Article VI Outer Space Treaty as a Gateway to Extending State Immunity before Domestic Courts to Non-Governmental Space Operators

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While the drafters of the Outer Space Treaty predicted the emergence of a non-governmental space sector, they chose an approach of classic public international law-character to regulate them. In disputes between a non-governmental entity and a state, the parties can sometimes rely on specialized dispute resolution mechanisms. The five UN space treaties, however, do not provide a *lex specialis* to the general methods of dispute resolution. The Outer Space Treaty provides for an interstate approach, allowing non-governmental space activities, while obliging state parties to authorize and continuously supervise all their national space activities. To this effect, the rule on attribution of conduct by non-governmental entities to states found in the Outer Space Treaty goes far beyond those of general customary international law. Consequently, dispute resolution involving private parties needs to be analyzed through the lens of public international law, which includes the role of national courts. The paper will examine if and to what extent the doctrine of state immunity may be applied to space related disputes involving non-governmental entities. It will elaborate the implications to dispute resolution of attributing non-governmental entities to states similarly to the attribution of state agents performing governmental duties. The issue is thus, whether domestic court proceedings against foreign non-governmental space-faring entities are precluded and only the toolset of public international law can be utilized.

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1. Introduction

What started as an unprecedented sensation in 1957 has become a normal aspect of today's global society, as we depend on outer space for many services now considered essential. This demand has made private individuals and corporations realizing the growing business potential of space-based services.[1] The commercialization of outer space goes far beyond providing television services and civilian navigation instruments. Private space businesses serve as governmental contractors even in highly sensitive national security areas and increasingly take over operations that have previously been restricted to governmental entities.[2] These developments emphasize the importance of many pressing issues with respect to space activities, nearly all of them being a potential future source for disputes. While public international law provides for dispute resolution mechanisms between states[3], the involvement of private actors changes the situation. Given the increased human activity in outer space, legal disputes are bound to arise and private actors are likely to become subject to legal scrutiny by foreign judicial bodies.
This paper addresses one particular aspect of legal proceedings against private space operators: immunity from foreign national adjudicative jurisdiction in civil proceedings. A state, brought before a domestic court of a third state, may invoke the procedural safeguard of state immunity. Why should private space businesses, having taken over tasks from states, not do the same? Why should states be fully responsible for their national space activities, even those by non-governmental entities, while not being able to invoke their sovereign immunity in foreign courts?
Although the topic of state immunity has been analyzed plentifully, little has been written about its applicability to space activities;[4] even more regarding state immunity and private actors in outer space.[5]

1 D. Brown, As New Space Race Beckons, Astronauts Face Identity Crisis, 16 July 2019, https://www.nytimes.com/2019/07/16/science/astronauts-nasa-apollo.html, (accessed 19.09.19).
2 J. Cheetham, The billionaires fueling a space race, 21 October 2019, https://www.bbc.com/news/business-45919650, (accessed 19.09.19).
3 Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Chapter VI.
4 A brief analysis regarding governmental space activities is to be found in: H. Fox & P. Webb, The Law of State Immunity, Third ed., Oxford University Press, Oxford, 2013, pp. 111-113, 296, 310, 314, 474, 521-522; L-J. Smith, Legal Aspects of Satellite Navigation, in: F. von der Dunk, F. Tronchetti, Handbook of Space Law, First ed., Edward Elgar Publishing, 2015, pp. 554, 589-590; M. Williams, Dispute Resolution Regarding Space Activities, in: F. von der Dunk, F. Tronchetti, Handbook of Space Law, First ed., Edward Elgar Publishing, 2015, pp. 995, 1034, 1036, 1042; F. Lyall, P.B. Larson, Space Law. A Treatise, First ed., Ashgate Publishing Ltd., Farnham, 2009, pp. 405, 409; Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Outer Space Activities, Art. 1 para. 2.

2. The Modern International Law of State Immunity

Embodied in the Latin principle of *par in parem non habet imperium*, the international norms on state immunity from the jurisdiction of foreign domestic courts implement the fundamental principle of sovereign equality of states under public international law.[6] State immunity, as put by *Lord Millett* in *Holland v. Lampen-Wolfe*,

> "*is a creature of customary international law and derives from the equality of sovereign states. It is not a self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt. It is a limitation imposed from without upon the sovereignty of the United Kingdom itself.*"[7]

This addresses several features of the modern law of state immunity already. The first question for any legal argument is the source of law it is based on. In the case of state immunity, the binding rules are to be found in customary international law.[8] While the development of customary law norms started after the period of absolutism, attempts at codifying this branch of law are dated much more recently. After the first attempt of the European Convention on State Immunity in 1972,[9] it was only in 2004, that a text for a UN Convention on Jurisdictional Immunities of States and their Property was adopted in the UN General Assembly,[10] drawing heavily drawing upon the respective draft articles by the International Law Commission (ILC) of 1991[11].[12]

