

The Sub-Orbital Private Space Flights May Require a Law Suit to Escape Benefit Sharing

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ABSTRACT

After describing the suborbital private space flight agenda and detailing the possible space treaty problems that may apply, such as the prohibition of simple commerce in outer space, a possible lock-step and blanket defense is proposed. The principal problem is that short term tours into space are clearly for commercial purposes and are currently not being considered part of the existing OST call for international cooperation to achieve a 'benefit for all mankind.' The possible ways to present a defense are detailed. A federal district court lawsuit in the US is recommended to adjudicate this close case so that the industry may avoid benefit sharing obligations later.

INTRODUCTION

There are many legal issues that could become a hindrance to the successful conduct of any commercial space business. These are largely occasioned by the Outer Space Treaty (OST) of 1967, but there are other problems as well. The President of the United States has recently been heard to promote the advent of a commercial space phase of outer space development. Virgin Galactic and 5 other suborbital, meaning not fast enough to reach orbit at 18,000 miles per hour orbit, space flight businesses have announced plans to fly passengers into space and, then, return to Earth perhaps a few hours after takeoff from Earth. The passenger ticket price of \$250,000.00 USD

per seat appears to be an average price per passenger.

As our orbital environment is evolving rapidly with new developments, there is an increasing number of States as well as non-state actors now seeking to develop or extend their space capabilities. On the one hand the OST tells us that Earth's orbital environment is a true place for the common good for mankind, while there is a growing population of space debris and now, commercial space ventures that pose a major threat to the long-term sustainability of space activities.

Moreover, non-state actors have sought ways to avoid or mitigate the legal issues involved with satellites and private 'space-flight' business by considering that

they work in ‘sub-orbital’ space and therefore are not limited by such treaties on “outer space.”

We are proposing three options that especially non-state actors should incorporate as they develop their commercial “space flight” business: first, suggestion that the commercial businesses partnership with the State run space authority (e.g., NASA, ESA) or another government agency; second, to conduct government contracts to assist such government pursuant to Article VI of the OST; and, thirdly, to comply with the full measure of the treaties, (referring to all five space treaties), for example, by providing a benefit to all mankind.

Because the commercial space industry is so new and precedent is wholly lacking, and because the litigation potential is so cumbersome if the treaty remedy of benefit sharing is adjudicated, a fourth option is also a possibility and that is a pre-flight court decision to determine remedy. If a relevant Court could opine that the Virgin Galactic or other such competing company plans are treaty compliant, then an International Court precedent could be asserted as a legal defense.

How to run this sort of obstacle course is the subject of this paper. The conclusion is that the salient risks are so great that the recommended pre-clearance by judicial precedence may be well worth the effort to obtain precedent by prevailing in an appropriate law suit. No other precautionary measure would have more clout under the structure of international space law as it stands at this time.

THE PRINCIPAL PROBLEM

The OST of 1967 is well known as a statement of principles. However, the International Institute of Space Law has

treated it no differently from any other treaty. It is considered the Constitution of international space law by most IISL members over the past 25 years, or so it appears to the author. Furthermore, the other four space treaties merely elaborate upon the principles codified in the OST of 1967. [1][2]

Perhaps the principal problem in law for the commercial space industry is stated at the OST Article I, sentence one, as follows:

“The exploration and 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.”

From the beginning these words were interpreted to require a trustee position for the commercial entity going into space. The beneficiary as stated is “all countries” and that has been legally interpreted as for the benefit of “all mankind”. The *res* of the trust, under this model of space treaty interpretation, would be outer space and space resources indigenous to outer space.

Also, this model contemplates that non-governmental actors are “required to have authority from their State and continuing supervision by the appropriate State Party to the Treaty”. [3]

This point is important because this Treaty also provides that the State has liability for most damages caused by the actor, as follows:

“Each State Party to the Treaty that launches or procures the landing of an object into outer space...and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juried persons by such

object or its component parts on Earth, in airspace, or in outer space,” [4]

This principle is detailed and expanded in another space treaty, i.e. the Convention on International Liability for Damage Caused by Space Objects. Thus, the role of the nations is treaty labeled as one of ultimate burden.

