LEGISLATOR VERSUS INTERPRETER:

HOW FAR IS IT NECESSARY TO SUPPLEMENT SPACE LAW ?

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ABSTRACT

Fundamental Space law has been existing for a quarter of a century. There have been treaties, agreements, principles created by the United Nations; special international agreements have been devoted to subjects of particular interest.

Yet, it has been emphasized more than once that it would be necessary to be more explicit with some fundamental notions of space law. Space lawyers now have to make a choice between the legislator and the interpreter.

In this paper, the author wishes to explain that the issue now is to keep space law as is is, and trust the interpreters who will have to deal with disputes occurring in the future; or try to adopt new texts which ought to be more and more sophisticated in order to avoid possible misunderstandings.

These are two completely different policies. Therefore a prerequisite is to thoroughly examine the ins and outs of each policy. On the one hand, it could be desirable to draft new texts. On the other hand, it could be more simple to contemplate the possibility of interpretation of existing legislation rather than to plan to improve the *corpus juris* of space law.

In this session devoted to "Emerging and future supplements to space law", it appears it is first advisable to contemplate what are the consequences of either creating new texts or going into more detail with the existing texts.

One must remember that the function of lawyers is twofold: first of all, they have to comment on existing texts, to pinpoint that some provisions are important, others are ambiguous or imperfect or unnecessary; secondly, they have to suggest that sometimes, these texts are incomplete, some definitions are missing and it is necessary to write new ones. By the way, if they are politely asked to do so, they are ready to draft the necessary supplements to existing law.

In space law, it has been may times emphasized that, in the space treaties, some important definitions are missing: outer space, space object, launching and so on. At the same time, with the continuous development of space activities, one may easily understand that it is necessary in the future to add new texts to the previous ones, in order to approach new questions or to take into account new problems relating to former questions.

But the present author would like to underline what is at stake in these supplements, that is the respective roles of the legislator and of the intepreter. If the work of the legislator were ever perfect, the interpreter would be unemployed. If the work of the legislator were insignificant, the interpreter would be overemployed.

1. WHO IS THE LEGISLATOR?

Indeed, the main legislator, in public international law and especially in space law has more than often been the United Nations, adopting treaties (in the past) or "principles" (at the present time). One must add that in order to create new organizations (Intelsat, Inmarsat, European Space Agency...,) many other treaties also have been adopted. These texts are never complete or perfect; they always are perfectible.

In order to improve a treaty, it is possible either to amend it, or to adopt a protocol to complete the original text.

The Outer Space Treaty (art XV) states that "Amendments shall enter into force for each State Party to the Treaty accepting the amendments upon their acceptance by a majority of the States Parties to the Treaty and thereafter for each remaining State Party to the Treaty on the date of acceptance by it". Similar provisions are included in the Rescue Agreement (art. 8), the Liability Convention (art. XXV) the Registration Convention (art. IX) (1) and the Moon Agreement (art. 17). All these texts indicate that amendments may be proposed by any State Party.

To date, none of these texts has ever been amended. No protocol has ever been discussed in order to supplement space treaties with specific points of law. On the other hand, "principles" adopted by the United Nations General Assembly have been taken up in order to deal with new subjects (direct broadcasting, remote sensing, and probably within a near future, the use of nuclear power sources in outer space) . Since they are not treaties, and therefore not compulsory, the problem of amending "principles" is irrelevant. Principles only state that the activities they deal with (direct broadcasting, or remote sensing) have to be carried out in accordance with public international law, especially the United Nations Charter and the Outer Space Treaty (2). Disputes arising from these activities have to be settled by pacific means (3).

From the seventies onwards, the trend in international texts consisted in providing many definitions of fundamental concepts (e.g. art I of the Liability Convention) (4). Sometimes very carefully worded definitions are used, for instance, in art. 3 & especially 16 of the 1988 Intergovernmental Agreement on the Space Station (concerning cross waivers of liability).

