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THE TERM "APPROPRIATE STATE" IN INTERNATIONAL SPACE LAW

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Table of Contents

A. Introduction
B. Use of the Term in Codifications
C. Interpretation of the Term
D. Conclusion

A. Introduction

With the growth of space activities and after the major space treaties have been enforced for many years, it has been experienced that certain definitial issues in space law not only arise more frequently than before, but also are of more and more practical relevance. It is therefore recommendable that the International Institute of Space Law has taken the initiative of creating a working group on definitial issues as a medium- term research project which may eventually result in a collection of coordinated efforts to define major terms in international space law. This paper is meant to be a first draft for such a contribution regarding the term "appropriate state".

That term, and the term "launching state", are found in space treaties as being relevant as indicators of state responsibility and state liability, both with regard to space activities of states and with regard to space activities of private enterprises. The practical importance is obvious: The more states become active in space the more they want to know which space activity is attributed to them with a consequence of responsibility and, in case of damage, liability. And as private enterprises become more and more active in space, both they and the states need to know, to which state these private space activities are attributed and which state therefore is responsible and liable for such activities under the space treaties. In addition to the space treaties, there will often also be a consequence in national law, as a state who finds itself responsible and liable for a certain private space activity, will normally try to assure in its national legislation that it can turn to the respective private enterprise, especially for any reimbursement of damages and costs the state may have to pay to another state due to its responsibility or liability.

Definitial clarification of the term "appropriate state" is therefore not only of academic interest in international space law, but also at present and even more in the future of practical relevance for the exploration und use of outer space by states, international organizations and private enterprises.

B. Use of the Term in Codifications

The term "appropriate state" is used in Article VI of the Outer Space Treaty (OST) which, after stating the international responsibility of State Parties for "national activities in outer space", provides as follows:

> "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."

C. Interpretation of the Term

As Article VI (OST) does not clarify which is the "appropriate" state, clarification by interpretation is required.

Article IX OST provides that the duty of consultation by the State Party exists also with regard to "an activity or experiment planned by...its na-tional in outer space". Much speaks in favour of applying Article VI OST in the same way as Article IX OST to the effect that a state's duty to provide for

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authorization and supervision applies to its nationals, since the obligation under Article IX should fall on the same state who is responsible under Article VI. But on the other hand, this would mean that responsibility under Article VI may be different from liability, as both Article VII OST and Article II of the Liability Convention (LC) refer to the state "that launches or procures the launching of an object into outer space, ...and...from whose territory or facility the object is launched", shortly speaking the "launching state". It would certainly be an unsatisfactory solution to find different criteria - and therefore different results - to attribute space activities for responsibility on one hand and liability on the other hand[1].

For the Outer Space Treaty, as a Convention of public international law, the travaux préparatoires can be of relevance for the interpretation in case of doubt arising from the text of the Convention. The Draft Declaration of Principles Relating to the Exploration and Use of Outer Space[2] presented by the United States in 1962 contained the following paragraph 6:

> "A state or international organization from whose territory or with whose assistance or permission a space vehicle is launched bears international responsibility for the launching, and is internationally liable for personal injury, loss of life or property damage caused by such vehicle on the earth or in air space;"

From this it may be argued on one hand that, as responsibility and liability are dealt with together, what later became the "launching state" should also be considered as the "appropriate state". But one may also argue, as in the final accepted version of the Outer Space Treaty, responsibility and liability were dealt with in separate Articles using different denominations or criteria for attribution to a state, one must not identify the "appropriate" state with the "launching" state. The latter conclusion seems to be confirmed by the Draft Treaty presented by the USSR in 1966 which already contains a separate Article VI on international responsibility referring to the "state concerned" and Article VII dealing with liability referring to the launching state as well as an Article VIII which - similarly to the final Article IX OST - calls for consultation for the state for space activities "by it or its nationals"[3].

As neither the text nor the travaux préparatoires lead to a clear answer to the question of the definition of the term "appropriate state", as provided for in Article 38 of the Statute of the International Court of Justice, international legal literature may be referred to as a subsidiary means of interpretation of public international law. There is an early citation from Ms Galloway to the effect that there may be several "appropriate states" and one of the "appropriate states" may be a state "whose only connection with the particular space activity was that some components or space instruments were produced on its territory"[4]. Indeed, since several states may fulfill the criteria for "launching states", if one applies the same criteria for defining the "appropriate" state, there may also be several appropriate states. On the other hand, if one applies the criteria of nationality used in Article IX OST, one has to attribute to the non-governmental entity only one nationality, which would also mean that only one state "shall require authorization and continuing supervision". In any case, doubts arise with regard to the second part of that citation as the production of components or space instruments on its territory does not appear anywhere as the decisive criteria either for the "appropriate" or the "launching" state, and as Article VI OST expressly is only dealing with "national activities in outer space" (first sentence) and "activities of non-governmental entities in outer space" (second sentence). Therefore, taking the production activity on the surface of the Earth as a criteria is hardly in conformity with this approach of Article VI OST.

For the same reason, it is difficult to find support for the opinion expressed by Herczeg[5] who adopts an even wider approach to the effect that (1) the state of the seat of the non-governmental entity, (2) the state where production takes place, and (3) the launching state are all to be considered "appropriate" states.

Stephen Gorove[6] indicates on one hand that most logically the "appropriate" state could be the state of nationality, as the responsibility is for "national" activities, but that the drafters of the Outer Space Treaty used the phrase "appropriate State Party" and not "the state of nationality". He concludes that "at least in some cases the designation could refer to the launching state", but does not mention in which cases on the basis of which

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criteria this should be so.

Michel Bourély[7] adopts a similarly flexible approach in noting that the term "appropriate state", as he puts it, "is sufficiently vague to allow several interpretations". As possible interpretations he mentions the state which exercises jurisdiction and control over the private enterprise, the launching state, the registration state, and the state "which owns the space device".

D. Conclusion

As a first conclusion, it seems that indeed, Article VI OST leaves room for a number of different arguments leading into different directions regarding the definition of what is the "appropriate" state and that not one single argument and interpretation is sufficiently overwhelming to exclude all other interpretations as acceptable. This vagueness and flexibility may be unsatisfactory from an academic point of view, but may prove to be helpful in the future to deal with the growing number of private space activities in many different circumstances. One will have to keep in mind the intention of Article VI to provide for all necessary authorization and supervision by a state in view of its responsibility "for national activities in outer space".

Keeping this intention in mind a functional interpretation may be the relatively best solution defining the "appropriate state" from case to case[8].

Footnotes

1. This seems to be the main argument by van Traa-Engelmann, IISL 26th Colloquium Budapest 1983. Proceedings, p. 141.

2. UN Doc. A/C1/881; 14 October 1962.

3. UN Doc. A/6352; 16 June 1966.

4. Cited without source by Herczeg, IISL 10th Colloquium Belgrade 1967, Proceedings, p. 108.

5. IISL 10th Colloquium Belgrade 1967, Proceedings, p. 107.

6. Annals of Air and Space Law VIII (1983), p. 377.

7. IISL 29th Colloquium Innsbruck 1986, Proceedings, p. 159.

8. Within the exchange between members of the IISL Committee on Definitional Issues, our colleagues Vereshchetin, Kamenetskaya, and Zhukova considered the functional interpretation as "undesirable from the legal point of view because in practice it could mean the absence of any definition".