

Transfer of satellites in orbit. An International Law Approach

Dr. Julian Hermida⁽¹⁾

⁽¹⁾*LL.M. and D.C.L (McGill), PDF (Ottawa), julianhermida@justice.com*

ABSTRACT

The legal literature has voiced concerns about the possibility of transferring satellite ownership in orbit, especially to a non launching state, as the Registration Convention does not expressly contemplate this situation. This assertion ignores the full array of possibilities permitted both by the Convention and general international law. The article intends to explore the legal feasibility of transferring satellites that are already in orbit both to launching and non launching states. The pivotal thesis is that an interplay between article II of the Registration Convention, which does not prohibit the transfer of all the jurisdictional and control rights, and the international –both conventional and customary- norms on stipulation of rights to a third State provides an adequate legal framework for the transfer of a satellite in orbit –even to a non launching state- without any amendment to the Registration Convention.

INTRODUCTION

The legal literature has voiced concerns about the possibility of transferring satellite ownership in orbit, especially to a non launching state, as the Registration

Convention does not expressly contemplate this situation¹.

An analysis of International Law and conventional Space Law clearly shows that that these concerns are unfounded and that transfer of satellites in orbit is legally possible, even to non launching states.

CUSTOMARY INTERNATIONAL LAW

Since the State of registry has been defined in the Registration Convention as “a launching State on whose registry a space object is carried in accordance with article II”, it follows from this definition that there may be only one State of registry.

Difficulties have arisen with respect to the transfer of satellites in orbit, especially in the case of sale of satellites. In this respect, two sets of facts have to be differentiated: the transfer of satellites between launching States and the transfer of satellites to a non launching State.² There have been some cases in practice, such as the transfer of satellites registered in the United Kingdom to China as a consequence of the hand over of Hong Kong or the sale of Canada’s Anik CI and CII satellites to Argentina,³ among some other ones. These isolated cases may not be considered to amount to a general and consistent practice of States followed from a sense of legal obligation, and thus there is no rule of customary international law governing the transfer of satellite ownership in orbit.⁴ Since recourse to general principles does not

Copyright © 2003 by the author. Published by the American Institute of Aeronautics and Astronautics, Inc, with permission. The content of this paper reflects the views of the authors and not necessarily those of their affiliated institutions.

either offer any solution to this problem the analysis must be done exclusively in light of the conventional sources.

TRANSFER TO LAUNCHING STATES

The legal literature agrees that transfers of satellites in orbit among launching States would be permitted under the Registration Convention and would not offer major difficulties, such as is evidenced by the Hong Kong precedent.⁵

This is so because according to the Registration Convention, in the event that there are several launching States these have to determine which one of them will register the object in its national registry. These States may further agree on the application of certain aspects of the legislation of the State which will not act as State of registry.⁶

TRANSFER TO NON LAUNCHING STATES

However, with respect to the transfer of ownership in orbit to a non launching State, the answer given in the literature is that the Registration Convention does not permit any modification in this case.⁷ This is grounded on the premise that according to the Registration Convention the State of registry has to be one of the launching States, i.e., a State which launches or procures the launching of a space object; a State from whose territory or facility a space object is launched⁸.

This assertion ignores the full array of possibilities permitted both by the Convention and general international law⁹. In this respect, the Registration Convention allows the possibility of launching States to conclude agreements on jurisdiction and control over the space object and over any personnel thereof.¹⁰ Thus, launching States

can decide to transfer certain jurisdictional rights to others, such as in the case of criminal law under the Intergovernmental Agreement on the International Space Station.¹¹ As put forward by Aldo Cocca, this reflects the principle that special agreements override general ones and the unitary criteria of Art. II (1) of the Convention.¹²