2. THE USE OF DEFINITIONS

First of all, a definition is a combination of words whose purpose generally is to distinguish one concept from another (5); it is then possible, in a given situation, to determine whether it fits inside or outside of the concept (6). A juridical regime is to be applied to some situations which fall inside the scope of the definition; another one is to be applied to other situations.

Therefore, the area covered by the rules included in an international convention, a contract or any juridical text depends of the concepts used in the text. The boundaries of the text are more or less precise, depending of the accuracy of the concepts used.

In international conventions, reservations made by States can limit the scope of the text. So do interpretative declarations made by States who do not wish to make reservations, but who prefer to make clear the meaning they intend to give to some provisions; actually interpretative declarations sometimes are not very far from reservations. It follows that all these techniques (definitions, reservations and so on) will have two prominent effects:

* first of all, they are very important for every party involved in space activities since they define the extent of space law . In particular, entrepreneurs have been concerned with a plethora of questions about the extent and the meaning of the applicable law, especially since the eighties, when the stress has been put on the commercialization of space activities.

* secondly, they determine the future scope of the text because, the more precise the text is, the more rigid it is to be. In this case, if a problem arises in the future, the interpreter will have a very narrow margin to deal with. Thus, before supplementing space

law, it is necessary to keep in mind that it could be easier to trust the interpreters who would be in charge of clarifying the issues at stake.

Actually, the first interpreter is the State. Anytime a problem arises in applying a treaty, States bring to light the meaning they give to the provision at stake.

3. WHO IS THE INTERPRETER ?

A prominent feature of space law is that one rarely asks for external interpretation. The parties themselves do prefer to manage the existing disagreements in order to prevent them to become disputes. A well-known procedure provided by the texts is to undertake appropriate consultations. In this respect, article IX of the Outer Space treaty is the first example of such a procedure. It has been established in order to prevent harmful interference between the activities or experiments of several parties to the treaty. Any State Party may request consultation (7). Obviously, consultation is a means of reconciling two points of view, in other words of interpreting a text without asking a third party to step in (8).

Consultation is also used in international contracts concerning space activities, usually as a preliminary step, in order to try to prevent an arbitration or a judicial procedure.

A closely related procedure is to be found in the Liability Convention whose article IX provides that a claim for compensation for damage has to be presented to a launching State through diplomatic channels. If no settlement arises through diplomatic negotiations within one year from the date on which a claimant State has submitted the documentation of its claim, one may establish the Claims Commission (9). This is another significant example emphasizing that the parties (to an international agreement, to a contract) intend to interpret a text without asking a third party to provide an objective interpretation. It is worth noting that in 1980, Canada and the USSR settled the Cosmos 954 incident only through bilateral negotiations (10).

In other words, entering in this flexible procedure, the parties are perfectly able to use a text as they wish or to alter a text they have signed in order to use it without having to amend or supplement it (11). But this is not necessarily so. Then, the interpreter has to appear.

4. TRUST THE INTERPRETER

If some concepts are not clearly defined, when a disagreement occurs, when a problem arises, the interpreter will have many opportunities of creating or streamlining the law, thus complementing the existing texts. Obviously, in so doing, the interpreter is not perfectly free. He has to keep in mind:

* The original text as it was drafted: were the lacunas made on purpose or unintentionnally ? In international law, many texts are ambiguous because it was the only way to get the approval of many different parties (12). This is one of the dead ends of international law: either texts are drafted in order to gather a large number of acceptations; thus, they are not supposed to contain many commitments; or texts are drafted in order to be precise and compulsory and it is likely that they will not enter into force within a few months and with many parties: we get a well-known example in space law with the Moon treaty which, to date, has been ratified by seven states.

