State practice, domestic legislation and the interpretation of fundamental principles of international space law

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ABSTRACT

Though international space law is frequently characterised as lacunal, the general nature of the provisions of the existing UN space treaties is such as to cover all activities by public and private entities that can be characterised as exploration or use. The lack of detailed rules regulating every conceivable activity in space should thus not be taken as an indication that there are forms of exploration or use of outer space that escape the application of the fundamental principles of international space law.

This realisation is fundamental in trying to understand the current deadlock in international space law-making. The UN space law regime is characterised by principles of global cooperation and inclusion that nonetheless only grant enforceable rights of protected use to individual States that are factually capable of implementing the legally equal freedom of all States to engage in spacefaring activities (Arts. I, II and IX OST).

In this context, it is understandable that technologically advanced States are turning their space law-making efforts to a national interpretation of the existing principles that furthers their own interests instead of engaging in protracted multilateral negotiation processes that risk upsetting the basic balance of the existing space law regime that favours them in the first place. We are hence witnessing a clear regulatory shift in space law-making, from the international level to the national level. This shift is characterised by an increasing body of practice of a limited number of States in the application of space law principles that were adopted specifically with the intention of guaranteeing access to an inclusive environment for equal use and exploration by all States.

The present article assesses the extent to which the interpretation of these universal principles may be affected by a selective application by a small number of States.

1. Introduction

We are currently witnessing firsthand the evolution of the international space law framework from an ambitious set of general principles agreed to at the intergovernmental level at global forums, to a patchwork of national laws and policies navigating around an almost equally diverse set of informal, non-binding instruments of international origin. This shift in law-making dynamics is not to be lamented, nor is it unique to space law. Indeed, it may be considered self-evident and, in fact, desirable, that an inherently evolutive branch of universal scope be tackled, first of all, through the adoption of multilateral agreements that set out the beacons for future regulations. Such regulations are typically developed at multiple levels of governance and subsequently implemented by national practice in the form of domestic legislation and activities carried out in application of international rules.

If these evolving dynamics are hence inconsequential in and of themselves, the peculiarities of the existing international space law framework do, in our view, warrant a closer look at them. For shifts in the framework of global space governance may anticipate, or even conceal, important shifts in the content of existing space law. In particular, the regulatory move toward national legislation raises specific issues for the interpretation of multilateral treaties that codify universal principles applicable to all States and whose foundation is the freedom to use an inclusive environment without national appropriation. This is the case when the applicable multilateral treaties (a) have been concluded a long time ago; (b) contain general and ambiguously phrased provisions that require subsequent agreement and practice for their clarification; (c) concern pioneering activities performed by or under control and supervision of a limited number of States; and (d) provide no apparent incentive among governments to pursue further action at the multilateral level.

As is well known, the UN space law regime is characterised by a limited set of principles of inclusive, equal use that nonetheless appear to grant enforceable rights of protected use only to those States that are factually capable of implementing their freedom to engage in
spacefaring activities. In this context, it is understandable that technologically advanced States are turning their space law-making efforts to a national interpretation of the existing principles of international space law. Indeed, prominent spacefaring States are increasingly resorting to the adoption of domestic legislation that implements their international obligations according to an interpretation that best serves their own interests. This approach is obviously preferred over protracted multilateral negotiation processes that, apart from being cumbersome, risk upsetting the basic balance of the existing space law regime that favours spacefaring States in the first place.

The most notorious example of domestic space legislation whose very adoption, if emulated in subsequent practice of other States, may well affect the interpretation of a fundamental principle of international space law, is the 2015 US Commercial Space Launch Competitiveness Act.1 The final section of this Act grants private American citizens property rights over natural resources extracted by them from asteroids and other celestial bodies in outer space. Regardless of the intentions of the State concerned in adopting the Act, the law itself, and subsequent governmental and non-governmental practice on the basis thereof, is likely to become an important source of interpretation of the non-appropriation provision in the 1967 Outer Space Treaty (OST).2

Interestingly, separate statements made by the US representative at the 2016 and 2017 sessions of the Legal Subcommittee (LSC) of the United Nations (UN) Committee on the Peaceful Uses of Outer Space (COPUOS) address this possibility.3 Noting that remarks made by some delegations at the sessions appeared to be based on a number of misunderstandings of the recently adopted US law, the representative clarified that the Act was merely a first step toward the development of a space resource exploitation industry; that much remains unclear in terms of the law that is applicable to the activities of this industry; and that, far from acting outside international space law, the US Act rather clarified that any future activities of US citizens in this area must be governed by the international obligations of the United States, including those under the Outer Space Treaty.

