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UNIDROIT

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

**STEERING AND REVISIONS COMMITTEE
FOR THE CONSIDERATION OF THE PRELIMINARY DRAFT PROTOCOL
TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE
EQUIPMENT ON MATTERS SPECIFIC TO SPACE ASSETS**

(Rome, 1 February 2002)

REPORT

(prepared by the UNIDROIT Secretariat)

Rome, March 2002

I. INTRODUCTION

(a) *Background to the meeting*

1. - At its 80th session, held in Rome from 17 to 19 September 2001, the UNIDROIT Governing Council was seised of the text of a preliminary draft Protocol to the then draft [UNIDROIT] Convention on International Interests in Mobile Equipment (hereinafter referred to as the *draft Convention*) on Matters specific to Space Assets (hereinafter referred to as the *preliminary draft Protocol*) prepared by a Space Working Group organised, at the invitation of the President of UNIDROIT, by Mr Peter D. Nescgos.¹ This text had been communicated by the latter to UNIDROIT on 30 June 2001, pursuant to the decision taken by the Space Working Group at its third session, held in Seal Beach, California on 23 and 24 April 2001, that it was ready to be communicated to UNIDROIT in accordance with the terms of reference given to Mr Nescgos by the President of UNIDROIT.² After due consideration, the Governing Council, whilst authorising the UNIDROIT Secretariat to transmit this text to Governments and to convene a UNIDROIT Committee of governmental experts to prepare, on the basis thereof, a draft Protocol capable of being submitted for adoption to a diplomatic Conference, decided that it should, however, in line with the practice established for previous preliminary draft Protocols to the draft Convention, be first reviewed by a Steering and Revisions Committee, composed *inter alia* of members of the Governing Council.³ The purpose of this review would be, primarily, to ascertain the compatibility of the preliminary draft Protocol, from both the stylistic and the terminological points of view, with the text of the draft Convention as finalised and, where shortcomings of this kind were identified, to refine the text accordingly as well as, subsidiarily, to consider the preliminary draft Protocol in the light of the text of the draft Protocol to the draft Convention on Matters specific to Aircraft Equipment (hereinafter referred to as the *draft Aircraft Protocol*) also as finalised as well as the provisional conclusions to be drawn from the work of the *ad hoc* consultative mechanism of the United Nations Committee on the Peaceful Uses of Outer Space (U.N./COPUOS) set up at the 44th session of that body, held in Vienna from 6 to 15 June 2001 (hereinafter referred to as the *Consultative mechanism*), for the purpose of reviewing the draft Convention and the preliminary draft Protocol, in particular in relation to existing international space law.⁴

2. - The Space Working Group met in fifth session in Rome on 30 and 31 January 2002, essentially for the purpose of revising the preliminary draft Protocol in such a way as to reflect the changes made to the texts of 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*) 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*).⁵ It was the text of the preliminary draft Protocol as revised by a restricted drafting group of the Space Working Group in the light of the amendments agreed at the fifth session of the Space Working Group that was forwarded for consideration to the Steering and Revisions Committee.⁶

¹ Cf. Study LXXIIJ-Doc.6.

² Cf. Study LXXIIJ-Doc. 5, § 45.

³ Cf. C.D. (80) 20, 2-3.

⁴ *Idem*, 3.

⁵ Cf. Study LXXIIJ-Doc. 11.

⁶ *Idem*, § 34.

(b) Opening of the meeting and election of the Chairman

3. - The Steering and Revisions Committee met at the seat of UNIDROIT in Rome on 1 February 2002. The meeting was opened at 10.15 a.m. by Mr Herbert Kronke, Secretary-General of UNIDROIT. *Mr Kronke* referred to the invaluable preparation for the meeting that had been done by the Space Working Group in the course of its fifth session and stressed the importance of the meeting in the context of preparing the preliminary draft Protocol for transmission to Governments. Upon a proposal from Sir Roy Goode, Q.C., seconded by Mr Jacques Putzeys, Mr Jorge Sánchez Cordero Dávila, the Mexican member of the Governing Council, was elected Chairman.