The impact of both of these treaties remains limited, as the former has only been ratified by eight states[13] and the latter has not entered into force yet.[14] However, the UN convention has been cited by several international and

5 See e.g. G. Goh, Dispute Settlement in Outer Space: A Multi-door Courthouse for Outer Space, First ed., Brill-Nijhoff Publishers, Leiden, 2007, p. 87.
6 P.-T. Stoll, State Immunity, in Max Planck Encyclopedia of Public International Law, April 2011, paras 1, 4.
7 Holland v. Lampen-Wolfe, UK House of Lords (2000) 119 ILR, 367.
8 See e.g. Jurisdictional Immunities (Germany v. Italy: Greece intervening) (Merits, Judgement) [2012] ICJ Rep 99, para 55, 56; Ferrini v Federal Republic of Germany, Supreme Court of Cassation of Italy (2004) 128 ILR 658, 663–4; J. Crawford, Brownlie's Principles of Public International Law, Eighth ed., Oxford University Press, Oxford, 2012, p. 487.
9 European Convention on State Immunity, 16 May 1972, ETS 74.
10 United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, A/RES/59/38.
11 International Law Commission Articles on Jurisdictional Immunity States and their Property (State Immunity Articles Commentary), in Report of the International Law Commission, U.N. Doc. A/46/10 (Supp) (1991).
12 P.-T. Stoll, *supra* 6, paras 5-9.
13 As of 20.09.2019; Council of Europe, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/074/signatures?p_auth=RvlVDgjf, (accessed 20.09.19).
14 J. Crawford, *supra* 8, p. 490.

domestic tribunals as a reflection of the consensus of the international community.[15] Even the International Court of Justice (ICJ) has referred to the convention and specifically emphasized its importance for the assessment of the content of the relevant customary international law rules on state immunity.[16] Two considerable *caveats* need to be given at this point. First, these international norms of state immunity reflect a minimum standard guaranteed to all sovereign states. Nevertheless, states may choose to go beyond this level in their domestic legislation or court rulings.[17] A good example for this is the People's Republic of China, which grants absolute immunity to foreign sovereign states, while it has ratified the UN convention, enshrining the restrictive theory of state immunity.[18] The second issue to consider is that the ILC's mandate encompasses both the codification as well as the progressive realization of international law, which is referenced in the UN convention as well.[19] Some of the codified rules may have not achieved the status of customary law yet.

With the increasing understanding of states as commercial actors, domestic courts went from granting absolute immunity to implementing a more restrictive approach.[20] The Supreme Court of Austria in 1950 ruled that the doctrine of absolute immunity had ceased to be a rule of international law and overwhelming state practice and *opinio iuris* confirmed that states retreated to only granting immunity for „sovereign" acts (*acta iure imperii*), but no longer for „private/commercial" ones (*acta iure gestionis*).[21] This doctrine of restrictive immunity has been adopted by many domestic courts, domestic legislation as well as the two aforementioned and further international treaties.[22]

Before addressing the intricacies of the law of state immunity, the primary question needs to be answered as to whether private space companies possess the necessary link to a state to be included into the scope of state immunity in

15 J. Crawford, *Ibid*, p. 490.
16 Jurisdictional Immunities (Germany v. Italy: Greece intervening) *supra* 8, para. 66.
17 U. Kriebaum, Privilegien und Immunitaeten im Voelkerrecht, in: A. Reinisch (ed.), Oesterreichisches Handbuch des Voelkerrechts, Vol. I, Fifth ed., Manz Verlag, Vienna, 2013, pp. 404, 405; J. Crawford, *supra* 8, p. 490.
18 DRC v FG Hemisphere Associates LLC, Hong Kong Court of Final Appeal, Judgment of 8 June 2011, para 202.
19 United Nations Convention on Jurisdictional Immunities of States and Their Property, *supra* 10, Preamble, para. 3.
20 M. Shaw, International Law, Eighth ed., Cambridge University Press, Cambridge, 2017 p. 529.
21 Dralle v. Republic of Czechoslovakia, Supreme Court of Austria (1950) 17 ILR p. 155.
22 P.-T. Stoll, *supra* 6, paras 6, 7, 9, 13; also M. Shaw, International Law, Eighth ed., Cambridge University Press, Cambridge, 2017, pp. 529, 531; State Immunity Articles Commentary, *supra* 11, commentary on Art. 10 paras. 13-17.

the first place. Here, a closer look at the law on responsibility for and attribution of national space activities by non-governmental entities seems appropriate.

3. Rules of responsibility and Attribution under General International Law

Every act or omission attributed to a state is ultimately conducted by a (non-state) entity. To establish state responsibility is to attribute the actions of certain entities to the state.[23]
Most applicable rules accepted as custom have been codified in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[24] Most relevant for attribution are the rules codified in Article 4, 5 and 8 of the ARSIWA which span the range of attribution possibilities. The amount of actions attributed correlate to the proximity of an entity to the state.

