

## CRITICAL ISSUES IN THE UNIDROIT DRAFT SPACE PROTOCOL

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The objective of the Space Protocol is to create a document that will protect financiers thus giving them confidence to loan money for space ventures. It is in their interest that the Protocol be as sweeping as possible without ambiguous exceptions that will cause doubt whether they are adequately protected. A Protocol that has many exceptions and reservations creates uncertainty in the minds of financiers about the risks of financing. The Protocol also must be simple, certain and easily understood in order to be workable. For example an open-ended blanket treaty provision that the Protocol is subject to and subservient to existing space law might incorporate public international law extraneous to the private law purposes of the Protocol. If those public law provisions contain ambiguities, they could create uncertainty for private investors about the scope of legal protection for their assets. The space industry working group was conscious that this could undermine the intended uniformity and predictability of the Protocol's legal regime. The working group thought it is essential that the Protocol advance and increase the confidence and feeling of security of financiers. 1/

The Space Protocol, like the Aviation Protocol, is based on private

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international law governing the relationships among private parties. To understand the Space Protocol provisions, it helps to read the corresponding provisions in the Aviation Protocol. 2/ This will be even more important as practical experience and case law develop under the Aviation Protocol. The establishment of a Supervisory Authority and Registry under the Aviation Protocol will have particular value as a precedent for the Space Protocol's similar arrangement. 3/

### A. Coexistence of the Space Protocol with Space Law Treaties

The Outer Space Treaty (hereinafter OST) 4/ obligates States Parties to ensure that national activities in outer space, whether they are governmental or nongovernmental, be performed in compliance with the provisions of the treaty. Furthermore, OST, Art. IX, obligates States to conduct their outer space activities "with due regard to the corresponding interests of all the other States Parties to the Treaty." If States' activities in outer space may cause harmful interference with the activities of other States then they must consult with other States before proceeding. 5/ The States parties must supervise private activities of their nationals in outer space for compliance. 6/ Consequently, in order to respect existing space law, all interested parties agree on a governing

principle of having no conflicts between public law space treaties and the private law Space Protocol. 7/ This principle is incorporated in the text of the Protocol. Its preamble recognizes "the established principles of space law, including those contained in the international space treaties under the auspices of the United Nations." 8/ Acceptance of the no-conflicts principle arose out of a study by a special industry working group which examined the existing space law and did not find any conflicts with the current draft of the Space Protocol. 9/ The COPUOS Consultative Group agreed with the no conflicts principle and recommended "that appropriate language should be incorporated within the text of the space protocol to the extent necessary to ensure the integrity and respect for the rights and obligations of States in accordance with those principles." 10/ The chairman of the Legal Subcommittee, Prof. Kopal, in his address to the working group stressed the importance of this principle in saying "the nature of the relationship between the two regimes needed to be clarified expressly in the text of the preliminary draft Protocol, at least in the preamble thereto." 11/

## B. Space Assets

The Space Protocol regulates space assets. 12/ Its definition of space assets is very broad in order to afford all assets in a space project protection by the Protocol. It includes property that has been launched into outer space, manufactured in outer space, and property that has been returned from space. The definition includes space assets on Earth intended for launch into outer space; intangible rights to control satellites, contractual rights, proceeds

and revenues and other rights yet to be established. The Protocol's scope also includes debtor's rights to payments or performance under agreements secured by or associated with space assets. These associated rights 12/ include permits, licenses, authorizations or equivalent instruments granted or issued by national or intergovernmental bodies including authorities to control, use or operate space assets and include authorizations to use orbital positions, transmission and reception of radio signals from or to space assets, in each case "to the extent permissible and assignable under the laws concerned." 14/ In addition the associated rights include rights to payments or other performance due a debtor by a person relating to space assets, and a debtor's contractual rights secured by or associated with such space assets. 15/

