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THIS TREATY NEEDS A LAWSUIT*

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Abstract

The Outer Space Treaty of 1967 has been discussed for 30 years but the treaty burden of benefit sharing has not been litigated. Instead, it has been politically removed from the protagonist southern states by UNGA resolution. However, the treaty was not amended so a juridical decision by a competent court could re-instate the forced transfer of space resource benefits requested by the southern states. Because of this future open door and because the financial stakes are getting higher, this treaty needs a lawsuit. The naked possibility that an injunction against the use of orbits or other space resources could obtain by court order in the future, or damages for trespass in the past could be calculated, requires judicial action now. This is viewed as curative and preemptive: a proper lawsuit may be the only way to define the treaty burden adequately. Strategies and problems are discussed.

Introduction

The treaty burden of benefit sharing has been restated in UN General Assembly (UNGA) Resolution 51/122, adopted December 13, 1996, to mean that nations should freely engage in international cooperation and that space powers should not forget to integrate the developing nations into space exploration. During the decade leading up to this political emasculation of the entire concept, northern and developed and spacefaring nations refused to consider any agenda that could lead to a legal commitment on benefit sharing. Only philosophical discussion was allowed. Since UNCOPUOS is conducted on a basis of 100 percent consensus voting, this refusal has forced the protagonist under-developed nations to concede their case:

> "It marks the end of a North South Debate which has focused on the introduction of forced cooperation and transfer of resources. By providing

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an authoritative interpretation of the cooperation principle of Art. 1 of the Outer Space Treaty the Declaration prevents further confrontation on the general political level."[1]

This political solution culminates a deep seated and heart felt campaign at the United Nations by a group of 77 nations (called G77). They have relied on Article 1 of the 1967 treaty to mean what it says and say what it means: "taking into account the particular needs of developing countries" indicated the need for unequal treatment for states in unequal situation.[2] The developing countries viewed outer space benefit sharing as a key part of their conception of "New International Order" involving a whole world economy and benefits from the satellite communications system. One draft paper by nine such states in 1991 "was rich in New International Order language aiming at forced cooperation and an automated transfer of financial and technological resources from North to South.[3]

The 1979 Moon Treaty had provided hope to the South because it expanded the concept of benefit sharing to individuals and companies, as well as clarified in much detail that the "common heritage of mankind" would be required as space treaty law. In 1982 this phrase was defined by the UN to require administration of the resources by all nations and equal distribution of benefits to all nations.[4] It is no wonder that G77 expected northern nations to respect their New International Order of mandatory transfers to them of money and resources in respect to space activities.

UNGA Resolution 51/122 (1996) may represent a political solution to benefit sharing, but it does not represent a legal solution. The treaties are not amended by this resolution, nor are they formally interpreted. The issue is technically unresolved.

If the southern states appear to be asking for too much, it may also be observed that the northern states may be offering too little. The satellite information and telecommunications industry has been relying on a rather novel theory of benefit sharing. It relies on the idea that its work product is valuable to the people who use it so that a benefit is made available to mankind and that complies with the treaty principle.[5] This self-serving declaration is true, but it means little to G77 citizens who can not afford it.

Somewhere in between these extremes there may be a fair and legal solution to the administration of a truly valuable principle. That depends on three procedural points that need to be fleshed-out before a court could deal with the substance:

1. Whether or not the treaty principles are enforceable or are they mere policy. The prevailing view appears to be that this principle is not legally enforceable.[6]
2. Whether or not a judicial forum can be found that can deal with such an issue. It has been asserted that no such forum is available.[7] The International Court of Justice has no case in controversy, but it could render an advisory.[8] This may not be

adequate.

3. Whether or not parties will consent to service of process.[9]

This paper will not deal with the substantive arguments regarding benefit sharing, except in order to frame the issue. The need for litigation is now clear because UNGA Resolution 51/122 (1996) was over reaching politically. The prospect of maintaining litigation in a procedural sense is our focus and it is the next logical step in the North South Debate.

