

The relevance of hard law and soft law in the further development of space law

10th UN Workshop on Space Law, Panel 6

Tanja Masson-Zwaan
Asst. Professor IIASL / President IISL

UNOOSA, Vienna
8 September 2016



Universiteit
Leiden
The Netherlands



Panel 6 → UNISPACE+50

- Thematic Priority 2: ‘Legal regime of outer space & global space governance: current & future perspectives’ (A/AC.105/2016/CRP.3)
- Objective:
 - Promote universality of the 5 UN space treaties
 - Assess state of affairs of the treaties & their relationship with principles, resolutions, guidelines
 - Analyse effectiveness & identify areas that may require additional regulation (i.e. ‘gaps’)

How?

- Use questionnaire of WG on status/application of the 5 treaties to address status /scope of, and possible gaps in legal regime
- Study future legal /institutional initiatives
- Study legal mechanisms to manage safety, security, sustainability of space activities
 - Esp. notification/registration
- Guidance doc. for States wishing to join the treaties
- Strengthen LSC as prime multilateral body to promote progressive development of int'l space law
 - Procedural /institutional improvements; cooperation STSC

What is 'hard space law'?

- Art. 38 Statute ICJ
 - International conventions
 - International custom, as evidence of a general practice accepted as law
 - General principles of law recognized by civilized nations
 - Judicial decisions and teachings of the most highly qualified publicists as subsidiary means
- Also:
 - Bi-/multilateral agreements
 - National legislation: growing

UN Space Treaties



Outer Space Treaty 1967



Rescue Agreement 1968



Liability Convention 1972



Registration Agreement 1975



Moon Agreement 1979

Custom, judicial decisions?

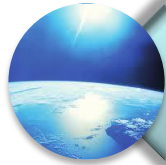
- Who declares custom?
- Will there ever be a judicial case before an int. court or arbitration (e.g. PCA rules)?
- Request for 'advisory opinion', by GA? ITU?
- Study by International Law Commission?
 - 'Initiate studies & make recommendations to encourage progressive development of international law and its codification'
 - 2013: Identification of customary international law
- Statement by COPUOS members?
- National law → practice (delimitation, resources...)

What is 'soft space law'?

- UN resolutions
- Guidelines
- Codes of conduct
- Best practices, standards...

- Also, contributions to (soft) law-making by
 - Recommendations, statements, position papers, etc. (NGOs etc.)

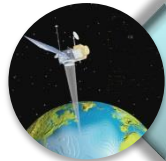
UN Space Principles Resolutions



'Principles' Resolution 1963



Television Broadcasting 1982



Remote Sensing 1986



Nuclear Power Sources 1992



Benefits Declaration 1996

Other UN Resolutions



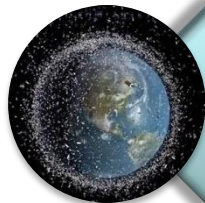
Concept of Launching State
2004



Enhancing Registration Practice
2007



National Space Legislation
2013



Debris Mitigation Guidelines
2007

‘Noting’...

- ... ‘that **nothing** in the conclusions of the Working Group or in the present recommendations **constitutes an authoritative interpretation** or a proposed amendment to the United Nations treaties on outer space’



Challenges



New
actors



New
activities

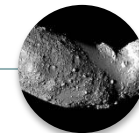


New
law

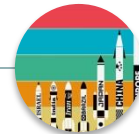
Issues



Space / earth environment



Use of resources



Developing countries



Commercialisation / privatisation



Safety, security & sustainability



Increase treaty ratifications

Are there gaps?

- Benefit / interest of all states
- Province of all Mankind
- CHM
- Non-appropriation
- Space object
- Definition/delimitation
- Harmful interference
- Peaceful purposes
- ...

Solving 'gaps': hard law?

- Amending treaties?
- New treaties?
- Increasing relevance /impact of current treaties

- **Advantage**: binding on parties
- **Disadvantage**: success not likely in current climate, time-consuming, binds only parties, implementation depends on political will of sovereign states, verification and enforcement not easy

- Another way: more **national law**, in (some) harmony
- Or: **custom**? (ILC, Adv. Opinion, case law...)

Solving gaps: soft law?