3.1. Attribution pursuant to Article 4 ARSIWA

Pursuant to Article 4 of the ARSIWA conduct of any State organ is considered an act of that state, irrespective of whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds; including any person or entity which has such status according to internal law and even if its conduct is of commercial character and does not use governmental authority (*acta iure gestionis*).[25]
Difficulties arise, since an entity can still be considered as a state organ even if not classified as such by internal law.[26] Other entities (such as private corporations) can themselves be considered a State Organ pursuant to Article 4.[27] Consequentially, it needs to be ascertained that a State organ is acting in that capacity. The difference between unauthorized conduct of a State organ and private conduct can be drawn as such: responsibility is only excluded if the act had no connection with the official function and was in fact merely the act of a private individual (in the case of a natural person).[28]

3.2. Attribution pursuant to Article 5 ARSIWA

Article 5 of the ARSIWA stipulates that an act of an entity empowered by the law of a State to exercise elements of governmental authority is considered an

23 M. Shaw, *supra* 22, p. 86.
24 J. Crawford, *supra* 8, pp. 539ff.
25 Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, ILC Yearbook 2001/II (2) (ARSIWA Commentary) p. 41 para. 6.
26 ARSIWA Commentary p. 42 para. 11 with reference to Propend Finance Pty Ltd. v. Sing, England, Court of Appeal, ILR, vol. 111, p. 611 (1997).
27 Michael Feit, Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity, 28 Berkeley J. Int'l Law. 142 (2010) p. 150.
28 ARSIWA Commentary p. 42 para. 13.

act of that state, when the entity is acting in this particular capacity. This is to be understood as a functional assessment.[29] The commentary to the ILC Draft Articles proposes that to determine if an act is governmental, inquiry should rely upon the particular society, history and traditions (i.e. essentially a subjective standard) and be based on internal law of the state in question.[30] Attribution by Article 5 is meant to account for *inter alia* privatization of former state corporations retaining certain public or regulatory functions.[31] Each act of such entity needs to be examined if it is attributable.[32]

3.3. Attribution pursuant to Article 8 ARSIWA

Pursuant to Article 8 of the ARSIWA, conduct of entities are considered an act of State if the entity is in fact acting on the instructions of or under the direction or control of that State in carrying out the conduct.[33] Under this rule, it is not relevant that the entity in question is private nor if the actions or omissions attributed amount to governmental activity.[34] A general situation of dependence and support has been found insufficient to establish attribution to a state.[35]

Ownership by the state of private corporations does not constitute control per se. Indeed, the state will have to actively use its stake in a company to control the conduct in question, or otherwise provide instructions and directions.[36]

3.4. Attribution pursuant to Article 11 ARSIWA

As a special rule, unattributable conduct is linked to a State if the State acknowledged and adopts, expressly or implicitly, the conduct as its own, pursuant to Article 11 ARSIWA. A state aware of a continuing wrongful act on its territory who endorses or continues the situation is usually considered to have assumed responsibility. Mere endorsement however is not sufficient. Such attribution can take place in situations where attribution pursuant to Article 8 might not be possible.[37]

29 Feith *supra 27* p. 147.
30 ARSIWA Commentary p.43 para. 6,7.
31 ARSIWA Commentary p.42 para. 1.
32 cf. Maffezini v. Spain, Award on the Merits, ICSID Case No. ARB/97/7 (Nov. 13, 2000) para. 57.
33 cf. Zafiro case, UNRIAA, vol. VI (Sales No. 1955. V.3), p. 160 (1925).
34 ARSIWA Commentary p. 47 para. 2.
35 *Ibid* para 4, cf. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986 pp. 62 and 64–65, paras. 109 and 115.
36 Tehran, Inc. v. The Government of the Islamic Republic of Iran, Iran-U.S. C.T.R., vol. 10, p. 228 (1986).
37 ARSIWA Commentary p. 52 para. 3, 5, 6, 9.

3.5. Applicability of the ARSIWA Articles

Article 55 states that the ARSIWA rules do not apply where and to the extent that special rules apply with respect to international responsibility (*lex specialis*). A treaty can create a specific responsibility regime with respect to its obligation imposed. However, such rule must displace the general rules of attribution; an actual inconsistency or discernible intention that one provision shall exclude the other is necessary.[38]

3.6. Attribution of space activities under ARSIWA

Because Article VI of the Outer Space Treaty clearly sets out that states must authorize and supervise non-governmental entities, the conclusion is possible, that space activities are per se an act of state. Consequently, a non-governmental entity conducting a space activity might always carry out acts of state and thus could generally be attributed under the rule of Article 5.If this would exceed the discretionary envelope granted to the non-governmental entity by a state by its authorization, non-governmental entities remain attributable to the state by virtue of the *ultra vires* doctrine codified in Article 7 of ARSIWA. In any case, conduct of entities are considered to be an act of state if they are authorized by a state in carrying out this activity, as codified in Article 8 of the ARSIWA.[39]

