

ment the freedom of use principle, as appropriation undermines freedom of use.⁵⁶ One State's appropriation of an area of outer space, or a celestial body, permanently denies every other State the right to freely use and explore that unique territory. This is antithetical to Article I.⁵⁷ The purpose of these articles is to protect space from Earthbound conflicts. They are intended to keep war and violence from spreading into outer space.⁵⁸ "By removing the common cause of disputes from outer space, armed conflict would be confined to the terrestrial environment thereby reducing the costs of space exploration."⁵⁹

Clearly the Outer Space Treaty prohibits appropriation by a State. However, private appropriation is not directly addressed in Article II.⁶⁰ Article II does not explicitly prohibit appropriation by natural persons, corporations or non-governmental entities.⁶¹ Prior to the drafting of the Outer Space Treaty, several international NGOs and legal organizations presented drafts, which contained explicit prohibitions, targeted at private entities, which were not incorporated into the final draft of the Outer Space Treaty.⁶² This lends support to the argument that

and in accordance with international law, and there shall be free access to all areas of celestial bodies." *Id.* at art. I.

⁵⁶ Susan Cahill, Note and Comment, *Give Me My Space: Implications for Permitting National Appropriation of the Geostationary Orbit*, 19 WIS. INT'L L.J. 231, 236 (2001).

⁵⁷ Jannat C. Thompson, Comment, *Space for Rent: The International Telecommunications Union, Space Law, and Orbit/Spectrum Leasing*, 62 J. AIR L. & COM. 279, 306 (1996).

⁵⁸ Leslie I. Tennen, Article II of the Outer Space Treaty, the Status of the Moon and Resulting Issues, presentation at the IISL/ECSL Space Law Symposium (Mar. 29, 2004) (PowerPoint presentation on file with author).

⁵⁹ *Id.* "The risk of disputes between competing claimants in space would be significant, and armed conflicts beyond the confines of this planet become not merely foreseeable but inevitable. Thus, an atmosphere of insecurity would pervade the outer space environment, and the cost of conducting missions would increase in direct proportion to the defensive planning, armaments and weaponry made necessary for protection of personnel and spacecraft. *Id.* at 5.

⁶⁰ Lynn M. Fountain, Note, *Creating Momentum in Space: Ending the Paralysis Produced by the "Common Heritage of Mankind" Doctrine*, 35 CONN. L. REV. 1753, 1753 (2003).

⁶¹ *Id.* at 1763.

⁶² Setsuko Aoki, *Commentary on Emerging System of Property Rights in Outer Space*, in PROCEEDINGS: UNITED NATIONS/REPUBLIC OF KOREA WORKSHOP ON SPACE LAW: UNITED NATIONS TREATIES ON OUTER SPACE: ACTIONS AT THE NATIONAL LEVEL 59, 60 (2004).

private appropriation might be tolerated by the Outer Space Treaty.

Taking the principles of the Outer Space Treaty as a whole, it is clear that “national appropriation includes all forms of appropriation whether national, private or otherwise.”⁶³ Until recognized by a sovereign State, a natural person’s, corporation’s or non-governmental entity’s control of previously unoccupied land is merely a fact of occupation.⁶⁴ It is not until that occupation is recognized by the sovereign that a property right vests in the natural person, corporation or non-governmental entity.⁶⁵ This requires some type of state action to legitimate control, which would be seen as appropriation under the pretext of national authority, if not national appropriation via the recognition of control itself. By this reasoning a State’s recognition of the claims of its nationals to lunar or celestial property would violate the “by any other means” clause of Article II of the Outer Space Treaty.⁶⁶

The Outer Space Treaty, like all treaties, is not intended to be read article by article, but rather as a whole.⁶⁷ Article II cannot be read by itself but should be read in conjunction with the other articles of the Outer Space Treaty. Article VI of the Outer Space Treaty defines the term ‘national’ as including non-

⁶³ Hongkyun Shin, *Emerging System of Property Right in the Outer Space*, in PROCEEDINGS: UNITED NATIONS/REPUBLIC OF KOREA WORKSHOP ON SPACE LAW: UNITED NATIONS TREATIES ON OUTER SPACE: ACTIONS AT THE NATIONAL LEVEL 50. See also Statement by the Board of Directors of the International Institute of Space Law on Claims to Property Rights Regarding the Moon and other Celestial Bodies, available at http://www.iafastro-iisl.com/additional%20pages/Statement_Moon.htm (2004) [hereinafter Statement by the Board of Directors].

