

UNIDROIT 2001
Study LXXIIJ – Doc. 5
(Original: English)

UNIDROIT
INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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SPACE WORKING GROUP
(Seal Beach, California, 23/24 April 2001):

REPORT

(prepared by the UNIDROIT Secretariat)

Rome, June 2001

I. INTRODUCTION

(a) Background to the session

1. - As planned at the session of the Space Working Group held in Rome on 19 and 20 October 2000 (cf. Study LXXIIJ – Doc. 2, § 21), the Space Working Group met, at the kind invitation of The Boeing Company, in Seal Beach, California on 23 and 24 April 2001. The main business of the Space Working Group on this occasion was to consider the new working draft 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*) prepared by Mr Peter D. Nsgos, co-ordinator of the Space Working Group, with the assistance of Mr Dara A. Panahy (cf. Study LXXIIJ – Doc. 4). This new working draft had been prepared with a view to implementing the amendments agreed at the previous session of the Space Working Group. In considering this new working draft it was intended that the Space Working Group should indicate such further amendments as they felt to be necessary before it might be considered ready to be submitted by Mr Nsgos to UNIDROIT in execution of the mandate conferred upon him by the President of UNIDROIT in August 1997.

2. - Additional matters on the table were, first, consideration of a progress report on the work of the Sub-committee of the Space Working Group that had been set up, pursuant to the decision taken at the previous session of that body, to consider further the relationship between the preliminary draft Protocol and existing international space law and, secondly, the outcome of the consideration of the draft Convention and the preliminary draft Protocol by the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) at its 40th session held in Vienna from 2 to 12 April 2001.

(b) Opening of the session

3. - The session of the Space Working Group was opened by Mr Nsgos at the Space & Communications Headquarters of The Boeing Company in Seal Beach, California at 9.30 a.m. on 23 April 2001. Mr Nsgos took the chair. Mr Robert W. Gordon, Vice President, Space & Defence, Boeing Capital Corporation, was elected Co-chairman. Both Mr Nsgos and Mr Martin J. Stanford, on behalf of the Secretary-General of UNIDROIT, expressed their gratitude to the Boeing Capital Corporation, and to Mr Gordon in particular, for generously offering to host the session.

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

Expert designated by intergovernmental Organisation

Mr Martin J. STANFORD

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

Experts designated by international non-governmental Organisations

Mr Peter D. NESGOS

Partner, Milbank, Tweed, Hadley & McCloy LLP.,
New York / Co-ordinator, Space Working Group

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

Mr Jeffrey WOOL Partner, Perkins Coie, *Washington, D.C.* / *Group Secretary and General Counsel, Aviation Working Group*

Representatives of international commercial aerospace and financial communities and others

Mr Robert H. BRANDOW Director, Space & Defence, Boeing Capital Corporation, *Long Beach, California*

Mr Franco BREGOLI Deputy Divisional Director, Assicurazioni Generali S.p.A. (U.K. Branch), *London*

Mr Bénédicct FOEX Professor of Law, University of Geneva, *Geneva*

Mr Robert W. GORDON Vice President, Space & Defence, Boeing Capital Corporation, *Renton, Washington*

Mr Paul B. LARSEN Adjunct Professor, Georgetown University Law Centre, *Washington, D.C.*

Mr Scott H. SIEGEL Vice President, General Counsel and Secretary, Lockheed Martin Finance Corporation, *Burbank, California*

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., W.P. 1);
- (2) Draft [UNIDROIT] Convention on International Interests in Mobile Equipment (DCME Doc No. 3);
- (3) 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 March 2001 for discussion within the Space Working Group by Peter D. Nesgos, Esq., co-ordinator of the Working Group, with the assistance of Dara A. Panahy, Esq. (Study LXXIIJ – Doc. 4);

(4) Draft convention of the International Institute for the Unification of Private Law on international interests in mobile equipment and the preliminary draft protocol thereto on matters specific to space property: report of the Secretariat of the United Nations Office for Outer Space Affairs and the Secretariat of the International Institute for the Unification of Private Law (A/AC.105/C.2/L.225);

(5) Consideration of the draft convention of the International Institute for the Unification of Private Law (UNIDROIT) on international interests in mobile equipment and the preliminary draft protocol thereto on matters specific to space property: Comments on the report of the Secretariat and the Secretariat of the International Institute for the Unification of Private Law (A/AC.105/C.2/L.225) submitted by delegations of the member and co-operating States of the European Space Agency that are members of the Committee on the Peaceful Uses of Outer Space (A/AC.105/C.2/L.229);

