A European Legal Regime for Commercial Utilisation of the International Space Station?

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1. Introduction

Projects to establish space stations, manned facilities to orbit the earth for longer periods at an altitude of several hundreds of kilometres, were often hailed as the 'next step' of mankind into outer space. After the first manned space flights had ultimately given rise to the famous visits to the Moon, time seemed ripe to extend human presence in outer space beyond a matter of days or weeks. And while the Soviet Union, now Russia, had already built up considerable experience with human flights of longer duration, those had been of a – legally speaking – simple character: they were single-nation efforts.

Now, with the ISS, in a spirit of innovative cooperation, fifteen States are engaged in a joint international project to realise this next step in the exploration of outer space. Through a pooling of financial and technological capacities of these fifteen States, it became possible to realise the operation of a permanently manned station in outer space: the International Space Station (ISS). The

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current legal basis of the project is an agreement signed in 1998 between the United States of America, Russia, Japan, Canada, and eleven members of the European Space Agency (ESA) that is mostly referred to as the Intergovernmental Agreement on the ISS (IGA). Under the lead role of the United States a genuine partnership is established for the “design, development, operation, and utilization of a permanently inhabited civil international space station (...) [which] will enhance the scientific, technological, and commercial use of outer space”.

As an international collective effort, the space station is a highly interesting experiment in international collaboration. The participating States (“partners”) join their efforts to design, build and operate the space station, while retaining full rights of jurisdiction and control over the flight elements (e.g. laboratory modules) that they contribute to the space station and over their nationals in or on the Space Station, subject to specific provisions of the IGA and other related agreements. A spaceship is created that will function under jurisdiction and control of several States, where none of these States has been granted full jurisdiction and responsibility over the spaceship as a whole, but only over a specific part thereof, or as Balsano and Wheeler have put it: “the ISS consists of a jigsaw of nationally owned space elements rather than an ‘international’ space station per se.” As a result, all participating States must ensure that their national legislation contains the necessary provisions for the effective implementation of the rights and responsibilities that they have accepted in this context.

Questions of jurisdiction and control of activities of States with regard to the ISS are further complicated by the stated aim of the IGA that the ISS should enhance the commercial use of the outer space. As a consequence, not only public entities but also private entities with commercial objectives will be involved in the operation of the ISS. They may use the facilities of the ISS for conducting scientific experiments, or other activities considered of interest from a commercial vantage point. In particular, the European Partner States have shown a great interest of involving commercial partners in their activities, and indeed some first activities of this kind have been undertaken.

Attracting private entities to invest in outer space activities first of all requires legal certainty, in particular with regard to protection of intellectual property

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3 Art. 1(1), IGA.

4 See Art. 5, IGA.

5 Balsano & Wheeler, infra, Section 2.2.

6 See Art. 1(1), IGA.