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REVISITING THE OUTER SPACE TREATY: A RE-EXAMINATION OF THE SOVEREIGNTY - JURISDICTION COMPROMISE*

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Abstract

International space law is dominated by the Outer Space Treaty, 1967. It neglected the concept of jurisdiction while detailing principles of lesser magnitude, such as ownership, appropriation, usage, and sovereignty. it left a void in governance in outer space that may be revisited as we bridge into the Twenty-first Century. With technology advancing quickly the day when we live and work in outer space is nearby. Perhaps we should re-look at the fundamental first principle of governance -- jurisdiction. There are several alternative models examined herein, all of which may be compatible with the 1967 treaty.

Introduction

The 1967 Outer Space Treaty resolved the important issue of ownership of outer space, including the celestial bodies. The compromise prohibited "national appropriation" of space, but required nations to retain "control and jurisdiction: over their space objects and spacefarers. That solution was widely hailed as a solomonic decision that played a role in preventing greater conflict in space (and on earth). That solution, consistent with the politics and indeed the technologies of the 1960s, may not be so clearly appropriate for the technology and experience of a new millennium. This paper will look at the compromise in light of the changing realities in space and will investigate alternatives that may prove more consistent with the needs of spacefarers in the next century.

The Compromise

Before the 1967 treaty was signed and ratified by more than one hundred nations, many scholars speculated about the prerequisites needed to claim and annex the moon and planets. The Russians had crash landed an unmanned probe on the Moon; soon, the United States would land men on the Moon. Clearly, actual

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settlement -- a most telling determinant of sovereignty -- was not technologically feasible into the foreseeable future. Based somewhat on the earlier Antarctica analogy (in which claims of sovereignty over territory were held in abeyance), the UN Committee on the Peaceful Uses of Outer Space (UNCOPUOS) agreed that space was the province of mankind, for the benefit of mankind, and finally that the moon and the other celestial bodies could not be annexed or appropriated by any means.[1]

This solution prevented squabbling over territory, but seemed to create a lacuna regarding responsibility for space activities. That problem, in turn, was solved by Articles 6, 7, and 8 of the Outer Space Treaty, which placed responsibility with the "launching" or "registering" nation. Article 6 placed international responsibility on the State Parties for the actions of public and private space activities by their nations. Article 7 made nations (states parties) launching or procuring the launch responsible for any damages resulting from the launch. And finally, Article 8 placed control and jurisdiction over space objects and spacefarers with the nation of registry. These three articles, thus, bestowed many of the indicia of sovereignty upon the launching or registering nation.

In the past thirty years, the implications of such "quasi-sovereignty" has not been very fully explored. Yet, in this context, the Bogata Resolution and the lonely French position that a long-termed orbital slot was a form of national appropriation find new philosophical meaning. Indeed, the structural and policy struggles in the ITU and other governmental and nongovernmental organizations (such as INTELSAT) at century's end can be interpreted in the wider context of finding new mechanisms to balance anew the sovereignty equation, and to manage and otherwise supervise the increasingly sophisticated activities in space.

More as an intellectual exercise than an actual agenda, we will begin by looking at new mechanisms to manage space activities deeper into the future. As personnel remain in space for longer time and in larger numbers, as the financial commitment and benefit from space becomes more profound, the very nature of supervision will begin to change. On the one hand, the interests of earth will dictate a greater interest in space activities; on the other hand, the interests of the spacefarers may begin to diverge from those of earth.

Of course, the introduction of the interests of the spacefarers emphasizes a new element into the legal and political equation. It is in this context that we should reopen the debate over the 1967 compromise. And it is in this spirit, that we want to discuss examples of quasi-sovereignty (control and jurisdiction with less than full independence). First, we will look briefly at American Indian Law, the jurisprudential treatment of the semi-autonomous tribes vis a via the sovereignty of the federal government and the limited sovereignty of the states. Then, we will review the legal treatment of "territories" under the Jurisdiction of the UN Trusteeship Council. Finally, we will return to the more near termed needs for a stable legal regime in space. We would like to discuss the EDA, Economic Development Authority (about which O'Donnell has written

extensively), in the context of the control - sovereignty continuum as preparatory for the other more long termed solutions.

Analogy -- American Indian Law

The patch quilt of legal relationships between the United States Government and the Indian tribes in America represents a jurisdiction - sovereignty compromise similar to that expressed in the 1967 treaty. In this analogy, the province of mankind at least as represented by the UN or by the world as a whole is the "federal government" and the space settlers are the "tribe." The treaty or contract between the ultimate sovereign (the federal) and the dependent (tribe) creates a "constitutional" and often a "corporate" entity.[2]

The tribes retain those indicia of sovereignty that the treaty permits; moreover, the tribe retains inherent elements of sovereignty that are not negated by the dominant relationship.[3] There is also some authority that the tribe, as "dependent nations," have a higher status than the fifty states of the union have![4] Tribes maintain control over their members and their territory.[5]

Although the comparison is admittedly not complete, this analogy for subordinate authority suggests several issues that are likely to arise in the future between the semi-autonomous space settlements and the sovereignty on earth.

