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The Outer Space Treaty and the International Organisations conducting Space Activities

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Introduction

In considering the 1967 "Outer Space Treaty" ("the Treaty") and the place it accords to international organisations, I shall also be looking at the other Agreements established by the United Nations Committee on the peaceful uses of outer space (UNCOPUOS) and its Legal Subcommittee, namely, the Agreement on astronauts, the Convention on international liability for damage, the Convention on registration and the Agreement on the moon (note 1). The various Principles enshrined in Resolutions adopted by the United Nations General Assembly (on broadcasting, remote sensing, nuclear power sources, and the recent Declaration on the international cooperation for the benefit of mankind) have not been taken into account for the purposes of this article.

This body of law when setting out the principles governing the activities of States whilst underlining the need of international cooperation, adopts initially a restrictive position on international intergovernmental organisations. It is, however, inherently putting itself in difficulty, in that it cannot avoid emphasising international cooperation and the need to encourage such cooperation, though without going so far as to give full recognition to the international organisation.

The first mention of international organisation appears in Article VI. In discussing this point, it was impossible to be unaware of the differences among legal writers as to whether or not international organisations should be recognised as having legal personality. History was to favour a solution based effectively on the terms of reference of those organisations, which will continue to be -perhaps in a different form- undoubtedly among the major players in the conduct of space activities.

I propose to trace the course of this evolution, from the first efforts of the Member States of ESRO[1] and ELDO [2] (now ESA) through to the latest developments, notably in the context of the Intergovernmental Agreement on the international space station (IGA). What is becoming of the division that was introduced into space law at its inception? Should the entire subject be reviewed in the light of the general trend towards greater international cooperation involving more players in the conduct of space activities?

CHAPTER 1

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1 ESRO: European Space Research Organisation set up by the Convention opened for signature on 14 June 1962

2 ELDO: European Organisation for the Development and Construction of Space Vehicle Launchers set up by the Convention opened for signature until 30 April 1962

Principles: the legal precedence of States and the joint responsibility of States and international organisations in the conduct of space activities

The principle of international cooperation to further the objectives pursued by States in their space activities was a basis in COPUOS debates from the outset (stated in the UNGA resolutions) I am referring to Western Europe. No country in Western Europe had the necessary resources to proceed alone. International cooperation was essential and ELDO and ESRO were consequently established being coordinated on the political plane by the "European Space Conference" (ESC) (note 2), a body without legal personality. The ESC in turn set up a Committee charged with monitoring the work of the United Nations[3] and I am sure many of us will still remember the Chairman of that Committee, Mr A. Vranken, who played a prominent role in negotiating the Convention on liability and the New Delhi "compromise".

(a) The question first arose at the time of the Declaration of legal principles of 13 December 1963 and an initial answer is to be found at the end of § 5 which states that "when activities are carried on in outer space by an international organisation, responsibility for compliance with the principles set forth in this Declaration shall be borne by the international organisation and by the States participating in it". That line was to be taken again in the 1967 Treaty. Discussions on the subject eventually led to a distinction being drawn between the situation of States and that of international organisations (see note 3) and it was decided not to treat them in the same way, notably because international organisations could not exercise some of the powers exercised by States, a problem that still arises in practice. Article VI of the Treaty provides that States alone are to bear international responsibility for national activities in outer space but it acknowledges the reality of the international organisation in terms of the responsibility it shares with States:

"When activities are carried on in outer space, including the moon and other celestial bodies, by an international organization, 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."

Article XIII of the Treaty affirms that States are to have precedence, even when activities are conducted within the framework of an international organisation:

"The provisions of this Treaty shall apply to the activities of States Parties to the Treaty in the exploration and use of outer space, including the moon and other celestial bodies, whether such activities are carried on by a single State Party to the Treaty or jointly with other States, including cases where they are carried on within the framework of international intergovernmental organizations.

Any practical questions arising in connection with activities carried on by international intergovernmental organizations in the exploration and use of outer space, including the moon and other celestial bodies, shall be resolved by the States Parties to the Treaty either with the appropriate international organization or with one or more States members of that international organization, which are Parties to this Treaty."

