

The Privatisation of the "Province of Mankind" Time to Reassess Basic Principles of Space Law?

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ABSTRACT

Since the Cold War ended, the private sector's involvement and influence in space activities and policies have increased considerably, creating new legal expectations, such as ownership rights to intangible outer space resources, or rights to their exploitation. These endeavours are putting into question basic principles of public international law and space law.

While the Outer Space Treaty states that outer space shall be free for exploration and use by all States, a monetary value is being attached to intangible resources that heretofore have been considered "res communis humanitatis", or the province of mankind.

Should these fundamental tenets be reinterpreted, to allow for the progressive privatisation of outer space, according to the same economic principles that permeate terrestrial activities? Or should space resources remain beyond the scope of the privatisation pendulum, and continue to be governed by the principles of customary international law incorporated in the Outer Space Treaty?

INTRODUCTION

A few years ago, the "ISMs" were dominant: communism, commercialism, colonialism, nationalism, capitalism, among others. Now, it is the "ATIONS" that prevail: deregulation, commercialisation, globalization, liberalisation, privatisation, and other terms being coined daily.

The "ATIONS" imply movement, action, trends that perhaps cannot be stopped. Certainly, space activities, and in particular satellite communications, are evolving at an ever-increasing speed, and are subject to many of the "ATIONS": commercialisation, globalisation, deregulation. These terms are not synonymous, and through time, their meanings have been evolving, and influence our conduct of space activities.

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A SYNOPSIS OF THIRTY YEARS OF SPACE ACTIVITIES

Thirty years ago, the major powers, advocates of either communism or capitalism, agreed on several important principles relating to outer space activities, which were

incorporated in the "Outer Space Treaty."^{1/}

One of the most important stated:

"Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claims of sovereignty, by means of use or occupation, or by any other means."^{2/}

With time, however, the principles of the Outer Space treaty have been subject to reinterpretation by different parties, who allege that the words of the Outer Space Treaty do not really mean what they say. The reinterpretations enable claims similar to those made on terrestrial resources. For example, about 20 years ago, the "Equatorial" countries, basing their arguments on laws of physics, made claims of national sovereignty over certain segments of the geostationary orbit (GSO); these claims evolved into preferential or special rights to the GSO.^{3/} Their claims were rejected by the major space powers, which declared that their sovereignty claims were misplaced. It should be noted that several of the countries which dismissed these claims are now engaging in the auctioning of geostationary orbital positions (slots) and related resources, such as the frequencies to be used by spacecraft, alleging that remuneration for their use merely reflects their most efficient allocation.^{4/}

In the past ten years several national events and factors account for the move from government to the private sector to undertake certain space-related activities. The US policies in support of privatisation / commercialisation were embodied in several laws, such as the 1985 U.S. Executive Order on Separate Satellite systems, and the Space Commercialisation Act.^{5/} The creation of private international satellite systems, such as PANAMSAT, and

ORION, as separate from the traditional intergovernmental organisations -INTELSAT and INMARSAT- are a reflection of the "commercialisation" and "privatisation" of space communications. Further, the 1986 "Challenger" accident led to curtailment of non-military payloads on the space shuttle, and to the "commercialisation" of many launches.^{6/} Hence, the incipient "commercialisation" and "privatisation" of certain space activities gained in importance.^{7/}

By the late 1980s, many corporations, with the approval of their governments, became increasingly involved in all phases of space activities. With the impending demise of communism, the major space powers seemed to realise that their public sector did not have the financial resources to pursue many space activities, but hoped that the private sector would be able to find them.

The demise of "Communism" led to the further shifting of activities from government to the private sector. By the early 1990s, economic considerations seemed to become paramount, with the result that the private sector began performing functions that heretofore had been considered the purview of governments. Private corporations and financial institutions began assuming a leading role, while governments were being relegated to a secondary role in many of these activities, especially in their financing.

PROMOTING PRIVATISATION

In the US's satellite telecommunications sector, these policy and economic changes became more evident with the implementation of the "separate satellite systems", and the planning of new satellite systems in non-geostationary orbits (NGSOs)^{8/}, to be operational by the end of this century. The NGSOs will revolutionise the way we

communicate, the way we relate to each other; they will also change the regulatory environment, and concepts of responsibility of entities engaged in these activities.^{9/} The end of this century will see outer space teeming with numerous private satellite systems in a variety of orbits, comprised of scores of spacecraft, balloons and platforms.^{10/}

