

III - JURISDICTION OVER SPACE STATION ACTIVITIES

The nature and extent of U.S. jurisdiction over a space station will determine when U.S. laws could be applied, what unilateral actions the United States may take in space, and the rights and obligations of foreign nationals. This section examines the concept of jurisdiction and explains how it might be applied to private and government-owned space stations.

A. The Concept of Jurisdiction

Jurisdiction is a legal concept used to describe a state's right to take action--e.g., to prescribe and enforce rules of law--with respect to a particular person, thing, or event. In its inception, the principle of jurisdiction was primarily territorial, deriving from the belief that the power of a nation to act within its own borders was "necessarily exclusive and absolute . . . susceptible of no limitation not imposed by itself."³⁷ But the actions of nations have rarely been limited to their territory. As a result of international trade and travel, and military and political cooperation and competition, the concept of 'jurisdiction had to expand to comprehend the myriad interactions of states.³⁸

37 Cements of Chief Justice Marshall in *Schooner Exchange v. McFadden*, 7 Cranch 116, 136 (U.S. 1812).

38 Although there are many jurisdictional rationales, all require that there be some genuine link between the state and the persons, property, or events over which jurisdiction is claimed.

"States have traditionally sought to assert jurisdiction on certain bases or principles. As usually identified, these include:

1. *The Territorial Principle* - A state may exercise jurisdiction with respect to an act occurring in whole or in part in its territory.

2. *The Nationality Principle* - A state may exercise jurisdiction with respect to its own national, wherever he may be.

3. *The Protective Principle* - A state may exercise jurisdiction with respect to certain types of acts wherever, and by whomever, committed where the conduct substantially affects certain vital state interests, such as its security, its property, or the integrity of its governmental process.

4. *The Universality Principle* - A state may exercise jurisdiction with respect to certain specific universally condemned crimes, principally piracy, wherever and by whomever committed, without regard to the connection of the conduct with that state.

Jurisdiction must be exercised somewhere, with respect to *something or person*. As discussed above, jurisdiction cannot be applied to the high seas or to outer space³⁹ because these areas are considered *res communis* under international law and therefore are not 'places' that can be appropriated by claim of sovereignty. However, the 1967 Outer Space Treaty declares that a nation may exercise jurisdiction and control over objects in space, much as a nation may exercise jurisdiction over a ship at sea. Objects in space and ships at sea are treated (with some important limitations) as if they were part of the territory of the country on whose registry they are entered and whose flag they fly.⁴⁰

B. Extent of National Jurisdiction

International law recognizes a nation's jurisdiction over its citizens, its territory, territorial waters and airspace, and those ships and aircraft which it has registered. Whether nations have, through the exercise of their domestic laws, actually extended their jurisdictions to the full extent allowed by international law is a more complicated question.

With reference to U.S. jurisdiction over space activities, it will be important to distinguish between what the United States is capable of doing and what, through congressionally enacted legislation, it has already done. Absent a specific statement of congressional intent, U.S. courts have been reluctant to give extraterritorial reach to certain domestic laws. For

5. *The Passive Personality Principle* - A state may exercise jurisdiction with respect to any act committed outside its territory by a foreigner which substantially affects the person or property of a citizen."

(S. Houston Lay, Howard J. Taubenfeld, *The Law Relating to Activities of Man in Space*, The University of Chicago Press, 1970).

"These principles of jurisdiction are not all accepted as equally valid. The nationality and territorial principles . . . are universally accepted. The protective principle is now almost universally accepted. Universality is generally accepted only for recognized international crimes. The passive personality principle remains controversial as a basis of jurisdiction." (Major General Thomas Bruton, "The Status of Criminal Jurisdiction in Outer Space," 24th Conference of the Interamerican Bar Association (Panama City, Panama, February 1984).

39 Except insofar as a nation may exercise jurisdiction and control over a ship **on** the high seas or a space object in outer space.

