

UNITED NATIONS/THAILAND WORKSHOP ON SPACE LAW

***Activities of States in Outer Space in Light of New Developments:  
Meeting International Responsibilities and Establishing National Legal and Policy Frameworks***

16-19 November 2010  
Bangkok, Thailand

**NATIONAL JURISDICTION FOR REGULATING SPACE ACTIVITIES OF  
GOVERNMENTAL AND NON-GOVERNMENTAL ENTITIES**

***PROF. SERGIO MARCHISIO***

SAPIENZA UNIVERSITY OF ROME  
INSTITUTE FOR INTERNATIONAL LEGAL STUDIES CNR  
E-MAIL: [sergio.marchisio@cnr.it](mailto:sergio.marchisio@cnr.it)

SUMMARY

1. *“Jurisdiction” in outer space*
2. *Article VI and VIII of the OST: State’s responsibility*
3. *Article VI and its relationship with Article VIII*
4. *Future perspectives: the ultimate goal of harmonization*

**1. “Jurisdiction” in outer space**

“Jurisdiction” means, in international law, the power of a State to exercise its sovereignty and authority and is based on the principle of effectiveness. Sometimes it simply means territory, but most often it refers to powers exercised by a State over persons, property or events.

A State’s jurisdiction may take various forms and its extent may differ in each contexts.

Jurisdiction concerns both international law and the internal law of each State. International law sets out the permissible limits of a State’s jurisdiction, in the various form it may take; internal law prescribes the extent to which, and the manner in which, the State in fact asserts its jurisdiction.

Under international law, a State's title to exercise jurisdiction rests primarily in its sovereignty. When the exercise of jurisdiction impinges upon the interests of other States, the overlapping claims to jurisdiction have to be coordinated. Private international law is precisely aimed at solving such kind of problems.

Generally speaking there is some tendency now towards a broad principle according to which the right to exercise jurisdiction depends on there being between the subject matter and the State exercising authority a sufficiently *close connection* to justify that State in regulating the matter.

Let us think about jurisdiction at sea or in the air.

Although the high seas are not part of the territory of any State and are thus not within the scope of its jurisdiction, States do have certain rights of jurisdiction over persons and things on the high seas. The legal order on the high seas is based primarily on the rule of international law that requires every vessel sailing the high seas to possess the nationality of, and to fly the flag of, one State; by this means a vessel, and persons and things aboard, are subjected to the law of the State of the flag, and in general subject to its exclusive jurisdiction. It is for each State to fix the conditions for the grant of nationality and of registration within its territory, and for the right of vessels to fly its flag. It must exist a genuine link between the State and the ship.

Somehow different considerations apply in respect of air space. Although that part of the airspace which is above the high seas is, like the high seas, not within the territorial jurisdiction of any State, that part which is above a State's territory falls within its territorial jurisdiction. Aircraft, as ships, have a nationality, with its connotations of rights of jurisdiction and protection. Article 17 of the 1944 Chicago Convention establishes that aircrafts have the nationality of the State in which they are registered and the conditions for registration are a matter for the municipal law of the State concerned. Furthermore an aircraft cannot be validly registered in more than one State. Every aircraft engaged in international aviation is required to bear its appropriate nationality and registration markings.

When applied to outer space activities, "jurisdiction" has a specific connotation and different implications. In fact, in outer space the non-appropriation principle prevails and reference to the State sovereignty is absent. This qualifies outer space as *res communis omnium*.

Accordingly, the 1967 Outer Space Treaty, which sets out the rules governing the interactions between States in outer space, establishes that its use and exploration are "province of all mankind" (Article I). Therefore, the OST in essence sets outer space aside as an extra-jurisdictional territory and no State can exercise any sovereign rights over it.

This does not preclude States exercising jurisdiction and control over objects and persons in outer space. For this, there should be a link between the State and a space object or personnel thereof, allowing the former to maintain jurisdiction and control

over outer space national activities and comply with its international obligations, as set forth by outer space treaties.

## **2. Article VI and VIII of the OST: State's responsibility**

In this regard, a special significance must be attached to Articles VI and VIII of the 1967 Outer Space Treaty (OST), which provide for obligations to be implemented by States Parties in their domestic legal order by enacting, when necessary, specific legislation.

