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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

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**SPACE WORKING GROUP**

**(Rome, 30/31 January 2002):**

***REPORT***

(prepared by the UNIDROIT Secretariat)

Rome, February 2002

## I. INTRODUCTION

### (a) *Background to the session*

1. - Pursuant to the decision taken at the fourth session of the Space Working Group held in Evry Courcouronnes on 3 and 4 September 2001,<sup>1</sup> the Space Working Group met at the seat of UNIDROIT in Rome on 30 and 31 January 2002. The main business of the Space Working Group on this occasion was to consider further the text of the preliminary draft Protocol to the Convention on International Interests in Mobile Equipment (hereinafter referred to as the *Convention*) on Matters specific to Space Assets (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, with a view to implementing the amendments agreed at the previous session of the Space Working Group<sup>2</sup> and to reflecting the changes made to the Convention and the Protocol thereto on Matters specific to Aircraft Equipment (hereinafter referred to as the *Aircraft Protocol*) at the diplomatic Conference convened for their adoption in Cape Town from 29 October to 16 November 2001 (hereinafter referred to as the *diplomatic Conference*),<sup>3</sup> prior to its finalisation by the Steering and Revisions Committee decided upon by the UNIDROIT Governing Council, at its 80<sup>th</sup> session, held in Rome from 17 to 19 September 2001, and its subsequent transmission to Governments.

2. - Additional matters on the table were, first, the giving of a report on the diplomatic Conference, secondly, the formulation of the position to be adopted by the Space Working Group at the aforementioned Steering and Revisions Committee meeting, thirdly, the organisation of the Space Working Group's future work in relation to both the intergovernmental consultation process to be launched by the UNIDROIT Secretariat, pursuant to the decision taken by the Governing Council at its 80<sup>th</sup> session, following the meeting of the Steering and Revisions Committee and the consideration of the Convention and the preliminary draft Protocol underway within the United Nations Committee on the Peaceful Uses of Outer Space (U.N./COPUOS), and in particular the *ad hoc* consultative mechanism of that Committee which it had set up at its 44<sup>th</sup> session, held in Vienna from 6 to 15 June 2001 (hereinafter referred to as the *Consultative mechanism*), and, finally, the organisation of an educational campaign to market the preliminary draft Protocol among suppliers of, and lenders against space assets as also Government officials, as advocated by the Space Working Group at its third session.<sup>4</sup>

### (b) *Opening of the session*

3. - The session of the Space Working Group was opened at 10 a.m. on 30 January 2002 by Mr Nesgos, who took the chair.

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

#### ***Experts designated by intergovernmental Organisations***

Mr Gabriel LAFFERRANDERIE

Legal Adviser, *European Space Agency, Paris*

Mr P. Ruari McDOUGALL

Legal Affairs Officer, *United Nations Office for Outer Space Affairs, Vienna*

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<sup>1</sup> Cf. Study LXXIIJ – Doc. 8, § 72.

<sup>2</sup> Cf. Study LXXIIJ – Doc. 8, §§ 13-51.

<sup>3</sup> Cf. Study LXXIIJ – Doc. 7.

<sup>4</sup> Cf. Study LXXIIJ – Doc. 6, §§ 8 and 16.

Ms Patricia O'NEILL Senior Legal Expert, Legal Service, *European Organisation for Safety of Air Navigation (Eurocontrol), Brussels*

Mr Jerzy W. VONAU Director, *International Mobile Satellite Organization, London*

***Experts designated by international non-governmental Organisations***

Ms Anna Maria BALSANO Legal Department, European Space Agency, *Paris / International Institute of Space Law*

Mr Marcello GIOSCIA Partner, Studio Legale Ughi & Nunziante, *Rome / United Nations and other World Organisations Standing Committee (UNWOC) of the International Bar Association*

Mr Gabriel LAFFERRANDERIE President, *European Centre for Space Law, Paris*

Mr Peter D. NESGOS Partner, Milbank, Tweed, Hadley & McCloy LLP., *New York / Co-ordinator, Space Working Group*

Mr Dara A. PANAHY Milbank, Tweed, Hadley & McCloy LLP., *Washington, D.C. / Assistant to the Co-ordinator, Space Working Group*

Mr Bradford Lee SMITH Senior Intellectual Property Counsel, Intellectual Property Department, Alcatel, *Paris / International Institute of Space Law*

***Representatives of international commercial aerospace and financial communities and others***

Mr Francesco AMICUCCI General Counsel, Alenia Spazio S.p.A., *Rome*

Ms Darcy BEAMER-DOWNIE Legal Counsel, Beaumont & Son, *London*

Mr Jacques BERTRAN DE BALANDA Partner, Banking Department, Lovells, *Paris*

Mr Matthias CREYDT Legal Adviser, German Aerospace Centre (D.L.R.), *Cologne*

Mr Claude H. DUMAIS Senior Legal Counsel, Arianespace, *Evry*

Mr Hermann ERSFELD Legal Counsel, Department IC2, Space Infrastructure Division, Astrium G.m.b.H., *Bremen*