40 The legal fiction that ships on the high sea and space objects in orbit are like "floating islands" has not been universally accepted. The U.S. Supreme Court, in *Cunard S.S. v. Mellon* (262 U.S. 100), referred to the floating island theory as "a figure of speech, a metaphor. "

example, in *McCulloch v. Sociedad Nacional de Marineros de Honduras*,⁴¹ the Court was asked to decide whether U.S. labor laws would apply to ships registered in Honduras and owned and operated by the Honduran subsidiary of a U.S. corporation. The Court noted that Congress had the "constitutional power to apply the National Labor Relations Act to the crews working foreign-flag ships, at least while they are in American waters," but decided that the resolution of the case depended on "whether Congress exercised that power." The court held: "to sanction the exercise of local sovereignty in this 'delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed' . . . Since neither we nor the parties are able to find any such clear expression, we hold the [National Labor Relations] Board was without jurisdiction . . ."

Similarly, in *United States v. Cordova*,⁴² the Court was asked to decide whether an assault committed in a U.S. flag airplane flying over the high seas was within the admiralty and maritime jurisdiction as described in the then current U.S. Criminal Code (18 U.S.C.A. Sec. 451).⁴³ Although the Court noted that "Congress could, under its police power, have extended federal criminal jurisdiction to acts committed on board an airplane owned by an American national. . . ," the applicable legislation (18 U.S.C.A. Sec. 451) spoke only of "vessels" on the "high seas." The Court then concluded that "'vessel' . . . evokes in the common mind a picture of a ship, not of a plane," and that no case or legal principle would "justify the extension of the words 'high seas' to the air space over them." ⁴⁴

The U.S. statute defining the "special maritime and territorial jurisdiction of the United States" for criminal jurisdiction has since been modified to resolve the problem presented in *United States v. Cordova* and to try to anticipate those problems which might arise in future space activities.⁴⁵ Currently, this special jurisdiction includes:

1. any vessel belonging in whole or in part to the United

⁴¹ 372 U.S. 10; 83 S. Ct. 671.

⁴² 89 F.Supp. 298.

⁴³ At the time, 18 U.S.C.A. Sec. 451 stated that the admiralty and maritime jurisdiction of the United States extended to "American vessels on [the] high seas."

⁴⁴ *Cordova* involved the interpretation of a criminal statute; therefore, under U.S. law, the statute was strictly construed. Not all statutes are strictly construed. For example, the Death on the High Seas Act (46 U.S.C. 761), which provides a remedy for wrongful death occurring "on" the high seas, has been interpreted by several Federal courts to apply to tortious conduct "over" as well as "on" the high seas. See: *D'Aleman v. Pan American Airways*, 259 F.2d 493.

⁴⁵ 18 U.S.C.A. Sec. 7.

States, or any citizen thereof, or to any corporation created by or under the laws of the United States . . .

5. Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, . . . while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States . . .
6. Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the [1967 Outer Space Treaty] . . . and the [Registration Convention] . . . while that vehicle is in flight . . . [emphasis added]
- 7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

Given the restrictive interpretation of the U.S. jurisdiction presented in the *McCulluch* and *Cordova* cases, it is possible to imagine further problems even under the revised Criminal Code. For example, is a large, manned space station designed to travel in a stable, set orbit considered to be a vehicle "used or designed for flight or navigation in space?" If so, then paragraph 6 of the Criminal Code (above) would include a space station within the "special maritime and territorial jurisdiction" of the United States. However, since space stations will have attributes which differ from those of space transportation vehicles--e.g. , their size, complexity, multinational nature, duration in orbit, etc.--they might be considered to fall outside the general provisions of paragraph 6 which seem more applicable to shuttle-type vehicles.⁴⁶ If space stations did not meet the requirements of paragraph 6, they still might be included under the general provisions of paragraph 7. However, paragraph 7 raises a number of issues concerning the extraterritorial application of U.S. jurisdiction that are beyond the scope of this report.

In the future, it is entirely possible that some space stations will be privately owned. It is also possible that space stations owned in whole or in part by U.S. nationals or corporations will be registered in other countries. A state is generally considered to have jurisdiction to prescribe (though not necessarily enforce) rules of law regarding the conduct of its nationals wherever that conduct occurs.⁴⁷ The extension of U.S. law to privately owned space stations that were registered in other countries would be complicated by the fact that the law of the state of registry might conflict with that of the United States. This could cause problems since the United States, under article VI of the Outer Space Treaty, would remain responsible for the acts of its nationals in space,

46 The 'nature' of space stations is discussed in: Hamilton DeSaussure, "The Impact of Manned Space Stations on the Law of Outer Space," *supra*, note 10.

