PRACTICAL IMPLICATIONS OF LAUNCHING STATE - APPROPRIATE STATE DEFINITIONS

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Abstract

Meanings of the terms "launching State" and "appropriate State" are discussed by a number of space lawyers. This paper shall not attempt to duplicate this credible effort. Rather this paper will look at some of the ramifications of various definitions both from a practical and commercial prospective. It is the conclusion of the author that a middle ground must be found. It is hoped that tribunals which seek to apply these terms will take a narrow view and find interpretations which further the goals of the drafters of the Outer Space Treaty and its progeny.

Introduction

"Launching State" is specified in Article VII of the Outer Space Treaty, Article I(c) of the Liability Convention and Article I(a) of the Registration Convention. In essence, the term applies to a State which launches, procures a launch or from whose territory/facility a launch is accomplished. The effect of falling within the parameters of the term is that the State has liability for damage caused by it through a launch by either a governmental or a non-governmental entity. This liability is both joint and several among the States involved.

"Appropriate State" is used in Article VI of the Outer Space Treaty. The effect of falling within the parameters of this term is that the State bears responsibility to authorize and continually supervise space activities whether by a governmental or a non-governmental entity.

The distinction between liability and responsibility must be kept in mind. Responsibility applies to a State's obligation to regulate and control space activity both in the present, and in the future, to assure compliance with not only the letter but the spirit of the Outer Space Treaty principles. Liability on the other hand speaks to an obligation of a State to compensate for damages.

Liability for damage is an age old concept present in every culture and legal system. The only significance of including it in the various space treaties is to waive States' sovereign immunity and provide "equitable" procedures to compensate victims.

The extension of the concept of responsibility of a State for the acts of private entities is

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new. While various States have historically employed regulations and domestic laws to assure acceptable behavior by individuals and other entities within their borders, the application to behavior in the international arena expands the obligations of the State.
The inclusion of "responsibility" in the Outer Space Treaty is the result of a compromise between the U.S. and the U.S.S.R. The Soviet Union asserted that only States should participate in space activity and that "to give private companies a free hand in outer space could lead to chaos and anarchy."[1]

The United States asserted that private entities must also be entitled to originate and participate in space ventures. The analogy might be drawn to limiting use of the high seas to States in their sovereign capacity. The solution offered by the Soviet Union was to afford private entities the opportunity to undertake space activity on the condition that such activity would be subject to the control of the "appropriate State" and the State would bear international responsibility for it.[2]

Previous Authors

The IISL Board of Directors appointed a three member board in 1967 composed of Mrs. Eilene Galloway, Dr. Michel Bourely and Dr. Istvan Herczeg, to study the problems of interpreting the Outer Space Treaty.

Dr. Herczeg, in his report that year, quotes Mrs. Galloway as saying, "The point would seem to be correct that there may be several 'appropriate States' with responsibility under Article VI." He continues to quote her, "Is it not doubtful, however, that the State Party whose only connection with the particular space activity was that some components or space instruments were produced on its territory would often be one of the 'appropriate States'?"[3]

Mrs. Galloway's opinion is so important on an interpretation of the Outer Space Treaty that I called her to verify her position. She said the first portion was what she said, but the latter appeared to be Dr. Herczeg's thoughts. I suspected that the words were not hers because of the sentence construction.

Mrs. Galloway's view is that there may be several "appropriate States" with differing degrees of responsibility. What is needed are the methods to handle them in a given situation. Recognizing the potential problems that multiple "appropriate States" can pose should encourage States to come to an agreement early on in a space project to avoid disputes later.

Dr. Herczeg in his 1967 report provided an example where the private entity was incorporated or had its headquarters in one State, the payload was produced in a second State and the launching took place in a third State. He concluded all three were "appropriate States". He drew an analogy to Article VII's use of "launching State" to conclude that more than one State may be involved.[4]

Dr. Bourely discusses responsibility and suggests several possible interpretations for "appropriate States". These include the State which exercises jurisdiction and control

over the private enterprise, the launching State, the registration State, the State where the head office is located, or the production plant is located, the State which owns the payload or the State from which the payload is controlled.[5]

Professor Stephen Gorove urges that nationality be the key to determining who is an "appropriate State" since the responsibility is for "national" activities. He also concludes that, "at least in some circumstances, the designation could refer to the launching State."[6] Professor Vereshchetin supports these views.[7]

