IISL-01-IISL.1.09

SOME THOUGHTS ON STATE RESPONSIBILITY AND COMMERCIAL SPACE ACTIVITIES

Luis F. Castillo Argañarás[1]

Adjunct Professor of Public International Law- Universidad de Buenos Aires and Universidad Argentina de la Empresa. Email: lfcastillo@netline.com.ar

ABSTRACT

Roberto Ago, from the initial steps of his work on State Responsibility as Special Rappourter of the International Law Commission, made a distinction between "primary" and "secondary" rules of international law. Ever since, this topic has been the object of sharp academic controversies surrounding the issue of primary and secondary obligations resulting from a breach thereof.

Articles 20 and 21 of the ILC Draft established a difference between obligations of conduct and obligations of result. The elucidation of this point is absolutely vital in order to determine the breach of an international obligation.

The purpose of this paper is to discuss the existence of primary rules within article VI of 1967 Outer Space Treaty, and to establish the nature of the obligations arising therefrom. Moreover, the author will attempt to determine whether these obligations imply obligations of conduct or obligations of result. The question of State responsibility is considered essential when dealing with the commercialization of space activities. As a practical example, the space activities carried out in recent years by Argentine Republic will be examined.

INTRODUCTION

Over thirty years have gone by since 27 January 1967, when the "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including The Moon and Other Celestial Bodies"[1] was opened for signature (hereinafter the Outer Space Treaty). As commented by Peter Malanczuk[2], when Manfred Lachs, known as the father of this Treaty, gave his course at The Hague Academy of International Law on " The International Law of Outer Space" in 1964, the issue of different actors taking part in space activities did not really worry him. Naturally, as indicated by Malanczuk[3], at that time the focus was on the role of States alone. Nowadays we find new actors involved in space activities, a field where the exploitation by private enterprises has become of great importance.

As Manfred Lachs has observed, to extend the international legal regime governing States on Earth into outer space has as a major consequence, viz. the extension of State responsibility. For this reason it is essential to analyze international State responsibility and its application to

commercial space activities. For practical reasons, space activities carried out by Argentina will be addressed in the following pages.

STATE RESPONSIBILITY

As Ian Brownlie stated: "the law of responsibility is concerned with the incidence and consequences of illegal acts, and particularly the payment of compensation for loss caused"[4]

Roberto Ago, from the initial steps of his work in this area, believed it essential to distinguish between "primary rules" and "secondary rules". Primary rules establish primary obligations, and secondary rules, secondary obligations. Secondary obligations are those originated from the breach of a primary obligation, and primary obligations are those imposed on States directly by international law. Secondary obligations come into polay play when the "primary" ones are violated.[5]

Article 1 of the International Law Commission's Draft Articles on State Responsibility states:

"Every internationally wrongful act of a State entails the international responsibility of that State"[6]

This article is consistent with the reasoning of the Permanent Court of International Justice in the Chorzow Factory case (Indemnity) (Jurisdiction) who held in 1928:

"It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention, and there is no necessary for this to be started in the convention itself"[7]

Bin Cheng[8] explains that the term "responsibility" is often used as synonymous with the term "obligation" and this is not, in fact, the proper meaning. In this sense he refers to the "German-United States Mixed Claims Commission" (1922), when referring to : "Germany's financial responsibility", It uses the word "responsibility" in an improper way. This confusion will be found many times throughout the decision as the Commission spoke generally of the "financial obligations" of Germany[9]. Bin Cheng explains that the so-called "financial responsibility for losses occurring during belligerency" means no more than the "financial obligations to compensate for losses occurring during belligerency". To support his point of view, this author quoted Administrative Decision N° V (1924) of the Commission, stating:

"The Treaty[10] embodies in its terms a contract by which Germany accorded to the United States, as one of the conditions of peace, rights in behalf of American nationals which had no prior existence but which were created by the treaty. While these Treaty terms doubtless include obligations of Germany arising from the violation of rules of international law or otherwise and existing prior to and independent of the Treaty, they also include obligations of Germany which were created and fixed by terms of the Treaty. (footnote No 19: A large proportion of the financial obligations fixed by paragraph 9 of Annex 1 to Section of Part VIII of the Treaty of Versailles as carried by reference into the Treaty of Berlin did not arise under the rules of international law but are terms imposed by the victor as one of the conditions of peace). All of these conditions, whatever their nature, are merged in and fixed by the treaty".[11]

From the above quotation of the Administrative Decision it is evident that the so-called Germany's "financial responsibility" refers to a contractual, or conventional, obligation of a pecuniary nature. Thus, we may find three kinds of obligations:

1) obligations arising from a contract
2) obligations arising from the violation of rules of law
3) obligations arising under other circumstances

Bin Cheng recommends that special attention should be paid to the second kind of obligation: "obligations arising from the violation of rules of law"; for it will be seen that the commission of an act in violation of

law gives rise to immediate responsibility, involving a legal obligation to make reparation for all the prejudicial consequences caused to others by the act. This is the proper meaning of "responsibility" in law.[12]

Professor Crawford, when analysing the breach of an international obligation in his Second Report on State Responsibility at the International Law Commission, has drafted a new version of articles 16 and 17 of the Draft adopted on 1996. The new text provides as follows:[13]

"There is a breach of an international obligation by a State when an act of that State does not comply with what is required of it under international law by that obligation, regardless of the source (whether customary, conventional or other) or the content of the obligation"

Before going deeper into the juridical instruments that govern space activities we must clarify a distinction generally made between obligations of conduct and obligations of result. This distinction was made in the former articles 20 and 21 of the Draft of State Responsibility of the International Law Commission as follows:[14]

"Article 20:

"There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation"

Article 21:

"1. There is a breach by a State of an international obligation requiring it to achieve, by means of its owns choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.

2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation!

In the commentary to these articles, according to Professor Crawford[15]; the distinction is "of fundamental importance in determining how the breach of an international obligation is committed in any particular instance". This is so because it affects both whether, and when, a breach of obligation may be judged to have occurred. In particular, the conditions in which an international obligation is breached vary according to whether the obligations requires the State to take some particular action or only requires it to achieve a certain result, while leaving it free to choose the means of doing so. The essential basis of the distinction is that obligations of conduct, while they will have some purpose or result in mind, determine with precision the means to be adopted. Therefore they are sometimes called obligations of means. By contrast, obligations of result do not do so, leaving it to the State party to determine the means to be used. This does not mean that the State has a free choice of means. Its choice may be constraine tosome extent. But it will have a degree of choice, and indeed in some cases, it may have a further choice, to remedy the situation if no irrevocable harm has been done by a failure of the means originally chosen.[16] Professor Crawford continues quoting as example, the adoption of a law, while it may appear inimical to the result to be achieved, will not actually constitute a breach; what matters is whether the legislation is actually applied. In such cases, the breach is not committed until the legislation is definitively applied in the particular case, producing the prohibited result.[17]

The Special Rapporteur on State Responsibility explains that in the commentary to articles 20 and 21 it is clear that they carry a distinction between different types of obligations established by the primary rules and seek to develop the consequences of that distinction in terms of responsibility. Then the main consequence of

that distinction is that: "the existence of a breach of an obligation of (result) is thus determined in international law in a completely different way from that followed in the case of obligation of conduct or of means where ...the decisive criterion for concluding that the obligation has been fulfilled or breached is a comparison between the particular course of conduct required by the obligation and the conduct actually adopted by the State"[18]

In the Second Report, Crawford[19], considers that the distinction between obligations of conduct and of result derives from civil law systems. According Cambacau: "the law or contract limits itself to reducing the risk and engaging only an obligation of means"[20]

Professor Crawford considers that in civil law systems obligations of result involve in some measure a guarantee of the outcome, whereas obligations of conduct are in the nature of best efforts obligations, obligations to do all in one's power to achieve a result, but without ultimate commitment. Under this conception, it is clear that obligations of result are more onerous, and breach of such obligations correspondingly easier to prove than in the case of obligations of conduct.[21]. An obligation of conduct is an obligation to impose a more or less determinate conduct. An obligation of result gives the State a choice of means.

