

UNIDROIT

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

**RESTRICTED INFORMAL GROUP OF EXPERTS TO IDENTIFY,
AND ENGAGE IN A PRELIMINARY DISCUSSION OF THE ISSUES WHICH
MERIT CONSIDERATION IN THE CONTEXT OF THE RELATIONSHIP
BETWEEN THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL
INTERESTS IN MOBILE EQUIPMENT AND THE PRELIMINARY DRAFT
PROTOCOL THERETO ON MATTERS SPECIFIC TO SPACE PROPERTY AND
THE EXISTING BODY OF INTERNATIONAL SPACE LAW**

(Rome, 18/19 October 2000):

REPORT

(prepared by the UNIDROIT Secretariat)

I. – INTRODUCTION

(a) *Background to the meeting*

1. – In the context of the development 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*) within the Space Working Group, set up by the President of UNIDROIT in 1997, and in view of the decisions taken at the 43rd session of the United Nations Committee on the Peaceful Uses of Outer Space (C.O.P.U.O.S.), held in Vienna from 7 to 16 June 2000, first, to include consideration of the draft Convention and the preliminary draft Protocol on the agenda of the Legal Subcommittee of C.O.P.U.O.S. at its 40th session, to be held in Vienna from 2 to 12 April 2001, as a single issue discussion item and, secondly, to invite the Secretariats of UNIDROIT and the United Nations Office for Outer Space Affairs (O.O.S.A.) to prepare a joint background paper for that session, the Secretariat of UNIDROIT decided, following consultation with O.O.S.A., that it would be useful to convene back-to-back meetings of the Space Working Group and an *ad hoc* restricted informal group of experts to focus in a preliminary way on the issues to be discussed at the aforesaid Legal Subcommittee meeting and at the same time to advance the work of the Space Working Group, in particular by updating the then current working draft of the preliminary draft Protocol (prepared in January 2000 by Mr Peter D. Nesgos, co-ordinator of the Space Working Group, assisted by Mr Dara A. Panahy, for discussion within that group).

Notwithstanding the fact that the work on the development of the preliminary draft Protocol was still at the preliminary stage and had not yet been submitted to the UNIDROIT Governing Council with a view to the convening of governmental experts, it was considered opportune by the Secretariat of UNIDROIT, in particular in view of the fact that it was due for consideration by the member Governments of C.O.P.U.O.S. and that a certain number of these Governments had taken a particularly close interest in following up with UNIDROIT its work in this area, to extend participation in the planned meetings beyond the normal range of industry expertise and therefore, exceptionally, to invite designation by such Governments¹ of experts to attend the *ad hoc* restricted informal group of experts alongside industry experts. It was recognised that the principal benefit of such a solution would lie in the facilitation of dialogue between the industry experts at work on the preparation of the preliminary draft Protocol and experts from those Governments that had already indicated their interest in the subject, in particular regarding the interaction between the solutions advocated in the preliminary draft Protocol and the existing body of space law, both national and international.

For reasons of administrative convenience, it was decided to hold the meeting of the *ad hoc* restricted informal group of experts before the meeting of the Space Working Group. Thus, the restricted informal group of experts met on 18 and the morning of 19 October 2000, whereas the Space Working Group met on the afternoon of 19 and on 20 October 2000.²

¹ The Governments invited to designate such experts were the Governments of Argentina, Australia, Belgium, Brazil, the People's Republic of China, the Czech Republic, the Arab Republic of Egypt, France, Germany, Italy, Japan, the Russian Federation, South Africa, Sweden, the United Kingdom and the United States of America.

² For the report on the meeting of the Space Working Group, held on the afternoon of 19 and on 20 October 2000, cf. Study LXXIIJ-Doc. 2.

(b) Opening of the meeting

2. – The meeting of the *restricted informal group of experts* was opened by Mr Herbert Kronke, Secretary-General of UNIDROIT, at the seat of UNIDROIT at 9.35 a.m. on 18 October 2000. Upon a proposal by Mr Niklas Hedman, one of the experts designated by the Government of Sweden, supported by Mr Harold S. Burman, one of the experts designated by the Government of the United States of America, Mr Olivier Tell, the expert designated by the Government of France, was elected Chairman. Upon a proposal by Mr Tell, supported by Mr Burman, Mr Hedman was elected Deputy Chairman.

