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Regulatory Options for Dealing with the Transfer of Ownership

*Olavo de O. Bittencourt Neto**

This paper offers a study about regulatory options for dealing with the transfer of ownership of space objects in orbit, as presented during the International Institute of Space Law (IISL) and European Centre for Space Law (ECSL) Symposium "Transfer of Ownership of Space Objects: Issues of Responsibility, Liability and Registration", held in Vienna, during the UNCOPUOS Legal Subcommittee, on 19 March 2012.
To begin with, an important fact must be acknowledged: as UNCOPUOS Legal Subcommittee's Working Groups have previously identified,[1] the transfer of ownership of space objects in orbit was not specifically addressed by relevant space treaties, including the Space Treaty of 1967,[2] the Rescue Agreement of 1968,[3] the Liability Convention of 1972[4] and the Registration Convention of 1975.[5] The reasons behind such situation are, nevertheless, understandable, since at the time those important international instruments were drafted, problems related to the transfer of operation and control of space objects in orbit could not be properly anticipated.

I Responsibility and Liability of the New Owner

Nowadays, current practices, particularly in relation to geostationary communication satellites, require attention from the international community, in order to address questions related to responsibility, liability and registration, particularly regarding transfers to non-Launching States. As observed by Michael GERHARD, it shall be acknowledged that, "*in addition to a contract of sale, a transfer of operation and control may also be effected by an act of leasing or any other transfer of possession which enables the transferee to exercise control over the space object*".[6]

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* University of São Paulo, Brazil, olavo.bittencourt@usp.br.

1 A/AC.105/C.2/L.255.

2 "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies."

3 "Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space."

4 "Convention on International Liability for Damage Caused by Space Objects."

5 "Convention on Registration of Objects Launched into Outer Space."

6 "*Transfer of Operation and Control with Respect to Space Objects – Problems of Responsibility and Liability of States*", ZLW, n. 51, 4/2002, p. 573.

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A solution for dealing with such lacuna in the international legal system could be provided either by extensive interpretation of space law treaties in effect, or through the drafting of new set of rules, as far as international law is concerned.

After carefully considering other relevant alternatives, I'm inclined to support the formulation of a regulatory proposal based on a clear provision: any State (or, eventually, International Organization) that acquires a space object in orbit shall be regarded as a Launching State, as far as international responsibility, liability and registration is concerned, irrespective of the level of participation of the new owner during the original launching, also realizing that such transfer of ownership would imply the change of the respective "appropriate State" responsible for all national activities, whether performed by governmental or non-governmental entities, as provided by article VI of the Space Treaty.[7]

This proposition is based on two important considerations, the first one quite categorical: once a Launching State, always a Launching State. In accordance with such reasoning, inferred hermeneutically from the current space treaties, the eventual transfer of ownership of a space object in orbit cannot affect the responsibility and liability of the original Launching State or States. The second consideration acknowledges that ownership shall entail not only responsibility, but also liability. Thus, the new owner of a space object shall be internationally liable for damage to third parties, in accordance, specifically, with the legal system provided by the Liability Convention of 1972.[8]

7 "*States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization.*"

8 "*In apportioning the burden of liability the* [Liability] *Convention* [of 1972] *makes a clear distinction between two areas where damage may occur: damage caused on the surface of the Earth or to an aircraft in flight, and damage caused elsewhere than on the surface of the Earth: (1) for damage caused by a space object on the surface of the Earth or to an aircraft in flight the Convention introduces absolute liability (Articles II and IV (a)); (2) for damage caused by a space object elsewhere than on the surface of the Earth fault liability will apply (Article III and IV (b)).*" I. H. Ph. Diederiks-Verschoor. *An Introduction to Space Law*. 2. ed. Dordrecht, the Netherlands: Kluwer Academic Publishers, 1999. p. 39.

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Ultimately, the thesis hereby espoused could, indeed, limit the possibility of development of a deleterious practice of establishing "flags of convenience" in relation to space objects, as long as properly drafted.

