

UNIDROIT Space Protocol: Comments on the Relationship Between the Protocol and Existing International Space Law

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Existing space law is mostly public law. The draft UNIDROIT Convention on International Interests in Mobile Equipment as implemented by the draft Space Protocol¹ is private space law relating to asset-based debt financing only. It concerns contracts, financing private contracts and protecting the parties to contracts. It does not seek to regulate ownership.

The following discussion examines the relationship between existing international space law and the regulation of space assets through the Protocol. It concludes that there are no conflicts between the UNIDROIT Space Protocol and existing space law. It describes a potential role for COPUOS under the Space Protocol.

I. DEFINITION OF SPACE ASSETS

The 1967 Outer Space Treaty (OST)² addresses ownership of space property in outer space. OST Art VIII provides that States:

on whose registry a launched space object is carried shall retain jurisdiction and control over such object, and over any

personnel thereof, while in outer space or on a celestial body. Ownership of objects launched into outer space, including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the Earth.

The OST reserves the issue of ownership of space property launched into outer space to the States. The individual States are free to join the UNIDROIT Protocol, which gives financiers legal protection.

The Protocol's proposed definition of space assets in Art. 1 is limited by the context of the UNIDROIT Convention on International Interests in Mobile Equipment³ and its Space Protocol⁴ defining the scope of the Protocol's application. It differs from the definition of "space object" in the Registration Convention: "space object" is limited to property that has been launched into outer space⁵, whereas space assets under the Protocol⁶ includes not only property that has been launched into outer space but also property that is returned from space. Space assets for the purpose of the Protocol includes objects on the ground intended for launch, as well as permits, licenses, approvals, intangible rights to control satellites, contractual rights, proceeds and revenues derived from space assets, and other rights. (The

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exact scope of the definition is yet to be established).

The Space Protocol concerns private law financing of contracts which is different from the public law objectives of the Registration Convention; therefore, there is no need for common terminology regarding definition of space assets for these two legal instruments.

II. THE PROTOCOL'S REGISTRY

The major purpose of registration with the United Nations under the Registration Convention is for the launching State to give notice to other States of where its space objects are located so that registered objects can be avoided. Registration also establishes which State has jurisdiction and liability for a satellite.⁷ The purpose of registration under the Space Protocol is to regulate the relationships between creditors and debtors.⁸ The two instruments have different purposes. Consequently, the UNIDROIT Convention envisions registration of international interests by a separate international registry for asset-based financing.

A. Marking

The Registration Convention, Art V, does not require States to mark space property with a registration number. However, under the Space Protocol, there is expected to be identification of the property. Under the Protocol, Art. VII, the description of Space Property is by reference to the principal manufacturer's serial number. It is one of several criteria that could become a computer search criterion for space property in the Registry.⁹

B. The Protocol's Registry

The Registration Convention currently provides for dual registration.¹⁰ Each launching State shall register its space objects. Additionally the U.N. registers space objects in the U.N. registry pursuant to Art. IV of the Registration Convention. The U.N. Registry is maintained by the UN Secretary General. It is administered by the U.N. Office for Outer Space Affairs (OOSA). The Registry is open for examination without restriction. The U.N. Registry lists the name of the launching State; designation or registration of the space object; the date and territory or location of launch; and orbital parameters (nodal period, inclination, apogee, perigee). The Secretary General makes adjustments and modifications of information in the U.N. Registry in accordance with receipt of additional information subsequent to the original filing. While registration in the U.N. Registry is by the States, the UNIDROIT Registry contemplates registration by private companies. The UNIDROIT Protocol envisions registration of international interests by a separate international registry for debt financing.¹¹ Expansion of the U.N. registry to include secured interests in space property could be difficult. U.N. supervision of a separate registry of secured interests would be more feasible.

C. Supervisory Authority

Under the Space Protocol, Art. XV, the Supervisory Authority has yet to be determined. The function of the Supervisory Authority would be to appoint the Registrar for a five year period. According to Art. XVI, the Supervisory Authority would establish

regulations governing the Registrar. If COPUOS accepts the responsibility to act as Supervisory Authority it would require additional funding. Art. XVIII provides for a user charge to cover the reasonable costs of operating the Registry and costs of the Supervisory Authority, including insurance and financial guarantees. Full reimbursement of COPUOS would be a major prerequisite for a COPUOS role.