3. – The meeting was attended by the following experts:

Experts designated by UNIDROIT member States

Mr Hans-Georg BOLLWEG	<i>Ministerialrat</i> , Head of Division (Law of Compensation, Law of Environmental Liability and Law of Civil Aviation), Federal German Ministry of Justice, <i>Berlin</i>
Mr Harold S. BURMAN	Executive Director, Office of the Legal Adviser (L/PIL), Department of State of the United States of America, <i>Washington, D.C.</i>
Mr Louis E. EMERY	Counsel, Export-Import Bank of the United States of America, <i>Washington, D.C.</i>
Mr Niklas HEDMAN	Head of Section (Law of the Sea and Space Law), International Law and Human Rights Department (FM), Ministry of Foreign Affairs of Sweden, <i>Stockholm</i> / <i>Deputy Chairman of the restricted informal group of experts</i>
Mr Henrik KJELLIN	Deputy Director, Ministry of Justice of Sweden, <i>Stockholm</i>
Mr D. Stephen MATHIAS	Assistant Legal Adviser, United Nations Affairs, Office of the Legal Adviser, Department of State of the United States of America, <i>Washington, D.C.</i>
Mr Jean-François MAYENCE	Legal Adviser and Head of Mission, Space Research and Applications Service, Services of the Belgian Prime Minister, Federal Services for Scientific, Technical and Cultural Affairs, <i>Brussels</i>
Mr Igor B. POROKHIN	Director and Group General Counsel, Inspace Consulting (Russia) L.L.C. Law Offices, <i>Moscow</i>
Mr Claudio J. ROZENCWAIG	Secretary, Embassy of Argentina in Italy, <i>Rome</i>

Mr Konstantin Y. TARYSHEV	Second Secretary, Security and Disarmament Department, Ministry of Foreign Affairs of the Russian Federation, <i>Moscow</i>
Mr Olivier TELL	Judge, Service for European and International Affairs, Office of European and International Civil and Commercial Law, Ministry of Justice of France, <i>Paris</i> / <i>Chairman of the restricted informal group of experts</i>
Ms Gabriella VENTURINI	Professor of International Law, Department of International Studies, University of Milan, <i>Milan</i>
Mr Vladimir V. VOZHZHOV	Department of International Co-operation, Russian Aviation and Space Agency, <i>Moscow</i>

Experts designated by international Organisations

Ms Lisa CURRAN	Attorney, Brosio, Casati & Associati – Allen & Overy, <i>Rome</i> / <i>Co-chairman, Sub-committee E8 of the Section on Business Law (Financing Transactions), International Bar Association</i>
Ms Cécile FEYTE	Aviation and Space Department, Marsh S.A., <i>Levallois-Perret</i> / <i>Legal Consultant, European Centre for Space Law</i>
Mr Marcello GIOSCIA	Partner, Ughi & Nunziante, <i>Rome</i> / <i>Past Chairman, Banking Law Committee of the Section on Business Law, International Bar Association; International Bar Association Liaison with UNIDROIT</i>
Mr Robert W. GORDON	Vice President, Space & Defense, Boeing Capital Corporation, <i>Renton</i> / <i>Aviation Working Group expert</i>
Mr P. Ruari McDOUGALL	<i>Legal Officer, United Nations Office for Outer Space Affairs, Vienna</i>
Mr Peter D. NESGOS	Partner, Milbank, Tweed, Hadley & McCloy LLP, <i>New York</i> / <i>Co-ordinator of the Space Working Group</i>
Mr Dara A. PANAHY	<i>Associate, Milbank, Tweed, Hadley & McCloy LLP, Washington, D.C.</i> / <i>Assistant to the co-ordinator of the Space Working Group</i>
Mr Jeffrey WOOL	Partner, Perkins Coie, <i>Washington, D.C.</i> / <i>Group Secretary and General Counsel, Aviation Working Group</i>

Representatives of international commercial aerospace and financial communities and others

Mr Yann AUBIN	Head of Legal Affairs, Astrium S.A.S., <i>Velizy-Villacoublay</i>
Ms Darcy BEAMER-DOWNIE	Liability Consultant, Airclaims Limited, <i>London</i>
Mr Claude H. DUMAIS	Legal Adviser, Arianespace, <i>Evry</i>
Mr Michael GERHARD	Legal Adviser, Legal Support Agency, German Aerospace Centre, <i>Cologne</i>
Mr Arwed W. HESSE	Senior Manager, Legal and Contracts Affairs / Space Services, EADS Germany G.m.b.H., Space Services, <i>Munich</i>
Mr Robert H. LANTZ	Assistant General Counsel, Legal Department, Lockheed Martin Global Telecommunications, <i>Bethesda</i>
Mr Paul B. LARSEN	Adjunct Professor, Georgetown University Law Centre, <i>Washington, D.C.</i>
Ms Martine LEIMBACH	Assistant to the Head of the Structured Finance Unit, Directorate of Legal Affairs, Crédit Lyonnais Group, <i>Paris</i>
Ms Angela NACLERIO	Legal Affairs, TELESPAZIO S.p.A., <i>Rome</i>
Mr Alfons A.E. NOLL	Of Counsel, Baker & McKenzie, <i>Geneva</i> / former Legal Adviser to the International Telecommunication Union
Mr Olivier M. RIBBELINK	Senior Researcher, Department of Research, T.M.C. Asser Instituut, <i>The Hague</i>
Mr Thomas SCHMID	Legal Consultant, Airclaims Limited, <i>London</i>
Mr Bradford L. SMITH	Senior Intellectual Property Counsel, Intellectual Property Department, Alcatel, <i>Paris</i>
Ms Caroline M. VIDELIER	Legal Expert, Navigation Systems Department, Alcatel Space Industries, <i>Toulouse</i>

4. – The restricted informal group of experts adopted the draft agenda, which is reproduced as an appendix to this report.

