

## REFLECTIONS ON THE INTERESTS OF LESS DEVELOPED COUNTRIES: THE LAW OF OUTER SPACE AND THE LAW OF THE SEA

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### ABSTRACT

The exploration and use of outer space has progressed dramatically in the last decades. However, one feature remains constant, namely the small number of developing countries participating in these activities. The growth of activities and its consequences call for a revision of the meaning of the concept of "legal equality of States" laid down in the international texts on outer space.

Information, insofar as access, confidentiality and restrictions are concerned, is a field in which any gap in the law becomes clearly manifest and where the need to protect the rights of a majority of States which lack the necessary technologies and economic means to explore and exploit those areas is easily perceived.

The Law of the Sea, within the framework of the 1982 Montego Bay Convention, provides interesting examples concerning less developed States or States in a geographically disadvantaged position. This law-making experience may be useful –with a few adjustments– in the field of teleobservation of the Earth and

protection of the environment by means of space technologies.

### INTRODUCTION

The regulation of the activities of States and international intergovernmental organizations of a regional nature in outer space and celestial bodies is based on the need for mankind to search for and explore new resources and on the possible existence of such in outer space. It is also based on the advances of technology which have made possible the exploration and exploitation of outer space, the moon and other celestial bodies with increased skills. Since the end of the sixties, technological achievements, coupled with the growing complexity of relations between States, clearly showed the deficiencies to regulate the new situations. This scenario worsened in the eighties when the international treaties on outer space become outdated as a result of technological progress and the activities of the super space powers (1).

It should be pointed out, at this stage, that the present paper assumes, as starting point, the factual imbalances perceived in the use of outer space. It does not, however, examine the social, economic, cultural and political reasons advanced in

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connection with the enormous gap between development and underdevelopment (2).

to information on the part of all States actors (regardless of their degree of development), international and regional organizations, legal entities and individuals.

Consequently, the objective is not find solutions to this problem but, rather, to submit proposals from the legal standpoint with a view to allowing and, later, improving the conditions of access

The "equality-inequality" formula

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Most of the countries in the world are not in a position to have their own satellites nor the technologies to enable them to control any such activity and, if necessary, to prevent the activity carried out by other States and international organizations in outer space to continue.

This absence of equality as regards resources runs counter to the principle of "legal equality" laid down in Article I of the Space Treaty where it is provided that the exploration and use of outer space, including the moon and other celestial bodies, will be carried out for the benefit and in the interest of all countries, on a basis of equality.

A possible solution to this clear imbalance of forces is provided by the same Article when stating that international cooperation for scientific research should be encouraged.

In addition, Article III of the 1967 Space Treaty clearly refers to the role given to international cooperation.

The duty of cooperation in the field of information assumes that States are responsible, especially in the initial stages, to collect and exchange data. This is in fact an obligation "to do something" which has hardly ever been observed by those States which carry out activities in outer space.

In other words, when a State, either individually or jointly, engages in the exploration of outer space, it is exercising a real monopoly in the handling of information. There are no legal rules to ensure fair competition as regards the distribution of information. Consequently, the duty of cooperation is affected by said monopoly and by the lack of precise legal rules on the matter.

Perhaps an institution along the lines of the "Authority of the Area", created in the framework of the Law of the Sea, should be envisaged for outer space. One of its main tasks should be to regulate and ensure access to information obtained by

some members of the international community so as to avoid the monopoly which, necessarily, takes place in the initial stage.

### Access to information

The contradiction between the principle of most absolute freedom in the observation, teledetection and, in turn, restricted access to the information collected, evidences a sharp inequality between powerful and poorer countries. As pointed out by Maureen Williams (3), a distinction should be made between teleobservation activities, in themselves, and the use one may give to the information collected. In the first case it is doubtless that, *de lege lata*, such activity is legal and perfectly consistent with the 1967 Space Treaty. In the second instance, however, the sovereign rights of States over their natural resources could be affected.

