Role of International Space Law in the Development and Strengthening of International and Regional Cooperation of States in the Peaceful Exploration and Uses of Outer Space

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The preliminary draft Protocol to the Cape Town Convention on Matters specific to Space Assets:

a unique opportunity to expand the benefits of space-based services and to broaden the market for commercial space activities in general

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I. INTRODUCTION: LEGAL AND ECONOMIC RATIONALE OF THE PROJECT

Mr Hernando de Soto, the Lima-based President of the Institute for Liberty and Democracy, delivered a remarkable speech at the opening ceremony of the Annual Conference of the International Bar Association in Buenos Aires on 12 October 2008. He noted that over the previous 60 years the world had grown more than in the previous 2,000 years but that, in the process, some four billion people had been left behind. He noted that wealth was, indeed, a very comparative phenomenon and that it was, therefore, necessary to empower those left behind, in particular since those not legally empowered would not have the tools with which to survive in a global economy. The essential key to such legal empowerment he saw as lying in property law, with the issue of security over property crucial. The recording of property interests is, to Mr Soto's mind, fundamental to the capacity of those countries who have to date been left behind to start catching up, not least given the enormous potential that property has to permit the raising of capital and, thus, the creation of new wealth.

It was precisely to deal with this sort of problem that Unidroit, the International Institute for the Unification of Private Law, an intergovernmental Organisation - with 63 member States, from all four corners of the world - set out to create a new international regimen governing the taking of security in those categories of high-value mobile equipment likely to be moving across or, in the case of satellites, beyond national frontiers in the ordinary course of business. Without such an international regimen financial institutions tend to be extremely reluctant to advance secured funding for the acquisition of such assets, unless, of course, the party seeking such funding has what is normally referred to as "triple A" status. Such reluctance has to do with the **legal** uncertainty that would arise, in the case of such highly mobile assets, as to the law that would be applicable to questions concerning the validity, enforceability and priority ranking of such security. And the effect of this is to make it extremely difficult for **new market entrants, in particular start-up companies, and the smaller operators**, to obtain such funding, when, as in the case of satellites, all they have to offer by way of

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collateral is the satellite with which they hope to go into business: clearly, satellites do not particularly lend themselves to repossession, in the event of default by such lenders.

The particular **economic** significance of the Unidroit project in this context has to do with its focus on the technique known as asset-based financing, where the financier is able to lower the cost to a lender of financing through the fact that, in the event of default by the lender, the financier will be able to go against the asset.

And it is not that Unidroit is seeking simply to provide a uniform regulation of asset-based financing but rather, in keeping with the trend of its efforts over recent decades, to look less toward the harmonisation of existing national laws in this field and more toward modernising the law with a view to the opening up of new economic opportunities, and in particular with a view to enhancing the access to the international capital markets of those countries most in need of such financing to develop their economic infrastructure to meet essential needs, namely **the emerging and developing economies**. Thus, the new international regimen is designed to apply at the same time to those categories of high-value mobile asset like aircraft, for which asset-based financing is nothing new, as well as to those categories, like satellites, for which asset-based financing opportunities have hitherto been all too limited, with the result that satellite financing is much more expensive and available to a much smaller number of players than would otherwise be the case.

II. ESSENTIAL FEATURES OF THE NEW INTERNATIONAL REGIMEN

The essential means by which the Convention on International Interests in Mobile Equipment, which was opened to signature in Cape Town on 16 November 2001 and already counts 32 Contracting Parties, aims to achieve these profound legal and economic changes is through **the establishment of an international electronic registry, open on a 24-hour-a-day seven-days-a-week basis**. The security interest over a high-value mobile asset like a satellite created by a chargor under a security agreement or the equivalent interest vested in the conditional seller under a title reservation agreement or the lessor under a lease may, provided it meets the requirements set out in the Convention for its constitution as an international interest, be filed in the International Registry established for each separate category of mobile equipment contemplated by the Convention, pursuant to a system of equipment-specific Protocols. Such an interest will thereupon, in any future dispute, have priority over any other interest subsequently registered in the same asset in the International Registry or, indeed, any other interest in that asset not registered in the International Registry.

In effect, the Convention sets out the **general** rules, governing such matters as the formal requirements for the constitution of an international interest, the remedies exercisable by the creditor in the event of the debtor's default and the international registration system. For each of the specific categories of mobile asset contemplated by the Convention - at present three, namely, first, aircraft, aircraft engines and helicopters, secondly, railway rolling stock and, thirdly, space assets - these general rules need to be filled out by **special** rules, for instance defining the category of assets in question and spelling out modifications to the remedies rules of the Convention, something that is particularly relevant in the case of satellites, for which the classic repossession remedy is, clearly, not practicable.