5. – The restricted informal group of experts was seized of the following materials:

- (1) Draft agenda (Study LXXIIJ – R.I.G.E., W.P. 1);
- (2) Preliminary draft Protocol on Matters specific to Space Property: comments by Mr Hermann Ersfeld, Head of Commercial and Legal, Space Infrastructure, Astium G.m.b.H. (Study LXXIIJ – R.I.G.E., W.P. 2);
- (3) Text of the draft [UNIDROIT] Convention on International Interests in Mobile Equipment, as approved by the UNIDROIT Governing Council at its 79th session, held in Lisbon from 10 to 13 April 2000;
- (4) Text of the draft Protocol to the draft [UNIDROIT] Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment, as approved by the UNIDROIT Governing Council at its 79th session, held in Lisbon from 10 to 13 April 2000;
- (5) Current working draft of a preliminary draft Protocol to the draft [UNIDROIT] Convention on International Interests in Mobile Equipment on Matters specific to Space Property, prepared in January 2000 for discussion within the Space Working Group by Mr Peter D. Nesgos, co-ordinator of the Space Working Group, and Mr Dara A. Panahy;
- (6) “The prospective UNIDROIT Convention on international interests in mobile equipment as applied to space property,” an article by Mr Dara A. Panahy and Mr Raman Mittal, reproduced from the *Uniform Law Review* 1999/2, 303 *et seq.*;
- (7) “The preparation by UNIDROIT of a new international regimen governing the taking of security in high-value mobile equipment, in particular space property,” a presentation by Mr Martin J. Stanford to the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space, at its 39th session, held in Vienna from 27 March to 7 April 2000.

6. – In introducing the business of the meeting, the *Secretary-General of UNIDROIT* stressed the originality of the method being followed in the preparation of the preliminary draft Protocol. Already during the preliminary stage it had been decided that it would be useful to open up the possibility for an informal dialogue between experts designated by a number of Governments and experts from the world aerospace industry and financial community. This dialogue would permit an exchange of points of view between experts who would be looking at the subject from different perspectives. This informal participation in these preliminary discussions by experts designated by a number of Governments that had demonstrated a particular interest in following up UNIDROIT’s work in this area was quite exceptional in relation to the procedure normally followed by UNIDROIT in the preliminary phase of its work on a subject. He recalled that the objectives of this meeting were to clarify both a number of questions that had been left open in the current working draft of the preliminary draft Protocol and its relationship with the existing body of space law, as also to prepare the ground for the forthcoming session of the Legal Subcommittee of C.O.P.U.O.S.

7. – *Mr Martin Stanford*, speaking on behalf of the UNIDROIT Secretariat, illustrated the relationship of the preliminary draft Protocol with the draft Convention. UNIDROIT’s original intention had been to prepare a single international instrument capable of covering all the different categories of high-value mobile equipment intended to be covered thereby. The aircraft industry, representatives of which had become actively involved in the development of the Convention in 1994, however, quickly demonstrated its anxiety to see the future Convention enter into force and for it to be able to benefit from its innovations at the earliest possible

opportunity. This anxiety on their part was matched by a corresponding reluctance to wait for other industry groups, such as the space industry, to reach the same level of industry consensus as they had achieved regarding the special rules that would be needed to adapt the general rules of the contemplated Convention to the special characteristics of each of the different categories of equipment intended to be covered. In 1997 it was therefore decided to split the future Convention into a base Convention, carrying the general rules applicable to all the different categories of mobile equipment intended to be covered, and separate equipment-specific Protocols for each of the said different categories, carrying the special rules needed to adapt the general rules of the Convention to the special characteristics and requirements of each category of equipment. From that moment on, priority had been given to the completion, as a necessary first stage, of the future Convention and a future Protocol thereto on Matters specific to Aircraft Equipment. It was the draft Convention and the draft Protocol thereto on Matters specific to Aircraft Equipment (hereinafter referred to as the *draft Aircraft Protocol*) that had thus been the subject of three sessions of governmental experts organised jointly with the International Civil Aviation Organization (I.C.A.O.), in view of that Organisation's special competence for international civil aviation matters, and a recent session of the Legal Committee of I.C.A.O. Equally, it was these two texts that were to be the subject of the diplomatic Conference to be convened in South Africa in 2001.