(6) Consideration of the draft convention of the International Institute for the Unification of Private Law (UNIDROIT) on international interests in mobile equipment and the preliminary draft protocol thereto on matters specific to space property: Comments on the report of the Secretariat and the Secretariat of the International Institute for the Unification of Private Law (A/AC.105/C.2/L.225) submitted by the Chinese Delegation (A/AC.105/C.2/2001/CRP.11);

(7) Consideration of the draft convention of the International Institute for the Unification of Private Law (UNIDROIT) on international interests in mobile equipment and the preliminary draft protocol thereto on matters specific to space property: Statement on the report of the Secretariat and the Secretariat of the International Institute for the Unification of Private Law (A/AC.105/C.2/L.225) made by the representative of the Russian Federation (in Russian only);

(8) UNIDROIT Space Protocol: Comments on the relationship between the Protocol and existing international space law by Paul B. Larsen, Esq., Georgetown University Law Centre, *qua* Chairman of the Sub-committee of the Space Working Group to consider the relationship between the preliminary draft Protocol and existing international space law;

(9) Memorandum on the application of the preliminary draft Space Property Protocol to a space-based communication project submitted by Scott H. Siegel, Esq.

II. OUTCOME OF THE LEGAL SUBCOMMITTEE OF COPUOS' CONSIDERATION OF THE DRAFT CONVENTION AND THE PRELIMINARY DRAFT PROTOCOL

7. - The Space Working Group heard a report from Mr Stanford on the discussions concerning the draft Convention and the preliminary draft Protocol, in particular the relationship between these and existing international space law and a possible role for the United Nations as Supervisory Authority of the international registration system that would underpin the future Space Property Protocol, that had taken place during the aforementioned 40th session of the Legal Subcommittee of COPUOS. He noted that the Legal Subcommittee had agreed to the setting up of an *ad hoc* informal consultative mechanism, under its auspices, to continue the review of the two instruments that had been commenced at that session. It was planned that there would be informal consultations during the 44th session of COPUOS, to be held in Vienna from 6 to 15 June 2001, with a view to advancing the work of this mechanism. It was anticipated that the mechanism might meet once or twice in the interval preceding the following session of

the Legal Subcommittee. The French Government had expressed its willingness to host one such meeting, in Paris in the first half of September 2001 and the making of arrangements for such a meeting was likely to be among the items to be the subject of informal consultations at the 44th session of COPUOS. The Secretariats of both UNIDROIT and the Office for Outer Space Affairs would be actively involved in such intersessional consultations. It was agreed that other relevant specialised international Organisations, such as the European Space Agency and the International Telecommunication Union, should also be invited to take part therein. While there was recognition of the vital role to be played in this process by experts from the international commercial aerospace and financial communities, certain members of the Legal Subcommittee had expressed reservations concerning the direct involvement of such circles in its work. It was accordingly agreed that representatives of the Space Working Group could be included among the representatives of UNIDROIT. The Legal Subcommittee had agreed that consideration of the draft Convention and the preliminary draft Protocol should stay on its agenda for its 41st session, to be held in Vienna in April 2002. The mechanism was to report back to the Legal Subcommittee at that session. Mr Stanford suggested that the fact that the Legal Subcommittee had taken the exceptional step of envisaging intersessional work on this subject should be seen as evidence of the importance that that body attributed to UNIDROIT's work in this field and, with the imminent submission of the preliminary draft Protocol to the UNIDROIT Governing Council with a view to its subsequent transmission to Governments, its recognition of the consequential desirability of its views being conveyed to UNIDROIT in good time.

8. - The Space Working Group noted the desirability of its treading with care in relation to the deliberations underway within the Legal Subcommittee and in particular of its showing sensitivity to COPUOS' role with regard to that body of international space law of a public international law character that had been developed by it. It was important that it not lose sight in this context of its belief that the United Nations was in principle the most appropriate body to exercise the functions of Supervisory Authority in respect of the international registration system for space property under the future Space Property Protocol. It was at the same time conscious of the need to maintain momentum and for UNIDROIT to maintain control of the process. The Space Working Group accordingly welcomed the decision by the Legal Subcommittee to set up the informal consultative mechanism, while noting the importance that appropriate input from finance experts in the work of the latter would have for the establishment of the right balance in its findings as between existing international space law and commercial financing law. There was however also at the same time recognition that UNIDROIT had a key role to play in ensuring that sight was not lost of the fundamental commercial imperatives that had to be met for the project to be a success. The Space Working Group suggested the importance in this context of attention at all times being focussed on the special character of the instrument under preparation, that is as an instrument concerned with commercial financing. The role of asset-based financing not being nearly as well developed in space finance practice as it was in aviation finance practice, it was suggested that consideration should be given to the organisation of educational initiatives, aimed at Government officials, explaining the commercial benefits likely to be reaped under the future Protocol.