II Possible Sources of International Law

The immediate following discussion would be in relation to the possible sources of international law for implementation of the mentioned legal norms. In that regard, one should contemplate the alternatives available, as far as the regulatory framework is concerned. Therefore, a study must be conducted to identify through which mechanism of creation or manifestation such rules could be better contemplated, in order for them to be deemed effective. Since there are several regulatory alternatives available, any decision requires a thorough assessment of their respective pros and cons.

In view of that, three possible international regulatory alternatives will be subsequently considered for the task at hand: A. unilateral act; B. treaty; and 3. United Nations General Assembly Resolution.

A Unilateral Act

Publicists and international courts have recognized that, as provided by Malcolm N. SHAW, "*in certain circumstances, the unilateral acts of States, including statements made by relevant State officials, may give rise to international obligations*".[9]

Therefore, due to the well-known fragmented nature of our international legal system, a clear and official declaration performed by a State that has acquired ownership of a space object in orbit, recognizing its respective responsibility and liability as a Launching State, should suffice to contemplate the abovementioned regulatory proposal. Such unilateral declaration could be provided not only by States, but also International Organizations, whenever applicable.

References to unilateral declarations is nothing new in space law; indeed, they can be found in relation to registration of space objects performed in accordance with the General Assembly Resolution 1721 B (XVI) of 1961.[10] In fact, the referred instrument could be presented to the United Nations Office of Outer Space Affairs (UNOOSA), as additional information, concerning change of control of space object already registered, in accordance with the General Assembly Resolution 62/101 of 2008.[11]

Additionally, those acts could be supported by national legislation, encompassing the domestic procedure applicable as well as respective legal consequences involving those unilateral declarations, or even by a bilateral agreement between

9 *International Law*. 3. ed. Cambridge, England: Cambridge University Press, 2003, p. 114.

10 "*International Cooperation in the Peaceful Uses of Outer Space*".

11 "*Recommendations on enhancing the practice of States and International Intergovernmental Organizations in Registering Space Objects*".

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previous and current owners of the space object in question. Kay-Uwe HÖRL and Julian HERMIDA acknowledged the possibility of a special agreement between a Launching State and a non-Launching State, transferring rights and obligations arising from the registration of a specific space object.[12]
Concluding, in relation to the present alternative, the new owner of the space object in question would have to provide an official public declaration to the UNOOSA (a) accepting responsibility and liability as a Launching State; and (b) requiring proper registration of the applicable space object on its behalf.
The resort to unilateral acts to solve this complicated situation, as far as transfer of ownership of space objects is concerned, would certainly not be free from criticism. First, one should observe the pros involved in this alternative: due to its unilateral and straightforward nature, it could be implemented immediately, whenever a case of transfer of ownership were to be identified; also, a simple public statement should suffice, as long as unequivocal, and would be effective in relation to third parties, that is, binding to the State or International Organization that offered it. On the other hand, the cons must not be overlooked, since the lack of standard procedure for declaration could give rise to different interpretations, eventually leading to international disputes. Also, questions could arise in relation to legal security, due to possible elusive characteristics of those instruments.

B Treaty

Ian BROWNLIE observed that "*law-making treaties create general norms for the future conduct of the parties in terms of legal propositions, and the obligations are basically the same for all parties*".[13]
Indeed, the drafting of a new multilateral law-making treaty provision contemplating the refereed proposal could constitute a clear and binding statute applicable to all parties. Nevertheless, it must be reckoned that such new treaty rule, for proper implementation, would require amendments to several other law-making treaties, as part of an overwhelming revision endeavor that seems rather difficult to be accomplished nowadays.
In truth, for such alternative to reasonably succeed, a new law-making treaty would have to conceived, superseding all the others at least in that regard - what, by no means, represents an easy challenge for the international community.
Anyhow, if that were to be the case, a window of opportunity would be opened to address other relevant pending problems, related not only to the registration of space objects, as noted by the UNCOPUOS Working Group on the Practice of States and International Organizations in Registering Space Objects in 2007,[14] but also to questions involving the concept of Launching State, as

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12 "*Change of Ownership, Change of Registry? Which Objects to Register, What Data to be Furnished, When, and Until When?*" American Institute of Aeronautics and Astronautics, 2003.
13 *Principles of Public International Law*. 6. ed. Oxford, England: Oxford University Press, 2003, p. 12.
14 A/AC.105/2007/CRP.5.