Ownership of, and responsibility for, space objects is also treated as follows:

“A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object and over any personnel thereof....” [5]

The registration aspect of this treaty procedure is expanded and detailed in “The Convention on Registration of Objects Launched Into Outer Space”. This treaty refers to two registries, one is the nation’s registry of objects and this one is mandatory only as to “when a space object is launched into earth orbit or beyond....” (Article II) [6]

Furthermore, the same Article II later provides that the State Registry content is up to the State itself only, as follows:

“The contents of each registry, (of a member State), and the conditions under which it is maintained shall be determined by the State of registry concerned.” [7]

The Second Registry is that one maintained by the Secretary General of the United Nations. Commercial vessels headed into space on a suborbital mission may be excluded from this registry because it requires only such information that the launching nation carries on its local registry. Thus “the general function” of the space object is not disclosed pursuant to treaty anywhere. [7][8]

Because there is no treaty need to register any suborbital commercial flight there is temptation to believe such flights are totally “sub-treaty”. In fact, it appears that this new industry does not utilize any of the space treaties, nor use any other government regulation. Perhaps the industry association should lobby to change this impression by having sub-orbital flights placed on the nation’s local registry as permitted by the Registration Treaty. It has a private industry group association and the companies are generous in attending conferences and advertising their future flights. Registration should not be restricted, but, this status quo is justified, except, probably, for the first sentence of the first treaty, the principal problem, known as “for the benefit of all countries”. [1]

This position is required because the IISL Board of Directors has included the phrase “commercial space” as a category prohibited by Article I of the OST recently. The probable reasoning is that the dominant purpose of grossing millions of U.S. dollars per flight is contradictory to the preferred purpose of donating or providing any genuine benefit to mankind, let alone to “all countries”. [9]

REMEDY

The treaty remedy of benefit sharing is the probable and most concerning remedy. This has specific treaty basis in the Moon Treaty and the Law of the Sea Treaty where the term “Common Heritage of Mankind” is used liberally. Assuming without deciding that benefit sharing as a remedy is advanced in litigation a new set of problems arise.

This concept of the “Common Heritage of Mankind” has no legal case as precedent but it has been widely presumed as available by space lawyers. The treaties do not specify how it works but the wording

by itself suggests that all gross proceeds derived by the commercial space company must be “disgorged” for re-distribution to all nations or to all but somehow weighted for developing nations. In a class action federally this would jeopardize all providers and carry a mandatory award of attorney fees, costs, and expenses to the Plaintiffs. [10]

In the USA under the 1933 Securities Act the remedy of disgorgement is usually and typically asserted by the Securities and Exchange Commission Enforcement Division in Federal litigation. The Federal judiciary is very well accustomed to applying it where proceeds were derived illegally under securities laws. Therefore, it may be inferred that “treaty law disgorgement” is not a large leap for attorneys at all, whether or not the treaty framers actually intended 100% of the derived monies to be disgorged, or an amount equivalent thereto, plus attorney fees of about 33 1/3% usually, plus costs, and plus all expenses of Plaintiff’s case expenses, plus pre-filing and pre-judgment interest on that award.

Because of this specific legal risk of suffering civil disgorgement analogized to security law remedies the US commercial space flight providers may care to mitigate or avoid this result.

A more comprehensive remedy is to change the space treaty regime. The Moon Treaty provides a road map as to how the United Nations + 9 countries foresee changing the current treaty regime for space. This is as follows: “States Parties to this Agreement hereby undertake to establish an international regime to govern the exploitation of the natural resources of the Moon as such exploitation is about to become feasible”, (emphasis added). [11] The IISL and the IAF should dedicate a

large part of the next IAC to producing evidence of that feasibility.

PRE-FLIGHT PLANNING

There are reasons to discount the premise of this paper to zero. For example, Dr. Buzz Aldrin repeatedly preaches that public support for the outer space development phase requires that more and more people in our society actually go into outer space. This, plus the reality that sub-orbital space flights will produce data relevant to enhance the safety and comfort of all future space flight and such is important.

The UN-Spider (United Nations Platform for Space-based Information for Disaster Management and Emergency Response) network created in 2006 is a start to this data bank. The United Nations agreed to establish UN-SPIDER with the following mission statement: “Ensure that all countries and international and regional organizations have access to and develop the capacity to use all types of space-based information to support the full disaster management cycle.” [12]

It may be that the industry’s existence will by itself represent a benefit to all countries, especially developing countries who otherwise could not participate in outer space applications. It was this special benefit to developing countries that led to communication satellite facial compliance with this treaty burden.