The Protocol's definition of space assets is broader than the definition of space objects in the space law treaties. 16/ "Space object" concerns property that has been launched into outer space whereas "space assets" include property on the surface of the Earth. 17/ Is consistency of the Protocol's definition with the definition under existing international space law necessary? This is an important question because all the space law conventions concern space objects. 18/ For example, the Registration Convention, Art. II, mandates registration of space objects; registration identifies the state which has jurisdiction and control over the object; thus registration has bearing on ownership of the space object. 19/ Consistency of definition of "space object" with "space asset" is probably not necessary because the Protocol's purpose differs from the purpose of

existing space law: The Protocol is concerned primarily with private law and with the protection of financiers who enter into private law contracts, whereas the existing space law is primarily public law. However, the broader definition of space assets has the consequence that some space assets are not subject to the international space law treaties because they are not defined as space objects. 20/

### C. The Registry

The registry of financial interests is visualized as a computer bank that is accessible by computer. The registry will be open on a 24 hour basis so that it can be electronically accessed and searched at any time from anywhere in the world. 21/ The Space Protocol will not only establish a registry for space assets that is separate from aviation equipment, it will also establish a registry that is separate from the current U.N. registry established under the Registration Convention. 22/ Establishment of a separate registry for space assets would have several advantages: Several space-faring countries, including the United States, support the principle that existing space law treaties should not be changed by the Space Protocol. 23/ Use of the current U.N. Registry to register international interests might require amendment of the Registration Convention, whereas a separate Protocol registry would satisfy the principle of no change to existing space law. Nevertheless, the separate registries could still provide a limited identification link between the two registries. 24/

Persuasive argument for separate registries are that the Space Protocol and

Registration Convention registries serve different purposes. The Protocol's registration is by individual companies whereas the Registration Convention's registration is by States. 25/ Secondly, the purpose of the Space Protocol is to regulate the relationship between creditors and debtors, whereas the Registration Convention's purpose is to determine which State has jurisdiction and control over space objects. 26/ Furthermore, as mentioned above, 27/ the scope of the Registration Convention is more narrow than that of the Protocol. Therefore, the space working group, as indicated in the Space Protocol, 28/ favors a Protocol registry that is separate from the Registration Convention's registry, perhaps operated by a private contractor, under the supervision of the Supervisory Authority. Equipment must be identifiable for the purpose of registration. The Space Protocol, influenced by the Aviation Protocol, favors use of the manufacturer's name or serial number and model description and the intended location of the space asset. 29/ Parts of space assets may be registered separately and several different modes of registration are contemplated. The space working group agreed that multiple search criteria would enhance the reliability of searches in the computerized data base. 30/

The Supervisory Authority will appoint and dismiss the Registrar. 31/ All liability of the Registrar shall be covered by liability insurance or by a financial guarantee as directed by the Supervisory Authority. 32/

### D. Supervisory Authority.

Art. 17 of the Convention would create a Supervisory Authority to appoint and

supervise the Registrar, provide for continuity of the Registry and perform several administrative functions. 33/ The Space Protocol provides that the Authority will be appointed by the diplomatic conference. 34/ Furthermore, the Supervisory Authority shall be immune from legal and administrative process. 35/ A commission of experts, to be nominated by the States, may be appointed by the Authority to assist the Authority with its duties. 36/ The Supervisory Authority may adopt regulations placing in special escrow the command codes for access and control of space assets. 37/

Full reimbursement of all the Supervisory Authority's expenses will be essential to its function. 38/ Thus all the cost of the Supervisory Authority relating to appointing, supervising and regulating the Registrar will be recovered from the fees charged for use of the registry's facilities and services. 39/

The Supervisory Authority under the Space Protocol has not yet been finally identified. UNIDROIT has approached the United Nations, which has indicated interest. 40/ COPUOS asked for guidance from the U.N. Legal Counsel about whether the United Nations can serve as Supervisory Authority. 41/ However, other intergovernmental organizations are also interested in serving as Supervisory Authority. 42/ Service of the United Nations or another intergovernmental organization as Supervisory Authority would not change the basic nature of the Space Protocol as being "a transactional private law treaty," because, as Loren Clark and Jeffrey Wool point out, the involvement by an intergovernmental organization

