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DISPUTE SETTLEMENT AND SPACE ACTIVITIES: A NEW FRAMEWORK REQUIRED?

by

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I. The present situation

The question of dispute settlement in the field of space activities has been a matter of permanent concern to the IISL and the Space Law Committee of the International Law Association. Both these bodies have made contributions to the progressive development of international law in this area which, together with the work of other specialised institutions at the national and international levels, provide a sound basis for the study of this problem on the eve of a new millennium.

The provisions embodied in the outer space treaties in force today appear insufficient. This is particularly so if we have in mind the growth of commercial activities in outer space, in which private enterprises participate directly. The 1967 Space Treaty, or Treaty on General Principles, lays down a number of guidelines which go no further than referring the question to the traditional methods of dispute settlement listed in article 33 of the U N Charter (1), to be read together with the underlying obligation to negotiate in good faith. There exists an additional duty to hold consultations, stemming from the 1967 Treaty , but only when States have reason to believe that damage may be caused to the Earth environment (2) as a result of their activities in outer space. The 1972 Liability Convention, for its part, implied a slight step forward at the time of its conclusion in spite of not going beyond a conciliation procedure (3). Finally, the 1979 Moon Agreement did not make any effective progress in this regard as no binding mechanism for dispute resolution was agreed upon in this text.

The principle of international co-operation -now seen by an important part of the doctrine as a legal obligation, and usually referred to as a "general obligation to co-operate"- is still far too weak. The magnitude of the consequences of never-ending stages of negotiations and consultations are sometimes difficult to predict.

The solution adopted by the Intelsat Agreements is indeed more realistic. Failing direct negotiations, arbitration is compulsory on a few assumptions including legal disputes between the parties to the Governmental Agreement, in other words, between subjects of public law, and between parties to the Special Agreement (which may, of course, be private companies).

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It is true that Intelsat arrangements are predominantly technical. Thus, sensitive political issues are less frequent in this area. However, as observed earlier, the present pace of space activities indeed justifies, in a number of cases, the need for a more effective legal framework for dispute settlement in general. This means that new law should be created in connection with disputes between states and international organisations resulting from activities in outer space.

II. The goals in mind

In August 1996 the International Law Association celebrated its 67th Conference in Helsinki. In accordance with the mandate stemming from the 66th ILA Conference (Buenos Aires, 1994), the Space Law Committee was entrusted with the task of revising the ILA Convention on the Settlement of Space Law Disputes adopted in Paris in 1984, at its 61st Conference.

The aim of the Committee was to establish, in the most realistic manner, to what extent the Paris text had survived the times and whether any adjustments or changes to this instrument were necessary in the present stage of development of space activities.

Some of us here today have taken part in the Helsinki Conference. Others have sent in their comments and suggestions. The net result is an interesting spectrum of ideas from which useful common denominators may be drawn after a deep analysis of coincidences and divergences between members.

At the end of the day a Resolution was adopted by the Conference requesting the Space Law Committee to elaborate a Revised Draft Convention on the Settlement of Disputes related to Space Activities (this slight amendment to the original title, suggested by Dr. Jasentuliyana, was agreed at the Helsinki Conference).

III. A need for change or for minor adjustments?

As pointed out at the outset, commercial activities in outer space are the sign of the times. Private enterprises are becoming involved in this area with increased frequency. One of the most illustrative examples today is provided by the exploitation of the geostationary orbit, especially insofar as telecommunications are concerned. Equally commercial are the legal problems originated by these activities, e.g., advertising, copyright, intellectual property in general, and others.

Disputes arising from private activities in space which do not confront subjects of public law and therefore, are unlikely to raise issues involving sovereignty, do not appear unmanageable in light of the present legal system. Indeed, the rules and procedures applicable to international commercial arbitration seem, with certain adjustments, appropriate in this new field.

On this point, the views of the experts converge. Professor Böckstiegel considers that the greater flexibility shown by private enterprises due to the important economic interests involved in the practical uses of outer space is prompting lawyers to look for more realistic and agile solutions, such as those applied in international business law (4). This stand coincides with Professor Cocca's position, elaborated in his answers and comments to the Helsinki Space Law Report, where he stresses the need to give pride of place to the problem of dispute settlement between states.

Professor Malanczuk holds a similar view as to disputes between private enterprises. In his opinion, where disputes between a state and a private enterprise were concerned, good reasons justified the drawing up of a special system to cover investment disputes with the ICSID, even though about one third of this type of disputes had been dealt with under the auspices of the ICC (5).