III. CONSIDERATION OF THE WORK ACHIEVED BY THE SUB-COMMITTEE SET UP TO CONSIDER THE RELATIONSHIP BETWEEN THE DRAFT CONVENTION/PRELIMINARY DRAFT PROTOCOL AND EXISTING INTERNATIONAL SPACE LAW

9. - The Space Working Group considered the comments on the relationship between the draft Convention/preliminary draft Protocol and existing international space law prepared by Mr Larsen *qua* Chairman of the Sub-committee that had been set up pursuant to the decision

taken by the Space Working Group at its previous session (cf. Study LXXIII- Doc. 2, § 15). Whilst all those involved in the work of the Space Working Group were eligible for membership of the Sub-committee, those who had actually responded to the invitation to take part in its work were as follows: Ms Elda Garrouste (C.N.E.S.), Mr Michael Gerhard (German Aerospace Centre), Mr Gabriel Lafferranderie (European Space Agency/European Centre for Space Law), Mr P. Ruari McDougall (United Nations Office for Outer Space Affairs), Mr Alfons A. E. Noll (Baker & McKenzie, Geneva), Ms Susanne Reif (Institute of Air and Space Law of the University of Cologne), Mr Olivier M. Ribbelink (T. M. C. Asser Institute) and Mr H. Peter van Fenema (Institute of Air and Space Law, McGill University, Montreal/Jonker c. s. Advocaten, Amsterdam).

10. - Mr Larsen's comments dealt with the definition of "space property" employed in the preliminary draft Protocol, the international registration system for space property contemplated by the draft Convention as implemented by the preliminary draft Protocol, the implications for the latter of the 1972 Convention on International Liability for Damage Caused by Space Objects (hereinafter referred to as the *Liability Convention*), the obligations incumbent on a creditor *qua* operator of a space object under the 1967 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*), the concept of jurisdiction in the draft Convention as implemented by the preliminary draft Protocol, the impact on a creditor's right to possession or control of the space property of the 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects launched into Outer Space (hereinafter referred to as the *Rescue Agreement*) and the incidence that the Convention of the International Telecommunication Union might be expected to have on a creditor's exercise of his rights and remedies in respect of space property. In introducing these comments Mr Larsen acknowledged helpful suggestions proffered by Mr Gerhard and Mr Stanford in respect of a first draft. He indicated that he had concluded from his examination of the relationship between the preliminary draft Protocol and existing international space law that there was no conflict between the two. In addition his examination had shown that there was a potential role under the proposed new international regimen for COPUOS to exercise the functions of Supervisory Authority in respect of the international registration system contemplated by the draft Convention as implemented by the preliminary draft Protocol.

11. - The Space Working Group's consideration of Mr Larsen's comments revealed a number of areas capable of refinement. In particular, it was agreed that they should be amended so as to make it clear that:

(a) the Space Working Group saw no conflicts arising between the draft Convention/preliminary draft Protocol and existing international space law;

(b) the preliminary draft Protocol was concerned solely with that area of private law relating to asset-based debt financing;

(c) the preliminary draft Protocol did not seek to regulate ownership;

(d) under the Outer Space Treaty the question of ownership of space property launched into outer space was reserved to States;

(e) the definition of "space property" employed in the preliminary draft Protocol was limited to those situations falling within the sphere of application of the draft Convention as implemented by the preliminary draft Protocol;

(f) the distinct ambits of the preliminary draft Protocol (private law) and the 1975 Convention on Registration of Objects Launched into Outer Space (public law) meant that it did not matter that the two instruments employed different terminology ("space property" and "space objects" respectively) to describe the categories of equipment that they covered;

(g) the manufacturer's serial number was just one of a number of potential search criteria for space property in connection with the future International Registry for space property;

(h) the problem arising out of the interaction of the preliminary draft Protocol with the Liability Convention cited in the Report for the 40th session of the Legal Subcommittee prepared by the UNIDROIT Secretariat and the United Nations Office for Outer Space Affairs (*op. cit.*, § 37) was not peculiar to the preliminary draft Protocol but could arise whenever possession and control of space property was transferred to a person who was not a national of the launching State;

(i) the Outer Space Treaty was not intended to cover the question of the jurisdiction of national courts;