Among the high economic implications of the most powerful countries pride of place should be given to remote sensing satellites (4), telecommunication satellites, meteorological and climate exploration satellites and satellites used for maritime purposes and oceanographic research.

One of the crucial questions for less developed States is their access to information gathered by industrialized countries using modern technologies. The teleobserved State (namely the less developed one), does not have a preferential treatment nor does it have control over the prices and distribution of such information which leads to economic speculation on the part of State-actors or others, such as private entities (5). Privatization of remote sensing may, in turn, imply an increase in the cost of exploration.

The problem is clearly perceived with the restrictions imposed to access to information on the basis of national security of intergovernmental agencies. This negative, however, runs counter to the exploration carried out by those same

agencies in total freedom , with no possibilities of an effective control and without taking account of security conditions of developing countries.

Another aspect to be taken into account when evaluating access to information is the fact that it is scattered between governments and other national institutions. Some efforts to systematize the collected information and setting up a data bank have been undertaken by the UNEP. However, in this case the objective is confined to the creation a bank of space data concerned exclusively with the conditions of life on Earth.

#### Confidentiality of information

The next problem to tackle is the confidential nature of the information collected. In principle, it should be strictly confidential if we are to respect the principle of complete and permanent sovereignty of States over their natural resources and wealth. In other words, it should be limited to the State or international organization obtaining the information and, naturally, to the teleobserved States .

However, the fact is that confidentiality varies in accordance with the characteristics of each teleobservation activity. Thus, it seems necessary to agree previously on the conditions in which access to information - as well as its distribution - will be handled.

Nevertheless, the duty of international cooperation, which is a legal obligation in these new areas, is gradually gaining ground. Therefore , and to say the least, there would be a duty to give preferential rights to the teleobserved States in their access to information.

It seems pertinent to recall that the draft submitted jointly by Argentina and Brazil on teleobservation, later supported by Venezuela, Chile and Mexico, is an important precedent in the way towards a treaty on the teleobservation of natural resources by means of space technologies

(6). The Argentine proposal envisaged the establishment of an international information centre in charge of the distribution of the information collected by these means.

No doubt the adoption of the Principles relative to Teleobservation of the Earth from Space (7) is an important achievement. The inclusion of a number of definitions on teleobservation, primary data, processed data, analyzed information and teleobservation activities enlightens the topic and helps in the understanding of the concepts. Principle II, providing that teleobservation activities should be carried out for the benefit and in the interest of all countries, irrespective of their degree of economic, social, scientific or economic development and having in mind especially the needs of developing countries, is of particular significance.

#### An Authority for Teleobservation

Part XI of the 1982 Convention on the Law of the Sea relating to "the Area" , and which refers to the Seabed and Ocean Floor beyond national jurisdiction, considers these regions as a common heritage of mankind (cf. UNGA Res. 2749 and Article 136 of the Law of the Sea Convention). By analogy, it would appear sensible to think of a similar régime for outer space (8).

On this question article 137, paragraph 2 of the above-cited Convention should be had in mind when establishing that the rights over the Area belong to the whole of Mankind in whose name the Authority would be acting . In spite of Part XI of the 1982 Convention having been revised in 1994 in New York, and a new Agreement adopted on this question, the cited provision is an important precedent. That is to say, that an institution was envisaged to represent Mankind with functions both expressly defined and implicitly (Art.157, paragraph 2). In addition to its composition, also its venue and functioning were contemplated.

Among its organs, mention should be made of an Assembly, a Council (with executive powers), a Secretariat and the Enterprise to deal with the actual carrying out of activities. It is interesting to observe that the Council is made up by all those sectors having invested in the Area.

It may be wondered whether the setting up of a similar institution in the field of space law would help to create a forum for discussion and eventual solutions for the many disparities among the different actors in this field.

