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LIMITS to SOVEREIGNTY: ANTARCTICA OUTER SPACE and THE SEABED

by

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Abstract

Sovereignty as a basic concept in international law had a beginning 350 years ago in the Westphalian system following the Thirty Years' War. Will it have an end now that the world is becoming smaller, more integrated and more globalized? The concept has been adapted to changing conditions and exists in relationship to other legal concepts such as the Common Heritage of Mankind principle. There are limits and restrictions on sovereignty in the legal regimes for the oceans, Antarctica and outer space. Yet the commercial and military activities of sovereign states and state-sponsored entities continue to be salient features of human enterprise in these non-sovereign areas. Why is this the case if it takes sovereignty to guarantee property rights and the rule of law? Sovereignty is becoming less sovereign as a concept, i.e., less absolute.

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It is no longer a question of 100 percent sovereignty or nothing, i.e., res nullius, or everything, i.e., res communis or the Common Heritage of Mankind. They are points on a continuum from complete independence and autonomy to complete interdependence and community. The commercial and peaceful military ventures of states and state-sponsored corporations and organizations can exist under a rule of law because of specific arrangements and conventions established for each function in space, e.g., allocating frequency space and not because of an overall plan or philosophy of law which can encompass every human endeavor in the cosmos.

Recent Treaty Provisions Limiting Sovereignty

1. No acts or activities taking place while the present treaty is in force shall constitute a basis for asserting, supporting, or denying a claim of territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica.

   Antarctic Treaty, Art. 4 (2) (entered into force, 1961)

2. Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

> Outer Space Treaty, Art. II
> (entered into force, 1967)

3. No state shall claim or exercise sovereignty or sovereign rights over any part of the area or its resources . .

> Third UN Convention on the Law of the Sea, Art 137 (1)
> (entered into force, 1994)

Transformations of Westphalia

Sovereignty, an attribute of statehood implying autonomy, control, independence, territorial integrity and exclusive internal jurisdiction,[1] does not apply to much of the planet earth, i.e., 60+ percent of earth are the oceans which are not subject to national jurisdiction and one of the earth's seven continents has a non-sovereign regime. These areas were historically res nullius or res communis and are now subject to discrete legal regimes established by states. Similarly, while sovereignty does apply to airspace over a state's territory,[2] it does not apply to outer space where more and more states and corporations conduct commercial and public activities.

Sovereign states did not exist throughout history. It is a convention to date the sovereignty of states and the modern state system with Westphalia in 1648. Theoretically, modern sovereignty may be said to begin with Jean Bodin in 1576,[3] although there is always the necessity to reference the ultimate sovereignty of God to whom sovereign kings and perhaps sovereign peoples owe their allegiance. So state sovereignty has a beginning. Will it have an end? Perhaps its evolution over 350 years has shown adaptive mechanisms that will enable it to survive. On the other hand, perhaps it is becoming more and more a legal fiction endangered by interdependence, integration, globalism and a world without borders.[4]

In this paper, I shall examine the limits to sovereignty in three legal regimes established by "sovereign states," i.e., the regimes in Antarctica, outer space and the seabed. A basic question to ask is what difference it would make if there were no sovereignty in terms of commercial and military activities? What are the consequences of the increasing limitations placed on sovereignty?

Antarctica

The 1959 Antarctica Treaty[5] places territorial and sovereign claims by states in abeyance. The treaty provides that the seventh continent is to be used exclusively for peaceful purposes. There can be no military bases or maneuvers or weapons tests, although military personnel can be used for scientific research. Over time, these self-limitations by seven states (Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom) have taken on added momentum. It appears that a state will not be able to do what states have done throughout much of the Westphalean era, i.e., claim new territory, go to war and start commercial and mercantile ventures. On January 14 of this year an historic new agreement on Antarctica, the Protocol on Environmental Protection to the Antarctic Treaty entered into force. All twenty-six Antarctic Treaty, Consultative Parties have ratified it.[6] Antarctica is designated as a natural reserve devoted to peace and science and all activities related to mineral resources except for scientific research are prohibited. This protocol replaces the more permissive Convention on the Regulation of Antarctic Mineral Resources Activities (CAMRA) which was opened for signature in 1988, but is not in force. The reaction against CAMRA by environmentalists such as Jacques Cousteau exemplifies the greening of sovereignty and a countervailing power to unfettered global markets.

