

The Legal and Policy Considerations in Implementing the Space Assets Protocol: Lessons from the Aircraft Equipment Protocol in South Africa

*Phetole Patrick Sekhula**

Abstract

The adoption of and ratification of the Protocol To The Convention On International Interests In Mobile Equipment On Matters Specific To Space Assets (“The Space Assets Protocol”) is hindered by uncertainties surrounding, in the main, the implementation of the Protocol To The Convention On International Interests In Mobile Equipment On Matters Specific To Aircraft Equipment (“The Aircraft Equipment Protocol”). Yet South Africa is labouring under a heavy moral obligation to be an active part of the international institutional and legal framework on international interests in mobile equipment: the main Convention On International Interests In Mobile Equipment, including the Aircraft Equipment Protocol, were deliberated upon and adopted in the City of Cape Town located in South Africa. Presently, South Africa does not benefit from the benefits flowing being a Signatory to the Convention and the associated Aircraft Equipment Protocol, despite having given the name to the Convention.

In light of the hindrances to enjoying the benefits of being part of the Cape Town Convention and the Aircraft Equipment Protocol, the South African space industry cautioned the South African Government from adopting and ratifying the Space Assets Protocol. This cautionary approach reflects and is a consequence of not only the objections raised by the satellite industry in the United States and its allies to the Space Assets Protocol, but was also informed by South Africa’s experiences in the implementation of the Aircraft Equipment Protocol. While the primary objective of the Convention is to harmonize the international legal framework relating to security

* J.D., Georgetown University Law Centre, LLM Candidate, University of Pretoria; Advocate of the High Court of South Africa, Councillor, South African Council For Space Affairs (SACSA), advppsekhula@gmail.com.

interests in mobile equipment, there was inserted in that legal regime benefits that Contracting States should enjoy, namely, debtor's discounts when acquiring aircraft equipment. A Cape Town List was developed stipulating the circumstances under which a Contracting State would qualify for such discounts. South Africa is not on the Cape Town List.

I Introduction

The legal impediments disqualifying South Africa from the benefits of being a Signatory to Cape Town Convention and related Aircraft Equipment Protocol¹ provides an experiential paradigm for the adoption and implementation of the Space Assets Protocol. The major obstacle is the uncertainty on whether the South African Government Declarations have been properly incorporated into South African domestic law. While the benefits of being part of the Space Assets Protocol have not been codified as such, it is necessary for the South African Government to ensure that once adopted, the Space Assets Protocol is incorporated into domestic law in a clear manner devoid of any legal ambiguity. It is recommended that UNIDROIT clarify the benefits accruing out of the Space Assets Protocol analogous to the Cape Town List² under the Aircraft Equipment Protocol.

II The Cape Town Convention Framework

1 Relationship between The Cape Town Convention and The Protocols

The International Institute for Private Law (UNIDROIT) has been the driving force to ensure that the Convention and its associated Protocols are developed and implemented.³ Accordingly, UNIDROIT ascertained the need for and developed "uniform rules governing security interests in cross-border

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- 1 *The Convention On International Interests In Mobile Equipment And Protocol Thereto On Matters* (UNIDROIT 2011–DCME-SP-Doc 4, signed at Cape Town on 16 November 2001 with 51 Contracting Parties as at March 2012).
 - 2 *See, Aircraft Sector Understanding Appendix II SECTION 2-H. The Cape Town List is a guide developed by the OECD under the Aircraft Sector Understanding to assess compliance with the requirements of the Cape Town Convention in order to qualify for reductions on the minimum premium rates.*
 - 3 (UNIDROIT 2011–DCME-SP-Doc 4, signed at Cape Town on 16 November 2001 with 51 Contracting Parties as at March 2012¹, see, *Statement by The Observer Representing UNIDROIT To the UNCOPUOS Legal Sub-Committee 51st Session, Vienna, 19-30 March 2012. Item 9: Examination And Review Of Developments Concerning The Draft Protocol To The Convention On International Interests In Mobile Equipment On Matters Specific To Space Assets*).

transactions in mobile equipment, in particular, aircraft objects, railway stock and space assets”.⁴ As consequent, numerous Treaties have been adopted in accordance with this remit. The Convention On International Interests In Mobile Equipment (“The Cape Town Convention”) has been in force for a little over a decade. The Protocol to the Convention On International Interests In Mobile Equipment Specific To Aircraft Equipment (“The Aircraft Protocol”) was also adopted in Cape Town during the same Diplomatic Conference.⁵

The main objective of the Cape Town Convention is to harmonise supranational commercial transactions involving highly mobile equipment.⁶ The Cape Town Convention legal framework provides a standardised transactional framework to simplify the acquisition and related security measures while providing for internationally acceptable legal remedies in cases of default.⁷ It seeks “to promote and expand availability of a particular financing technique, asset-based financing, in respect of a particular class of asset, high-value mobile equipment normally moving from country to country ...”.⁸ The result is a reduction in transaction cost relating to financing of such equipment.⁹

The Convention On International Interests In Mobile Equipment And Protocol Thereto On Matters Specific To Space Assets (“The Space Assets Protocol”) was adopted during the Diplomatic Conference held in Berlin in March 2012.¹⁰ The main objective of the Cape Town Convention Space Assets Protocol “is to create and protect by treaty law a publicly accessible international registry of

4 *Id.* The Aircraft Protocol now has 44 Contracting Parties as at March 2012. There is also a Convention on Matters Specific to Railway Stock (“Railway Protocol”) adopted in Luxembourg during 2007 with about four States having signed it.