(j) the courts of the place in which the Registrar had its centre of administration had exclusive jurisdiction to make orders against the Registrar, under Article 43 of the draft Convention;

(k) where possession or control of space property belonged, by virtue of the preliminary draft Protocol, to a creditor in a State other than the State of registry, there would be little incentive for the launching authority to request return of such space property under the Rescue Agreement but, should it do so, the preliminary draft Protocol would permit the return of the space property to the creditor;

(l) the purpose of the Rescue Agreement was not to regulate the basic remedies of a creditor in respect of space property returned to earth;

(m) the priorities established by the Convention of the International Telecommunication Union related to the allocation of radio frequencies and not to the regulation of creditors' rights;

(n) the Convention of the International Telecommunication Union did not directly impede or affect a creditor's exercise of the remedies granted him under the draft Convention /preliminary draft Protocol.

12. - The Space Working Group concluded from its consideration of Mr Larsen's comments that there was nothing in the draft Convention and the preliminary draft Protocol that was inconsistent with existing space law and that the role of Supervisory Authority for the international registration system for space property was one that the United Nations was competent to fill, subject to full reimbursement of all the expenditure that it might incur thereby.

13. - It was noted that the discussions that would be necessary before any decision could be taken for the United Nations to become Supervisory Authority would, however, be complex and lengthy. It was suggested that informal discussions therefore be initiated as soon as possible with certain key players, such as the Under Secretary for Legal Affairs of the United Nations.

14. - It was suggested that alternatives to the United Nations, such as a body made up of Contracting States to the future Space Property Protocol, might also usefully be explored.

15. - It was agreed that Mr Larsen should revise his comments in the light of the deliberations of the Space Working Group and that they would then be submitted by the Space Working Group to the United Nations Office for Outer Space Affairs. It was agreed that the *Basic features of the International Registry contemplated under the draft Convention as implemented by the draft Protocol thereto on Matters specific to Aircraft Equipment* (hereinafter referred to as the *draft Aircraft Protocol*) prepared by the International Registry Task Force should be set out in an appendix thereto. Mr Nesgos expressed his and the Space Working Group's gratitude to Mr Larsen for his signal contribution to the advancement of its work.

IV. CONSIDERATION OF THE NEW WORKING DRAFT OF THE PRELIMINARY DRAFT PROTOCOL (Study LXXIJJ – Doc. 4)

(a) General remarks

16. - The Space Working Group noted the importance of organising an educational campaign to market the preliminary draft Protocol among suppliers of, and lenders against space property (cf. also § 8 *in fine, supra*). It was suggested that half-day seminars should be organised in such places as New York, London and Paris, focussing in particular on banks and insurance companies.

(b) Re preamble

17. - Regarding that clause of the preamble referring to the “principles of international law established by the international space treaties under the auspices of the United Nations,” it was suggested that this ought to be modified to reflect the fact that any overlap between the draft Convention/ preliminary draft Protocol and the United Nations treaties on outer space could only be limited and to recognise the shift from exclusively public funding to more commercial financing of space projects that the draft Convention/ preliminary draft Protocol were designed to facilitate. It was agreed that the words “international law” should be deleted from the clause in question and that a footnote should be added referring to the comments of the Sub-committee in this regard.

(c) Re Article I

18. - It was noted that the *definition of “proceeds”* set forth in *Article I(2)* was an addition to the previous working draft designed to test the feelings of Space Working Group members as to the appropriateness or otherwise of such an extension of the proposed new international regimen in relation to space property. It had been included in line with a suggestion to this effect made by several participants at the meeting of the restricted informal group of experts held in Rome on 18 and 19 October 2000 (cf. Study LXXIJJ-Doc. 4, footnote 2 to Article I(2)). Concern was however expressed as to the advisability of so extending the definition of proceeds to be covered. It was recalled that the effect of covering general proceeds (as opposed to money or non-money proceeds arising from total or partial loss or destruction or total or partial confiscation, condemnation or requisition of the specific object protected by registration in the future International Registry) would be to broaden the ambit of the proposed new international regimen in such a way that it would no longer be possible to limit its scope merely to objects capable of protection by such registration and would involve dealing with perfection requirements and priority rules relevant to receivables financing detached from the underlying equipment as well as cutting across the draft Convention on Assignment of Receivables in International Trade under preparation by the United Nations Commission on International Trade Law (UNCITRAL) (hereinafter referred to as the *draft UNCITRAL Convention*) (cf. Article 1(w)

of the draft Convention and *Draft [UNIDROIT][UNIDROIT] Convention on International Interests in Mobile Equipment and draft Protocol thereto on matters specific to Aircraft Equipment: Explanatory Report and Commentary* (DCME-IP/2, p. 20, *sub comment 14*). For all these reasons it was agreed that the concept of proceeds to apply to space property should remain that enunciated in Article 1(w) of the draft Convention and that there should not be a special rule in this regard in the preliminary draft Protocol.