- Code of Conduct?
- Guidelines?
- **Advantage**: can be fast, higher probability of adoption, can be amended smoothly, can have global legitimacy without need for adoption by each state, can evolve into (binding!) customary law
- **Disadvantage**: not binding; this may be an issue in critical fields, like safety, security, sustainability

Example: space resources

- ‘Gold rush’ for asteroids, moon resources
- Can lead to conflict, destabilize
- In absence of clear international hard law, states start to adopt national legislation
- It would be desirable to reach international agreement on governance of space resources

Current int'l legal regime

- Outer Space Treaty 1967 – 104 parties
- (Moon Agreement 1979) – 16 parties (excl. US/LUX)
- Relevant points regarding space resources
 - **Moon/celestial bodies:**
 - Non-appropriation (no sovereignty)
 - **Space resources:**
 - Status extracted resources unclear; Freedom of use?
 - **Private commercial activities:**
 - Authorization/supervision by state!

Ownership of resources



Ownership of celestial bodies =
appropriation (OST/MA)



Ownership of resources *in situ* (MA)



Ownership of extracted resources

- MA: Not allowed as long as there is no int'l regime



Ownership of extracted resources

- OST: Not explicitly prohibited; freedom of use?

Steps to solve the legal gap

- Creation of national law (US, LUX, UAE)
- New agenda item COPUOS LSC 2017
- IISL Position Paper
- International Working Group created by The Netherlands

IISL Position Paper 2015

- Specifically focused on the US Space Act
 - It is uncontested under international law that any appropriation of “territory” even in outer space (e.g. orbital slots) or on celestial bodies is prohibited by Art. II OST
 - It is less clear whether it also prohibits the taking of resources, i.e. whether “free use” includes the right to take and consume non-renewable natural resources, including minerals and water on celestial bodies
 - Moon Agreement requires setting up a regime, but is not binding on US

IISL Position Paper - cont'd

- In view of the absence of a clear prohibition of the taking of resources in OST, one can conclude that the **use of space resources is permitted**
- The **US Space Act is a possible interpretation of the OST**; whether and to what extent this interpretation is shared by other States remains to be seen
- It can be a **starting point** for development of international rules to coordinate the free exploration and use of outer space, including resource extraction, for the benefit and in the interests of all countries

The Hague Space Resource Governance Working Group

- Website: www.iiasl.aero – follow the link
- See also A/AC.105/C.2/2016/CRP.17
- Multi-stakeholder group with consortium partners, members and observers



THE HAGUE
SPACERESOURCES
GOVERNANCE WORKING GROUP

Aim

- Assess the need for a regulatory framework for space resource activities and prepare the basis for such regulatory framework
- If there is such a need:
 - Encourage States to engage in negotiations for an international agreement or non-legally binding instrument
 - Identify/formulate building blocks for governance of space resource activities as a basis for negotiations on an international agreement or non-legally binding instrument
 - Recommend on implementation strategy and forum for negotiations on an international agreement or non-legally binding instrument
- First face to face meeting April; second on 6-7 Nov., Leiden

Examples of 'building blocks'

- Objective of international legal framework
- Definition of key terms
- Exercise of jurisdiction
- Access to / Utilization of space resources
- Sharing of benefits
- Safety of activities / Capacity
- Liability
- Compliance



Hard law or soft law?

- Hard law
 - Outer Space Treaty does not give clear answer on ownership of resources
 - Moon Agreement requires international regime but has only 16 parties
- On the road to a solution?
 - LSC agenda item
 - IISL BoD Statement
 - Hague Space Resources Governance Working Group
- **Step-wise** approach to **ideally a long-term hard law** solution?

Role of NGOs



International Institute for Space Law



European Centre for Space Law



European Space Policy Institute



Secure World Foundation

Conclusions

- Treaties & laws set the general framework
- But also leave gaps, and new needs emerge
- New hard law takes time, political will
- Soft law can help fill gaps, clarify terms in flexible and time-efficient manner
 - UN Res. could be more effective?
- It is a legal obligation to use space for peaceful purposes, for the benefit of mankind, and for states to ensure compliance by private actors with treaty provisions

Thank you

t.l.masson@law.leidenuniv.nl - www.iiasl.aero - www.iislweb.org



Universiteit
Leiden
The Netherlands



Discover the world at Leiden University