DETERMINING LIABILITY FOR DAMAGE CAUSED DUE TO DEBRIS IN OUTER SPACE: - PORTAL TO A NEW REGIME

REQUIREMENTS OF A SPACE-ENVIRONMENT PROTECTION DRIVE

- The outer space environment should be preserved to enable countries to explore outer space for peaceful purposes, without any constraints.
- The danger posed by the human-made debris to operational spacecraft (pilotless or piloted) is a growing concern. Because debris remains in orbit for long period of time, they tend to accumulate, particularly in the low earth orbit.
- As with many aspects of Earth-bound pollution, it is taking time to recognize the damaging effects of what we call space pollution.

THE CURRENT LEGAL FRAMEWORK

THE ROLE OF THE UNITED NATIONS

- Over the past years, the United Nations On Peaceful Use of Outer Space (UNCOPUOS) and its Scientific and Technical Subcommittee (STSC) have played an important role in debating space debris issues.
- The Committee has the following goals:
  1) Review the scope of international cooperation in peaceful uses of outer space.
  2) Devise programs in this field to be undertaken under United Nations auspices.
  3) Encourage continued research and the dissemination of information on outer space matters.
  4) Study legal problems arising from the exploration of outer space.

ROLE OF THE INTER-AGENCY SPACE DEBRIS COORDINATION COMMITTEE (IADC)

- The primary purpose of the IADC is to exchange information on space debris research activities between member space agencies, to facilitate opportunities for cooperation in space debris research, to review the progress of ongoing co-operative activities and to identify debris mitigation options.
- The IADC Space Debris Mitigation Guidelines’ drafted in 2002 is the first international document specialized in the field of space debris mitigation.
It serves as the baseline for the debris mitigation in two directions:

1) toward a non-binding policy document.
2) toward applicable implementation standards.

They remain voluntary and are not legally binding under international law.

THE FLAWS

A critical weakness in the international law on space debris is that the existing space law is related to the use of space and not to debris regulation. This means that commercial and government-sponsored space launches can still create more debris without limits.

The codification of space law in largely five treaties designed in a form more directory than binding.

Articles I and II of The 1972 Convention on International Liability for Damage Caused by Space Objects, provide that a country which launches or procures the launching of a space object or from whose territory a space object is launched, is liable for damage caused by its space object on the surface of the earth or to aircraft in flight. With respect to damage caused elsewhere than on the surface of the earth, however, the notion of liability is not clearly established.

The notion of direct damage is established under Article VII of the Outer Space Treaty.

However, there is a terrifyingly large legal gap when it comes to dispute resolution and compensation mechanisms. The issue of liability protocols in case of a commercial disruption by debris is also not covered by any convention.

The issue of contribution of different states to the resolution of space-debris damage has also not been dealt at all in any of the existing laws.

In the absence of an agreement establishing binding procedures for the field of space law, it is likely that most national governments will seek to continue to resolve their disputes through the existing diplomatic channels. Private parties to a dispute, i.e. a commercial firm, would therefore be at a disadvantage under the existing regimes.
CONFLICT BETWEEN INTERNATIONAL AND MUNICIPAL LAW

- The doctrine of res communis mandates that space is public domain for the equal use and forms common heritage for all states.

- According to Stanley Hoffman sovereignty carries with it the principle of equality wherein all states are held to be in equal relation to each other regardless of their size or capability, but this may not be possible in reality as the power and influence of each state is of great importance in today’s international scenario.

- Sovereignty cannot be exercised in its true sense with the prevailing disparity between nations. A developing country may find it difficult to make its own decisions free from international influence due its own limitations of resources and technology.

- Though resources and technology is shared for the common use of outer space it is done on lines of capitalist ideology.

- To affix liability a duty of care is a pre requisite.

- The liability system in place is often criticized for its illusory liability ascertainment using the fault system which is firstly not defined and secondly difficult if not impossible to ascertain. The convention calls for further censure on grounds that the fault system pre supposes the existence of a duty of care on the use of outer space.

