

INTERNATIONAL IMPLICATIONS OF NATIONAL SPACE LEGISLATION

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I. INTRODUCTION

National space legislation has influenced the development of the international law of outer space and this international law has influenced national space laws. Over time, these processes have contributed to patterns of cooperation, competition and conflict. Let us examine these three patterns in the revolutionary and evolutionary developments that have become the law of outer space. Francis Fukuyama writes, “The law is a body of abstract rules of justice that bind a community together.”¹ While he is concerned with law within nations, we may make the same point about the international law of outer space and ask whether, over the course of the Space Age, it has helped bind together the global community of nations.

II. COOPERATION

In November, 1959, while crossing the Pedernales river on his ranch in Texas, the majority leader of the Senate received a call from the President asking him to fly to New York City and address the General Assembly of the United Nations on the peaceful uses of outer space. My mother was part of LBJ’s staff at the time and she flew with him to New York. There, with her input, on November 17, Johnson re-iterated Eisenhower’s call for the creation of the Ad Hoc Committee on the

¹ Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (New York: Farrar, Straus and Giroux, 2011), p. 246

Peaceful Uses of Outer Space (COPUOS). Earlier, in 1958, Senator Johnson had shepherded the legislation creating NASA through the Senate, and my mother was very proud to be part of the legislative process, in the Senate and the House, especially in regard to Sect. 205 of the National Aeronautics and Space Act (now 51 U.S.C. 20115). This early legislation existed before the ratification of the Outer Space Treaty in 1967, but national legislation can influence international law. For instance, Section 102 (a) (now 51 U.S. C. 20102) reads, “The Congress declares that it is the policy of the United States that activities in space should be devoted to peaceful purposes for the benefit of mankind,” while the preamble to the Outer Space Treaty recognizes “the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes.” So one of the important international implications of national space legislation is that it can lead to the language which is in international treaties, resolutions and codes of conduct.

Once international laws have been enacted, they, in turn, can lead other nations to adopt national laws which reinforce the commitments made in international law. There are now 21 such nations², most of which have

² The twenty-one states are Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, China, France, Germany, Japan, Netherlands, Norway, Republic of Korea, Russian Federation, South Africa, Spain, Sweden, United Kingdom, Ukraine, and the United

adopted national legislation after the four first UN Treaties went into force and whose national laws implement all or some part of the requirements of the Outer Space Treaty, the Liability Convention and the Registration Convention. For instance, one of the most recent national laws is that of Austria. One would expect Austria to be committed to international cooperation, given that Vienna is the seat of COPUOS and the UN's Office of Outer Space Affairs (OOSA). The Austrian law is entitled "Federal Law concerning the authorization of space activities and the institution of a National Space Registry (Austrian National Space Law)." It has licensing, liability, registration, and environmental articles as one would expect from reading Articles VI, VII, VIII, and IX of the Outer Space Treaty as well as the subsequent Liability (1972) and Registration (1975) Conventions. And this law specifically references Art.II92) of the Registration Convention³.

Sometimes, the impact of national laws on international law and organization and vice versa is noted at the regional level. Most recently, we can see in Europe a treaty which can lead to more de facto harmonization of national laws. In December, 2009, the Lisbon Treaty gave the European Union new space powers while seemingly excluding the possibility of harmonization of national laws. Art. 189 of the Treaty on the Functioning of the European Union gives the EU parallel powers and a coordinating role in space while preserving the sovereignty of its members, but it can be argued that these new powers will

States. Only two, France and the United States, passed laws before 1967. see www.unoosa.org

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result over time in more de facto harmonization in Europe⁴

When we examine the law, we must remember that forming a virtuous circle means translating law into policy, programs and budgets which deliver on the promises of peaceful uses and benefits. In terms of cooperative projects between nations, we see the fulfilment of the dreams of the founding fathers and mothers of space law. I am thinking of the development of the communications satellite industry, weather satellites, navigation satellites and such high profile individual projects as Sputnik, Apollo, Apollo-Soyuz, MIR, the International Space Station and the Hubble Telescope.

However, one of the puzzles of international cooperation is that while there has been much increase in international cooperation over the years since 1957, there has also been an increase in international competition and, some would say, in the prospects for space militarization and weaponization. Which pattern will dominate? Can we disentangle them? Let us now turn to an analysis of competition.

III. COMPETITION.

It is said that the race to the moon was a political and prestige competition and not a zero-sum conflict. The USSR lost, but it lost its pride, not its existence. (That came later) Perhaps the moon race was the moral equivalent of war. War, itself, was too horrible to contemplate. Thus we have the nuclear deterrence of MAD (mutual assured destruction)– and not the nuclear war fighting of NUTS (nuclear utilization target selection). But today, when we speak of competition in

⁴Irina Kerner, "Supranational Space: Why the Powers of the EU are not quite Parallel," a paper presented at the 54th Colloquium on the Law of Outer Space, Cape Town, South Africa, October 2011

space, it is becoming more a case of commercial than political competition, which is a good thing. Free, competitive markets result, given the invisible hand, and, given the fact that the game is not being rigged, in a growing pie and a virtuous circle. In the early years of the Space Age, most of this competition was between government-subsidized corporations. The first commercial legislation was in the United States. It was the Communications Satellite Act of 1962, which set up Comsat, the Communications Satellite Corporation⁵. Subsequently, additional commercial legislation in sectors such as remote sensing, launching and space tourism has been enacted⁶. There has been a trend towards less government involvement and more straight commercial competition. In the early years, we may say, economic competition was more apt to undermine international cooperation through various laws which promoted economic nationalism and mercantilism, but, now, we see a trend toward competition where contracts can be awarded to companies which are not based in the country making requests for proposals. There are still industrial policies and national champions, but given WTO mandates, these market imperfections should become obsolescent. In fact, pursuing protectionist policies can backfire as we see in the United States with ITAR.