4. - The meeting was attended by the following representatives of UNIDROIT, the United Nations Office for Outer Space Affairs and the Space Working Group:

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Sir Roy GOODE, Q.C., Emeritus Professor of Law and Fellow of St John's College, University of Oxford; *member of the Governing Council*

Ms Sama PAYMAN, Office of International Law, Attorney-General's Department, Canberra, *representing Mr Anthony S. BLUNN, member of the Governing Council*

Mr Jacques PUTZEYS, Emeritus Professor of Law, Catholic University of Louvain; *member of the Governing Council*

Mr Jorge SANCHEZ CORDERO DAVILA, Notary Public; Director, Uniform Law Centre, Institute of Legal Research, National Autonomous University of Mexico; *member of the Governing Council*

United Nations Office for Outer Space Affairs

Mr P. Ruari McDOUGALL, *Legal Affairs Officer*

Space Working Group

Mr Peter D. NESGOS, Partner, Milbank, Tweed, Hadley & McCloy LLP., New York; *Co-ordinator*

Mr Dara A. PANAHY, Associate, Milbank, Tweed, Hadley & McCloy LLP., Washington, D.C.; *Assistant to the Co-ordinator*

(c) Materials before the Committee

5. - The Steering and Revisions Committee was seised of the following materials:

(1) Draft agenda (Study LXXIIJ-S.R.C. 3 Agenda) (English only);

(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 and as further amended pursuant to the discussions at its fifth session, held in Rome on 30 and 31 January 2002 (Study LXXIIJ – Doc. 9);

(4) Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (DCME Doc No. 75).

(d) Approval of the draft agenda

6. - The Steering and Revisions Committee approved the draft agenda, which is reproduced as an Appendix to this report.

II. DECISIONS TAKEN BY THE COMMITTEE REGARDING THE PRELIMINARY DRAFT PROTOCOL (Study LXXII - Doc. 9)

(a) Introductory remarks

7. - *The Chairman* noted that there was agreement that the most efficacious manner of disposing of the Steering and Revisions Committee's brief would consist in proceeding to an Article-by-Article examination of the preliminary draft Protocol in relation to the relevant provisions of the Convention and, where appropriate, in relation to the corresponding provisions of the Aircraft Protocol and having regard to the provisional conclusions reached by the Consultative mechanism.

8. - On behalf of the Space Working Group, *Mr Panahy* illustrated the amendments that had been made to the preliminary draft Protocol at its fifth session with a view to reflecting those changes that had been made to the Convention at the diplomatic Conference and, where appropriate, taking account of those changes made there to the Aircraft Protocol. He laid particular stress on the creation of a new Article XVI, to which the provisions previously located in Article IX(4) had been moved, and the deletion of the phrase "and to the extent stated in such declaration" featuring at the end of Articles VIII(1), IX(1), X(1) and XII(1) and the corresponding placing in square brackets of the words "wholly or in part" in Article XXVII(2) and (3) in the interests of the promotion of uniformity in the application of declarations.

9. - On behalf of the United Nations Office for Outer Space Affairs, *Mr McDougall* indicated that the only area of the preliminary draft Protocol where the work of the Consultative mechanism had revealed the possible need for amendment concerned that of the relationship between the preliminary draft Protocol and existing international space law, an area which called for clarification, at least in the preamble, in the view of the Consultative mechanism. He further indicated the special interest of his Organisation in all those provisions relating to the role of the Supervisory Authority, a role which it was contemplated that the United Nations might play.

(b) Article-by-Article examination of the preliminary draft Protocol

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

10. - The Steering and Revisions Committee noted that the concept of “associated rights” envisaged under Article I(2)(a) of the preliminary draft Protocol differed entirely from that reflected in the definition of the same term provided in the Convention and it was suggested that consideration should accordingly be given to referring to the concept contemplated by the preliminary draft Protocol by a different term, such as “debtor rights,” so as adequately to distinguish this concept from that employed in the Convention,⁷ and to introducing in the preliminary draft Protocol a provision specifying that the assignment of an international interest in space assets carried with it not only associated rights but also such debtor rights.

11. - In support of referring to the rights referred to under Article I(2)(a) by a quite different term, such as “debtor rights,” the French-speaking member of the Steering and Revisions Committee in particular noted that the adjective “accessoires” qualifying the term “droits” in the French text of Article I(2)(a) was in any case not the right word to use in that context, carrying as it did a different meaning from the corresponding adjective “associated” employed in the English text. He further noted that the rights referred to under this subparagraph were not by nature “accessory” to the principal obligation, that is those rights arising under the agreement creating or providing for the international interest, but rather rights that were “associés,” “dérivés” or “annexés.”