5 *Id.*

6 *See, M.J. Stanford, The Draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets on the Brink of Adoption, IN CELEBRATION OF THE 50TH ANNIVERSARY OF THE LEGAL SUBCOMMITTEE OF THE UNITED NATIONS COMMITTEE ON THE PEACEFUL USES OF OUTER SPACE.*

7 *See, e.g. Sir Roy Goode, CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT, OFFICIAL COMMENTARY, Revised Edition 2008, UNIDROIT, ROME, at p8 (hereinafter “Commentary On Aircraft Protocol”).*

8 *MJ Stanford, supra.*

9 *Id. see, also, Sir Roy Goode, supra; MJ Stanford, supra. The Export-Import Bank of the United States has decided to reduce its exposure fee by one-third on the export financing of large commercial aircraft for buyers in Contracting States to the Convention and the Aircraft Protocol. Id.*

10 *Id. see, also, Nick Hughes, UNIDROIT DRAFT SPACE ASSETS PROTOCOL, Aerospace: Holman Fenwick William, February 2012 at 62.*

security interests in high value space assets”.¹¹ The Protocol seeks to govern the financing of space assets by private commercial entities with the avowed intention of creating a harmonised international legal framework for security interests in these assets.¹²

These objectives mirror those contained in the main Convention and attendant Protocols, and specifically for the present analysis, the Aircraft Protocol. It is for that reason that the implementation of the latter has significant bearing on the successful development of the Space Protocol. The Convention, however, is general in nature and applies “to any of the categories of mobile equipment to which it relates, namely, airframes, aircraft engines, helicopters, railway rolling stock and space assets”.¹³ However, the Convention only comes into force “as regards a category of objects to which a Protocol applies”.¹⁴ Thus, Article II of the Aircraft Protocol provides that “the Convention apply in relation to aircraft object as provided by the terms of this Protocol” while, on the other hand, Article 6 of the Convention stipulates that the “Convention and the Protocol shall be read together as a single instrument”. Moreover, where there is an inconsistency between the Convention and the Protocol, the latter shall prevail.¹⁵

The reasons for the two-instrument approach is to avoid “cluttering up the text of the Convention with detailed equipment-specific rules, and provides a convenient mechanism for modifying the Convention provisions by the Protocol to meet the particular needs of the industry sector involved”.¹⁶ The provisions of the Convention and the Protocol are interdependent: the Convention does not operate separately from the Protocol as it relates to objects.¹⁷ As a result, a State may not become a Party to the Protocols unless it is or becomes also a Party to the Convention.¹⁸

The pivotal aspects of the Cape Town Convention are the Declaration provisions which provide Contracting State with various options in implementing the Protocol. A Contracting State is entitled to declare that certain provisions of

11 Paul B. Larsen, *JURISDICTION OVER COMMERCIAL SPACE ASSETS*, *American Institute of Aeronautics and Astronautics, IAC 2011*, see, also Sir Roy Goode, *OFFICIAL COMMENTARY, CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO SPACE ASSETS, Draft Consultative Version, July 2012, UNIDROIT, ROME at 1 (hereinafter “Commentary On Space Assets Protocol”)*.

12 *Id.*

13 *Ibid.*

14 *Ibid.*

15 See, Article 49 Convention which provides that the Convention enters into force only as regards category of objects to which a Protocol applies subject to the terms of the Protocol.

16 Sir Roy Goode, *supra* note 11.

17 *Ibid.*

18 Article XXVI of the Aircraft Protocol and Article XXXVI of the Space Protocol.

the Convention and the Protocol will be applicable to it or not.¹⁹ For example, Article XI can be excluded by the Parties in writing, but only when the Contracting State has made a Declaration under Article XXX (3).²⁰

2 Salient Provisions of the Aircraft Equipment Protocol

The Aircraft Protocol came into force in 2006 when the eighth Signatory ratified it.²¹ Both the United States and the European Union are Contracting Parties primarily because the largest aircraft manufacturers, *viz.*, Boeing and Airbus, are located in these jurisdictions and fully support the Protocol. The proviso to provide discounts under the Cape Town List meant more countries and operators would afford to acquire aircraft. The airline sector is therefore more receptive to the Protocol as it guarantees uniform redress mechanism in cases of default.²²

The objective of the Aircraft Protocol is to implement the Cape Town Convention as it relates to aircraft equipment.²³ In order for the Cape Town Convention and Aircraft Protocol to apply to a transaction, three primary conditions must be met: firstly, there are technical specifications for the aircraft, secondly, the transaction documents, whether a sale, lease or financing of aircraft, must create and international interest or prospective interest in aircraft, and thirdly, either the aircraft is registered in or a debtor is located in a Contracting State at the time of the concluding the agreement that creates the international interest.²⁴

The electronic international registry for the registration of international interests in aircraft equipment has created greater certainty and boosted creditor confidence in cross-border transactions.²⁵ An international interest and prospective

19 *See, e.g. Article 54 of the Convention, Article XXXI (1) of the Aircraft Protocol provides that a Contracting State may, at the time of ratification, declare that it will apply any one or more of listed Articles VIII, XII, and XIII of the Protocol. Article XXXI (3) relates to Alternatives provided in Article XI on remedies on insolvency of a debtor.*

20 *Id.*

21 *See, Parlee McLaws LLP, Cape Town Convention International Aircraft Registry Established in Dublin, Ireland, Aviation Legal Alert, April 2006.*

22 *Preamble, Aircraft Protocol; Sir Roy Goode, supra note 7 at 14.*

23 *Ibid.*

24 *Article I and Article IV(1), Aircraft Protocol. Airframes must be certified to transport at least 8 persons (including crew) or goods in excess of 2750 kilos, and specifications for helicopters and aircraft engines.*

25 *The international registry is supervised by the International Civil Aviation Organisation (ICAO) and operated out of Dublin, Ireland by Aviareto, a joint venture between an air transport services IT service provider and the Irish Government, see, Parlee McLaws, supra; Over 260,000 international interests against approximately 110,000 aircraft object have been registered since the Aircraft Protocol came into force. MJ Stanford, supra at p2.*

international interest encompasses interest related to that of a charger under a security; a lessor under a lease (title reservation); a seller under a conditional sales agreement; a contract of sale, amendments, assignments, subordinations, and subrogations relating to interests, as well as certain non-consensual rights or interest, *i.e.* rights which a Contracting State has declared as having priority without being registered.²⁶

To assure priority of interests, Parties must register such interests where those interests are subject to registration under the Cape Town Convention and Aircraft Protocol. Failure to register such registrable interest results in losing priority over subsequently registered interest.²⁷ Accordingly, priority in international interests registered in registry is “determined on a first to register priority basis”, regardless of knowledge of an unregistered prior interest.²⁸