It should be borne in mind in light of my initial observation that most of the earth is not subject to territorial sovereignty that Antarctica is not only the land mass of the continent but the seas going out to 60° latitude an area much wider than most states' territorial seas or exclusive economic zones (EEZs).

So states have limited themselves in Antarctica in terms of sovereignty, commerce and military activities and these incremental self-limitations have created an erosion of sovereignty and the creation of a new world beyond sovereignty.[7]

Outer Space

Since outer space is not subject to sovereignty what is it for? It is, inter alia, "free for exploration and use by all states," and this exploration "shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind."[8] In the Cold War context of 1967, what this self-limitation meant was that colonialism and great power rivalry were to be avoided. And in the competition for allies on earth, imperialism in outer space a la 1492 and after was prohibited. Further, military activities were limited. Under Article IV, "States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner." Further, "The moon and other celestial bodies shall be used by all states parties to the treaty exclusively for peaceful purposes."

While the 93 countries that are party to the outer space treaty have limited themselves in terms of territorial acquisition and in certain military activities (not reconnaissance or remote sensing[9]), they have not limited themselves in commercial activities as much as they have in the Antarctic Regime. Global industries have migrated into space and the most profitable have become the launching industry, the communications satellite industry and the remote sensing sector. The question immediately arises how can one make money in an area not subject to sovereignty and thus a sphere where private property claims can be called into question? Well the satellites are owned by the states or corporations that launch them but the space through which they orbit is not. This space is the "province of all mankind." This is analogous to the high seas. A ship is owned by its owners; the seas through which it passes are, at least according to John Locke "that great and still remaining common of mankind."[10] Outer space and the high seas are free for use because there is little scarcity and all states can use them profitably. However, problems can result and that is why states are given powers, even if no sovereignty exists, to regulate their activities, e.g., in implementing Article VI which makes states parties internationally responsible for national activities whether undertaken by governments or corporations.[11]

Another question presents itself and that is where does air space end and outer space begin? Airspace according to the Paris Convention of 1919,[12] is subject to the complete and exclusive jurisdiction of the states under it. Outer space is not subject to national sovereignty. There is no agreement concerning where air space ends and outer space begins. Is this a problem? No. No cases have resulted from this "vacuum," but rather it has been asserted that problems might result if there were a premature definition which could hinder technological advances and functional activities.[13] M. Rothblatt argues that even the stratosphere which begins at approximately thirty kms. up should be part of outer space.[14]

Another issue which is on the horizon concerns the resources of the moon. Under the Moon Agreement of 1979 which has been ratified by only 9 countries, "The moon and its natural resources are the common heritage of mankind . . . . "[15] While the agreement passed the UN Committee on the Peaceful Uses of Outer Space (COPUOS) by consensus, the principal consenting parties have not ratified it fearing that this article reflects the spirit of a bygone age of socialism and not the new age of privatization, free enterprise and open markets. In the meantime no commercial ventures are about to become feasible, so it is not necessary to consider amending or reconceptualizing the Moon Agreement as has been done with the Seabed regime. But when mankind thinks up commercial ventures, e.g., mining the moon for Helium3,[16] then the issue of the operational meaning of the common heritage of mankind principle (CHM) will become newsworthy.

In sum mankind's move into outer space has seen limits placed on sovereignty but not on many aspects of commercial or military activity. The limitations on commerce have to do with ownership of space and celestial bodies - not of the satellites launched into space which are the carriers of the profit motive. The businesses are post-industrial and part of the Information Age rather than the mining and manufacturing industries we associate with the Industrial Revolution of the 19th century. Assets are renewable and nondepletable like orbital slots and the frequency spectrum. The most profitable outerspace industries are launching, communications satellites and remote sensing satellites. Similarly, the limitations placed on military activities do not restrict national defense except insofar as prohibiting the orbiting of weapons of mass destruction which, in any event, are not as useful to the military in orbit as in the Intercontinental ballistic missiles (ICBMs), Submarine launched ballistic missiles (SLBMs) and bombers on earth.

