REVIEW OF THE SOUTH AFRICAN REGULATORY FRAMEWORK IN THE CONTEXT OF INTERNATIONAL SPACE REGULATION

Adv Luthando S. Mkumatela
Director: Amalico Investment Solutions
South Africa
lsmkumatela@vodamail.co.za

The paper is intended to provide and contextualise a historical perspective concerning the development of space activities in the country, in particular the development of integration and launching facilities. In this regard it addresses matters and concerns that relate to international regulation of space related activities and also taking into account other obligations emanating from public international law.

The paper aims to present a critical review of the significance of the regulatory regime that is created by the current main national legislation on space affairs, that is, the Space Affairs Act of 1993. A specific attention is devoted to the relationship between the provisions of the Act and the norms and values that are contained in international legal instruments governing outer space related activities.

The paper will also explore other regulatory instruments that support the above mentioned Space Affairs Act and these include the national space policy. Again the emphasis and focus are directed at establishing the extent to which the national instruments support the regime created by the international legal norms.
The paper adopts a comparative approach thus benefiting from selected statutes policies and/or international agreements of other administrations.

Therefore, the main objective of the review is to raise issues that would assist administrations that still intend to initiate processes of drafting statutes pertaining to space related activities or those governments that are contemplating improving their existing regulatory norms on space matters.

INTRODUCTION

States, being members of the international community had to recognise during the cold war era the risk of allowing outer space to be another terrain of arms race. Consequently, efforts that were directed at preserving space for peaceful purposes prevailed as mankind through the United Nations adopted a number of resolutions such as, Resolution 1884 (XV111) of 1963,[1] which called upon States to refrain from placing in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction or from installing such weapons on celestial bodies. (** UN Treaties A/AC.105/722: A/CONF.184/BP/15. p.3

The first milestone Convention that was adopted to specifically regulate outer space activities is the Outer Space Treaty. [2]

South Africa's involvement in modern astronomy dates back to 1685. In 1980 the country developed a space programme thus developing a capability to manufacture earth observation satellites, a launching capability and other related necessary space capabilities. The space programme had a military objective and it was terminated. The government resolved to initiate a space programme that was based on the principle of peaceful use of outer space. Therefore, the legislative instrument that was enacted to redirect space activities in the country is the Space Affairs Act No. 84 of 1993.

South Africa is a participant in international measures and bodies that are meant to promote peaceful use of outer space and international cooperation. It is a Party to the Outer Space Treaty and Rescue Agreement.

It is a signatory to the Liability Convention.[3]

[1] Resolution 1884 (XV111) of 1963

[2] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other celestial Bodies of 1967 herein after referred to as the Outer Space Treaty.

[3] Convention on International Liability for Damage Caused by Space Objects of 1972.

Although South Africa indicated to COPUOS that it had embarked on a process of becoming a Party to the remaining treaties it is noted that the process had taken rather a relatively lengthy period.

It is, however, important to note that South Africa also evokes Article 111 of the Outer Space Treaty when interacting with, for example, other States that are Parties to the Liability and Registration Conventions. Article 111 of the Outer Space Treaty states that, "States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies, in accordance with international law, including the charter of the United Nations...".

SOME OF THE CHALLENGES FACING INTERNATIONAL SPACE LAW

The critical issues that necessitate legal regulation of space related activities include promotion and implementation, in good faith, of the principle of peaceful use of outer space. Another key matter relates to the obligation to promote and implement the principle that exploration and use of outer space should be carried on for the benefit of all nations regardless of their stage of economic development.

The international cooperation that is envisaged in the space treaty law is a condition that could enable most developing countries to benefit from space related activities.

COMPARATIVE ANALYSIS OF THE NATIONAL SPACE AFFAIRS REGULATORY INSTRUMENTS

Space Affairs Act No. 36 of 1993.

The principal legislative instrument that regulates the space affairs environment and space related activities in South Africa is the Space Affairs Act. This submission is expressly supported by the declaration made by the government when it announced in the National Space Policy document that, "The Space Affairs Act regulates all space activities in South Africa. The National Space Programme and any space activities undertaken by the public and private sector entities are thus subject to the Space affairs Act.[4] ,)) As indicated in the Introduction the main objective of the government when it enacted the statute was to terminate the military inclined space programme and embark instead on space activities that promote peaceful use of outer space.

PROVISIONS OF THE STATUTE THAT REFER TO INTERNATIONAL COMMITMENTS:

Sec 2) of the Act stipulates that when the national space policy is determined the intention should be to: (a) meet all the international obligations of the Republic of South Africa and (b) control and restrict the development and proliferation dual purpose technologies in terms of international conventions applicable to RSA.

Sec 5 (2) mandates the South African Council for Space Affairs, hereinafter referred to as SACSA, to take care of the interests and obligations of the State concerning matters related to space and space related activities in order for the State to be comply with its treaty law obligations.

According to Sec 5(3) c) SASCA may supervise and implement matters arising from international agreements entered into or ratified by the government of the Republic of South Africa.

Sec 5 (3) (g) further provides that the Council may further matters leading to the orderly and responsible participation by any person or authority in space affairs.

Sec 11 (1) (a) and (b) states that specific space activities may not be realised or conducted without a licensing issued by SACSA. In this regard the Act compels the parties involved in space activities to acquire authorisation from the State and the latter carries international responsibility for the space activities of its nationals. Article V1 of the Outer Space Treaty states that, "Parties to the Treaty shall bear international responsibility for national activities in outer space… The activities of non-governmental entities shall require authorisation".