D. Legal Authority of UN COPUOS to Supervise Registry

Analogy to the UNIDROIT Aviation Protocol is the major guide for the Space Protocol. ICAO is of the view that the Chicago Convention,¹² Art. 44, broadly authorizes ICAO "to foster international air transport," and it thus provides legal authority for ICAO's oversight role. Thus ICAO's organizational responsibility for aviation is viewed as ICAO's legal authority to become the supervisory authority for the Aviation Protocol.¹³

Likewise, it can be stated that the United Nations, acting through COPUOS and the U.N. Office for Outer Space Affairs, is charged by the space treaties and the UNGA Resolutions with responsibility for space activities and has, by analogy to ICAO, general legal authority to concern itself with the registry of secured interests in space property. The 1967 Outer Space Treaty leaves room for future space activities in the United Nations Organization and COPUOS. The Registration Convention gives the United Nations the duty to maintain a space registry. The Aid to Astronauts and the Liability Treaties¹⁴ implement the U.N.'s authority originally provided in the 1967 Outer Space Treaty. The

1979 Moon Treaty¹⁵ establishes the United Nations as the coordination point for exchange of information about the moon and other celestial bodies. All the U.N. General Assembly resolutions on outer space establish COPUOS as an active forum for exchange of information about outer space activities. The U.N. Declaration on International Cooperation specifically strengthens the role of COPUOS.¹⁶

Thus, similar to the implied legal authority claimed by ICAO to supervise the registry for aviation assets, the United Nations and COPUOS may likewise claim legal authority to supervise the registry for space assets. (Note another analogy: the Intergovernmental Organization for International Carriage by Rail, OTIF, has indicated its willingness to supervise a registry for rail assets).¹⁷

How can the Secretary of the United Nations legally undertake functions that are not specifically authorized by the U.N. Charter? Treaties often contain functions for the Secretary General of the United Nations. For example the Liability Convention, Article IX, provides that a State may present a claim under the Liability Convention through the Secretary General of the United Nations. The Secretary General has discretion to perform these kinds of functions as long as they are consistent with the Secretary's functions under the Charter and with decisions that U.N. committees may issue.

E. Reimbursement of COPUOS

The United Nations is notoriously short of operating funds. However, if the cost of U.N. supervisory activities were fully

provided by the users who would benefit from the existence of such a registry, then the Secretary General and the United Nations should not object, particularly if the performance of these functions is generally supported by U.N. Member States

Using ICAO as analogy once more, the ICAO President, representing the ICAO Organization, can assume the supervisory role which would be performed by ICAO staff according to direction of the ICAO President subject to reimbursement of all expenses from the fees charged by the International Registry. Similar to ICAO, the U.N. Secretary General could assume the supervisory role for the Space Protocol's registry subject to reimbursement of all U.N. expenses from the fees charged by the registry. The U.N. Secretary General would act with the assistance of U.N. staff, whether from the Office for Outer Space Affairs (OOSA) or special contract staff. Thus, the Space Protocol allows for adequate reimbursement for all U.N. supervisory activities, through fees paid by users.

III. LIABILITY

A COPUOS working paper¹⁸ states that interaction of the Space Protocol and Article II of the 1972 Liability Convention is an area of possible difficulty because the launching State may no longer be able to exercise control over space objects that have been transferred to creditors subject to the jurisdiction and control of another State. However, this question is not unique to the Space Protocol. It can occur any time possession and control of space property has been transferred to someone other than nationals of the launching State.

The issue of control described in the COPUOS working paper could arise if foreign financiers have to take physical possession and control of the space assets which they have financed. As operator of a space object, a financier may become liable to the State which is liable under the Liability Convention for damage caused by the space object. While the Liability Convention, Art. 2, holds the launching State liable for damage caused by space objects, the launching States would hold the operator responsible.

An example of possible financier liability would be the 1984 case of the insurer (Lloyds) which obtained possession of the Indonesian Palapa B satellite after payment of the amount of insurance to Indonesia. The insurer took title to and controlled the satellite and became liable for potential damage caused by it until the satellite was retrieved by the Space Shuttle, returned to the satellite manufacturer, and finally sold to another party.