Ms Simona FERRARO Legal Department, Alenia Spazio S.p.A., *Rome*

Mr John B. GANTT Partner, Mizrack & Gantt, *Washington, D.C.*

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>
Mr Arwed W. HESSE	Senior Manager, Contracts, E.A.D.S. Deutschland G.m.b.H., <i>Munich</i>
Mr Vladimir KOPAL	Professor of Law, University of Pilsen; Chairman, Legal Subcommittee, United Nations Committee on the Peaceful Uses of Outer Space, <i>Prague</i>
Mr Souichirou KOZUKA	Associate Professor of Law, Faculty of Law, Sophia University, <i>Tokyo</i>
Mr Michel LAFFATTEUR	Chargé de mission, Direction des relations internationales, Centre National d'Etudes Spatiales (CNES), Paris; en détachement auprès de l'Agence spatiale allemande, <i>Cologne</i>
Mr Riccardo LALA	General Counsel, FiatAvio, <i>Turin</i>
Mr Paul B. LARSEN	Adjunct Professor, Georgetown University Law Centre, <i>Washington, D.C.</i>
Mr Alfons A.E. NOLL	Of Counsel, Baker & McKenzie, <i>Geneva</i> /former Legal Adviser, International Telecommunication Union
Mr Rolf OLOFSSON	Partner, White & Case Advokat AB, <i>Stockholm</i>
Mr Morten PAHLE	Technical Lead, Space Business Underwriting Team, Assicurazioni Generali S.p.A., <i>London</i>
Mr Igor B. POROKHIN	Partner, Inspace Consulting (Russia) L.L.C., <i>Moscow</i>
Mr Olivier M. RIBBELINK	Head of Research, T.M.C. Asser Instituut, <i>The Hague</i>
Ms Maria TAMMARO	Corporate & Legal Affairs, International Legal Affairs - Europe, Telecom Italia S.p.A., <i>Rome</i>
Mr H. Peter VAN FENEMA	Adjunct Professor of Law, McGill University, c/o Jonker c.s. Advocaten, <i>Amsterdam</i>

Mr Salvatore VITALE	Head of International Legal Affairs – Europe, Telecom Italia S.p.A., <i>Rome</i>
Mr Vladimir V. VOZHCHOV	Chief expert, Department of International Co- operation, Russian Aviation and Space Agency, <i>Moscow</i>
Mrs Antonella ZANABONI	Legal Department, Italian Banking Association, <i>Rome</i>

In addition, Mr Harold S. BURMAN, Executive Director, Office of the Legal Adviser, Department of State of the United States of America, attended the session as an observer.

5. - The Space Working Group adopted the draft agenda, which is reproduced as an Appendix to this report.

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

- (1) Draft agenda (Study LXXIIJ – S.W.G., 5<sup>th</sup> session, W.P. 1);
- (2) Convention on International Interests in Mobile Equipment (DCME Doc No. 74);

(3) Preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets, 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 and as amended pursuant to the discussions at its fourth session, held in Evry Courcouronnes on 3 and 4 September 2001 and to the deliberations of the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol, held in Cape Town from 29 October to 16 November 2001 (Study LXXIIJ – Doc. 7);

(4) Space Working Group (Evry Courcouronnes, 3/4 September 2001): report (prepared by the UNIDROIT Secretariat) (Study LXXIIJ – Doc. 8);

(5) Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol (Cape Town, 29 October to 16 November 2001): comments on the draft Convention (presented by the Space Working Group) (DCME Doc No. 14);

(6) Preliminary draft Protocol on Matters specific to Space Assets, 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 and as amended pursuant to the discussions at its fourth session, held in Evry Courcouronnes on 3 and 4 September 2001 and to the deliberations of the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol, held in Cape Town from 29 October to 16 November 2001: comments by Michael Gerhard, Esq. (German Space Agency) (Study LXXIIJ - S.W.G., 5<sup>th</sup> session, W.P. 2) (English only);

(7) Preliminary draft Protocol on Matters specific to Space Assets, 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 and as amended pursuant to the discussions at its fourth

session, held in Evry Courcouronnes on 3 and 4 September 2001 and to the deliberations of the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol, held in Cape Town from 29 October to 16 November 2001: comments by Ms Susanne Reif (Institute of Air and Space Law of the University of Cologne) (Study LXXIIJ - S.W.G., 5<sup>th</sup> session, W.P. 3) (English only);

(8) Preliminary draft Protocol on Matters specific to Space Assets, as established by a working group, organised, at the invitation of the President, by Peter D. Nescgos, 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 and as amended pursuant to the discussions at its fourth session, held in Evry Courcouronnes on 3 and 4 September 2001 and to the deliberations of the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol, held in Cape Town from 29 October to 16 November 2001: comments by Jacques Bertran de Balanda, Esq. (Lovells, Paris) (Study LXXIIJ - S.W.G., 5<sup>th</sup> session, W.P. 4) (English only);

