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International law-making for outer space

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A B S T R A C T

While the need for adequate space law may be as urgent as ever, the international community has discovered that today it is increasingly difficult to reach consensus on statutes to govern new space activities. In view of the noticeable slowdown in the law-making process, serious discussions about the most suitable and effective techniques of space legislation are required. The author discusses the political and legal problems of making laws to deal with space and space activities. A number of suggestions aimed at improving the present legislative process are formulated.

For a certain period, which may be described as the 'golden age' of space law-making, rapidly developing space activities were accompanied by the adoption of a number of general multilateral treaties dealing exclusively with space and space activities.[2] These treaties, elaborated and signed in the 1960s and 1970s, provide a set of broad principles defining the status of outer space and regulating its various uses.

The successful adoption and subsequent promulgation of these multilateral treaties does not mean, however, that further development of space law will focus exclusively on their implementation and interpretation. A viable system of space law presupposes a continuous law-making activity. The need for further law-making becomes clear after even a perfunctory glance at existing space treaty law. Not all the essential subjects that are amenable to treaty regulation are dealt with. Even during the 'golden age' states failed to reach agreement on a number of important problems. Some of them, such as the delimitation of outer space and the character and utilization of the geostationary orbit, are still on the agenda of the UN Committee on the Peaceful Uses of Outer Space (UNCOPUOS), a central legislative body dealing with space and space activities.

Advances in space technology and the need for international cooperation in the exploration and use of outer space require more specific and detailed rules to govern new activities. One of the urgent issues is adequate regulation of the use of nuclear power sources in outer space. More generally, there is a growing need to agree on rules and procedures for the prevention of pollution of outer space and the Earth from space activities. The development of space military capabilities requires an adequate normative response from the international community concerned with the escalation of an arms race in outer space. The expanding space economic activities also require regulation. In addition, there are important issues, which, although already regulated by the relevant UN General Assembly resolutions, may call for treaty regulation at a later stage. These include the use of satellites for direct television broadcasting, covered by the 1982 Principles Governing Direct Television Broadcasting,[3] and the use of satellites for remote sensing, governed by the 1986 Principles Relating to Remote Sensing.[4]

While the need for adequate space law-making may be as urgent as ever, the international community has discovered that today it is far more difficult to reach consensus on new legal rules. Although multilateral negotiations are being conducted in a number of forums, since the adoption of the Moon Treaty in 1979 there has been no agreement on a new multilateral space treaty. In view of this noticeable slowdown in the law-making process, the time may have come for a reassessment of existing legislative

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[2] These treaties are as follows: (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', *UNTS,* Vol 610, p 205 (hereafter referred to as the Outer Space Treaty); (2) 'Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, 1968', *UNTS,* Vol 672, p 119; (3) 'Convention on International Liability for Damage Caused by Space Objects, 1972', *UNTS,* Vol 961, p 187; (4) 'Convention on Registration of Objects Launched into Outer Space, 1975', *UNTS,* Vol 1023, p 15; (5) 'Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979', UN GA Res 34/68 (1979) (hereafter referred to as the Moon Treaty).

[3] UN GA Res 37/92 (1982).

[4] UN GA Res 41/65 (1986).

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techniques. On both the political and doctrinal levels serious efforts seem to be required to formulate proposals aimed at improving the law-making process. This article raises some of the issues which may be of interest for the ongoing debate about the most suitable and effective techniques of law-making concerning space and space activities.

1. The search for a genuine consensus

The exploration and use of outer space is a global problem affecting the entire international community. This fact is recognized by the Outer Space Treaty, which stresses 'the common interest of all mankind' in the exploration and use of outer space for peaceful purposes. From a political legal perspective, this provision provides sufficient legal grounds for claims to full and effective participation by all members of the international community in the decision-making process relating to outer space. Realistically, then, viable solutions to outer space issues can be found only through multilateral negotiations leading to legal regimes of universal scope.