Turning to the misunderstandings surrounding the adoption of the US Act, the delegate noted that it was incorrect to posit that the Act embodied a change in the understanding of international space law by the US; rather, the United States had always insisted on the legality of space resource utilization during the lengthy negotiations for the existing international space treaties. The second misunderstanding concerned the allegation that the Act amounted to a unilateral approach to the further development of space law, which was refuted by the US delegate. Finally, the delegate noted that the Act did not wish to advance any particular interpretation of the international legal obligations of the United States, but rather postponed such issue to a future moment when US internal law would be applied in accordance with international space law.

Though we have no reason to doubt the veracity of these statements, they reveal, at the very least, a delicate balance between a multilateral interpretation of treaty provisions reflecting the intentions of all States Parties and a possible reinterpretation of such provisions on the basis of subsequent practice by a selection of States Parties. The present paper therefore wishes to frame this development by offering some thoughts on the following, related issues: (a) the role of national space legislation in implementing the international legal obligations contained in the UN space treaties (Section 2); (b) the rules of the Vienna Convention on the Law of Treaties (VCLT)3 that govern the role of subsequent State practice in the application of a treaty as revealing its meaning; and (c) the particularities in the evolution of the space law-making dynamics between the domestic and international governance levels that may affect the application of this interpretative tool (Section 3).

The paper does not concern the possibility that domestic space legislation advocating a specific interpretation of international legal principles would thereby constitute a violation of the relevant State Party’s obligations codified in the UN space treaties. Nor do we consider a possible modification of the meaning of the international space law principles through domestic space legislation as an example of States invoking their internal law to ignore their international obligations. The latter eventuality is clearly governed by existing rules of treaty law, for Article 27 VCLT provides that a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty.4 The former situation is clearly an issue of State responsibility under international law, which for its resolution requires that we can arrive at an unambiguous interpretation of the international obligations that may or may not be breached.

2. Role of national space legislation

States that adopt national space legislation mainly do so in order to provide a secure legal framework in order to spur the development of and provide support for their domestic space industry. It should therefore not come as a surprise that, as noted in the 2013 UN General Assembly (UNGA) Resolution on national space legislation, “States have adapted their national legal frameworks according to their specific needs and practical considerations”.5 The global nature of spacefaring activities nevertheless requires that the resulting patchwork of domestic space legislation be coordinated, lest an inconsistent implementation of the obligations laid down in the UN space treaties impede international cooperation.

The 2013 UNGA Resolution therefore also emphasizes “the importance of appropriate means of ensuring that outer space is used for peaceful purposes and that the obligations under international law and those specifically contained in the United Nations treaties on outer space are implemented”.6 The recommendations of the Resolution are rather selective, however, and principally aim to ensure consistency among provisions of national space legislation that are necessary to implement the international obligations of States of authorization and continuing supervision of spacefaring activities. Other recommendations concern specific aspects related to the scope of national legislation in terms of space activities, and issues of registration, liability and transfer of ownership and control.

Likewise, the proposed Model Law on National Space Legislation, contained in the Sofia Guidelines of the International Law Association (ILA), takes a practical approach to ensuring consistency between national space laws. The Model Law is the result of ILA discussions between 2004 and 2010, and was presented at the 2013 LSC UNCOPUOS session in a revised version, though with little variation in content.7 The resulting guidelines can be traced back to the [Project2001] Plus of the Cologne Institute of Air and Space Law and the German Aerospace Centre, and its identification of five so-called building blocks for national space law. Like the 2013 UNGA Resolution, these blocks focus on

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 27 January 1967, entered into force 10 October 1967, 610 U.N.T.S. 205.
3 Statements made during the fifty-fifth and fifty-sixth sessions of the UNCOPUOS LSC, as reflected in the recordings of the relevant meetings by the UN Office for Outer Space Affairs, available at http://www.unoosa.org/oosa/audio/v2/meetings.jsp?lng=en, last accessed on 7 June 2017.
7 Ibid., PP 1.
8 UNCOPUOS LSC, Information on the activities of international intergovernmental and non-governmental organizations relating to space law, UN Doc. A/AC.105/C.2/2013/CRP.6 of 26 March 2013.
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