12. - For reasons of time, it was however agreed to leave this matter to be resolved by governmental experts and thus for the time being for it simply to be signalled by a footnote to be appended to Article I(2)(a). It was noted that it would in due course be necessary, once the matter had been so resolved, to consider corresponding changes to the term “associated rights” in those other places where it appeared in the preliminary draft Protocol, for example Article XVI.

(ii) Re Article IV

13. - The Steering and Revisions Committee replaced the erroneous cross-reference in Article IV to Article IX(2)-(7) by one to Article IX(2)-(3).

(iii) Re Article V

14. - The Steering and Revisions Committee made four small drafting refinements to Article V, consisting in putting the word “assets” in Article V(1)(b) and (c) and (2) into the singular and the consequential addition of the pronoun “a” before the noun “asset” in Article V(1)(b).

(iv) Re Article VI

15. - The Steering and Revisions Committee made an analogous drafting refinement to Article VI, placing the word “assets” in the singular and adding the pronoun “a” before the word “asset”.

⁷ Cf. also Study LXXIIJ-Doc. 11, § 16.

(v) Re Article VII

16. - The Steering and Revisions Committee made two minor drafting amendments to Article VII, one of which involved moving the content of the former paragraph (iv) to new paragraph (v) and the other the placing of the word “components” at the beginning of the former paragraph (v) (new paragraph (iv)) in the singular in order to bring it into line with the same word as employed elsewhere in that paragraph.

17. - While maintaining the concept of a “general” description in paragraph (iii), the Steering and Revisions Committee deleted the same word “general” in the former paragraph (v) (new paragraph (iv)) as not being an adequate qualification of the description required for separately identifiable components: whereas a general description of a space asset might suffice for the purposes of the Convention as applied to such assets, the same would not be true for components, which would need to be described much more precisely.

18. - Reflecting the view expressed by the Space Working Group at its fifth session,⁸ the Steering and Revisions Committee agreed that it would be appropriate to provide for the possibility of the specific identification criteria enumerated under Article VII being filled out by any additional criteria that might be specified in the regulations to be laid down by the Supervisory Authority of the future international registration system under Article XVIII.

19. - The Steering and Revisions Committee also agreed that it should be made clear that the information to be provided in respect of those separately identifiable components referred to in the former paragraph (v) (new paragraph (iv)) also included each of the additional elements required separately for a space asset under the other paragraphs of Article VII.

(vi) Re Article IX(1)

20. - In Article IX(1) the Steering and Revisions Committee decided to reintroduce in square brackets the phrase “and to the extent stated in such declaration” the deletion of which the Space Working Group had decided upon at its fifth session.⁹ It took the view that this was necessary in view of the decision to maintain the words “wholly or in part” in square brackets in Article XXVII(2).

(vii) Re Article IX(2)

21. - In respect of the placing into escrow of the access and command codes required to access, command, control and operate a space asset contemplated by Article IX(2), the Steering and Revisions Committee took the view that, in so far as it was provided that these might be placed into escrow with the International Registry, this was a matter that should first be regulated in the regulations dealing with the operation of the International Registry and that the proper place of Article IX(2) should accordingly be in a new paragraph 4 of Article XVII, dealing with the Supervisory Authority, responsible as the latter would be for the promulgation of the regulations, under Article 17(2)(d) of the Convention. It was noted that this would clearly be without prejudice to the possibility of the creditor and the debtor *agreeing* at the time of the creation of the international interest or any time thereafter to place such codes into escrow with an escrow agent other than the International Registry as provided for under Article IX(2).

⁸ Cf. Study LXXIIJ-Doc. 11, § 20 ; cf. also Study LXXIIJ-Doc. 9, footnote 6 to Article VII.

⁹ Cf. Study LXXIIJ-Doc. 11, § 22.

(vii) Re Article IX(3) and (4)

22. - The Steering and Revisions Committee agreed that Article IX(3) and (4) should be deleted, as being entirely concerned with matters to be settled by the creditor and the debtor in their contract.

(viii) Re Article X(1)

23. - In Article X(1) the Steering and Revisions Committee decided to reintroduce in square brackets the phrase “and to the extent stated in such declaration” the deletion of which the Space Working Group had decided upon at its fifth session, for the same reason as in Article IX(1).¹⁰

(ix) Re Article X(6)

24. - The Steering and Revisions Committee made two minor drafting amendments to Article X(6), consisting, first, in the deletion of the words “as applicable” in sub-paragraph (a) and, secondly, in the replacement of the words “applicable authorities” in sub-paragraph (b) by the words “administrative authorities referred to in the preceding sub-paragraph,” this last amendment being designed to bring the language of the two sub-paragraphs into line with one another.

