

The Concept of Allocation of Certain Risk and its Construction in the Formulation of National Legislation on Liability in Outer Space Activities

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Abstract—The concept of Allocation of Certain Risk specifically has been regulated in the Convention on International Liability for Damage Caused by Space Objects 1972 (hereinafter referred to the Liability Convention 1972). However, practically such allocation is very hard to be implemented. This study aims to elaborate the mechanisms of the allocation of certain risk as the Liability Convention 1972 submit it to the internal agreement between the parties of such outer space activities. This study used normative juridical method which analyze the existing legal framework in outer space activities. Some countries are actively conducting outer space activities have applied the concept of Allocation of Certain Risk in describing the allocation of the division of liabilities between the parties to a joint launching. Therefore, the study of the concept of Allocation of Certain Risk and its practical application in several countries become indispensable for the creation of a national legislation on liability in outer space activities.

Keywords—allocation of certain risk; joint launching; division of liabilities; outer space activities

I. INTRODUCTION

Commercialization and privatization of outer space that has taken place intensively in the last two decades has made non-governmental entities the main actor in the utilization of outer space. The Outer space law does not explicitly mention the term 'commercialization', but this is by no means that the use of outer space is not allowed for commercial purposes. Actually, the Outer space Treaty assigns that "non-governmental entities" shall bear international responsibility for their activities in outer space [1]. This provision implies that privatization and commercialization of outer space is acceptable. However, the state is the main actor in the utilization and use of outer space and that state shall bear international responsibility for national activities in outer space.

The basic consideration that underlies the concept of state responsibility in space law is the understanding that space objects owned and operated by a non-government entity are usually launched from a country's territory and / or launched by a launching country. Refer to Article VII the OST each State

Party to the Treaty that launches or procures the launching of an object into outer space, including the Moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space or in outer space, including the Moon and other celestial bodies.

Article VII of the OST has been elaborated by Liability Convention 1972. Refer to Article V the Liability Convention whenever two or more States jointly launch a space object, they shall be jointly and severally liable for any damage caused. The participants in a joint launching may conclude agreements regarding the apportioning among themselves of the financial obligation in respect of which they are jointly and severally liable. Such agreements shall be without prejudice to the right of a State sustaining damage to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable. Some countries are actively conducting outer space activities have applied the concept of Allocation of Certain Risk in describing the allocation of the division of liabilities between the parties to a joint launching. In practice such allocation is very hard to be implemented, hence it requires more detailed elaboration of mechanisms.

II. LEGAL MATERIALS AND METHODS

This study used normative juridical method which analysing existing legal framework in outer space activities. While the primary legal materials consist of all the international treaties governing outer space activities (Corpus Juris Specialis) both directly and indirectly, secondary ones included the references, including books, journal articles as well as conference papers and other documents having correlation with the issues. The technique of analysis data used legal interpretation. Specifically, the international agreements as primary legal materials include: Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967 (the Outer Space Treaty) and Convention on

International Liability for Damage Caused by Space Objects, 1972 (the Liability Convention).

III. RESULT AND DISCUSSION

A. *State Responsibility in the Law of Outer Space*

The origins of international responsibility in the Law of Outer Space originally can be found in the United Nations General Assembly Resolutions of 1962 on principles governing the activities of states in the exploration and use of outer space [2]. Based on the fifth and the eighth principle of this Declaration: the activities of states in the exploration and use of outer space, the OST reiterates such two principles in Article VI and Article VII, as follows [1]:

Article VI:

States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. 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 VII:

Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the Moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space or in outer space, including the Moon and other celestial bodies.

Basically, the substance of the provisions set out in the Article VI and Article VII of the OST exactly the same with the fifth and eighth principles of the Declaration. Based on the Article VI of the OST, the state parties to the OST internationally are considered to be responsible for fulfilling the obligations as follows [3]:

- The undertaken outer space activities shall be in accordance with the provisions contained in the OST.
- Ensure that outer space activities carried out by non-governmental entities in accordance with the provisions of the OST, particularly the provisions regarding the authorization and continuous supervision requirements.
- Define 'the appropriate state' that shall authorize and supervise continuously to the outer space activities carried out by non-governmental entities.

- Assume the direct international responsibility to the outer space activities carried out by non-governmental entities.

Referring to the Article VI and Article VII of the OST, international responsibility in outer space activities directly stands against states. This is consistent with a general principle of international law which states that a state can only act through his agents and representatives [4]. However, deviating from the general doctrine of state responsibility, under the Article VI of the OST, states are responsible for the public activities carried out by non-governmental entities. In substance, this would be a disruption to the law and justice when a state which is not at fault should be responsible for damages caused by the launch of space objects in international territory carried out by national or multinational corporations act on behalf of the state to deceive the law [4].