(9) Preliminary draft Protocol on Matters specific to Space Assets, as established by a working group, organised, at the invitation of the President, by Peter D. Nescgos, 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 and as amended pursuant to the discussions at its fourth session, held in Evry Courcouronnes on 3 and 4 September 2001 and to the deliberations of the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol, held in Cape Town from 29 October to 16 November 2001: comments by Francesco Saverio Polito, Esq. (Studio Legale Associato Porcelli & Tamborra, Bari) (Study LXXIIJ - S.W.G., 5<sup>th</sup> session, W.P. 5) (English only);

(10) Resolution adopted by the UNIDROIT Governing Council at its 80<sup>th</sup> session (Rome, 17/19 September 2001) (Study LXXIIJ - W.P. 6);

(11) Preliminary draft Protocol on Matters specific to Space Assets, as established by a working group, organised, at the invitation of the President, by Peter D. Nescgos, 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 and as amended pursuant to the discussions at its fourth session, held in Evry Courcouronnes on 3 and 4 September 2001 and to the deliberations of the Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol, held in Cape Town from 29 October to 16 November 2001: comments by Alfons A.E. Noll, Esq. (Of Counsel, Baker & McKenzie, Geneva) (Study LXXIIJ - S.W.G., 5<sup>th</sup> session, W.P. 7) (English only).

## **II. CONSIDERATION OF THE REVISED TEXT OF THE PRELIMINARY DRAFT PROTOCOL (Study LXXIIJ - Doc. 7)**

### **(a) *Introductory remarks***

#### *(i) A propos of the diplomatic Conference*

7. - By way of background to the business of the session, Mr Herbert Kronke (*Secretary-General of UNIDROIT*) reported to participants on the outcome of the diplomatic Conference, to which the Space Working Group had submitted comments<sup>5</sup> and at which it had been represented by Mr Nescgos, Mr Robert W. Gordon (Boeing Capital Corporation) and Mr Arwed W. Hesse (E.A.D.S. Deutschland).

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<sup>5</sup> Cf. DCME Doc No. 14.

Mr Kronke envisaged the Convention and the Aircraft Protocol attracting wide acceptance. The presence at the diplomatic Conference of representatives from no fewer than 68 States was the first indication of this. The scale of this participation moreover gave an idea of the needs expected from, on the one hand, the Convention, the Aircraft Protocol, the preliminary draft Protocol and the preliminary draft Protocol on Matters specific to Railway Rolling Stock and, on the other hand, the financiers who supported investment in high-value mobile equipment, such as aircraft equipment, railway rolling stock and space assets.

Concerning the form of the Convention, Mr Kronke noted that, in line with the view advocated by the Space Working Group at its previous session and endorsed in the comments that it had submitted to the diplomatic Conference,<sup>6</sup> the latter had maintained the dual structure of a Convention and separate equipment-specific Protocols. This outcome was particularly felicitous for the preliminary draft Protocol in that it was likely to reduce considerably the time that would be needed for its finalisation as an international instrument.

He also noted that the proposal made by the Space Working Group for clarification in the text of the Convention of the relationship between the latter and each Protocol had been endorsed by the diplomatic Conference.<sup>7</sup> The effect of this change was to affirm the primacy of the Protocol over the Convention in respect of the category of equipment covered thereby. The contribution made by the Space Working Group in this sense had two merits. First, it resulted in an amelioration of the readability of the two instruments, laying down, as it did, a clear conflicts rule. Secondly, it clarified the right of those negotiating the text of each Protocol to adjust the asset-based financing rules laid down in the Convention to the specific needs and characteristics of the category of equipment covered in that Protocol.

Mr Kronke finally underlined UNIDROIT's interest in co-operating on this project with U.N./COPUOS. First, it was necessary to channel the legal expertise of that body in an appropriate manner into the finalisation of the preliminary draft Protocol with a view to ensuring its acceptability with those responsible for the development of international space law. The Institute's intention was to produce a Protocol that would be in line with international space law, from the standpoint of both the existing rules thereof and the terminology employed therein. Secondly, both UNIDROIT and the Space Working Group had reached the conclusion that the United Nations could in principle be considered the most appropriate body to exercise the functions of Supervisory Authority in respect of the international registration system for space assets that was intended to underpin the future Space Protocol and that would undoubtedly be the key part of the new international regimen. As evidence of the importance attached by UNIDROIT to co-operation with U.N./COPUOS in the work ahead, he noted that, at its 80<sup>th</sup> session, the UNIDROIT Governing Council had approved the idea of participation in the Committee of governmental experts to be convened following the Steering and Revisions Committee meeting due to take place in Rome on 1 February 2002 being extended beyond just UNIDROIT member States to all member States of U.N./COPUOS and the United Nations Office for Outer Space Affairs.<sup>8</sup>

(ii) *A propos of the work of the Consultative mechanism*

8. - The first and second working meetings of the Consultative mechanism had been held in Paris on 10 and 11 September 2001 and in Rome on 28 and 29 January 2002 respectively. The Space Working Group had been represented at both working meetings, under the umbrella

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<sup>6</sup> Cf. Study LXXIIJ – Doc. 8, §§ 12 and 53.

