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COMMENTARY

Commentary on ‘Comparative analysis of aircraft, rail and space international registries and their regulatory provisions’

F. Scott Wilson*

I. Introduction

The article titled ‘Comparative analysis of aircraft, rail and space international registries and their regulatory provisions’ by Rory McPhillips, Howard Rosen, Souichirou Kozuka, and Stuart Kennedy (the ‘Article’) provides a much-needed and informative description of the challenges facing the developers of the international registries called for by the Convention’s Space Assets Protocol and Luxembourg Rail Protocol. Many of these challenges are similar to those faced by the developers of the International Registry (the ‘Aircraft Registry’) called for by the Aircraft Equipment Protocol.

The Aircraft Registry commenced operations on 1 March 2006 after more than four years of hard work by the Preparatory Commission (International Registry), organized by and working under the supervision of the

International Civil Aviation Organization (‘ICAO’) in its role as Supervisory Authority. The Preparatory Commission was authorized by Resolution No. 2¹ to the Convention. Although the Preparatory Commission was to be comprised of delegates nominated by governments, Resolution No. 4 encouraged participation of others by resolving:

TO ENCOURAGE all negotiating States, international Organizations, as well as private parties, such as aviation and financial industries, to assist the developing negotiating states in any appropriate way, including facilities and know-how necessary to use the International Registry, so as to allow them to benefit from the Convention and the Protocol as early as possible.

Numerous private parties from the aviation and financial industries participated in the work of the Preparatory Commission, including this author. Industry participants brought to the process considerable knowledge of the practice of existing aircraft registries, thereby allowing them to contribute ideas for a simple and efficient registry. Discussion by this broad working group led to the development of working themes that guided the Preparatory

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¹ Adopted pursuant to the Final Act of the Diplomatic Conference to Adopt a Mobile Equipment Convention and Aircraft Protocol.

Commission in its work. The key point, however, is that it was the involvement of those industry participants, working alongside governments and the Supervisory Authority, that led to the development of an Aircraft Registry that is efficient, transparent, and financially sound.

At the outset, however, it must be noted that the Article makes clear that development of both the rail and space registries is being hampered by what appears to be a lack of cohesive global industry organization and regulation in those industries. Commercial aviation has been the beneficiary of worldwide regulatory coordination among states since the mid-1940s when, anticipating rapid growth in the volume and reach of commercial aviation, international efforts were made to harmonize the regulation of airspace and commercial aviation. The Chicago Convention, the creation of ICAO, and the Geneva Convention, among many other initiatives, were the result of a desire to bring order and standardization to commercial aviation. The Cape Town Convention and its Aircraft Protocol represent but one more step in the evolution of global cooperation in commercial aviation. The Aircraft Equipment Protocol's rapid development and implementation were facilitated by the existence of this global regulatory infrastructure. The design, development, and successful launch of the Aircraft Registry were also facilitated by that regulatory infrastructure. The Article describes how the absence of similar pre-existing international bodies and conventions could be hampering the development of the space assets and rail registries, but the issue is far broader than merely registry development. The lack of an aviation-like international regulatory framework is likely hampering the ability to achieve ratifications as well as to address other important issues beyond the creation and management of registries.

II. Asset identification systems

One of the stark differences between the Rail and Space Registries, on the one hand, and

Aircraft Registry, on the other, is in how unique asset identification systems are to be developed. The Article notes that the Preparatory Commission of the Space Protocol 'decided to adopt an approach inspired by the Rail Registry, which provides that the Space Registry Regulations basically require a "unique identification number" *which is an identifier issued by the Registrar*² (emphasis added). This contrasts with the Aircraft Protocol, which stipulates that the identification criteria for aircraft objects 'shall be the name of its manufacturer, its manufacturer's serial number and its model designation, supplemented as necessary to ensure uniqueness'.³ The Article describes in considerable detail the difficult issues faced by both the Rail and Space working groups owing to the large number of manufacturers, the very large number of assets, and the comparative lack of international serial number norms. This suggests the need for very active involvement by the same type of industry participants that worked with the Preparatory Commission in developing the Aircraft Registry.