would be merely incidental to the core purpose of the Protocol. 43/

## E. Liability Issues

The COPUOS consultative group is of the view the effect of the Space Protocol on liability for space activities should be studied. 44/ At issue is examination of the interaction between the Space Protocol and Articles II and III of the Liability Convention. 45/ Article II makes the launching State absolutely liable for damage caused by its space objects on the Earth's surface and to aircraft in flight. 46/ Art. III makes the launching state liable for damage to space objects caused by its negligence in outer space. 47/ The question is how can the launching State maintain oversight and control over a space object if the object has been transferred to creditors who are located in another State and subject to its jurisdiction? Such transfer to creditors in another State could take place if the financier, in accordance with his rights and remedies under the Convention, Art. 8 takes physical or constructive possession of space objects which they have financed. Suppose the financier decides to operate the space object and the space object causes surface damage or damage in outer space? The launching State could be liable under the Liability Convention. The launching State would then try to seek recourse from the operator (financier) who might be located in another country and difficult to hold responsible. Such recourse action would not be based on the Liability Convention, nor on the Space Protocol but could be based a separate agreement among States, or on specific local law, or on assumption of liability. 48/

Because the Liability Convention holds the launching State liable, this brings into issue the Convention's definition of launching State as "(i) a State which launches or procures the launching of a space object; a State from whose territory or facility a space object is launched." 49/ The space law treaties, including the Liability Convention, were drafted at the time when Governments conducted most space activities. 50/ The Liability Convention implies government operation. The Convention's drafters did not provide for individual liability of private satellite operators when the space assets have been transferred, whether by sale, lease or secured financing, to private operators in countries that are not launching states. 51/ Nevertheless, the Space Protocol can work in tandem with the Liability Convention. The Protocol requires that the name of the financier having financial interests in space assets be listed in the Space Protocol's registry. 52/ States would benefit from the enhanced transparency resulting from the existence of and access to the registry to be established under the Space Protocol. States would better be able to assess their potential liability under the Liability Convention and their supervisory functions under Art VI of the Outer Space Treaty. 53/ Consequently, the liability of the launching state under the Liability Convention does not appear to be undermined by the Space Protocol.

The problem is with the Liability Convention's definition of "launching State." 54/ The COPUOS Legal Subcommittee previously established a special working group on the problem of "launching State." 55/ That working group is particularly concerned with

improving the application of the Liability and Registration Conventions. 56/ The COPUOS Legal Subcommittee established a three year work plan on the definition of "launching State." 57/ However, some COPUOS member States noted that the definition of launching State has not caused any current problem and "that governmental and private launches were occurring on a regular basis and were able to proceed with the support of private insurance." 58/

Regarding the liability of the Supervisory Authority and the Registrar for negligent acts or omissions in performance of their duties, the Convention 59/ provides for immunity of the Supervisory Authority, 60/ and provides that the Registrar may buy insurance to cover the Registrar's liability. 61/ The Space Protocol reinforces these protections from liability. 62/

#### F. Jurisdiction

The Convention permits the parties to a finance contract to choose the exclusive forum to adjudicate disputes arising under the contract. 63/ The chosen forum does not need to have a connection with the transaction or with the parties. The chosen forum has jurisdiction to grant temporary relief in order to preserve the space asset, to repossess or immobilize it. 64/ The Space Protocol Article XX confirms that the waiver of sovereign immunity from the jurisdiction of the court specified in the Convention or regarding enforcement under the Convention is binding and shall confer jurisdiction and allow enforcement. 65/

The contractual freedom to choose a forum may be contrasted with the Outer Space Treaty, Art VIII: 66/

A State Party to the Treaty on whose registry an object is launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body.

Art. VIII governs State responsibility. It does not govern private party rights. Private parties may, under the Convention and the Space Protocol, agree to change the national jurisdictional rules that govern a contract. 67/ The contractual objective will normally be for the debtor to seek to stipulate that disputes be settled in an impartial forum.

Finally the Convention provides that the courts of the place where the registrar is located shall have jurisdiction to issue orders against the Registrar and to award damages. 68/

#### G. Choice of Law.

The Space Protocol 69/ provides that the parties to a financing agreement or contract of sale may agree on the law which shall govern the contract. The law chosen by the parties would be the domestic law of the designated state.