Under the situations described, the financier and the insurance company would be listed as operators or interest holders in the Space Protocol registry. Thus the Liability Convention is relevant. Furthermore, States exercising supervisory authority (through launch licensing) over national operators, under OST Art. VI, could seek recourse against insurance companies listed as operators or interest holders. These States would benefit from the enhanced transparency resulting from the existence of and access to the Space Protocol's registry. States would better be able to evaluate their potential liability under the Liability Convention and perform their

supervisory responsibilities under OST Art. VI.

As stated in the COPUOS working paper¹⁹ these issues are not limited to financiers who obtain possession or control of space assets which they have financed. They arise in connection with any transfer of possession or control of space property to nationals of different States.

Another relevant issue concerns the potential liability of the Supervisory Authority and of the Registrar. The UNIDROIT Protocol, Art 26, would grant immunity to the Supervisory Authority and limited immunity to the Registrar.

IV. FINANCIER OF SPACE ASSETS MAY BE SUBJECT TO PUBLIC LAW OPERATING PRINCIPLES

The OST establishes operating principles for the States Parties. These principles are in turn imposed by the States on the operators of a space object.²⁰ Thus the financier who becomes the operator of a space object, would be subject to the OST operating principles, for example the OST Art. III obligation to carry on activities in accordance with international law, and the OST Art. IX obligation that outer space activities shall be conducted "so as to avoid their harmful contamination and also adverse changes in the environment of the Earth."

V. JURISDICTION

The 1967 Outer Space Treaty is not intended to cover the issue of the jurisdiction of national courts. OST, Art. VIII, provides that countries "on whose

registry an object launched into outer space is carried shall retain jurisdiction and control over such object ... while in outer space or on a celestial body." Under the draft UNIDROIT Convention, Art 41, "the courts of a Contracting State chosen by the parties to a transaction have exclusive jurisdiction in respect of any claim brought under this Convention, unless otherwise agreed between the parties, whether or not the chosen forum has a connection with the parties or the transaction." Under the UNIDROIT Convention, Art 42, the courts of a Contracting State chosen by the parties and the courts on the territory of which the object is situated may exercise jurisdiction to grant temporary relief pending final determination. These jurisdictional provisions indicate that financiers and debtors can agree by contract to change the rules on jurisdiction that normally would apply in the absence of a special agreement. For example, the debtor can, by special agreement, assure that disputes are made subject to the jurisdiction of a neutral forum. Finally under Art 43 of the UNIDROIT Convention the courts of the place where the Registrar is located shall have jurisdiction to make orders against the Registrar.

VI. RETURN OF LOST SPACE OBJECTS

The 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Art. 5 (3), provides:

Upon request of the launching authority, objects launched into outer space or their component parts found beyond the territorial limits of the launching authority

shall be returned to or held at the disposal of representatives of the launching authority,..."

If possession or control of the space assets, according to the UNIDROIT Protocol,²¹ belongs to a creditor in a State other than the State of registry, then there would be little incentive for the launching authority to demand return of space objects. However, if such a demand for return were made, then the UNIDROIT Protocol would permit the objects to be returned to the creditor. Upon return of a space object to the launching authority under the Agreement, it would then become the obligation of a State Party to the Space Protocol to turn the property over to the person entitled to possession in accordance with the Space Protocol. However, in construing the Agreement on Rescue of Astronauts, the Return of Astronauts and the Return of Space Objects Launched into Outer Space, it is important to keep in mind its purpose. It is not designed to regulate the basic remedies of a secured creditor's rights to financed space property that has been returned to earth.

VII. ITU PROVISIONS RELATING TO TELECOMMUNICATIONS

Space assets are governed not only by international space law, but also by the ITU Constitution.²² Relevant are the general provisions in Arts. 33 – 48 relating to telecommunications. Under Art. 34 ITU members reserve the right to stop radio transmissions that are contrary to its laws. Under Art 35 ITU members reserve the right to suspend international telecommunication service, provided they give immediate notice to ITU.

Financiers of communication satellites would also be subject to Art. 40 which ensures absolute priority for telecommunications concerning safety of life.

