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IMPLEMENTING THE UNITED NATIONS OUTER SPACE TREATIES
The Case of the Netherlands

Frans G. von der Dunk
International Institute of Air and Space Law, Leiden - The Netherlands
F.G.vonderDunk@law.leidenuniv.nl

Abstract

The need, or at least desirability of establishing a national (framework) law dealing specifically with private space and space-related activities in implementing the United Nations outer space treaties – in particular some Articles of the 1967 Outer Space Treaty, the 1972 Liability Convention and the 1975 Registration Convention – is increasingly felt also in Western Europe.
One of the states currently developing such a national framework law is the Netherlands, where in September 2003 the Cabinet gave the green light for such a development. The current paper investigates the background to this decision, such as the European internal market for satellite communications and the active role of New Skies Satellites in that sector, as well as the current approach to what the national space law should specifically deal with: amongst others the licensing of private space activities, the various liabilities which might result from such activities and the registration of space objects involved in the licensed activities.
Finally, a brief comparison will be made with other existing national space laws, existing as well as being developed, specifically as to the extent and manner in which these implement the United Nations outer space treaties referred to.

1. Introduction

Many have been the places where, over the past years, the desirability and/or need (both legally speaking and otherwise) has been expressed, analysed and discussed to establish a national law dealing specifically with private space and space-related activities in the context of, in particular, the UN treaties forming the core of the *corpus juris spatialis*.[1]
At this point it should suffice therefore to briefly recapitulate the background to this discussion: the generally undisputed evaluation that this current *corpus*, while on the one hand remaining of key importance in preserving and elaborating a viable, fair and beneficial legal framework for all space and space-related activities, on the other hand at the principal level does not deal in any sufficient manner with the increasing private share in such activities. Private space activities are neither directly subjugated to the rules and obligations contained in the space treaties, nor do those space treaties take any *bona fide* interests of such private participation into account in any substantive manner.
It is also from this angle – the double-edged sword of ensuring more properly that private enterprise will abide by the rules of the space game *and* that its legitimate interests will be duly respected in order to enhance the overall quality and quantity of the endeavour of mankind into space – that the concept of a 'national space law' is somewhat narrowly defined. It does, at least for the purpose of this paper, not

encompass any national law dealing exclusively or principally with outer space or space activities (such as, for example, a law providing for the establishment of a national space agency), but only those national laws which provide for a dedicated framework for the involvement of private parties in such ventures, crucially by means of an authorisation or licensing system regulating such involvement.

2. The need for a national space law

Again, extended writings have shed light on the extent of the desirability and/or need for a national space law, both at the abstract level and in specific instances. Suffice it to summarise those discussions at this point: there are, essentially, three categories of justifications for establishing a national law.

The first arises as a consequence of international space law. The Second United Nations Workshop on Space Law Capacity Building in 2003[2] in this respect discussed a few elements which were considered to be key to the implementation of the space treaties:

- There is an *obligation* under Article VI of the Outer Space Treaty to 'authorise' and 'continuously supervise' the national space activities of private entities ("non-governmental entities").
- There is at least a *strong suggestion* that for reasons of comprehensiveness, coherence and transparency such authorisation and continuing supervision would best be given shape through a national framework space law, even if other means should not be principally disqualified.
- There is a further *strong suggestion* for states to use a national space law for coping appropriately with the domestic consequences of liability arising under Article VII of the Outer Space Treaty and the Liability Convention when such liability is the consequence of privately conducted space activities.
- There is an *obligation* for states under the Registration Convention to ensure, whether through a national law or (merely) through a national register, proper registration of space objects launched and/or operated by private entities.
- There is a *strong suggestion* under Article VIII of the Outer Space Treaty and the Registration Convention to apply national jurisdiction *inter alia* for the above purposes.

Due to such uncertainties as surrounding the precise scope of the concepts underlying such obligations or suggested actions (what are '*national* space activities'; how far does the concept of the 'launching state' extends) it is far from clear how states should in specific cases phrase and draft the relevant legislation called for, but the basic approach is obvious.

The second type of justification arises at the national legal level. Once the underlying privatisation of space and space-related activities is a fact of life within a certain country, there are certain elements of those activities which would call for regulation at the national level – simply because they are not dealt with, as such, at the international level.

A prominent example concerns liability. The Liability Convention only provides for dealing with cases of 'international' liability, i.e. liability for damage caused by the space object of a launching state or its citizens or entities to another state or *its* citizens or entities. Yet, such space object may of course also cause damage to citizens

and entities of the launching state itself, and since for obvious reasons that is not covered by the Liability Convention, national law should step in to deal with that.

The need to establish national legislation to deal with such domestic issues is 'objective', in that in and of itself does not indicate what the substance of such law should look like. This is where the third justification for national space law comes in: to implement the specific policy approaches, and relevant overall juridical, political, economic and social approaches to space activities by means of the substance of national legislation. Whether for example, in dealing with liability, cross-waivers amongst contractual partners to space activities]z are mandatory or limits to the reimbursement of third-party liability encountered by the relevant government are provided for, depends upon the particular policy outlook of a particular state. Equally, whether for example satellite communications or alternatively earth observation constitute key components of a nation's space policy, and should thus be stimulated by means also of the substance of national space legislation (e.g. by providing for tax incentives), is a matter of national policy having a distinct bearing on how a national space law will, in the end, look like.