19. - It was agreed that, with a view to the amelioration of the presentation of the definition of “space property” as set forth in Article I(2), the various ingredients of this definition should be rearranged as separate items in much the same way as the different ingredients of the definition of “aircraft engines” were set out in the draft Aircraft Protocol (cf. Article I(2)(b) of that draft). It was indicated that this would have the advantage of better distinguishing tangible from intangible space property. In the same way, it was agreed that “separately identifiable components forming a part of space property” should be listed as a separate item. It was further agreed that the associated intangible rights listed as the fourth element of the definition of “space property” should be moved into a separate definition of “associated rights”. It was suggested that one element was missing from the definition of “associated rights” featuring in Article 1(c) of the draft Convention, namely that of rights to payment or other performance *due to* a debtor by a third party. It was agreed that it should be brought out in the footnote to the definition of “space property” that this term included State-owned property intended to be financed privately, whether wholly or in part.

20. - Reference was made to the concern expressed during the 40th session of the Legal Subcommittee by delegations of the member and co-operating States of the European Space Agency concerning the employment of the term “space property” as opposed to the term “space object” used in the United Nations treaties on outer space (cf. A/AC.105/C.2/L.229, § 5(a)). The Space Working Group took the view that the term that was appropriate in an international instrument concerned with private commercial space financing was quite different from the term appropriate in an international instrument concerned with public international space law. It took the view that the term “space property” was accordingly the appropriate term for the preliminary draft Protocol and suggested that this point might usefully be pointed up in a footnote to the relevant part of Article I(2) of the preliminary draft Protocol. It did however agree that the term “bien spatial” employed as the equivalent term in the French-language version was not particularly felicitous and that it might usefully be replaced by the term “matériels d'équipement spatial”.

21. - Attention was drawn to the fact that the term “applicable law” as employed in *sub-paragraph (iv) of the definition of space property* was not being used in the same sense as it was used in Article 5(2) and (3) of the draft Convention. Given that the latter and the preliminary draft Protocol were intended to be capable of being read and interpreted as a single instrument (cf. Article II(2) of the preliminary draft Protocol), it was agreed that this was a matter requiring rectification.

(d) Re Article III

22. - It was agreed that footnote 4 to Article III should be deleted.

(e) Re Article VII

23. - The Space Working Group considered the description of space property that would be necessary as search criteria for debtors pursuant to its decision to envisage registration

against the name of the debtor under the future international registration system for space property. In particular, it considered whether any additional information should be required, for instance in respect of components of space property. When registering components it was suggested that it should be necessary also to provide an adequate description of the primary form of space property of which the component was a part. It was further suggested that for those items of space property that were launched or susceptible to launching the date of launch might also usefully be required.

(f) Re Article IX(2)

24. - It was noted that the new *Article IX(2)* had been drafted in accordance with the proposal made at the aforementioned meeting of the restricted informal group of experts in order to deal with the problem of the access and command codes necessary for the creditor to be able to exercise his default remedies under the draft Convention in the special context of space property (cf. Study LXXIII-Doc. 1, § 24). Its effect was to *permit* the creditor and debtor at the time of the creation of an international interest to place these codes into escrow with the future International Registry for space property. It was emphasised that both parties had first to agree to the appropriateness of such an escrow arrangement and that it should not therefore be seen as something arising as of right.

25. - Concern was expressed that the effect of the new provision might be to make the running of the future International Registry more costly. It was explained that the issue should be seen less as one of cost and more one of responsibility and that in fact any third party could act as escrow agent for this purpose. It was however also recalled that it was important that the Registrar not be seen as exercising quasi-judicial functions and it was as a result agreed that a better solution would, on an analogy with the *form of irrevocable de-registration and export request authorisation* provided for under Article XIII(1) of the draft Aircraft Protocol, consist in providing under the preliminary draft Protocol for a *form of release of escrow*. It was agreed that the purpose of such escrow arrangements should be brought out in a footnote to Article IX(2). It should be indicated that this purpose was, through a consensual and relatively mechanical process, to permit the expeditious and predictable exercise of remedies whilst, at the same time, avoiding any cause for the Registrar to act in a quasi-judicial function.

