

Obstacles on the Way to a General Convention.

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Abstract

This paper gives an overview of some of the obstacles the creation of a general convention can be expected to encounter. It looks into the back ground for the increasing difficulties in obtaining consensus when it comes to multi-lateral treaty-making. It further considers some of the areas that need attention but also deals with some of the tendencies in the recent development of space law. Special attention is given to the gap between developed and developing countries, the competing interests represented and the possibilities for anticipatory legislation.

Introduction

The conclusion of the 1967 Outer Space Treaty¹ was – just as the launch of Sputnik 1 – a remarkable achievement. Yet unaware of the enormous possibilities and the economic wealth to be gained, nations agreed on very far reaching principles that were to form the basis of all future development in this field of law. It was successfully followed by the 3 other determining conventions in this area, The Rescue Agreement 1968², The Liability Convention 1972³ and the Registration Convention 1974⁴. All were signed by a wide range of nations – most notably the space powers themselves.

By 1979 a new treaty - The Moon Treaty⁵ – was put forward. But, though it was concluded, it was never signed by any of the major space powers and in many ways marked the end of broadly concluded treaties based on consensus.

In order to have a serious conversation about the possibility of creating a general convention on space law, it is important to look at the changes in the international environment that has taken place since 1974 and, further, to give an overview of some of the areas that have caused problems.

Codification

The creation of a general convention can serve several purposes. In its simplest form it can be a mere recollection of earlier widely accepted treaties. It might also contain well established customs. However, defining customary law in a field of law that is so young as space law, is not without problems.

In reality a mere codification will rarely be worth the effort. Especially, in space law where technology has moved forward with unprecedented speed and the need for new legislation is pressing. Problematic topics are piling up and range from the creation of clear definitions to the development of whole new policies.

For a start it has still not been possible to establish the boundaries for space. Different suggestions have been put

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forward, most defining the boundary as beginning at 100km altitude (62 miles)⁶. But this boundary marks the end of a state's sovereignty and since we can only guess of the future possibilities for conventional aircrafts and satellites, so far no consensus has been achieved.

As for the development of new policies, areas like the demilitarisation of space, commercial activities by private entities and the access to limited resources such as the geostationary orbit must be dealt with. Among those the last topic might prove the hardest to resolve since it touches upon one of the main reasons why it has not been possible to obtain widely accepted conventions since 1974.

Few other areas are so heavily dependent on advanced technology and huge financial resources as the exploration and exploitation of space, so it is no wonder that this is an area with immense tensions between developed countries and developing countries.

Limited Spatial Resources

From the outset it was relatively easy to agree upon basic principles in the Outer Space Treaty since the different positions had not been so sharply drawn up. But during the 70'ties when the growing economic value of outer space became apparent, large groups of developing countries entered the law-making forums dealing with space law. Most notably was this development in the UN Committee on the Peaceful Uses of Outer Space (UNCOPUS) and it soon became a vehicle for advancing the establishment of a new international economic order.⁷

It was after pressure from the developing countries that the Moon Treaty 1979 was

agreed upon, opening up for an equal distribution of wealth gained from the exploration of the moon. It was a huge step from the earlier principles where, though no nation had a right of sovereignty or acquisition to the outer space, any nation had the right to freely exploit and use the resources. The power balance had shifted from favouring the space powers in favour of those with no space capabilities.

The Moon Treaty, however, quickly proved that this sort of power shifts can not be performed without any hold in reality. None of the major space powers had any interest in that sort of sharing and as a result never signed the Treaty.

The development of satellites and the realisation that the geostationary orbit is a limited resource were to become the next big battleground. This time posing a much more real threat of losing out for those yet lacking the necessary capabilities to employ the new technology.

The International Telecommunications Union (ITU) was given the task to handle issues in relation to space communication and the geostationary orbit but was as a primarily technical body not geared towards the political and economic battles that spilled over in it.

Also in other regards does the geostationary orbit serves as an example of how complex the situation is. It raises questions like if there is no right of acquisition in outer space can any nation then have a claim of a certain spectrum in the geostationary orbit? And is it possible to make allotments to different nations without violating this principle? The whole question about a priori allotment, as wanted by the developing countries, demands important

political and ethical decisions. It goes to the heart of beliefs of what is fair weighed against what is an efficient use. Equality is not the same as equity.

The discussion is only made more difficult by the possibility that some countries might never achieve the necessary capabilities or that technology, with a more efficient use of the orbit, will make the fear of running out of 'space' unfounded.

It will be a major task for a general convention to try to reconcile these two adverse positions and make all parties accept the outcome.

Competing interests

But it is not only competing economic interests that have made the achievement of consensus more difficult. As the range of space activities have grown many countries have started to realise that even if they are not space powers they can be affected directly and so have a very real and well defined interest in taking part in space law-making processes.

This is especially apparent when it comes to issues relating to liability and environmental protection but also concerns issues like remote sensing. Unfortunately there is a tendency to a strong polarisation between space powers and the rest of the world. States needs to reconcile common interests with their specific interests. Often a state's starting point will be defined by whether it is most liable to suffer environmental damage caused by others or most likely to cause accidents. In the field of space law this conflict can be very difficult to reconcile since the possibility of becoming space powers themselves are a very remote possibility for a great deal of poor countries. Thus, they have no interest

in taking the perspective of a space power during negotiations.