<sup>7</sup> Cf. DCME Doc No. 14, §§15-17 and Article 6 of the Convention.

<sup>8</sup> Cf. C.D. (80) 20, p. 3.

of UNIDROIT. At the first working meeting it had been represented by Mr Jacques Bertran de Balanda (Lovells, Paris), Mr Souichirou Kozuka (Sophia University, Tokyo) and Mr Paul B. Larsen (Georgetown University Law Centre) and at the second working meeting by Mr Panahy and Mr Larsen. The Space Working Group had submitted comments on the relationship between the then draft Convention and the preliminary draft Protocol and existing international space law to the United Nations Office for Outer Space Affairs for consideration by the Consultative mechanism. It was the intention for the Consultative mechanism to report its conclusions to the Legal Subcommittee of U.N./COPUOS at the 41<sup>st</sup> session of that body, to be held in Vienna from 2 to 12 April 2002. *Mr Nesgos* invited Mr Vladimir Kopal, as Chairman of the Consultative mechanism, to report on the principal results of the work that it had accomplished.

9. - *Mr Kopal* explained the purpose behind the review of the Convention and the preliminary draft Protocol by the Consultative mechanism: this was to permit an in-depth examination of the relationship between the rights and obligations of States under existing international space law and those that would arise under the Convention and the preliminary draft Protocol. While the Consultative mechanism had noted that the preliminary draft Protocol sought to respond to new developments in space activities, in particular the growing development of commercial activities in outer space, involving both public and private interests, there were aspects of international space law such as the international liability of States and the jurisdiction and control exercised by States over space objects that merited careful consideration in the context of the new obligations that would arise under the Convention and the preliminary draft Protocol. In order to guarantee the compatibility of the latter with existing international space law, the nature of the relationship between the two regimes needed to be clarified expressly in the text of the preliminary draft Protocol, at least in the preamble thereto. Mr Kopal also underlined the importance of the International Telecommunication Union (I.T.U.) taking an active part in future work on the preliminary draft Protocol.

10. - Mr Kopal and *the representative of the United Nations Office for Outer Space Affairs* informed the Space Working Group of the feelings of the Consultative mechanism regarding the question as to whether the United Nations should exercise the functions of Supervisory Authority in respect of the international registration system for space assets. The Consultative mechanism, whilst admitting the possibility that the United Nations might agree to exercise such functions, nevertheless noted that turning this possibility into reality would necessarily hinge on the conditions, and in particular the financial conditions, to be set for the exercising of such functions and on a feasibility study to be carried out in close co-operation with UNIDROIT and the other Organisations concerned.

11. - Mr Kopal finally expressed to UNIDROIT, on behalf of the member States of U.N./COPUOS taking part in the work of the Consultative mechanism, their appreciation of the decision by the Governing Council to open up the Committee of governmental experts that would be carrying forward work on the preliminary draft Protocol to member States of U.N./COPUOS, urging such States to take advantage of this decision and expressing the hope that it would prove beneficial to the project.

**(b) *Article-by-Article consideration of the preliminary draft Protocol***

*(i) Re Article I(2)(a)*

12. - The definition of the term “associated rights” in Article I(2)(a) gave rise to considerable discussion. One member of the Space Working Group saw this definition as a potential source of difficulty in that, while the fact that the rights covered by this sub-paragraph were, by virtue of Article 2 of the Convention, subject to the regimen provided for the



international interest and thus to the remedies granted to a creditor for the enforcement of such an interest would not create any problems for those rights referred to in clauses (ii) and (iii), the same would not be true for the rights referred to in clause (i), the transfer of which would affect the sovereignty of States in that such rights consisted in licences or authorisations granted by States or international Organisations and might only be granted on an *intuitu personae* basis.<sup>9</sup>

13. - The question was also raised as to whether the very broad definition of “associated rights” given in the preliminary draft Protocol was compatible with the definition of the same term provided by the Convention in Article 1(c).