The Aircraft Protocol offers Parties various options for remedies in cases of default, including speedy interim relief.²⁹ These remedies include, but are not limited to, repossession and control of aircraft, selling such an aircraft or granting a lease in respect thereof; receiving income from the aircraft; and/or applying to Court for enforcement of agreements between the parties.³⁰ The effective result is to achieve the objective of the Convention, *viz.*, to mitigate creditor risk, reduce transaction costs and provide a predictable international aircraft finance regime.³¹

Yet the most innovative feature of the Convention and the Aircraft Protocol is the system of declarations contained therein.³² These Declarations provide Contracting States with choices relating to provisions a State would want to apply. There are mandatory Declarations, opt-in and opt-out Declarations.³³ These declarations have significance in the application of the Convention and Aircraft Protocol in a Contracting State. For instance, a Contracting State will have to declare whether to apply Articles VIII, X, XI, XII, XIII when ratifying the Protocol. The far-reaching effect of these declarations are illustrated by the inability of South Africa to benefit from being a signatory to the Aircraft Protocol.³⁴

26 Id.

27 Id.

28 Id.

29 See, Articles 8, 10, 13, of the Convention Article XI of the Aircraft Protocol.

30 Articles 13 of the Convention and Article X Aircraft Protocol.

31 See, *Airline Association of South Africa: DISCUSSION DOCUMENT ON THE INCORPORATION OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND ASSOCIATED INSTRUMENT INTO SOUTH AFRICAN DOMESTIC LAW, First Draft, 19 June 2012, copy on file with author.* (“*The AASA Discussion Document*”).

32 See, Articles 54 and 56 of the Convention and Article XXX of the Aircraft Protocol.

33 Article 54 is mandatory declaration, Articles 39 and 40 are opt-in declarations.

34 AASA Discussion Document, *supra*.

3 Relationship between the Aircraft Equipment Protocol and the Space Assets Protocol

The Space Asset Protocol is geared towards meeting the specific demands of the space sector in a similar manner as the Aircraft Protocol was designed to meet and address the specific needs of the aircraft sector.³⁵ It modifies the Convention to particularize it to the space environment. Just like the Aircraft Protocol, the Space Assets Protocol must be read in tandem with the Convention: the two instruments creates “an international legal regime that provides secured lenders, conditional sellers and lessors with an autonomous international interest in space assets protected by registration in an International Registry, coupled with speedy and effective default remedies ...”.³⁶

The Space Protocol mirrors the Aircraft Protocol with such deviations peculiar to the space environment added. This is so because it was decided to follow the Aircraft Protocol as far as possible.³⁷ To maintain consistency, “and to avoid any implication that a change in wording was intended to alter the substance”, the drafters avoided “the temptation to make what might be thought as improvements on the text of the Aircraft Protocol”.³⁸ Thus in Article I, terms used in the Protocol have the same meaning set out in the Convention.³⁹ A prospective international interest in aircraft may be registered by the Parties before the transaction is closed but it would only become effective after closure.⁴⁰

When drafting the Space Protocol, the peculiar factors obtaining in the space environment necessitated certain changes “designed merely to make explicit what was implicit in the Convention or Aircraft Protocol or to correct inconsistency”.⁴¹ Yet, there are provisions in the Space Protocol which are “intentional changes of substance in order to produce what was seen to be a more practical rule or to introduce an option not available under one of the earlier Protocols, remove an option under it or insert an entirely new kind of provision”.⁴² For instance, the inclusion of a substantive provision governing “debtor’s rights”– “that is, rights to payments or other performance due to or to become due to the debtor by any person with respect to a space asset”, which can be recorded against the registration of an international interest and consequently accorded priority over subsequently recorded and unrecorded assignments.⁴³

35 *Sir Roy Goode, supra note 11, at 16.*

36 *Id.*

37 *Article I (1) Space Protocol.*

38 *Sir Roy Goode, supra note 11 at 121.*

39 *Id.*

40 *Id.*

41 *Sir Roy Goode, supra, note 11.*

42 *Id.*

43 *Id.*

For the present analysis, the interpretation and implementation of the Aircraft Protocol is a precedent for any action in relation to the Space Protocol. The lessons derived from the implementation of the Aircraft Protocol made it easier to modify and create a harmonised legal regime for security interests contained in the Space Protocol. Similarly, a jurisdiction that seeks to implement the Space Protocol must consider the lessons from the Aircraft Protocol.

4 The Distinctive Nature of and Financing Models for Space Assets

The nature and characteristic of space assets and the space business demanded a need for innovative financing models.⁴⁴ This is evidenced by the space sector's recourse "to use of hosted payloads and secondly, the shift that is likely in the pattern of this sector' development."⁴⁵ This future development mainly involve emerging markets, entrepreneurial start-ups and increased reliance on export credit as traditional banks get more shy to find high risk space ventures.⁴⁶

The commercial paradigm underpinning the space sector is revenue stream and cash flow from the space asset. Hence, financiers price "credit according to the predicted future cash flows of a company or project".⁴⁷ Creditors therefore place more value on the expected future revenue stream flowing to the debtor from third parties to whom the debtor has rented satellite capacity and licenses and which the debtor can assign to the creditor as additional collateral".⁴⁸ Hence, space financing is more project-based financing that asset-based financing.

The asset-based financing models do not address the unique nature of satellite commercial features because, firstly, satellites are mainly utilised for specific applications and/or missions unlike while aircrafts which are relatively uniform in use.⁴⁹ Secondly, satellites, after launch and while in orbit cannot be subjected to physical control or repossession and thirdly, satellite financing is, in the main, "project-based relying on revenues flowing from the asset".⁵⁰

Space assets therefore pose unique legal problems because of their "cross-border character while on Earth (they may be produced in one country and transferred to the launch pad in a different country) ... (and) the fact that once in space they do not fall within the physical borders of any jurisdiction".⁵¹ Hence, the normal conflict rule to apply the law of an object's physical location does not obtain when dealing with space objects, even though "there is a clear link between the space treaties and the concept of State control which underpins the *lex situs*

44 M.J Stanford, *supra*, at 6; Nick Hughes, *supra*.

45 *Id.*

46 *Id.*

47 *Ibid*, see, also, *Timei Aganaba*, ASSESSING THE SUPPORT FOR THE SPACE ASSETS PROTOCOL TO THE UNIDROIT CAPE TOWN CONVENTION, *International Institute of Space Commerce*.