In view of the growing economic value of outer space an increasing number of states are making use of their right to equal participation in space law-making. As a result the membership of negotiating forums, especially UNCOPUOS, has expanded. With the arrival of a large number of developing countries as new participants of the negotiating process broad issues relating to the establishment of more equitable international economic relations have gradually surfaced in space law-making. The trend towards discussing space issues from the standpoint of the establishment of a new international economic order (NIEO) has become particularly evident in connection with the discussions on the status of the natural resources of the Moon as the common heritage of mankind. It also appears to be confirmed by the new item on the agenda of the UNCOPUOS relating to the distribution of benefits from space activities, adopted in 1988.[5]

The increase in membership of the negotiating forums and the emergence of NIEO problems, which place space issues in a confrontational context where the positions of different groups of states are radically opposed, creates additional difficulties in reaching substantive consensus on new legal rules. The search for consensus tends to result in settlements on the lowest common denominator which does not prejudice the positions of the states involved. Such a consensus often serves only as a disguise for continued disagreement. The disputes over the meaning of the common heritage of mankind principle incorporated into Article 11 of the Moon Treaty may serve as an illustration of this trend. Reservations expressed by a number of states in connection with the adoption of the 1986 Principles Relating to Remote Sensing are also a strong indication of the difficulties in reaching a genuine consensus on issues of economic importance.

The lack of genuine consensus becomes particularly apparent in cases where negotiated legal instruments require ratification. By 1984 the Moon Treaty had been ratified by five states and in accordance with its provisions had entered into force; however, although the treaty was negotiated by consensus it had not been ratified by the major space powers.[6] It is beyond dispute that a treaty not ratified by states whose participation is crucial for the implementation of its provisions cannot be effective. The present signatories to the Moon Treaty who do not possess the necessary technical means to launch objects into outer space and to explore and exploit the resources of the Moon simply do not have the necessary effective power to bring this legislative project into operation.

The history of the ratification of the Moon Treaty clearly demonstrates that, contrary to a widely held view that consensus techniques provide 'a guarantee for wide acceptance of the space treaties, '[6a] a simple consensus achieved in negotiating forums is insufficient for proposed space treaties to be brought into effect. Indeed, in the framework of negotiation consensus means no more than the absence of any formal objection to a particular decision. It does not imply the positive support which is necessary for subsequent approval of the treaty by the national bodies responsible for ratification. In the absence of such positive support, especially on the part of the space powers most directly affected, consensus may not lead to ratification when each state decides individually whether it is in its best interests to be bound by a particular treaty.

Although the positive support of the states who are most involved in the relevant space activities is a prerequisite for effective space legislation, in the foreseeable future such states will remain a small minority in any multilateral negotiating forum. This fact inevitably affects the negotiating process, where the majority tend to use their numerical strength by controlling the agenda and by pressing for solutions which satisfy their own interests. In extreme situations they may resort to use of the majority vote. The dramatic departure from the previously uninterrupted record of consensus decision-making in connection with the adoption of the 1982 Principles Governing Direct Television Broadcasting is an indication of this. It is doubtful, however, whether such an approach will lead to viable legal regimes, especially when the outvoted minority includes the most affected states.

In such a situation the influential minority may resort to a number of tactics which will eventually frustrate the multilateral law-making process. Diplomatic manoeuvring may prevent the inclusion of major new items in the agenda of broad multilateral forums or frustrate meaningful discussion of items already included. Effective law-making may be shifted to specialized bodies dealing with more technical issues. Finally, the dissatisfied minority may resort to limited international agreements negotiated within closed state groupings. In view of the unsatisfactory results of the multilateral negotiations on the Moon, proposals have already been made that a commercially acceptable legal regime for the exploitation of lunar resources should be elaborated outside the United Nations through agreement between 'the space powers potentially capable of exploiting outer space natural resources'[7]

While limited agreements of this kind hardly offer a viable solution to problems calling for essentially global management, serious thought should be given to the need to secure the support of the most directly interested space powers for future space legislation on these and other matters. A realistic assessment of the situation should obviously proceed from the undeniable fact that not all states have the same level of interest in outer space. While many members of the international community may remain unaffected by a particular decision concerning outer space, others, on the contrary, are deeply concerned. Therefore it seems reasonable to suggest that the law-making process should reflect the various

[5] See UN Doc A/AC 105/411, p 10 (1988).

[6] By 1988 the Moon Treaty had been ratified by Australia, Austria, Chile, the Netherlands, Pakistan, the Philippines and Uruguay: see *Multilateral Treaties Deposited with the Secretary General, Status as of 31 December 1988,* UN, New York, 1989, p 801.

[6a] See Roy S. Lee, 'Multilateral treatymaking and negotiation techniques: an appraisal', in Bin Cheng and E. D. Brown, eds, *Contemporary Problems of International Law,* Stevens and Sons, London, 1988, p 167.

[7] Milton L. Smith, 'The commercial exploitation of mineral resources in outer space', in Tanja L. Zwaan, ed, *Space Law: Views of the Future,* Kluwer, Deventer, the Netherlands, 1988, p 54.