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identified by the UNCOPUOS Working Group Regarding the Review of the Concept of Launching State in 2005.[15]

About benefits of this alternative, the following considerations are of order: through a clear and binding text, greater legal security could be achieved; an opportunity would be opened for the drafting of a comprehensive regulation; finally, a standard procedure regarding registration of transfer of ownership of space objects could allow maximum effectivity in relation to state parties. On the other hand, one must recognize that it is no easy task to gather enough political will to back the drafting of novel, comprehensive space law treaty on that regard, arguably making such alternative unrealistic; additionally, a new convention may eventually affect important rules provided by prior agreements, putting in question relevant features of the undeniably interesting legal regime envisaged for space activities, conceived for the benefit of all mankind.

C United Nations General Assembly Resolution

As properly observed by Bin CHENG, "*rules of international law are binding because States considered themselves bound by them. The fact that they have been identified and enunciated by a General Assembly Resolution cannot undermine their binding force*".[16]

This final option would represent an intermediate alternative, contemplating clear rules in relation to transfer of ownership, respective registration procedure and applicable legal consequences, although non-binding by nature.

Such legal instrument, even though brief and pragmatic, could introduce an innovative registration procedure in case of transfer of ownership of space objects in orbit, legally authorizing the change of State of Registry before the UNOOSA.

It must be recalled that such alternative, as it happens in relation to any other United Nations General Assembly Resolution, would not be binding *per se*, that is, *ex proprio vigore*, representing an example of the so-called "soft law". But eventually, if the *opinion iuris* necessary for approval of such instrument before the UN General Assembly could later welcome a *consuetudo* by States, that is, practice with consideration of respective obligatory nature, a new set of customary rules could be constituted.[17] As far as space law is concerned, such practice could be accessed based on a rather brief period of time, as defended by Bin CHENG.[18]

15 A/AC.105/787.

16 *Studies on International Space Law*. Oxford, England: Clarendon Pr, 1998, p. 197.

17 "*Resolutions of International Organizations are sometimes regarded as a form of 'soft' international law – 'rules which are neither strictly binding nor completely void of legal significance' (Bernhardt, 1984), but which in time may harden into customary law.*" Mark W. Janis. *An Introduction to International Law.* Aspen, USA: Aspen Law & Business, 1993. p. 51.

18 *Studies on International Space Law*. Oxford, England: Clarendon Pr, 1998. p. 136.

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Since customs are legally binding, the resort to a United Nations General Assembly Resolution would provide an intermediate venue, contemplating clear rules in relation to the legal consequences of transfer of ownership and respective registration procedure.
In favor of this solution lies the argument that the UNCOPUOS Legal Subcommittee, considering the unique characteristics of space activities, could, through the refereed non-binding resolution, lead the way for further development of customs – or even a treaty – on that regard. However, it is important to notice that, as an example of "soft law", such General Assembly Resolution is not legally binding and may afterwards prove to be ineffective.

III Concluding Remarks

A comprehensive solution of problems related to the transfer of ownership of space objects rests in the best interests of all nations, whether spacefaring or not. For that reason, a proposal is hereby offered, in favor of the provision of a new set of international rules, providing that any State (or eventually, International Organization) that acquires a space object in orbit shall be regarded as a Launching State, as far as international responsibility, liability and registration is concerned.
After considering possible regulatory options to render the referred proposal, an United Nations General Assembly Resolution is finally pragmatically supported, despite any legal shortcomings. Such instrument, if approved, should encompass a detailed and clear registration procedure and also clarify legal consequences regarding transfer of ownership of space objects, thus opening space for consolidation of international customary rules, even constituting the cornerstone for a future treaty on that regard.
A solution to the current international legal lacuna regarding the transfer of ownership of space objects in orbit must preferably be examined multilaterally, and envisioned through the proper guidance of the UNCOPUOS Legal Subcommittee, that holds such a remarkable record, not only for debating, but most importantly for developing international law.