The Treaty, like the other Agreements, was open for signature only to States (Article XIV.1).

It should be noted that this applies only to international intergovernmental organisations, not to institutions established under private law, which - as we know - now play a considerable part in the conduct of space activities. In this case, the principle of Article VI of the Treaty applies.

However, this approach left some questions open (for example, the international organisation will not be bound by the international Agreement since it is not a signatory or party to it). The beginnings of a change are already observable in the 1968 Agreement on the rescue and return of

3 ESRO and ELDO obtained observer status in COPUOS on 12 September 1972.

astronauts, which contains the following special provision (Article 6):

"For the purposes of this Agreement, the term "launching authority" shall refer to the State responsible for launching, or, where an international intergovernmental organization is responsible for launching, that organization, provided that organization declares its acceptance of the rights and obligations provided for in this Agreement and a majority of the States members of that organization are Contracting Parties to this Agreement and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies."

This provision implies tacit recognition that the international organisation has legal personality. Of course, this was a limited field (the astronauts rescue), of interest to humanity at large and calling for general cooperation.

(b) Further thought was given to the matter when the draft Convention on international liability for damage came to be examined in a completely different context, at a time when the first launches were beginning to take place, conducted by or on behalf of international organisations. The organisation itself had to reflect on its position. In Western Europe, the task of considering the subject was taken up by the above mentioned ESC Working Group charged with monitoring the work of the United Nations and the results were embodied in a draft Article submitted by the delegations of the States belonging to ESRO and ELDO. That Article served as a basis for Article XXII of the Convention on liability signed on 29 March 1972, which provides that:

"1. In this Convention, with the exception of Articles XXIV to XXVII, references to States shall be deemed to apply to any international intergovernmental organization which conducts space activities if the organization declares its acceptance of the rights and obligations provided for in this Convention and if a majority of the States members of the organization are States Parties to this Convention and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. "
This Article doesn't stop here and continues with provisions being guidelines for the States organization or what they have to do. It continues:

"2. States members of any such organization which are States Parties to this Convention shall take all appropriate steps to ensure that the organization makes a declaration in accordance with the preceding paragraph.

3. If an international intergovernmental organization is liable for damage by virtue of the provisions of this Convention, that organization and those of its members which are States Parties to this Convention shall be jointly and severally liable; provided, however, that:

(a) any claim for compensation in respect of such damage shall be first presented to the organization;

(b) only where the organization has not paid, within a period of six months, any sum agreed or determined to be due as compensation for such damage, may the claimant State invoke the liability of the members which are States Parties to this Convention for the payment of that sum.

4. Any claim, pursuant to the provisions of this Convention, for compensation in respect of damage caused to an organization which has made a declaration in accordance with paragraph 1 of this Article shall be presented by a State member of the organization which is a State Party to this Convention."

That Article marks an important stage in the process of according the international organisation the same treatment as States. Instead of "the provisions of this Convention shall be deemed to apply to any international organisation in the same way as to a State...", it adopted the following form of words, which was to become standard: "In

this Convention, references to States shall be deemed to apply to any international intergovernmental organisation ...".

As we know, the same clause was to be included in the Convention on registration (Article VII) and the Agreement on the moon (Article 16).

States and international organisations are not yet on an equal footing, as this presents certain legal difficulties, but we are in practice very close to that situation.

(c) The declaration of acceptance presupposes that a majority of the States members of the organisation are already Parties to the Treaty and to the Agreement in question. However, the organisation may not propose amendments to the Agreement (Article XXV of the Convention on liability) and nothing is said about what happens if the organisation withdraws its declaration of acceptance (Articles XXV and XXVII). The solution that has been adopted is therefore not an entirely satisfactory one from the international organisations' point of view and, taking into account the place occupied by international organisations, there is a case for resuming the discussions on the subject. As regards the manner in which the provision is applied, it is interesting to turn to the international organisation itself (at that time: ESRO, ELDO, Intelsat and Intersputnik) and in particular ESRO/ELDO, which merged in 1975 to form ESA.