One of the key innovations of the Aircraft Registry was the development of 'drop-down' lists: pre-populated computer lists of aircraft object data by make, model and serial number. These lists were developed not only to facilitate the novel online nature of the Registry, but also in an effort to avoid error – key-stroke or otherwise. Given the different ways a manufacturer could be referred to, or that there may be more than one way to refer to a model of aircraft objects or to an object's serial number, the use of drop-down lists ensures uniformity, thereby avoiding a need to make multiple registrations to cover multiple ways of referring to object data, and making searches of the Registry's database much easier and, importantly, more complete. Key to the

² Article, 'Comparative Analysis of Aircraft, Rail and Space International Registries and their Regulatory Provisions' The Cape Town Convention Journal. doi:10.1080/2049761X.2016.1252258.

³ Aircraft Protocol, Article XX(1).

development of the drop-down lists was the supply of drop-down information by airframe, engine and helicopter manufacturers. While not all manufacturers of aircraft objects participate by supplying data, most do, and the number keeps growing.⁴ In order to induce manufacturer participation, a framework memorandum was developed.⁵ All participating manufacturers were then asked to agree to provide the object data in accordance with that framework memorandum. The framework memorandum expressly provides that a manufacturer has no legal obligation or liability to the Aircraft Registry, and makes clear that the Registrar will only use the data for its intended purpose on the drop-down lists. In addition, registered users of the Registry acknowledge that neither the manufacturers nor the Registrar shall have any liability with respect to the data provided.

Although the Rail and Space Protocols both delegate to the Registrar the obligation to develop unique asset identifiers, it would seem that both groups' Registrars will need to rely heavily on direct industry participation in developing such a system. As noted in the Article, the Rail Protocol seeks the development of 'unique identifiers' by the registrar in the form of either (1) an affixed identification number, (2) 'associated in the [Rail] Registry with the manufacturer's name and ... identification number', or (3) 'associated with a national or regional identification number required by a Contracting State so affixed'. Regardless of the method chosen, it is apparent that heavy industry participation will be required. Space faces the same challenge. The aircraft object approach was to encourage manufacturer participation, allow the manufacturers to provide the data, to have the data supplied electronically, and to require the use of drop-down lists in making registrations. The Rail and Space industries might be well advised to

⁴ Fifty-two manufacturers currently supply such data to the Aircraft Registry. Source: author's interview with the Registrar (notes on file with the author).

⁵ Copy on file with the author.

approach their tasks in a similar fashion, which would start with enlisting participation and end with drop-down lists.

III. Purely administrative function of the Registrar

As the Article notes, a key operating principle of the Aviation Registry is that 'the Registrar has a purely administrative function'.⁶ This is a reflection of the principle that an efficient registry is one that is open and available to all, with no undue barriers to registration or searching. The registrar of the Aircraft Registry has no role in determining whether or not a registration is validly made, or whether or not the Convention applies to a particular transaction.⁷ Further, while it may be clear that a particular registration made with the Aircraft Registry may have no legal effect under the Convention of the Protocol, there will be 'no technical impediment to the registration' thereof.⁸ And, as the Article notes, there are no documents required to be filed with the Aircraft Registry to accompany or constitute a part of a registration, meaning there is no requirement for the verification or vetting of the sufficiency thereof. The only instance where the Registrar of the Aircraft Registry is authorized (required) to exercise discretion is in the approval of a 'registry user' and even then the Registrar's judgement is limited to reaching a reasonable conclusion that an applicant and its administrator 'are who they claim to be' and that the administrator is entitled to act for the applicant.⁹ This contrasts rather sharply with the

⁶ Article (n 2).

⁷ See Section 3.2 of the Regulations: 'Since the International Registry merely provides notice of registrations, the facts underlying any such registration or registered interest shall determine whether it falls within the scope of the Convention or the Protocol.'

⁸ Regulations, Section 3.2. The author's personal experience indicates that the Aircraft Registry is being used in cases where it is clear the Convention does (or did) not apply. See also Section 2.151 of the Official Commentary.