The above-mentioned author considers that in adopting what was originally a civil law distinction, the draft articles have nearly reversed its effect. But of course it does not follow that a distinction which has clear meaning and rationale in national legal systems will necessarily be applied in the same way in international law. It is necessary to treat the issue in the terms adopted by the draft articles, even if these are not those of any particular system of national law.[22]

Tomuschat, cited in the Second Report presently analysed[23], remarks that "difficult to apply, the distinction between obligations of conduct and obligations of result provides little help to those having to determine whether a breach of an international obligations has occurred". Crawford[24] believes that most writers, however, consider the distinction to be of limited value. It has been stressed that there is not always a clear-cut line between the two types of obligations, in addition to the fact that they may be intertwined to such an extent that they lose their distinguishing features. Overall, the special rapporteur sees little support in the literature for retaining this distinction, at least in the manner adopted on first reading[25]. However, Cambacau believes the distinction to be "indispensable in principle". And this author concludes that: "the validity of notions such as means, conduct, result, objective...being applied to rules in cases where what at first appears to be the result of a behaviour is itself a behaviour, and where each of the means offered to the party fulfilling the obligation still provides for a choice of means"[26].

Finally the Special Rapporteur drafted a new article 20[27]:

"1. An international obligation requiring a State to adopt a particular course of conduct is breached if that State does not adopt that course of conduct

2. An international obligation requiring a State to achieve, or prevent, a particular result by means of its owns choice is breached if, by the means adopted, the States does not achieve or prevent that result"

The Special Rapporteur states that this article replaces former articles 20 and 21, concerned with the distinction between obligations of conduct and of a result and "whether a particular obligation is one of conduct or result depends on the interpretation of the relevant primary rule. The statement of the distinction between such obligations does not exclude the possibility that a particular primary rule may give rise to obligations both of conduct and of result"[28]:

ARTICLE VI OF OUTER SPACE TREATY

State responsibility is an essential element in the field of commercial space activities. Therefore it is necessary to analyze the effects of the general theory of law on article VI of Outer Space Treaty .

Bin Cheng[29] recalls that in the negotiations leading to the conclusion of the Space Treaty, the Soviet Union intended to restrict space activities to States only, excluding private entities, whilst the United States advocated the inclusion of private entities as well. Article VI reflects a compromise between these two positions. The result is, to Bin Cheng, that non - governmental national space activities are assimilated to governmental space activities. To J. F. McMahon[30] the Russians have accepted the view that non-governmental entities may participate if they are authorized and supervised by the State with the consequent international responsibility of that State.

Article VI of the Outer Space Treaty, according to Krystyna Wiewiorowska[31], has been interpreted in several ways. In this sense this author quotes J. Rajski, who considers that "the Treaty of 1967 set a principle, according to which the exploration and exploitation of outer space and celestial bodies can be carried out only by subjects of International Law". The same author, as Wiewiorowska explains, believes that the need for such a solution is justified on the one hand by the international implications of this kind of activity, and on the other, by the need for assuring that it will be carried out exclusively for purposes advantageous to mankind as a whole. A country may conduct this activity either directly or indirectly by authorizing subordinated natural or juridical persons. M.G. Marcoff , also quoted by Wiewiorowska[32], states that "Le terme activités nationales, peut designer, apart les activités étatiques, celles de toute personne soumisse a sa compétence territoriale ou personnelle". This author believes that "the authorization procedure should cover continuing State supervision as an indispensable condition for non - governmental entities to carry out outer space activities"[33].

The rule under analysis establishes state responsibility for space activities carried out within national jurisdiction imposing an absolute duty of authorization and supervision over space activities not only for governmental entities activities but also for non-governmental and international entities activities. Thus, this provisioin embodies a **primary rule**: "The activities of non - governmental entities in outer space...shall require authorization and continuing supervision by the appropriate State Party to the Treaty"[34] . This duty is, therefore, imposed on States parties.