48 *Sir Roy Goode*, *supra* note 11.

49 *Id.* Nick Hughes, *supra*.

50 *Timei Aganaba*, *supra*.

51 *Sir Roy Goode*, *supra*, note 11.

rule and leads to the application of the *lex registry*” as far as property rights are concerned as regards registered space objects.⁵²

III Treaty Incorporation into South African Domestic Law

South Africa hosted the Diplomatic Conference that adopted the Convention and the Aircraft Protocol during November 2001. On 16 November, South Africa, together with ... countries, adopted and signed the Convention, now known as the Cape Town Convention as well as the Aircraft Protocol.⁵³ These have been widely ratified as the number of Contracting Parties increases yearly. South Africa subsequently ratified the Convention and the Aircraft Protocol during 2007.⁵⁴

When ratifying the two instruments, the South African Government made certain Declarations (“South African Declarations”) as required by both the Convention and the Aircraft Protocol.⁵⁵ Presently, there is much discord and uncertainty as to whether the South African Declarations have been properly incorporated into South African domestic law and are binding as such in terms of local law.

1 Constitutional Requirements for Treaty Incorporation

In order to be a source of domestic rights and obligations, an international agreement approved by Parliament must be incorporated in domestic legislation.⁵⁶ The incorporation of international agreements is governed by the South African Constitution. Section 231 of the Constitution prescribes the procedure to be followed when an international treaty is not only to bind the country, but also to be recognised as part of the domestic legal regime. In terms of Section 231 of the Constitution, an international agreement must be approved by resolutions of both the National Assembly and the National Council of Provinces (“NCOP”) to be binding on the Republic.⁵⁷ An international agreement that is administrative, executive or technical in nature, however, does not require Parliamentary approval to be binding on the Republic.⁵⁸

52 *Id.* It is also noted herein that the treaty law on Outer Space continues to govern rights and responsibilities of States, while “the Convention and Space Protocol are concerned with the rights of private parties to transactions involving space assets”. *Ibid.*

53 *MJ Stanford, supra note 6.*

54 *Id.*

55 *See, “The AASA Discussion Document”, supra note 32.*

56 *Section 234, The Constitution of the Republic of South Africa, 1996 (“SA Constitution”).*

57 *The South African Parliament is divided into Chambers, viz, the National Assembly and the National Council of Provinces, the latter charged with ensuring that the National Assembly has due regard to the interests of the nine provinces when passing laws.*

58 *Section 234(1) SA Constitution.*

In practice, the Executive negotiates and signs international agreements, and Parliament approves such by means of a resolution.⁵⁹ The international agreement becomes binding on the Republic the moment Parliament approves it, unless the international agreement is administrative, executive or technical in nature. The relevant instruments of ratification must be lodged with the relevant Depository, should the international agreement so require.⁶⁰ The Constitutional Court endorsed this approach when it recently declared “the approval compels, as between South Africa and other States, to take steps to comply with the substance of the agreement ...”.⁶¹ South Africa complied, to a greater, with these Constitutional imperative when it incorporated the Cape Town Convention and the Aircraft Protocol into domestic law by enacting the Convention on International Interest in Mobile Equipment Act (“CIIME Act”).

2 The Incorporation Process into Domestic Law

The legal process to incorporate the Convention and the Aircraft Protocol unfolded during 2006 when the Republic passed Resolution to approving the two instruments.⁶² South Africa had earlier signed both the Convention and the Aircraft Protocol at the Diplomatic Conference held in Cape Town during November 2001. The National Assembly approved the Aircraft Protocol by a resolution on 14 June 2006, while the Convention was approved on 20 June 2006 by resolution.⁶³ The Convention and the Aircraft Protocol were both approved by a resolution of the NCOP on the 19th September 2006 thus finalising the Parliamentary process in terms of Section 231(2) of the SA Constitution. The Instruments of Ratification for the Convention and the Aircraft Protocol were duly executed by the Minister of International Relations and Cooperation during November 2006. The Convention and Aircraft Protocol requires Declaration to be made when ratifying the two instruments. Such a List of Declarations made by the South African Government (“the SA Declarations”) was attached to the Instruments of Ratification. In order to be binding, these Ratification Instruments had to be lodged with the Depository.⁶⁴ Both the Convention and the Aircraft Protocol became binding on the Republic on 18th January 2007.⁶⁵ South Africa was now bound to the Convention and the Aircraft Protocol.

59 Id.

60 *Article XXVI of the Aircrafts Protocol. The responsible line Department would negotiate the substance of the international agreement and the Department of International Relations and Cooperation (“DIRCO”) would be responsible for the procedural aspects outlined herein.*

61 *see, Glenister v. The President of the Republic of South Africa, 2011 (3) SA 347 (CC).*

62 The AASA Discussion Document, *supra*.

63 *Ibid.*

64 *Ibid.* UNIDROIT is the designated Depository and the Instruments of Ratification were deposited there on 12 January 2007 and acknowledged by UNIDROIT on 18 January 2007. MJ Stanford, *supra*, page 2.

65 *Ibid.*

3 Enforceability of the Convention and the Aircraft Protocol

Section 231 (4) requires international agreements to be incorporated into South African domestic law by an enactment of domestic legislation. Only after the enactment of a domestic legislation would the Convention and the Aircraft Protocol become part of South African law, despite them being binding at an international plane.⁶⁶ The Convention on International Interest in Mobile Equipment Act (“CIIME Act”) was enacted by the SA parliament and came into operation on 24 August 2007.⁶⁷ On that day, the Convention and the Aircraft Protocol became part of the South African domestic law in accordance with section 231(4) of the SA Constitution.

