

IISL/ECSL Symposium on the occasion of the 52nd Session of the Legal
Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space

Vienna International Center, 8 April 2013

The UNIDROIT Space Protocol

Report by

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On the first day of the 52nd Session of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space, the afternoon session was reserved for the joint Symposium of the International Institute of Space Law (hereafter referred to as IISL) and European Centre for Space Law (hereafter referred to as ECSL). After some words of welcome by Dr. Tare Brisibe, Chair of the Legal Subcommittee, Prof. Sergio Marchisio, President of the ECSL, and **Ms. Masson-Zwaan**, President of the IISL, opened the Symposium, which was devoted to the UNIDROIT Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (hereinafter referred to as the Space Protocol), adopted in March 2012. The Convention on the International Interests in Mobile Equipment, or Cape Town Convention, entered into force on 1 March 2006. It is a Convention initiated by UNIDROIT in order to standardize registrations of security interests in mobile equipment with an international dimension, and thus facilitate international asset-based financing, a matter of specific interest to the space industry.

Six presentations were scheduled in order to go deeper into the Space Protocol, its benefits and its points of criticism. Unfortunately, **Prof. Paul Larsen** from Georgetown University, USA was unable to attend the Symposium. **Mr. Chris Johnson**, LLM adv. Air and Space Law, Leiden was also unable to attend, but he provided a written statement to **Ms. Masson-Zwaan** to be read on his behalf.

Mr. Martin Stanford, the former Deputy Secretary-General of UNIDROIT, made a presentation entitled *The way to the successful completion of the negotiations*, where he elaborated on the origins of the Cape Town Convention and the Space Protocol. A decision by the UNIDROIT Governing Council in June 1988 initiated the project concerning international security interests in mobile equipment, which led to the adoption of the Cape Town Convention on 16 November 2001. In January 1997 the project was split into two parts. On the one hand there would be the Convention containing the general rules applicable to all such assets; on the other hand, there would be different Protocols applying the general rules to assets for specific sectors, i.e. the Aircraft Protocol, adopted simultaneously with the Convention, the Railway Protocol, adopted in Luxemburg on 27 February 2007, and finally the Space Protocol, adopted in Berlin on 9 March 2012. In August 1997, Mr. Peter Nesgos from Milbank, Tweed, Hadley & McCloy, New York was invited by the Secretary-General of UNIDROIT to organize a Working Group in order to research a regime that would make asset-based financing more accessible to commercial space financing transactions.

This led to a close cooperation between UNIDROIT and UNCOPUOS, which included consideration of the matter on the agenda of the Legal Subcommittee (henceforth LSC). In 2001, a preliminary draft Space Protocol was transmitted and reviewed by the UNIDROIT Committee of governmental experts, and subsequently by the LSC. Starting from 2002, the LSC considered two questions: 1) The concordance of the draft Convention and Space Protocol with the existing body of international space law, and 2) The designation of the UN as the Supervisory Authority under the Space Protocol. The first one was easily solved by the LSC, however no consensus could be reached concerning the second one.

At its 90th session in Rome in May 2011, the UNIDROIT Governing Council endorsed the final text that was transmitted to the Diplomatic Conference held in Berlin from 27 February to 9 March 2012 for adoption. Forty States attended the Conference as well as representatives from the European Union, ESA, OTIF, ICAO, ITU, representatives of the space, financial and insurance communities that had already participated in the development of the draft Protocol, and several technical advisers. Together

with the Protocol, five Resolutions were adopted. These five Resolutions were designed to provide for the setting up of a Preparatory Commission for the establishment of the Registry for space assets, to invite the ITU to consider becoming the Supervisory Authority, and to provide the Protocol with an Official Commentary by Prof. Sir Roy Goode.

The Space Protocol is designed to make asset-based financing more widely available, as it is an attractive instrument to entrepreneurs, start-up businesses and overall developing States. –In asset-based financing the maximum loan to a company is linked to that company’s total assets tied in cash, inventory, accounts receivable and equipment instead of in the case of fixed-based financing or project-based financing–. Mr. Stanford drew comparison with the Aircraft Protocol, which was completed in 2001 and already has 49 Contracting Parties and approximately 313,000 registrations against 125,000 aircraft objects. This comparison has to be contextualized, since asset-based financing is much more common in the commercial aviation sector whilst the space market is much limited. Another important footnote is that in reality, most players on the commercial market currently do not have funding problems that would warrant the Space Protocol. However, the objective of the Space Protocol is to make this commercial market more accessible to new players that would benefit from the Protocol, as asserted in its Preamble.