26. - It was suggested that, as with Article XIII(1) of the draft Aircraft Protocol, such a provision might usefully be made optional for future Contracting States (cf. Article XXVIII(1) of the draft Aircraft Protocol). It was announced in this regard that the Aviation Working Group would be laying before the diplomatic Conference for the adoption of the draft Convention and the draft Aircraft Protocol (hereinafter referred to as the *diplomatic Conference*), that was to be held in Cape Town from 29 October to 16 November 2001, a proposal designed to replace the current opt-in/opt-out declaration system employed in the draft Aircraft Protocol by a single opt-in Annex regimen. It was believed that such a change would make the text of the draft Aircraft Protocol easier to follow and it was suggested that thought might usefully be given to a corresponding change in the preliminary draft Protocol.

27. - Attention was drawn to the interrelationship between Article IX(2) and Article IX(6)(b)(iii) concerning the proposed public order/public safety restriction on the creditor's right to take constructive repossession of space property.

28. - It was agreed that the words "or any other agreed third party" should be added after the words "International Registry" in Article IX(2).

29. - In addition, it was agreed that the words “or at any time thereafter” should be added after the words “at the time of creation of an international interest”.

(g) Re Article IX(3)(b)

30. - Attention was drawn to the need to take account of the interrelationship between *Article IX(3)(b)* providing for the possibility of other special default remedies in respect of space property and Article XII as regards the State in which the creditor would desire to exercise such remedies. It was suggested that it might not however be necessary to provide for any such additional special remedies once the creditor was in fact assured of being able to exercise constructive repossession.

31. - It was agreed that the first five sentences of footnote 7 to Article IX(3)(b) be deleted. In relation to the reference in that footnote to the idea of recourse to binding arbitration being introduced as a means of enforcement, it was suggested that dispute resolution mechanisms should not be seen as substitutes for the provisions of the draft Convention/preliminary draft Protocol.

(h) Re Article IX(6)(b)(iii)

32. - It was noted that the words “or would adversely affect the operation of space property that is used for public safety” had been introduced, in square brackets, in *Article IX(6)(b)(iii)* in order to deal with a point made by one expert at the aforementioned meeting of the restricted informal group of experts (cf. Study LXXIIJ-Doc. 1, § 24).

33. - Concern was however expressed that the effect of such a rule, even as an optional provision, would be seriously to emasculate the effectiveness of the creditor’s remedies under the preliminary draft Protocol and thus to lessen legal certainty. Of equal significance, it was considered that to include such a rule would be seriously to compromise the chances of a State’s nationals gaining access to commercial financing facilities for their use of space property.

34. - It was suggested that thought therefore be given, as an alternative solution, to the working out of a standard delimiting more precisely what was intended. One such solution might be to provide that, in exercising remedies, the creditor should seek to avoid any consequential disruption of satellite services having public safety implications and to this end consult the State concerned, coupled with the introduction of a “waiting period” on the lines of that provided for under Article XI(3) (Alternative A) of the draft Aircraft Protocol. It was however considered that the creation of such a standard could be well nigh impossible, given the difficulty of envisaging all the different possible scenarios. It was pointed out that the corresponding provision in the draft Aircraft Protocol had moreover been deleted some considerable time previously by the UNIDROIT/I.C.A.O. Joint Sessions of governmental experts.

35. - The Space Working Group decided that it would in the circumstances be better to remain silent on this issue, mindful that under Article 5(2) of the draft Convention it would in that case fall to be settled “in conformity with the general principles on which [the draft Convention] is based or, in the absence of such principles, *in conformity with the applicable law*”. It was accordingly agreed to delete Article IX(6)(b)(iii). In the meantime it was agreed that thought should be given to alternative means of permitting a creditor to exercise his remedies under the draft Convention/preliminary draft Protocol - and thereby of ensuring greater access to commercial financing facilities for users of space property – while not disrupting a State’s operation of space property that was used for public safety. Reference was made in this context

to the idea alluded to in footnote 9 to this provision, namely that of requiring such a State to indemnify the creditor within a certain period of time for his resultant financial loss. It was however agreed that the consequences of including in the preliminary draft Protocol a public safety limitation on the creditor's exercise of his remedies, even as an opt-in provision, should be spelled out clearly in a footnote.

(i) Re Article XII

36. - The Space Working Group agreed to delete clauses (ii) and (iii) from *Article XII*, clause (iii) being considered redundant in view of clause (i). It also agreed that the words "to the maximum extent possible" should be reviewed in view of the particular importance attaching to cross-border co-operation in the context of space property and that this should be noted in footnote 12 to Article XII. It further agreed that the first two sentences of said footnote should be deleted and that reference should be added therein to the UNCITRAL Model Law on Cross-Border Insolvency.