The CIIME Act proclaims that “the Convention and the Protocol have force of law in the Republic.”⁶⁸ In accordance with Article 6 of the Convention, the Convention and the Protocol are attached as Schedules 1 and 2 to the CIIME Act. They are to be read and interpreted together as a single legal instrument.⁶⁹ Section 2(1) of the CIIME Act expressly provides that “the Convention and the Protocol have the force of law in the Republic”. Thus the CIIME Act made the Convention and the Aircraft to be source of rights and obligations under South African law thus completing the incorporation process. But the ratification process was not complete without the Declarations as previously stated. The List of Declaration was attached to the Instrument of Ratification, but were not part of the incorporation process demanded by Section 234 of the SA Constitution as outlined above. It is that omission that is the present source of legal uncertainty and discord as to whether South Africa is compliant to the requirements of the Cape Town Convention, hence, the exclusion from the Cape Town List.⁷⁰

4 The South African Government Declarations

While there are numerous provisions in the Convention that require some kind of Declaration to be made, not all the Declarations are considered to maximise the economic benefits to contracting States, “in fact, some of the Declaration are likely to have the opposite effect as they run contrary to asset-based financing principles”.⁷¹ The OECD has identified certain Declarations in the Aircraft Sector Understanding, as the qualifying declarations, as they are specially designed to reduce transaction costs and increase economic benefits to airline carriers in Contracting States. It is therefore necessary to make these declares when ratifying the Convention and the Airline Protocol in order to reap commercial benefits.⁷²

66 Section 231(4) of SA Constitution.

67 See, Government Gazette No. 30212, 24 August 2007 for President Proclamation that determine the date CIIME Act came into operation.

68 Section 2(1).

69 Article mmmm, AASA Discussion Document, supra.

70 Id.

71 Id.

72 Id.

The South African Government Declarations attached to the Instruments of Ratification are as follows:

4.1 Form No.1: Declaration under Article 39(1)(a) (Priority Rule)

A registered interest has priority over unregistered interests and over any other subsequently registered interests, even with knowledge of a pre-existing unregistered interest.⁷³ This rule is intended to avoid actual disputes as to whether a second creditor did or did not know of an earlier interest. In terms of Article 39(1) of the Convention, however, a Contracting State may declare that certain categories of non-consensual rights or interests may be prioritised without registration, over a registered international interest, provided that such Declaration does not purport to expand rights beyond those afforded under national law.

South Africa made the Declaration pursuant Article 39(1) of the Convention “declares that all categories of non-consensual rights or interests which under South African law have and will in the future have priority over an interest in an object equivalent to that of the holder of a registered international interest shall to that extent have priority over a registered international interest.”⁷⁴

4.2 Form No 4 : Declaration under Article 39(1)b (Public Service Debt)

A contracting State can declare that the State or State entity, intergovernmental organisation or other private provide of public services, retains its right to arrest or detain an aircraft object for unpaid amounts associated with services rendered with respect to that aircraft or another aircraft of the same fleet. South Africa declared that “pursuant to Article 39(1)(b) of the Convention the Republic of South Africa declares that nothing in the Convention shall affect its right or that of any entity of that State, any intergovernmental Organisation or other private provider of public services to arrest or detain an object under its laws of payments of amounts owed to the Republic of South Africa, any such entity, organisation or provider directly relating to the services provided by it in respect of that object or another object.”

4.3 Form No.6 (Opt-In Declaration under Article 40)

A Contracting State is permitted to expand the application of the Convention, through allowing specified categories of non-consensual rights or interests to be registered as if they were international interests In terms of Article 40. Pursuant

73 Article 29 of the Convention.

74 Annex to the Instrument of Ratification in respect of the Cape Town Convention (the “Convention”) Containing the Declarations made by The Republic of South Africa For The Purposes of The Convention, done in Pretoria 21st November 2006.

thereto, South Africa declared the following categories of non-consensual right or interests:

- (a) Rights of a person obtaining a court order permitting attachment of an aircraft object in partial or full satisfaction of a legal judgement; and
- (b) Liens or other rights of a state entity relating to taxes or other unpaid charges.

Shall be registerable under the Convention as regards any category of object as if the right or interest were an international interest and shall be regulated accordingly.”

4.4 Form No. 13 (Mandatory Declaration under Article 54(2) (Self Help Remedies)

A Contracting State must declare whether remedies which under the Convention would be available without the leave of a court, are to be exercisable only with the leave of the court; or whether such remedies may be exercised without such leave (commonly referred to as “Self-help Remedies”).

The Republic of South Africa declares that any remedies available to the creditor under the convention which are not expressed under the relevant provision thereof to require application to the court may be exercised without court action and without leave of the court.”

Article 54(2), the only mandatory Declaration in the Convention, is problematic because its constitutionality is in question.

5 Aircraft Protocol Declaration

5.1 Form No. 19 (opt-in Declaration under Article XXX(1) in respect of Article VIII):

A Contracting State may declare that the parties to an agreement may choose the law governing their contractual rights and obligations, wholly or in part⁷⁵. In terms of Article XXX(1), South Africa has made the following Declaration: “The Republic of South Africa declares that it will apply Article VIII”.

5.2 Form No. 21 (Opt-In Declaration under Article XXX(2) in Respect of Article X Providing for the Application of the Entirety of the Latter) (“Timely Remedies Declaration”)

A Contracting State can declare that it will apply Article X relating to speedy interim judicial relief pending final determination of claims and state the time period for such interim relief proceedings. South Africa declared that it will apply Article X in its entirety and specified the time periods under Article 13(1) (a), (b), (c) of the Convention (preservation of aircraft objects and their value;

⁷⁵ Article XXX (1) and Article VIII of the Article VIII of the Aircraft Protocol.

possession; control or custody of the aircraft objects; and their immobilisation) to be not more than 10 calendar days, and In respect of the remedies specified in Article 13(1)(d), (e) (lease or management of the aircraft objects and the income thereof and sale and application of proceeds from the aircraft equipment) to be not more than 30 calendar days.

Article 13 has constitutional implications in the South African context.⁷⁶

5.3 Form No. 23 (General Opt-In Declaration under Article XXX(3) in Respect of Article XI Providing for the Application of Alternative A in Its Entirety to All Types of Insolvency Proceedings)

A Contracting State may declare whether it apply Article XI, Alternative A or Alternative B in all types of insolvency proceedings. Alternative A provides that in case of an uncured default by an airline debtor, the creditor's contractual remedy to repossess the aircraft will always be an option to the creditor even in the event of an insolvency. The defaulting airline debtor must either cure all the defaults or return the aircraft to the creditor at the end of the waiting period as determined by the Contracting State.⁷⁷ South Africa declared that it will apply Article XI in its entirety and the waiting period shall be thirty (30) calendar days.

