UNITED NATIONS/CHINA/APSCO WORKSHOP ON SPACE LAW

The Role of National Space Legislation in Strengthening the Rule of Law

jointly organized with and hosted by
China National Space Administration (CNSA)
17 to 20 November 2014
Beijing, China

Responsibility and Liability for National Space activities

Armel Kerrest

Institute of Law of International Spaces and Telecommunications

University of Western Brittany

Introduction

Why should a State license a private activity to be conducted in outer space ?

- **Because it is responsible for this « national activity »**
  (OST article VI)
- **Because it may be liable as a « launching State »**
  (OST art. VII, liab conv)

Responsibility and liability

Responsibility / liability /Responsabilité/ Responsabilitad

A clarification must be done because of the difference between English and the other official languages. *(this issue may be looked after when responsibility –article VI – or when liability is concerned (article VII)*

- The distinction is not so clear in international law outside space law

If we have a look to the work of the International Law Commission of the UN on responsibility of States for Internationally wrongful acts, the word used in English was responsibility. In 1973 the US member of the Commission Mr Kearny ask the translators to use the word *"responsibility" "only in connection with internationally wrongful acts and that, with reference to the possible injurious consequences arising out the performance of certain lawful activities, the more suitable term "liability" should be used."*

In his report on "International liability for injurious consequences arising out of acts not prohibited by International Law", Mr Quentin Baxter Special Rapporteur referred to this precedent: *"Indeed, the distinction made by Mr Kearney was well established, at least by the mid-1960s, in the practice of the United Nations Committee on the Peaceful Uses of Outer Space; and no change is now proposed. Nevertheless, if two terms are used in English where one serves in French and in other working languages, it is necessary for the Commission to be satisfied that the variation in English is a matter of idiom (like the use of the two English terms, "President" and "Chairman", to correspond with the single French term, "President"), and that it imports no distinction in substance. This would seem to be the case. Within the Commission and elsewhere, the English terms "responsibility" and "liability" have been used interchangeably in relation to the regime of obligation in respect to the injurious consequences of acts not prohibited by international law. The term "responsibility", no less than the term "liability", implies "the necessity to make reparation", and in the English language literature of international law the term "liability" is commonly employed to refer generically to the consequences of any legal obligation."*

In a footnote, Mr Quentin Baxter very usefully refers to the text of Informal Composite Negotiating text of the convention of the law of the see in discussion at the time (for instance article 139 of the LOS conv "Responsibility to ensure compliance and liability for damage » is translated into "Obligation de veiller au respect de la Convention et responsabilité en cas de dommages" and "Obligación de garantizar el cumplimiento de las disposiciones de la Convención y responsabilidad por daños"

Part I

Responsibility of States according to article VI Outer Space Treaty.

History of this disposition:

a compromise between the USSR and the USA about private activities in Outer space

UNITED NATIONS

GENERAL ASSEMBLY

Distr.
LIMITED

A/AC.105/L.2
10 September 1962
ENGLISH
ORIGINAL: RUSSIAN

COMMITTEE ON THE PEACEFUL USES OF OUTER SPACE

UNION OF SOVIET SOCIALIST REPUBLICS: DRAFT DECLARATION OF THE BASIC PRINCIPLES GOVERNING THE ACTIVITIES OF STATES PERTAINING TO THE EXPLORATION AND USE OF OUTER SPACE

The Governments of the States whose representatives have signed this Declaration,

Inspired by the great prospects opening up before mankind as a result of penetration into outer space,

Recognizing that the peoples of all the countries of the world are interested in the conquest of outer space,

Desiring to promote broad international co-operation in the exploration and use of outer space for peaceful purposes,

Taking into consideration UN General Assembly resolution 1721 (XVI) approved unanimously by all the States Members of the United Nations,

Solemnly declare that in the exploration and use of outer space they will be guided by the following principles:

1. The exploration and use of outer space shall be carried out for the benefit and in the interests of the whole of mankind.

2. Outer space and celestial bodies are free for exploration and use by all States; no State may claim sovereignty over outer space and celestial bodies.

3. All States have equal rights to explore and use outer space.

4. The activities of States pertaining to the conquest of outer space shall be carried out in accordance with the principles of the United Nations Charter and with other generally recognized principles of international law in the interests of developing friendly relations among nations and of maintaing international peace and security.