(j) Re Article XVIII(1)

37. - It was noted that *Article XVIII(1)* would need to be brought into line with Article VII as amended.

(k) Re Chapter V: new Article XX bis

38. - It was agreed that a new *Article XX bis* should be added to the preliminary draft Protocol making it clear that nothing in the draft Convention/ preliminary draft Protocol was intended to affect any liability under the Liability Convention (cf. § 11(h) *supra*).

39. - It was also agreed that a footnote should be appended to this Article indicating that the concept of "jurisdiction and control" employed in the Outer Space Treaty (cf. Article VIII) was not the same as that of "jurisdiction" employed in the draft Convention, which referred rather to the jurisdiction of national courts (cf. also § 11(i), *supra*), and referring to the comments of the Sub-committee on the relationship between the draft Convention/preliminary draft Protocol and existing international space law as revised.

(l) Re Article XXII

40. - It was suggested that the square brackets around the number of ratifications/accessions necessary for the entry into force of the draft Convention in relation to space property should be removed. It was however explained that this would not be appropriate in a text that had not even been laid before the UNIDROIT Governing Council for authorisation of its onward transmission to Governments, this being a matter that was exclusively the prerogative of Governments, traditionally during the proceedings for adoption of the future draft Protocol. It was nevertheless agreed that a footnote should be appended to this provision, indicating that the Space Working Group took the view that the entry into force of the draft Convention in relation to space property should be accomplished with the minimum number of ratifications/accessions possible, in line with UNIDROIT practice.

(m) Re Article XXIII

41. - It was agreed that the wording of *Article XXIII* should be reviewed in the light of Article 36 of the draft UNCITRAL Convention.¹

(n) Re Article XXIV

42. - It was agreed that the opt-in/opt-out declaration system embodied in *Article XXIV* should be reviewed in the light of the single opt-in Annex regimen that was to be proposed in respect of the draft Aircraft Protocol to the diplomatic Conference by the Aviation Working Group (cf. § 26, *supra*). It was agreed that Mr Wool would to this end send Mr Nesgos an advance copy of this proposal.

(o) Re Article XXVIII(1)

43. - It was agreed to delete the word “five-member” in *Article XXVIII(1)* and to leave the precise number blank for the time being, in square brackets. The idea of the number of members to man the envisaged Review Board had been borrowed from the draft Aircraft Protocol. It was recognised that this was a matter that would require further thought at the appropriate moment.

V. ORGANISATION OF FUTURE WORK

(a) Relationship of the draft Convention/preliminary draft Protocol with the draft UNCITRAL Convention

44. - The Space Working Group noted that the UNIDROIT Secretariat had in March 2001 submitted comments on the draft UNCITRAL Convention to the Secretary of UNCITRAL with a view to the finalisation of that draft Convention at the 34th session of UNCITRAL, to be held in Vienna from 25 June to 13 July 2001. In these comments the Secretariat had, following consultations with Mr Nesgos, on behalf of the Space Working Group, again argued for the exclusion of the draft UNCITRAL Convention in respect of the assignment of receivables arising from an agreement which created or provided for an interest in space property as defined in the preliminary draft Protocol (cf. *Draft Convention on Assignment of Receivables in International Trade: compilation of comments by Governments and international Organizations*, A/CN.9/490, 11 *et seq.*). It was noted that both the UNIDROIT Secretariat and the Aviation Working Group would be represented at that part of the forthcoming session of the Commission at which the relationship

¹ Article 36 of the draft UNCITRAL Convention reads as follows:

“Article 36

Application to territorial units

1. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at any time, declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.

2. Such declarations are to state expressly the territorial units to which this Convention extends.

3. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the assignor or the debtor is located in a territorial unit to which this Convention does not extend, this location is considered not to be in a Contracting State.

4. If a State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.”

between the draft Convention/preliminary draft Protocol and the draft UNCITRAL Convention would be under discussion.

(b) Finalisation of the preliminary draft Protocol with a view to its submission to the UNIDROIT Governing Council

45. - It was agreed that every effort would be made to revise the preliminary draft Protocol so as to take account of the amendments agreed at the Seal Beach session in good time to permit its submission by Mr Nesgos, on behalf of the Space Working Group, to the President of UNIDROIT in execution of the mandate conferred upon him by the President of UNIDROIT (cf. § 1, *supra*) and its subsequent submission by the UNIDROIT Secretariat to its Governing Council, with a view to the 80th session of that body, to be held in Rome from 17 to 19 September 2001, in English and French by 18 July 2001.