Having established the primary rule we may then focus on the various duties originated therefrom. Article VI lays down two kinds of duties. In first place it establishes the duty of "**authorization**" which means "give formal permission to or for"[35] and in second place the duty of "**supervision**" meaning "to keep watch over a job or activity as a person in charge"[36]. Moreover, the non – governmental entities must be authorized by the appropriate State Party to carry out commercial space activities following which it must be supervised by that same State. To comply with this primary rule the State must enact domestic legislation stating all the requirements to be fulfilled, agencies in charge of the duties, etc. For this reason the first obligation (authorization) would be an obligation of result and the second one (supervision, would imply an obligation of result and of conduct at the same time. This may be verified in practice, as indicated above: "obligations of conduct and obligations of result present not a dichotomy but a spectrum"[37] as we can prove in this analysis".

Prof Hobe favours the drafting of a separate instrument to govern the activities of private entities in outer space. This new instrument should call upon States to enact national legislation on commercial space activities.[38] Dr Jansetuliyana does not coincide with Professor Hobe's idea. This is

so, in Jasentuliyana's views, because states are internationally responsible whereas private entities require authorization and permanent supervision to engage in space activities.[39]

There is a problem of interpretation in connection with the term "national activities" contained article VI.

The General Rapporteur of the ILA, Professor Maureen Williams[40] suggests, as a possible solution, to consider all the activities under the effective jurisdiction of the State as national activities for which it is internationally responsible.

The Outer Space Treaty does not establish the criteria to be followed by States in compliance with the primary rule of authorization and supervision regarding actitivies in outer space. Therefore, each State is free to choose the means of compliance within domestic legislation.

In March 1991, Argentina created the National Commission for Space Activities-Comisión Nacional de Actividades Espaciales (from here on CONAE)[41]. At the beginning, CONAE operated within the framework of the Presidency of the Nation. Presently, it is under the authority of the Ministry for Foreign Affairs.

The National Space Programme 1995/2006: "Argentina en el Espacio" was proposed according Presidential Decree 995/91 and approved by Decree 2076/94 and 792/96. Presidential Decree 1330/99 in its first article approved the National Space Programme 1997/2008. This Programme is carry on by CONAE.

The National Registry of Space Objects was created by Decree 125/95, according to 1967 Outer Space Treaty and 1974 Registration Convention[42]. It funtions under the authority of CONAE and it gives effective jurisdiction.

In August 1997, CONAE adopted the Resolution 303 as whose articles 1 states all procuderes of governmental or private entities that follow the establishing of satellites systems under national jurisdiction must be initiated at CONAE

As example as commercial space activities carry on by private entities we find Nahuelsat S.A. who operates Nahuel A1 satellitte who is registered in CONAE. The Argentina Permanent Mission in United Nations notified it launching, accordding to article IV of 1974 Registration Convention[43]

CONCLUDING REMARKS

Following Ago's work in the International Law Commission, a primary rule may be identified in article VI of 1967 Outer Space Treaty, as follows: "**The activities of non - governmental entities in outer space...shall require authorization and continuing supervision by the appropriate State Party to the Treaty**"

Considering the difference between obligations of conduct and obligations of result we reach the conclusion that they must be construed in the framework of a primary rule. In this sense article VI of Outer Space Treaty lays down an obligation of authorization and supervision. The former is an obligation of result, and the latter is both an obligation of result and of conduct

In the case of Argentina an institutional structure was created aiming at he fulfillment of the obligation to authorize and supervise national space activities carried out by private and governmental entities (E.g. Nahuelsat S.A.). We may therefore conclude that the distinction between obligations of result and of conduct is, in practical terms, inexistent. To be mandatory, both should be enacted within domestic law.

---

[1] It was adopted by Argentine. National Legislation Number 17. 989.