* The time elapsed since the text has been adopted. Is the original text outdated and therefore unclear because the technical conditions have evolved in some directions rather than others ? Especially in the area of space law, technology regularly improves (13). It is thus necessary to consider the case in the light of the recent developments of technology: for instance, the Radiocommunication Regulation of the International Telecommunication Union which allocates different frequency bands to the fixed (FSS) and Broadcast (BSS) satellite services is considered outdated. In the *Autronic AG* case (1990), concerning direct broadcasting satellites, the European Court on Human Rights stated that it had to take into account the recent technical and juridical developments in order to shed light on the

merits of the case (14). Thus it considered it had to decide in accordance with the provisions of the European Convention on Human Rights rather than in accordance with the ITU's technically obsolete regulations.

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Indeed, one may consider that in a few States which can be considered as "launching states" by the Liability Convention (15) it is highly advisable to create municipal space legislation.

But in every other case, one may conclude that before supplementing space law, it is first advisable to think over whether it is really necessary or is it better to trust any future interpreter ? The present author does not push forward choosing one answer rather than the other. He rather advises to reflect over the matter.

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(1) Art. XXVI of the Liability Convention (also Art. X of the Registration Convention and art. 18 of the Moon Agreement) provided that ten years after its entry into force, the question of the review of the Convention should be included in the provisional agenda of the General Assembly of the United Nations in order to consider, in the light of past application of the Convention, whether it required revision. At the same time, it stated that "at any time after the Convention has been in force for five years, at the request of one third of the States Parties to the Convention and with the concurrence of the majority of the States Parties" a conference could be convened to review the Convention. Such review should take into account in particular any relevant technological development. This opportunity has never been made use of.

(2) See Principle B (Direct Broadcasting) and Principle III (Remote Sensing).

(3) See Principle E (Direct Broadcasting) and Principle XV (Remote Sensing).

(4) Also art. 1 of the Registration Convention; see also Principle I of the Principles on Remote Sensing.

(5) "A statement of the exact meaning of a word or phrase or of the nature of a thing" (Oxford Paperback Dictionary).

(6) See P.M. Martin, *Le droit des activités spatiales*, Ed. Masson, 1992, pp. 36-41.

(7) Consultation is also provided for in article 15 of the Moon Treaty. On the other hand, "consultation" in principle "J" of the "Principles on Direct Broadcasting" merely conceals the right for any State to veto unwanted broadcastings.

(8) See for instance, art. 23 of the International Agreement on the Space Station.

(9) The Claims Commission has to decide on the merits of the claim "as promptly as possible and no later than one year from the date of its establishment..." (art XIX § 3 of the Liability Convention).

(10) See M. Benkö and W de Graaf, The Use of Nuclear Power Sources in Outer Space in *Space Law in the United Nations*, Martinus Nijhoff, 1985, p. 50. Also B Hurwitz, Reflections on the Cosmos 954 Accident, *Proceedings IISL, 1989*, pp. 348-357.

(11) The most notorious case is article 27 of the UN Charter concerning the voting procedure in the Security Council. As early as 1946, the Security Council decided that abstaining in a vote was not equivalent to a veto. Yet the original text of the Charter clearly states that a decision is adopted only when all the five permanent members have approved it.

(12) It is a frequent way out in drafting Security Council resolutions. One may recall that the notorious resolution 242 (1967) on the Arab Israeli conflict was on purpose drafted ambiguously. The English text asked for "withdrawal of Israeli armed forces *from territories* occupied in the recent conflict" whereas the French text was "retrait des forces armées israéliennes *des territoires occupés* lors du récent conflit".

(13) See above [note 1] the provisions of the Liability Convention and of the Registration Convention concerning "any relevant technological development".

(14) See G. Cohen-Jonathan, La libre circulation internationale des informations par satellite - Note concernant l'arrêt Autronic de la Cour européenne des droits de l'homme, *Revue universelle des droits de l'homme*, vol 2, n° 9, 1990, 313-315.

(15) See P.M. Martin, Legal Consequences of the Lack of French Space Legislation, *Proceedings IISL, Montréal, 1991.*