Litigation Strategies

For the southern states there is one overriding strategy for litigation: political solutions are not available at the UN. The going to court scenario is forced as a consideration. The bottom of it rests on the legal meaning of a treaty and courts are cautioned that nations must respect treaties as binding agreements to be performed in good faith.[10] A competent court will not be able to refuse legal discussion of the issue in favor of merely philosophical discussions as forced against the South by UNCOPUOS during the last decade. All facts, circumstances, and UN Treaties will be briefed and argued towards a more fair hearing with due process.

This strategy is timely because the Deep Sea Bed Conservation Treaty is gaining momentum.[11] Not only does this agreement relate to analogous kinds of world resources, it also provides specific and enforceable procedures for the protection of deep sea bed resources as the common heritage of mankind. Not surprisingly, there has been published some basis for the juridical analogy of sea bed assets to outer space resources.[12] The temptation to connect the two by court order is compelling, if not obvious.

The South would be able to represent all nations in this proposed litigation. The treaty burden would fall on the relatively few nations and companies that gain revenues from space resources. However, the treaty benefit is clearly stated as applicable to all. The Moon Treaty of 1979 mentions "equitable sharing" in addition to the "common heritage of mankind" so a degree of apportionment is possible.[13] There are many ways to accommodate our space constitution level principal legal directive but the 1996 UN Resolution probably is not one of those methods.

For the North the strategy is closure. It is not tolerable to avoid this issue for 30 years while wrenching resources from mankind. The low earth orbits (LEO) are saturated with telecommunication satellites and more are expected by the year 2000 AD. Constellations of small satellites in LEO may bring the total number of satellites to well over 2,000 by that time. The amount of money earned by revenues from space by private industry surpassed government space expenditures world wide in 1996, according to *SPACE NEWS*. Revenues for the global space industry are at $77 billion USD per year. This will be $100 billion USD by the year 2000 AD.[14] It is too dangerous for private investors to build their castles in the sky out of shifting sands on earth. Litigation is probably the only way to clarify this issue and set it in concrete.

Enforceability of the UN Benefit Sharing Burden

Article 1 of the Outer Space Treaty and the UNGA resolutions that preceded it were obviously assertions of principles only. No standards for enforcement were provided. Based on this there has been a high degree of open and free cooperation internationally under the aegis of the UN Office of Outer Space Affairs.[15] The lack of enforceability has not thwarted healthy cooperation among diverse states and under-developed countries have experienced much benefit. (There is no criticism to be implied in this paper of the status quo).

However, treaties are to be considered binding and the advent of the Moon Agreement in 1979 and the Sea Bed Treaty in 1982 and the enormous strides by the environmental movement over the past 30 years need to be considered. Public interest litigation in the outer space arena is being prepared by United Societies in Space Inc. for the benefit of all people and as trustee for all nations. It asserts that this principle may now have legal significance because standards have evolved. There is no question about the specific, detailed, and comprehensive standards now a part of international conservation law in the Sea Bed Treaty. If the common heritage of mankind as defined there was equated through the wording of the Moon Treaty of 1979 into Article 1 of the 1967 treaty, then Sea Bed procedures would be relevant. If relevant and if enforceable, this would impose all of the following onto the use of space resources:[16]

1. Neither the area nor its space resources could be appropriated by anyone, except as follows:
2. All of the nations in the world must have an active sharing in the management of the area and its space resources, and,
3. All benefits reaped from these space resources must be shared by, and actually distributed to, all such nations, and,
4. The area and its resources must be preserved for future generations of mankind.[16]

These directives are legally cognizable, albeit some creative mechanisms would be required to implement them. Courts normally engage in such activity and the North and the South may soon be required to propose to a proper court how that should be accomplished. Enforceability of benefit sharing as a treaty law is now predictable, perhaps because in part the political process has failed.

What Forum is Available

The International Court of Justice would represent a good forum for resolution of this issue. It is an instrumentality of the UN and its judges have the appropriate background. However, there is no case pending and nations would have to consent to jurisdiction in that court for such a case. There are 185 UN member nations and it is unlikely they will all submit voluntarily to such litigation. The likely alternative is declaratory relief at the request of the UNGA or any other office of the UN.[17]

No declaratory relief of any kind is acceptable. Political and/or administrative solution have not gotten

to the bottom and no unenforceable judgment could do much more. It is time for a lawsuit, not just for another opinion.