The tribes, subject to treaty provisions, have the inherent right to issue regulations to administer to its needs and to protect its members.[6] The tribal councils can determine membership in the tribe, and can regulate internal matters such as domestic relations and inheritance.[7] Nonetheless, representing the dominant sovereign, the Congress still can intervene and assume control over all Indian affairs as deemed necessary.[8]

This model suggests insights into ways that a "quasi-sovereignty" in space may deal with its citizens as well as with its earth-based visitors. In general, Indian tribes have the inherent sovereign powers to control the activities of non-Indians on the reservation; this authority includes the power to license and tax these activities, and to regulate and prohibit actions that endanger the safety or the welfare of the tribe.[9] In this regard, it should be noted that the federal congress can and has interceded to require tribal councils and courts to meet constitutional requirements of due process and civil rights.[10]

The space settlement in orbit or on another world will similarly need to regulate its own members as well as its visitors. Indeed, the existing agreement among the nations on the International Space Station already provides rules about whose laws apply and who has the authority to enforce them. The large space settlements of the future will need such quasi-sovereign powers to provide for the safety and welfare of the installation and its inhabitants.

Another related (if esoteric) situation that might arise is the case where a criminal or terrorist on earth escaped to the quasi-sovereignty in space and asked for asylum or "citizenship" in the community. Or less dramatically, if a recent space immigrant is involved in a legal conflict, is he or she subject to the laws of earth or of the space settlement?

An analogous situation arises when someone claims membership in a tribe and claims its law applies. Generally the Congress by treaty or statute provides a mechanism to determine who is included on the tribal role (often a commission).[11] The treaty with the Seneca nation, however, permits that tribe to retain authority to determine its own membership roles.[12] Moreover, tribes have been found to have the authority to admit (adopt) "aliens" into the tribe.[13]

These types of issues arise in the event that space settlements will be governed by a distant sovereign. But what if the future determines that at some point the space settlement should become independent or at least has a right to prepare for eventual independence. What earthly analogy offers itself in this eventuality?

Analogy -- Trust Territories

The United Nations Trusteeship Council represents another theory and vehicle with which to address the problem of managing, administering, and otherwise governing spacefarers and space activities in the Twenty-first Century. This theory requires further interpretation as to the province of mankind and even the common heritage of mankind provisions. Since the UN represents almost the entire world, it would not be much of a stretch to vest that world body with the duty of overseeing the "province of mankind." Moreover, that body could determine, at some future date, that it is to the "benefit of mankind" that fully self-sufficient space colonies require their independence and sovereignty.

Created after World War II to head off struggles over conquered territories, the Trusteeship Council administered eleven trust territories. By 1975, ten had become independent. The status of US Micronesia was finally settled in 1990, and the last territory, Palau, became independent in 1994.

The Trusteeship Council originally had 14 member nations divided between administering (colonial) powers and non-administering nations. After 1980, the five permanent members of the Security Council assumed the duty and role of the Trusteeship Council.

As the human and physical infrastructure in space matures, the need to oversee these assets will increase. Indeed, the struggles within and around the ITU are symptomatic of attempts to deal with the maturation of satellite telecommunications. This process will continually repeat itself as other areas of space commerce and space applications mature. The Trusteeship is a tested mechanism that might find applications in the future evolution of space settlements.

Economic Development Authority (EDA)

Space economic development authorities (EDAs), about which Mr. O'Donnell has written extensively, can fit into either scenario - the quasi-sovereign dependency of the tribe, or the preparation for sovereignty. EDAs are important in the near term as a means to organize, finance, and otherwise rationalize the commercial development of space. In the context of the sovereignty dilemma, EDA also offers a solution that practically oversees and encourages space

development and can serve either as the terminus or a stopgap until a satisfactory new compromise can be reached between mother earth and its space children.

Courts in the US have found that some Indian tribes have a corporate as well as a political/constitutional existence.[14] Similarly, EDAs could exist within either a corporate or a political or a combined structure. Indeed, INTELSAT and other space international organizations have such dual natures. Somewhat ironically, INTELSAT and INMARSAT are busy trying to divest themselves of much of the political component of their existence.

EDAs can exist as free standing authorities that would help finance and supervise space development. Additionally, it could have a political existence either as a UN-affiliated organization or as a semi-autonomous proto-governmental agency.

Conclusions

In the final analysis, the sovereignty - jurisdiction compromise of 1967 contained two related components: (1) the limited sovereignty for humans in space (non-appropriation), because of (2) the ultimate sovereignty of humankind over human activities in space (province of mankind/common heritage of mankind). As settlements in space become more common and develop the need and desire to exercise more autonomy, one or both components of the 1967 compromise will have to be addressed, amended, or abolished. If the focus will be on the first component (limited, shared sovereignty), the Native American analogy might offer some guidance or analogies for the new regime in space. If the second component (eventual sovereignty) is the focus, the Trust Territory may better address the ultimate determination of sovereignty in space. EDA mechanisms can play an important role in either scenario.

References and Notes

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