#### H. Space Protocol Interaction with ITU International Law and Regulations

The COPUOS Legal Subcommittee focused on the interaction of the Space Protocol with the Constitution, Convention and Radio Regulations of the International Telecommunication

Union (ITU), in particular on treaty obligations in the situation when space assets are transferred from one country to another. 70/ Some COPUOS delegates wish to have more active ITU participation in this discussion. 71/ Examples of Space Protocol interaction with the ITU legal instruments are: The general provisions under the ITU Constitution 72/ give the ITU Member States the right to terminate illegal radio transmissions. 73/ ITU Member States may suspend international telecommunication service after due notice to ITU. 74/ The space working group's view is that there is no conflict with the ITU legal instruments because the operators of communication satellites and thus the financiers take possession of those satellites subject to ITU's established priority of telecommunications on safety of life. 75/

Fortunately, ITU participated actively in the space industry working group through its former ITU General Counsel, Alfons A. E. Noll. 76/ Furthermore, UNIDROIT sent a formal request to the Secretary General of ITU asking ITU to study the relationship between the Space Protocol and the ITU instruments. ITU responded that the Space Protocol does not contradict the ITU instruments, nor does the Protocol overlap with these instruments. 77/

The reasons for ITU's absence of concern with the Space Protocol relate to its view of the Protocol's private law regulation of the contractual rights of financiers and debtors. In ITU's view the Protocol does not regulate or supersede the public law regulatory functions of ITU. Financiers and debtors are very conscious of the importance of satellite

operators complying with the ITU legal instruments when they enter into financing or lease contracts. The parties conclude their financing contracts expecting compliance by the satellite operators with applicable governmental authorizations, including existing ITU rules and regulations. They accept that the ITU laws and regulations regulate the legal use of radio frequencies and orbital locations. 78/

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#### FOODNOTES

1. UNIDROIT 2002, Study LXXIIJ - Doc. 11 at 9.
2. Aviation Protocol to Convention on International Interests in Mobile Equipment, U.N.Doc A./AC.105/C.2.2002/CRP.3
3. Preliminary Draft Protocol on Matters Specific to Space Assets, UNIDROIT 2002, Study LXXIIJ – Doc. 10 (Space Protocol), Chapter III.
4. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 610 U.N.T.S. 205(OST), Art VI.
5. Id. Art. IX.
6. Id. Art. VI.
7. See U.N. Committee on Peaceful Uses of Outer Space, Report of the Legal Subcommittee on its forty-first session held in Vienna from 22 to 12 April 2002, U.N.Doc A/AC.105/787 (COPUOS Report)
8. Space Protocol, supra n. 3, Preamble.
9. Id. at vi.
10. COPUOS Report supra n. 7, at 24.
11. UNIDROIT Doc. 11, supra n. 1, at 7.
12. Space Protocol, supra n.3, Art. 1.
13. Id.
14. Id.
15. “Associated rights” means(i) any permit, license, authorization or equivalent instrument that is granted or issued by a national or intergovernmental or other international body or authority to control, use or operate a space asset, relating to the use of orbital positions and the transmission, emission or reception of radio signals to and from a space asset, which may be transferred or assigned , to the extent permissible and assignable under the laws concerned; (ii) all rights to payment or other performance due to a debtor by any person with respect to space assets; and (iii) all contractual rights held by a debtor that are secured by or associated with the space assets.”
16. Registration Convention, 1023 U.N.T.S. 15, Art. 1.
17. Space Protocol, supra n. 3, Art. I.
18. All the space law treaties refer to space “objects.”
19. See OST, supra n. 4, Art. VIII.