As a concluding remark, he emphasized that this Protocol is aimed to broaden the access to the commercial space market and meet the future needs of space financing, being in the interest of all humankind.

Mr. Vassilios Cassapoglou, representative of Greece, questioned the future of the Space Protocol. He drew a parallel with the Aircraft Protocol and stressed that certain actions by industry may have undermined the progress of the working groups, which in turn might have influenced governments of participating Member States. **Mr. Stanford** emphasized the collaboration between governments and members of industry, as much time was taken and much expertise was applied. He drew a parallel again with the Aircraft Protocol, where the biggest critics who felt they did not need a Convention that promoted asset-based financing later changed their minds, and are now renewing their fleets by making use of the Convention. Mr. Stanford therefore invited all States, but more particularly the developing States to sign the Protocol and bring it and its benefits to the attention of the international community.

Ms. Ramirez de Arellano, representative of Mexico, questioned whether repossession of a satellite is likely and what the impact of such an action would be on any public services provided by the satellite. Mr. Stanford explained that the question relating to the public services is actually a key-question, which is covered by article XXVII of the Protocol. Paramount here is finding the right balance when weighing the remedies. This is quite unusual for Public International Law as this is mostly dealt with in the contracts. It is therefore commendable that the Contracting Parties were willing to compromise in order to benefit the developing markets.

The second presentation was a combined presentation by **Dr. Bernard Schmidt-Tedd** from DLR and **Prof. Stephan Hobe** from the University of Cologne, Germany, entitled: *The negotiations at Berlin – what promise for the future?*

The main focus of **Dr. Schmidt-Tedd**’s presentation pertained to the question of whether the Space Protocol is in fact necessary at all. Three main issues in legal terms needed to be addressed. The first issue concerned the scope of application of the Protocol. It was decided to have open definitions of space assets and criteria for identification of space assets. Also a choice was made that the Protocol would apply prior to the launch.

The second issue was the competing rights in physically linked assets. On this matter, consensus was reached that inter-creditor agreements would claim priority to the Protocol and in absence of such agreements; the creditor may not interfere or impair the operation of another space asset. The third issue regarded the public service exemption, which will be limited to situations where the provided public service is in practice made unavailable and a formal declaration of public service will need to be issued.

Dr. Schmidt-Tedd continued his presentation by providing an in-depth examination of the five resolutions adopted during the Berlin Conference. The first resolution concerns the setting up of a Preparatory Commission, which would be a fully authorized provisional supervisory authority with the goal to conduct preparatory work; to establish the International Registry and make sure proper liaisons are conducted with members of industry. Resolution Two discusses the matter of the Supervisory Authority. As the ITU expressed interest in the adoption of such role, ITU was invited to further consider this position and to take the appropriate necessary measures. Resolution Three invites the Supervisory Authority to set standards relating to article XVII (3) of the Protocol dealing with

modification of default remedies with physically linked space assets for the Registry. The Registry should reveal all international interests registered against such assets, as well as right assignments, acquisitions by subrogation and rights reassignments recorded as part as the registration of those assets. Also, Art. XXIX of the Protocol states that the first regulations shall be made by the Supervisory Authority as so to take effect on the entry into force of the Protocol. These regulations will be relevant for the identification of space assets and the purpose of registration of competing rights in relation to physically linked assets. Resolution Four deals with the reasonable discounts and exposure rates. Resolution Five states that Sir Roy Goode will provide the official commentary of the Space Protocol; this task is currently in its final stages.

After summarizing the current status of the Cape Town Convention and its three Protocols, **Prof. Dr. Stephan Hobe** proceeded to discuss why the Space Protocol requires a higher quorum of signatures before entering into force, in comparison to the Aircraft and Railway Protocols, which is in fact directly linked to the EU competences. Two legal issues were raised: is the EU entitled to sign the Cape Town Convention and its Protocols? And are Member States allowed to issue statements on subject matters, which fall under the competences of the EU?

