Overview of State Responsibility in a Global Commons

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“Commons” as Concept

• General
  — “any of the earth's ubiquitous and unowned natural resources, such as the oceans, the atmosphere, and space…” Oxford Pocket Dictionary of Current English

• Law
  — “Res communis” “thing belongs to all, all have right to use and enjoy, even in single parts, can never be exclusively acquired as a whole.” Black’s Law Dictionary
  — No single, formal, authoritative definition of “global commons”, per se
    – Aggregate of treaty and practice language relating to Antarctica, oceans, and space

• Economics
  — “…natural assets outside national jurisdiction such as the oceans, outer space and the Antarctic.”
    – French equivalent: patrimoine commun OECD Glossary
Modern Global Commons

• Antarctica
  — 1959 Antarctic Treaty
    – Entered into force June 23, 1961
    – 157 signatories, 157 ratifications & accessions, 68 declarations

• Space
  — 1967 Treaty on Principles Governing the Activities of States in the Exploration and Uses of Outer Space (Outer Space Treaty)
    – Entered into force on 10 October 1967, 98 ratifications, 27 signed
  — 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Agreement)
    – Entered into force 11 July 1984, 13 ratifications and 4 signatures

• Oceans
  — 1982 UN Convention on the Law of the Seas (UNCLOS)
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.
Question Raised: What does “international responsibility” mean?

Antarctic Treaty

- Mentions “responsibility” once
  - No specific mention of “international responsibility”
  - States have continuing responsibility to resolve disputes by “negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means” even if not referred to the ICJ Art. XII (2)

- Principles and rules that create responsibility of Signatory-States to other Signatory-States
  - Stated consequences of a breach
    - Settlement and/or deference to ICJ
  - Apparent “international responsibilities”
Question Raised: What does “international responsibility” mean?

U.N. Convention on the Law of the Sea

“International responsibility” applies to two specific cases:

1. Case one:
   A. Loss or damage to a coastal State in territorial sea
   B. Caused by Flag State’s government ship due to ship’s breach of treaty or other international law or coastal State’s regulations
   C. Operating for noncommercial purposes

2. Case two:
   A. Loss or damage to a strait-bordering State
   B. Caused by Flag State’s ship or aircraft due to breach of treaty’s or strait-bordering State’s regulations
   C. On transit passage
Question Raised: What does “international responsibility” mean?

Outer Space Treaty

• Radical, rapid departure from evolution of law of other commons
  — Months versus centuries or decades
    - 10 months from end of negotiations to entering into force
  — Clear intent to be governed by international law
  — Specifically, clearly declared that space is *res communis*
  — Art. VI is compromise between US and USSR negotiating positions
    - USSR: Only State actors in space
    - US: State and private actors in space
• “International responsibility” mentioned once
  — Applies to States, international organizations, and States participating in international organizations
• “International responsibility” for
  — National activities
  — Assuring that national activities conform to OST
  — National activities of nongovernmental actors
Question Raised: What does “national activities” mean?

The Antarctic Treaty

• Contains no specific language re: “national activities”

• Numerous rules applicable to States and nongovernmental actors
  —Prohibition of nuclear explosions and nuclear waste dumping
    
    Art V.1 and 2

  —All parts of Antarctica, fixtures, and equipment always open to official inspectors
    
    Art VII.3
Question Raised:
What does “national activities” mean?

The UN Convention on the Law of the Sea

- No express language re: “national” activities
- Numerous rules re: nongovernmental actors e.g.,
  - All ships must respect safety zones
  - No exploitation of continental shelf without coastal State’s express consent
- Some activities by nongovernmental entities will not be “national” activities
  - E.g., piracy: government ship or aircraft whose crew commits piracy can lose government status and remain a State’s national as a private vessel. *Art. 104*
    - State makes determination as to national status after the act
Question Raised:
What does “national activities” mean?

Moon Agreement

- Art. 14 language is almost exact language of Outer Space Treaty Art. VI.

- Requirements written differently:
  - OST requires States to authorize and supervise activities of nongovernmental actors
  - Moon Agreement requires States “ensure non-governmental entities under their jurisdiction shall engage in activities ...under...authority and continuing supervision...”

- Apparent change in target of authority?
  - OST = authorizing activities
  - Moon Agreement = authorizing actors
Question Raised: What does “national activities” mean?

Custom

- “The general principle, drawn from State practice and international judicial decisions, is that the conduct of a person or group of persons not acting on behalf of the State is not considered as an act of the State under international law.”

  *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Art. XI.*

- States are responsible for private activities “to the extent that the State acknowledges and adopts the conduct in question as its own.”

  *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Art. XI.*
Question Raised:
What does “national activities” mean?

Outer Space Treaty

- OST Art, VI “acknowledges and adopts the conduct” of nongovernmental entities “to the extent” of national activities
Open Questions

• Does the OST requirement of State authorization and supervision of nongovernmental actors “adopt the conduct” of nongovernmental entities as “national” activities?
  — i.e., how high of a standard is set by Art. VI?

• “International responsibility” requires “assuring” that “national activities” conform to OST, but what constitutes “assurance”?

• What methods and procedures meet authorization and supervision requirements?
  — Licenses? National laws and regulations? International norms?
  — Do these apply to States and international organizations in the same manner?

• What, if any, non-space international documents impose or define “international responsibility” and “national activities”?
Conclusion

• At international law nongovernmental actor - State relationship is ambiguous and evolving, e.g.:
  — Draft Articles on Responsibility of States for Internationally Wrongful Acts
  — International Law of Human Rights
• Art. VI provisions atypical at international law
  — State-nongovernmental actor relationship more defined
    − Something more is required than in Antarctica and on the high seas, unclear exactly what
• Clarification will come, in large part, from national laws, regulations, and practices
  — Must be consistent with OST and international law
    − At minimum, authorization and continuing supervision
      • Could be more depending on application and circumstances
Questions?
Comments?