Nothing in Art. II of the Registration Convention prohibits the transfer of all the jurisdictional and control rights. Therefore, it is legally possible for a State to register a space object and to enter into an agreement with another launching State to transfer part or all of the rights and obligations arising from the registration of a space object. Moreover, it is legally tenable to transfer rights to a non launching State, for the Registration Convention simply prescribes that any such agreement must be made among the launching States. In this respect, a launching State which intends to transfer rights to a non launching State will have to conclude with all the other launching States the transfer of jurisdiction and control rights and obligations to a third non launching State.¹³ Under general public international law, the stipulation of rights to a third State is permitted both under customary and conventional law. In effect, in the Free Zones Case, the Permanent Court of International Justice held that "it cannot be lightly presumed that stipulations favorable to a third State have been adopted with the object of creating an actual right in its favor. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favor of a third State meant to create for that State an actual right which the latter has accepted as such."¹⁴ Furthermore, Art. 34 of the Vienna Convention establishes that no rights and responsibilities may be

created for third parties, except for with the consent of the third party. In such case, there must be acceptance of the third party. In case when the parties intended to create a benefit, the acceptance may be presumed. However, in cases when the States created an obligation acceptance must be in writing.¹⁵

Additionally, it must be borne in mind that the concept of launching state is not only acquired at the moment of the launch but may be acquired later as in the case of the state that procures the launch.

Thus, once a satellite is sold to a non launching state according to the provisions of international law that state becomes a launching state according to both the Registration Convention and the Liability Convention.

CONCLUSIONS

The transfer of satellite ownership in orbit is legally possible under international law. This, however, requires an agreement among the launching States to transfer all of the jurisdiction and control rights and obligations in favor of a third non launching State. In light of customary and conventional international rules on effects of treaties to third parties acceptance in writing of the non launching State is essential.

¹ Kerrest, "Remarks on the Notion of Launching State" (1999) 41 IISL at 309.

² J. Hermida, *Legal Basis for a National Space Legislation*, (DCL, Thesis, McGill University, 2003) [unpublished], at 65.

³ In order to establish a temporary satellite system to comply with ITU timelines Argentina purchased the Anik CI and Anik CII satellites to Telesat Canada by the Argentine corporation Paracom S.A. Both companies -Paracom and Telesat- formed the Paracomsat joint venture, which was in charge

of the operation of the Anik satellites. Both Canadian satellites had to be moved approximately 30° to the East from their original position, to be situated at 76° West (Anik CI) and 72° West (Anik CII). Paracomsat leased transponder capacity not only to Argentine corporations -ATC Cable, Crónica TV, Canal 8 de Mar del Plata-, but also to Uruguayan television channels -4, 10, and 12 of Montevideo-, which sets the basis for a potential regional system. The satellites remained registered in Canada. J. Hermida, "Argentine Space Law and Policy" (1996) XXI-II *Ann. Air & Sp. L.* at 177 [hereinafter "Argentine Space Law and Policy"].

⁴ *Ibid.* at 178.

⁵ R. J. Lee, "Effects of Satellite Ownership Transfers on the Liability of the Launching States" (2000) 43 IISL at 148. Kerrest, "Remarks on the Notion of Launching State" (1999) 41 IISL at 309.

⁶ J. Hermida, *Commercial Space Law: International, National and Contractual Aspects* (Buenos Aires: Ediciones Depalma, 1997) at 63. It must be highlighted that in the International Governmental Agreement on the Space Station, States opted for the registration in a separate way of each element contributed by the States. European States delegated this responsibility to the European Space Agency. In effect, pursuant to Art. 5 of the Agreement each partner will register as space objects the flight elements which it provides, which are all listed in an annex to the Agreement. IGA, Art. 5.

⁷ Kerrest, "Remarks on the Notion of Launching State" (1999) 41 IISL at 309.

⁸ A. A. Cocca, "Registration of Space Objects", N. Jasentuliyana & R.S.K. Lee eds., *Manual on Space Law* (New York: Oceana, 1979) Vol. 1 at 180.

⁹ J. Hermida, *Legal Basis for a National Space Legislation* (Dordrecht: Kluwer Academic Publishers, 2004) at 65.

¹⁰ Registration Convention, Art. II.

¹¹ *Agreement among the Government of Canada, the Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America concerning Cooperation on the Civil International Space Station, signed January 29, 1998, Art. 22.*

¹² A. A. Cocca, "Registration of Space Objects", in N. Jasentuliyana & R.S.K. Lee eds., *Manual on Space Law* (New York: Oceana, 1979) Vol. 1 at 180.

¹³ Registration Convention, Art. II (2).

¹⁴ Free Zones Case, France v. Switzerland, 1932, PCIJ at. 97.

¹⁵ Vienna Convention, Art. 34.