4. State responsibility under space law

Responsibility and attribution thereof is governed by Space Law.[40] Article VI of the Outer Space Treaty[41] stipulates that States bear international responsibility for national activities in outer space. The activities of non-governmental entities in outer space require authorization and continuing supervision by the appropriate State.[42]

The view has been expressed that "responsibility" of the state in the meaning of the Outer Space Treaty is exhausted by authorization and continuing supervision, i.e. no attribution in itself as understood under general

38 ARSIWA Commentary p. 140 para. 4.

39 See *supra* 33.

40 The articles of the Outer Space Treaty discussed hereafter are widely considered to have entered the rank of international custom, see for thorough analysis G.S. Sachdeva, Select Tenets of Space Law as Jus Cogens, in: R. V. Rao, V. Gopalakrishnan, K. Abhijeet (Eds.), Recent Developments in Space Law, Springer, Singapore (2017) pp. 12-16.

41 cf. the fifth principle in GA Res. 1962, UN GAOR Supp. (No. 15) at 15, UN Doc. A/5515 (1963). ('Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space').

42 While the Article of the Outer Space Treaty uses the terminus "state party", strong arguments have been made that (all aspects of) the state responsibility inherent to the treaty constitutes an obligation *erga omnes,* hence the term state will be considered as sufficient in the following elaborations, see Sachdeva, *supra* 40, pp. 21f.

international law is conducted.[43] In this case, all other issues of attributions would follow the rules of general international law outlined above. We submit to a wider approach to the term of responsibility, as set out below.
As will be shown, responsibility in space follows state jurisdiction. For international co-operation activities, special domestic rules usually apply.

4.1. Registration as starting point for responsibility

The rules in Article VIII of the Outer Space treaty, stipulate that a state on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object and its personnel while in outer space. Such registration can provide for "grounding" responsibility with the registry state.[44] The scope of this provision is difficult to ascertain, as the jurisdiction described might only be granting prescriptive jurisdiction (applicability of national law for the object) but not enforcement or adjudicative jurisdiction (jurisdiction of national courts).[45] Additionally, this jurisdiction is not necessarily exclusive.[46] Furthermore, the rise of non-governmental entities comes with the issue of transferring responsibilities away from an initial launching state or state of registry.[47]

4.2. Establishing jurisdiction over space activities

If no registration has taken place, jurisdiction, pursuant to international custom, may be determined by territorial, nationality, effects or national security jurisdiction.[48] Here, arguments are made *inter alia* in favor of attribution in case of non-governmental entities carrying out activities from the State's territory or if the non-governmental entities are nationals of that

43 I. Marboe, National Space Law, in F. von der Dunk, F. Tronchetti, Handbook of Space Law, First ed., Edward Elgar Publishing, 2015, p. 132 (footnote 14).

44 F. Lyall, P.B. Larsen, Space Law. A Treatise, First ed., Ashgate Publishing Ltd., Farnham, 2009, pp. 84f.

45 M.J. Sundahl, Legal status of spacecraft, in R. S. Jakhu, P. Dempsey, Routledge Handbook of Space Law, First ed.; Routledge, 2017, 43; P.B. Larsen, UNIDROIT Space Protocol Comments on the Relationship between the Protocol and Existing International Space Law, International Institute of Space Law, Issue 3 2006, 187, 191.

46 M. Chatzipanagiotis, The Legal Status of Space Tourists in the Framework of Commercial Suborbital Flights, Air & Space Law 39 (2014) 427.

47 Cf. M. Gerhard Transfer of Operation and Control with Respect to Space Object – Problems of Responsibility and Liability of States, Zeitschrift für Luft- und Weltraumrecht 51 (2002) 571-581.

48 Territorial jurisdiction: object launched from its territory; nationality jurisdiction: object under the control of its nationals; effects jurisdiction: operation of the object had significant effects on the state (e.g., media broadcasting); national security jurisdiction: object posed a security threat to a state, cf. M.J. Sundahl, supra 45, p. 44.

State[49]; or in the case of non-governmental entities being attributed to a respective State of Registry according to the Registration Convention[50] or to (all) launching states.[51] State practice seems to indicate that general aspects of public international law should be followed, so that States are responsible for such activities if they have jurisdiction over an activity carried on from its territory or by non-governmental entities that are its nationals.[52]

4.3. Extension of responsibility to non-act-of-a-state national activities

Under general international law, a State would (already) be directly responsible for its space activities, irrespective of where they are conducted, insofar these activities amount to an act of state.[53] Under space law, this scope is widened to include space activities in general, as long as they meet the threshold of being "national activities" in outer space.[54]

National activities might describe either activities of nationals,[55] all activities that qualify a state as liable for damage based on Article VII of the Outer Space Treaty and/or as a register state,[56] or activities over which the state can exercise jurisdiction (i.e. activities conducted from the state's territory, and activities conducted by its nationals and activities conducted involving space objects registered by that state).[57] Responsibility is hence considered to also

49 M. Gerhard, Article VIII, in: Cologne Commentary on Space Law, Vol. I, S. Hobe, B.S. Tedd, K.U. Schrogl (Eds.), Carl Heymanns, Cologne, 2009, p. 112.