14. - This in turn led another member of the Space Working Group to suggest that perhaps the best solution to the twin problems raised might lie in a restructuring of Article I(2) in such a way as to move the contents of Article I(2)(a)(i) to a new Article I(2)(g) treating the rights in question as a new defined term (“space asset related rights”) and the deletion of Article I(2)(a)(ii) and (iii) so that the term “associated rights” would only cover those rights defined as such in the Convention.<sup>10</sup>

15. - In response to these concerns, it was suggested that the problem of incompatibility was already dealt with by the conflicts rule provided by Article 6 of the Convention, a rule that had moreover found its inspiration in a proposal made by the Space Working Group in the comments it had submitted to the diplomatic Conference.<sup>11</sup> In effect, in the words of that Article, “[t]o the extent of any inconsistency between this Convention and the Protocol, the Protocol shall prevail”. With a view to dealing with any problem of potential interference with the sovereignty of States, it was agreed by the Space Working Group that a footnote should be appended to clause (i) making it clear that the definition in question was limited to the regulatory licences and permits necessary for the operation of space assets that could be transferred or assigned under the relevant domestic law.

16. - The Space Working Group’s deliberations in this regard in general brought out the different nature of the different types of right included in the definition of “associated rights” and thus the desirability of further thought being given to this question, and in particular seeing how those parts of the definition covering associated rights might best be distinguished from those parts dealing rather with space assets themselves.<sup>12</sup>

17. - In a similar spirit and with a view to ensuring that the definition of “associated rights” not be over broadly drawn, it was agreed that it should be made clear in clause (ii) of Article I(2)(a) that the rights to payment or other performance due to a debtor referred to therein had to be linked to the operation of space assets.

(ii) *Re Article I(2)(c)*

18. - One member of the Space Working Group drew attention to the different nature of the four types of guarantee contract listed in Article I(2)(c), in particular as regards the manner of their enforcement. He noted that the operation of demand guarantees, standby letters of credit and other forms of credit insurance was quite different from that of a suretyship and that there was a fundamental difference between the operation of demand guarantees and standby letters of credit, on the one hand, and credit insurance, on the other, in the sense of the automaticity or

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<sup>9</sup> Cf. Study LXXIIJ – S.W.G. 5<sup>th</sup> session, W.P. 2.

<sup>10</sup> Cf. . Study LXXIIJ – S.W.G. 5<sup>th</sup> session, W.P. 7.

<sup>11</sup> Cf. § 7, *supra*.

<sup>12</sup> Cf. Study LXXIIJ – Doc. 7, footnote 4 to Article I(2)(f).

otherwise of the operation of remedies. It was agreed by the Space Working Group that the question of the inclusion in Article I(2)(c) of demand guarantees, standby letters of credit and other forms of credit insurance accordingly merited further consideration with a view to better evaluating the consequences of such inclusion.

(iii) *Re Article I(2)(f)*

19. - The Space Working Group agreed that the term “space” employed as part of the definition of “space assets” in Article I(2)(f) should be brought into line with existing international space law, and in particular with the United Nations treaties and principles on outer space. It was therefore decided that, for the purposes of the definition of “space assets”, the term “space” was to mean outer space, including the Moon and other celestial bodies.

(iv) *Re Article VII*

20. - Conscious of the vital importance of appropriate search criteria for the effectiveness of the future international registration system for space assets, the Space Working Group was agreed that the reliability of searches in the computerised data base of the International Registry would, in the case of the different categories of space asset encompassed by the preliminary draft Protocol, be enhanced by the provision of multiple search criteria.

(v) *Re Article VIII*

21. - One member of the Space Working Group raised the question as to the extent to which a judge should give preference to the law chosen by the parties in their contract or to the *lex fori* in a case where the two States concerned had not made the same declarations provided for under the system of the Convention and the preliminary draft Protocol. While the answers to be given to this question would undoubtedly vary from one judge to another, it was suggested that it above all highlighted the difficulties in the way of that uniformity of application that was so essential if commercial parties were to be able to rely upon the new international regimen that the excessive degree of flexibility built into this regimen by its complex system of declarations risked creating. For this reason, the Space Working Group decided to delete the phrase “and to the extent stated in such declaration” featuring at the end of Article VIII(1).

(vi) *Re Article IX*

22. - The phrase “and to the extent stated in such declaration” featuring at the end of Article IX(1) was deleted for the same reason as in Article VIII(1).<sup>13</sup>

23. - A propos of Article IX(3)(b), it was suggested that further consideration might usefully be given to the question of the operation of remedies in the case of repossession by an agent.

24. - The Space Working Group felt that the rule enounced in Article IX(4), designed to enable Contracting States to apply their own rules regarding restrictions or controls on the export of technology, should be made the subject of a separate Article dealing with limitations on remedies. For this reason, the paragraph in question was moved to a new Article XVI.<sup>14</sup>

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<sup>13</sup> Cf. § 21, *supra*.

<sup>14</sup> Cf. §§ 26-28, *infra*.

(vii) *Re Articles X and XII*

25. - The phrase “and to the extent stated in such declaration” featuring at the end of Articles X(1) and XII(1) was deleted for the same reason as in Articles VIII(1) and IX(1).<sup>15</sup>

(viii) *Re new Article XVI*

26. - In line with its decision in respect of Article IX(4),<sup>16</sup> the Space Working Group introduced a new Article XVI, designed to accommodate, in a new paragraph 2, the content of the former and, in line with Article IX(1), to specify, in a new paragraph 1, that for States to be able to invoke it they must first lodge an appropriate declaration at the moment of ratification, acceptance, approval or accession under Article XXVI(2).