There have been tendencies towards trying to simply outnumber the space powers in negotiations and decision-making processes based on the principle of equality between all sovereign states. The results have however, as seen with the Moon Treaty, not been successful since they have failed to take the determining power structures into account.

Another example of the problems, that the formation of a general convention poses, can be found in the Convention on the Law of the Sea. A United Nations Conference on the Law of the Sea (UNCLOS III) was convened in 1973 but the final text for the convention was not adopted before 9 years later in 1982. The states used the 'package-deal' principle⁸ whereby issues were interlinked and the approval of one part of the convention became dependent on other states approval of other parts. This inevitably led to deadlocks and even after 9 years negotiations when the convention was closed for ratification the only Western State to ratify was Iceland.

Different authors⁹ have suggested that with so many different interests present it's a better option to try to pay special attention to the opinions of the states most involved in space activities. These states are able to create customary law by their persistent acts and a convention not signed by any of them is unlikely to make a relevant contribution to space law. An alternative could be to let the entering into force of a convention be dependent on it being signed by the space powers.

It is clear that this will weaken the negotiation position of developing countries but it seems a better option than

letting the space powers develop customary law. In that case the developing countries' influence will be even more limited.

Fragmentation of Space Law

As space technology has advanced with unprecedented speed it has come to cover an ever wider range of activities. While this development would surely be supported and aided by a progressive General Convention in fact tendencies have gone in the opposite direction. While the most important forum is still UNCOPOUS, a specialisation process has taken part for example the important area of telecommunication has been placed with ITO. Further, the area of demilitarisation has been placed with the Conference on Disarmament.

While this process of fragmentation has surely been aided by the problems of achieving consensus in the UNCOPOUS, it must also be seen as part of a natural development in a new field of law. The more activities to be regulated the less possibilities of dealing with them in one forum.

Furthermore, since space law has no general convention to work as a foundation there is a real danger of different forums agreeing on conflicting principles and that this field of law will lose its consistency.

The whole fragmentation has made the creation of a general convention much more difficult. Since a general convention must take into account earlier agreements it must also try to solve conflicts and create consistency.

It will take enormous resources for one forum to achieve a complete overview and

it will be necessary to carefully consider which topics a general convention is supposed to cover, as well as in how much detail and what earlier agreements it is to substitute.

No doubt already these preliminary negotiations will be very hard to resolve.

Anticipatory legislation

In an area where technology has developed so fast, it is no surprise that states have often resorted to anticipatory legislation.

As we have seen, some of the most successful conventions were made in the space law's "childhood". It will not come as a surprise since it has already been established how nations in the last years tend to think of themselves either as users of space technology or as potential victims.

The force of anticipatory legislation is that it is easier to establish a negotiation process based on common interests when specific conflicts have not yet arisen. It prevents the strong polarisation of competing interests that often leads to deadlocks.

While much is in favour of this legislative technique it is, unfortunately, also a very complicated way of regulating. It is not easy to predict how fast and in which direction technology will develop.

It is important not to curb the development of new technology and anticipatory legislation should be careful not to become too detailed and too controlling. It should be used as a mean to establish general guidelines which will be in accordance with the function that a possible general convention would have.

An example of premature legislation is the Moon Treaty 1979 dealing with the exploitation of resources on the moon. It has been advanced¹⁰ that another possible reason for the failing success of this treaty is that many countries thought it premature and of no real relevance in the nearest future.

Therefore, this legislative technique demands an upcoming topic of real relevance but one that still has not crystallised into a conflict. To strike this balance will be a very difficult task.

Conclusion

The creation of a general convention will face a wide range of problems. These will span from the mere definition of outer space to the distribution of limited resources. It will be a slow process to reconcile all the competing interests and when we look at the Sea Convention it also becomes apparent that there will be no guaranties of success.

This of course leaves the question why we should even make an attempt to undertake such a major task. The answer is that there is a real need. A need to try to get a fair solution on the sharing of limited resources, a need to try to reconcile all the different interests present and, not least, a real need to try to create a coherent legislative system before it gets too fragmented.

A widely accepted progressive convention will be a major advantage to this field of law if it manages to solve just some of the pressing issues that face us.

¹ The Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies.

² The Agreement on the Rescue and Return of Astronauts, and the Return of Objects Launched into Outer Space

³ The Convention on Registration of Objects Launched into Outer Space

⁴ The Convention on International Liability for Damage Caused by Space Objects

⁵ The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies

⁶ John F. Graham uses the following definition :” A current definition is the lowest altitude that permits a vehicle to orbit the Earth without entering the earth’s atmosphere.”

p.2.

⁷ See Gennady M. Danilenko, *Outer Space and the Multilateral Treaty-Making Process*.

⁸ See p. 174 Akehurt’s *Modern Introduction to International Law* by Peter Malanczuk, 7th revised ed. Routledge.

⁹ Lawrence D. Roberts, *Needed: A private property Standard for Space*, Nov/Dec 1997, *Ad Astra* – the magazine of the National Space Society.

Gennady M. Danilenko, *Outer Space and the Multilateral Treaty-Making Process*.

¹⁰ See Gennady M. Danilenko, *Outer Space and the Multilateral Treaty-Making Process*. P. 9.