These activities are a reflection of one of the most important policy changes that has occurred in the last decade: the separation of regulatory responsibilities from daily operations of telecommunication systems. Regulatory entities have been created, while operations are slowly being "demonopolised", and transferred from the public sector to private companies.^{11/} As the private sector's involvement and influence increase, some corporations and individuals seem to be of the view that the ITU should take second place to the World Trade Organisation (WTO) in the allocation of frequencies and regulation of telecommunications systems, even though telecommunications services only recently became subject to the GATT (General Agreement on Trade and Tariffs).^{12/}

The views reflected in the WTO agreements signal important changes in the regulation and provision of services in the telecommunications sector. Wireless communications are expanding and their importance is increasingly linked to development, with radio frequencies viewed as potential "gold mines in the sky". Hence the "auctioning" of radio frequencies, a new means of generating revenues for the governments, while creating expectations of (sovereign?) property rights over the frequencies and orbital slots. This practise is seen as acceptable within the framework of corporate / economic development, especially as industries and

corporations becomes "globalised". Many strong advocates of the commercialisation and privatisation^{13/} of outer space activities and resources (including radio frequencies), however, are not familiar with their international regulation; thus, they do not consider that auctioning these resources may be in violation of any international legal instrument, such as the Outer Space Treaty, and potentially the ITU Convention as well.

As the "ATIONS" gain ground, and "ISMs" become concepts of another era, underlying legal principles are also subject to reinterpretation. This is reminiscent of George Orwell's "Animal Farm".^{14/} This fairy tale is an indictment of several "ISMs": communism, totalitarianism, authoritarianism; i.e., political systems that preclude expressions of dissent or disagreement with the decision-makers. During the first stages of the animals' rebellion, several tenets of "Animalism" were agreed to, one of the main ones stating that "all animals are equal."^{15/} With time, however, a few other words were added to this simple phrase: "There was...now a single Commandment:

**ALL ANIMALS ARE EQUAL BUT
SOME ANIMALS ARE MORE EQUAL
THAN OTHERS.**^{16/}

Similar revisions seem to be occurring with outer space activities: some States claim that they place a greater value on outer space, and thus are able to make better use of these resources than others. Admittedly, some States have greater access than others to these resources, but this does not confer on them the right to unilaterally decide what is "best" for the others. Nor does the size of the state bear any relation to these claims. (New Zealand was one of the first countries to auction parts of its spectrum, while Tonga set the precedent of charging fees for the use of orbital positions. Since then, auctioning of orbital slots has gained

in importance as a means of creating revenues for the government. It also creates expectations of property rights in the slots.)^{17/}

While the World Trade Organisation (WTO) and the ITU recognise that the radio frequency spectrum is a scarce resource, their views of how this resource should be allocated, by whom it should be managed and used, are quite divergent. While making the "best" or "most efficient" use of these resources is a laudable goal, the question remains: who will define and determine what is meant by "most efficient"? The party willing to pay the highest price for the resource, even though it may not be able to use it?

Economics may be one criterion, but it should not be the dominant, or sole basis for re-allocating, or assigning certain frequencies or orbital positions.^{18/} While the ITU is increasingly subject to criticism -- that its definitions and means of allocating these resources are not optimal, that they lead to non-use, or less efficient use -- so far there is no indication that "privatising" these endeavours or resources, or making them available through auctions, will lead to their more efficient use. Rather, access to these resources, based on economic or financial considerations or power alone, will lead to their (even more) skewed distribution, and their concentration in a few "mega-corporations". Ironically, this outcome would be contrary to one of this decade's key goals: competition and "market forces" replacing monopolistic control.

DÉJA VU?

With the implementation of privately owned and controlled non-geostationary satellite and other communication systems, national Administrations are being pressured to reconsider their concept of national sovereignty, to review their licensing procedures, to modify their long-

standing policies on control and use of radio frequencies, and to contract with corporations for their future satellite communications. In return, the corporations promise to bring fruits of development and of better communications to all countries.^{19/}

In this respect, however, the Outer Space Treaty, other UN Resolutions, the Preamble of the INTELSAT Agreement, even the ITU Constitution and Convention, should be re-examined, as these, and nearly every other document related to development make reference to the benefits that communications will bring to developing countries. Many of the benefits of space communications which were being promised thirty years ago are being reiterated by the corporations which plan to provide Satellite Personal Communication Services (S-PCS), or Global Mobile Personal Communication Services (GMPCS) via NGSOs. The principal difference is that private parties, rather than governmental organisations, are making the promises to other private parties, who in turn, are to convince Administrations and end users of the benefits of their new means of communication. The next decade will see the implementation of many new communication systems, (but not necessarily of the promises), whose principal beneficiaries will be the corporations of developed countries.

