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CONSULTATION REGIME IN SPACE LAW

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Abstract

There are some Treaties and U.N. Resolutions on Space Law which display a tendency to control controversies between the states by the "consultation procedure".

This procedure consists of three phases:

- (1) prior notification of the plan of space activities;
- (2) right of the affected state to request consultation;
- (3) duty of the affecting state to enter into consultation;

and it can provide a very effective means not for "settling" but for "avoiding" disputes between the states.

Such a "Consultation Regime", as a procedural rather than a substantive regulation, would become one of the contributory steps toward international co-operation of space

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1. Introduction

The United Nations and its COPUOS have adopted some treaties and resolutions in the area of Space Law. These treaties and resolutions provide for *consultation* to control controversies between the states parties. Similar provisions for *consultation*, although not altogether unknown before World War I, have become more frequent in security treaties after World War II. But the legal effect of such consultation is not always clear (Ref. 1).

Recently this *consultation* has become noticeable not only in "Space Law" but also in "International Environmental Law". Clearly it is better, in these areas of law, to anticipate potential disputes and prevent them from arising than to try to settle them after they have emerged. Therefore, it is necessary to consider techniques in order to avoid and to manage disputes (Ref. 2). And this *consultation* can provide a much more effective means not for "settling" but for "avoiding and managing" disputes between the states

parties.

So, in the following section, *consultation* in Space Law is to be examined from three points of view: its objects, procedures and functions.

2. Objects of Consultation

Article 9 of the "Outer Space Treaty" (Ref. 3) provides that activities or experiments planned by states parties which would cause potentially harmful interference with those of other states parties shall be the object of *consultation*. Certainly the scope of "potentially harmful interference" is not always clear, but this *consultation* shall be claimed at least at the stage of potentiality. So, it can be considered as a "prior" coordination of the interests of the states parties.

In the meantime, Paragraph 3 of Article 8 of the "Moon Agreement" (Ref. 4) provides that activities of states which would interfere with those of other states parties shall be the object of *consultation*. And Paragraph 2 of Article 15 of the same Agreement claims *consultation* in case a state party believes that another state party is either not fulfilling its obligation under the Agreement or is interfering with the right of the former state under the Agreement. As *consultation* shall be claimed at the stage of a state's belief, this *consultation* can also be considered as "prior" coordination. At the same time, a non Space Power, as a contracting party, shall be able to enter into *consultation* in case of violation of the obligation or interference with the right under the same Agree-

ment. Therefore, this Agreement could give a non Space Power more room to play a part than the former "Outer Space Treaty".

Next, the "Duty and Right to Consult" principle in the "DBS Principles" (Ref. 5) provides that any broadcasting or receiving state shall enter into *consultation* with a requesting state regarding its activities in the field of international direct broadcasting. Especially, *consultation* shall be claimed in case of the establishing of international direct broadcasting service under the "Consultations and Agreements between States" principle. And Principle XIII of the "Remote Sensing Principles" (Ref. 6) provides that a sensing state shall consult with a sensed state in regard to such activity, in particular to make available opportunities for participation and enhance the mutual benefits to be derived therefrom. So, it is well said that these *consultations* can coordinate in advance the interests of broadcasting or sensing states with those of receiving or sensed states.

And Article 2 of the "Rescue Agreement" (Ref. 7) provides that assistance for rescuing the personnel of a spacecraft which lands in an emergency shall be the object of *consultation*. As this *consultation* can prevent conflicts between the territorial sovereignty of a landing state and the personal sovereignty of a launching state, it can be considered as "prior" coordination too.

Consequently, it is clear that *consultation* in Space Law can be considered as "prior" coordination of the interests

of the states parties.

3. Procedure of Consultation

First of all, as to the procedure of requesting and accepting *consultation*, Article 9 of the "Outer Space Treaty", Paragraph 3 of Article 8 of the "Moon Agreement", the "Consultation and Agreement between States" principle in the "DBS Principles" and Principle XIII of the "Remote Sensing Principles" provide that the state affected by the space activities may have the right to request *consultation* independently, and that the state which is affecting the former state shall have a duty to enter into such *consultation*. Paragraph 2 of Article 15 of the "Moon Agreement", however, provides that a contracting party may have the right to request *consultation* independently, and that a contracting state receiving such a request shall enter into *consultation*. As previously mentioned, the object of *consultation* of this Article is wide and includes the violation of obligation or interference with the right under the Agreement. Thus, the scope of the state which may request or shall enter into such *consultation* is essentially wider than that under other treaties or agreements. Further, the "Rescue Agreement" has no provisions for the procedure of *consultation*.