- However this duty of care has no pre fixed or consensual standard and the standard is subject to a state’s ability to take precautions which is naturally disparate. The second component of duty of care is foreseeability which has been excluded from Article III of the liability convention but is often argued by a defendant state to absolve liability. Forseeability would be subject to a nation’s research for there is no centralized international body that provides information to allow for reasonable foreseeability.

- Convergence of burden to pay damages for commercial use of Space.

- The commercial use of space is the forte of largely space faring nations with sufficiency of resources and inclination. The less developed nations who cannot afford the use of outer space independently, depend on other nations to enjoy its benefits on lease. The damage ascertainment for such use is then a question of much debate and more often than not the burden lies on the nation using such benefit using another nation as a crutch than on the provider of such service. In lieu of capitalism globally rampant, each state is an individual player in the global market with minimal international interference and is allowed to write its own fate.

- The disparity between nations economically and thus scientifically will prevail and always be a factor in determining a legal regime for the use of outer space.
THE NEW MODEL

RESOLUTION OF THE CHM-SOVEREIGNTY DEBATE

The term CHM is of wider ambit than the term ‘province of all mankind’. ‘Province of all mankind’ on the other hand has a slight negative connotation meaning thereby that it is a positive right that forbids the exclusive use or ownership of space or colonization in any form.

Since only the latter is binding, the interpretation followed should be that outer space is not subject to territorial claim by any state and is for communal use the ownership of this territory however does not vest in any nation but in a legal fiction called the international community.

If this is the interpretation followed then the only obligation on every state is to use the property such that so as not to hinder the right of any other state to use such property. This resembles the nature of the right to property followed in most countries which is subject to only two conditions

1. Infringement of another’s right to enjoy his property
2. Eminent domain

CREATION OF A SPACE-DEBRIS CONTROL CONVENTION

Our proposal of a multifarious approach involves the creation of a 'leviathan' set of rules by representatives of all states forming a body to which the international community of states submits their right to use outer space. This right can be qualified by the convention in light of space being the common heritage of mankind.

The basic framework of such a policy will include:-

I. Increasing awareness of space debris hazards and the recognition of the importance of taking precautionary actions to prevent further degradation in the Space Environment.

II. Liability must be borne by the state which authorizes space ventures from its territory.

III. The legal status of international space objects is distinguished by the fact that their construction and operation gives rise to problems concerning the relations between the parties to the joint project and their obligations to a third party.

IV. A DAMAGE DEPOSIT can be created which maybe paid for in ways other than kind for nations that cannot afford economically to contribute.

V. Space Debris Mitigation Policy

To design a policy that would effectively curb the problem of space debris it becomes crucial to understand the dynamics of the problem. Space debris consists not only of fragments of exploded rocket stages or broken-up satellites but also a plethora of smaller items.
If this is the gist of the problem at hand then the policy to counter it must

1. Prevent its formation/ minimize creation of space debris
2. Minimise the impact of already formed debris
   ✓ To the victim
   ✓ In the environment

VI. The convention should also be aimed at defining a liability and compensation regime for damage.

VII. Some debris present serious hazards, i.e. nuclear powered satellites. In case of damage, loss and major disruption, it is crucial to have a dispute handling mechanism in place to determine liability and claims compensation.

VIII. Valuation Standards for Damage Assessment
   - Simple and consistent, rather than subtle and arbitrary:-
   - This allows easy and transparent processing of claims, consistency and accuracy of the valuation work.
   - Seek to integrate generally accepted valuation standards and procedures in order to maximize
   - Rely, as much as possible on independent evidence for assessing liability

IX. Use of Independent Experts to reduce undue influence of space-faring nations.

X. State parties to the space debris convention must be expected to make a contribution to funding the liability and dispute settlement mechanism. The size of this contribution is a matter to be decided on the basis of the capacity of payment and need for services of the states.

XI. For homogenous collisions milder form of liability for damages seems justified. It should be kept in mind that the active participants of space activities are deliberately facing the risk involved, thus the application of absolute liability seems unjustified.

XII. Creating international funds to pay compensation for damages caused by non-identifiable space debris, which should be financed by the polluters, might also be effective to encourage nations to adopt national legislation on space debris, and to impose space industries for responsive strategies.

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