⁶⁴ Aoki, *supra* note 62, at 61.

⁶⁵ *Id.*

⁶⁶ Leslie I. Tennen, *Second Commentary on “Emerging System of Property Right in the Outer Space*, in PROCEEDINGS: UNITED NATIONS/REPUBLIC OF KOREA WORKSHOP ON SPACE LAW: UNITED NATIONS TREATIES ON OUTER SPACE: ACTIONS AT THE NATIONAL LEVEL 67 [hereinafter *Commentary*].

⁶⁷ “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties; May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 8 I.L.M. 679. The term “context” is later explained to mean “the text, including its preamble and annexes.” *Id.* at art 31(2).

governmental entities.⁶⁸ Non-governmental entities have been interpreted to mean private parties, whether natural persons or corporations.⁶⁹ Thus, the Outer Space Treaty prohibits national appropriation, because when the treaty is read as a whole private appropriation is part of the definition of national appropriation.

Drawing further from Article VI, States "bear international responsibility" for the acts of their nationals in outer space.⁷⁰ Thus, the appropriation of a national, if recognized or legally sanctioned by the State, would create international responsibility on that State for their national's actions.⁷¹ Also, it would be illogical to believe that a State could authorize a private actor to act when the State itself is denied the same action.⁷² To do so would allow States to circumvent treaty obligations by delegating authority to act in unauthorized manners to non-state actors.⁷³

V. CONCLUSION

The law on this issue is clear. The Appellant does not present a claim for which the District Court may provide relief. The Appellant presents no legal or factual evidence for the source of his "natural right" in Eros. He merely claims that this right lies within the unenumerated rights of the Ninth and Tenth Amendments. These Amendments have never been interpreted to create property rights. Thus, the Appellant's claim

⁶⁸ "States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty." Outer Space Treaty, *supra* note 20, at art. VI.

⁶⁹ Statement by the Board of Directors, *supra* note 63.

⁷⁰ Outer Space Treaty, *supra* note 20, at art. VI.

⁷¹ "According to international law, States party to a treaty are under a duty to implement the terms of that treaty within their national legal systems. Therefore, to comply with their obligations under Articles II and VI of the Outer Space Treaty, States Parties are under a duty to ensure that, in their legal systems, transactions regarding claims to property rights to the Moon and other celestial bodies or parts thereof, have no legal significance or recognised legal effect." Statement by the Board of Directors, *supra* note 63.

⁷² Aoki, *supra* note 62, at 61.

⁷³ *Commentary*, *supra* note 66, at 69.

is without merit and cannot survive a Federal Rules of Civil Procedure Section 12(b)(6) motion to dismiss for failure to state a claim.

The case does contain an interesting issue, but which was not raised by the parties and therefore which, regrettably, the court will not address: whether or not Article II and Article VI of the Outer Space Treaty allow for private ownership of lunar or celestial property. Appropriation of lunar and celestial property by natural persons, corporations and non-governmental entities is prohibited by Article II and VI of the Outer Space Treaty for three reasons. First, natural persons, corporations and non-governmental entities may act in outer space only with the authorization and under the supervision of States. If a government was to recognize an appropriation made by one of them, it would constitute national appropriation "by any other means". Second, Article VI of the Outer Space Treaty defines "national" to include non-governmental entities such as natural persons and corporations. If these actors are viewed as national then their appropriation is likewise national. Third, if private actors were allowed to appropriate lunar and celestial property, then it would allow States to circumvent their treaty obligations merely by delegating authority to act in otherwise unauthorized manners to non-state actors. This is not to say that natural persons, corporations and non-governmental entities might not be able to acquire some types of property interests in lunar and celestial property or engage in some types of private activities. That is not the focus of this study. This merely means that they are prohibited from appropriating lunar and celestial property.