Article VI establishes that State Parties "shall bear international responsibility for national activities in outer space ... whether such activities are carried on by governmental agencies or by non-governmental entities", and for "assuring that national activities are carried out in conformity with the provisions" of the Treaty.

International responsibility in the sense of Article VI of the OST is the equivalent of attribution to the State of all its national activities in outer space.

Another important effect arising from the accountability provided for in Article VI is the recourse by a State to take legislative action at the national level in order to answer for private space activities and their legal consequences for which the State is internationally responsible.

The drafting history of Article VI brings us back to the discussions which took place during the drafting process of the 1963 United Nations Declaration on the Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space. The Soviet Union in favor of the State monopoly in space was in counter position to the United States intentioned to maintain the principle of free enterprise and against any restraints.

Article VI, in its present wording, is the compromise between these two opposing positions.

Space activities can be carried out by any legally constituted body other than the States themselves, but the responsibility is placed by the international community on States for all national space activities, whether such activities are carried out by governmental agencies or by non-governmental (private) entities.

Contrary to the concept applicable under general international law, where "direct state responsibility" only pertained to acts somehow directly attributable to a State and States could only be addressed for acts by private actors under "indirect", "due care"/"due diligence" responsibility, Article VI assimilates governmental and non-governmental activities, by making no difference as to whether the activities at issue were the State's own or those of private actors.

As for the concept of “national activities”, which determines the scope of State responsibility especially in terms of categories of private activities, it should be said that this concept is not confined to State activities in a strict sense, but can also include activities which have some special connection with the State. National activities obviously include those performed by the State itself through its own agencies without geographical limits.

As for the private activities, the practice shows that the nationality criterion is not absolute. In the absence of a rigid definition in the OST, States have interpreted the notion of national activities, in their internal space legislation, in a broader sense, including sometimes activities carried on from their territory or from their jurisdiction by foreigners. What more is that States also include in the notion of national activities carried on by their nationals from the territory of another State or from a *res communis omnium*, like the high seas or activities carried on by non nationals from their territory or jurisdiction (think for instance at the registration of a space object launched by a private national from the territory of a foreign State).

As a consequence of the compromise reached during the negotiations, Article VI imposes on States specific obligations with regard to non-governmental activities, which “shall require authorization and continuing supervision by the appropriate State Party to the Treaty”.

In order to clarify the meaning of the “appropriate State”, which is a crucial to identify the State internationally responsible for non-governmental entities, the best solution might be found within the OST. In particular, the “appropriate State” seems to be the State which retains jurisdiction and control over the space object and personnel thereof, namely the State of registration.

### **3. Article VI and its relationship with Article VIII**

Article VIII of the OST provides that: “A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body.”

This rule concerns the prerogative of (one of) the ‘launching State(s)’ to register the space object and, thereby, to exercise “jurisdiction and control” over it.

The composed term “jurisdiction and control” is built as a consequence of the non-appropriation principle and the absence of reference to the State sovereignty.

“Jurisdiction” means the legislation and enforcement of laws and rules in relation to persons and objects. Public international law distinguishes, in general, between territorial, quasi-territorial and personal jurisdiction. Jurisdiction is decisive for the applicable law.

The “control” competence is more than a technical capability. Control refers, firstly, to a factual situation and such control should be ensured by technical means. It is the right of the State of registry to adopt technical rules to achieve the space object mission and, if necessary, to direct, stop, modify and correct the elements of the space object and its mission.

There are different types of “control”, either on space objects, on components of space objects or on personnel on board the space object, for technical use, explanation of it, implying the establishment of various regulations.

On registration, Article VIII of the OST contains three important principles:

- a) it assumes that all space objects are to be registered at the national level;
- b) it sets out that these objects are under the jurisdiction and control of the State of registry;
- c) it provides that stray space objects shall be returned to the State of registry.

However, while the Treaty assumes that space objects will be registered, it makes no provision for their registration. The Convention on Registration of Objects Launched into Outer Space was concluded in 1975 just in order to fill these gaps.

The main requirements of the Convention are three.