50 H.A. Wassenbergh, Public Law Aspects of Private Space Activities and Space Transportation in the Future, in Proceedings of the Thirty-Eighth Colloquium on the Law of Outer Space, American Inst. of Aeronautics and Astronautics, Washington D.C. 1997, p. 109.

51 M. Bourely Rules of International Law, in: Proceedings of the Twenty-Ninth Colloquium on the Law of Outer Space, American Inst. of Aeronautics and Astronautics, New York, 1986, pp. 159ff.

52 M. Gerhard, *supra* 49, p. 114.

53 B. Cheng, Studies in International Space Law, Clarendon Press, Oxford 1997, p. 616.

54 F.von der Dunk, International Space Law, in: F. von der Dunk, F. Tronchetti, Handbook of Space Law, First ed., Edward Elgar Publishing, 2015, p. 46.

55 K.H. Böckstiegel, The Terms 'Appropriate State' and 'Launching State' in the Space Treaties – Indicators of State Responsibility and Liability for State and Private Activities, in: Proceedings of the Thirty-Fourth Colloquium on the Law of Outer Space, American Inst. of Aeronautics and Astronautics, Washington D.C., 1992, p. 13.

56 H.A. Wassenbergh, Public Law Aspects of Private Space Activities and Space Transportation in the Future, in Proceedings of the Thirty-Eighth Colloquium on the Law of Outer Space, American Inst. of Aeronautics and Astronautics, Washington D.C. 1997, 246, cf. V. Kayser, An Achievement of Domestic Law: U.S. Regulation of Private Commercial Launch Services, Annals of Air and Space Law 17 (1991), pp. 341f.

57 F.von der Dunk, International Space Law, in: F. von der Dunk, F. Tronchetti, Handbook of Space Law, First ed., Edward Elgar Publishing, 2015, p.54, M. Lachs, The Law of Outer Space, (Sijthoff, Leiden) 1972, pp. 112f ; Gerhard, *supra* 49, 112;

cover activities which only partly take place in outer space, including launching of space objects or their operation.[58]

4.4. Extension of responsibility to non-governmental entities

Responsibility is expressly extended to the activity of non-governmental entities by Article VI. Differently from general international law, activities of non-governmental entities are equated to state activities with respect to the regime of international responsibility.[59]

4.5. Supervision and Authorizaton by an appropriate State

The Outer Space Treaty does not exercise effect on non-governmental entities directly. States must authorize and supervise "their" non-governmental entities.

Different theories are proposed to determine the "appropriate" State tasked with authorization and supervision, namely that it is the launching state[60], or state of registry[61]. We submit that Article VI is to be understood to denominate the State which is responsible for the activities subject to authorization and supervision. Assignation of supervision and authorization obligations to multiple States, and/ or States that are not in operative control of the space activity anymore seems unnecessary based on the source treaty.

Aforementioned control mechanisms therefore allow the responsible State to impress its obligations onto the non-governmental entities (as requests for compensation as well as liabilities for damages as a result of the their activity[62] can be incurred) as well as ensuring other national interests by de facto monopolizing the access to space within the jurisdictional reach of said State.[63]

Authorization serves as a lever for the state to ensure that private space activities do not run against their national security and foreign policy interests.[64] Both authorization and supervision are not described in the treaty

F. von der Dunk, Private Enterprise and Public Interest in the European "Spacescape" (Diss.), p.18; Bin Cheng, *supra* 53 pp. 617f.

58 M. Gerhard, *supra* 49, p. 109.

59 F.von der Dunk, International Space Law, in: F. von der Dunk, F. Tronchetti, Handbook of Space Law, First ed., Edward Elgar Publishing, 2015, p. 46.

60 H.L. van Traa-Engelman, Commercial Utilization of Outer Space, Martinus Nijhoff, Leiden, 1993, p. 62.

61 B.C.M. Reijnen, The United Nations Space Treaties Analysed, Editions Frontieres, Gif-sur-Yvette Cedex, 1992, p. 114.

62 While Article VII of the Outer Space Treaty is the treaty's standard instrument for matters of compensation via the regime of liability, Article VI allows for compensation in case of a wrongful act.

