Secretary-General of UNIDROIT was asked in particular to ensure that the necessary funding was made available for a Space Working Group representative to be present at the diplomatic Conference and to submit a draft Resolution to the forthcoming session of the UNIDROIT Governing Council requesting member States of UNIDROIT to shoulder a proportionate burden of the Space Working Group's expenses. In this connection, the representative of UNIDROIT explained that the purpose of the Space Working Group as conceived by the President of UNIDROIT at the time he had invited Mr Nesgos to organise a working group to prepare a preliminary draft Space Protocol capable of submission to the UNIDROIT Governing Council had been *not* to create an *internal* UNIDROIT working group but rather to create an opportunity for the international commercial aerospace and financial communities, via an *external* working group, themselves to take the lead in indicating which special provisions, adapting the draft Convention, they would see as being necessary for space financing to be able to benefit from the proposed new international regimen. To that extent it had been envisaged by UNIDROIT that the international commercial aerospace and financial communities would themselves be shouldering the burden of funding the work of the Space Working Group. Given the limited resources that the Space Working Group had however obtained to date, the UNIDROIT Secretariat had sought to assist it in kind, in an administrative and secretarial role. He nevertheless assured the Space Working Group that he would transmit its views in this regard to the Secretary-General and the competent bodies of UNIDROIT.

62. - The Space Working Group was also informed orally of the comments that were to be submitted by the Aviation Working Group and the International Air Transport Association to the diplomatic Conference.

¹³ For the comments to be submitted by the Space Working Group, cf. §§ 52 - 55, *supra*.

(c) Organisation of an educational campaign to market the preliminary draft Protocol among suppliers of, and lenders against space assets as also Government officials

63. - Whilst all attending the session indicated their strong support for the work being carried out by the Space Working Group, the latter was nevertheless aware of the need to increase awareness of the preliminary draft Protocol. A number of proposals were made to this end.¹⁴ It was however recognised that for the Space Working Group and in the first place its co-ordinator to carry out effectively such a role it would be necessary both for a greater number of members of the Space Working Group to share the burden currently being essentially shouldered by a relative few and for those following its work in the international commercial aerospace and financial communities to consider shouldering a greater part of the considerable expenditure that it was likely to face in the immediate future if it were to meet in satisfactory fashion all the calls on its time and expertise that were likely to be made as the preliminary draft Protocol moved forward at the intergovernmental level.

64. - It was pointed out that it was reasonable to conclude that a considerable part of the success achieved by the Aviation Working Group, which had played such an important part in the development not only of the draft Protocol but also of the draft Convention, could be attributed to the very significant financial support from the international commercial aviation and financial communities that that Working Group had enjoyed.

65. - It was noted that, while representatives of banks were regularly approaching space manufacturers, it appeared difficult for them to attend meetings like those of the Space Working Group. It was pointed out that space financing represented only a small part of their business and that the number of creditors and borrowers operating in this field was extremely small indeed. One banking representative moreover suggested that, in her experience, banks rarely refused to finance a space financing transaction for reasons of purely legal risk. It was suggested that it would be necessary for them first to see the opportunities for commercial space financing improving. Representatives of the banking community attending the session were nevertheless unanimous in appreciating the importance and topicality the Space Working Group's work represented for them. It was suggested that an effort should be made to contact persons at the highest level in banks with a view to seeking greater involvement on their part.

66. - The request addressed by the Space Working Group to the Secretary-General and the competent bodies of UNIDROIT in respect of the funding of the Space Working Group's work has already been referred to elsewhere in this report.¹⁵ It was suggested that, given the importance of marketing the preliminary draft Protocol, the Secretary-General of UNIDROIT should put a member of the UNIDROIT Secretariat in charge of such a marketing exercise.

67. - It was suggested that, when a revised version of the preliminary draft Protocol was ready in electronic form, a letter should be sent out to those following the Space Working Group's work, encouraging them to lend their support thereto, either in person or via comments.

68. - It was agreed that efforts should be made to organise conferences on the preliminary draft Protocol and certain members of the Space Working Group present at the session offered to use their good offices with the Royal Aeronautical Society and the Bankers Institute to seek the organisation of such a conference in London.

¹⁴ Cf. §§ 65 - 71, *infra*.

¹⁵ Cf. § 61, *supra*.

69. - It was also agreed that efforts should be made to have the revised text of the preliminary draft Protocol published in specialist industry publications, for instance the Airfinance Journal.

70. - It was moreover noted that the Space Committee of the International Bar Association would be devoting a session to the preliminary draft Protocol at the forthcoming Conference of that Organisation, to be held in Cancun.

71. - It was suggested that a study should be commissioned on the economic benefits that the international commercial aerospace and financial communities stood to gain from adoption of the preliminary draft Protocol. It was also suggested that consideration be given to the preparation of a guide, explaining the Space Working Group's work.

(d) *Fixing of the date and venue of the following session of the Space Working Group*

72. - It was agreed that the following session of the Space Working Group should be held at the latest by February 2002, and in any case before the meeting of the UNIDROIT Steering and Revisions Committee that would be responsible for finally vetting the text of the preliminary draft Protocol to be sent out to Governments.

DRAFT AGENDA

1. Adoption of the agenda.
2. Preliminary remarks by Mr Claude Dumais, Legal Adviser, Arianespace and host of the Space Working Group session.
3. Election of the Chairman.
4. Organisation of work.
5. Consideration of the draft UNIDROIT Convention on International Interests in Mobile Equipment (hereinafter referred to as the *draft Convention*) (cf. DCME Doc No. 3) and the preliminary draft Protocol thereto on Matters specific to Space Property (hereinafter referred to as the *preliminary draft Protocol*) (cf. UNIDROIT Study LXXIIJ-Doc. 6) as revised following the third session of the Space Working Group, held in Seal Beach, California on 23 and 24 April 2001 (cf. UNIDROIT Study LXXIIJ-Doc. 5).
6. Organisation of future work, in particular:
 - (i) interaction with the future intergovernmental consultation process, and in the first place undertakings relating to the meeting of the *ad hoc* informal consultative mechanism of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space, to be held in Paris on 10 and 11 September 2001;
 - (ii) undertakings relating to the consideration of the preliminary draft Protocol by the UNIDROIT Governing Council at its 80th session, to be held in Rome from 17 to 19 September 2001;
 - (iii) undertakings relating to the diplomatic Conference for the adoption of the draft Convention and the draft Protocol thereto on Matters specific to Aircraft Equipment, to be held in Cape Town from 29 October to 16 November 2001;
 - (iv) organisation of an educational campaign to market the preliminary draft Protocol among suppliers of, and lenders against space property as also Government officials;
 - (v) next meeting of the Space Working Group.
7. Any other business.