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Space Assets Protocol and Compliance with International and Domestic Law

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Abstract

One of the main issues debated during the negotiating process of the draft Protocol on space assets was the concern that this new international regime could hamper the compliance by States parties of obligations under pre-existing international instruments and/or national peremptory prescriptions. Reference was made to the UN outer space treaties, to mandatory decisions of international bodies and to national legislation concerning sensitive sectors. In particular, the major concern was the transfers of ownership of space assets that the draft Protocol, once in force, would allow and their consequences on pre-existing obligations, both international and national, of such kind. The paper addresses these aspects with a view to clarify the legal situations at stake, the meaning of the optional character of the regime set out by the Protocol for private parties and the public law (international and domestic) limits within which the regime would work.

1 Introduction

The process of negotiation of the draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets, held by a UNIDROIT Committee of governmental experts, was quite long, going through five sessions between 2002 and 2011. Finally, the diplomatic Conference for the adoption of the draft Protocol met in Berlin, at the invitation of Germany, from 27 February to 9 March 2012. Following its deliberations, the Conference adopted the text of the Protocol on Matters specific to Space Assets, which has been opened for signature the 9th of March 2012.

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A The Berlin Conference

The final version of the Space Protocol has maintained its original features, based on principles that aim at ensuring transparency in the priorities under which financing and ownership interests are registered and remedies promptly enforced. The principal objective of the Protocol is in fact to facilitate the efficient financing and leasing of space equipment. The Convention and Protocol system is designed to bring significant economic benefits to countries at all stages of economic development, and in particular to developing countries by bringing within their reach commercial finance for mobile equipment that has previously been unavailable or available only at relatively high cost.

At the beginning of the process there was no doubt that the main beneficiaries of the international regime provided by the Protocol should be satellite operators, both investment grade operators as well as early-stage satellite operators that require asset-based financing to acquire satellites; aerospace manufacturers, including satellite manufacturers and launch services providers, and financial institutions that require the protection and benefits of secured financing to support their transactions.

The need for a Protocol was advocated because the legal regimes of many countries do not provide clear, enforceable and protective systems for the security interests, mortgages or hypothecs over space equipment, such as satellites and their component parts, such as transponders. There was also agreement that it would reduce costs and simplify satellite financing.

B Industry's Position

Since 2009, however, some major satellite operators, as Intelsat and *Société Européenne des Satellites* (SES), took a negative attitude towards the process, insisting that there is little asset-based financing in the satellite sector and not enough to justify a regime relating to security interests in space assets. In their view, national laws applicable to financing adequately address matters of grant and perfection of security interests and ownership rights for space objects. Other industry representatives, while expressing concerns on specific clauses of the draft Protocol, manifested their openness toward improvements of the text to solve the major outstanding issues, considering that the Protocol does not impose unnecessary burdens on the satellite industry.

In considering these opposite arguments, it should be kept in mind that the legal regime established by the Protocol provides an *optional regime* that may be used, as an additional guarantee, by private parties in case of asset based financing. The key value of the Protocol is that it would frame a unified international register to identify and prioritize international interests in relation to asset based financing, subject under the present state of law to a number of competing legal orders. The main advantage is that the priority established by the registering of an international interest must be honored by the courts of each Contracting State.

In the end, the text is now adopted and it is up to the States to decide for signature and subsequent ratification.

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II The Compliance with International and Domestic Law

A The General Legal Framework

Within this general framework, the issue of the compliance by the Protocol with international and domestic law relates to the concerns raised by some States, during the negotiating process, requiring a more stringent consideration of the "public law" aspects of the space asset-based financing and consequently the reinforcement of the clauses contained in the Protocol safeguarding the interests of the States.

The issue of compliance is twofold: on the one side, it concerns the consistency between the protocol and the international space treaties already in force and, on the other side, the consistency with the internal legislation of peremptory nature, not suitable for modifications through the Protocol.