Professor Bockstiegel compared Article VI of the Outer Space Treaty which speaks to "appropriate States" with Article IX of the Outer Space Treaty which provides that the duty of consultation by the State Party exists also with regard to "an activity or experiment planned by it or its nationals in outer space" (my emphasis) and concludes that it may be favorable to find these terms coterminous but that it may lead to different States being "appropriate States" vs. launching States, which would be unsatisfactory. He finds that a functional definition may be the best solution, defining the term from case to case.[8]

Interpretation

To apply these terms fairly and appropriately to a given set of circumstances, consideration should be given to the intent of the drafters. It is important to look at the Outer Space Treaty as a whole to glean the flavor to be im-parted to the terms "launching State" and "appropriate State". Clearly, the intent was to foster and encourage space activity to the greatest extent practicable in order to maximize the benefits that space exploration holds. The preamble recognizes, "the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes".[9]

No one has argued that private entrepreneurial activity is not a "peaceful purpose", therefore, applications of the principles of the Outer Space Treaty and the following treaties should foster and encourage such activity.

Launching State

The provisions for liability were sought by non-space faring nations to assure themselves that they would be compensated for any injury.

The three categories of "launching State" are:

1. one who launches;
2. one who procures the launch; and
3. one whose territory or facility is used to launch.

States falling within points one and three are usually identifiable without difficulty, but point two poses questions. The usual meaning of "procure" is to acquire/secure or to bring about. This could include any State which assists a launch, either by providing items included in the payload or launch or benefits politically, scientifically or economically.

Even "launches" or "facility" could be given a broad interpretation to include any State which assists in any way, for

example by providing telemetry support. The primary States should be clearly identifiable but the secondary or supporting States may not be as easily identified.

While the Liability Convention has provision for agreement among launching States to make special provisions for liability among themselves, such agreement would provide no protection against a claim by an injured State party on its own behalf or on the behalf of one of its citizens.

Were a broad interpretation to be given the term "launching State" it could have the effect of stifling participation by some nations that do not want to be exposed to the hassle of resolving a claim and the potential liability to which they would subject themselves.

Such an interpretation would thwart the objects of the Outer Space Treaty which were to "contribute to broad international cooperation and use of outer space for peaceful purposes" which in turn "will contribute to the development of mutual understanding and to the strengthening of friendly relations between States and peoples."[10]

States in turn would be even more hesitant to approve participation by their private entities if they would be subject to liability even for tangential connections to a launch.

Commercial Space Launch Act

The United States enacted the Commercial Space Launch Act of 1984[11] to satisfy its obligations as a "launching State" under Article VII of the Outer Space Treaty.

The law and accompanying regulations are broadly drawn, but focus on the preparation for launch and the act of launching. They do not cover the procedures for continuing supervision required by Article VI of the Outer Space Treaty.

The Secretary of Transportation must assure that all payloads are appropriately authorized by U.S. law. If not approved by another U.S. procedure, the Secretary reviews the propriety of launching the payload both from a policy and safety perspective.[12]

In practice, the requirement for continuing supervision incumbent upon an "appropriate State" is accomplished by the Federal Communications Commission working with the International Telecommunications Union for communications satellites. As to remote sensing satellites, their operations are governed by the Land Remote-sensing Commercialization Act of 1984.[13] Other space activity by private entities now and for the foreseeable future are under the direct control of the U.S. government. At some future date, when there are privately operated space stations or privately operated space colonies, additional provisions for "continuing supervision" may be required.

Dr. S. Neil Hosenball notes that it was the position of Legal Advisor, U.S. Department of State, that under U.S. law, Article VI of the Outer Space Treaty is self-executing and does not require implementing legislation and private entities can be controlled by ad hoc application of existing laws and regulations.[14]

Dr. Martin Menter commented, "To my mind, State responsibility for supervision over its non-governmental entities' space activities does not mean that a government representative is to be ever present with a private sector commercial space activity. Rather, the responsible agency or agencies would issue regulatory directives within legislative enacted guidelines; and by consultations, reports, inspections and by investigation of reported discrepancies, compliance should be assured."[15]

Appropriate State

The provision on responsibility and the term "appropriate States" were included by States who feared that private entities would rush to exploit space for economic gain irresponsibly and would cause pollution, damage and contamination. The meaning of "appropriate State" is not elucidated and it is not possible to determine the full scope of the term. Article VI only speaks to "the activities of non-governmental entities." It does not address the level or extent of activity. Here, as with "launching State" the ambit of the term must be given some limits to further the purposes of the Outer Space Treaty. Professor Gorove has suggested that the degree of participation is a critical question in resolving who is an "appropriate State."[16] I wholeheartedly concur.