[2] Malanczuk, Peter: "Actors, States, International Organizations, Private Entities" en Lafferranderie, Gabriel (Editor in Chief): "Outlook on Space Law over the Next 30 Years". Kluwer Law International: The Netherlands. 1997. Page 23

[3] Malanczuk, Peter: "Actors, States, International Organizations, Private Entities" en Lafferranderie, Gabriel (Editor in Chief): "Outlook on Space Law over

the Next 30 Years". Kluwer Law International: The Netherlands. 1997. Page 23

[4] Brownlie, Ian: "Principles of Public International Law". Fifth Edition. Oxford University Press. 1998. Pp. 436

[5] Ago, Roberto: Second Report on State Responsibility (A/CN.4/233)1970. Para 11. Also see Ago, Roberto: Third Report on State Responsibility (A. CN. 4/246). 1971. Para 15

[6] United Nations.A/CN. 4/L.569. 5th August. 1998

[7] Annual Digest of Public International Law Cases. Years 1927 and 1928. Editors Arnod McNair and H. Lauterpacht. Reprint Edition Grotius Publications Ltda. Cambridge. 1981. Pp. 502

[8] Cheng, Bin: "General Principles of Law as applied by International Courts And Tribunals". Grotius Publications Limited. Cambridge. 1987. Page 163 and subsequent pages.

[9] Cheng, Bin: "General Principles of Law as applied by International Courts And Tribunals". Grotius Publications Limited. Cambridge. 1987. Page 165 and he quoted as example the Administrative Decision N° I:"The financial obligations of Germany to the United States arising under the Treaty of Berlin...embrance: (a) all losses, damages, or injures..."

[10] According Bin Cheng this treaty is the Treaty of Berlin of August 21, 1921, which made the reaparations provisions of the Treaty of Versailles applicable between United States and Germany. See: Cheng, Bin: "General Principles of Law as applied by International Courts And Tribunals". Grotius Publications Limited. Cambridge. 1987. Page 165 Footnote 10.

[11] Cheng, Bin: "General Principles of Law as applied by International Courts And Tribunals". Grotius Publications Limited. Cambridge. 1987. Page 165

[12] Cheng, Bin: "General Principles of Law as applied by International Courts And Tribunals". Grotius Publications Limited. Cambridge. 1987. Page 166

[13] Crawford, James:, (Special Rapporteur): "Second Report on State Responsibility" General Assembly. International Law Commission. Geneve. 3 May -23 July 1999. A/CN.4/498. Pp 20

[14] United Nations. Yearbook of the International Law Commission.. 1996. General Assembly. (A./51/10). 1996. Pp. 141 and 142.

[15] Crawford, James:, (Special Rapporteur): "Second Report on State Responsibility" General Assembly. International Law Commission. Geneve. 3 May -23 July 1999. A/CN.4/498. Para. 53

[16] Commentary of article 20. According Crawford, James:, (Special Rapporteur): "Second Report on State Responsibility" General Assembly. International Law Commission. Geneve. 3 May -23 July 1999. A/CN.4/498. Para. 53

[17] Commentary of article 21 paras (18) -(22), citing the Mariposa Development Company case -1933 (United States - Panama General Claims Commission), Certain German Interests in Polish Upper Silesia-1926-P.C.I.J. and the decision of the European Court in the De Becker Case -1962-. According Crawford, James:, (Special Rapporteur): "Second Report on State Responsibility" General Assembly. International Law Commission. Geneve. 3 May -23 July 1999. A/CN.4/498. Para. 53 and footnote N° 107

[18] Crawford, James:, (Special Rapporteur): "Second Report on State Responsibility" General Assembly. International Law Commission. Geneve. 3 May -23 July 1999. A/CN.4/498. Para. 55 and also see : Yearbook of the I.L.C 1977 II. Second Part. Pp. 13 and subsequent

[19] Crawford, James:, (Special Rapporteur): "Second Report on State Responsibility" General Assembly. International Law Commission. Geneve. 3 May -23 July 1999. A/CN.4/498. Para. 57