5.4 Form 26 (Opt-In Declaration under Article XXX (1) in Respect of Article XII (Courts))

South Africa declared that it will apply Article XII and its Courts will cooperate with foreign courts and insolvency administrators.

5.5 Form 27 (Opt-In Declaration under Article XXX (1) in Respect of Article XIII)

A Contracting State may declare that a de-registration and export request authorisation be recorded in its registry authority to ensure that "the relevant civil aviation registry authority in the Contracting States will implement the remedies provided for under Article XI (1) of the Aircraft Protocol."⁷⁸

South Africa declared that it will apply Article XIII.⁷⁹

These Declarations are crucial to the implementation of the Convention and the Protocols as they "determine the manner in and extent to which the Convention and the Aircraft Protocol to South Africa and that the difference between the Convention and the Aircraft read without the South African Government, and the Convention and the Aircraft Protocol, read with the Declarations, is substantial."⁸⁰ This is demonstrated by the lamentable fact that the legal

⁷⁶ See, Chapter IV, *infra*.

⁷⁷ See, AASA Discussion Document.

⁷⁸ *Id.*

⁷⁹ Annex, *supra*.

⁸⁰ AASA Discussion Document, *supra*.

uncertainty and confusion surrounding South Africa's admission to the Cape Town is primarily based on whether these Declarations were properly incorporated into domestic law.

IV Legal Tensions between Cape Town and Domestic Law

There is lack of consensus on whether the South Africa has fully implemented the Cape Town Convention, "including the qualifying declarations in its laws and regulations, as required to ensure that the Cape Town Convention commitments are appropriately translated into national law".⁸¹ The lack of consensus is based two primary considerations. Firstly, an analysis of the process and legal requirements that South Africa has taken in the implementation of the Convention reveals legal uncertainty on whether SA Government Declarations were properly incorporated into domestic law, and secondly, there are constitutional and domestic legal impediments to fully harmonise the provisions of the Convention and South African law.

1 The Legal Uncertainty Surrounding of the SA Government Declarations under Domestic Law

The legal uncertainty and lack of consensus on whether the SA Government Declarations were properly incorporated into domestic law arise from the following factors:⁸²

- 1.1 The domestic Convention implementing law, CIIME Act, does not make provisions for the Declarations nor are the Declarations mentioned therein;
- 1.2 There is no mention of the Declarations in either the Convention nor the Aircraft Protocol;
- 1.3 As a consequence, were the Declarations enacted into domestic law by national legislation?

Yet there are counter-arguments to the effect that the approval of the Convention and the Aircraft Protocol by Parliament "included approval of the terms of the Convention and the Aircraft Protocol which contemplate and allow for Declarations to be made by Contracting States".⁸³ A resolution of this legal dilemma is dependent on application of statutory interpretation principles outside the scope of this analysis.

2 Constitutional and Domestic Legal Impediments

The constitutional impediments to the full implementation of the Convention and the Aircraft Protocol include, but not limited to, self-help remedies

81 Article 40, ASU Appendix II.

82 AASA Discussion Document, *supra*, note 32.

83 *Id.* Other argument include the fact that the making of Declarations was an Executive acts performed in terms of the Convention and Aircraft Protocol ad as such do not require independent Parliamentary approval. I.

in Article 8, 9, 10, 13, Article 54 Mandatory Declaration on Court sanctioned remedies, insolvency-related laws, and business-rescue laws under the Companies Act.⁸⁴

2.1 Self-Help Inconsistent with Right to Access to Court

South Africa made a Declaration under Article 54 that remedies may be resorted to without recourse to the Courts. Article 8 of the Convention provides for, *inter alia*, the creditor to take possession and control of an aircraft or income, or sell the mobile equipment in case of a debtor default. Therefore, South Africa enables a creditor to exercise “self-help” remedy under Convention rights.⁸⁵ Self-help remedies offends the access to courts right enshrined in Section 34 of the SA Constitution because it “permit a creditor to exercise a remedy not sanctioned by a court of law, and consequently inhibit the debtor concerned from defending itself against or seeking recourse against the creditor’s conduct”.⁸⁶

Under South African constitutional jurisprudence, “the rule of law imposes a n obligation on the State to provide the necessary mechanisms for citizens to resolve disputes that arise between them”.⁸⁷ The Constitutional Court further held that “in a modern constitutional State, like ours, there is no room for legislation which, as in this case, is inimical to a fundamental principle such that against self-help”.⁸⁸ The only way “a creditor can be permitted to take possession of specified movable property of a debtor on the occurrence of events specified in that legislation is with the debtors’ permission or on the basis of an order of Court”.⁸⁹

2.2 Timely Remedies Declaration and Article 13

South Africa committed to apply Article 13 in its entirety by making the Timely Remedies Declaration.⁹⁰ Article 13 applies ONLY where a Contracting State has not made a declaration in terms of Article 55 opting out of the provisions of

84 *Id.*

85 *Articles 10 relates to conditional seller or a lessor who would be permitted to terminate the reservation agreement or lease without recourse to Courts given the SA Declaration under Article 54.*

86 *AASA Discussion Document, supra.*

87 *Id, referring to the Constitutional Court’s decision President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd, 2005 (5) SA 3 (CC).*

88 *Chief Lesapo v North West Agricultural Bank And Another, 2000 (1) SA 409 (CC) (No one is entitled to take the law into her or his own hands. Self-help, in this sense, is inimical to a society in which the rule of law prevails”).*

89 *AASA Discussion Document, supra at 25.*

90 *Article 13 provides for interim relief from court in the form of an order requested by the creditor.*

Article 13. South Africa has not opted out Article 13. Article 13 is read together with Article X (type of orders) and XXX(2) (Timely Remedies Declaration) of the Aircraft Protocol. The effect is that a creditor adduces evidence of default in a Court and the court is obliged to order one or more of the remedies pending final determination.⁹¹ The minimum threshold contemplated in Article 13 may not meet the standards required for interim in South African law.⁹² The Court may not readily grant interim relief where such minimum standards have not been met.