5. Scientific and technological advances shall be applied in outer spac in the interests of a better understanding among nations and the promotion of broad international co-operation among States; the use of outer space for propagating war, national or racial hatred or enmity between nations shall be prohibited.

6. Co-operation and mutual assistance in the conquest of outer space sh be a duty incumbent upon all States; the implementation of any measures that m in any way hinder the exploration or use of outer space for peaceful purposes b other countries shall be permitted only after prior discussion of and agreement upon such measures between the countries concerned.

7. All activities of any kind pertaining to the exploration and use of outer space shall be carried out solely and exclusively by States; the sovereig rights of States to the objects they launch into outer space shall be retained by them.

8. The use of artificial satellites for the collection of intelligence information in the territory of foreign States is incompatible with the objectives of mankind in its conquest of outer space.

9. States shall regard all astronauts as envoys of mankind in outer spac and shall render all possible assistance to spaceships and their crews which may make an emergency landing on the territory of a foreign State or on the high seas; spaceships, satellites and capsules found beyond the limits of the launching State shall be returned to that State.

The Governments of the States signatories to this Declaration call upon all the States of the world to accede to it.

GENERAL ASSEMBLY

COMMITTEE ON THE PEACEFUL USES OF OUTER SPACE

UNION OF SOVIET SOCIALIST REP
AGREEMENT ON THE RESCUE OF AS
MAKING EMERGE

The Governments of .....

Recognizing the common interest of of outer space,

Wishing to do their utmost to assis with an accident,

Have decided to conclude this Agree their representatives who, having exchan due form, have agreed on the following p

Articl

Each Contracting State shall render which have met with an accident and shal an emergency landing; to this end it sha including electronic and optical equipme facilities of different kinds.

Articl

A Contracting State which discovers Contracting State has met with an accide launching State without delay.

Responsibility

The compromise:

Assimilation of Private activities with States activities within the notion of “national activities”

Responsibility

This assimilation is clearly précised

« whether such activities are carried on by governmental agencies or by non-governmental entities, »

Responsibility

“National activities <u>in</u> Outer space”

“shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies (…)”

Responsibility

“International responsibility “

“for assuring that national activities are carried out <u>in conformity</u> with the provisions set forth in the present Treaty.”

Responsibility

international organizations

« responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization. »

Responsibility

If activities are conducted in violation of International Law : Responsibility of the State of the "national activity".

If this violation conducts to damage :

Obligation of reparation (liability) by the responsible State.

Responsibility

"shall require

•authorization and

•continuing supervision

by the appropriate State Party to the Treaty."

Part II
Outer space treaty article VII and the Liability Convention

History of the space law liability regime

The 1963 declaration

The Outer Space Treaty,

the rescue agreement

The liability convention

The registration convention

Were mainly proposed by the space faring States of the time and accepted by the others.

Liability Convention and national licensing regimes

The space faring States wanted an undisputed freedom of use of outer-space

They recognised therefore a very much « victim oriented » liability regime for victims not taking part in the risky adventure (damage on earth)

We have to keep in mind that this regime is therefore a counterpart of the freedom of use.

The regime for liability for damage in Outer space is quite different: a fault of the launching State must be proven

Presentation of the liability regime for space activities

The liability convention is very efficient for the victim not taking part in the adventure (damage on earth) .

- **Because of the choice of the liable entity**
- **Because of the extend of the liability**

The choice of the imputation of liability is very protective :

The launching State.

The interest of the choice.

A State

A well known State

the notion of launching State.

A State that launches

A State that procures the launching

A State from whose territory

A State from whose facility an object is launched,

the difficulty for the victim to prove the launching State

Importance of the criteria easy to prove:

- **State of Territory and**
- **State of registration.**

- **Difficulty of the notion of “procuring the launch”**

When there is more than one launching State, they are jointly and severally liable

i.e. any of them may have to pay compensation for the whole damage

The victim may choose among the launching States the most likely to pay

- The plurality of launching States is a guaranty for the victims
- It is a problem for the Launching States

The extent of the liability

The liability convention is very efficient for the victim not taking part in the adventure (damage on earth) .