Actually, Article VI and Article VII of the OST impose a strict liability regime to a launching State as the OST prohibits any outer space activities conducted by non-governmental entity unless being authorized and supervised continuously by the state. Thus, the provision set out in the second article of the OST must be read by the state parties to the OST as follows: when a non-governmental entity carries out the outer space activities, the state has given the authorization to conduct the activities will take responsibility for damages caused by such activities. Hence, even though it is not mandatory, each state party to the OST needs to make its national legislation governing the outer space activities.

The matter of authorization for the activities of non-governmental entities in outer space has been discussed since the time of the drafting on the Article VI of the OST. Back to the background of the drafting on Article VI of the OST, there are disagreements between the two space power countries, the United States and the Soviet Union, in the period 1950 - 1960. The United States did not agree to the proposal of the Soviet Union that the outer space activities can only be carried exclusively by the state [5]. The provision set out in the fifth principle of the Declaration and in the Article VI of the OST is a compromise between the dissenting opinions. Finally, these provisions provide that the outer space activities carried by non-governmental entities are legal activities. However, it should be subject to the provisions that regulate the international state responsibility. In other words, such activity is private but the responsibility is public [6].

B. *The application of the concept of Allocation of Certain Risk in the Formulation of National Legislation on Liability in Outer Space Activities*

The outer space activities have grown along with the rapid development of space technology. The involvement of non-governmental entities in outer space activities has been increased. Today, the outer space activities carried on by non-governmental entities has made the outer space as a source of world business. Even though a legal concept of non-governmental entity is far from clear, the outer space activities of private companies within the jurisdiction of a state or a multinational corporation (MNC) that own, control or regulate business operations either alone or in cooperation with other

economic entities in two or more states, informally being recognized as non-governmental entities. Private company engaged in the outer space activities (state entrepreneur) is extensively increasing in the United States and Europe [7]. As explained earlier, the involvement of non-governmental entities will cause difficulties in determining the responsible party for such damage, particularly when the non-governmental entity is an MNC.

Based on the preceding discussions and the concept of state responsibility in the outer space law, each state party to the OST is internationally responsible for national activities in outer space, whether these activities carried on by government agencies or by non-governmental entities. It is absolutely necessary to authorize and supervise continuously by the appropriate state party to the OST towards the outer space activities carried on by non-governmental entity. This shows that non-governmental entities are not party to the treaty that have international responsibility for the outer space activities carried on by them. In other words, non-governmental entities have the indirect international responsibility.

The legal basis which supports the concept of state responsibility in the law of outer space is the Article 31 of Vienna Convention [8]. Under this article the responsibility may not be imposed on non-governmental entities that are not parties of an international treaty (*pacta sunt servanda*). However, the application of indirect international responsibility to the outer space activities carried on by non-governmental entities practically will create difficulties and complicated mechanisms, specifically, when non-governmental entities carry on the outer space activities within the territory of a state that is not party to the OST or if the non-governmental entity is a multinational Corporation (MNC). Therefore, the application of direct international responsibility to the outer space activities carried on by non-governmental entities will very helpful in the prosecution of their responsibility. In connection with the internationally wrongful act, the Article VI of the OST can be interpreted as the obligation of state to implement international obligations namely authorization and continuing supervision. Therefore, if the state has implemented the obligations correctly and effectively, then the state should not be responsible for the activities carried on by non-governmental entities in its territory or its jurisdiction [6].

To make non-governmental entities, including MNC, out of the subject of international law should not mean that non-government entity has rights and obligations as it is owned by other subjects of international law. Shaw and Harris claim that different subject of law would have the different legal capacity, different rights and obligations [9]. Furthermore, as stated by Janis and Noyes that the recognition of a legal subject can be done as there is a need of the society [10]. This opinion was confirmed by Robert McCorquodale, who states [11]:

“...while the State is the primary subject of the international legal system, the subjects of that system can change and expand depending on the ‘need of the international community’ and ‘the requirements of international life’”.

Hence, to accelerate the mechanism of responsibility for damages caused by the outer space activities carried on by non-

governmental entities, the community is very concerned to the awarding of non-governmental entity status as a subject of international law. In this context, the community referred to the international community including states, international organizations and even individuals.

IV. CONCLUSION

The Concepts of Allocation of Certain Risk specifically has been regulated in the Convention on International Liability for Damage Caused by Space Objects 1972 (hereinafter referred to The Liability Convention 1972). However, in practice such allocation is very hard to be implemented, hence it requires more detailed elaboration of mechanisms, as the Liability Convention 1972 submit it to the internal agreement between the parties of such outer space activities.

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