[20] See Crawford, James:, (Special Rapporteur): "Second Report on State Responsibility" General Assembly. International Law Commission. Geneve. 3 May -23 July 1999. A/CN.4/498. Para. 57

[21] Crawford, James:, (Special Rapporteur): "Second Report on State Responsibility" General Assembly. International Law Commission. Geneve. 3 May -23 July 1999. A/CN.4/498. Para. 57

[22] Crawford, James:, (Special Rapporteur): "Second Report on State Responsibility" General Assembly. International Law Commission. Geneve. 3 May -23 July 1999. A/CN.4/498. Para. 58

[23] Crawford, James: (Special Rapporteur): "Second Report on State Responsibility" General Assembly. International Law Commission. Geneve. 3 May -23 July 1999. A/CN.4/498. Para. 59

[24] Crawford, James:, (Special Rapporteur): "Second Report on State Responsibility" General Assembly. International Law Commission. Geneve. 3 May -23 July 1999. A/CN.4/498. Para. 59

[25] Crawford, James:, (Special Rapporteur): "Second Report on State Responsibility" General Assembly. International Law Commission. Geneve. 3 May -23 July 1999. A/CN.4/498. Para. 59

[26] Cambacau cited by Crawford, James:, (Special Rapporteur): "Second Report on State Responsibility" General Assembly. International Law Commission. Geneve. 3 May -23 July 1999. A/CN.4/498. Para. 59

[27] Crawford, James:, (Special Rapporteur): "Second Report on State Responsibility" General Assembly. International Law Commission. Geneve. 3 May -23 July 1999. A/CN.4/498. Pp. 70

[28] Crawford, James:, (Special Rapporteur): "Second Report on State Responsibility" General Assembly. International Law Commission. Geneve. 3 May -23 July 1999. A/CN.4/498. Pp. 70

[29] Cheng, Bin: "Article VI of the 1967 Space Treaty Revisited: International Responsibility, National Activities, and The Appropriate State" en Journal of Space Law. Vol. 26 Nro. 1 . 1998. Pp. 14

[30] McMahon,J. F. ·"Legal Aspects of Outer Space: Recent Developments" in The British Year Book of International Law. 1965-1966. Oxford University

Press. 1968. Pp..423

[31] Wiewierowska, Krystyna: "Some Problems of State Responsibility in Outer Space Law" in Journal of Space Law. Volume 7. Number 1. Mississippi. 1979. Pp. 26

[32] Wiewierowska, Krystyna: "Some Problems of State Responsibility in Outer Space Law" in Journal of Space Law. Volume 7. Number 1. Mississippi. 1979. Pp. 27

[33] Wiewierowska, Krystyna: "Some Problems of State Responsibility in Outer Space Law" in Journal of Space Law. Volume 7. Number 1. Mississippi. 1979. Pp. 28

[34] Article VI of Outer Space Treaty

[35] Longman: Dictionary of Contemporary English. New Edition. UK. 1992

[36] Longman: Dictionary of Contemporary English. New Edition. UK. 1992

[37] Crawford, James:, (Special Rapporteur): "Second Report on State Responsibility" General Assembly. International Law Commission. Geneve. 3 May -23 July 1999. A/CN.4/498. Para. 79

[38] See Williams, Maureen (Rapporteur): "Review of Space Law Treaties in View of Commercial Space Activities". Space Law Committee. International Law Association. London Conference (2000).Pp.3

[39] See Williams, Maureen (Rapporteur): "Review of Space Law Treaties in View of Commercial Space Activities". Space Law Committee. International Law Association. London Conference (2000).Pp. 8

[40] Williams, Silvia Maureen: "Derecho Internacional Contemporáneo". Abeledo Perrot. 1990. Pp. 22

[41] Published in Boletin Oficial 22nd August 1997 .

[42] It was adopted by Argentine. National Legislation Number 23.158

[43] United Nations, Secretariat. ST/SG/SER.E/323. 29 July 1997