On general lines, it is fair to say that the doctrine is almost unanimous in that the question of dispute settlement between private companies carrying out activities in outer space is nowadays adequately covered by the existing law. This consensus was reflected within the ILA Space Law Committee in its Report submitted to the Helsinki Conference (6). Consequently, only minor adjustments would be required in this area.

The question is infinitely more complex when we enter the domain of public international law. Here, the lack of effective mechanisms is clearly manifest. The problem is aggravated by the possibility of political issues being brought up in certain sensitive areas such as remote-sensing and direct broadcasting.

In this field a definite step forward ought to be taken to move away from the danger of falling back into a stage of autointerpretation of the law. In other words a change, and not just a minor adjustment, is needed. Therefore, new law should be developed in connection with disputes between subjects of public international law within a down-to-earth framework which takes due account of the modern, and indeed inexorable, trend proclaiming the relativism of state sovereignty in the contemporary world (7).

The 1984 Paris Convention laid down a system which includes non-binding dispute resolution by resort to conciliation (in article 4) and binding mechanisms which may be found in article 5 et seq. of this instrument. The latter, in addition to establishing the jurisdiction of the ICJ and arbitration procedures, envisages the possibility of setting up an International Tribunal for Space Law. States and international organisations (8) are free to choose one or more of those means by written declaration at the time of signing, ratifying or acceding to the Convention.

In order to move closer to the objectives in mind, a minor change is hereby suggested to article 3 of the Paris Convention. Both in paragraphs 1 and 2 of this article it is spoken of "expeditiously" when referring to the compulsory exchange of views to be held by the parties to a dispute before starting conciliation procedures. It is submitted that this requirement be made less subjective and more terminant. To this end it would be advisable to follow the Inmarsat example in establishing a precise time-limit (9) which, in the case of the 1984 Paris Convention, could be thirty days.

With a view to making the Paris text more effective which, in practice, means to have the maximum support from the international community and ease the way to ratification, the present writer considers that the exclusion clause included in article 1. 2 (a, b and c) of the Convention should, for the time being at least, be kept. The provision in question means that any State could leave out specific space activities or specific space areas and declare it will not be bound by certain sections of the Convention. This point was the object of a lively discussion within the ILA Space Law Committee at the Helsinki Conference as well as in the work carried out previous to this Meeting.

Opinions are conflicting on this matter (10).

Professor Umberto Leanza, for example, in his comments to the afore-mentioned Helsinki Report, squarely opposed the possibility of excluding any space activity from the scope of the Convention suggesting, instead, the inclusion of a list of disputes in respect of which the Space Law Tribunal would be competent. Professor Kopal, for his part, proposed to draw up a "list of exclusions".

Both these scholars openly favour the setting up of a special chamber within the future Tribunal for Space Law Disputes. Indeed, the idea is sensible and worthy of support. However, prior to the creation of this Tribunal, it is advisable to think in terms of a special chamber for space law disputes within the ICJ, as is presently the case where environmental law issues are concerned. This idea is advocated by Professor Böckstiegel in his presentation entitled "Equipping the Court to deal with Developing Areas of International Law" (11) submitted in April 1996 on the occasion of the 50th anniversary of the ICJ.

From a strictly legal point of view Professor Leanza's position on the deletion of the exclusion clause seems impeccable. So does Professor Kopal's, in his effort to compromise opposite views. Yet, in the world of today, it is not unreasonable to suppose that both these possibilities -namely, to have a list of disputes for which the Tribunal would be competent or, conversely, a list of exclusions- are likely to conspire against the main target which is to achieve the widest possible support for this Convention, particularly from those countries engaged in space activities.

Consequently, it is contended that article 1 of the 1984 text should remain unchanged for the moment (12). At a later stage - and hopefully in a not too distant future if we have in mind the increasing investments in this field and enormous interests in play - States will no doubt be more inclined to adopt harsher restrictions to their sovereignty in pursuance of a more effective dispute settlement system.

The task of convincing States to choose binding procedures by means of the declaration envisaged in the Paris Convention is not easy. Progress is expected to be slow and gradual in spite of the sometimes astronomic economic interests referred to before. In this challenge, it is perhaps helpful to have in mind the provisions of the Intelsat Agreement in connection with dispute settlement, to be read together with other useful examples such as the system laid down for dispute settlement in the 1991 Madrid Protocol for the Protection of the Environment in the Antarctic. These are important precedents in our quest for a more effective mechanism for dispute resolutiom between persons of public international law.