COMMENTARY

MAINTAINING INTERNATIONAL SPACE COOPERATION FOR PEACEFUL USES

*Eilene Galloway**

The dramatic orbiting of *Sputnik* over all nations on October 4, 1957 raised fears of weapons of mass destruction, but nations responded by organizing with hope for peace. International space cooperation has brought the world 47 years of safety and order to develop benefits for all humankind: profitable global satellite communications systems, new industries from remote sensing, economic savings from improved meteorology, advances in agriculture, medicine, and many more applications from knowledge obtained from space. This is a remarkable achievement that we must protect against any influence that could destroy the system of international space cooperation.

Now, demands for private property rights on the Moon and other celestial bodies are threatening to destroy the existing international system, and without regard for consequences such as conflicting national claims, and the inability to use such property because of hazardous conditions and cost.

The idea of owning space property began when an unauthorized individual decided to sell lots on the Moon. At first, this action was regarded as an amusing fantasy, but the seller profited from the sale and the practice, now followed by imitation, is regarded by most space law experts as unlawful.

However, no official action has been taken to stop such claims, and the idea has spread. The "Report of the President's Commission on Implementation of United States Space Explo-

* Dr. Eilene Galloway is Honorary Director of the International Institute of Space Law, and a Trustee Emeritus of the International Academy of Astronautics. She served on the NASA Advisory Committee on the International Space Station, and the NASA Advisory Committee on Space Flight.

ration Policy"¹ (June 2004) called attention to the United States being signatory to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies² which prohibits claims of national sovereignty on any extraterrestrial body. The Commission recommended that Congress "increase the potential for commercial opportunities...by assuring appropriate property rights for those who seek to develop space resources and infrastructure."³

This recommendation is not based on all the facts essential for analyzing the question of property rights in connection with Article II, which provides that—

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.⁴

This policy has been adhered to by all nations since 1957-58, even before the Outer Space Treaty was completed, because sovereign claims were judged to be a potential cause for conflict and war. The United States played a leading role in the adoption of this policy. As satellites orbit quickly over all nations while preserving safety and order, the policy is recognized as international customary law.⁵

We have proved that outer space can be used for a variety of humanitarian, commercial, and beneficial purposes without the necessity for ownership. The global satellite communication industry alone produces millions of dollars in profits.

We must recall the dramatic incident in American history when President Eisenhower asked Lyndon Johnson, then the

¹ REPORT OF THE PRESIDENT'S COMMISSION ON IMPLEMENTATION OF UNITED STATES SPACE EXPLORATION POLICY, A JOURNEY TO INSPIRE, INNOVATE, AND DISCOVER, (June 2004), available at http://www.nasa.gov/pdf/60736main_M2M_report_small.pdf (last visited Oct. 29, 2004) [hereinafter PRESIDENT'S COMMISSION REPORT].

² Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 1, 1967, 18 U.S.T. 2410; 610 U.N.T.S. 205. [hereinafter Outer Space Treaty].

³ PRESIDENT'S COMMISSION REPORT, *supra* note 1, at 33, Recommendation 5-2.

⁴ Outer Space Treaty, *supra* note 2, at art. II.

⁵ Kerrest Arnel, *New Developments in the Legal Framework Covering the Exploitation of the Resources of the Moon*, in IISL/ECSL SPACE LAW SYMPOSIUM (2004).

Majority Leader of the Senate, to go to the United Nations on November 17, 1958 and promote U.S. foreign policy by persuading other nations to join us in creating the Ad Hoc Committee on the Peaceful Uses of Outer Space. Senator Johnson pointed out that the President was a Republican while he was a Democrat, and said:

These are distinctions. They are not, on this Resolution, differences. On the goal of dedicating outer space to peaceful purposes for the benefit of all mankind there are no differences within our Government, between our parties, or among our people. The executive and the legislative branches of our Government are together. United we stand.⁶

On September 22, 1960, President Eisenhower addressed the United Nations General Assembly on the opportunity to control the future of outer space, proposing that—