27. - It was agreed by the Space Working Group that the new Article XVI(2) should be expanded so as to permit a Contracting State to restrict or control the exercise of the remedies provided under Chapter III of the Convention and Chapter II of the preliminary draft Protocol where the exercise of such remedies would either involve or require the transfer of controlled goods, technology or data to persons of States other than that Contracting State or involve the transfer or assignment of the associated rights referred to in Article I(2)(a)(i) rather than just, as under the former Article IX(4), where the exercise of such remedies would involve or require the disclosure of restricted or controlled technical information. In particular, the extension of this provision to, and therefore the possibility for States to restrict or control the exercise of remedies in respect of transfers or assignments of the types of associated right referred to in Article I(2)(a)(i) was seen as one way of responding to the concerns regarding the potential for interference under that clause with State sovereignty that had been expressed by one member of the Space Working Group.<sup>17</sup>

28. - While this new provision seemed in principle to the Space Working Group to provide Contracting States with sufficient guarantees regarding the exercise of remedies, it recognised that further consideration needed to be given to those remedies involving the potential transfer of items that were controlled or restricted for export and the assignment or transfer of regulatory licences or permits granted by domestic or international authorities, with a view to making the new regimen both responsive to the legitimate expectations of commercial parties as regards the foreseeability of their transactions and to the need for a satisfactory balance as between the imperatives of commercial financing and the interests of States.

(ix) *Re Article XXI*

29. - As regards the relationship between the Convention/preliminary draft Protocol and other Conventions, the Space Working Group wondered whether there might not be an overlap between the Convention/preliminary draft Protocol and the sphere of application and substantive provisions of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as the *United Nations Convention*). It was therefore agreed provisionally to provide under Article XXI that the Convention as applied to space assets would supersede the United Nations Convention too, pending further consideration as to whether there were indeed any specific areas where the two regimes would be inconsistent with one another.

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<sup>15</sup> Cf. §§ 21 and 22, *supra*.

<sup>16</sup> Cf. § 24, *supra*.

<sup>17</sup> Cf. § 12, *supra*.

(x) *Re Article XXIII*

30. - *The representative of Eurocontrol* sought clarification as to whether Organisations like hers, in view of the satellite-based services that it planned to provide to air carriers and its relations with the European Community – which was a “Regional Economic Integration Organisation” for the purposes of Article XXIII - might qualify under the Convention/ preliminary draft Protocol for the same treatment accorded to Regional Economic Integration Organisations, a provision that had been added to the preliminary draft Protocol in line with the corresponding addition that had been made to the texts of the Convention and the Aircraft Protocol at the diplomatic Conference. Not feeling that it was the appropriate forum to pronounce on the advisability or otherwise of adding such a provision and that this was rather a matter for decision by Governments at the appropriate moment in the forthcoming intergovernmental negotiations, the Space Working Group agreed that the only action to be taken at this stage would be to append a footnote to the provision in question indicating that further consideration should be given to the question of the types of Organisation to benefit from such treatment at the appropriate moment in those negotiations.

(xi) *Re Article XXIV*

31. - Convinced of the case for the Convention as applied to space assets entering into force at the earliest possible opportunity, the Space Working Group took the opportunity to indicate in Article XXIV to those whose prerogative it would be in due course to settle the matter of the number of ratifications/accessions to be required for such entry into force that, in its opinion, the appropriate number would be five.

(xii) *Re Article XXVI*

32. - Having decided to delete the phrase “and to the extent stated in such declaration” in Articles VIII, IX, X and XII,<sup>18</sup> the Space Working Group wondered whether there was any sense in maintaining the phrase “wholly or in part” in Article XXVI(2) and (3). It recognised that the promotion of uniformity in the application of the declarations to be made by States was a matter of great importance for the commercial sectors represented at the session. It was accordingly agreed to place the words “wholly or in part” in Article XXVI(2) and (3) in square brackets and to append a footnote to these provisions indicating the need for due consideration to be given to their possible deletion with a view to promoting such uniformity in the application of declarations.

(xiii) *Re Article XXVII*

33. - In the same way as the Space Working Group had advocated to the diplomatic Conference the addition of Article 6 to the text of the Convention, in order to provide a clear conflicts rule in the event of inconsistency between that text and that of any Protocol, affirming the primacy of the latter on the ground of its specificity in relation to the Convention,<sup>19</sup> the Space Working Group considered that it would be useful to include a parallel rule in Article XXVII, making it clear that, to the extent of any inconsistency between a declaration made under the Convention and the preliminary draft Protocol, the latter should prevail.

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<sup>18</sup> Cf. §§ 21, 22 and 25, *supra*.

<sup>19</sup> Cf. § 7, *supra*.