⁹ Regulations, Section 4.1. Section 10 of the Procedures describes the limited information a proposed

Rail Registry to the extent it would purport, for instance (and as the Article notes), to authorize the registrar thereof not to accept registrations that do not comply with a registrar-developed unique asset identification system, or to allow the registrar thereof to reach agreement (or not) with 'declared national or regional systems' where procedures or mechanisms may be developed to aid in tracking and developing unique asset identifiers. Notwithstanding the perceived threat of fraud or abuse in a system devoid of any oversight of registrations, as noted in the Article, the Aircraft Registry has not experienced any unmanageable problems in this regard. Further, the cost savings associated by not having to cover the cost of a system where registrations have to be vetted, or accompanied by transaction documents, has allowed the Aircraft Registry to keep fees low. Finally, risk of registrar liability is reduced as registrar discretion is limited.

IV. Advisory board

The Article makes brief mention of the International Registry Advisory Board (IRAB). The IRAB is comprised of practitioners in aviation finance,¹⁰ and its mission is to provide industry feedback to the Registrar in order to allow the Registrar to improve the Aircraft Registry. The IRAB's work has resulted in numerous improvements with the way the Aircraft Registry operates and has led to the development of many innovations including the Closing Room¹¹ and, before that, multiple registration features, and improved search techniques. The IRAB has also been instrumental in the developments of amendments to the Regulations

registry user must provide to the Registrar in order to allow the Registrar to 'reasonably conclude' that the applicant and its proposed administrator are who they claim to be and that the latter is authorized to act for the former. Note also that one does not have to be a registered user, and therefore approved by the registrar, to conduct a search of the Registry (to be a 'searching person' as defined in the Regulations).

¹⁰ The author has been a member of the IRAB since its inception in 2006.

¹¹ See Section 5.20 of the Regulations.

and Procedures, highlighting as it did issues with merged entities, controlled entities, authorized delegates of administrators, fractional or partial interests, and the transferability of rights to discharge, among others – most of which were not addressed in the initial Regulations that went into effect in 2006.¹² This is yet another example of the value of including industry practitioners in the process of building and managing a registry unique to an industry. Rail and Space should consider ways to develop and encourage industry participation.

V. Provision of information not related to registrations

One goal of a wholly electronic registry, using primarily drop-down lists or other accessible information, is ease and quickness of use. But it is tempting to want to use such an accessible system to collect information beyond that strictly required for the initial purpose of the registry – to register international interests in assets. Both the Rail and Space Registry working groups are responding to that temptation. In the case of the Rail industry, whereas the Luxembourg Rail Protocol does not extend to contracts of sale, it does allow for the development of a scheme to register 'Notices of Sale' for informational purposes. A portion of the Article devoted to the Space Registry discusses how data from the Master International Frequency Register (MIFR) and the UN Registry of Space Objects can be provided in conjunction with the registration of international interests in the Space Registry, to include such irrelevant information as the COSPAR designator, UTC and place of launch, and radio

¹² The Regulations and Procedures have been revised six times in the 10 years since the Aircraft Registry was opened for business on 1 March 2006; the Seventh Edition having been published and to go into effect in November 2016. Revisions are made pursuant to a precise procedure managed by the Supervisory Authority and its Commission of Experts, working in consultation with IRAB.

frequency assignments. The Aircraft Registry initially attempted to include an opportunity for users to provide an aircraft's (airframe's) nationality mark (often referred to as a 'registration number'). That nationality mark, however, is not relevant for purposes of the recordation of an international interest over the helicopter or airframe bearing that nationality mark, and its inclusion in the Aircraft Registry's online information sheet caused confusion.¹³ This feature was later removed by the Supervisory Authority via amendment to the Regulations. The Rail and Space Registry working groups might reconsider the benefits to be achieved by allowing the provision of information not necessary to the primary goal of perfecting a registration – those benefits are likely to be outweighed by the confusion caused.

VI. Conclusion

The major challenge faced by the Rail and Space Registries is the need to develop systems of unique identification. In both cases the relevant protocols place the responsibility for the creation of unique identifiers on the registrar. The success of the Aircraft Registry is due in large part to the active participation of industry participants. Manufacturers, airlines, financiers and lawyers have all contributed to the Aircraft Registry, motivated as they were by a desire to develop a simple, clean, efficient registry. The Rail and Space Registry working groups will need similar participation by their industry representatives to develop a system that will achieve industry acceptance.

¹³ Article IV(1) provides that the Convention applies to helicopters or airframes registered in an aircraft register of a Contracting State, and thus a nationality mark may be evidence for determining whether or not the Convention applies.