RESPONSIBILITY and LIABILITY ISSUES

Privatisation of outer space resources, their increasing control by only a few corporations, raises the issue of their accountability under the terms of the Outer Space Treaty. While it is often considered the "Magna Carta" of space activities, it is being subject to re-interpretation, to accommodate to changing times and pressures.

Administrations are being relegated to secondary roles in many respects, but a question remains: are private corporations prepared to take on full

responsibility for the consequences of their endeavours, from which they hope to reap great financial benefits, most of which are increasingly beyond the control of governments? It should be recalled that under the terms of the Outer Space Treaty, it is still the Parties, or Governments that are internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts...²⁰/, since State Parties to the [Outer Space] Treaty ...retain jurisdiction and control over such object[s]...²¹/

As with the rulers of "Animal Farm", one of the drawbacks to transferring power, or decision-making to a few, such as with the "privatisation" of certain activities, is a shift of accountability, even responsibility. Private investors are accountable primarily to their shareholders, whose main interest is financial profit. However, the public has little control over private investors, few means of holding them responsible or accountable for their actions. Government officials, on the other hand, may be held accountable to the persons who elected them, and thus removed.

Further, with the "globalization" of multi-national corporations, responsibility and accountability become even more tenuous or nebulous, as their "headquarters" become more difficult to define or locate. In the end, it may be that those "animals that are more equal than others", those who are the most persuasive, will manage to convince the others that private corporations alone are the best judges of what is best for the communications world.

The result could be a return to a monopoly situation, a new kind of colonialism, but with a variation. Rather than governments, a few multi-national monopolies so large as to be uncontrollable will have total

domination of the means and content of communications. They will be in control of the hardware and software necessary to operate any communication system. As in prior colonial times, there will be total dependence on the part of the less economically affluent societies, on the largesse of corporations, not of other governments.

Some economists and political leaders would have us believe that the healthy growth of most enterprises will benefit from the globalization of their theories and practises, that national borders are obstacles to the economic benefits to be reaped from their activities. Globalization has led to increasing economic interdependence of countries, but the financial health of a few corporations seems to obscure the potential negative consequences of this trend. Ironically, globalised communications, and particularly satellite communications which should eradicate the differences and boundaries between countries, may have just the opposite effect.

CONCLUSION

In the last few years, "ISMS" have given way to "ATIONS", raising the question as to the future management (in the broadest sense of the term) of outer space activities and resources. The fundamental role of government is also put into question: is there still a need, let alone room, for it?

Privatisation of outer space resources, their increasing control by only a few corporations, also raises the issue of their accountability under the terms of the Outer Space Treaty.

Perhaps the basic principles of Article I of the Outer Space Treaty need to be restated, and reaffirmed:

The exploration and use of outer space...shall be carried out for the benefit and the interests of all countries, [not only for the benefit of a

few corporations] ... and shall [remain]
the province of mankind.”^{22/}

¹ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. United Nations Publication. [Cited as the Outer Space Treaty hereinafter.]

² Article II, Outer Space Treaty.

³ See The Bogota Declaration of 1976. See also the UNCOPUOS Reports to the UN General Assembly, where the issue of these claims and principles to govern the use of the geostationary orbit (GSO) have been debated at nearly every session of the UNCOPUOS. Even in that forum, the importance of a new (commercial) environment is recognised in the *Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interests of All States, Taking into Particular Account the Needs of Developing Countries*. UN Document A/AC.105/L.211, 11 June 1996. The International Telecommunication Union (ITU) Convention also reflects the evolution of these claims, and their acceptance, or at least acquiescence by the international community. (Article 33 of the 1982 Nairobi Convention, now Article 44 of the Convention, Geneva 1992). Whether the ITU or the UN should take the lead in resolving these issues has also been subject to debate for years.

⁴ So far, the frequencies that have been auctioned have been those allocated for national terrestrial services. However, since the US has done away with the difference between domestic and international satellite systems, the frequencies and orbital slots that heretofore were for domestic communications systems, may now be used for these, as well as for transborder and international services. See the US FCC's "DISCO 1" January 1996 Report and Order.

⁵ See President Reagan's 1985 Executive Order allowing for the creation of international satellite systems separate from INTELSAT. See also the U.S. 1984 Commercialization of Space Act, allowing for the provision of launch services by private corporations, and subsequently by joint ventures in partnership with corporations of the former Soviet Union.

⁶ The US Commercialisation of Space Act was drafted in the early 1980s, enacted in 1989, and subsequently amended on various occasions. An examination of

these changes is beyond the scope of this paper.