(x) Re Article XI

25. - In Article XI(8)(a) (Alternative A) the Steering and Revisions Committee deleted the reference to the words “registry authority and the,” which were not appropriate in the context of the preliminary draft Protocol. In the light of this amendment, the Steering and Revisions Committee replaced the words “applicable authorities” by the words “administrative authorities referred to in the preceding sub-paragraph” in Article XI(8)(b) (Alternative A).

26. - In Article XI(2) (Alternative B) the Steering and Revisions Committee replaced the term “State Party” by the term “Contracting State” in order to complete the task of bringing the terminology of the preliminary draft Protocol into line with the 1969 Vienna Convention on the Law of Treaties (hereinafter referred to as the *Vienna Convention*).

(xi) Re Article XIII

27. - In addition to correcting a spelling mistake in paragraph 2, involving the replacement of the word “interests” by “interest,” and making three minor drafting amendments to Article XIII, consisting in placing the word “assets” in paragraphs 1 and 2 into the singular and replacing the term “registered contract of sale” in paragraph 1 by the term “registered sale,” thus bringing this provision into line with the corresponding provision (Article XIV(1)) of the Aircraft Protocol, the Steering and Revisions Committee agreed upon the deletion of paragraph 3, modelled upon the corresponding provision of the draft Aircraft Protocol (Article XIV(2)), as serving no useful purpose in the context of the preliminary draft Protocol.

(xii) Re Article XV(1)

28. - The Steering and Revisions Committee made a number of amendments to Article XV(1), consisting in the addition of the words “in the capacity of buyer” after the conjunction

¹⁰ Cf. § 20, *supra*.

“or” in sub-paragraph (a), the replacement of the words “and Article XIII” by “or, in the capacity of buyer, Article XIII(2)” in sub-paragraph (b) and the addition of references to the appropriate sub-paragraphs in the cross-references to Article 29(4) in both sub-paragraphs, designed to take account of the corrections to the corresponding provisions of the Aircraft Protocol under consideration at the time as part of the verification procedure in respect of that text that had been decided upon by the diplomatic Conference.¹¹

(xiii) Re Article XVI(2)

29. - In Article XVI(2) the Steering and Revisions Committee again replaced the term “State Party” by the term “Contracting State” in order to bring the terminology of the preliminary draft Protocol into line with that of the Vienna Convention. It further added the words “in accordance with its laws” for the purposes of clarification. It also deleted the words “to persons of States other than the State Party” as being a pleonasm.

(xiv) Re Article XVII

30. - In Article XVII the Steering and Revisions Committee introduced a new paragraph 4, in line with the decision taken in respect of Article IX(2).¹²

(xv) Re Article XIX

31. - The Steering and Revisions Committee agreed upon the deletion of Article XIX, as being modelled on the corresponding provisions of the Aircraft Protocol (Article XIX) and not appropriate to the current situation of space assets.

32. - In this connection, *Mr McDougall* however noted that consideration would need to be given in due course to the question of the relationship between the proposed new International Registry and the existing international registry of space objects provided for under the 1975 United Nations Convention on Registration of Objects Launched into Outer Space.

(xvi) Re Article XX

33. - The Steering and Revisions Committee agreed that it was possible to delete the greater part of Article XX(1), in that it reiterated what was already spelled out in Article VII, by simply providing that the search criteria for space assets were those specified in that Article.

34. - The Steering and Revisions Committee further agreed as to the deletion of the second sentence of Article XX(4), as a consequence of the deletion of Article XIX.

(xvii) Re Article XXII

35. - Convinced that there could be no overlap - and therefore no potential conflict - between the preliminary draft Protocol and the United Nations Convention on Contracts for the International Sale of Goods, the Steering and Revisions Committee agreed upon the deletion of the reference to that Convention in Article XXII.

¹¹ Cf. Authentic text clause of the Aircraft Protocol.

¹² Cf. § 21, *supra*.