1. We agree that celestial bodies are not subject to national appropriation by any claims of sovereignty.
2. We agree that the nations of the world shall not engage in warlike activities on those bodies.
3. We agree, subject to appropriate verification, that no nation will put into orbit or station in outer space weapons of mass destruction. All launchings of space craft should be verified in advance by the United Nations.
4. We press forward with a program of international cooperation for constructive peaceful uses of outer space under the United Nations. Better weather forecasting, improved world-wide communications, and more effective exploration not only of outer space but of our own earth—these are but a few of the benefits of such cooperation.⁷

The initiative of President Eisenhower in starting the process that led to creation of the U.N. Committee on Peaceful Uses

⁶ FINAL REPORT OF THE SENATE COMMITTEE ON SPACE AND ASTRONAUTICS. S. REP. NO. 100, 1st Sess., at 58 (1959).

⁷ President Eisenhower's Address to the General Assembly of the United Nations, 1960 PUB. PAPERS 714-15 (1960).

of Outer Space (UNCOPUOS) in 1959 led to the formulation of space treaties which furthered the application of space science and technology for beneficial uses. The Committee's membership, today representing 65 nations, makes all decisions by consensus. The 1967 Outer Space Treaty reiterated the space policy against national claims for sovereignty that has been followed since the space age began. This Treaty has been ratified by 98 nations and signed by 27 others.⁸

The problem created by advocates of property rights in space and on celestial bodies cannot be solved by a unilateral attack on the 1967 Outer Space Treaty. The proposal evidently arises from the unquestioned assumption that an accepted practice on Earth can automatically be transferred to outer space. Actually, all space activities must conform by means of space science and technology to the unique condition of the outer space environment which is lethal, hostile to humans and vehicles, and extremely expensive to develop. We could expect rival claims among nations. Who would decide what is "appropriate" for private property rights? How could we have an efficient system if some nations permit private property rights and others do not? Exactly what rights are being considered? And how would a divided world system adjust to the fact that every nation has the right of self defense? All the probable consequences of such a proposal have not been thought through.

The irony is that the issue of private property rights in space can be solved without threatening the existing successful system of international cooperation. A study should be made of all the private entities that make profits from property they do not own. For example, fishing from the ocean, logging from public forests, drilling oil from the Gulf of Mexico, running hotels in public parks, and mining for minerals from the bottom of the sea. If difficulties arise, such as a diminishing supply of fish, the problem can be settled by negotiation. Even now we do not need to own parts of outer space in order to make profits from space applications. Commercial space uses are apt to differ, but

⁸ *Status of International Agreements Relating to Activities in Outer Space* as at 1 January 2004, U.N. Treaties and Principles on Outer Space, Addendum, Ref.: Sales No. E.02.I.20, ST/SPACE/11/Add.1/Rev. 1 (2004).

their unique characteristics could be accommodated as long as they are in compliance with the safety and order required for maintaining peace. This study should lead to action for positive results in dealing with the problem of private property rights. We have the responsibility of preserving Article II from attack.

The United States should decide how to implement its international responsibility for national space activities, particularly in connection with U.S. sellers of deeds to the Moon and other celestial bodies. Article VI of the Outer Space Treaty provides that "The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision."

The Board of Directors of the International Institute of Space Law concluded in 2004 that "[t]he sellers of such deeds are unable to acquire legal title to their claims...[which] have no legal value," "States party to a treaty are under a duty to implement the terms of that treaty within their national legal systems," and such "claims to property rights to the Moon and other celestial bodies or parts thereof, have no legal significance or recognised legal effect."⁹

The United States Government should designate an agency to be responsible for supervising such unlawful national activities as soon as possible to stop the unmanageable growth of unauthorized sales.

The problem created by proposals unfavorable to the policy of non-sovereign claims to outer space and celestial bodies could be handled by the Department of State in cooperation with NASA.

⁹ Statement by the Board of Directors of the International Institute of Space Law on Claims to Property Rights Regarding the Moon and other Celestial Bodies, *available at* http://www.iafastro-iisl.com/additional%20pages/Statement_Moon.htm (2004).