8. – Notwithstanding the priority that had been accorded since 1997 to completion of the draft Convention and the draft Aircraft Protocol, work had nevertheless been pursued continuously over that period on the preparation of the preliminary draft Protocol pursuant to the invitation addressed by the President of UNIDROIT that year to Mr Nesgos to organise a working group to prepare, for submission to the UNIDROIT Governing Council, the text of a preliminary draft Protocol on Matters specific to Space Property that could be considered representative of industry consensus. This work had acquired special momentum by virtue of the decision taken by C.O.P.U.O.S. at its last session to include consideration of the draft Convention and the preliminary draft Protocol as a single issue discussion item on the agenda of the 40th session of its Legal Subcommittee. UNIDROIT had therefore felt it to be particularly timeous to bring together experts representing the international commercial aerospace and financial communities and those Governments that had to date demonstrated a particular interest in its work on this subject not only to ensure an adequate preparation on its part for the exercise to be accomplished in this regard by the Legal Subcommittee of C.O.P.U.O.S. but also to stimulate the international commercial aerospace and financial communities to mobilise their support behind the efforts of the Space Working Group, in particular with a view to ensuring that the latter be in a position to submit the text of a preliminary draft Protocol to the UNIDROIT Governing Council at its 80th session, to be held in Rome in September 2001, that might be considered ripe for transmission to intergovernmental negotiations.

9. – Speaking as co-ordinator of the Space Working Group, *Mr Nesgos* underlined the unique opportunity that the proposed new international instrument would open up for the commercialisation of space, by facilitating the financing thereof. The legal vacuum that existed in the field of security over space property enhanced the possibility of constructing a global legal regimen. It would be particularly important to ensure that this regimen left open the possibility for security to be taken over types of space property that were still unknown in the current state of space technology. By way of illustrating the importance that the availability of an international interest would have for the financing of such transactions, he cited a joint venture for a space project the purpose of which was the launching of an orbital satellite: the different nationalities of the firms involved in the joint venture and the way in which the ground installations were spread out geographically meant that the project was connected to no fewer than five different

jurisdictions. The legal system of each of these States would give different answers as to the feasibility and the means of using asset-based financing in respect of such property. The difficulties associated with the recognition of the validity of a security interest therein in another State, especially where the debtor was insolvent, could only increase the complications involved. Such complexities were incompatible with the need for simplicity and speed that underpinned the availability of asset-based financing.

10. – He looked forward to constructive discussion of the current working draft of the preliminary draft Protocol which, as it stood, raised more questions than it solved. He noted that particular attention needed to be devoted to the relationship between the preliminary draft Protocol and the existing body of space law as well as other international commercial law instruments, whether already adopted or under preparation, in particular the draft UNCITRAL Convention on Assignment of Receivables in International Trade.

11. – *The Chairman* invited the expert from O.O.S.A. to explain how he saw the meeting in relation to the work to be done by C.O.P.U.O.S. *Mr Ruari McDougall* indicated that he saw the discussions that would take place at the meeting as being very important for the success of the Legal Subcommittee's consideration of the draft Convention and the preliminary draft Protocol.

II. – CONSIDERATION OF THE PRELIMINARY DRAFT PROTOCOL

(a) *Re matters left open in the current working draft*

12. – *The Chairman* noted that the draft Convention and the preliminary draft Protocol were to be read as a whole. The application of the future Convention to a specific category of equipment was intended to be conditional on the entry into force of the Protocol for that category of equipment.

(i) *Re Article I*

13. – Considerable discussion took place on *Article I*, and in particular on the definition of “space property” set forth in *the fifth paragraph of Article I(2)* and as illustrated in *footnote 2*. General comments were first of all addressed to the question as to the most appropriate angle from which the definition of space property should be looked at. Several factors needed to be taken into account in the choice of such a definition. The group of experts was agreed as to the desirability of the form of the definitions being linked to that of the enforcement of the creditor's remedies in the event of default by the debtor and to the practical need to be able to identify the asset registered on the international register. One expert thus felt that the definition of space property in respect of which an international interest should be capable of registration ought to be functional, in the sense that it should correspond as far as possible to the objective pursued by the draft Convention, namely to favour the financing of this type of property by making it possible for the security to be held by creditors in respect of such property to be reliable and effective. *The Chairman*, speaking in support of this view, felt that the private law nature of the instrument under preparation permitted a distinction to be drawn between the definition of space property to be enshrined therein and the definition of “space object” for the purposes of the United Nations treaties on outer space. The question was also raised as to whether the notion of space property required a definition of what was constituted by space. *Mr McDougall*, recalling that the boundary between space and the earth's atmosphere had not yet been defined by international law, suggested that two views were possible: either space should be defined, but only for the purposes of the preliminary draft Protocol, or some means of getting round the

problem should be found. One expert advanced the idea that the definition should include a list of items that were clearly identifiable as space property while leaving open the possibility for this definition to be extended to other types of space property that were still unknown at the present time but which might be capable of being clearly identified as space property in future.