That being recognized, our recommendation is that efforts become structured to produce the kind of benefits contemplated by the OST treaty.[13] [14] That is to strengthen the function to regulate the orbital environment for the fair and responsible use of space. It is the common interest of all mankind, and as such stronger

institutions need to be in place to mitigate the ability to own and operate spacecraft in orbit without participating in the rule-making process or ratifying the existing Treaties and Conventions. [15]

Reluctantly but necessarily, it must be suggested that no Federal or National or UN Court has yet defined and decreed the true applicability of OST Article I, Section 1, and its first sentence. The first step is to work with a National government agency as a partner or as a standing contract awardee to sponsor, design, and effect a benefit to all. To this end one must consider the recent recommendations of the NASA Advisory Council Committee on Commercial Space, as stated below. [16]

Because Article VI of the treaty placed the content of a beneficial outer space program with each member state, as that may appear on its local REGISTRY, it is automatically presumed that service to the National Space Program is treaty compliant. This is not guaranteed but it is convincing legally. In this regard the Commercial Space Committee for NASA has put heavy favor on the COTS Cargo Program as a likely place for commercial space flight providers. "COTS" refers to the NASA Commercial Orbital Transportation Services program for delivery of cargo to the International Space Station, primarily.

Already in December 2010, COTS in coordination with Space X Corporation helped to launch the Falcon 9 rocket. In addition, there are several NASA Space Acts Agreements already negotiated with such companies as The Boeing Company and the Sierra Nevada Corporation Space Systems.

NASA acknowledges that public-private partnerships are being negotiated. [17] However, its more general statement is to the effect that SPACE ACT

AGREEMENTS be negotiated for cargo and commercial crew transportation to and from ISS. These are treated like a public-private partnership in which both parties provide funding.

There is an incremental new expense because the ISS is in orbit so the commercial space vehicle must speed up to catch it and safely dock at it. However, NASA has published that it has proposed a \$312 million USD for the COTS program over its current budget. Because of the available Federal funding "the use of Federal Acquisition Regulations, (FAR), Part 12 commercial services contract is appropriate". [18][19]

Issues that arise in these agreements involve "Proprietary Data Notices" where, data retrieval and intellectual property rights are detailed, whereby NASA is granted the data from the partnership missions. However, in some cases NASA is not to release the data to the public, unlike data normally acquired by NASA where images are considered non-copyrighted and publicly made available.[20]

Analogously, less demanding contract services may be awarded by an agency of the Nation. Some may not have a budget, no grants, and no loans, but research data is required that supports the National Program.

In lieu of a Federal Government involvement, a State, County, or Municipal government contract that tangentially complies with the Nation's Space Policy Program may be undertaken. For example, the City and County of Denver recently formed an Extraterrestrial Affairs Commission after voter approval. It is not funded by any governmental monies and it could use a donation. Perhaps a contract from a commercial space flight provider to search for and video-graph and transmit data

on alien craft sightings by passengers and/or crew would plug into this model, if NASA or other national space agency was transmitted that data also.

The next step in this recommendation is to seek a Court Case decision that could represent real precedent in favor of compliance with OST Article I and all treaty requirements. The US Federal Court system only handles cases in controversy so an Agency of the US Government should initiate the case, if that forum is desired. If not, a private party or entity could seek a pre-flight injunction in such Court based on Article I of the OST. Injunctions are typically hard to win so this litigation structure may be preferred. Perhaps all of the sub-orbital private space flight providers should be named as defendants so the Court may discern that some are enjoined and some are not. That would clarify the law locally and internationally, on diverse facts.

The UN International Court at the Hague, Netherlands, only handles disputes among member nations, but it could agree to take a case for advisory purposes, one perhaps sponsored by several nations. This avenue of seeking precedence may be considered the highest and best road to travel upon, bar none.