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* Ms. Dyer is a third year law student at the University of Mississippi School of Law, student researcher at the National Remote Sensing and Space Law Center, and a JOURNAL OF SPACE LAW editor.

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* This section was provided by Ms. Maria Nikolaevna Bjornerud, a third year law student at the University of Mississippi School of Law, student researcher at the National Remote Sensing and Space Law Center, JOURNAL OF SPACE LAW editor, and associate member of the American Translators Association.

Agency new ministerial status, in order to speed up and simplify the procedures dealing with international activities.¹

The Russian Aerospace Agency was transformed into the Federal Space Agency by Presidential Edict No. 649, *Questions of the Structure of Federal Organs of Executive Power*, of May 20, 2004.² The Space Agency is no longer a separate operating agency under the purview of the Deputy Prime Minister but is now subordinated to the Ministry of Industry and Energy.³ Nevertheless, the agency can hold direct negotiations and sign contracts with foreign partners, issue licenses for space activities and solve all management issues concerning space-related enterprises and facilities.⁴ The agency is no longer in charge of the aviation industry, which used to drain the budget allocated to space activities.⁵

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² See *Questions of the Structure of Federal Organs of Executive Power*, Presidential Edict No. 649 of May 20, 2004, available at www.government.ru (last visited : Oct. 14, 2004).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See James Oberg, *Anxiety at NASA After Russian Space Chief Replaced*, MSNBC Space News, Mar. 14, 2004, at <http://msnbc.com/id/4527950/> (last visited Oct. 14, 2004).

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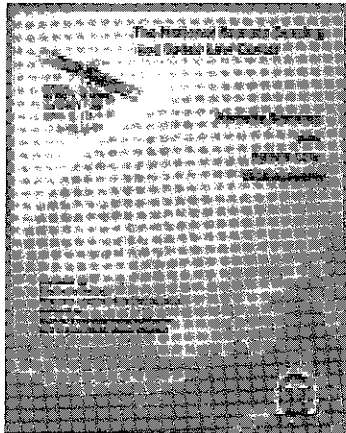
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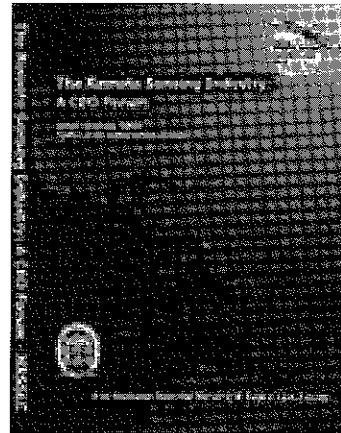
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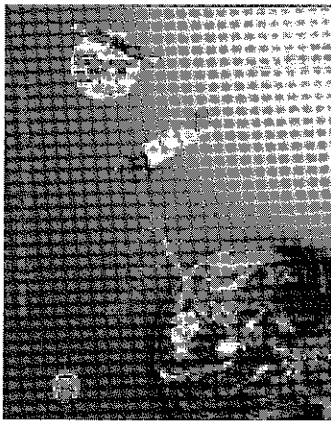
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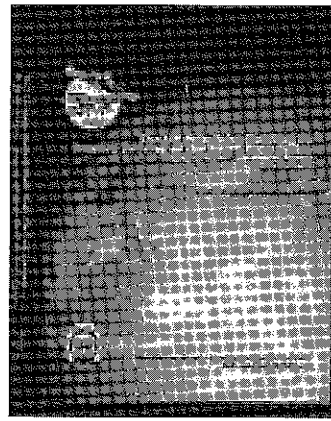
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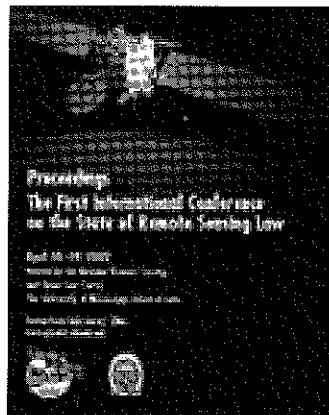
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