63 Cf. I. Marboe, *supra* 43, p. 185.

64 Cf. S. Hobe, Harmonization of National Laws as an Answer to the Phenomenon of Globalization, in K.H. Böckstiegl (Ed.)'Project 2001' – Legal Framework for the Commercial Use of Outer Space, Cologne, Carl Heymans, 2002, pp. 639f.

and are left to the discretion of the States; consequently, state practice differs between exercising territorial or personal jurisdiction.[65]

5. Art VI OST and the definition of "State" under the law of state immunity

The first question posed by a claim of state immunity is whether the addressee is in fact covered by the term "state" as used in international sovereign immunity law. According to the UN Convention on Jurisdictional Immunities of States, the term "state" also encompasses its various organs, constituent units, political subdivisions, agencies or instrumentalities and representatives of a state acting in their sovereign capacity.[66] Domestic legislation and common law as applied in the US and UK allow for this immunity by agencies, agents etc. under modestly narrow circumstances of performing acts within their sovereign capacity.[67] While US law requires some organizational link to the government[68], in the UK a completely private corporation may be accorded state immunity.[69] State enterprises can be considered as capable of being afforded state immunity, if proven that they are exercising governmental powers.[70] It would seem unreasonable to circumvent state immunity simply by allowing lawsuits against its agents, insofar, as they are acting within the protected scope of sovereignty[71] and therefore interfere with the *raison d'etre* of state immunity, namely to enable states to govern without foreign interference.

An interesting detail is provided by cases where third entities, not organizationally connected to a state and only related by commercial contract, have been afforded immunity, such as insurance companies.[72] Pursuant to the UN Convention a legal proceeding shall be considered instituted against a state, *inter alia* if the proceeding in effect seeks to affect the property, rights, interests or activities of that other state.[73] Proceedings, in which the state is indirectly concerned, shall be open to the applicability of state immunity.[74] According to the ILC commentary[75], the idea is to protect the interests and activities and, thus again, the functioning of government.

65 I. Marboe, *supra* 43, p. 134.
66 United Nations Convention on Jurisdictional Immunities of States and Their Property, *supra* 10, Art. 2 para. 1 lit. a.
67 J. Crawford, *supra* 8, pp. 492-494.
68 Foreign Sovereign Immunities Act (FSIA), 28 USC §1603(a), (b).
69 J. Crawford, *supra* 8, p. 492.
70 Mainly cases involving state-owned corporations from (formerly) socialist states. See e.g. Dralle v. Republic of Czechoslovakia, *supra* 21, p. 155.
71 C. Whomersley, Some Reflections on the Immunity of Individuals for Official Acts, 41 Int'l. and Comp. Law Quarterly (1992) pp. 848, 850.
72 State Immunity Articles Commentary, *supra* 11, commentary on Art. 12 para. 7.
73 United Nations Convention on Jurisdictional Immunities of States and Their Property, *supra* 10, Art. 6 para. 2 lit. b.
74 State Immunity Articles Commentary, *supra* 11, commentary on Art. 6 para. 13.

It may prove difficult to establish, which private defendants may reasonably be linked to a state and thus be considered for state immunity. The ILC referred to the rules on attribution of conduct to states in the law of state responsibility.[76] It may thus quite safely be assumed that, interpreting the term attribution in light of the context of other norms of public international law, those provide some guidance. Art VI Outer Space Treaty sets up a much more comprehensive standard for the attribution of space activities by non-governmental entities than general public international law and provides a stronger legal link between them and their respective states. Consequently, a mirroring broad spectrum of non-governmental entities and their actions should be considered to be *prima facie* eligible for state immunity under certain circumstances which will be explained below.

6. The differentiation between sovereign and non-sovereign acts in relation to space activities

According to the UN Convention on State Immunity, the test to be applied by courts when qualifying an activity as sovereign or commercial is twofold. It states that reference should be made primarily to the nature of the act, but its purpose shall also be taken into account if the parties so agree or if, in the practice of the forum state, that purpose is relevant in determining the commercial character of the act.[77] Although the stated rationale behind this revised deviation of previous draft was stated as being for the benefit of developing countries, it opens up a controversially discussed variety of the "nature test".[78] Despite the danger of potentially exponential extension of state immunity, in more recent decisions, some domestic courts adopted that approach.[79] The generally accepted exception to state immunity for military activities[80] and most acts connected to them[81] serves as a strong showcase for the limited divisibility of nature and purpose. While upholding the primacy of the "nature test", the context has been seen as relevant and, after all, the "*distinction between sovereign acts and non-sovereign acts is easy to state but notoriously difficult to apply in practice*"[82].[83]

75 State Immunity Articles Commentary, *supra* 11, commentary on Art. 6 paras. 6-13.
76 State Immunity Articles Commentary, *supra* 11, commentary Art. 13 para. 10.
77 United Nations Convention on Jurisdictional Immunities of States and Their Property, *supra* 10, Art. 2 para. 2.
78 M. Shaw, *supra* 22, pp. 532-533; State Immunity Articles Commentary, *supra* 11, commentary on Art. 2, para. 26 regarding developing states.
79 M. Shaw, *supra* 22, p. 536.
80 See *inter alia* Jurisdictional Immunities (Germany v. Italy: Greece intervening) *supra* 8, para. 78
81 Holland v. Lampen-Wolfe, *supra* 7, at 367.
82 Lord Dyson MR in Benkharbouche v. Embassy of the Republic of Sudan, UK Supreme Court (2015) EWCA Civ 33, para 21.

