The relevance of hard law and soft law in the further development of space law

10th UN Workshop on Space Law, Panel 6

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- Objective:
  - Promote universality of the 5 UN space treaties
  - Assess state of affairs of the treaties & their relationship with principles, resolutions, guidelines
  - Analyse effectiveness & identify areas that may require additional regulation (i.e. ‘gaps’)
How?

• Use questionnaire of WG on status/application of the 5 treaties to address status /scope of, and possible gaps in legal regime
• Study future legal /institutional initiatives
• Study legal mechanisms to manage safety, security, sustainability of space activities
  • Esp. notification/registration
• Guidance doc. for States wishing to join the treaties
• Strengthen LSC as prime multilateral body to promote progressive development of int’l space law
  • Procedural /institutional improvements; cooperation STSC
What is ‘hard space law’?

• Art. 38 Statute ICJ
  • International conventions
  • International custom, as evidence of a general practice accepted as law
  • General principles of law recognized by civilized nations
  • Judicial decisions and teachings of the most highly qualified publicists as subsidiary means

• Also:
  • Bi-/multilateral agreements
  • National legislation: growing
UN Space Treaties

- Outer Space Treaty 1967
- Rescue Agreement 1968
- Liability Convention 1972
- Registration Agreement 1975
- Moon Agreement 1979
Custom, judicial decisions?

- Who declares custom?
- Will there ever be a judicial case before an int. court or arbitration (e.g. PCA rules)?
- Request for ‘advisory opinion’, by GA? ITU?
- Study by International Law Commission?
  - ‘Initiate studies & make recommendations to encourage progressive development of international law and its codification’
  - 2013: Identification of customary international law
- Statement by COPUOS members?
- National law → practice (delimitation, resources…)
What is ‘soft space law’?

- UN resolutions
- Guidelines
- Codes of conduct
- Best practices, standards…

- Also, contributions to (soft) law-making by
  - Recommendations, statements, position papers, etc. (NGOs etc.)
UN Space Principles Resolutions

- ‘Principles’ Resolution 1963
- Television Broadcasting 1982
- Remote Sensing 1986
- Nuclear Power Sources 1992
- Benefits Declaration 1996
Other UN Resolutions

- Concept of Launching State
  2004

- Enhancing Registration Practice
  2007

- National Space Legislation
  2013

- Debris Mitigation Guidelines
  2007
‘Noting’…

• … ‘that nothing in the conclusions of the Working Group or in the present recommendations constitutes an authoritative interpretation or a proposed amendment to the United Nations treaties on outer space’
Challenges

COPUOS

New actors
New activities
New law
Issues

COPUOS

- Space / earth environment
- Use of resources
- Developing countries
- Commercialisation / privatisation
- Safety, security & sustainability
- Increase treaty ratifications
Are there gaps?

- Benefit / interest of all states
- Province of all Mankind
- CHM
- Non-appropriation
- Space object
- Definition/delimitation
- Harmful interference
- Peaceful purposes
- …
Solving ‘gaps’: hard law?

- Amending treaties?
- New treaties?
- Increasing relevance /impact of current treaties

- **Advantage**: binding on parties
- **Disadvantage**: success not likely in current climate, time-consuming, binds only parties, implementation depends on political will of sovereign states, verification and enforcement not easy

- Another way: more **national law**, in (some) harmony
- Or: **custom**? (ILC, Adv. Opinion, case law…)
Solving gaps: soft law?

- Code of Conduct?
- Guidelines?

• **Advantage**: can be fast, higher probability of adoption, can be amended smoothly, can have global legitimacy without need for adoption by each state, can evolve into (binding!) customary law

• **Disadvantage**: not binding; this may be an issue in critical fields, like safety, security, sustainability
Example: space resources

- ‘Gold rush’ for asteroids, moon resources
- Can lead to conflict, destabilize
- In absence of clear international hard law, states start to adopt national legislation
- It would be desirable to reach international agreement on governance of space resources
Current int’l legal regime

• Outer Space Treaty 1967 – 104 parties
• (Moon Agreement 1979) – 16 parties (excl. US/LUX)

• Relevant points regarding space resources
  • Moon/celestial bodies:
    • Non-appropriation (no sovereignty)
  • Space resources:
    • Status extracted resources unclear; Freedom of use?
  • Private commercial activities:
    • Authorization/supervision by state!
Ownership of resources

Ownership of celestial bodies = appropriation (OST/MA)

Ownership of resources in situ (MA)

Ownership of extracted resources
  - MA: Not allowed as long as there is no int’l regime

Ownership of extracted resources
  - OST: Not explicitly prohibited; freedom of use?
Steps to solve the legal gap

- Creation of national law (US, LUX, UAE)
- New agenda item COPUOS LSC 2017
- IISL Position Paper
- International Working Group created by The Netherlands
IISL Position Paper 2015

• Specifically focused on the US Space Act
  • It is uncontested under international law that any appropriation of “territory” even in outer space (e.g. orbital slots) or on celestial bodies is prohibited by Art. II OST
  • It is less clear whether it also prohibits the taking of resources, i.e. whether “free use” includes the right to take and consume non-renewable natural resources, including minerals and water on celestial bodies
  • Moon Agreement requires setting up a regime, but is not binding on US
In view of the absence of a clear prohibition of the taking of resources in OST, one can conclude that the use of space resources is permitted.

The US Space Act is a possible interpretation of the OST; whether and to what extent this interpretation is shared by other States remains to be seen.

It can be a starting point for development of international rules to coordinate the free exploration and use of outer space, including resource extraction, for the benefit and in the interests of all countries.
The Hague Space Resource Governance Working Group

- Website: www.iiasl.aero – follow the link

- See also A/AC.105/C.2/2016/CRP.17

- Multi-stakeholder group with consortium partners, members and observers
Aim

• Assess the need for a regulatory framework for space resource activities and prepare the basis for such regulatory framework

• If there is such a need:
  • Encourage States to engage in negotiations for an international agreement or non-legally binding instrument
  • Identify/formulate building blocks for governance of space resource activities as a basis for negotiations on an international agreement or non-legally binding instrument
  • Recommend on implementation strategy and forum for negotiations on an international agreement or non-legally binding instrument

• First face to face meeting April; second on 6-7 Nov., Leiden
Examples of ‘building blocks’

- Objective of international legal framework
- Definition of key terms
- Exercise of jurisdiction
- Access to / Utilization of space resources
- Sharing of benefits
- Safety of activities / Capacity
- Liability
- Compliance
Hard law or soft law?

• Hard law
  • Outer Space Treaty does not give clear answer on ownership of resources
  • Moon Agreement requires international regime but has only 16 parties

• On the road to a solution?
  • LSC agenda item
  • IISL BoD Statement
  • Hague Space Resources Governance Working Group

• Step-wise approach to ideally a long-term hard law solution?
Role of NGOs

- International Institute for Space Law
- European Centre for Space Law
- European Space Policy Institute
- Secure World Foundation
Conclusions

• Treaties & laws set the general framework
• But also leave gaps, and new needs emerge
• New hard law takes time, political will
• Soft law can help fill gaps, clarify terms in flexible and time-efficient manner
  • UN Res. could be more effective?
• It is a legal obligation to use space for peaceful purposes, for the benefit of mankind, and for states to ensure compliance by private actors with treaty provisions
Thank you