Conclusions

Both terms must be given limits to assure that the spirit of the Outer Space Treaty and its progeny prevails. It is suggested the terms be limited to substantial participation. Indeed, the best view may be to limit the application of these terms to those States or private entities of a State who have a controlling role in the decisions.

I contend that the term "launching State" in a "procure" situation should not be applied unless there is direct control over the launch. Of course "launching State" would include launches from the territory/facility and instances when a second State directly manages a launch and the State whose territory is being used is merely an accommodating party. Additionally, I would include in the definition of "launching State", a State/private entity who purchases a launch service but does not control or manage the actual launch, because they will control the payload on orbit which has the potential to cause damage.

However, no real harm is caused by there being a host of "launching States" because the only significant consequence is liability and these States can make provision among themselves as to how to apportion damage awards.

None of the previous authors have addressed the issue of liability of a State in the event it or a private entity purchases a payload already on orbit.[17] I contend that such a State should be considered a launching State even though this status occurs after launch. In this vein, it may be appropriate to have the registration modified so that the new owner becomes the State of registry.[18]

In a similar regard, "appropriate State" should be limited

in its application to circumstances where a State/private entity manages or controls a space venture. States who are merely used for convenience should be disregarded by the world community.

Today, international shipping companies utilize "flags of convenience", registering ships in small nations to avoid the rigorous laws and regulations of their State of nationality. This should not be permitted for space activity. Private entities who are the real parties in interest should be authorized and continually supervised by their State of nationality.

Nationals of a State should not be permitted to avoid the States' responsibility as an "appropriate State" by the simple stratagem of incorporating or having its "main offices" in another State.

While this may be difficult to enforce, in practice the principle should be clear. States/ private entities who manage, control or are the principal investors in a space project must be included as "appropriate States."

U.S. Regulations

This is the essence of the law and implementing regulations of the United States. The Commercial Space Launch Act of 1984 requires U.S. citizens to apply to the Secretary of Transportation for a launch license.

The Federal Regulations specifically include within the definitions, "Any corporation, partnership, joint venture, association, or other entity which is organized or exists under the laws of a foreign nation, if the controlling interest in such entity is held by an individual or entity described in paragraphs (a) or (b) of this definition. 'Controlling interest' means ownership of an amount of equity in such entity sufficient to direct management of the entity or to void transactions entered into by management. Ownership of at least fifty-one percent of the equity in an entity by persons described in paragraphs (a) or (b) of this definition creates a rebuttable presumption that such interest is controlling." Paragraph (a) provides for U.S. citizens and paragraph (b) includes U.S. Corporations.[19] By the same token, States/ private entities that do not fall within the parameters of this principle should be excluded.

Multiple "Appropriate States"

In the event there are multiple "appropriate States" such States should be responsible for only the function or participation which cause them to be an "appropriate State".

It has been proposed[20] that the term "appropriate State" be interpreted to include the elements of the term "launching State" with the result that it would have the responsibility to authorize and continually supervise all future non-governmental activities.

To many problems there is a simple solution, easy to understand and easy to implement, but has the potential to produce disastrous results. This is one of them. By analogy, it would require automobile manufacturers to supervise operators of vehicles where ever they drive. This is not practicable.

To conclude that all "launching States" are ipso facto "appropriate States" would potentially lead to conflicting requirements for authorization and mind boggling conflicting supervision by the "appropriate States". In accord is Dr. Silvestrov of the Russian Institute of State and Law.[21]

Commercial Considerations

It is an article of faith with entrepreneurs that government intrusion increases the cost of operations and the length of time to bring a project to maturity at which point profits will be produced. Therefore, the less the governments feel compelled to "authorize and continually supervise" private entities, the more those with private capital will be willing to invest in space projects.

This is not to suggest that there should be no control over States or private entities but it should suffice to look only to those States who themselves or through their private entities control the project.

The critical concern is for supervision of the conduct of private entities. States who control or whose private entities control space projects are major players on the world scene now and should remain so for the foreseeable future. They have a great deal to gain or lose politically, scientifically and economically.