14. – *Mr Nesgos* explained that, when drafting the preliminary draft Protocol, he had favoured a very broad concept of space property. One of the reasons for this approach had been to provoke thought. The definition that he had proposed thus encompassed both tangible property and the associated intangible rights (rights given by contract or by State authorities) necessary for the commercial use of the space property to which they are associated, which are of great value for creditors in so far as it is they which, when it comes to enforcing an international interest, will enable them to take control or possession of such property (for example, a satellite) and to enjoy the commercial benefits that derive from use thereof. He was however aware of the difficulties that such a broad approach might be seen as engendering from a feasibility point of view and accordingly invited opinions on the definition proposed. Some experts took the view that it was necessary to have the broadest definition of space property possible so as to afford creditors the maximum degree of protection possible and thereby to facilitate financing. *Mr Nesgos* indicated that, in drafting the preliminary draft Protocol, he had to a very large extent sought inspiration in the solutions advocated in the draft Aircraft Protocol. In this regard, *Mr Jeffrey Wool*, hitherto co-ordinator of, and now Group Secretary and General Counsel to the Aviation Working Group, noted that, while the draft Aircraft Protocol was capable of serving as a guide, the specificity of space property meant that it would call for original solutions that would most definitely differ from those proposed in the draft Aircraft Protocol. He added that, whereas asset-based financing was already in general use for aviation financing at the time of the preparation of the draft Aircraft Protocol so that the latter had the advantage of being founded on actual practice, this was not yet the case for space financing.

15. – *Sub-paragraph (a)* of the definition of space property set forth in *the fifth paragraph of Article I(2)* provides that an object is only to be considered space property from the time at which it is in space. The financing of the construction of a satellite would not therefore be able, under the current text, to benefit from the new international regimen. *The Chairman* invited the experts from the private sector, representing the international commercial aerospace and financial communities, to express their point of view as to the desirability of this exclusion and as to the possibility of the future Protocol applying already during the pre-launch stage. He nevertheless noted that so to extend the sphere of application of the Protocol could bring it into conflict with the law governing the taking of security of the State on the territory of which the object under construction was physically located.

16. – Several experts expressed their desire to be able to register a future international interest in an object being manufactured that was intended to be launched into space. The first argument adduced in support of this thesis was that the possibility of obtaining reliable security as early as possible would permit a reduction in the legal risks arising from the possible differences between the law governing the taking of security of the State in which the object was manufactured and the law of the State from which the object was launched. What is more, banks would be interested in obtaining security over an object under construction: this would be in line with the financing usual for this type of operation, that is, where financing was arranged in line with the state of development of the manufacture of the object. In fact, at the present time, the line of credit granted by a creditor would in practice be entirely exhausted by the time the object came to be launched, not to speak of the risks for the creditor arising from a transfer of ownership of the object at the time of launching. Finally, one expert took the view that to apply

the new international regimen already at the construction phase of an object would have the advantage of permitting the development of this economic sector in a number of States. Another expert, on the other hand, took the view that an international interest was not indispensable in respect of an agreement for the launching of an object into space. Such an agreement was a service contract, meaning that there was no transfer of the launcher to the debtor and that the creditor would always keep physical possession of the launcher so long as the debtor did not pay. In the same way, it was not clear that a manufacturer would necessarily be interested in being able to avail itself of an international interest during the performance of the contract for the construction of an object, in that security for payment of the debt could be guaranteed by other means, for example, an assignment as security of the contract and the disposition value of satellite components.

17. – *The Chairman* noted that this question was closely linked to that of the exclusion, by means of a State's deposit of a declaration, of the application of the future international regimen in respect of those transactions considered by that State to be wholly domestic transactions (cf. Article S of the draft Convention). One expert, whose opinion was shared by the representative of O.O.S.A., took the view that States should be left the possibility of choosing whether the future international regimen should apply to the pre-launch phase, for example by means of the inclusion of an optional (opt-out) provision.

18. – Regarding *sub-paragraph (ii) of the fifth paragraph of Article I(2)*, *the Chairman*, speaking as an expert, expressed his concern regarding the unqualified reference therein to applicable law, taking the view that recourse to conflicts of law rules was not desirable in this context. There was lively discussion of the inclusion in the definition of "all permits, licences, approvals and authorisations granted or issued by a national or intergovernmental body or authority to control, use and operate the space property." Two different positions were taken in this regard. Some experts took the view that to permit the transfer of such rights to the creditor would be to go too far. To assign or transfer such rights could be prejudicial to the sovereignty of the State which had granted or licensed these rights to a specific debtor. Some experts nevertheless considered that it was necessary for a creditor taking control or possession of space property to be able to be sure that he would be able to enjoy the use thereof. One expert however indicated that this question was only relevant in the case where the creditor wished to use the space property in a way identical to that in which it had been used when it was in the hands of the debtor. It would accordingly be necessary to find a balance between the interests of States and the commercial interests of creditors. Analogous difficulties could arise should the definition of space property include ground installations. One expert suggested that the possibility of such rights being included in the definition should be the subject of an optional (opt-out) provision.