(xiv) *Re Article XXXII(3)*

34. - The Space Working Group agreed that the term “States” employed in Article XXXII(3) should be made more precise in order to bring it into line with the corresponding term employed in the previous paragraph and that it should therefore read “States Parties” in each of the three places in which it was used in Article XXXII(3).

### III. ORGANISATION OF FUTURE WORK

#### (a) *Undertakings relating to the Steering and Revisions Committee*

35. - The Space Working Group entrusted a restricted drafting group, drawn from amongst its membership, with the task of revising the text of the preliminary draft Protocol in such a way as to reflect the amendments that had been agreed during the session with a view to such a revised text being ready for consideration by the Steering and Revisions Committee<sup>20</sup> at its meeting to be held in Rome on 1 February 2002. It noted that this drafting group, made up of Messrs Nesgos, Bertran de Balanda and Panahy and supported by the UNIDROIT Secretariat, would be meeting immediately after the end of the session.

36. - It was agreed that, pursuant to the invitation addressed to Mr Nesgos by the Secretary-General of UNIDROIT to designate one or more representatives to attend the aforementioned meeting of the Steering and Revisions Committee on behalf of the Space Working Group, Mr Nesgos himself, accompanied by Mr Panahy, would represent the Space Working Group at such meeting and, in that capacity, would illustrate to the Steering and Revisions Committee the manner in which the Space Working Group had endeavoured to align the preliminary draft Protocol on the Convention as it had emerged from the diplomatic Conference.

#### (b) *Interaction with the existing and future intergovernmental consultation processes*

37. - The Space Working Group took note of both the commitments that would continue to be made on its expertise and time by the intergovernmental consultation process already underway in respect of the Convention and the preliminary draft Protocol within U.N./COPUOS, in particular at the 41<sup>st</sup> session of the Legal Subcommittee of that body, and the considerable additional commitments that would be its once, following the aforementioned meeting of the Steering and Revisions Committee, it fell to UNIDROIT, pursuant to the aforementioned decision of the Governing Council,<sup>21</sup> to transmit the text of the preliminary draft Protocol resulting from that meeting to Governments and to convene a Committee of governmental experts responsible, on the basis of that text, for the preparation of a draft Protocol capable of being submitted for adoption as an international instrument.

38. - While recognising that the need for, and the scale of its input would, if anything, be accentuated by the impending transmission of the preliminary draft Protocol to Governments for finalisation, the Space Working Group noted that it was difficult for it at that time to plan the precise modalities of its future interaction with the intergovernmental consultation process. This was partly due to the fact that the scheduling of the first session of the UNIDROIT Committee of governmental experts had yet to be finalised, something that could only be envisaged once the Steering and Revisions Committee had completed its work. However, the principal factor that

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<sup>20</sup> Cf. § 1, *supra*.

<sup>21</sup> Cf. §§ 1 and 7, *supra*.

had to be resolved before the Space Working Group could determine the modalities of its interaction with the intergovernmental consultation process concerned rather the need for its members to consider the steps that they would individually be prepared to take, in particular as regards funding, with a view to enabling it, and in particular its co-ordinator, to respond in an appropriate manner to the considerable increase in the calls on its expertise and time that would necessarily flow from the transmission of the preliminary draft Protocol to Governments and the convening of governmental experts.

39. - The Space Working Group took note in this context of the steps that had been taken by UNIDROIT since its previous session with a view to responding to the call that had been addressed on that occasion to the Secretary-General of that Organisation to bring to the attention of its competent bodies the urgent need for it to assume greater responsibility, in particular at the financial level, for the activities of the Space Working Group,<sup>22</sup> in particular the Resolution that had been adopted by the Governing Council at its 80<sup>th</sup> session urging member States to provide to, or procure for the UNIDROIT Secretariat, as a matter of the greatest urgency, the resources necessary to endow the Space Working Group with the funding necessary to enable it to respond to the vital calls on its expertise that were to be expected in connection with the launching by UNIDROIT of the intergovernmental consultation process.<sup>23</sup>

40. - It was recognised, however, that, with the transmission of the preliminary draft Protocol to Governments, the work of the Space Working Group would be entering a new phase in which it would be essential for its efforts to be organised quite independently from UNIDROIT, as the intergovernmental Organisation responsible for convening the Committee of governmental experts, and in which its task should rather consist in representing the interests of the international commercial aerospace community and the financial and insurance communities supporting that community in relation to the further elaboration of the preliminary draft Protocol during the intergovernmental consultation process.