2.3 Inconsistency with Insolvency Laws

The definition of security in the Insolvency Act of 1936 does not include an international interest registered in terms of the Convention, and may have an effect contrary to the provisions of Article 30(1) of the Convention which provides that “in insolvency proceeding against the debtor an international interest is effective if prior to the commencement of the insolvency proceedings that interest was registered in conformity with this Convention”. Therefore, an international interest must be included for the holder of an international interest to be considered a secured creditor.⁹³

2.4 Conflict with Companies Act

A company in financial distress can be subjected to rescue processes under the Companies Act. Section 129 provides for voluntary supervision or can be placed under supervision by a Court on application of an affected person.⁹⁴ Section 133 provides that during business rescue proceedings “no legal proceeding, including enforcement action, against company, or in relation to any property belonging to the Company, or lawfully in its possession, may be commenced or proceeded with in any forum”. Furthermore, “no person may exercise any right in respect of nay property in the lawful possession of the company, irrespective whether the property is owned by the company, except to the extent that the business rescue practitioner consents”.⁹⁵ Section 136 provides for the “suspension or cancellation of the company’s performance obligations under contracts entered into by the company prior to commencement of business proceedings”.

This general moratorium on legal proceedings against the company during business rescue proceedings is contrary to the requirements of the Convention

91 *These timely orders includes possession, preservation, immobilisation, lease, etc. of the object.*

92 *These include a showing, on a balance of probabilities, clear right by the Applicant; irreparable harm by respondent and no alternative remedy. Id.*

93 *Id.*

94 Section 131 of Companies Act 2011.

95 Section 134.

and Aircraft Protocol on creditor's remedies upon default by the debtor.⁹⁶ Alternative A of Article XI of the Aircraft Protocol provides that the debtor shall give possession of the aircraft object to the creditor upon the occurrence of an insolvency-related event. The inception of business rescue proceedings can be interpreted as an insolvency-related event.⁹⁷ Therefore, Alternative A is inconsistent with the provisions of Section 134 of the Companies Act.

The inconsistencies between the identified pieces of domestic legislation and the Convention and Aircraft Protocol have proved a hindrance to South Africa's airline industry acquiring commercial benefits under the Convention, especially as regards discount rates on premium since South has been unable to satisfy the OECD that it has implemented the Convention and the qualifying declarations in its laws and regulation in a manner that the Convention commitments are translated appropriately into domestic law.⁹⁸

2.5 Recommendations to Bring Legal Certainty in Implementation of the Convention and Aircraft Protocol

The airline sector recommends a process of legal reform to remove the legal uncertainty surrounding the implementation of the Convention and Aircraft Protocol.⁹⁹ These recommendations are crafted to achieve legal certainty, constitutional validity and maximum commercial benefit for all participants in the South African aircraft sector, in the most efficient and effective manner".¹⁰⁰ The recommendations include:

- 2.5.1 Amendment of the CIIME Act to include South Africa Declarations and include the declarations in a new Schedule 3 or incorporate the declaration into the CIIME Act;
- 2.5.2 Withdraw the Article 54(2) Self-Help Declaration and replace it with a declaration in accordance with Article 58 to the effect that "any remedies available to the creditor under any provision of the Convention which is not expressed to require application to the Court, may be exercised only with leave of the Court";¹⁰¹
- 2.5.3 Amend the CIIME Act to the effect that its provisions shall continue to apply notwithstanding inconsistencies with Sections 133(1), 134(1)(a) and (c) and 136(2) of the Companies Act;
- 2.5.4 Amendment of CIIME Act to include international interest be "security" for purposes of Insolvency Act and the inclusion of insolvency administrator and link with equivalent term in the Companies Act.¹⁰²

⁹⁶ AASA discussion Document, *supra*, note 32 at 37.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id* at 41.

¹⁰⁰ *Id* at 42.

¹⁰¹ *Id* at 48.

¹⁰² *Id* at 49.

V Incorporating the Space Assets Protocol into Domestic Law

The identified legal impediments to South Africa's full participation in the aircraft sector provide a legal prism to evaluate the most legally effective way to implement the Space Asset Protocol. The airline sector has identified ways to improve and remove the obstacles hindering the appropriate implementation of the Convention and Aircraft Protocol. The problems and recommendations apply equally to the space sector given the underlying Convention and the similarity in the two Protocols.¹⁰³ There is, however, a major obstacle in implementing the Space Asset Protocol in South Africa: the space industry is still in its infancy dominated by satellite and hardly any major financier of space business.

Yet there is strong Government support for the space industry in South Africa: the creation of a national Space Agency and the subsequent development of a National Space Program are indicators of a desire to be an active user of space.¹⁰⁴ The National Space Program is an plan to identify the niche that South Africa should carve for itself in the global space market in the field of micro- and nano-satellites, earth observations satellites and applications, and space science.¹⁰⁵ With such an ambitious space program, South Africa will need to objectively assess the relevance and efficacy of the Space Asset Protocol, and decide to ratify same.

1 Avoiding the Aircraft Equipment Protocol's Flaws

The lessons derived from the implementation of the Convention and the Aircraft Protocol indicates the need for a coordinated efforts between the aircraft and the space sector in relation to modern regulatory trends governing the aerospace industry. The recommendations by the aircraft for legislative reform are relevant and equally apply to the implementation of the Space Asset Protocol. As regards the procedural processes, the proposed amendments to the CIIME Act will benefit the incorporation of the Space Assets Protocol into domestic law. These procedural requirements include, but are not limited to, the Constitutional requirements contained in Section 231 of the South African Constitution to incorporate an international agreement into domestic law; the ratification process to make South Africa bound by the international agreement, and the enactment of domestic law to give effect to the international agreement into national law.

103 See discussion on the relationship between the Aircraft Protocol and Space Protocol in Chapter III *supra*.

104 South Africa has a historically active role in space use with a telemetry, tracking and command centre that is used by all major space nations including NASA, ESA, etc. In *Astronomy*, South Africa is uniquely endowed with the Square Kilometre Array (SKA) project being rolled in the country, among others.

105 The National Space Program 2030 provides a detailed roadmap on space activities ranging from manufacturing earth observations satellites to space exploration. See, www.sansa.org.za.