19. – The question of the inclusion of access codes in the definition of space property was raised by one expert (cf. *sub-paragraph (iii) of the fifth paragraph of Article I(2)*). From the point of view of a creditor's exercise of his remedies, knowledge of these access codes would be vital for him to take control of space property. Some experts noted that the automatic transfer of access codes to the new creditor could raise a number of difficulties for States where parts of the space property in question involved those States' military technology or where the space property belonged to such States. Such a transfer of codes could likewise create problems in the relations between the creditor who is the holder of an international interest and other creditors. It would therefore be necessary to find a balance between these divergent interests. *Mr Nesgos*, in the light of the foregoing remarks, wondered whether it might not be possible to remove the question of codes from the definition of space property and to treat it under remedies. He indicated that another solution might be to make it the subject of an optional (opt-out) provision.

20. – One expert highlighted the difficulties that would arise from inclusion of intellectual property rights as associated rights in the definition of space property (cf. *sub-paragraph (v) of the fifth paragraph of Article I(2)*). After recalling the great complexity of the legal regimen governing intellectual property rights, this expert cited the following example by way of illustration. The intellectual property law of State A might provide that it applied to all property belonging to a subject of State A. This law would thus apply in the case of the assignment of a satellite that was not registered in State A but assigned to a creditor in that State. Such an assignment would have the effect of modifying the applicable law. The use of space property might in this way interfere with the rights of a third party under the new applicable law whereas such use would have been completely lawful under the intellectual property law that was originally applicable. Another expert felt that intellectual property rights should be excluded from the definition of space property for two reasons: first, their protection was a matter over which only States had legislative competence and, secondly, it was not possible to consider them as being transferable as associated rights.

21. – While the criteria employed for the identification of space property could, where they existed, serve also as search criteria for use in connection with the future international registry in respect of space property, it was clear that, to the extent that not all space property had either a manufacturer's serial number, model designation or the like, such criteria could not provide an answer for all cases. Regarding the question raised in *footnote 5* to the text of the current working draft of the preliminary draft Protocol, one expert accordingly proposed the use of a system of multiple search criteria. In this context, it was explained moreover that separate search criteria would not of course be necessary for those intangible rights associated with space property intended to be covered by the preliminary draft Protocol: such associated rights were only intended to be covered by the proposed new international regimen to the extent that they were associated with a given item of space property.

(ii) *Re Article III*

22. – As regards *Article III* concerning the sphere of application of the preliminary draft Protocol, *the Chairman* noted that these provisions were to be read in conjunction with those of Article 3 of the draft Convention. He raised the question whether the sphere of application of the preliminary draft Protocol should be restricted to cases where the debtor was situated in a Contracting State or whether it should be capable of having a broader sphere of application by virtue of an additional connecting factor. Two other possible connecting factors had been proposed in this regard: the State of registration and the State of launching. *Mr Nesgos* noted that, whichever additional connecting factor might be chosen, what was important was that it corresponded to the financing requirements of space property. He took the view that, unlike the draft Aircraft Protocol, the criterion of registration was not necessarily appropriate in the context of space property and might cause confusion with the United Nations Convention on Registration of Objects Launched into Outer Space. One of the Aviation Working Group's experts however felt that any such confusion could easily be avoided by reference to the different objectives of the different instruments. *The Chairman* took the view that a reference to the State of launching might render the determination of the sphere of application of the preliminary draft Protocol more complicated. Under the definition given in Article I(c) of the United Nations Convention on International Liability for Damage Caused by Space Objects (hereinafter referred to as the *Liability Convention*), the launching State could be any one of four distinct States. Moreover, while the criterion of the launching State was appropriate for the resolution of questions concerning the determination of the liability of a State under public international law, the same was not true for its use in a private law instrument the aim of which was to assist and

promote private financing. In response to a question, *Mr Nesgos* explained that, while the connecting factor provided for by the draft Convention was mobile, in so far as the place where the debtor was situated was capable of changing during a transaction, this would not create problems in that the substantive sphere of application of the preliminary draft Protocol would have to be determined in each case as of the time when the relevant agreement was concluded.

(iii) *Re Article VI*

23. – The question of the desirability of the preliminary draft Protocol applying to sales of space property (cf. *Article VI* and *footnote 4*) was discussed. These deliberations demonstrated the need for the solutions to be enshrined in the preliminary draft Protocol to be both original and equipment-specific. *Mr Wool* noted that the cross-references in the preliminary draft Protocol to provisions of the draft Convention no longer corresponded to the current numbering of those provisions and that these cross-references would need to be checked against the latest text of the draft Convention resulting from the third Joint Session (UNIDROIT CGE/Int.Int./3-Report; ICAO Ref. LSC/ME/3-Report).