41. - A restricted group of members of the Space Working Group, bringing together those representatives of the international commercial aerospace community attending the session, accordingly met during the latter to discuss the best means of organising, particularly at the level of funding, this second phase of the Space Working Group's work. It was noted that this second phase would *inter alia* require a global effort to educate a variety of constituencies, and not only Governments but also industry and financial institutions themselves, as to the need for, and the scope of the preliminary draft Protocol and that such an effort would require the allocation of significant time and resources, both human and financial, resources that the Space Working Group did not yet command. It was further noted that, whereas the co-ordinator of the Space Working Group had hitherto succeeded in carrying forward the Space Working Group's work virtually alone and notwithstanding extremely limited financial resources, contributed moreover by only two of its members, albeit supported by administrative and secretarial assistance from the UNIDROIT Secretariat, the anticipated change in the nature and scale of its activities over the second phase meant that these resources would no longer suffice.

42. - It was agreed that the only means of filling the anticipated shortfall would be by bringing about greater involvement by industry participants, in particular in the funding of the future activities of the Space Working Group. It was noted that the commitment of such support by industry participants would moreover be particularly appropriate at this stage as a yardstick of the potential practical usefulness of the Convention as applied to space assets as seen by them.

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<sup>22</sup> Cf. Study LXXIIJ – Doc. 8, § 61.

<sup>23</sup> Cf. Study LXXIIJ – S.W.G. 5<sup>th</sup> session, W.P. 6.

The UNIDROIT Secretariat agreed in these circumstances to use its best offices with a view to securing such a result, in particular by itself taking up the matter with appropriate representatives of the international commercial aerospace and financial and insurance communities.

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

43. - It was considered premature to discuss in any detail the organisation of an educational campaign to market the preliminary draft Protocol among suppliers of, and lenders against space assets as also Government officials so long as the fundamental question of the future organisation of the Space Working Group's work, and in particular its funding, had not been satisfactorily resolved.

44. - The Space Working Group nevertheless took note of the joint session of Committee E (Banking Law) and Committee Z (Outer Space) of the Section on Business Law of the International Bar Association (I.B.A.) that had been devoted to consideration of the preliminary draft Protocol in Cancun on 1 November 2001 on the occasion of the 2001 Conference of the I.B.A. The Space Working Group had been represented at the joint session by Mr Panahy and presentations given by Mr Panahy, Ms Lisa Curran (Allen & Overy, Rome), Co-Chair, Subcommittee E6 (Innovations in Financing Transactions) and Mr David Meltzer (Vice-President, Intelsat Global Service Corporation, Washington, D.C.).

45. - It was noted that consideration was being given by the UNIDROIT Secretariat to the organisation of a seminar designed to bring the Convention and the preliminary draft Protocol to the attention of the countries of the Asia-Pacific region. It was however recognised that, given the evident importance of participation in such a seminar of experts from the Space Working Group, it was desirable that a final decision regarding the organisation of such a seminar should await the securing of the necessary funding requirements for the second phase of the Space Working Group's work.

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

46. - It was agreed that the Space Working Group would not meet again until the question of the funding of its future activities had been satisfactorily resolved.

DRAFT AGENDA

1. Adoption of the agenda.
2. Election of the Chairman.
3. Organisation of work.
4. Report by Mr Peter D. Nesgos on the diplomatic Conference in Cape Town at the conclusion of which the Convention on International Interests in Mobile Equipment (hereinafter referred to as the *Convention*) and the Protocol thereto on Matters specific to Aircraft Equipment (hereinafter referred to as the *Aircraft Protocol*) were opened to signature.
5. Consideration of the preliminary draft Protocol to the Convention on Matters specific to Space Assets (hereinafter referred to as the *preliminary draft Protocol*) (cf. UNIDROIT Study LXXIIJ-Doc. 7) as revised to reflect the amendments agreed at the fourth session of the Space Working Group, held in Evry Courcouronnes on 3 and 4 September 2001 (cf. UNIDROIT Study LXXIIJ-Doc. 8) and the texts of the Convention and the Aircraft Protocol as opened to signature in Cape Town on 16 November 2001, *inter alia* in the light of the deliberations of the *ad hoc* informal consultative mechanism of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space (U.N./COPUOS).
6. Organisation of future work, in particular:
  - (i) undertakings relating to the consideration of the preliminary draft Protocol by the UNIDROIT Steering and Revisions Committee, entrusted by the UNIDROIT Governing Council with the finalisation of the preliminary draft Protocol prior to its transmission to Governments, at its meeting to be held in Rome on 1 and 2 February 2002;
  - (ii) interaction with the intergovernmental consultation process, present and future, namely, within both UNIDROIT (where a Committee of governmental experts is to be convened following the meeting of the Steering and Revisions Committee for the preparation of a draft Protocol on the basis of the preliminary draft Protocol) and U.N./COPUOS (where consideration of the Convention and the preliminary draft Protocol, in particular in the light of the work of the *ad hoc* informal consultative mechanism, is on the agenda of the Legal Subcommittee at its 41<sup>st</sup> session, to be held in Vienna from 2 to 12 April 2002);
  - (iii) organisation of an educational campaign to market the preliminary draft Protocol among suppliers of, and lenders against space property as also Government officials;
  - (iv) next meeting of the Space Working Group.
7. Any other business.