Article 48 of the Cape Town Convention allows for an organization such as the EU to sign, accept, and accede to the Convention, however it is limited to subject matters within the competency of said organization. The EU has competence over the jurisdiction and recognition of judgments in civil and commercial matters, insolvency proceedings, and law applicable to contractual obligations. Concerning the following question, Member States are not allowed to make statements on subjects, which fall under the competence of the EU.

The Space Protocol is the first international space law instrument that has been adopted since the 1979 Moon Agreement, and it is also the first Private International Law agreement related to outer space.

Prof. Hobe concluded his presentation with some future perspectives. The Space Protocol is first and foremost an optional instrument; it encourages start-up companies and provides the necessary access to the space market by creating alternative financing options. The Space Protocol is therefore to be considered as an instrument that is not required by all but needed by some. Prof. Hobe remained hopeful that the Protocol will enter into force.

The **delegate of Canada** raised two questions: the first question related to the Cape Town discount, as it requires a lot of declarations to be made before a State can be considered. **Dr. Schmidt-Tedd** considered the instrument to be practical, particularly as it provides for clear identification of the criteria and as the Aircraft Protocol has proven to work in practice. In his second comment, referring to the statement by Prof. Hobe that no outer space agreements had been made in over thirty years, the Canadian delegate mentioned the 1998 ISS agreement as an addition to the body of existing international space law. **Prof. Stephan Hobe** responded by noting that the International Space Station Intergovernmental Agreement (IGA) was not negotiated within the UN, unlike the UNIDROIT Space Protocol, where COPUOS was involved in the process. Furthermore, in the last thirty years only soft law has been adopted in the LSC. Professor Hobe considered this to be of great concern and hoped that the Space Protocol might make States more inclined to commit to new space agreements.

The next presentation, entitled: *The perspective from emerging space faring nations*, was made by **Adv. Phetole Sekhula**, Councilor for the South African Council for Space Affairs. Mr. Sekhula did not examine the background of the Space Protocol, as the previous speakers had already extensively addressed this. He focused on the particular interests in the Space Protocol by African countries, the identification of a space asset, the international Registry, and the certainty in financing. Through these three aspects essential basic services can be provided.

South Africa and other African countries are facing major environmental and social challenges. Furthermore, the continent is endowed with natural resources, yet it is not in a position to reap the benefits of these resources and raise the standard of living. Space based systems can contribute to the sustainable development of these countries, as well as monitor the environment and climate change. The major challenge however, is that financing of satellites is competing with basic infrastructural needs. The asset based financing provided for in the Space Protocol will hopefully give enough incentives for start-up companies to obtain the required financial assistance.

So far, only a limited number of African countries have space capabilities, such as South Africa, Nigeria, Algeria, Egypt and Tunisia. Kenya, Ghana and Uganda have announced plans to enter the field on a small scale.

The observed commonalities and key trends in these countries are that all the programs are government funded and are for public use, so there is no commercialization. The main objective of the current space programs is earth observation since this primarily serves the public interest. The Space Protocol may provide for incentives for private funding that could go hand in hand with innovation. Such private funding will also facilitate financing for mobile equipment, which moves across national borders. Ultimately the Space Protocol will provide benefits for the creditor. Such rights are the priority for registered interests, the right to repossess, and right to assistance by the courts in various jurisdictions. What is also important for South Africa is Article XXXIV of the Protocol, which states that a State's rights will not be compromised. Rights and obligations under existing United Nations Space Law treaties are not affected, and in particular, there will be no interference with national security regulations.

The Space Protocol does have a particular shortcoming, i.e. the benefits for the debtor are not clearly defined. A large number of declarations have to be made in order to be of benefit, resulting in the Cape Town discount. In order to remedy this, Resolution Four was adopted at the Diplomatic Conference in Berlin which entails the encouragement to international, national and private financing institutions of the Contracting States to assist developing Contracting States by providing them with reasonable discounts or rebates in their efforts to finance space assets.

South Africa has ratified both the Cape Town Convention and the Aircraft Protocol. South Africa is currently reassessing the issues that are raised with the implementation of the Aircraft Protocol that also have a direct bearing on the Space Protocol. Mr. Sekhula finished his presentation by expressing his desire for a positive outcome.