CHAPTER II

The declaration of acceptance: procedures and implications

(a) How are the terms of the "standard" Article to be interpreted in practice? What does "declare" mean? The texts were silent on the subject, that is to say they left it to the organisation itself to find an answer. At the European Space Agency, the subject was discussed in the International Relations Advisory Group (IRAG), now the International Relations Committee (IRC) and a draft declaration was prepared, submitted to the ESA Council which adopted it unanimously, and finally lodged with the depositaries of the Agreement in question. In due course, the Director General of ESA forwarded declarations of acceptance of the Agreement on the rescue of astronauts, the Convention on liability and the Convention on registration, respectively, the other condition, namely that a majority of the Member States of ESA be Parties to the Agreement or Convention, being fulfilled in each case. The Director General of ESA also informed the Secretary-General of the United Nations of the establishment of the registry of space objects.

The standard text of the declaration of acceptance (note 4) is relatively simple, comprising:

- a preamble recalling the purpose of the European Space Agency, noting the provisions of the Agreement or Convention in question, and considering that a majority of the Member States are parties to the 1967 Treaty;

- a Declaration that the Organisation "accepts the rights and obligations" and "considers that the references made to the States Parties to the Convention (or Agreement) apply to it with effect from the date of this Declaration". In the case of the liability convention it makes no mention of recognition or of the fact that the decision of the Claims Commission is binding.

The declaration is a unilateral act which is binding upon all the Member States of ESA and which is consequently adopted by unanimous decision of those States. It should be noted that, because of the peculiar legal situation obtaining at that time, the declaration is subscribed, in accordance with an approved form of words, by "the European Space Research Organisation, established by a Convention opened for signature at Paris on 14 June 1962, conducting its activities as from 31 May 1975

under the name of European Space Agency".[4]
The Agency was the first intergovernmental space organisation to follow this practice in its declarations of acceptance (Eutelsat has since followed suit) and its declarations have been published in the ST/SG/SER-E)115 series.

(b) Other practical questions remained to be settled within the organisation.

(i) International liability for damage

The European Space Agency conducts both mandatory activities, in which all the Member States are required to participate, and optional ones, undertaken only by States wishing to participate, which contribute in accordance with a scale which they themselves decide. How can it be ensured that Member States not participating in an optional programme will not have to bear part of the cost of compensation, if damage is caused by a space object developed under the programme in question? What if a participating State withdraws from the programme before the damage occurs? What if a State participating in the optional programme in question is not a party to the Space Treaty? And what about the fact that, although the Agency is concerned solely with development and has no responsibility for commercial launches - which are carried out by the Arianespace company -, they take place on Agency property, namely the Ariane launch site in the French Department of Guiana? So the Agency is a "launching State"(note 5).

The principles, the fundamental answers, are to be found in a Resolution adopted by the ESA Council on 19 December 1977 (note 6) and in a series of Agreements concluded between the Agency and the French Government on access to and use of the Guiana Space Centre (CSG) and the Ariane launch site, as well as in the Convention with Arianespace and the latter's launch contracts with its clients, not to mention the Arrangements or Declarations relating to the optional programmes (note 7).

(ii) Registration of space objects

The Convention on registration of space objects contains the same Article on acceptance by an international organisation. However, the application of that Article by the organisation raises questions concerning the difference between a State and an international organisation in respect of certain powers which the international organisation does not have.

Before accepting that Convention, ESRO had asked the UN Legal Adviser about keeping the registry of space objects and about the concept of a "State of registry". In his reply, dated 19 September 1975, the UN Legal Adviser said that an international organisation was regarded as a launching State and could therefore register space objects. He acknowledged that the question of jurisdiction and control over space objects and personnel on board was not addressed in the Convention itself: "It would seem reasonable ... that the Organisation when considering the registration of the space object, should consider also the question as to which of its Member States could most appropriately exercise jurisdiction over the space object and its personnel... When an international intergovernmental Organisation launches a space object jointly with one or more States, the provisions of para. 2 of Article II are relevant" (note 8).
It remains to determine what constitutes a space object and a joint launch. The first case in point arose with the 1973 Spacelab Intergovernmental Agreement between the US Government and the Member States of ESRO participating in the Spacelab programme. Was Spacelab a space object eligible for registration? (Note 9) The American authorities thought not, because Spacelab was not self-contained but remained attached to the Shuttle. Non-American personnel and the results of the experiments, including those financed by Europe, were consequently

