

# Report of the Symposium

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**IISL President Tanja Masson-Zwaan** opened the Symposium. She declared that the transfer of ownership of space objects is a very important topic that is currently under consideration by the Legal Subcommittee of COPUOS, within the Working Group on Status and Application of the UN Outer Space Treaties. **ECSL President Sergio Marchisio** added that this issue is mentioned in several paragraphs of the draft report of the Working Group on National Space Legislation.

**Professor Armel Kerrest from University of Brest (France)** started off by saying that we are facing not a purely academic issue, but a practical one deriving from real commercial considerations. A satellite may be sold or bought while in outer space, or may be given as security for an investment. The new owner may be from a different State. An international transfer of ownership raises the additional questions of the transfer of control and supervision and transfer of registration of the space object.

The current legal framework that is significant for this topic is composed of the following provisions: Articles VI, VII and VIII of the OST; and the indication of liability of the launching State by registration of the space object (given the absence of a flag of nationality in space law). Questions relevant are: can a space object be sold/bought/transferred while in outer space? The answer is yes. Can we have a change of registration from the selling State to the buying State? The answer is no, except in those transactions done between launching States, as it happened when *Asiasat 1* and *Asiasat 2* from Hong Kong were changed from the British to the Chinese registry with the handover of Hong Kong. When a transfer of ownership is made, the State responsibility over the space object is also transferred. But State liability is not transferred, rather, it is forever attached to the original launching state. For such reason, certain States such as France and Belgium have included in their national space laws limitations on the possibility of transferring a space object to another State.

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\* IISL Member and Assistant Editor, 2012 Proceedings of the International Institute of Space Law. The author wishes to thank Mr. Hannes Mayer (University of Graz, Austria) for his notes from the 2012 IISL/ECSL Symposium, which contributed to the writing of the present report.

However, it may be possible to ease the implementation of the UN Treaties to take into consideration the development of private activities in outer space. The “new” State should be able to register the object and exercise jurisdiction and control over it, in order to fulfil its obligations under Art. VI OST. The proposed process to carry out such a transfer within the framework of current international space law is as follows: 1) To reach an international agreement between the two concerned States. The agreement should state in any case whether the transaction includes a transfer of registration or just a transfer of ownership. 2) In case a transfer of registration is also contemplated, since no changes of registration are allowed by the current international legal framework in favor of non-launching States, then a UN General Assembly Resolution should be adopted. In the UNGA Resolution, the UN Secretary General and OOSA would be requested formally to accept a change of registration, on an *ad hoc* basis, of the specific space object between those two UN Member States. This process would take into account all the interests involved in the transfer.

**Ms. Mildred Trögeler (ESPI, Vienna)** reminded that the COPUOS Legal Subcommittee has faced this problem when analyzing the practice of States and international organizations in registering space objects, between 2004 and 2007. Some problems were identified by the corresponding Working Group with regard to transfers of ownership of in-orbit space objects and the related transfers to other States’ registries.

Ms. Trögeler identified three possible cases of transfer of ownership: 1) Between two entities belonging to the same launching State; 2) From one launching State to another launching State; 3) From a launching State to a non-launching State. The second case took place once already, in 1999, when the two Hong Kong *Asiasat* satellites were transferred from the UK registry to the China registry. This transfer was however due to special circumstances involving a transfer of territory between the two launching States.

The third scenario is the one that poses the legal problems under consideration here, since according to the Registration Convention, only launching States can register a space object. This situation has occurred once in 1996, when the UK (launching state) sold to Sweden (non-launching State) two satellites already in orbit. One of them, the direct broadcasting satellite *BSB-1A*, is still included under such name in the UK registry, but it is also incorporated under a different name (*Sirius-1*) in the Swedish registry. As a rule, whenever two States become involved in this third type of transfers, an international agreement on how to address indemnification should be formalized. Other recommendations would be to emphasize the important role of national legislation to authorize and continuously supervise private space activities, and to submit more accurate and updated information to both the national registry and the UN Register in cases of transfers of ownership.

**Professor Setsuko Aoki (Keio University, Japan)** said that, as already noted by the previous speakers, the transfer of ownership of a satellite in orbit does not affect the liability regime of the launching State. This regime derives from the original launch, and it will not change: “once a launching State, forever a launching State”. In principle, a transfer of registration from an original launching State to another State might turn the new State of registry into an

additional launching State. However, there is no international rule recognizing that a State that was not involved with the physical launching of a satellite can be considered a launching State.

Ms. Aoki listed several reasons for transfers of ownership. Besides those already noted, she pointed out the transfer of ownership due to the acquisition of the owner company by a company from another State. As an example, she provided the case of the acquisition by China of US company LMI which owns a satellite, *LMI-1*. There is also the possibility of transferring the ownership because an international organization has been privatized. This was the case of Intelsat, Inmarsat and Eutelsat. Concerning the latter situation we have the practice of two States, the UK and the Netherlands, in the sense of establishing two national registries: one registry for their national satellites, that is, those satellites whose launch was procured by the government or by a national entity; and another registry for those satellites procured by an international company or operator whose only link with the country is that it is based or headquartered in their countries. Both the UK and the Netherlands declare not to be launching State or State of registry with respect to the latter satellites. Such national practice might become a customary rule if followed in the future by other countries.