B Compliance with International Law: The Priority Clause

Considering the space law treaties, it should be said that one of the main decisions taken from the very beginning by the negotiating States was that the draft Protocol should contain an express priority clause. This was done firstly including an indent in the Preamble, which says that the States Parties declare to be "*mindful of the principles of space law, including those contained in the international space treaties of the United Nations and the instruments of the International Telecommunication Union*". This language was considered satisfactory and maintained in the final text. The preamble of a treaty is not binding in itself, but it is an important element for interpreting a treaty and the will of the Parties. Furthermore, the Protocol contains a specific clause on the relationship with other conventions. Article XXXV stipulates that "*The Convention as applied to space assets shall not affect State Party rights and obligations under the existing United Nations outer space treaties or instruments of the International Telecommunication Union*".

Article XXXV functions as a *priority* clause, in line with art. 30 (2) of the Vienna Convention on the law of treaties of 1969, stating that "When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." This is a derogation from the general rule stating that the rights and obligations of States Parties to successive treaties relating to the same subject matter are normally governed by the principle *lex posterior derogat priori*, unless the treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty.

In substance, this provision takes note that there are international treaties governing the registration, launch and control of space assets, allocation of orbital slots and radio frequencies through the ITU, liability for damage caused by space objects, and the like, under which States exercise rights and assume responsibilities. As private law instruments, the Cape Town Convention and the Space Protocol should not affect the rights and obligations of States under these various treaties; however, in case a conflict should arise, Article XXXV gives priority to the UN

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space treaties and ITU regulations. This clause is aimed at coordinating the application of the Protocol with the international instruments preceding in time and relating to the space matter, and also with any amendment or modification to them that might be adopted in the future by the respective States parties.
More in general, the CGE was always attentive to avoid contradictions among the provisions of the Protocol and the UN space treaties and ITU legal instruments, and to accommodate the later Protocol to the earlier treaties. In fact nothing in the Convention or the Space Protocol should in principle touch matters covered by the space treaties, the former relating to the rights and obligations of private parties, the latter to the rights and obligations of States.

C Some Specific Aspects Concerning Article 1(3) of the Protocol

The issue of the consistency between the Protocol and the UN outer space treaties was raised more by academicians rather than by the States participating to the negotiating process, to whom the formula adopted by article XXXV the Protocol seemed quite satisfactory. This is true in particular with reference to Article 1(3) of the draft Protocol, discussed during the last meetings of the CGE, when there was some misunderstanding concerning the scope of the provision. In fact, it does not deal with the matter of "*jurisdiction and control*" under the UN Outer Space Treaties, nor with the *registration of space objects* according to the legal international texts applicable in the matter. Article I (3) defines some terms used in the Cape Town Convention and in the Protocol, to identify the Contracting State in which "the space asset is situated" or "from which the space asset may be controlled", namely for the purposes of Articles 1(n) of the Convention (on internal transactions) and 43 and 54(1) of the Convention, dealing with a Contracting State whose courts would have power to entertain actions under the Convention and the Protocol between private parties.
There was some debate on the possible adoption of *de facto* or *de iure* criteria, or a mix of both, such as the State that registered the space asset or where the command and control codes are located[1]. In Berlin, it became clear that a specific definition was needed with regard to internal transactions, while another

1 At the 5th CGE, in 2011, the language was the following : "In Articles 1(2)(n), 43 and 54(1) of the Convention and Article XXIII of this Protocol references to a Contracting State on the territory of which an object or space asset is located or situated shall, as regards a space asset when not on Earth, be treated as references to a Contracting State on the registry of which the space asset is carried for the purposes of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, signed at London, Moscow and Washington, D.C. on 27 January 1967 or of the Convention on Registration of Objects Launched into Outer Space, signed at New York on 14 January 1975 or of UNGA Resolution 1721 (XVI) B of 20 December 1961. When the State of registry is not identifiable under the mentioned international legal instruments, references to a Contracting State on the territory of which an object or space asset is located or situated shall, as regards a space asset when not on Earth, be treated as references to a Contracting State on the territory of which a mission operation centre for the space asset is located".

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paragraph should be devoted to the other Articles of the Cape Town Convention regarding the internal jurisdiction of a Contracting State for dealing with cases between private parties.