In the first place, it requires States launching objects into outer space to provide for inclusion in a United Nations Register information on those objects. This 'identification' purpose of the Registration Convention is reflected in the preamble of the Convention itself, respectively as follows:

"Desiring, in the light of the [Space Treaty, Rescue Agreement and Liability Convention], to make provision for registration by launching States of space objects launched into outer space with a view, *inter alia*, to providing States with additional means and procedures to assist in the identification of space objects, ... "; "Believing that a mandatory system of registering objects launched into outer space would, in particular, assist in their identification ..."; "Believing that a mandatory system of registering objects launched into outer space would. In particular assist in their identification ...".

Secondly, States are also required to maintain a National Registry of all space objects launched by them into Earth orbit or beyond.

Thirdly, the Convention sets down a procedure to identify objects that caused damage to a State Party or its nationals or juridical persons or which may be of a hazardous or deleterious nature.

The Convention requires the State of registry to furnish information concerning its space object “as soon as practicable”.

In this sense, States Parties to outer space treaties can meet their international obligations by enacting national space legislation. In fact, national space legislation has normally the dual objective of implementing the State's obligations and of clarifying the legal framework *vis-à-vis* private entities.

States should take legislative action at the national level mainly to answer for private space activities covered by their international responsibility and to the legal consequences thereof. In this regard, main elements of national space legislation have been identified, namely: a) the authorizations and supervision of space activities and the registration of space objects; b) the indemnification regulation, and c) other relevant issues.

The degree to which specific legislation is required depends on the level of non-governmental space activities conducted by nationals of a given State or from the territory of one State.

It is a fact that the growing commercialization of space activities has led to the development of national legislation regulating the ventures carried out by private persons in outer space, so to avoid any behavior inconsistent with the international obligation of the national State or the State of jurisdiction.

In this regards, the adoption of national legal provisions on space activities could indeed benefit the country concerned in multiple ways. States should not consider enacting national space legislation (regulating private space activities) as disadvantageous, as it visualizes or even reveals the existing responsibility.

Rather, the implementation of such legislation embraces a wide range of advantages.

The State can clearly take over jurisdiction and thus have all possible means for controlling such private space activities.

While registering a space object as a launching State, a State can also emphasize its jurisdiction and control over that space object - even if it is owned and operated by a private entity.

A State can include in its national legislation provisions fostering national industries, e.g. compulsory insurance requirements accompanied by limitation of reimbursement regulations.

Having enacted national legislation, a State can clearly also take additional measures to mitigate their responsibility and liability, e.g. by enacting provisions on safety regulations and indemnification. However, the key element in mitigating responsibility and liability is to consider international agreements with other (launching) States.

For these reasons, some texts adopted by the UNGA and negotiated within the UNCOPUOS Legal Subcommittee stress on the importance of national space legislations.

Resolution 59/115 of 10 December 2004 on the application of the concept of the “launching State”, recommends States conducting space activities to consider enacting and implementing national laws authorizing and providing continuing supervision of the activities of non-governmental entities under their jurisdiction.

Furthermore, Resolution 62/101 of 17 December 2007 contains recommendations for enhancing the practice of States and international intergovernmental organizations in registering space objects and invites such entities to harmonize their practices by ensuring the uniformity in the type of information to be provided to the Secretary-General on the registration of space objects.

#### **4. Future perspectives: the ultimate goal of harmonization**

The variety of understandings and interpretations of Article VI is now showing up in positive law. States which are not at the forefront of the space business are developing implementing rules based on their own reading of the provisions of the outer space treaties, but also taking into account their own economic, infrastructural, technological and legal features.

Therefore, the new challenge consist in harmonizing national legislations implementing the same provisions but according to different criteria. Harmonization is a challenge that COPUOS LSC will be very much instrumental to cope with.

The most significant clue in the handling of this issue is the willingness of States Parties to avoid, beyond their sovereign prerogatives, legal gaps between their respective jurisdictions. The fact that the criteria of application and implementation of Article VI of the OST are considered in a different manner by States Parties is not the real problem as long as those States seek for appropriate agreements at the international level in order to fill those possible gaps.

Therefore, the key-element in each national space legislation is the interface with foreign legislations and the flexibility to deal with activities featuring multinational aspects.

Aiming at preventing gaps between national legislations, the ‘harmonization’ of national space regimes should embrace a pragmatic approach, avoiding any heavy and formal process which might not be an incentive for States not yet parties to the outer space treaties to accede to them.