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PUBLIC LAW ASPECTS OF PRIVATE SPACE ACTIVITIES AND SPACE TRANSPORTATION IN THE FUTURE

International responsibility and liability

by Henri A. Wassenbergh*

Which State is responsible and which State is liable for *private* space activities in general and space transportation activities in particular ?

There are mainly four types of States involved in private activities in outer space law:
the 'national State';
the 'appropriate State;
the 'launching State'; and
the 'State of registry' of the space object.

Each of these States can also be one or more of the others. However, under present- day international space law, only a 'launching State' can be a 'State of registry'.

The 'national' State of Article VI of the Space Treaty of 1967, is the internationally *responsible* State for non-governmental entities *under its jurisdiction*, when deploying what is then called 'national activities *in outer space'*.

Article VI obviously takes it for granted (under the influence of the position of the USSR at the time) that national activities always are State activities of the launching State and that activities by non-governmental entities always come under the authority and supervision of the (a) launching State.
Article VI, therefore, considers the 'appropriate State' to also be the 'national State' as well as the 'launching State', as it is the 'appropriate' State which has to authorize and has the continuing supervision of the activities *in outer space.*

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In our opinion, 'national' activities are activities of the State and activities of non-governmental entities for which a State issues a license to deploy space activities, qualifying the private, non-governmental entity as 'fit, willing and able' to deploy space activities under the State's responsibility. That State then should give such private enterprise also an economic authorization to deploy specified space activities. Thus, in our opinion, the 'national' State need not be the 'appropriate State' mentioned in Article VI of the Space Treaty of 1967, which, under that Article VI, apparently always is the 'launching State', as it is taken for granted that it is that State that has to authorize and supervise the private, non-governmental activities *in* outer space.

This means, in our opinion, that it need not be the launching State which always is the internationally responsible (and internationally liable) State for the non-governmental activities in outer space that it launches into outer space.

In fact, the launching State, in our opinion, can only act as the 'appropriate State' as far as the launching activity is concerned. [1]
But of course, the launching State can also happen to be at the same time the national State of the activities concerned.

Summing up and in other words, in our opinion, the national State always should be the one that should authorize and supervise the object *while in outer space* and this not only if the national State is the appropriate State of Article VI, i.e. the launching State. I want to separate the launching state from the activity *in* outer space.

Article VI of the space treaty should be amended and clarified accordingly.

In our opinion, and also having regard to Article 14 of the Moon Agreement of 1979, Article VI of the Space Treaty should be changed so it can be read as to deal with two separate subjects, the

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first subject being 'national' activities in outer space of a State and the second subject being 'non-governmental' activities in outer space.

Therefore, in our opinion, it would be appropriate for non-governmental activities to be deployed in outer space, to distinguish between the 'appropriate State' being the launching State, in casu *for the launching activity* and the 'national State', authorizing and supervising the activities *in outer space*, as the internationally responsible (and also internationally liable) State for the activities *in outer space*.

In my opinion the 'national State' is the State having jurisdiction, in the sense of both the juris*faction* and the juris*action* as defined by professor Bin Cheng, over the *entity* wishing to deploy activities in outer space, at the time of the actual deployment *in outer space*.

The 'national' State thereby is the internationally *responsible* State for the conduct of the entity's space objects *in outer space*.

The *national State*, therefore, should also be the *State of registry* of the space objects used by the non-governmental, private entity, as registration will give it jurisdiction over the space object *in* outer space. [2]

The above also will necessitate an amendment of the Space Registration Agreement of 1975, as under that agreement only a launching State can register a space object and the 'national State', as we have seen, in our opinion, is not necessarily also a 'launching State'.

Of course, it might be reasoned and argued that the fact of the licensing and authorization of the private entity and the ensuing international responsibility makes the issuing State a 'launching State', e.g. under the criterion of 'procuring the launching'[3] (quod non).

The 'launching State' is defined in the Space Treaty of 1967, in the Liability Convention of 1972 and the Registration Convention of 1975, as :
the State that launches *or procures the launching of* a space object; and
the State from whose territory or facility a space object is launched.

A State that "procures" the launching is a State contracting for a launching of its space object(s).