A large liability

- Objective liability
- liability is unlimited in amount
- The liability is unlimited in time
- No exoneration

The liability convention does not apply to damage

To a launching State's national

To foreign nationals taking part

Space law must deal with this issue

The liability convention does not deal with damage caused to another launching State of the same launch or its nationals

Definition of the « damage » (1)

Damage « *caused by* » a space object

« caused by »

Definition of the space object

Liability convention article 1 :

« The term "space object" includes component parts of a space object as well as its launch vehicle and parts thereof ».

Bin Cheng, Vladimir Kopal :

« Any objects launched by humans into outer space, as well as any component part thereof, together with its launch vehicle and parts thereof »

Definition of the « damage » (2)

The term "damage" means

- **loss of life, personal injury or other impairment of health;**
- **or loss of or damage to property**
- **Damage to the environment ?**

The compensation :

« Restitutio in integrum »

Restore the person, to the condition which would have existed if the damage had not occurred.

(Liab conv Article XII)

The settlement of dispute mechanism

The victim may choose to ask for compensation under the liability convention or through another way.

The settlement of dispute mechanism under the liability convention

Diplomatic negotiation (article IX)

No exhaustion of local remedies (article XI)

One year from the damage (article X)

The Claims Commission

The possibility for the victim to obtain compensation through other ways.

A State at the international law level

Under responsibility of OST article VI

Under general international law

A victim under domestic law before a domestic judge

Damage in orbit

Fault liability

It was an error to deal with both systems in the same articles

The convention is far less efficient

The mechanism should be improved

Will the insurers go on accepting to pay in the case of space debris ?

The system is very much victim oriented

- It protects the victim (cf law of the sea)
- It encourages responsibility and control of every activity whether conducted by governments or by non governmental entities.

Some people argue that the current system is unfair.

In a certain sense they are right.

The system must be completed

The Launching State's point of view

Which State is a Launching State ?

The four criteria apply

Some of them need interpretation

Who determines which State is a Launching State ?

Not the launching State itself

***In fine* : the judge**

The proof of the quality of launching State

The victim has to prove

The importance of registration

If there are many: the victim have the choice

If a State is at risk to be considered as a launching State it should consider it carefully to avoid the obligation to pay for compensation.

A State cannot avoid being considered as a launching State by an international judge

Instead of trying to declare that it does not consider itself as a Launching State, which has no efficient legal effect, a State would be better off trying to escape from paying compensation.

A launching State may avoid paying compensation in case of damage :

It can transmit the « hot potato » to somebody else

How ?

The agreements refered to in article V of the liability convention.

The licence and domestic law when private actvities are concerned

The sharing of the risk among Launching States

Article V § 2 of the liability convention establishes a principle :

« A launching State which has paid compensation for damage shall have the right to present a claim for indemnification to other participants in the joint launching. »

Contrary to what is provided in article IV there is no precision on the way to obtain this indemnification

The text only indicates :

The participants in a joint launching may conclude agreements regarding the apportioning among themselves of the financial obligation …

These agreements are of major interest

They do not prejudice the right of the State of the victim

They do not share the liability itself

but

they share what is the most important :

The obligation of compensation

These agreements may

put the risk of the launch phase on the State which launches / State of the installations

put the risk of the space object when launched on the State which controls the space object

protect the other launching States from having to pay for damage caused by other States' pay loads.

protect the State of the territory when it does not really take part to the launch

Etc…

The effects of these agreements

In law they do not transfer the liability but the obligation of compensation

In fact the result will be often the same

The State victim / of the victim will most of the time choose to sue the State designated by the agreement

so doing it will avoid having to prove the status of launching State
and it will be easier get its money.
the parties to the agreement may agree to facilitate the action in this case

Resumé

The liability mechanism under the liability convention is efficient for the victim not taking part in the activity.

In connection with the obligation of article VI it imposes efficient control on any space activities

Résumé (2)

But it is far less efficient for other purposes

Relations between space faring States

Lialibity for damage in space

Relations between launching States

Sharing of the burden of the risk between Launching States

The solution : systematic arrangements according to article V

Résumé (3)

Relations between a State and its private entities

Indemnification of victims who are nationals of the LS or taking part in the launch

Possibility for the State to be reimbursed

Possibility for private entities to be protected by efficient ceilings in case of an action before a domestic judge

The solution : Licensing and control process

through domestic legislation, regulations or agreements

Armel.Kerrest@univ-brest.fr

http://www.univ-brest.fr/espace