D The Internal Transactions

Under Article 50 of the Cape Town Convention a Contracting State may, within rather narrow limits, by declaration exclude the Convention as regards internal transactions, which are there defined in terms which require that the centre of main interests of the parties and the location of the relevant object are in the same State and the interest created by the transaction has been registered in a national registry in the declaring State[2]. In order to make this work for a space asset when not on Earth, Article I(3) of the Space Protocol provides that for the purposes of the definition of "internal transaction", a space asset, when not on Earth, is deemed located in the Contracting State which registers the space asset, or on the registry of which the space asset is carried, as a space object under one of the following:

(a) *the Treaty on Principles Governing the Activities of States in the Exploration and Use of Space, Including the Moon and Other Celestial Bodies 1967 ("the Outer Space Treaty");*
(b) *the 1975 Convention on Registration of Objects Launched into Outer Space ("the Registration Convention"); and*
(c) *the UN General Assembly Resolution 1721 (XVI) B of 20 December 1961*[3].

What Article I(3) of the Space Protocol refers to is not the register maintained by the Secretary general of the United Nations, but the national registers maintained by Contracting States. For the purposes of determining the deemed location of an asset in deciding whether a transaction is an internal transaction the relevant registry is that on which the space asset is carried at the time of entry of debtor and creditor into the security agreement, title reservation agreement or leasing agreement. In general there should be only one such registration and only one deemed location.

E The Jurisdiction Provisions

For the purpose of the jurisdiction provisions, however, there can be a range of deemed locations and any one of these, if in a Contracting State, will satisfy the

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2 Cape Town Convention, Article 1(n).

3 Article I(3). – For the purposes of the definition of "internal transaction" in Article 1(n) of the Convention, a space asset, when not on Earth, is deemed located in the Contracting State which registers the space asset, or on the registry of which the space asset is carried, as a space object under one of the following:
(a) the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, signed at London, Moscow and Washington, D.C. on 27 January 1967;
(b) the Convention on Registration of Objects Launched into Outer Space, signed at New York on 14 January 1975; or
(c) United Nations General Assembly Resolution 1721 (XVI) B of 20 December 1961.

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jurisdiction requirement. So under Article I(4) a space asset when not on Earth is deemed to be located in a Contracting State if it is within a Contracting State referred to in Article I(3), just examined, or in a Contracting State which has issued a licence to operate the space asset or a Contracting State on the territory of which a mission control centre is located[4].

F Succession of Treaties in Time

More in general, the problem of coordination among treaties successive in time is not an issue exclusive to the Protocol. It regards also the relations among the UN five space treaties themselves. So, in applying Article XXXV of the Protocol in case of conflict, we should consider the variable geometry due to the different range of (future) ratifications of the Protocol and of the UN outer space treaties. Each one of them is indeed an independent multilateral treaty, with different content and an extremely variable sphere of application. This situation of great variability is unavoidable, because, firstly, each State is bound only by those treaties that has accepted, and, secondly, because *a treaty does not create either obligations or rights for a third State without its consent*. These principles, together with the priority clause in the Protocol (Article XXXV), will govern the relations between the future Protocol on space assets, once in force, and the multilateral treaties, including the UN space treaties, entered into by the States parties to the Protocol.

During the Berlin Conference, one State raised an issue concerning the relationship between the Protocol and the 1972 UN Convention on International Liability. It wanted to include in the Protocol a provision saying that:

> "In the light of the obligations flowing from the UN Convention on International Liability for damage caused by space objects, a Contracting state may condition the exercise of remedies under the Convention or this Protocol on
> (a) incorporation in that Contracting State and compliance with other measures designed to mitigate the liability risks; or
> (b) the existence of an indemnity agreement on liability caused by the space asset with the relevant Contracting State".[5]

This proposal was absorbed by the debate on Article XXVI, which I will discuss later on. More in general, it was considered that cases of transfer of ownership

4 Article I 4). – In Article 43(1) of the Convention and Article XXII of this Protocol, references to a Contracting State on the territory of which an object or space asset is situated shall, as regards a space asset when not on Earth, be treated as references to any of the following:
(a) the Contracting State referred to in the preceding paragraph;
(b) a Contracting State which has issued a licence to operate the space asset; or
(c) a Contracting State on the territory of which a mission control centre for the space asset is located.