(xviii) Re Article XXV(1)

36. - While noting that the Space Working Group had indicated by the amendment it had made to Article XXIV(1) at its fifth session¹³ its feeling that the Convention as applied to space assets should enter into force as soon as possible and therefore upon the deposit of the fifth instrument of ratification or accession - as opposed to the fifth/eighth such instrument, as it had hitherto proposed¹⁴ - the Steering and Revisions Committee nevertheless recognised that this, as indeed the entirety of Chapter VI, raised *par excellence* matters that were the prerogative of the plenipotentiaries gathered at the future diplomatic Conference to be convened for the adoption of the future draft Protocol on Matters specific to Space Assets and it was accordingly agreed that, in addition to the square brackets that were placed around the whole of Chapter VI, the adjective “fifth” should be placed in further square brackets.

(xix) Re Article XXVI(5)(c)

37. - The Steering and Revisions Committee, noting that Article XXVI had been modelled directly on Article XXIX of the Aircraft Protocol, recognised however that the second half of sub-paragraph 5(c) (“and any reference to the national registry ... to which the Convention and this Protocol apply”) was inappropriate for space assets and accordingly agreed upon its deletion.

(xx) Re Article XXVII(1)

38. - The Steering and Revisions Committee made a number of minor drafting amendments to Article XXVII(1) designed to improve their readability.

(xxi) Re Article XXVIII

39. - In addition to some minor drafting amendments made to Article XXVIII(1), the Steering and Revisions Committee took the view that the second paragraph of this Article, that had been introduced by the Space Working Group at its fifth session,¹⁵ was superfluous in view of Article 6 of the Convention and accordingly decided that it should be deleted.

(xxii) Re Article XXIX(1)

40. - The Steering and Revisions Committee, in addition to correcting an evident error in Article XXIX(1) by deleting the reference therein to Article XXXII, which concerned denunciations, decided that the reference therein to Article XXXI, concerning the withdrawal of declarations, should also be deleted, on the ground that the withdrawal of a declaration could not in itself constitute a “declaration.”¹⁶

(xxiii) Re Article XXXI

41. - The Steering and Revisions Committee decided to introduce a new paragraph 2 in Article XXXI, modelled directly on Article XXX(3), in order to take account of the corrections to the corresponding provisions of the Aircraft Protocol under consideration at the time as part of

¹³ Cf. Study LXXIIJ-Doc. 11, § 30.

¹⁴ Cf. Study LXXIIJ-Doc. 7, *sub* Article XXIV(1).

¹⁵ Cf. Study LXXIIJ-Doc. 11, § 32.

¹⁶ Cf. however Article XXXII of the Aircraft Protocol, which treats the withdrawals of a declaration as a declaration for the purposes of that Article.

the verification procedure in respect of that text that had been decided upon by the diplomatic Conference.

(xxiv) Re Article XXXII(3)

42. - The Steering and Revisions Committee made the same change to Article XXXII(3) in respect of the adjective “fifth” that it had made to Article XXV(1).¹⁷

III. THE WAY FORWARD

43. - The Steering and Revisions Committee 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 upon during its meeting. It was agreed that, once this task of revision had been completed, the UNIDROIT Secretariat should be free to transmit the resulting text to Governments with a view to the convening of a UNIDROIT Committee of governmental experts as soon as practically possible.

44. - It was however recognised that, once the verification procedures in respect of the Convention and the Aircraft Protocol, still underway at the time of the meeting and some of the preliminary results of which had been able to be reflected in the amendments agreed upon by the Steering and Revisions Committee,¹⁸ had been completed, it would be necessary for the UNIDROIT Secretariat to give careful consideration to the impact that the definitive results of these verification procedures were likely to have on other provisions of the preliminary draft Protocol and to make corresponding amendments to the text of the preliminary draft Protocol.

¹⁷ Cf. § 36, *supra*.

¹⁸ Cf. §§ 28 and 41, *supra*.

DRAFT AGENDA

1. – Election of the Chairman.
2. – Approval of the draft agenda.
3. – Consideration of the text of the preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (hereinafter referred to as the *preliminary draft Protocol*), prepared by the Space Working Group (Study LXXIIJ – Doc. 7) in the light of:
 - (a) the Convention on International Interests in Mobile Equipment opened to signature in Cape Town on 16 November 2001 (hereinafter referred to as the *Convention*);
 - (b) the Protocol thereto on Matters specific to Aircraft Equipment opened to signature in Cape Town on 16 November 2001;
 - (c) the results of the *ad hoc* consultative mechanism set up by the United Nations Committee on the Peaceful Uses of Outer Space at its 44th session, held in Vienna from 6 to 15 June 2001, to consider the Convention and the preliminary draft Protocol.
4. – Any other business.