The Space Protocol is a flexible tool allowing a Contracting State various options on its application. It also allows for greater party independence and autonomy. Thus Article XXVI preserves the powers of Contracting States to exercise authority over issuing and grant of licenses, permits and authorisations while Article ... allows party to exclude most provisions of the Protocol to their transaction. There is a neat balance struck between rights of Contracting States and commercial imperatives of conducting a high risk business in space.

2 Incorporation into Domestic Law

The Space Assets Protocol is an integral part yet independent part of the Cape Town Convention. The Convention and the Aircraft have been approved by Parliament already. For the Space Protocol to be part of that legal regime, it has to pass a similar process, *i.e.* be approved by resolution of the two Houses of Parliament to become binding as an international agreement as between South Africa and other Contracting States.¹⁰⁶ The national law to implement and incorporate the Convention and the Space Protocol already exist. But the incorporation of the Space Protocol will depend largely on whether the sought legislative amendments take the form of incorporating the South African Declarations in the body of the CIIME Act or they are contained in a new Schedule 3. In case of the latter, the Space Protocol will be Schedule 4 to the CIIME Act.

3 Declarations under the Space Protocols

The main difficulty with a proper implementation of the Convention and the Aircraft Protocol related, in the main, to the Declarations the South African Government made when ratifying the two instruments. In order to avoid the legal uncertainty presently experienced by the airline sector, the Space Protocol Declarations must be incorporated as part of the Section 231 Parliamentary approval. As indicated, the South African Declarations included Declarations under the Convention and the Aircraft Protocol.¹⁰⁷

3.1 Article XLII: The Deeming Provision

Article XLII provides that the Declarations made under the Convention shall be deemed to have also been made under the Space Protocol unless indicated the contrary is stated. The purpose of Article XLII is to avoid “the need to lodge fresh declarations under the Protocol in respect of matters covered by those already made under another Protocol”.¹⁰⁸ Thus the South African Government Declarations made pursuant to the ratification of the Convention and the Aircraft Protocol will be deemed to apply to the Space Protocol, unless the South African Government expressly state otherwise.

The main objective of the Space Protocol, *i.e.* to promote asset-based financing technique in high value mobile equipment and maximise economic benefits to

106 See discussion relating to Section 231 incorporation process in Chapter II, *supra*.

107 See the discussion on SA Declaration, Chapter III *supra*.

108 See, Sir Roy Goode, *supra*, note 11 at 182.

Parties to the Cape Town Convention, remain a primary consideration on determining which declarations to adopt for a Contracting State. There are four kinds of Declarations under the Space Protocols: opt-in declarations, opt-out declarations, declarations concerning the operations of the Protocol within a Contracting State and mandatory declarations.¹⁰⁹

The effect of the declaration system is that a Contracting State must make a declaration if:¹¹⁰

- (a) it wishes to adopt an opt-in provision,
- (b) it wishes to opt-out of Article VIII;
- (c) the declaration is mandatory, *i.e.* under Articles XX(2), XXVII(4) and XXXVII(2).

3.2 Opt-In Declarations

These provisions are applicable in a Contracting State only if such a State makes a declaration to that effect:

3.2.1 Article XX: Modification of provisions regarding relief pending final determination

A Contracting State, must under Article XLI (3) declare that it will apply this Article. The Contracting State must also specify time within which such relief is to be granted under Article 13 of the Convention. Earlier, South Africa had declared to apply Article and stated time periods therein. However, upon analysis application of the Article 13 in domestic sphere, it was determined that the standard required to obtain interim relief may not be sufficient, and the Courts 'powers cannot be constrained in a manner provided by this Article.

3.2.2 Article XXI: Remedies on Insolvency

A Contracting State is required to choose remedies on insolvency and select Alternative A or Alternative B. The application of Alternative A in the implementation of the Aircraft Protocol was found to be unconstitutional in relation to right to access to courts. Self-help remedies are inimical to a constitutional dispensation such as South Africa. Therefore, Alternative B is the most appealing option.

3.2.3 Article XXII: Insolvency Assistance

The courts of a Contracting State shall cooperate with foreign courts and foreign insolvency administrators.

3.3 Opt-Out Declarations

3.3.1 Article VIII: Choice of Law

Parties to an agreement, contract of sale or rights assignment, etc. may agree on the law which is to govern their contractual rights.

¹⁰⁹ Id.

¹¹⁰ Id at 183.

3.4 **Declarations Relating to the Operation of the Protocol within a Contracting State**

3.4.1 **Article XXXI: Designated Entry Points: Article 18(5) Convention**

It is for each Contracting State to decide whether to make a declaration designating an entity as the entry point for the transmission of registration information to the International registry.¹¹¹

3.5 **Mandatory Declarations**

3.5.1 **Article XXVII(4) Limitations on Remedies in Respect of Public Service**

A Contracting State is required, at the time of ratification, approval of, or ascension to the Space Protocol to specify by declaration a period during which the creditor may not exercise any such remedies if the debtor does not cure its default within that period. The period is limited to six months.

3.6 **Consistency with Existing Domestic Space Legislation**

The overarching legislation covering space activities in South Africa is the Space Affairs Act.¹¹² The Space Affairs Act provides for a Council to oversee the international obligations of the Republic and supervise any space activity occurring in South Africa or undertaken by South African persons elsewhere, including in space.¹¹³ The Space Affairs Act does not deal with the subject matter of the Protocol. The only inconsistencies are therefore those identified in the implementation of the Aircraft Protocol and the discussion thereto is equally applicable here.¹¹⁴ The minor issue of definitions will then be addressed during the incorporation process.

VI **Future Perspective**

The Aircraft Protocol is enjoying wider acceptance because of the commercial benefits in the form of discounts on premium rates enjoyed by debtor airlines. There is no such benefit expressly provided for in the Space Protocol. Yet there is a complementary benefit provided to creditors in the form of the provisions relating to debtor's rights. There is a need to develop an analogous benefit framework under the Space Protocol. This is the import of Resolution 4 approved at the Berlin Diplomatic Conference. South Africa introduced the Resolution given its experiences in the implementation of the Aircraft Protocol.

111 *Sir Roy Goode, supra, note 11 at 400.*

112 *Space Affairs Act 84 of 1993.*

113 *Section 4 ibid.*

114 *See, Chapter III, supra.*