The 'appropriate State', in my opinion, is the State having jurisdiction in the sense of juris*action* as defined by professor Bin Cheng, over the launching *activity*, which, to begin with, is the State from whose territory or facility a space object is launched.

This State, therefore, is a 'launching State' and as such, *under existing space law*, is apart from internationally responsible for the launching activity, also internationally *liable* for damage caused by the launching activity.

Should this 'appropriate' State also be (co)responsible with the 'national State' for the conduct of the entity *in outer space* ?

In my opinion, only the launching activities, and not the activities *in* outer space as such, should come under the authorization and supervision requirement of Article VI for the 'appropriate' State, i.e. under the responsibility of the appropriate State as the launching State.

The 'authority' for non-governmental entities to deploy space activities or better 'activities in outer space', which in my opinion is required from the 'national State', not from the 'appropriate (launching) State', shall specify the type of space activities which may be deployed by the licensee and contain the conditions on which the entity may deploy these activities in outer space, and, for instance, may make the *entity* co-liable with the 'appropriate State' as the 'launching State' for damage caused by the launching activities, as well as with the national State for damage caused by the activities in outer space.

Present-day space law does not seem to create the appropriate regulatory environment for the above approach towards activities in outer space by non-governmental entities.
In our opinion, space law should be made directly applicable to private commercial space activities, among them space *transportation* activities, which are deployed on the tangent plane of air transportation law and space law.[4]

For space transportation activities (including launching activities) by private enterprise ('space carriers'), which transportation should be defined as :
'commercial transportation by spacecraft of traffic between the earth and outer space or via outer space',
special international rules should be drafted after the example of the international legal instruments applicable to international air transportation.

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To this end transportation to/from or via outer space should be defined as *international* transportation for all States in order to bring it under common internationally standardized rules, while transportation wholly within outer space should be defined for all States as 'own cabotage', as outer space should be regarded and treated as a common territory (area).

For one important thing, the concept, that is the definition of the 'appropriate State' as the launching State under present space law, nor that of the 'launching State' under present space law, would have a place in our special space transportation law.

For example, the 'appropriate State', under existing space law being the authorizing, supervising and therefore, in our opinion, as such also the launching State in Article VI of the Space Treaty, cannot be held internationally liable for the risks of privately exploited space activities nor even the space transportation by the mere fact that its territory or facility was used by private enterprise for the 'launch' of their spacecraft.
The State where the airport is located from where international air services are operated, is not therefore internationally liable for damage caused by the air transport operation either, let alone for damage caused by the traffic carried, after its disembarkation.

The mere fact of the authorization by the 'launching' State of the launching from its territory or facility of spacecraft for space transportation purposes, cannot make hat State liable for damage caused by these activities *in outer space*, let alone for the activities of the traffic that 'disembarks' in outer space. To the extent that the 'launching State' is involved in the launching activity itself, can it be held internationally liable for damage by the launching activity.

The internationally responsible State would be the State of the space carrier, while that 'national State' as the State of the space carrier, could also be made (co-)liable with the space carrier itself under its authorization, while the space carrier could be co-liable with the actual operator of the launching activity, but with the latter being only liable for damage caused by the launching activity.

The main problem of creating a liberal environment, a freedom of outer pace, for private commercial space (transportation) activities is that there is no 'level playing field' for national competitors. There is not even a playing field at all for national non-governmental activities of many States in their own territory, as these entities may not be able to reach outer space : they may not have the technology, nor the means or space to establish a launching pad and launchers (ground-based, sea-based or air based) within their territory.[5]

The best legal approach in order to ensure each State a legitimate share of (an effective participation in) the action and the benefits thereof, to begin with, will be to at least try and create an "equal *opportunity* to participate and benefit".
This still is far from creating a level playing field, however. An opportunity merely is a chance to get a share, but this is not an equal chance, neither is it a guarantee to survive in a competitive environment.

International co-operation between States among them and between national non-governmental entities, private entities interested in deploying space activities, may be the only possibility for many States as well as for the non-governmental entities of many States to effectively participate in the action and the benefits of activities in outer space. This is why "national" activities should no longer be a criterium.