The presentation gave rise to some remarks. Mexican delegate **Ms. Ramírez** reiterated that indeed strong domestic law is needed, in particular good trade law and contract law. A lot of good work has been done in the development of this Protocol, but there is still a long way to go. **Prof. Hobe** agreed with her assessment and stressed the importance of the rule of law in outer space activities. Too many countries rely on less stringent rules in this area and are reluctant to enter into binding agreements. This has to do with the method of lawmaking rather than the actual will.

Prof. Marchisio noted that the drafting process of the Space Protocol between 2002 and 2009 was said to be too commercially oriented, while after 2009, and particularly during the Conference in Berlin, the accusation was the opposite, i.e. that the text was not enough business-friendly. In his opinion, the current text is a good compromise between these two positions.

Ms. Masson-Zwaan continued by reading the statement by **Mr. Chris Johnson**, from Leiden University, entitled: *A look ahead*. In 2009, Mr. Johnson attended as an impartial observer two governmental meetings of experts considering the Space Protocol.

The Protocol benefitted from further development during the drafting period, and according to Mr. Johnson, its potentials are as yet untested. In his paper he discussed the issues that arise from space assets moving between multiple jurisdictions, creating considerable distance between the asset and the security holder. This makes it very difficult for creditors to collect. The conflict of laws that results from moveable assets crossing State boundaries can be solved by the creation of an International Registry, in which all the rights and limitations of the assets are defined. When the legal uncertainty faced by the holders of security interests in space assets is reduced, the financial risk of each investment is also considerably less. As a result, the stable financial base makes it possible for the market to expand and encourage new market entrants such as start-up firms, developing countries, and other parties that were before limited to enter the market.

Several well-established corporations in the space industry were resistant to the idea of a new financing system, as they had long-standing contracts that dealt with jurisdictional issues. The concern was that their way of doing business might become threatened by new market entrants, low collateral requirements, and the creation of the Registry, which would fall under international and uniform regimes. Mr. Johnson was of the opinion that the Protocol provides more opportunities for new market entrants than it limits the highly profitable satellite industry.

Asian, African and Latin American States should seriously consider ratifying the Space Protocol, as they would reap the most benefits. Stakeholders and observers should endeavour to create wider recognition, appreciation and implementation of the Protocol. Other interested parties should be made aware of the Protocol and the advantageous environment it can create. This means that word has to be spread by organizations such as the IISL and ECSL. Understanding why the Protocol has raised

criticism and being able to dispel that criticism with well-founded arguments, thus informing how it will benefit those who need it will be paramount to the Protocol's success.

The Protocol will be considered successful if the parties that ratify are the ones that will benefit most from the instruments it provides. Particularly in States whose national legal instruments have thus far hampered the possibility of entering the commercial space market, the Space Protocol will provide a flexible way of financing space assets and a higher level of security – thus creating a global space market.

As the afternoon came to an end, delegates and participants were invited to provide questions and observations. **Mr. Jean-François Mayence**, representative of Belgium, asked UNIDROIT to provide an update about its other space-related project, on liability of the providers of global navigation satellite services. **Mr. Stanford** had to excuse himself explaining that, since he is retired, he is not completely up-to-date on all the current developments. However, he could tell that consultations are taking place on that project.

Ms. Masson-Zwaan raised a topical issue relating to the Space Protocol. As the Protocol describes 'space assets' as being 'in space', do we not need an actual definition or delimitation of outer space? **Prof. Bernhard Schmidt-Tedd** proposed another option for the definition of space assets, i.e. any object intended to be launched into outer space. He concluded that the definition of space asset does not contribute any new element to the on-going debate on the definition and/or delimitation of outer space. **Prof. Marchisio** added that the Space Protocol would not apply to the market of suborbital flights, since those assets are not to be located in space.

Dr. Tare Brisibe, Chair of the Legal Subcommittee, closed the symposium. He sincerely thanked IISL and ECSL for organizing this symposium, which was most interesting and thought provoking, and expressed his appreciation to all the speakers and for the interaction with the delegates and young scholars. As the symposium came to an end, **Prof. Masson-Zwaan** invited all participants to the reception hosted by IISL and ECSL, concluding an afternoon of intellectual discussions essentially dealing with the future of space activities.

The papers and presentations contributed by the speakers may be obtained from the website of United Nations Office for Outer Space Affairs (UNOOSA) at <http://www.unoosa.org/oosa/en/COPUOS/Legal/2013/symposium.html>