Sec 11 (d) prohibits involvement by juristic persons without authorisation in space activities that entail international obligations to the State in terms of applicable conventions.

[4] dti doc Nat. space policy; Introduction p.3

Sec 11 (2) c) provides that SACSA may impose licence conditions taking into account relevant international obligations of the State.

In terms of Sec 11 (4) SACSA is obliged to gather, maintain and disseminate information regarding licences thus fulfilling provisions of applicable international agreements to which South Africa is a Party.

Such conditions may according to Sec 14 (1) (b) pertain to the liability of the licensee resulting from international conventions applicable to South Africa, for example, the licensee to provide security to settle demands or compensation that may be required in case of damages inflicted to other persons or interests.

In Sec 14(1)(a) which deals with liabilities the term "damage" is not defined in the Act but the term is defined in the Liability Treaty.

Giving significance to the role that is played by international agreements, the Space Affairs Act expressly provides in Sec 24 (1) that the State President may, by proclamation, add to the Act any Schedule containing provisions of an international agreement entered into or ratified by the government of the Republic of South Africa.

The contribution made by the Act relates to the provision of definitions to some of concepts used in space affairs. It is a fact that the definitions of some of the terms and related substantive issues are still being debated in such fora as COPUOS, for example, the issue of delimitation of airspace and outer space, "launching", "launching state" and so on. There is an argument that current space developments seem to necessitate an amendment of the definition of, for example, "launching state" which is contained in Article 1 of the Convention on International Liability for damage Caused by Space Objects.

This issue of delimitation of airspace and outer space was for a number of years an item that was in the agenda of the sessions of COPUOS and its sub committees. The Space Affairs Act defines "outer space" as "the space above the surface of the earth from a height at which it is in practice possible to operate an object in an orbit around the earth".

It further defines 'suborbital trajectory as "the trajectory of any object which leaves the surface of the earth due to a launch, but returns to the surface of the earth without completing an orbit around the earth. The significance of the definition of suborbital trajectory in the Act lies in the fact that it is intended to address, for example, incidents of failed launches or suborbital test launches.

It is however submitted that if the intention of launching an object is not necessarily to operate it in an orbit then its location in outer in a place other than an orbit should not make the activity not be regarded as a space activity.

The definition of outer space that is provided in the Space Affairs Act is relatively more acceptable because it does not provide a definite line of demarcation that may not take into account technological developments but instead relies on the functionality factor, that is, the possibility to operate an object in an orbit around the earth.

It is noteworthy that there is no international agreement in force that provides a definition of outer space. For example, the Outer Space Treaty and other main conventions regulating space affairs only make reference to "outer space including the Moon and other celestial bodies".

The main feature used in the definition found in the Space Affairs Act is the "orbit around the earth". However, the Outer Space Treaty prohibits in Article 1V the possibility of placing weapons in orbit around the earth and also goes further to preclude stationing of weapons in outer space "in any other manner". Therefore, it is submitted that activities taking place in outer space may not necessarily be confined to the orbits. There are launched objects whose trajectory may by design be suborbital or as the Outer Space Treaty indicates activities such as weaponisation may take place "in any other manner" other than in orbit around the earth.

It is worth noting that the Space Affairs Act also regards an activity in the sub orbital trajectory as a space related activity, for example, what it refers to as "attempted launching".

Another concept defined in the Act is "launching" which refers to "placing or attempted placing of any spacecraft into a sub orbital trajectory or outer space, or the testing of a launch vehicle or spacecraft in which it is

foreseen that the launch vehicle will lift from the earth's surface".

It is also noted that according to Article 1 of the Liability Convention the term "launching" includes attempted launching". Therefore, the Convention does not define "launching" but simply states that the term launching includes attempted launching. Furthermore, Article 6 of the Rescue Agreement introduces for its purposes the term "launching authority" which is intended to refer to the State responsible for launching or where an international intergovernmental organization is responsible for launching, that organization if the latter accepts the terms of the Agreement.

South African National Space Agency Act No 36 of 2010 encapsulates the spirit of the national space policy when it states that its aim is to support the creation of an environment conducive to industrial development in space technologies within the framework of national government policy. The Act further provides that the Space Agency will implement any space programme in line with the policy contained in the Space Affairs Act.

NATIONAL SPACE POLICY:

The principle that is captured in the National Space Policy which directly addresses the international legal obligation to use space for peaceful purposes provides that "South Africa is committed to utilising outer space for peaceful purposes and for the benefit of all mankind".

Enhancing international cooperation it further states that, "South Africa shall actively participate in regional and global multilateral fora for the peaceful uses of outer space, informed by this National Space Policy and the relevant legislation, and in fulfilment of its international treaty obligations". **Ibid p. 17,

The envisaged legal mechanisms to be used to promote international cooperation in space activities include bilateral agreements.

The National Space Policy also states that, "the domestic regulatory environment shall be intended to promote predictable and orderly participation by the private and public sectors in the domestic and global space arena. It shall enforce compliance with regulatory provisions and applicable international obligations, while ensuring transparent and timely processing of licence and import/export applications".

CONCLUSION

It is demonstrated that the current South African regulatory instruments contain a number provisions that address legal issues that are regulated by the international space agreements. The statutes and policy attempted even to provide definitions to some of the concepts that are not defined in the treaties. However, it is also important to note that the national statutes that regulate the space environment also need to be reviewed to capture international and domestic developments in the space sector.