Each nation has its own court system available to it. Argentina could file any time to test this principle in its own courts. So could the USA and so could representatives of any nation or combinations thereof, like G77. The costs of administering such a large suit would be very substantial and the losers may have to pay the litigation expenses of the winners. One reason to doubt that nations will rush forward to sue themselves and each other is that it has never happened before.

Another reason is that there are conflicts of interest inherent in the subject matter. For example, an attorney representing the USA would have to be on both sides of the controversy: It earns revenue subject to the burden and is also one of the class of beneficiaries of that burden. No ethics code of any bar association would permit this double dealing by its lawyers.

Without reciting all of the possible forum considerations, one traditional and likely avenue of litigation is planned: a Rule 23 class action in a US Federal District Court. United Societies in Space Inc. would bear the cost of maintaining such an action and it is proposing to file it soon. The basic research has been accomplished and the strategies have been evaluated.[18] Much of this analysis has centered on the Antarctic Treaty and the benefit sharing analogies to be made therein.[19] Clearly the oil and gas under Antarctica are in no immediate danger of being appropriated by anyone.

The local US Forum is believed appropriate here because the telecommunication industry is the target defendant. Most of that legal, financial, and regulatory activity is located in America.[20] Also, most of the plaintiffs and defendants can be located there and the legal community is well versed in these kinds of suits. Adequate representation is available.

The class action under Rule 23 gathers together a class of plaintiffs called all nations in the world. There are 269 of these according to *Town & Country* magazine (but eight do not order Coca-Cola and, therefore, may not be real). The defendants can be defined as nations and enterprises that receive revenues from the use of LEO satellites. It too is a class.

Personal Jurisdiction and Service of Process

The Rule 23 procedure includes a preliminary hearing to determine the suitability of the class as named.[21] Notice is the focus rather than service of papers for legal process. No individual is a party but the class itself is the party. This rule may represent the only way to get started on this mission. Of course, there is an "opt out" clause so any company or nation who would prefer to go it alone could be served and joined as a formal party to the pending suit, or deferred for litigation after judgment is rendered. Because of the economy and the need for clarification already stated above, it is expected that each class will remain in the notice group.[22]

The court traditionally focuses primarily on whether or not the class is well represented. This anticipates not only class attorneys and space lawyers

but, also, a healthy array of *amicus curie* briefs and direct representation of the major actors by competent counsel.

The class action is designed to provide equitable remedies against the defendant class, such as an accounting and an injunction against future use of orbits.[23] However, as a matter of practice, ancillary damages may be assessed and settlements that exchange full releases for money are commonly approved by the court. No dismissal or settlement is permitted without specific court approval following a hearing on that subject.[24]

The monetary damages could be sizeable. Even a modest award of money, even a nominal $1 USD per orbit per satellite, could be substantial. There have been hundreds of satellites in various orbits for 20 years. The space treaties do not contain any statute of limitation and the operators could not claim lack of notice of this burden. All of their nations signed the 1967 treaty.

The likely defendants are Comsat, Pan Am Sat, and their sponsoring nations. Comsat is not an agency of the US government and could be served directly with legal process. It would bring in its sponsors by interpleader in such a case. The class action rule is preferred, however, in order to avoid selective litigation within the industry.

Conclusion

The Outer Space Treaty needs a lawsuit in order to test and measure benefit sharing as a burden. US Federal District Court litigation under Rule 23 class action procedures is recommended. United Societies in Space Inc. of Colorado is considering public interest litigation to that end.

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8. UN Charter, 1947, Chapter XIV, Article 96, para. 1 and 2 providing for advisory opinions at the request of various UN offices and instrumentalities.

9. Nations may not be sued without their consent to waiver of sovereign immunity.

10. Vienna Convention on the Law of Treaties, 1969, Article 26: "Pacta Sunt Servanda," meaning that every treaty in force is binding upon the parties to it and must be performed in good faith.

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21. Federal Rules of Civil Procedure (US), 23(c)(1), "Determination by Order Whether Class Actions to be Maintained; Notice, Judgment, Actions Conducted Partially as Class Actions."

22. F.R.C.P. 23(c)(2).

23. F.R.C.P. 23(b)(2).

24. F.R.C.P. 23(e).