INTERNATIONAL INSTITUTE OF SPACE LAW

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POSITION PAPER ON SPACE RESOURCE MINING

Adopted by consensus by the Board of Directors on 20 December 2015

I. The U.S. Commercial Space Launch Competitiveness Act

On 25 November 2015, the President of the United States signed into law the U.S. Commercial Space Launch Competitiveness Act (H.R. 2262).[1]

It consists of four Titles: I. Spurring Private Aerospace Competitiveness and Entrepreneurship; II. Commercial Remote Sensing; III. Office of Space Commerce; and IV. Space Resource Exploration and Utilization.

Title IV, which is of interest here, addresses in a preliminary way space resource exploitation.

It consists of three sections, whereby Section 402 with its amendments contains most of the substantial legal provisions and envisions: the facilitation of "commercial exploitation for and commercial recovery of space resources by United States citizens"; discouragement of "government barriers to the development in the United States of economically viable, safe, and stable industries for commercial exploration"; and promotion of "the right of United States citizens to engage in commercial explorations for and commercial recovery of space resources free from harmful interference, in accordance with the international obligations of the United States and subject to authorization and continuing supervision by the Federal Government".

The Act determines in § 51303 that United States citizens engaged in commercial recovery of an asteroid resource or a space resource under this chapter "shall be entitled to any asteroid resource or space resource obtained, including to possess, own, transport, use and sell the asteroid resource or space resource obtained in accordance with applicable law, including the international obligations of the United States."

[1] *See* https://www.congress.gov/bill/114th-congress/house-bill/2262/text.

Finally, Section 403 of the Act assures that the United States does not assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any celestial body.

II. The legal situation relating to space resource exploitation under International Space Law

1. In 2004 and 2009, the Board of Directors of the IISL addressed questions regarding the appropriation of the Moon, other celestial bodies and their resources, in two statements[2] to which reference is made. The adoption of the United States law gives rise to the following evaluation of the current legal situation:

    a. First, the Outer Space Treaty of 1967 contains the basic legal regulation for outer space and celestial bodies. In its Article II, it provides that "Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."

    b. Second, 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, it is less clear whether this Article also prohibits the taking of resources. Article I para. 2 of the Outer Space Treaty specifies the right of the free exploration and use of outer space and celestial bodies, without discrimination of any kind, on the basis of equality and in accordance within international law. Yet, there is no international agreement, whether the right of "free use" includes the right to take and consume non-renewable natural resources, including minerals and water on celestial bodies.

    c. Third, according to the Moon Agreement of 1979, concluded twelve years after the Outer Space Treaty and adopted by consensus in the United Nations General Assembly, natural resources cannot become "property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person" (Article 11 para. 3). State Parties to the Moon Agreement agreed to establish an international regime to "govern the exploitation" of mineral resources "as such exploitation is about to become feasible". This clause, be it interpreted as a moratorium or not, is binding upon the sixteen States that have so far ratified the Moon

[2] Full texts of the Statements available online at: http://www.iislweb.org/docs/IISL_Outer_Space_Treaty_Statement.pdf and http://www.iislweb.org/docs/Statement%20BoD.pdf.

Agreement, but not upon the United States. Moreover, Article 11 has not gained the status of a rule of customary international law.

2. Therefore, in view of the absence of a clear prohibition of the taking of resources in the Outer Space Treaty one can conclude that the use of space resources is permitted. Viewed from this perspective, the new United States Act is a possible interpretation of the Outer Space Treaty. Whether and to what extent this interpretation is shared by other States remains to be seen.

3. This is independent from the claim of sovereign rights over celestial bodies, which the United States explicitly does not make (Section 403). The purpose of the Act is to entitle its citizens to these resources if "obtained in accordance with applicable law, including the international obligations of the United States". The Act thus pays respect to the international legal obligations of the United States and applicable law on which the property rights to space resources will continue to depend.

III. Future perspectives

It is an open question whether this legal situation is satisfactory. Whether the United States' interpretation of Art. II of the Outer Space Treaty is followed by other states will be central to the future understanding and development of the non-appropriation principle. It can be a starting point for the development of international rules to be evaluated by means of an international dialogue in order to coordinate the free exploration and use of outer space, including resource extraction, for the benefit and in the interests of all countries.

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