The Seabed Regime

According to the 1972 Seabed Arms Control Treaty, states parties to the treaty, "undertake not to emplant or emplace on the seabed and the ocean floor and in the subsoil thereof . . . . any nuclear weapons or any other types of weapons of mass destruction . . . .[17]

In commercial terms, like the moon and its natural resources, in 1982 the Area, i.e., "the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction," and its resources were declared the common heritage of mankind.[18] And "Activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole . . . ."[19] And, as with the Moon Agreement, this provision has caused the United States not to ratify the UN Convention on the Law of the Sea (UNCLOS III) even though it was opened for signatures in 1982 and entered into force in 1994. Instead a movement has been underway to "amend" the convention by the "provisional application" of an "Agreement Relating to the Implementation of Part XI."[20] The United States consented to the Agreement on November 17, 1994 and this agreement could supplant de facto Part XI of UNCLOS which contains the "objectionable" phrase "Common Heritage of Mankind."[21] The Agreement, while reaffirming CHM, recognizes "that political and economic changes, including in particular a growing reliance on market principles, have necessitated the re-evaluation of some aspects of the regime for the area and its resources."[22] In effect, what may be underway, and seabed mining has already begun,[23] is an affirmation of private enterprise and the market (the invisible hand) for developing and allocating the resources of the deep seabed rather than the apparent legal regime in force based on the idea of "equitable sharing of financial and other economic benefits derived from activities in the area . . .

."[24] If this is the case the moral philosophy behind the new legal arrangements would be based on consequentialist ethics and utilitarianism rather than on the deontological ethics of Immanuel Kant.

In sum, in UNCLOS's "Area," sovereignty had been replaced by res communis in the guise of the common heritage of mankind principle, but now private enterprise is making a comeback, but this may not be via national corporations of the great powers but multinational ventures where sovereignty is at bay[25] and globalism is in the saddle.

Conclusion

This short introduction to the limitations on sovereignty in three realms - Antarctica, Outer Space, and the Seabed - points us toward a new world and the metamorphosis of the Westphalian system. Sovereignty has been eroding for a long time. Independence, autonomy and complete control are legal fictions in the world today. Paradoxically it is sovereign states which are limiting themselves but the consequences of each self-limitation may add up over time into an irreversible force of history. But where is this force heading? It may not be heading towards one world and res communis but towards a global free for all of the marketplace and world industries beyond political control - a world where everything is for sale including what's left of national sovereignty.[26] Sovereignty has eroded, yet commerce continues without private property being guaranteed by an exclusive sovereign. Instead we have regimes characterized by "governance without government" over "common property resources."[27] Military activities also continue but not of a directly aggressive nature. In fact, some military activities are of a peaceful nature in that they help provide transparency for arms control agreements. One protection for the common interest may be the marketplace itself and consumer sovereignty. And some of these consumers may be environmentalists as is the case with the story of the Protocol on Environmental Protection in Antarctica. However, we may also require auxiliary precautions and in this connection new approaches to international law are crucial. As David Kennedy writes of another subject ("the right of conquest"), the discourse on sovereignty offers "a promising venue for exploring international law not as a set of rules with origins and applications, but as a history of people with institutional, polemical and political projects."[28] This could be called post-modern sovereignty where "sovereignty" is not sovereign!

ENDNOTES

1. See Karen T. Litfin, "Sovereignty in World Ecopolitics," Mershon International Studies Review, vol. 41, supplement 2 (November, 1997), 167-204.