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4 The ESRO Convention served as a legal basis during the period of de facto application of the Convention of the European Space Agency, which was opened for signature on 30 May 1975, and Article XIX of the ESA Convention governed the continuity of rights and obligations from its entry into force on 30 October 1980.

governed by US law. The Europeans took the opposite view, contending that the concept of a "space object" had not been defined and there did not appear to be any justification for holding that all activities on board should automatically be governed by US law, especially as the same Agreement took a different line on the subject of damage that might be caused by Spacelab on its return!

The subject came up again in connection with the international space station and the 1988 IGA and the same solution was adopted in a new version, which is to be signed soon. The answer (see Article 5) is based on the concept of jurisdiction and control and on the fact that Europe's contribution, the Columbus module now known as the COF, is regarded as a space object and therefore eligible for registration despite the fact that it is attached to the station. The same reasoning applies to the Canadian robotic arm. It is true that we are now moving towards a wide definition of space objects but this was the only way of protecting the legitimate interests of the various partners and reaching a generally agreed solution.

This broad approach is reflected, for example, in the provisions on ownership of assets, intellectual property, the implementation of the Convention on liability, patents, criminal jurisdiction, etc. As regards the personnel involved, the safety of the on-board team will be the determining factor and here too solutions will have to be found that are in keeping with the international nature of the station. The IGA is thus a major extension of the Space Treaty and, as we know, responsibility for implementing it has been assigned to national bodies (NASA, RKA, CSA) and to ESA, with the result that the various MOUs and Arrangements have become a rich source for the development of space law.

The European Space Agency therefore maintains a registry of space objects launched by the Agency or on its behalf (satellites, the third stage of Ariane), though there are for the present no entries under the heading "State of jurisdiction".

(iii) The crew - There are three sources for the provisions governing the international crew and, in particular, the role of the station commander: the IGA, the MOUs between the Agencies involved in the venture, and the Code of conduct drawn up by the Agencies and approved by the partners (a draft has still to be drawn up). As an extension of the Agreement on rescue, consideration is now being given to life and work on a space station, today in outer space, tomorrow on the moon. Add to this the provisions on criminal liability, and we have the beginnings of a legal status for astronauts in space (note 10).

Conclusion

The evolution of space activities, space law and the role of the international organisations

To conclude, in view of the ever increasing international cooperation and ever greater resources required to conduct space activities (mission to Mars for instance) and the demand for their effects to be deployed to the greatest possible advantage, the international organisation, possibly in a more advanced form [5](note 11), is becoming an essential player, not yet in the field of primary law but certainly in the context of secondary law. I offer the following examples:

- observation of the Earth's resources, and the MOUs concluded by ESA on the collection and processing of satellite data (ERS-1/ERS-2, etc.), in particular, as well

5 It should be mentioned that there is a move to privatise certain intergovernmental space organisations (Eutelsat, Inmarsat, Intelsat) and we therefore need to consider ways of ensuring continuity in the application of the principles of space law, of Article VI of the Treaty in particular and of the relevant provisions of other Agreements, Liability and Registration Conventions.

as in the areas of meteorology and satellite navigation (GNSS)[6];

- monitoring space debris, and the leading role played by ESA in this area, in establishing the Inter-Agency Space Debris Coordination Committee (IADC);

- scientific research (Hubble, Giotto, etc.) and astronomy, including ground stations.

I should not wish to close this brief review without mentioning the teaching of space law. It is taught in our universities, of course, but its essential elements are also becoming part of the intellectual baggage of the citizens of tomorrow. The Agency supports the activities of the European Centre for Space Law, which has been instrumental in reviving Europe's interest in this branch of the law (note 12). Space law is constantly expanding, on the firm basis of the Treaty, and the international organisation's contribution to this development is far from negligible.