5 Proposals presented by the delegation of Canada, DCME - SP, Doc. 9, 28 February 2012.

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of satellites and defaults of companies which imply the taking over of satellites by foreign creditors occur also presently without the Protocol being in force. So, it is not demonstrated that the Protocol would increase, once in force, the amount of such kind of occurrences. Furthermore, the Protocol is not meant to cover issues concerning liability for damages caused by space objects, which are left to the applicable international and national rules. In particular, the Protocol cannot modify the UN Convention on Liability, which states that a launching State is absolutely liable even in case of transfer of ownership under the jurisdiction and control of another State.

III National Interests and Compliance with Domestic Law

A Potential Conflicts between the Protocol and Domestic Legislation of Public Order Nature

Another topic that was debated in Berlin and led to some modifications of the relevant provisions of the draft presented to the Conference was the potential for conflicts between the Protocol and domestic legislation considered of public order. Article 3 of the French Law n. 2008-518 of June 3 2008 "*relative aux opérations spatiales*" establishes, for instance, that the transfer to a third party of the commanding of a space object which has been authorized pursuant to the terms of the act is subject to prior authorization from the administrative authority. Consequently, an effort was made to accommodate the concerns raised by several States with regard to the "public service" issue and to the limitations of powers of Contracting States. These concerns were covered by Article XXVI of Protocol, which allows States, in accordance with their laws and regulations, to restrict or attach conditions to the exercise of the remedies in case of default, and by Article XXVII on limitations on remedies in respect of public services.

B Limitations on Remedies before the Berlin Conference

As the Convention and the Protocol deal with rights and obligations in private law, Contracting States remain free to apply and enforce their rules of criminal law and tort law, as well as regulatory measures designed to impose economic sanctions or to prevent money laundering, drug dealing, and regulations in the field of financial services law and competition law. However, in the perspective of being be as much guarantor as possible, Article XXVI of the Space Protocol spells out the position in some detail on the insistence of the States that were concerned that the Protocol might otherwise imply a power for the parties to override national law governing the control of licences, security issues, and the like, concerning space assets.

In fact, before the Berlin Conference, a draft Article XXVI provided for limitations on remedies in the following terms:

"*1. – This Article applies only where a Contracting State has made a declaration pursuant to Article XL(1) of this Protocol.*

2. – A Contracting State, in accordance with its laws and regulations, may restrict or attach conditions to the exercise of the remedies provided in Chapter III of the Convention and Chapter II of this Protocol, including the placement

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of command codes and related data and materials pursuant to Article XIX, where the exercise of such remedies would involve or require the transfer of controlled goods, technology, data or services, or would involve the transfer or assignment of a licence, or the grant of a new licence."

There was however an alternative text, saying that:
"2. — *Nothing in the Convention and this Protocol limits the ability of a Contracting State, in accordance with its laws and regulations, to restrict or attach conditions:*
(a) to the constitution of an international interest or a rights assignment, for reasons of national security, international peace and security, or in order to regulate controlled goods, and
(b) to the exercise of the remedies provided in Chapter III of the Convention and Chapter II of this Protocol, including to the placement of command codes and related data and materials pursuant to Article XIX, for reasons of national security, international peace and security or where the exercise of such remedies would involve or require the transfer of controlled goods, technology, data or services, or would involve the transfer or assignment of a licence, or the grant of a new licence.]
3. – In this Article, "controlled" means that the transfer of the goods, technology, data or services is subject to governmental restrictions."