They have a stake not only in space activity but in all of the significant issues facing the world. This should suffice to reassure other States both space faring and non-space faring that such a State will comply and have its private entities comply with the spirit and intent of the Outer Space Treaty.

Correspondingly, the goal when there is injury or damage is to reimburse other States and their citizens. Those States/private parties who have the wherewithal to manage and control space projects would surely have deep enough pockets to reimburse for injury.

Limited application of the terms "launching State" and "appropriate State" should suffice to reassure and compensate damaged or potentially injured parties as these State Parties with the most to gain either politically, scientifically or economically should have the deepest pockets and the most to lose in failing to ensure compliance with the spirit and intent of the Outer Space Treaty.

With the demise of the "Cold War" has come the reduction of governmental support for space activity by all nations. In my opinion the future of space exploration is dependent upon non-governmental entities.

Accordingly to convince the entrepreneur to invest in space there needs to be a legal infrastructure which instills confidence and reduces political and regulatory risk to a minimum.

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1. U.N. Doc. A/AC.105/c.2/SR. 28, P.13, 9 July 1963.

2. Christol, Carl Q., The Modern International Law of Outer Space, p.65 (1982).

3. Herczeg, Istvan, Introductory Report - Problems of Interpretation of the Space Treaty of 27 January 1967, 10th Colloquium on the Law of Outer Space, p. 105 (1967).

4. Id.

5. Bourely, Michel, Rules of International Law Governing the Commercialization of Space Activities, 29th Colloquium on the Law of Outer Space, p. 157 (1986).

6. Gorove, Stephen, Annals of Air and Space Law VIII, p. 377 (1984).

7. Vereshchetin, Vladlen, Space Activities of "Nongovernmental Entities": Issues of International and Domestic Law, 26th Colloquium on the Law of Outer Space, p. 261 (1983).

8. Bockstiegel, Karl-Heinz, The Terms Appropriate State and Launching State in the Space Treaties - Indicators of State Responsibility and Liability for State and Private Space Activities, 34th Colloquium on the Law of Outer Space, p. 13 (1991). Dr. Bockstiegel, in this paper cited the 1967 report of Dr. Herczeg and attributed to Mrs. Galloway the opinion that an "appropriate State" may be a State whose only connection with the particular space activity is that some components or space instruments are produced on its territory. This is not her view but that of Dr. Herczeg.

9. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967. 18 U.S.T. 2410. T.I.A.S. 6347, 610 U.N.T.S. 205 (effective Oct. 10, 1967).

10. Id.

11. Pub. Law No. 98-575, 49 U.S.C. app. sec. 2601, Oct. 30, 1984.

12. 14 CFR Ch. III Sec. 415.27.

13. Pub. Law. No. 98-365, 15 U.S.C. Sec. 4201, July 17, 1984; amended in 1988.

14. Hosenball, S. Neil, The Law Applicable to the Use of Space for Commercial Activities, 26th Colloquium on the Law of Outer Space, p. 143 (1983). He reviews the U.S. law prior to the enactment of the Commercial Space Launch Act of 1984.

15. Menter, Martin, Legal Responsibility for Outer Space Activities, 26th Colloquium on the Law of Outer Space, p. 121 (1983).

16. Gorove, Stephen, Space Transportation Systems: Some International Legal Considerations, 24th Colloquium on Outer Space, p. 117 (1981).

17. Space Commerce Corporation considered offering to buy the Salyut space station from the then U.S.S.R. after it was essentially abandoned. Other examples would be the sale of communications satellites on orbit, e.g., GTE's Spacenet 1 sale to China in 1992 and the possible sale of Spacenet 4.

18. Convention on Registration of Objects Launched Into Outer Space, January 14, 1975, 28 U.S.T. 695, T.I.A.S. 8480, 1023 U.N.T.S. 15 (effective Sept. 15, 1976).

19. 14 CFR Ch. III Sec. 401.5.

20. van Traa-Engleman, H. L., Problems of State Responsibility in International Space Law, 26th Colloquium on the Law of Outer Space, p. 139 (1983). See also Bittlinger, Horst, Private Space Activities: Questions of International Responsibility, 30th Colloquium on the Law of Outer Space, p. 191 (1987).

21. Silvestrov, G., On The Notion Of The "Appropriate" State In Article VI Of The Outer Space Treaty, 34th Colloquium on the Law of Outer Space, p. 326 (1991).