Governments can ensure that their nationals will assume third party liability through national legislation in line with the UN Outer Space Treaties. The provision of information concerning the transfer as well as national legislation could be the solutions with respect to in-orbit transfers of space objects.

Regulatory options for dealing with the transfer of ownership of space objects in orbit were also explored by **Olavo Bittencourt Neto, from the University of São Paulo, Brazil**. Such transfers were not specifically addressed in the UN Outer Space Treaties, as already found by the COPUOS Legal Subcommittee. A solution could be provided either by extensive interpretation of the Treaties in effect or by the drafting of new rules. A clear provision should be introduced establishing that any State (or international organization) that acquires a space object in orbit shall be regarded as a launching State, as far as international responsibility, liability and registration are concerned, and irrespective of the level of participation of the new owner during the original launch.

How could the international community implement such a change? There are three possible ways. Unilateral acts would work if the new owner State should provide an official public declaration to UNOOSA, accepting liability and registration over the space object. However, unilateral acts of different States can be subject to different interpretations. Changing the current regime through a new treaty would be best for the sake of legal certainty, and also because it would mean the same obligations for all parties. But it is not easy to gather enough political backing for a new treaty.

As a third alternative, Mr. Bittencourt proposed to elaborate and adopt a UNGA Resolution covering this topic. The proposed Resolution should contain a detailed and clear registration procedure, as well as clarify the legal consequences regarding transfers of ownership. This way, it would open the way for consolidation of international customary rules in this regard, and might even constitute the cornerstone for a future treaty.

**Dr. Martin Stanford (UNIDROIT Institute, Italy)** announced that only ten days earlier, the Space Protocol to the 2001 Cape Town Convention had been concluded and adopted in Berlin, in order to extend the sphere of application of the Convention to space assets (satellites and certain other assets). The Protocol is intended to facilitate the transfer of possession or control of space assets, pending the transfer of ownership. The transfer of ownership as such is not regulated by the Space Protocol, and it has to be done in accordance with applicable national law of the States concerned.

Awarding just the physical possession over the space object to the creditor is not very useful: the latter would have to retrieve it from orbit and launch it again under a new license, to a different orbital position, and perhaps using other frequencies, etc. which of course is totally impractical. Therefore, the Space Protocol facilitates the placement of data and other materials (e.g. command codes) with a third party in order to give a creditor the opportunity to take possession of, or control over the space asset in question. The Protocol also extends the scope of application of the Convention to so-called “debtor’s rights” (the latter defined as “all rights to performance or payment due to a debtor by any person with respect to a space asset”) without interfering with State Authority over such rights.

According to Dr. Stanford, in order to preserve the powers of the contracting parties, the Protocol does not affect the States’ ability to exercise authority over space assets in accordance with domestic laws and policies. The applicability of the Protocol is thus always limited by reference to the relevant law. This is a limitation that affects all forms of commercial space financing.

The next lecture, by **Professor Frans von der Dunk (University of Nebraska, USA)**, was titled “Towards ‘flags of convenience’ in space?” The term “flag of convenience” originated in maritime law. Despite the adoption in 1958 of the first UN Convention on the Law of the Sea, with its provision mandating a “genuine link” between a State and all ships bearing its flag, a rule later incorporated in the 1982 UNCLOS, the problem of “flags of convenience” persists until today—as an example, Mr. von der Dunk reminded that Sea Launch has used ships with Liberian flag.

In outer space, the risk may also exist that private operators will choose to be based in a country with the least or no regulation. There are two reasons for that: 1) The Registration Convention does not provide a “genuine link” requirement (as UNCLOS does in Art. 91.1) or any specific requirements addressing potential safety concerns; and 2) In international space law, there is no reference whatsoever to certification of spacecraft, crew requirements, or general safety of operations. On the domestic level, only two States (Russia and Ukraine) have included some provisions on the safety of space vehicles in their national space laws. There are no other rules concerning safety in either international or national space law. Therefore, there are almost no divergences here. It is in the national treatment of liability where the main differences arise between States. Divergences focus on three policy choices made by space faring nations having domestic laws: 1) whether to put a cap on the reimbursement of any potential liability to the licensing State; 2) whether to make a third-party

liability insurance requirement mandatory, and if so, whether to also put a cap or limit on it; and 3) which scope of application to select for their laws: personal jurisdiction, territorial jurisdiction, both, or other.

A brief analysis of the dozen or so existing national space laws handling private involvement in space activities (notably the liability consequences thereof) shows that States have done so in a varying fashion. In theory, this might lead to certain prospective operators to make a choice as to which regime they want to be licensed under as being the least costly. Therefore, the risks of “forum-shopping” and “flags of convenience” in space are on the horizon, perhaps not immediately but in the longer term.

Installing international rules precluding or at least minimizing the future appearance of “flags of convenience” in space is much more feasible when there are as yet no such flags, and thus no vested interests would be harmed by the establishment of such a rule. In particular, Mr. von der Dunk suggested to include somehow, in international space law, an outer space version of the “genuine link” rule: “there must exist a genuine link between the State and the space object, and in particular, the State must effectively exercise jurisdiction and control over space objects registered by it. In doing so, the State shall ensure due compliance by the operator of the registered space object – preferably by means of a system of authorization, licensing and supervision – with the applicable rules of international space law.”

**As a final note, concluding remarks were made by the Chairman of the Legal Subcommittee and by the Chairpersons of the Symposium, and an opening of the discussion rounds took place.**