A case-by-case analysis is thus necessary to account evolving circumstances in the future.[84] The circumstances of space activities are exceptional and, while not beyond the reach of international law, clearly need examination, which takes into account such highly special context. One argument to be raised here is the importance of space technology and space-based applications for daily life including public order and safety, national security and public health. Thus, while some of these activities are or could be outsourced to government contractors, secondary recourse to context and therefore purpose will show that these acts may be considered sovereign for the purposes of state immunity. Furthermore, taking up the ILC's argument in favor of developing countries, the categorization of space activities by non-governmental entities such as universities and government contractors as private could be a detrimental obstacle to their access to outer space in the absence of public capabilities.[85] As space activities are increasing, it is important to be careful when qualifying space activities as sovereign. This, however, does not necessarily adversely affect the merits of doing so on a case-by-case basis.

7. Further Exceptions, potentially applicable

Beyond the exclusion of non-sovereign activities, contemporary scholarship and legislation further limits state immunity in cases concerning, for example, intellectual property and employment contracts.[86] The historically most well accepted exception is a state's right to waive its immunity either by international agreement, written contract or declaration before the competent foreign court *in casu*.[87] This right is retained only by the state itself, regardless which sub-division or other entity is directly named as a defendant by the legal proceedings.[88]

One exception to state immunity potentially pertinent to damage caused by space objects is the so-called "tort exception". According to the UN convention, states shall not be granted immunity, neither for *acta iure imperii* nor *gestionis*, in cases of personal injuries or damage to property.[89] However, this broad exception is limited by the requirements of the injurious act

83 M. Shaw, *supra* 22, p. 536.
84 *Ibid*, p. 536.
85 The resulting use of legal barriers to, effectively, prevent developing states from exercising their rights under international space law creates a whole new at least ethical issue.
86 J. Crawford, *supra* 8, pp. 496-498.
87 United Nations Convention on Jurisdictional Immunities of States and Their Property, *supra* 10, Art. 7; J. Crawford, *supra* 8, p. 501.
88 H. Fox & P. Webb, *supra 4*, pp. 377-378.
89 United Nations Convention on Jurisdictional Immunities of States and Their Property, *supra* 10, Art. 12.

occurring, at least in part, in the territory of the forum state and the presence of the author of the act or omission in the same.[90] Thus, it seems improbable that this would be fulfilled in cases of damage caused by a space object. In any case, while domestic US law recognizes this exception[91], neither the ILC nor the European Court of Human Rights considers that this exception represents customary international law.[92]

8. Immunity in space related agreements

A quick glance at provisions related to immunity or the lack thereof in international agreements related to space activities is due here.

First, even a cursory read of the text of the UN Convention reveals to the attentive reader that it excludes immunities enjoyed by a state under international law with respect to aircraft and space objects owned or operated by a state.[93] Since the UN Convention is currently only relevant to the extent as it is reflecting customary international law,[94] the status of this particular norm needs to be examined. The ILC draft articles mentioned in their commentary regarding the article on state ships, that this provision is not applicable (by analogy or otherwise) to aircraft or space objects since these two categories of objects are dealt with in specific treaty regimes.[95] This resulted also in the clarifying addition to Art 3, in deviation from the ILC's draft.[96] While the ILC deferred the inclusion of space objects to necessary further studies[97], the UNGA Ad Hoc Drafting Committee was split over the issue.[98] In light of this context, the mention of space objects in the Convention is to be taken rather as legislative clarification than a reflection of customary international law, probably with the exception of the ILC's explicit statement of non-applicability of the rules regarding state ships to space objects by analogy.[99]

90 *Ibid*, Art 12.
91 J. Crawford, *supra* 8, p. 498; State Immunity Articles Commentary, *supra* 11, commentary on Art. 12, fn 149.
92 State Immunity Articles Commentary, *supra* 11, commentary on Art. 12, para. 8; ECtHR, McElhinney v Ireland and Fogarty v UK, 21.11.2001; regarding damage or injury caused by military operation this has also been stated by the ICJ in Jurisdictional Immunities (Germany v. Italy: Greece intervening) *supra* 8, para. 78.
93 United Nations Convention on Jurisdictional Immunities of States and Their Property, *supra* 10, Art. 3 para. 3.
94 Jurisdictional Immunities (Germany v. Italy: Greece intervening) *supra* 8, para. 66; J. Crawford, *supra* 8, p. 490.
95 State Immunity Articles Commentary, *supra* 11, commentary on Art. 16, para. 17.
96 H. Fox & P. Webb, *supra* 4, 2013, pp. 314, 474.
97 See State Immunity Articles Commentary, *supra* 11, para 23.
98 H. Fox & P. Webb, *supra 4*, pp. 522.
99 State Immunity Articles Commentary, *supra* 11, commentary on Art. 16, para. 17.