47 Restatement (Second) of Foreign Relations Law of the United States, Sec. 30, American Law institute, 1965.

Finally, should the United States have the right to exercise its jurisdiction in a particular instance, it would still be necessary to decide how to share power between the Federal government and the individual States. This generally means deciding: 1) whether the grant of jurisdiction in a particular case is exclusively limited to Federal courts or is shared with the state courts, and 2) whether the individual States would be allowed to pass laws in this area.⁴⁸ The Judiciary Act of 1789 granted Federal courts exclusive jurisdiction over *in rem* (action against the vessel) admiralty questions. However, *in personam* (action against the owner of the vessel) maritime cases can be brought in State courts.⁴⁹ Similar grants or restrictions of the jurisdiction of Federal and State courts may be necessary for cases involving space activities. In addition, Congress may choose to limit the ability of States to pass laws in certain areas while allowing State courts to apply Federal law. For example, the Federal Aviation Act⁵⁰ limits the right of States to legislate with respect to commercial air travel; however, State courts share with Federal courts the ability to interpret the Federal Aviation Act. The "Commercial Space Launch Act,"⁵¹ establishes a Federal licensing mechanism but notes that the "authority of States to regulate space launch activities within their jurisdictions, or that affect their jurisdictions, is unaffected by this Act. . ."

To summarize, the issue of jurisdiction is fundamental to the application of U.S. laws to space activities. The fact that international law would allow an extension of U.S. jurisdiction in a particular instance does not mean that such an extension has occurred. Laws meant to regulate U.S. domestic activities may not apply to U.S. space activities (just as the U.S. criminal laws did not apply to the Cordova case) unless Congress has clearly established its intention to so extend these laws. Should international law allow an extension of U.S. jurisdiction and should Congress establish its intention to take advantage of such an extension, it would still be necessary to decide whether Federal laws would preempt State laws with respect to space

⁴⁸Some laws may have to be exclusive (*e.g.*, registration laws and laws pertaining to the spaceworthiness of spacecraft); other laws might be amenable to concurrent State/Federal jurisdiction (*e.g.*, criminal and tort law pertaining to individuals on board).

⁴⁹ *Maritime causes of action brought in personam* in State courts must rely on maritime law and not the common law of the State of the forum. (See: *Garret v. Moore McCormack*, 317 U.S. 239 (1942).) Justice Black, writing in *United Fruit* (365 U.S. 731) noted that "Article VI of the Constitution carries with it the implication that wherever a maritime interest is involved, no matter how slight or marginal, it must displace a local interest, no matter how pressing and significant." The supremacy and uniformity doctrines that prevail in maritime law could be applied to law in outer space.

⁵⁰ 49 U.S.C. 130, *et seq.*

⁵¹ 49 U.S.C. 2601-2623.

activities, and whether jurisdiction was shared by both Federal and State courts.

C. Jurisdictional Alternatives for Governments

A space station could have at least four different types of legal status, making it either:

1. a national space station under the jurisdiction and control of a single nation;⁵²
2. a multinational space station under the joint jurisdiction and control of several nations;
3. a multinational space station the individual modules of which are under the independent jurisdiction and control of separate nations; or
4. an international space station under the jurisdiction and control of an international governmental organization similar to INTELSAT.

Under each of these options, the rights and liabilities of the U.S. Government and its citizens could be substantially different:

1) U.S. Jurisdiction and Control. To avoid the controversy and complexity of cooperative international ownership and operation, the United States may wish to retain complete control over the space station. Assuming the space station is owned and registered solely by the United States under the terms of the 1976 Registration Convention, its legal status would be similar to that of a ship or airplane flying the U.S. flag. As discussed above, ships⁵³ and aircraft⁵⁴ have the nationality of the state in which they are registered. The United States would have the sole power to make and enforce rules of law regarding the operation of such a space station as long as such rules did not violate international law. Presumably, the United States would coordinate many of these rules with the foreign participants in the space station.