In short: by means of a national space law a particular state may try to establish precisely that balance between the public interests in space, both of itself and of mankind as reflected by the international space treaties, and those of private entities operating under its jurisdiction, which best fist its political, economic and social philosophies.

3. The Dutch situation

Applying the above analysis to the Netherlands, until fairly recently the conclusion was that, at least from the perspective of implementing international space law and providing for national law, no necessity existed to take general and comprehensive action in this area by means of establishment of a national space law.

The private space activities taking place under the sway of the Dutch government amounted to either of the following:

- Industrial activities as sub-contractors to European Space Agency (ESA)-led projects, the legal aspects of which were taken care of within the ESA legal framework;
- Industrial activities in any case not as such leading to private "activities in outer space" as Article VI of the Outer Space Treaty would hold those to be "national" activities of the Netherlands (such as the establishment of the EADS consortium in Amsterdam, or any role as contractor or subcontractor to foreign entities);
- Activities which were dealt with in an ad hoc-manner, as originating from a previous situation where regulation properly speaking was not even necessary to comply with Article VI of the Outer Space Treaty (notably this concerned the activities of the former Dutch signatory to INTELSAT, INMARSAT and EUTELSAT, PTT, later KPN, which was a public entity before being privatised); or
- Activities where, from a liability perspective, no domestic legislative action was considered necessary since the launching state(s) with respect to the space objects

involved in those activities did not include the Netherlands (notably this concerned the case of New Skies Satellites (NSS), which had inherited five satellites from INTELSAT which had been in orbit already for a number of years).

Over recent years however this paradigm changed fundamentally for the Netherlands.

Firstly, the ongoing privatisation taking place within the European Union, in particular in the satellite communications field, made clear that a former public telecom operator could no longer rely on its former rather exclusive status with the government for being allowed to undertake proper space activities. Special rights let alone monopoly rights in principle were to be abandoned and only to be maintained under stringent conditions and if a set of requirements as to need, proportionality, transparency and suchlike would be complied with. The markets also for satellite communications were to be liberalised, and basically telecommunications including satellite communications was now a matter for private entities in a level playing field to conduct.[3]

In other words: instead of an ad hoc-relation or special arrangement raking care of Dutch duties under international space law, an open and transparent legal system would be obliged – read: a licensing system not principally excluding anyone.

Secondly, the ongoing concentration and diversification taking place in the European space industry opened perspectives for a consortium like EADS and its constituent companies, to extend their activities from terrestrial industrial activities to also include proper space activities, e.g. by means of turn-key delivery of satellite in orbit. If such a development were to materialise, in view of EADS's Dutch nationality as a consortium (as opposed to the nationalities of its individual constituent member companies) would then directly trigger application to the Netherlands of such rules of international space law as concerning responsibility and liability.

Thirdly, there were some new activities with at least a foot in the Netherlands, which might engage Dutch international responsibility and/or liability under space law. Notably this concerned MirCorp, the US-funded private entity which was key to sending the first tourists into outer space – and officially located in the Netherlands. (Since then, however, it has been renamed and relocated to the United States, likely at least partially because the Netherlands was seen to be moving into the direction of a proper national space law-*cum*-licensing regime.)

And fourthly, NSS started to procure the launch of its own new satellites, for which – in contrast to the satellites inherited from INTELSAT – did immediately lead to the question whether the Netherlands would not be held to qualify as a launching state in case of relevant accidents.[4]

4. Towards a Dutch national space law

It was against this background, that in 2001 the Dutch government started a serious investigation into the need or desirability for a Dutch national space law. Two reports by persons active in the field were solicited, one focusing on the narrower legal issues and aspects as *inter alia* arising from the space treaties, the other dealing with the broader setting and including economic and policy issues and aspects.

Both efforts came to the same conclusion: national Dutch legislative action was indeed considered necessary

on a number of counts, and desirable on a number more.

The sole question remaining was, whether such legislative action could be confined to additions here and there to existing legislation, or whether it would require a new (framework) law.

After internal consultations between the various relevant ministries, Economic Affairs being the leading Dutch Ministry in space and others – notably Foreign Affairs, Justice, Transport and Waterways – providing the relevant input from their own perspectives, it was decided that the former option would not suffice.

Too wide-spread, too varied were the legal issues to be dealt with, with a view to private space activities taking place under the jurisdiction of the Netherlands, too specific also were the outer space-aspects of the envisaged activities, to be appropriately dealt with by means merely of extending an existing licensing system and adding some scattered provisions e.g. to existing intellectual property rights- or securities-related national legislation. Consequently, in September 2003, the Council of Ministers of the Dutch Government gave the green light for drafting a proper national Dutch framework space law.