The priorities established by the ITU Convention relate to allocation of radio-frequencies and not to the regulation of creditors' rights. It may be assumed that a financier is mindful of the limitations that exist concerning the use of the radio-frequencies available to a satellite that the financier has financed. However, the ITU Convention does not directly impede or affect the secured financier's exercise of rights and remedies. Rather, the ITU Convention governs the acceptable and proper use of the frequencies for the operation of the satellites.

CONCLUSION

The space industry working group has reviewed the interaction of the UNIDROIT Space Protocol with existing international space law. The working group examined the Protocol's definition of space assets, creation of the Protocol's registry of international interests, the relationship of the Protocol's registry to the existing registry established under the Registration Convention, legal issues relating to the U.N. (COPUOS) serving as the Supervisory Authority for the Protocol's registry, reimbursement of all expenses incurred by the United Nations, possible liability issues under the Liability Convention, the financier of space property being subject to public space law operating principles, jurisdiction, return of lost space property, and application of the existing ITU law. The working group is firmly of

the view that there is nothing in the preliminary draft Space Protocol that is inconsistent with existing space law. Furthermore, the U.N. (COPUOS) could serve as the Supervisory Authority for the Protocol's registry, subject to full reimbursement of all incurred expenses.

FOOTNOTES

¹ 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, UNIDROIT 2001, Study LXXIIJ – Doc. 4, Rome March 2001 (hereinafter Space Protocol). This draft was revised at a meeting of the UNIDROIT Space Working Group at a working group meeting in Los Angeles in April 2001. Peter Nesgos is Chairman of the Space Working Group. The revised draft will be considered by the UNIDROIT Council in September 2001. For background see Larsen & Heilbock, UNIDROIT Project on Security Interests: How the Project Affects Space Objects, 64 J. Air L. & Com. 1 (1999).

² Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan 27, 1967, 610 U.N.T.S. 205 (hereinafter OST).

³ Draft UNIDROIT Convention on International Interests in Mobile Equipment, Uniform Law Review, 1999-2, 478. The most recent text of the draft UNIDROIT Convention together with a draft Protocol on Matters specific to Aircraft Equipment (hereinafter Aviation Protocol) was approved both by the UNIDROIT Governing Council and the ICAO Council as being ready for submission for adoption to a diplomatic Conference, to be held in Cape Town, South Africa, 29 Oct. 16 Nov. 2001.

⁴ Space Protocol, supra n. 1.

⁵ Convention on Registration of Objects Launched into Outer Space, Nov 12, 1974, 1023 U.N.T.S. 15 (hereinafter the Registration Convention), Art II.

⁶ Space Protocol, supra n. 1, Art. I.

⁷ Registration Convention, supra n. 5, Art II.

⁸ Space Protocol, supra n. 1, Art. III

⁹ Id. Arts. VII and XVIII.

¹⁰ Registration Convention supra n. 5, Arts. II & III.

¹¹ Space Protocol, supra n. 1, Chapter III.

¹² 1944 Convention on International Civil Aviation (hereinafter Chicago Convention) ICAO Doc 8900.

¹³ Status of Aviation Protocol described supra n. 3.

¹⁴ Agreement on Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (hereinafter Aid to Astronauts Agreement); Convention on International Liability for Damage Caused by Space Objects (hereinafter Liability Convention), U.N. Treaties and Principles on Outer Space A/AC.105/722, A/CONF.184.BP/17, 8-21 (1999).

¹⁵ 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, id. at 22 (hereinafter 1979 Moon Treaty).

¹⁶ U.N. Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interests of All States, Taking into Particular Account the Needs of Developing Countries, id. at 45

¹⁷ Stanford, UNIDROIT's Project for the Creation of a New Regime Governing the Taking of Security in High-value Mobile Assets: A Window of Opportunity in the Context of the Privatization and Commercialization of Space, Proceeding of the Workshop on Space Law in the Twenty-first Century, UNISPACE III, at 148.

¹⁸ U.N. Doc. A/AC.105/C.2/L.225, 23 Jan. 2001

¹⁹ Id.

²⁰ OST, supra n. 2, Art VI obligates states parties to the treaty to assure that national activities are carried out in conformity with the treaty.

²¹ UNIDROIT Convention, Art 7, as applied by the Space Protocol, chapter II, supra n. 3.

²² Project 2001 Legal Framework for the Commercial Use of Outer Space (Satellite Telecommunications) 8/9 June, 2000 Berlin, Germany, at 314 – 316.