The law, both international space law and national space law, should make multi-national efforts not only possible but should stimulate and promote cross-border co-operation:
to start with, non-governmental entities should be treated by international space law and under national space legislations regardless of their nationality.
National space legislations should be enacted, as these are necessary under present international space law to enable non-governmental, private entities to become active in outer space. These legislations should enable as a standard the deployment of activities in outer space from their territory or facility, by non-governmental entities regardless of their nationality.
These national laws also should be internationally standardized as to the requirements for licences (to allow activities in outer space) and for authorizations (to specify which activities may be deployed and how this should be done).

But internationally extending the present 'free for all States' legal environment for space

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activities to non-governmental entities, private enterprise, the preliminary question remains whether a fundamental right to a 'national legitimate share' of the action in outer space and the benefits thereof exists for each State or should as yet be agreed upon, or in general and in other words, should there be a guaranteed 'basic (space) income' for all States?[6]

There is already general agreement that space activities should be carried out in the interest and to the benefit of all countries. This, however, is a rather vague formula.[7]

The translation thereof in the Moon Agreement, that the natural resources of the celestial bodies in the solar system are the 'common heritage of mankind' does not help much, as, so far, no space powers have ratified the Agreement and no follow-up to this requirement was given.[8]

First there should be general agreement between States :
- that there exists a 'common good' (wealth !) in societies, to which each subject is entitled;
then there should be agreement on
- what constitutes this 'common good' (wealth);
and then there should be
agreement on
- the criteria on which to base the size of the share of each subject (i.e. in the international society, each State and its nationals).
Only then a general, shared obligation of all States in the international society of States, to together provide each subject of the international society with a guaranteed, minimum existence, in casu a guaranteed share of the space benefits, can be formulated and agreed upon.

The sense of interdependence and the solidarity required as a result of this interdependence, is a condition to achieve such agreement. This sense and this solidarity, however, are totally absent.
One thing is certain, 'equality' of States as a fundamental basis for any international legal regime, in the sense of each State being entitled to an equal 'proportional national' share of the 'common wealth', etc. is a fiction, while moreover it is unattainable and would be inequitable.
Non-discrimination in the sense of 'no prejudiced or prejudicial treatment', is all that may be agreed upon, but of course this 'non-discrimination' does not mean nor bring 'equality' in "effective participation". To think that such equality can be or should be achieved and guaranteed by law is a misconception of what is the objective of law, which is, for law to be equitable, to discriminate in the sense of 'to use good judgement', to make a distinction, 'to differentiate', which is to distinguish by discerning differences.[9]

People, States, conditions and circumstances are different and therefore the law should treat its subjects differently, if it wants to give each subject a fair and equitable share of the 'common good' (wealth) of societies, at least if the existence of a 'common good' is accepted and the entitlement of each to a 'fair' share thereof is recognized.

The Hague, June 15, 1995.

Notes:

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1 C.f. UK-China Agreement; see presentation of Bin Cheng at the Beijing Conference, August 1995.

2 See Article VIII of the Space Treaty and Articles I (c) and II of the Convention on Registration of Objects Launched into Outer Space, of 1975.

3 See Article I (c) of the Convention on International Liability for Damage caused by Space Objects of 1972, and Article I (a) of the Convention on Registration of Objects Launched into Outer Space, of 1975.

4 See also Henri A. Wassenbergh in Journal of Space Law, Vol. 21, nrs 1. & 2., 1993 : "The law governing international private commercial activities of space transportation."

5 See also my valedictory lecture, given at Leiden University, on September 2, 1994, the International Institute of Air & Space Law : "The right of States to participate in Air and Space Transportation Activities." pp. 17 ff. Kluwer , Deventer.

6 Cf. the Moon Agreement of 1979, Article 11, para 5, about an international regime to govern the exploitation of the natural resources of the celestial bodies, Article 11, para 7 (d), about an 'equitable sharing' in the benefits derived from those resources, and Article 18 about a review conference of the Moon Agreement.

7 See Article I of the Space Treaty of 1967.

8 See Article 11, para 1 of the Moon Agreement of 1979.

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[9] Cf. the 'preferential treatment' sought by the African States during the ICAO World Air Transport Conference, held at Montreal from 23 November-6 December, 1994.
See State letter SC 4/4-95/32 of 7 April 1995, Attachment A, recommendation g, (8).