Secondly, as to the procedure of providing information, Article 11 of the "Outer Space Treaty" provides that "states parties shall inform the Secretary-General of the United Nations as well as the public and the international scientific community to the greatest

extent feasible and practicable, of the nature, conduct, locations and result of space activities". But this provision has a clause for restriction; "to the greatest extent feasible and practicable", it is well said that much information would not be given by states parties. At the same time, Paragraph 1 of Article 5 of the "Moon Agreement", the "Notification to the United Nations" principle in the "DBS Principles" and Principle IX of the "Remote Sensing Principles", having similar provisions for restriction, provide the same point as Article 11 of the "Outer Space Treaty". In comparison with these provisions, the "Consultation and Agreements between states" principle in the "DBS Principles" provides prior notification of the plan of space activities from the affecting state to the affected state: from a broadcasting state to a receiving state. This procedure, giving concerned states chances and materials from which the influences of space activities can be judged, will contribute to the prior coordination of the interests of states, and will become very important.

Thirdly, as to the procedure of sanction in case space activities are carried out without such *consultation*, treaties and principles have no sufficient provisions. Therefore, the interpretation of the general international law will be necessary in each space activity. In this connection, every state holds the supreme power to keep its cultural integrity. And in all probability, it can be said that international direct broadcasting or remote sensing interferes with

the integrity of affected states, in case such activities disregard the intentions of these states (Ref. 8). And such *consultation* in "DBS Principles" and "Remote Sensing Principles", as a procedural regulation, could offer a kind of justification. So, international direct broadcasting or remote sensing without such *consultation* will become a deviation from the procedure, and will be illegal under these principles.

Consequently, the procedure of *consultation* mainly consists of three phases; the first step is the prior notification of the plan of space activities, the second step is the right of the affected state, such as the receiving or sensed state, to request *consultation* and the last step is the duty of affecting state, such as the broadcasting or sensing state, to enter into *consultation*.

4. Function of Consultation

The main function of *consultation* in Space Law is to avoid and to manage disputes in the form of "prior" coordination of the interests of the concerned states.

First of all, *consultation* under the "Outer Space Treaty" and the "Moon Agreement" will coordinate the interests of states parties in respect of cooperative use and environmental protection of international public spaces: Outer Space itself and Celestial Bodies. And this can be considered as a procedure to avoid disputes between them. Under Article 1 of the "Outer Space Treaty" which provides that "the use of outer space shall be carried out for

the benefit and in the interests of all countries and shall be the province of all mankind", space activities would enter into the typical "Community Interests" regime, especially in consideration of the environmental protection of Outer Space (Ref. 9). So, *consultation* under the "Outer Space Treaty" and the "Moon Agreement" would become the procedure for avoiding disputes based on "Community Interests".

On the other hand, *consultation* under the "Rescue Agreement", as previously mentioned, can be considered as a procedure to prevent conflicts between the territorial sovereignty of a landing state and the personal sovereignty of a launching state. That is to say, this *consultation*, preventing violation of the rights of other contracting parties, can be considered as a procedure for avoiding disputes.

In the next place, the *consultation* under the "DBS Principles" and the "Remote Sensing Principles" has to be examined. As to direct broadcasting and remote sensing, the field of activities stretches over both Outer Space and the Earth. So, *consultation* under these principles would collectively hold the two functions mentioned above; with respect to activities in the space segment, functions like the "Outer Space Treaty" and the "Moon Agreement"; with respect to activities in the earth segment, a function like the "Rescue Agreement". In either event, this *consultation* would also function as a procedure for avoiding and managing disputes.

5. Concluding Remarks

The factual means which are employed by *consultation* in Space Law, after all, will be none other than the traditional "*negotiation*": discussion aimed at reaching a compromise. But viewed in the light of its procedure or function, this *consultation* holds a special feature which distinguishes it from "*negotiation*". That is to say, this "Consultation Regime" consists of a course of procedures; the prior notification of the plan, the right of the affected state to request *consultation* and the duty of the affecting state to enter into *consultation*. And this, which is the coordinating of the interests of states parties, can provide a much more effective means not for "settling" but for "avoiding" disputes between them (Ref. 10). These are the essential features of the "Consultation Regime".

To conclude, the "Consultation Regime" is going to coordinate various interests of states in advance. This procedural rather than substantive regulation, such as the one to be found in the Judgment by International Court of Justice for "North-Sea Continental Shelf Case" (Ref. 11), would be most appropriate for promoting "international cooperation" in the field of space activities which is provided by Article 1 of the "Outer Space Treaty". And the role of "international cooperation" as a procedure for avoiding disputes will become more and more important in the area of Space Law.

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