(iv) *Re Article IX*

24. – Regarding *Article IX (Modifications to default remedies provisions)*, a remark was made similar to that made in respect of *Article VI*, concerning the need to update the cross-references to provisions of the draft Convention. *Mr Nesgos* suggested that the question of access codes be only dealt with at the level of the enforcement of remedies. There was discussion of the question as to whether recourse to a judge was necessary for the implementation of the remedy granted under *Article IX(1)(a)* as also of the possibility of depositing such codes with a third party. *The Chairman* noted that a crucial problem would be the recognition in the State from the territory of which a satellite was controlled of the jurisdiction-related decisions concerning the transmission of these codes given in another State. Moreover, there was in-depth discussion of the limits to the implementation of remedies set under *Article IX(3)(b)(3)* (cf. §§ 27-29, *infra*). One expert wondered in a general way whether such a solution was appropriate in respect of national space projects where the space property in question had been financed, in part at least, by public funds and as to the appropriateness of allowing a private secured creditor to enforce his international interest against such a type of space property. In this connection, however, *Mr Nesgos* noted that in future space projects would be more and more often financed by private funds and that private secured financing of space property intended to be used for public purposes could most certainly be expected to render such projects more competitive.

(v) *Re Article XI*

25. – Regarding *Article XI (Remedies on insolvency)*, one of the Aviation Working Group's experts drew attention to the solutions proposed in the draft Convention and the draft Aircraft Protocol, and in particular the choice States were given to opt as between Alternative A, Alternative B or neither of these alternatives. He agreed with other experts that these provisions raised extremely complicated questions which merited in-depth consideration.

(vi) *Re Article XV*

26. – *Article XV (The Supervisory Authority)* aroused particular discussion. *Mr Nesgos* and *Mr Wool* both noted that *Article XV(1)* needed to be updated in the light of the amendments made thereto at the third Joint Session, and in particular the separation of the functions of the

Supervisory Authority and the Registrar. A consensus emerged in favour of the United Nations being the appropriate body to exercise the functions of Supervisory Authority in respect of the future international registry for space property. It was suggested that the Secretary-General of the United Nations would be the most appropriate person formally to be entrusted with such a task. It would then be for him to designate the most appropriate body within the United Nations system to exercise these functions, which might, it was suggested, be O.O.S.A.. Some experts however raised doubts as to the desirability of entrusting such a role to an organ of the United Nations. These doubts concerned both the compatibility of such a role with the existing terms of reference of organs of the United Nations, in particular in the light of the commercial character that the future international registry was intended to have, and the administrative capability of such organs to carry out this type of task with the necessary speed and flexibility. In the event of this task being entrusted to the United Nations, one expert saw a risk of confusion with the United Nations Register for objects launched into space. *Mr Nesgos* felt that any such risk of confusion should be excluded by reason of the quite different objectives of the two types of registry. Likewise, *Mr McDougall* took the view that it was not unusual for one Organisation to regulate different types of registry at the same time without this necessarily compromising the operation of either one or other of these registries. One expert raised the question as to the compatibility of the concept of the potential liability of the Supervisory Authority with the exercise of such functions by an organ of the United Nations. *The Chairman* suggested that the group bore in mind that this question was regulated by Articles 26 and 27 of the draft Convention, under the terms of which only the Registrar could be found liable, the Supervisory Authority benefitting from functional immunity. Proceedings brought by users of the future international registry would therefore have to be brought against the Registrar. It was envisaged that the latter, who was to be appointed by the Supervisory Authority, could be a private party. Both *the Chairman* and *Mr Wool* drew the conclusion in this regard that it would be necessary for the draft Convention to specify which law should be applicable to such proceedings.

(b) *Re interaction with the existing body of space law*

(i) Interaction with national space law

27. – Regarding the enforcement of remedies, under *Article IX* it was possible for the taking of possession or control of space property to be blocked on the ground of *public order*. This raised the question as to what was to be understood by the concept of public order in this context. *The Chairman* indicated that this would be a matter to be decided by the judges of each State in the light of the particularities of each such State. The concept of public order enshrined in this provision was accordingly intended to be polymorphous and should remain so. Some experts gave examples of grounds on which the taking of possession or control of space property could be blocked under their national law. First, one pointed out that in his country the vast majority of space property belonged to the State and any attempt by a private party to take possession or control of such property would arouse vigorous opposition on the part of his Government. Similarly, some States had passed legislation the effect of which was to prohibit the transfer of technology, in particular military technology; the mandatory character of this legislation could be breached by the transfer of space property and there could be no doubt that these States would oppose such transfers. Another expert stressed how, where the space property in question was needed to guarantee a State's provision of a public service, in particular where navigation systems were concerned, it would be difficult to conceive of such a State allowing a creditor to take possession or control thereof unless the latter could guarantee the continuing operation of the space property in question under the same conditions and for the same purposes. Summarising the views of various experts, *Mr Nesgos* suggested in this connection that

two possible solutions might be envisaged: either States could be allowed to elect to exclude certain types of property from the sphere of application of the preliminary draft Protocol by an opt-out clause and/or a provision could be included requiring States that blocked the taking of possession or control of space property to compensate the creditor therefor, with a view to establishing a fair balance between, on the one hand, the interests of States and, on the other, those of creditors.