It will be seen that the new international regimen provides precisely those elements of **predictability** - regarding the legal regimen that will determine remedies in the event of a dispute - and **transparency** - regarding notice to third parties - which are of such importance when a financier is considering, at the outset of a transaction, whether he should accede to a potential lender's request for funding.

III. CURRENT STATUS OF THE PROJECT

Unidroit is working towards a draft Protocol to the Cape Town Convention on Matters specific to Space Assets being ready for consideration by a diplomatic Conference of adoption either towards the very end of next year or, more probably, in the first half of 2011. Following intersessional work on a number of key outstanding issues, latterly within a Unidroit Steering Committee, made up of representatives of both Government and the international commercial space and financial communities - **participating in this stage of the work, it is important to note, on an equal footing** - the third session of the Unidroit Committee of governmental experts responsible for the preparation of this draft Protocol, of which Professor Sergio Marchisio (Italy) is Chairman, will be held in Rome next month. After that, Unidroit anticipates just one further session of governmental experts being necessary before the diplomatic Conference of adoption.

In line with Resolution No 3 passed by the Cape Town diplomatic Conference, the intergovernmental negotiations have been opened up, beyond just Unidroit's members, to all members of the United Nations Committee on the Peaceful Uses for Outer Space. The idea behind this was to ensure the participation of countries from all over the world and all levels of development.

Some 45 States have participated to date in the work of the Committee of governmental experts. The complexion of the Committee, **half the membership of which hails from the developing world provides eloquent testimony of the expectations that part of the world places on the benefits to be reaped under the future Protocol.** It is significant in this context to note that Mexico and South Africa hold the First and Second Deputy Chairmanships of the Committee.

Equally significantly, given Unidroit's commitment to the production of an instrument duly responsive to the needs and expectations of the international commercial space and financial communities, representatives of all these communities, including major satellite manufacturers, satellite operators, major satellite financiers and major satellite insurers, are taking an active part in the proceedings. The role of these parties is, at all times, crucial, not only in making known the concerns of industry regarding individual provisions but also in making sure that the Governments driving the process have access, at all times, to information regarding the practical aspects of commercial space financing.

IV. KEY OUTSTANDING ISSUES

The main focus of this project over the last few years, in particular within the Steering Committee, has been **to build consensus on a number of key outstanding policy issues**. In particular, these efforts have sought to identify solutions capable of securing timeous completion of this project, not surprisingly recognised as being essential for those who have hitherto been so generous with their support.

A basic consideration that emerged from the beginning of this intersessional work was the desirability of getting away from a text seeking to provide a blueprint for the future of commercial space financing - and thus, for example, including within the definition of those space assets subject to the future Protocol assets assembled or manufactured in space, something that will certainly come in time but which would be likely to complicate matters at this stage. The idea was that it would be **better to concentrate in the future Protocol on the satellite in its entirety**, which represents, after all, 80% of the space assets which are currently the subject of asset-based financing.

Questions have, therefore, been raised in particular as to the desirability of covering all **components**, many of which may be of limited value and, therefore, not really amenable to the new international regimen. There is general agreement that the future Protocol should, however, cover

high-value components, such as satellite transponders, which provide attractive collateral for financiers. Evidence of this is to be seen in the increasing use being made of **hosted/shared payloads** - that is payloads designed and manufactured by a Government or other public body for placement on a commercial satellite. Again, there are considerable cost-reduction advantages in the use of such payloads. By making use of room on board an existing satellite, such Governments or public bodies can reduce the time it takes to plan for and deploy a satellite from 10 years to four years. This practice is also useful for satellite operators, in that it offers economies of scale and provides additional sources of income during the initial stages of a space asset's life, and provides corresponding reassurance to financiers, by indicating a definite source of future income for the satellite operator.

One of the peculiarities of the application of asset-based financing to satellites is the **limited economic value that a satellite represents for creditors** in the event of the debtor's default. Another important conclusion reached during the intersessional work has, therefore, been to recognise the desirability of extending the application of the Cape Town Convention in relation to space assets to cover what creditors will tend to see as the most valuable aspect of a satellite, namely all rights to payment or other performance due to a debtor by any person with regard to a space asset, referred to in the future Protocol as **"debtor's rights".** Securing these rights under the future Protocol is particularly important for creditors of satellite operators because, without this ability, a creditor might take control of a satellite the right to the revenue stream from which might have been given to an unknown third party and thus render the satellite virtually valueless. The idea would be for such **debtor's rights to be recorded in the future International Registry against the space asset in question**.