As discussed above, Congress could apply U.S. laws to the activities aboard a U.S. space station, but in the absence of clear congressional intent

⁵² Space stations owned by private sector entities and registered under the laws of a single state would also fall in this category. A space station that was owned by a U.S. national but registered in another country would fall in this category but would raise a more complicated set of legal issues. Some of these issues are discussed below.

⁵³ Restatement (Second) of Foreign Relations Law of the United States, Sec. 28(1), American Law Institute, 1965.

⁵⁴ 1944 Convention on International Civil Aviation, 61 Stat. 1180; T.I.A.S. 1591.

such laws might not be independently applied by the courts.

2) Joint Jurisdiction and Control. Nations considering investing a substantial portion of their financial, technical, and human resources in the space station may wish to jointly own and register it through some type of international joint venture. Under current international law, joint *registration* (as distinguished from ownership) of space objects is not provided for. Article VIII of the 1967 Outer Space Treaty establishes the principle that "A State . . . on whose registry an object launched into space is carried shall retain jurisdiction and control over such object."⁵⁵ The 1976 Registration Convention maintains that where two or more states may be considered "launching states,"⁵⁶ "they shall jointly determine which one of them shall register the object . . . bearing in mind the provisions of article VIII."⁵⁷ Under the Registration Convention then, participants in a joint space endeavor must choose which one shall be the registering state. Nonetheless, the Registration Convention also states that such a joint determination is to be without prejudice "to appropriate agreements concluded . . . among the launching States on jurisdiction and control over the space object and over any personnel thereof."⁵⁸

Therefore, nations wishing to jointly own and jointly exercise jurisdiction and control over a space station can follow the Registration Convention's suggestion to engage in an agreement separate from the actual registration.

It is not clear now--and may not be clear until a body of case authority is available--just how "appropriate agreements" would modify the "jurisdiction and control" granted by article VIII of the Outer Space Treaty. The Registration Convention is patterned after maritime law. The 1958 *Convention on the High Seas* states that a ship may only sail under one flag and, save in exceptional circumstances provided for by treaty, the flag state has exclusive jurisdiction on the high seas.⁵⁹ Both maritime law and space

55 1967 Outer Space Treaty, *supra*, note 6, article VIII.

56 Defined in article I of the Registration Convention as:

- (i) A State which launches or procures the launching of a space object;
- (ii) A State from whose territory or facility a space object is launched.

57 The Registration Convention, *supra*, note 9, article II.

58 *Ibid.*

59 2 U.S.T. 2312; T.I.A.S. 5200. Article VI of the 1958 Convention states:

- 1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties, or in these articles, shall be subject to its exclusive jurisdiction on the high seas. . .
- 2. A ship which sails under the flag of two or more States, using them according to convenience, may not claim any of the nationalities in

law hold that registration implies jurisdiction. Similarly, both bodies of law allow this presumption of jurisdiction to be rebutted by specific agreements between the concerned parties. Although this practice has not been extensively used in maritime law it could be used for the space station.

3) Jurisdiction and Control Over Independent Modules. It is possible that nations may wish to join together to form a space station, yet retain control over their individual contributions. A space station could conceivably be composed of different modules, each owned, registered, and under the jurisdiction and control of separate countries. Common elements of the station such as power modules might be owned separately and shared through specific agreement (option one, above) or jointly owned (option two, above).

In such an environment, each module would be under the jurisdiction and control of the country that owned, operated, and registered it. The problems with registering the common elements of such a station would be similar to those encountered in option two.

4) Jurisdiction and Control by an International Organization. Assuming nations would wish to avoid some of the problems caused by concurrent national jurisdictions, it is possible that an international organization similar to INTELSAT could be formed to own, operate, and register the space station. Since such an organization would not be able to develop a completely independent body of law to regulate space activities, it would still be necessary to decide which national laws or combinations of national laws would apply to the organization.

Such an organization could have quasi-legislative powers (subject, of course, to the concurrence of the member states) similar to those held by INTELSAT. Such powers would allow the organization to make normal operational, management, and safety decisions without the need to renegotiate separate agreements among the member states.

question with respect to any other State, and may be assimilated to a ship without nationality.

Article 92 of the 1982 United Nations Convention on the Law of the Sea contains language almost identical to the language of the 1958 Convention. The United States is not a party to the 1982 Convention.