⁷ The author is grateful to Dr. Eilene Galloway for supplying several key NASA definitions:

Commercialisation: the employment of private sector financial and other resources to provide goods and services which can meet Government requirements as well as those of a substantial number of other customers. Because the Government is neither the sole nor the predominant customer, it neither dictates specific design or operational parameters, nor bears more than its proportionate share of development or overhead costs.

Privatisation: Generally the transfer to the private sector of responsibility for providing ongoing, necessary services or functions currently being provided by the Government for itself and others through in-house labor and property resources. When the Government transfers to the private sector the responsibility for services or functions performed by the Government for the sole benefit of the Government, the transfer is referred to *contracting out, a subset of privatisation*.

⁸ Among the NGSO systems are (in alphabetical order): Globalstar, ICO, IRIDIUM, ODYSSEY, ORBCOMM, Skybridge, Teledesic. Other proposed systems would use balloons ("SkyStation"), or stratospheric platforms to provide a variety of communications.

⁹ Carl Pope, Executive Director of the Sierra Club warns against the nefarious effects of the "enhanced power that globalisation [is] giving to multinational corporations." Economic profits are paramount, while human considerations diminish in importance. He states that "[t]he challenge to building a decent world order is to ... find solutions that guarantee that the fruits of human invention and labor are used to improve the lives of both present and future generations." *"Beware Globalisation That Leaves People Behind."* International Herald Tribune, p. 6, 22-23 November 1997.

¹⁰ The ITU's listing of proposed satellite systems has increased exponentially in the

last few years, resulting in many Administrations advocating the implementation of measures, such as “due diligence” tests which would prevent or at least reduce the number of filings of “paper” satellite systems. Resolution 18 of WRC '95 Final Acts was addressed and amended at the 1997 World Radio Conference (WRC).

¹¹ In most countries, there are now regulatory bodies, separate from the major operator or provider of basic telecommunications. The new regulatory entities enjoy varying degrees of success, independence from the Ministry, and adequate financing.

¹² The World Trade Organisation(WTO) concluded an agreement on General Basic Telecommunications in February 1997; WTO Members agreed to open, non-discriminatory, transparent regulations and treatment in licensing procedures, and access to the radio frequencies which are essential for satellite communications services.

¹³ See note 7, *supra*, for definition of these terms.

¹⁴ George Orwell, “Animal Farm”, Copyright 1945; Penguin Group, publishers of Penguin Books (1989).

¹⁵ *Ibid.*, p. 15 This is the seventh of the “The Seven Commandments”, “...the unalterable law by which all the Animals on Animal Farm must live for ever after.”

¹⁶ *Ibid.*; p. 90. (Emphasis in original.)

¹⁷ These issues are not a merely “domestic” questions. With the globalisation of many economic enterprises, as well as of corporations, practises which are deemed successful in one country are adopted by others. For example, Mexico is considering auctioning parts of “its” spectrum, while the trade press talks of the orbital slots “owned” by Mexico . See *Space News*, p.1., October 1997.

Auctions of resources that until now are deemed to be the “province of mankind” under the Outer Space Treaty could set unwelcome precedents: if they can be auctioned off, and become the “property” of private parties, why not do the same with other elements that are part of the “common heritage of mankind,” such as carving up the high seas, and assigning the right to use certain shipping lanes in the or air lanes in the skies to specific coprorations? The high seas and air space are as intangible as satellite uplinks and

downlinks, and their exclusive use may increase the profits (or lessen the costs) of members of the transportation industry.

¹⁸ The ITU Radio Regulations provide definitions of these terms of art: *Allocation* (of a frequency band to particular services), *allotment* (of a radio frequency or radio frequency channel, for use by one or more administrations for a radiocommunicaiton service), and *assignment* (authorisation given by an Administration to use a radio frequency under specified conditions. ITU Radio Regulations, Chapter S1, Article S1, Section II, S.1.16-1.18. [Italics in original].

¹⁹ In another context, Pope, *supra*, note 9, points out that while globalisation has enhanced the power of multi-national corporations, the benefits of this economic strategy have not all been positive. Unemployment is rampant, living standards have fallen, the environment adversely affected, particularly in developing countries.

²⁰ Outer Space Treaty, Article VII. There seems to be little concern on the part of the proponents of the NGSOs of the impact on the outer space environment that thousands of satellites and hundreds of launches are likely to have. The concept of responsibility and liability in Art. VII does not seem to include responsibility for these potentially ill effects.

²¹ *Ibid.*, Article VIII.

²² Outer Space Treaty, Article I . Proposed amendmments or changes in wording are indicated by the square brackets [].