Another and compatible avenue is to obtain an advisory opinion from the Supreme Court of the newly reorganized space development authority. This is the International Space Development Authority Corporation formed in 2011 by United Societies in Space, Inc. which had 10 years experience in space governance; the Regency of USIS; and publication of Space Governance Journal since 1993. The organic documents of this Court System authorizes advisory opinions. It also has the capacity to require review by higher Courts of its opinions. [21]

The ISDAC Court also mediates and arbitrates cases on request. It is expected that its arbitration decision will be filed and reduced to a Federal District Court judgment by the prevailing party. There may be grounds for appeal from there to a Circuit Court of Appeals and from there to the Supreme Court in the USA. Similar Court potential procedures exist in every nation, unless the arbitration agreement waives appeal. Such waivers are totally optional and need not be made.

CONCLUSION

The objective here is to convert legal opinions into an effective legal precedent that spells out compliance clearly and with legal clout in order to dissuade all from very serious litigation like benefit sharing. Favorable precedent is viewed as persuasive.

Unless courts adjudicate and establish the precedent for activities in space, current treaties may be insufficient to ensure that the activities in space “shall be for the benefit of all Countries.”

AUTHORS

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REFERENCES

[1] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 1967, herein referred to as the OST.

[2] The other four space treaties are as follows: Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space; Convention on International Liability for Damage Caused By Space Objects; Convention on Registration of Objects Launched into Outer Space; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies.

[3] OST at Article VI.

[4] OST at Article VII.

[5] OST at Article VIII.

[6] Convention on Registration of Objects Launched Into Outer Space, Article II, Section 1.

[7] Convention on Registration of Objects Launched Into Outer Space, Article II, Section 2.

[8] Convention on Registration of Objects Launched Into Outer Space, Article III.

[9] Resolution of the Board of Directors of the International Institute of Space Law, 2006.

[10] See, Federal Rules of Civil Procedure, Rule 23, Class Actions. The Federal question of jurisdiction as it is in such Courts would be based on the issue of treaty compliance.

[11] The Moon Treaty of 1979, Article II. Also note that Article 18 therein requires we look to “relevant technological developments”.

[12] United Nations Resolution 61/110, 14 December 2006.

[13] J.J. Hurtak, “New Environmental Frontiers on Earth and in Space”. (Paper presented to the UN World Summit on Sustainable Development, Johannesburg, 26 August 2002.)

[14] J.J. Hurtak and Matthew Egan, “Consequences for Space Law-Making of Water Discovery on Mars, Appendix A: A Proposal for a Mars Treaty” (*Annals of Air and Space Law*, vol. xxix, 2006.

[15] Committee on the Peaceful Uses of Outer Space “Towards a UN Space Policy”. 52nd Session, 3 June 2009. A/AC.105/2009.CRP.12.

[16] Report of the Commercial Space Committee, NASA Advisory Committee, Office of the Chief Technologist, Jet Propulsion Laboratories, August 5, 2010.

[17] *ibid*, Recommendations, Use of Space Act Agreements to participate in the COTS program, April 25, 2010. (Note that Co-Author J. J. Hurtak, Ph.D., recommended that commercial space providers contract with an international joint venture to explore Mars, thereby utilizing Treaty Article VI space policy as variously published by all participating nations). See, “A Multi-Lateral Agreement for a Manned Mission to Mars”, J. J. Hurtak and Matthew Jude Egan, J.D., *Mars Society Journal*, c. 2006.

[18] *ibid*, Recommendation, Defining the NASA Market: “The number of seats per year purchased by NASA on US commercial spaceflights has a significant impact on the business plans of and availability of private investment for commercial providers”.

[19] NASA has been flying approximately 40 US and international partners (astronauts) into space each year and seeks to maintain that presence in space. It has contracted with Russia for 6 seats per year to the ISS so another 34 seats may be sought for Space Act Contracting per year, at a minimum.

[20] Sierra Nevada Corporation, Commercial Crew Development (CCDev) JSC No JSC-CCDev-1, 09.CRL.08880.783, January 2010.

[21] See, Poster Presentation: “HOW TO DEVELOP THE MOON LEGALLY AND SURVIVE TO TALK ABOUT IT”, Author, Declan J. O'Donnell, Esq., IAC 11.A3.2.P.25, Session A3.2P, Moon Exploration—Poster Session, Co-Chaired by Carol Russo of NASA and Bernard Foing of ESA.