(ii) *Interaction with international space law*

28. – One expert drew attention to the importance of ascertaining the compatibility of the remedies provisions of the preliminary draft Protocol with the international obligations subscribed to by States under the Constitution and Convention of the International Telecommunication Union (I.T.U.), and in particular the provisions of Articles 33-48 of the said Constitution, including those relating to the security of communications by satellite. The same expert suggested that a questionnaire be sent to I.T.U. on this point with a view to avoiding future problems.

29. – Several experts noted the need to consider the relationship between the preliminary draft Protocol, on the one hand, and the Liability Convention and the United Nations Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (hereinafter referred to as the *Outer Space Treaty*). Under Article II of the Liability Convention, the launching State was required to compensate damage caused by its space object. According to one expert, the transfer of space property to the creditor could accordingly lead to the launching State finding itself liable at a time when it was no longer in a position to exercise control over such property. Under Article VIII of the Outer Space Treaty, a State on the registry of which an object launched into outer space was carried had the obligation of retaining jurisdiction and control over such an object, as well as any personnel thereof. The honouring of this obligation could again create problems in the case of the transfer of space property to a creditor.

III. CONSIDERATION OF THE MOST APPROPRIATE MEANS OF MOVING THE PRELIMINARY DRAFT PROTOCOL FORWARD TO INTERGOVERNMENTAL NEGOTIATIONS

30. – The UNIDROIT Secretariat and O.O.S.A. were both agreed that one of the most appropriate means of moving the preliminary draft Protocol forward to intergovernmental negotiations was to bring the work of UNIDROIT in this field to the attention of member States of C.O.P.U.O.S.

31. – Consideration of the draft Convention and the preliminary draft Protocol had been included on the agenda of the 40th session of the Legal Subcommittee of C.O.P.U.O.S. and it had been agreed that the Secretariats of UNIDROIT and O.O.S.A. would prepare a joint background paper for the attention of the member States of the Legal Subcommittee (cf. § 1, *supra*). *Mr McDougall* explained the significance of the inclusion on the agenda of the Legal Subcommittee of a subject as a single issue discussion item: whereas this would as a rule mean that the subject would only be considered by member States for that one session, it was possible, should C.O.P.U.O.S. so decide, for it to be included again on the agenda of the Legal Subcommittee at subsequent sessions. This highlighted the significance of the Secretariats' joint background paper. It would be for this paper to demonstrate, by reason of the economic and legal importance of the preliminary draft Protocol, the case for such consideration continuing at

subsequent sessions of the Legal Subcommittee. He indicated that the attendance of representatives of UNIDROIT at the forthcoming session of that body was expected.

32. — As regards what should be included in the joint background paper, broad consensus emerged as to the need, first, to explain therein the economic significance of the project for the international commercial aerospace and financial communities, secondly, to provide a clear and brief summary of the principal features of the preliminary draft Protocol and, thirdly, to illustrate the role that C.O.P.U.O.S. might usefully play in taking the project forward, in particular with a view to the possibility of the United Nations acting as Supervisory Authority in respect of the future international registry.

APPENDIX

**RESTRICTED INFORMAL GROUP OF EXPERTS
TO IDENTIFY, AND ENGAGE IN A PRELIMINARY DISCUSSION
OF THE ISSUES WHICH MERIT CONSIDERATION IN THE CONTEXT
OF THE RELATIONSHIP BETWEEN THE DRAFT UNIDROIT CONVENTION
ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND THE
PRELIMINARY DRAFT PROTOCOL THERETO ON MATTERS SPECIFIC TO
SPACE PROPERTY AND THE EXISTING BODY OF INTERNATIONAL SPACE
LAW**

(Rome, 18/19 October 2000)

DRAFT AGENDA

1. Adoption of the agenda.
2. Election of the Chairman.
3. Organisation of work.
4. Background to, and reasons for the convening of the meeting (oral reports by the UNIDROIT Secretariat and the co-ordinator of the Space Working Group).
5. Consideration of the draft UNIDROIT Convention on International Interests in Mobile Equipment (hereinafter referred to as the *draft Convention*) and the preliminary draft Protocol thereto on Matters specific to Space Property (hereinafter referred to as the *preliminary draft Protocol*), in particular as regards the:
 - (a) questions left open in the current working draft of the preliminary draft Protocol, as signalled by the footnotes to the text thereof; and
 - (b) relationship of the draft Convention and the preliminary draft Protocol with the existing body of international space law and national laws governing the taking of security.
6. Consideration of the most appropriate means of moving forward the preliminary draft Protocol to intergovernmental negotiations.
7. Any other business.