20. See definition of space assets in Space Protocol, supra n. 3, Art I.
21. Id. Art. XIX. The act of registration notifies the public of the existence of the security interests in space assets and of the priorities of creditors' interests.
22. Registration Convention, supra n. 16, Art III.
23. COPUOS Report supra n. 7. U.S. Delegation statements during discussion in COPUOS experts group.
24. COPUOS Report, supra n. 7, at 15.
25. Registration Convention, Supra n. 16, Art II states that launching States shall register space objects.
26. Registration Convention, supra n. 16, Art. II.
27. Supra at n. 16.
28. Space Protocol, supra n. 3. Also see UNIDROIT Doc. 11, supra n. 1.
29. Space Protocol, supra n. 3, Art. VII. Note that the Registry is based on registration of assets rather than on registration of debtors.
30. UNIDROIT Doc. 11, supra n. 1, at 9.
31. Convention, supra n. 2, at Art. 17 (2)(b)
32. Convention, supra n. 2, Art. 28 (4), Space Protocol supra n. 3, Art XIX. The Registrar will be liable for negligent record keeping.
33. Convention, supra n. 2, at Art. 17.
34. Space Protocol, supra n. 3, Art . XVII.
35. Convention, supra n. 2, Art. 27
36. Space Protocol, supra n. 3, Art. XVII.
37. Id., Art. 17(4).
38. COPUOS Report, supra n. 7, at 15.
39. Convention, supra n. 2, Art.17(2), Space Protocol, supra n. 3, Art XIX.
40. Id.. UNIDROIT Doc. 11, supra n. 1, at 6.
41. COPUOS Report, supra n. 7, at 18.
42. UNIDROIT Doc. 10, supra n. 3, at xv.
43. Clark and Wool, Entry Into Force of Transactional Private Law Treaties Affecting Aviation, 66 J. Air L. & Com. at 1407.
44. COPUOS Report, supra n. 7, at 14.
45. Space Protocol, supra n. 3; Liability Convention, 961 U.N.T.S. 18.
46. Id. Liability Convention, Art. II: "A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft flight."
47. Id. Art III: "In the event of damage being caused elsewhere than on the surface of the Earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, the latter shall be liable only if the



damage is due to its fault or the fault of persons for whom it is responsible.”

48. Liability could be based on bilateral agreements under which another state assumes all liability of a launching state; liability could be based on the statutory law of a State or on its law of Torts; it could also be based on assumption of liability either through the finance agreement or if the permitting authority required that the financier as receiver of title assumed liability.

49. Liability Convention, supra. n. 45, Art I.

50. The Liability Convention was finalized in 1972. All the space law treaties were negotiated in the 1967 – 1979 time frame.

51. Only launching States are liable under the Liability Convention, supra n. 45. References to States may include international intergovernmental organizations if they accept rights and obligations under the Liability Convention, see Art. XXII.

52. Space Protocol, supra n. 3, Art VII. Identification of space assets in the Registry shall include the name of the debtor and the creditor, their addresses, description of the space assets, date and location of launch, and description of separately identifiable component part.

53. OST, supra n. 4, Art. VI.

54. Liability Convention, supra n. 45, Art. I.

55. COPUOS Report, supra n. 3, at 16.

56. Id., at 26. Chairman of the COPUOS special working group on “launching State” is Mr. Kai-Uwe Schrogl, Germany.

57. Id. at 16.

58. Id. at 16.

59. Convention, supra n. 2, Art. 27.

60. Id., Space Protocol, supra n. 3, Art. XVII. See supra n. 32.

61. Convention, supra, n. 2, Art. 28.

62. Space Protocol, supra n. 3, Art. XIX.

63. Convention, supra n. 2, Art. 42.

64. Id. Art. 43.

65. Id. Arts. 42 and 43.

66. OST, supra n. 4, Art. VIII.

67. Convention, supra n. 2, Arts. 42 and 43; Space Protocol, supra n. 3, Art XVII.

68. Convention, supra n. 2, Art. 44.

69. Space Protocol, supra n. 3, Art. VIII.

70. ITU Constitution, Project 2001, Legal Framework for the commercial use of Outer Space (Satellite Communications), 8/9 June, 2000, Berlin, Germany, at 314 – 316.

71. COPUOS Report, supra n. 7, at 14.

72. ITU Constitution, supra. n. 69, Arts. 33 – 48.

73. Id. Art. 34.

74. *Id.* Art 35. The ITU requires radio stations to have licenses.

75. See Larsen, UNIDROIT Draft Space Protocol, 44 Colloquium on Law of Outer Space (2001).

76. UNIDROIT Doc.11, *supra* n. 1, at 3.

77. UNIDROIT Study LXXIII, S.W.G. ,4<sup>th</sup> Sess., W.P. 3 (2001). Also see Larsen, *supra* n. 775.

78. *Id.*