Its main duties would include:

1. to receive information to be provided, compulsorily, in connection with all teledetection activities carried out by States and international organizations.
2. to inform the State whose territory and resources are being teledetected, or are a potential field for this activity, in accordance with paragraph 1 above.
3. To act as forum for dispute settlement related to the obligations to inform, to the opposition of a State or international or regional organization to a programmed activity or in connection with restrictions or opposition to the carrying out of a given activity or the access to information collected by teleobservation activities. The procedure for dispute settlement could be similar to the one adopted within the framework of the WTO, namely, a three-stage mechanism: consultation, intervention of the Authority by means of a group of experts (where the list of candidates and members of the groups would be drawn from a list previously agreed upon and deposited with the Secretariat of the Authority) and, finally, arbitration.
4. This Authority could also be entrusted with a further activity involving the management of benefits derived from the commercialization of information, and the equal distribution of financial benefits arising from activities in the

area by means of appropriate mechanisms on a basis of non-discrimination (pursuant to the Montego Bay Convention).

#### Payments and contributions concerning teleobservation carried out with commercial purposes

The interests in accessing reliable information in connection with the activities of States or international organisations in space are strongly linked to the issue of contamination of the space environment and, more specifically, space debris. It is fair to support the idea that everybody should be informed of the risks to the environment as well as risks for astronauts and crew, and third parties on the ground, arising from space activities.

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#### Protection of outer space

Article IX of the 1967 Outer Space Treaty expressly establishes an obligation on States Parties to carry out the necessary investigations to avoid the harmful contamination of the earth environment and adopting the necessary measures in case of adverse changes arising from the introduction of extraterrestrial matter (10). Here is no doubt a lacunae in the law.

There are no clear obligations to protect the environment of outer space, the moon and other celestial bodies from activities carried out in those areas. There is a real need to adopt new law with a view to ensure an effective protection of the earth and space environment from any harmful effects arising from the exploration and use of outer space.

To prevent and control contamination and other risks and avoid affecting the equilibrium in the space environment appear to be a reasonable task to be entrusted to an authority or institution established -and accepted- by the international community. Likewise, in this field, the Law of the Sea Convention

provides a good example in Article 145 and Part XII (Arts. 192-196) of the Montego Bay Convention.

However, in this area it seems advisable to have a number of regional authorities to ease the coordination of national programmes. These authorities could sponsor regional programmes as well (11).

The conservation and rational use of resources (both explored and unexplored) in outer space, the moon and other celestial bodies is a task that lies upon the international community which could only be effective if States and international organizations engaged in space activities cooperate in a serious manner.

An important precedent in this sense is given by the ILA Instrument on the Protection of the Environment from Damage Caused by Space Debris (12) adopted at the 66<sup>th</sup> Conference of that institution in 1994 in Buenos Aires. If we have in mind the comments made thereto by Prof. Charles Bourne (13) from the Canadian Branch of the ILA, it is easy to understand the very close relationship between the protection of the environment and the unilateral obligation to inform, as well as the duty to exchange information, with the objective of reducing environmental risks.

#### FINAL REFLECTIONS

To conclude, it is advisable to design policies at the international and regional level. To this end, new institutions are needed to establish the conditions for exploration and use of outer space in a way that the needs of mankind as a whole are met.

Exploring and exploiting imply risks that not all States are able to confront given the disparities insofar as technology is concerned. However, and in the case of developed States, an early determination of all risks involved may lead to stopping the activity in question. This would not mean a retreat but, rather,

an advancement. The principle of the “hiding hand” outlined by Albert Hirschmann (14) which tends to conceal obstacles, is strongly related to technological development. Therefore, the idea of creating institutions to monitor and protect resources, as well as to act as a discussion fora for the common action of all those involved in space activities would help to enforce the duty of international cooperation and establish more equitable conditions in the access to and transfer of results concerning information and environmental protection. These institutions, however, should by no means be seen as a stumbling block for technological development nor should they overlook the existing differences among actors.