The bottom line concerning free market competition rather than mercantilist policies and industrial espionage is that the rule of law will provide for licensing to be used in a fair and transparent and accountable manner at the

⁵ Irina Kerner, "Supranational Space: Why the Powers of the EU are not quite Parallel," a paper presented at the 54th Colloquium on the Law of Outer Space, Cape Town, South Africa, October 2011

⁶ See Joanne Irene Gabrynowicz, "One Half Century and Counting: The Evolution of U.S. National Space Law and Three Long-Term Emerging Issues," *Harvard Law & Policy Review*, vol. 4, no. 2 (Summer, 2010), 405-426

national and global levels as is envisaged in the national legislation of many countries. And markets should become more competitive and not monopolistic, duopolistic, or oligopolistic. This has happened in the communications satellite industry. Also, concerning GPS, there used to be one system, the U.S. GPS. Now there are three other competitors – Galileo (Europe), GLONASS (Russia) and Beidou Navigation Satellite Systems (China).

IV. CONFLICT

Earlier I mentioned LBJ's commitment to the peaceful uses of outer space, but he had another perspective, another side. In a 1964 briefing on Project Ranger, then President Johnson asked Dr. Pickering, "This is really a battle for leadership and real existence in the world, isn't it?"⁷ Dr. Pickering agreed, and the President went on to maintain that the country that dominated space would lead the world. In the Cold War bipolar world, that seemed a reasonable perspective, but now that we live in a more multipolar world, a world with several countries having ASATs, cyber-warfare and other capabilities, the emphasis on conflict as a zero-sum game is myopic and misplaced. Sometimes realpolitik is not realistic. Rather, we see than a non-zero sum game in which, over time, one can see the evolution of cooperation. Even during the Cold War, there was no such thing as pure antagonism as the United States and the Soviet Union cooperated on a whole range of activities involving space exploration, arms control and in functional organizations such as the WMO. Now, while war can never be ruled out and while military strategists still use the atavistic vocabulary of space dominance and space control, there is an overriding need to control space debris and space weaponization as these and other threats can undermine space commerce and space exploration.

⁷ Jonathan Galloway, *op.cit.*, p. 133

In the beginnings, in the United States, there was no founding military statute which established military priorities in outer space as there was with the NASA legislation of 1958 vis-à-vis civil space and the Comsat legislation of 1962 vis-à-vis commercialization. The earliest laws were of two types – the annual authorization and appropriation legislation for projects like Vanguard and Explorer and treaty law such as the 1963 Partial Test Ban Treaty and Article IV of the Outer Space Treaty. Today these patterns continue and, in addition, we have much soft law (codes of conduct, guidelines, framework agreements and UN General Assembly Resolutions) which encourages military stability.

From a Clausewitzian perspective, the role of the military is not to win wars but to achieve political objectives. In today's interdependent world and congested space, nations should manage conflict according to the rule of law. National laws and policies should lead states, especially the major powers, to adopt military strategies which promote peace – not the perfect peace of peace with justice and general and complete disarmament – but a stable peace where potential enemies can engage in continual confidence building measures and arms control agreements.

V. CONCLUSIONS

The world is more complicated than just seeing cooperation, competition and conflict. There is competition about cooperation. If your state can show that you cooperate more than other states, then you have a leg up in the prestige race, which may be the moral equivalent of war. There is also cooperation about conflict because rational antagonists do not want to see conflict get out of hand. Thus, even during the Cold War, there was cooperation between the United States and the Soviet Union, for instance Apollo-Soyuz and

the Hot Line Agreement. And there is conflict about competition as, sometimes, mercantilism and national industrial policies trump free markets and the invisible hand.

But, taking the long range view from 1957 to 2011, we can look back on the first 54 years of the Space Age and say that international space law has progressed and national space laws have helped usher in the many peaceful benefits which we have become used to in our everyday lives – communications satellites, weather satellites, remote sensing, GPS and even in enhancing the internet. Projects such as Sputnik, Apollo, MIR, the International Space Station and the Hubble Telescope have caught the imagination of mankind. National laws have influenced the development of international law, and the international law of outer space has influenced new national space legislation. The journey is not done but a thousand steps have been taken. My mother was always amazed at how her work for Lyndon Johnson on missiles and rockets⁸ became a wonderful story over five decades of international space cooperation and the building of a space law community based on the fulfillment of the dreams for increasing peaceful uses and benefits. If we go back to the beginnings, we can see this trajectory to the future - which is now.

VI. CONCLUSION

The new Austrian Outer Space Act covers a variety of issues connected to both international obligations of Austria in accordance with the five UN space treaties but also takes into account the particular needs of space activities being carried out by Austrian operators. These currently encompass mainly

⁸ U.S. Congress, Senate, Committee on Armed Services, "Guided Missiles in Foreign Countries," Committee Print prepared by Eilene Galloway, National Defense Analyst, Legislative Reference Service, The Library of Congress (April, 1957).

educational and research purposes. The Austrian Act has therefore chosen a rather modest and simple approach and tried not to overregulate the emerging Austrian space sector. However, particular emphasis has been put on the mitigation of space debris. Small satellites are a very attractive option for newcomers as they are becoming technically more accessible and cheaper. Nevertheless, the

responsibility of the States in this respect is more pertinent than ever before. States have the duty to avoid that small satellite projects, as laudable and welcome they are, do not harm large and expensive space activities which are of vital interest to the world population at large. Austria has made an effort to comply with this duty by enacting the present Outer Space Act.