The new international regimen being concerned with asset-based financing, it is natural, though, that for an international interest over a space asset to be capable of registration in the future International Registry **the asset in question needs to be capable of unique identification**. Whereas this is a requirement easily satisfied in respect of aircraft, which, of course, all have a manufacturer's serial number, the same is not necessarily true of space assets. The solution developed during intersessional work was for **certain basic mandatory identification criteria to be required** in the future Protocol, namely, the name of the manufacturer and the serial number and model of the space asset, and for these to be the same whether the asset was on Earth or in space … but, to cover the case of a space asset in which no international interest had been registered at the time of launch, for **additional optional identification criteria**, such as the date and place of launch and the position of the asset in orbit and its orbital parameters, also to be capable of being employed, in order to provide a link between the physical asset and the registration in the International Registry.

One of the main issues referred to intersessional work was that of the extent to which the exercise of the creditor's remedies should be limited where the space asset being operated by the debtor in default was performing a **public service**. The basic dilemma here is to balance the interest of a Government or a public body in ensuring the continuity of such a public service and that of a financier in being able to recoup his investment. Clearly, for private financing to be available for commercial space activities, it is essential that the elements of predictability and transparency, referred to above, so important to a financier contemplating extending secured financing, be satisfied from the very outset. Equally clearly, it would be egregious to imagine a solution that would prejudice the operation of a satellite performing a function of life-and-death scale.

There was agreement during the intersessional work that public service should not be defined in the future Protocol, it being important not to create a new international duty on this matter. Support was rather expressed for States being given a menu of several options on this subject, any number of which could be chosen by a Contracting State at the time of ratification, through the lodging of a declaration. The thought was that this would enable Contracting States to choose between, on the one hand, a stronger measure of protection for the maintenance of public services or, on the other, a stronger dose of protection for the creditor's ability to exercise his default remedies. States would, thus,

have the responsibility for the extent to which they might in future expect to have access to private sources of financing in respect of satellites that would be performing a public service.

Concern must remain, though, that such a solution could seriously undermine the future Protocol's ability to achieve the objective for which it is principally designed, namely to secure valuable private finance for new space projects that would, through the resultant enhanced access to space-based services, immeasurably improve the lot of the four billion people left behind in the example given earlier from Mr de Soto's address. As we have sought to show, financiers look to predictability and transparency before undertaking such commitments.

It is worthy of note in this connection that the Aircraft Protocol does not contain a public service limitation on the exercise of the creditor's remedies. That decision, undoubtedly, reflected the realities of the contractual negotiations that precede the undertaking of a commitment by a financier to extend secured financing facilities in respect of high-value assets moving across or beyond national frontiers in the ordinary course of business, these negotiations invariably involving intensive negotiations among the parties on the issue of public service.

If the future Protocol is to enhance the opportunities for commercial space financing, as hoped, then it is, clearly, going to be essential for it not to worsen the situation currently obtaining under national law, as without such an assurance, there is little likelihood of it securing the necessary endorsements to enter into force. The question, therefore, has to be whether, as advocated by more than one eminent expert, the most equitable solution on this important matter would not, as under the Aircraft Protocol, be for the question as to the most appropriate limitations to be imposed on the exercise by a creditor of his remedies under the Cape Town Convention as applied to space assets to be left to **the applicable law**.

V. CONCLUSIONS

Summing up, perhaps it is appropriate to go back to what I was saying at the outset regarding the probable principal beneficiaries of the proposed new international regimen, namely the emerging and developing economies, start-up companies and smaller operators. It is clear, though, that manufacturers and financiers also stand to see their markets significantly broadened as a result of the enhanced transparency to be expected under a future International Registry. Already the advent of the mobile telephone in Africa has revolutionised the access of erstwhile subsistence economies to banking services and there can be no doubt that the range of space-based services the financing of which may be expected to be facilitated by the future Protocol is bound to have a quite extraordinary impact on those living in developing countries.

The widespread support that has been given to completion of the intersessional assignments by not only the Governments of the leading space-faring nations but also leading representatives of the international commercial space and financial communities provides eloquent testimony of the potential benefits that may, it is to be expected, be reaped by all parties involved in commercial space activities. Moreover, it testifies to the determination of Unidroit to ensure that, in line with the procedure followed with the Convention in general and the Aircraft Protocol in particular, the future Space Assets Protocol will be duly responsive to the essential needs and requirements of the business practice, whilst, at the same time, being in line with the United Nations Treaties and Principles on Outer Space, as well as other international instruments in force in this area.