#### NOTES

1. The legal texts governing this matter are the 1967 Outer Space Treaty, the 1968 Astronauts Agreement, the 1972 Liability Convention, the 1975 Registration Convention and the 1979 Moon Agreement.
2. For further thoughts on the subject, see Mariano Grondona, “Hacia una teoría del desarrollo. Las condiciones culturales del desarrollo económico”, publ. by Ariel Planeta, Buenos Aires 1999. An interesting study concerning developed and developing countries as to the media regulation, access to information and the proposal of a new information order may be found in Francis Balle, “Comunicación y Sociedad-Evolución y carácter comparativo de los medios”, publ. by Tercer Mundo Editores, Colombia 1991, especially chapter 2 of Part 2 entitled “Antiguos y Nuevos Desafíos”.
3. Williams, Sylvia Maureen, “Las actividades de los Estados en el espacio ultraterrestre a la luz del Derecho Internacional Positivo”, in Revista del Colegio de Abogados de la Ciudad de Buenos Aires, 1979, Vol. XXXIX, N°1, pp. 63-4.
4. In 1967, by means of Landsat, NASA started developing teleobservation

- activities. See Giovanni Caprara in "Enciclopedia ilustrada de Satélites Espaciales", Ed. ANAYA S.A., Madrid 1986, who makes a detailed description of exploration satellites detecting earth resources, meteorological satellites, navigation satellites, communication satellites, military satellites, scientific and technological satellites, etc.
5. Among the most critical opinions concerning communication satellite technologies, see Hamjid Mowlana, "Oportunidades y Desafíos para el Sur", in Revista Cooperación Sur del Programa de las Naciones Unidas para el Desarrollo-Dependencia Espacial para la Cooperación Técnica entre Países en Desarrollo, N° Dos, New York, 1998, pp.24.44.
  6. Doc. A/AC.105/C.2/L.73 and Doc. A/C.1/1047.
  7. Doc. Adopted by the UNGA in December 1986.
  8. A recent CEPAL publication analyzes in detail the relationship between the action of the Seabed Authority and less developed States. See "La Autoridad Internacional de los Fondos Marinos: un nuevo espacio para el aporte del Grupo de Países Latinoamericanos y Caribeños" (GRULAC/C. Artigas, CEPAL 2000 (Serie Recursos Naturales e Infraestructura, 6).
  9. The Report entitled "Our Common Future – Nuestro Futuro Común" (World Commission for the Environment and Development, 1987) envisaged, among the different possibilities for resource management in the geostationary orbit, the establishment of an international organisation which would grant licenses on the basis of a tender. This system is similar to the one adopted for the Law of the Sea where the creation of an International Authority for the Seabed was considered.
  10. See Silvia Maureen Williams, "El Riesgo Ambiental y su regulación", Abeledo-Perrot, Buenos Aires, 1998. In particular, see chapter, I, 2, entitled "El Artículo IX del Tratado del Espacio", pp.52-56, and Sandra C. Negro, "Cooperación Espacial Comunitaria", Ed. Ciudad Argentina, Buenos Aires, 1997, especially chapter I on "La Cooperación Internacional en la regulación jurídica del espacio", pp. 39-42.
  11. On this question the Law of the Sea also provides important experiences following the creation of the Commission for Fisheries in the North Pacific and the International Commission for Fisheries in the South Atlantic.
  - 12 See S.M.Williams, "El Riesgo Ambiental y su Regulación", Abeledo-Perrot, Buenos Aires, 1998.
  13. Op. Cit.in note 12, pp.131-132.
  14. See Hirshman, Albert, "The principle of the hiding hand", The Public Interest, Vol.6, Winter of 1967, pp.10-23.

**NOTE: the author participates in the Research Project on "Dispute Settlement in Contemporary International Law", conducted by Prof. Maureen Williams and sponsored by the University of Buenos Aires.**