2. Convention Relating to the Regulation of Ariel Navigation (The Paris Convention), (1919). See Prof. dr. I.H.Ph. Diederiks-Verschoor An Introduction to Air Law (Boston: Kluwer, 1983), 4-5. Reinforced by the Chicago Convention on International Civil Aviation of 1944, Art. 1. 61 Stat 1180, TIAS No. 1591, 15UNTS 295.

3. Julian H. Franklin, ed. and trans. Jean Bodin on Sovereignty (New York: Cambridge University Press, 1992).

4. J. Ann Tickner, Gender in International Relations: Feminist Perspectives on Achieving Global Security (New York: Columbia University Press, 1992), 18, 64, 81, 117.

5. Antarctic Treaty, December 1, 1959, 12UST 794, TIAS no. 4780, UNTS

71, entered into force June 23, 1961.

6. "Antarctica: An Important New Agreement," Department of State home page, www.state.gov. December 22, 1997.

7. cf. Marvin Soroos, Beyond Sovereignty: The Challenge of Global Policy (Columbia: University of South Carolina Press, 1986).

8. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies, January 27, 1967. 18 UST2410, TIAS No. 6347, 610 UNTS 20, Article I.

9. See annual Aeronautics and Space Reports of the President (Washington, DC: NASA).

10. John Locke, Two Treatises of Government (New York: Mentor, 1965), 331.

11. Stephen Gorove, Developments in Space Law (Dordrecht: Martinus Mijhoff, 1991), 24

12. Supra, n. 2.

13. M. Rothblatt, "Are Stratospheric Platforms in Airspace or Outer Space?" Journal of Space Law, vol. 24, no. 2 (1996), 107-115, 109-110.

14. Ibid.

15. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies. Adopted on December 5, 1979; opened for signature on December 18, 1979, entered into force on July 11, 1984.

16. G. L. Kulcinski, "Astrofuel for the 21st Century," a paper from The College of Engineering University of Wisconsin-Madison, n.d.

17. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Seabed Thereof. 10 ILM 1971. The treaty has been ratified by 66 countries and 28 have acceded to it. ACDA homepage.acda.gov February 28, 1998.

18. Third UN Convention on the Law of the Sea, December 10, 1982, opened for signature. November 16, 1994 entered into force. 21 ILM at 1261; 33 ILM at 309. Part XI The Area, Sect 2, Article 136. 21 ILM at 1293. The treaty has been ratified by 126 states but not the United States.

19. Ibid.

20. Annick de Marffy-Mantuano, "The Procedural Framework of the Agreement Implementing the 1982 United Nations Convention on the Law of the Sea," American Journal of International Law, vol. 89, no. 4 (October, 1995), 814-824.

21. Ibid., 824. Needless to say, many observers do not find the CHM objectionable. They find it transforming and progressive, e.g., Aldo Armando Cocca.

22. Agreement Relating to the Implementation of Part XI of UNCLOS 10 December 1982, July 28, 1994. General Assembly Resolution 48/263.

23. William J. Broad, "First Move Made to Mine Mineral Riches of Seabed,"

The New York Times, December 21, 1997, 1, 8.

24. Supra, n. 16. 21 ILM at 1293.

25. The reference is to Raymond Vernon, Sovereignty at Bay, (New York: Basic books, 1971). Also see Jonathan F. Galloway, "Responsible Transnational Corporations?" chap. 10 in John W. Harbeson, Raymond F. Hopkins and David G. Smith, eds., Responsible Governance: The Global Challenge (Lanham, M. D.: University Press of America, 1994).

26. Sanford J. Ungar, "Special Interests: Is U. S. Foreign Policy for Sale?" chap. 1 in Great Decisions 1998, (New York: Foreign Policy Associations, 1998).

27. Oran Young, ed., Global Governance (Cambridge: The MIT Press, 1997), 5, 8.

28. David Kennedy, review of The Right of Conquest: The Acquisition of Territory by force in International Law and Practice, by Sharon Korman. Oxford, New York. Oxford University Press, 1996. In The American Journal of International Law, vol. 91, no. 4 (October, 1997), 745-48.