C At the Berlin Conference: Preservation of Powers of Contracting States

At the Berlin Conference, some States argued that the drafting of Article XXVI should be reviewed to ensure that national regulatory and licensing regimes were preserved, without the need for a declaration, and that the provisions of the draft Protocol were not a basis upon which to assert non-compliance rights as to those regimes.[6]
The final text of Article XXVI of the Protocol took care of these concerns, stating that: firstly, the Protocol does not affect the exercise by a Contracting State of its authority to issue licences, approvals, permits or authorisations for the launch or operation of space assets or the provision of any service through the use or with the support of space assets. Further, it does not: (a) render transferable or assignable any licences, approvals, permits or authorisations which, in accordance with the laws and regulations of the granting Contracting State or the contractual or administrative provisions under which they are granted, may not be transferred or assigned; (b) limit the right of a Contracting State to authorise the use of orbital positions and frequencies in relation to space assets; or (c) affect the ability of a Contracting State in accordance with its laws and regulations to prohibit, restrict or attach conditions to the placement

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6 The issue was raised firstly by the USA and Canada separately. Then, in the end, there was a common compromise text. See the Joint Proposals by Canada, China, France, Germany, India, Luxembourg, the Russian federation, South Africa and the USA. DCME-SP - Doc. 13, 1 March 2012.

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of command codes and related data and materials pursuant to Article XIX of this Protocol.

Finally, para. 3 of the same Article establishes that nothing in the Protocol shall be construed so as to require a Contracting State to recognise or enforce an international interest in a space asset when the recognition or enforcement of such interest would conflict with its laws or regulations concerning:(a) the export of controlled goods, technology, data and services; or (b) national security[7].

On the public service restrictions[8], Article XXVII seeks to balance the different interests at stake. It applies where the debtor and a public services provider enters into a contract that sets out for the use of a space asset to provide services needed for a public service in a Contracting State. Where such a contract has been concluded the parties to it and the Contracting State may agree that the public services provider may register a public service notice in the International Registry describing the services in question in accordance with the regulations. This registration is the trigger for the suspension of the creditor's remedies where the exercise of those remedies would make the space asset unavailable for the provision of the relevant public service.

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7 Article XXVI – Preservation of powers of Contracting States
1. This Protocol does not affect the exercise by a Contracting State of its authority to issue licences, approvals, permits or authorisations for the launch or operation of space assets or the provision of any service through the use or with the support of space assets.
2. This Protocol further does not:
   (a) render transferable or assignable any licences, approvals, permits or authorisations which, in accordance with the laws and regulations of the granting Contracting State or the contractual or administrative provisions under which they are granted, may not be transferred or assigned;
   (b) limit the right of a Contracting State to authorise the use of orbital positions and frequencies in relation to space assets; or
   (c) affect the ability of a Contracting State in accordance with its laws and regulations to prohibit, restrict or attach conditions to the placement of command codes and related data and materials pursuant to Article XIX of this Protocol.
3. – Nothing in this Protocol shall be construed so as to require a Contracting State to recognise or enforce an international interest in a space asset when the recognition or enforcement of such interest would conflict with its laws or regulations concerning:
   (a) the export of controlled goods, technology, data and services; or
   (b) national security.

8 A service of public importance, whether military, navigational, educational or otherwise. Article XXVII does not define "public service" (in the absence of guidance from national laws it was not found possible to reach agreement on this) but simply refers to "a public service recognised as such under the laws of the relevant Contracting State at the time of registration", that is, registration of the public service notice.

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IV Conclusion

It is a fact that States guard their right to regulate the transfer of licences, the grant of new licences, the authorisation of the use of orbital slots and frequencies, and the like. In this line, Article XXVI contains detailed provisions designed to make it clear that nothing in the Protocol affects the exercise by a Contracting State of its authority over such matters.

The main critical point is that concerning "national security", which is a vague concept. It is for each Contracting State to decide what concerns its national security. In some States this could include laws and regulations which prohibit certain assets from being made available. The definition of "controlled" featuring in the draft Protocol disappeared in the drafting of Article XXVI but that word simply denotes that the transfer of the goods, technology, data or services is subject to governmental restrictions. Many States have tight controls over the export or transfer of objects classified as arms, or munitions, including satellites, without considering some mandatory decisions of the Security Council of the United Nations which forbid some States from having satellite defence systems.

We can conclude that the space assets Protocol has taken a particularly cautious attitude with regard to international space treaties of the UN and of the ITU through a priority clause, as well as with the preservation of powers of Contracting States, including specific safeguard provisions. My conclusion is that from this point of view the Protocol is even too much attentive towards the public law aspects than it is normally the case in instruments aimed at protecting the private investments in outer space activities.