Following the major recommendations from the reports as further elaborated in the intra-Ministerial consultation and co-ordination process, such a law was notably to provide for:

- A licensing system with respect to any private entities interested in undertaking space activities;
- The accompanying general requirements which would be imposed upon any licensee in order to strike a fair balance between his bona fide interests in undertaking space activities and the duty of the Dutch government to protect the public interests, both national and international;
- An arrangement of liability issues in the context also of the international treaties including further mandatory insurance or other financial guarantees as appropriate; and
- An arrangement for registration by the Dutch government in a national register of all relevant space objects.

The roadmap, pushed in particular by the ambitious new Minister of Economic Affairs Laurens-Jan Brinkhorst, foresaw a first draft law for parliamentary discussion by September 2004, and a specific senior official was tasked within the Ministry to draft such a law. Availability of that draft would have allowed a preliminary discussion by the present paper.

Fate interfered however. The difficulties confronting the Dutch government, since July 1, 2004, chairing the Council of the European Union, in terms of the ten newly acceded states and the concurrent efforts to get the European Constitutional Treaty back on track again, caused just enough delay to cause such a draft in the end not to be available as of yet.

5. The near future…

As can be glanced from the Abstract included at the very beginning of this paper, the original intention was to proceed, further to the above paragraphs, with a high-level summary and overview of the draft Dutch law and briefly discuss it from the perspective in particular of international law, as well as then to proceed with a high-level comparison with some other existing national space laws.

In view however of the above sketched delay, this is obviously not possible for the present version of the paper. Also any drawing of conclusions seems to be futile and/or premature at this point for the very same reasons.
It is only to be hoped that the draft of a Dutch national space law will see the light soon enough for a next version of this paper to be included in the Proceedings...

Endnotes

[1]. From the framework perspective, this concerns especially the Outer Space Treaty (Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, London/Moscow/Washington, done 27 January 1967, entered into force 10 October 1967; 610 UNTS 205; TIAS 6347; 18 UST 2410; UKTS 1968 No. 10; Cmnd. 3198; ATS 1967 No. 24; 6 ILM 386 (1967)), the Liability Convention (Convention on International Liability for Damage Caused by Space Objects, London/ Moscow/Washington, done 29 March 1972, entered into force 1 September 1972; 961 UNTS 187; TIAS 7762; 24 UST 2389; UKTS 1974 No. 16; Cmnd. 5068; ATS 1975 No. 5; 10 ILM 965 (1971)) and the Registration Convention (Convention on Registration of Objects Launched into Outer Space, New York, done 14 January 1975, entered into force 15 September 1976; 1023 UNTS 15; TIAS 8480; 28 UST 695; UKTS 1978 No. 70; Cmnd. 6256; ATS 1986 No. 5; 14 ILM 43 (1975)); which have been ratified/signed by states in the following respective quantities (status as of 1 January 2003; see http://www.oosa.unvienna.org/SpaceLaw/treaties.html): 98/27, 82/25 and 44/4.
From a 'substantive-law' perspective, the Rescue Agreement (Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, London/Moscow/ Washington, done 22 April 1968, entered into force 3 December 1968; 672 UNTS 119; TIAS 6599; 19 UST 7570; UKTS 1969 No. 56; Cmnd. 3786; ATS 1986 No. 8; 7 ILM 151 (1968)), with 88 ratifications and 25 signatures as of 1 January 2003 certainly also forms part of this implementation issue; see also e.g. K. Hodgkins, Procedures for return of space objects under the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, in Proceedings of the United Nations/ International Institute of Air and Space Law Workshop on Capacity Building in Space Law, 59 ff.
Finally, though the Moon Agreement (Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, New York, done 18 December 1979, entered into force 11 July 1984; 1363 UNTS 3; ATS 1986 No. 14; 18 ILM 1434 (1979)) with currently 10 ratifications and 5 signatures is a special case in view of the limited adherence to it, it *is* one of the treaties on outer space developed in the context of the UNCOPUOS, and at least the discussion on its relevance and potential need respectively possibilities for its further elaboration is back on the table now. Certainly for those states parties to it (which includes the Netherlands) it should therefore also be taken into account in the context of any national law-exercise.

[2]. Held in Daejon, South Korea, 3-6 November 2003. The Proceedings are available on the OOSA website, at http://www.oosa.unvienna.org/SpaceLaw/workshops/index.html.

[3]. See e.g. Commission Directive amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, 94/46/EC, of 13 October 1994; OJ L 268/15 (1994); Commission Directive amending Directive 90/387/EEC with regard to personal and mobile communications, 96/2/EC, of 16 January 1996; OJ L 20/59 (1996); Commission Directive amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, 96/19/EC, of 13 March 1996; OJ L 74/13 (1996); and Directive of the European Parliament and of the Council on a common framework for general authorizations and individual licenses in the field of telecommunications services, 97/13/EC, of 10 April 1997; OJ L 117/15 (1997).

[4]. This, of course relates to the discussion as to the precise scope and meaning of the 'launching State', as defined by Art. I(c), Liability Convention: would the Netherlands constitute a 'state procuring a launch' in the meaning of that definition by virtue of a Dutch private company NSS doing the actual procurement?