6 Various organisations are concerned: R&O, exploitation and operators (private?), plus the regulatory aspects (ICAO). How to ensure the ??? between the Space Law and the law of space activities?

Notes

(1) Declaration of legal principles governing the activities of States in the exploration and use of outer space - UNGA Res. 1962 (XVIII) - 13 December 1963.

Treaty on principles governing the activities of States in the exploration and use of outer space, including the Moon and other celestial bodies, opened for signature on 27 January 1967, entered into force on 10 October 1967.

Agreement on the rescue of astronauts, the return of astronauts and the return of objects launched into outer space, opened for signature on 22 April 1968, entered into force on 3 December 1968.

Convention on international liability for damage caused by space objects, opened for signature on 29 March 1972, entered into force on 1 September 1972.

Convention on registration of objects launched into outer space, opened for signature on 14 January 1975, entered into force on 19 September 1976.

Agreement governing the activities of States on the Moon and other celestial bodies, opened for signature on 18 December 1979, entered into force on 11 July 1984.
See UN Treaties and Principles on Outer Space - A/AC.105/572 1994.

(2) M. Bourély, La Conférence spatiale européenne, A. Colin, Dossiers U2 - Paris, 1970.

(3) Marco G. Markoff, Traité de droit international public de l'espace, Pedone Paris, 1973.

N. Jasentuliyana, Manual on Space Law, Oceana publications, 1979.

Y. Kolossov, International Space Law, Praeger, 1984.

(4) G. Lafferranderie, Responsabilité juridique internationale et activités de lancement d'objets spatiaux au CSG - Bulletin ESA, novembre 1994.

H. Kaltenecker and J. Arets: La position et la responsabilité des Organisations internationales de l'espace dans la Convention relative à la responsabilité concernant les dommages causés par le lancement d'objets dans l'espace extra-atmosphérique - XII IISL Colloquium, 1969.

(5) Declaration of acceptance (attached).

(6) G. Lafferranderie, L'application par l'Agence spatiale européenne de la Convention sur l'immatriculation des objets lancés dans l'espace extra atmosphérique - Annals of Air and Space Law, Vol XI, 1986, 226-235.

(7) ESA Council Resolution, December 1977 - cf. ESA Basic Texts, Vol. I (attached).

(8) CSG and ELA Agreements between the French Government and the Agency - Articles 13 and 14, respectively, ESA Basic Texts.

A further problem arises should the Agency's facilities at the CSG be used when a space object belonging to a non-Member State is launched from an aircraft or from the CSG.

The Agency agrees to indemnify the French Government against any claim for damage, prejudice or loss sustained by an ESA Member State, non-Member State or nationals of such States as a result of carrying out an ESA programme at the CSG, save where the damage is caused by gross negligence, a wilful act or deliberate omission on the part of a servant or agent of the French Government. The Agency bears sole liability where its activities do not involve use of CSG facilities.

(9) M. Bourély, Legal problems related to Spacelab Flight, IISL Colloquium, 1978.

G.B. Sloup, Legal regime of international space flights: criminal jurisdiction and command authority aboard the space Shuttle/Spacelab, 21 Colloquium IISL, 1979.

Gorove, Space Shuttle and the law, 1980, University Mississippi Law Center.

(10) G. Lafferranderie - Pour une Charte de l'astronaute, 12 Ann. Air & Space Law 263, 1987.

M. Bourély - Towards a Convention on the legal Status of Manned International Space Flights - IISL, 1980.

Draft Convention on manned space flights, a joint project by Prof. Bockstiegel, Prof. Vereschetin and Prof. Gorove - in Journal of Space Law and Manned Space Flight, Prof. Bockstiegel - Ed. Cologne, 1993.

(11) Outlook on Space Law over the Next 30 years, Kluwer 1997. Ed. G. Lafferranderie and D. Crowther.

(12) G. Lafferranderie and P.H. Tuinder - The role of ESA in the evolution of Space Law. Journal of Space Law, vol. 22, n° 1 and 2, 97-113.