Second, the five UN space treaties do not mention the term immunity.[100] Article XI paragraph two of the Liability Convention (LIAB) has received some attention in this respect.[101] It stipulates, "Nothing in this Convention shall prevent a State, or natural or juridical persons it might represent, from pursuing a claim in the courts or administrative tribunals or agencies of a launching state".[102] Upon a contextual interpretation of the words in their ordinary meaning according to Art 31 of the Vienna Convention on the Law of Treaties (VCLT)[103], codifying customary international law[104], it seems obvious that Article XI paragraph two is in fact limited to claims brought against states in their own courts. Since the parties to joint launches are jointly and severally liable for any damage caused within the terms of Articles II and III of the LIAB[105], no inference about rules on claims against one launching state in the courts of another launching state can reasonably be drawn. Potential cross-waivers of liability derogate the substantive claim, whereas immunity is merely a procedural barrier.[106]

Third, the Permanent Court of Arbitration's (PCA) Optional Rules for Arbitration of Space Related Disputes stipulate that agreement by a party to arbitration under these rules effectively includes a waiver of any potential jurisdictional immunities, which it might enjoy otherwise.[107] While this clarification might seem desirable for purposes of clarity and certainty, there is no issue regarding state immunity in the first place, since the latter only applies with regard to foreign domestic adjudicating bodies and not

100 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 10 October, 1967, 610 U.N.T.S. 205; Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Space, 3 December, 1968, 672 UNTS 119; Convention on International Liability for Damage Caused by Space Objects, 9 October 1973, 961 U.N.T.S. 187; Convention on Registration of Objects Launched into Outer Space, 15 September 1976, 1023 U.N.T.S. 15; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 11 July 1984, 1363 U.N.T.S. 3; see also H. Fox & P. Webb, *supra* 4, p 113.

101 *Ibid*, p. 114.

102 Liability Convention, *supra* 100, Art. XI para. 2.

103 Vienna Convention on the Law of Treaties, 27 January 1980, 1155 U.N.T.S. 331, Art. 31.

104 M. Viliger, Commentary on the 1969 Vienna Convention on the Law of Treaties, First ed., Brill-Nijhoff Publishers, Leiden, 2009, pp. 439-440; Arbitral Award of 31 July 1989 (Guinea-Bissauv. Senegal) (Merits, Judgement) [1991] ICJ Rep 69 para. 48; R.S. Jakhu, S. Freeland, The Relationship between the United Nations Space Treaties and the Vienna Convention on the Law of Treaties, Proceedings of the Fifty-Fifth Colloquium on the Law of Outer Space, 2012, pp. 375-391.

105 Liability Convention, *supra* 100, Art. V para. 1; for a differing view see H. Fox & P. Webb, *supra* 4, p. 113.

106 Jurisdictional Immunities (Germany v. Italy: Greece intervening) *supra* 8, para. 93; J. Crawford, *supra* 8, p. 487.

107 PCA Space Arbitration rules, *supra* 4, Art. 1 para. 2.

international ones, the jurisdiction of which may only be constituted by consent of all parties to a dispute.[108]

9. Conclusion

As demonstrated above, space faring non-governmental entities are not *per se* excluded from the shield of state immunity. Article VI Outer Space Treaty provides the necessary legal link to attribute non-governmental entities to 'their' states also with respect to state immunity. Furthermore, based on the specific nature of space activities, it seems appropriate to take into account not just their nature, but also their purpose when evaluating their status as sovereign acts. Public international law remains ambiguous and does not provide a clear-cut solution to the question addressed in this paper. Nevertheless, when considering the special status of space faring non-governmental entities due to the extensive attribution of their activities to their respective states together with the consequences of taking into account the purpose of the services provided, it would not seem unreasonable for domestic courts to grant state immunity *in casu*.

An interesting feature is the residual power of the state, the immunity of which is invoked, to exercise its right to waive immunity *in casu*. This puts another strong regulatory leverage in the hands of the state, as it could make its restraint to do so conditional on compliance with its authorization and supervision regime by the non-governmental entity.

Ultimately, it will be left to domestic courts to decide these questions. Given the legal uncertainties of the respective international treaties and customary rules, authoritative clarification could be achieved through a separate space dispute resolution agreement or additional protocol. When conceiving this potential instrument, however, progressive solutions with some measure of compulsory jurisdiction of international adjudicative bodies need to be found together with including non-governmental entities. The comparison to investor-state dispute settlement under the ICSID Convention appears to be fruitful.

Without a new agreement on the horizon, however, the application of state immunity to cases brought in foreign domestic courts may prove to be a way of re-internationalizing the resolution of space related disputes, as it will necessarily increase the pressure on states to protect the interests of their nationals by exercising their right to diplomatic protection. Ultimately, this may lead to a continuation of space related disputes being resolved primarily by international law and not domestic law of any state.

108 J. Crawford, *supra* 8, pp. 501-502.