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Third party liability issues in commercial space activities (3)

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NUCLEAR LIABILITY – A FEASIBLE MODEL FOR THE SPACE SECTOR?

Abstract

It is not always easy to establish liability pursuant to space law, yet damages can be considerable. The damaging potential of space activities can exceed the capacity of any single spacefaring entity to make reparation. Absolute and unlimited liability could render the highly hazardous activities uninsurable. Complex causation questions may complicate the situation further. The mere determination of the liable entity can be a problem.

Accordingly, allocation of losses within a larger community of relevant entities to balance the competing concerns would seem useful. It could better retain the economic viability of the space sector, yet still secure adequate indemnification for damages. Compensation claims for damage resulting from particularly risky activities should be facilitated, but operators of activities that are deemed necessary yet entail high risks should be shielded from excessive claims.

The setting in the space sector seems in many respects similar to that in the use of nuclear power, which also entails significant risks. There the solutions adopted include, i.a., a three-tiered system of compensation with absolute but limited liability of the operator of a nuclear installation, coupled with limited liability of the state in which the installation is located, and an international compensation fund. (This is the system of liability sharing in Western Europe.) In addition to nuclear liability systems, interesting analogies can be found from the law of the sea, including international regulation of liability for oil pollution damage. There are also certain other examples of international trust fund mechanisms serving very similar purposes which the space sector could draw inspiration from.

Well-designed tiered systems and collective loss-sharing arrangements could prove useful in channelling the risks and ensuring means for adequate compensation also in space activities. The first tier could consist of absolute but limited operator/owner liability with compulsory insurance. This could be backed up by supplementary state liability and, ultimately, by an international fund. If the source of damage cannot be identified or fault established, the entire reparation could come from the fund. This would be the case where damage has been caused by unknown space debris, for instance.

Such a system should include clear allocation of the burden of compensation between different stakeholders within a system where the victim of harm can easily identify the entity from which to demand reparation. At best, it could even support preventive measures, instead of providing mere post-disaster compensation.