(c) Finalisation of the comments of the Space Working Group regarding the relationship between the draft Convention/preliminary draft Protocol and existing international space law with a view to their submission to COPUOS

46. - It was agreed that, once Mr Larsen had incorporated into the comments he had prepared on behalf of the Sub-committee on the relationship between the draft Convention/preliminary draft Protocol and existing international space law the refinements proposed by the Space Working Group during the Seal Beach session, said comments should be communicated by Mr Nesgos, on behalf of the Space Working Group, to the United Nations Office for Outer Space Affairs, in particular with a view to assisting the work of the *ad hoc* informal consultative mechanism that had been set up by the Legal Subcommittee.

(d) Space Working Group preparations for the diplomatic Conference

47. - There was agreement that it was eminently desirable that the Space Working Group should be represented by appropriately qualified experts at the diplomatic Conference. Against this, however, it was recognised that, until such time as the necessary financial resources could be found, the possibility of such representation had necessarily to be considered doubtful. The Space Working Group nevertheless explored different ways of approaching this problem, in particular considering the possibility of the pooling of resources between the Aviation Working Group – some members of which were also participating in the work of the Space Working Group – and the Space Working Group for the purposes of representation at the diplomatic Conference.

48. - It was agreed that it would be vital for the Space Working Group to submit comments to the diplomatic Conference on the draft Convention in its application to space property. The text of the preliminary draft Protocol to be submitted to UNIDROIT should be appended to such comments. The deadline for the submitting of comments was 1 September 2001. It was suggested that the comments of the Space Working Group should be kept relatively simple but that they might usefully focus on such matters as, first and foremost, the importance of the maintenance of the Convention/Protocol structure for the future of space financing but also the timeliness of the opportunity the draft Convention opened up for the wider availability of asset-based financing for space financing, the need for a commercially oriented approach, as evidenced by the aforementioned opt-in Annex regimen, and the desirability of the early entry into force of the draft Convention.

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

49. - It was noted that the Space Working Group had been kindly invited by Arianespace to hold its following session at the Paris headquarters of Arianespace at the beginning of September 2001.

SPACE WORKING GROUP

(Seal Beach, California, 23 / 24 April 2001)

DRAFT AGENDA

1. Adoption of the agenda.
2. Preliminary remarks by Bob Gordon, Vice-President, Boeing Capital Corporation and host of the Space Working Group meeting.
3. Election of the Chairman.
4. Organisation of work.
5. Report by Martin Stanford regarding outcome of the UNIDROIT Secretariat presentation at the April 2 – 12 2001 UNCOPUOS Legal Subcommittee meeting in Vienna, Austria regarding the status of the preliminary draft Space Property Protocol.
6. Report by Jeffrey Wool, General Counsel to the Aviation Working Group and adviser to the Space Working Group, regarding the status of the draft UNIDROIT Convention on International Interests in Mobile Equipment (hereinafter referred to as the *draft Convention*) and the draft Protocol thereto on Matters specific to Aircraft Equipment (hereinafter referred to as the *draft Aircraft Protocol*).
7. Report by Paul Larsen, chairman of the Space Working Group informal sub-committee reviewing the relationship between the draft Convention, the preliminary draft Protocol thereto on Matters specific to Space Property (hereinafter referred to as the *preliminary draft Protocol*) (cf. UNIDROIT Study LXXIIJ-Doc. 4) and the existing body of international space law.
8. Consideration of the draft Convention and the preliminary draft Protocol in the light of the amendments made to the draft Convention and the draft Aircraft Protocol at the third Joint Session of the UNIDROIT Committee of governmental experts and the Sub-Committee of the ICAO Legal Committee, held in Rome from 20 to 31 March 2000, and at the 31st session of the ICAO Legal Committee, held in Montreal from 28 August to 8 September 2000, and as revised pursuant to the deliberations of the 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 Convention and the preliminary draft Protocol and the existing body of international space law (Rome, 18 / 19 October 2000) (cf. UNIDROIT Study LXXIIJ-Doc. 1) and the meeting of the Space Working Group (Rome, 19 / 20 October 2000) (cf. UNIDROIT Study LXXIIJ-Doc. 2).
9. Organisation of future work, in particular: (i) undertakings related to the UNIDROIT draft Convention and draft Aircraft Protocol diplomatic Conference to be held in October/November 2001; (ii) preparation of the finalised preliminary draft Space Property Protocol for consideration by UNIDROIT Governing Council in September 2001; and (iii) the next meeting of the Space Working Group, tentatively planned for July/August in Europe.
10. Any other business.