Jurisdiction and Liability Issues in Carrying out Commercial Activities in the International Space Station (ISS) Programme

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1. Background information on ISS commercial utilisation

First, it would be useful to recall that, for the five Cooperating Agencies (partners) in the International Space Station (ISS) programme, the expression ‘commercialisation of ISS’ entails basically, but not exclusively, (a) the carrying out of ‘utilisation’ or ‘utilisation-related’ commercial activities onboard any of the elements of the ISS on behalf of a private sector entity, for generating revenue, and (b) the carrying out of other types of activities connected to the ISS programme, essentially in a commercial environment and from a national territory, for the purpose of generating revenue for the benefit of the Cooperating Agencies concerned.

1 Mr. A. Farand, Legal Department, European Space Agency (ESA). This article reflects the views of the author and shall not be construed as being the position of the European Space Agency on any of the issues being considered.

2 The United States National Aeronautics and Space Administration (NASA), the Russian Space Agency (RSA, also known as Roskosmos), the European Space Agency (ESA), the Government of Japan (GOJ) representing different organisations responsible for various aspects of the cooperation, and the Canadian Space Agency (CSA).
The general understanding is that the profit portion of this revenue will be primarily reinvested in additional onboard ISS utilisation activities. Commercial utilisation is a subset of general ISS utilisation, the latter being done through research institutes and referred to as ‘institutional utilisation’ and, at least for the flight opportunity costs, financed almost entirely by the Cooperating Agencies themselves. The rules and organisational structure, basically the responsibilities of the various consensus-based cooperation bodies established by the partners through the ISS Agreements, are therefore applicable, although commercial utilisation has, in addition, characteristics of its own to consider.

It is also important to recall that, pursuant to the ISS Agreements, the utilisation of user elements (ISS laboratories) provided by four partners, within these partners’ respective percentages of the total utilisation available, is a right accruing to each of them in return for the provision of users or resources, or so-called ‘other’, ISS elements. As a consequence, it is up to each partner to determine to what extent it should make use of its own ISS utilisation right. Although it would make sense to strive for a full use of that right, this may not always coincide with appropriated funds.

The exercise of utilisation rights in a cooperative mode among two or more partners requires a new agreement and this explains the multiplication of agreements made in a simplified form, i.e. through exchange of letters, among the partners. Such cooperation entails additional commitments which are clearly over and above those contained in existing ISS Agreements. The interested parties have a wide margin of manoeuvre, although they are not allowed to make changes to the jurisdictional and liability rules, to define the rules applicable to this cooperative venture.

It should be noted that, by definition, commercial utilisation will extend well beyond the use of ISS laboratories, despite the fact that the latter is the only type of use described explicitly in the ISS Agreements. Therefore, one may ask if the basic rules outlined in these Agreements will still be applicable mutatis mutandis to commercial utilisation, and that is surely the partners’ favoured position, or if there will be a need to agree on new rules in the partnership to cover certain aspects of commercial utilisation.

2. Adequacy of existing ISS rules for commercial activities

The rules on jurisdiction and liability contained in the ISS Agreements do not provide all the answers to the issues raised by commercial utilisation, or

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3 The expression ‘ISS Agreements’ is used to make reference to both the ISS Intergovernmental Agreement (IGA) and the related ESA/NASA ISS Memorandum of Understanding, signed at Washington on 29 January 1998. Numerous other agreements also deal with different aspects of ISS cooperation between ESA and NASA.