IV. Other matters debated in 1996 in Helsinki

The discussion which followed the presentation of the Space Law Report at the Working Session of the 1996 ILA Conference was enlightening in many aspects and provides food for thought on extremely topical questions.

Among the major issues involved, some of which have already been touched upon, attention was focused on the various aspects of "entities other than States" having access to dispute settlement procedures under the 1984 Paris Convention, in accordance with the wording of article 10.2 (13). The conclusion was that the door is left open for private entities to take part in such procedures. The scope of this provision will no doubt facilitate our task.

The foregoing question prompted the participants to discuss the need for a "genuine link" - such as nationality - concerning the private entities in question. The increasing role of NGOs was mentioned in this respect. In fact, NGOs could not, under the Paris Convention, become High Contracting Parties but could nevertheless be parties to a dispute settlement procedure pursuant to the Convention. In this way a practical solution is provided without entering the slippery groundsrelating to the sovereign rights of subjects of public international law.

V. Conclusions

Most of the provisions of the ILA Convention on the Settlement of Space Law Disputes (Paris 1984) , now renamed as the Convention on the Settlement of Disputes related to Space Activities (Helsinki 1996), are applicable in the present time.

Therefore, a new international instrument is not necessary. Rather, work should be directed to making a few adjustments in the existing system. Disputes between private companies engaged in the exploitation of outer space are today conveniently covered by the law applicable to international commercial arbitration.

Conversely, efforts should now concentrate on dispute settlement between subjects of public international law involved in space activities with a view to convincing them of the advantages of having compulsory dispute settlement mechanisms in this field.

However, having in mind the importance of getting the widest possible support from the international community and easing the way to ratification of the Paris text, it is advisable to start at a low level of compulsion and then, gradually, move up the scale.

Consequently, the exclusion clause included in article 1 of the 1984 Paris Convention should, for the moment, be maintained.

The establishment of a summary procedure to determine disputes, as envisaged in article 50 of the Paris Convention, appears a suitable way to avoid delays, particularly in certain areas where long-lasting controversies may lead to untold consequences (14).

The idea of a future Tribunal for Space Law Disputes, as provided in the ILA Paris Convention is worthy of consideration. In the meantime the role of the International Court of Justice should be strengthened, particularly through the creation of a special chamber dealing with space law disputes.

VI. Notes

1. Article III of the 1967 Space Treaty.

2. Article IX of the 1967 Space Treaty.

3. In fact, one of the greatest criticisms made by the doctrine to this Convention is the recommendatory nature of the Claims Commission's awards unless the parties, beforehand, have agreed to the contrary.

4. K.H. Böckstiegel mentions, inter alia, the International Chamber of Commerce, the London Court of Arbitration and UNCITRAL. See this author's presentation entitled "Equipping the Court to deal with Developing Areas of International Law - Space Law", during the Colloquium INCREASING THE EFFECTIVENESS OF THE COURT , organised in celebration of the 50th Anniversary of the International Court of Justice, The Hague, 16-18 April 1996.

5. P. Malanczuk, in his answers to the ILA Space Law Committee Questionnaire, ILA 67th Conference, Helsinki, August 1996.

6. See Cocca, Christol, Malanczuk, Böckstiegel and the Rapporteur in the Report of the Space Law Committee of the ILA to the Helsinki Conference, August 1996.

7. The members of the ILA Space Law Committee were firm on this point. Christol, in the second reading of the Helsinki Space Law Report, observed that in three cases the European Space Agency had declared itself bound by international agreements within the United Nations aegis, viz. Rescue, Liability and Registration, adding that Eutelsat had taken a similar step with respect to the Liability Convention. This would entitle them to bring up claims against the parties and viceversa. Christol strongly favours the idea of the parties to the Liability Convention giving their support to the 1984 ILA Convention on the Settlement of Space Law Disputes.

8. This is in accordance with article 36 of the Paris Convention.

9. The dispute settlement system laid down for Inmarsat establishes one year as the maximum span over which negotiations should extend. After this, any party to the dispute may start arbitration procedures. Conversely, in Intelsat, no time-limit exists for negotiations.

10. On this question the opinion was divided within the ILA Space Law Committee. See comments of the members in the 1996 Helsinki Report.

11. K.H. Böckstiegel, op.cit. in note 4.

12. Article 1, paragraph 1 of the 1984 Paris Convention reads as follows:

> 1. This Convention applies to all activities in outerspace and all activities with effects in outer space, if such activities are carried out by High Contracting Parties (HCPs), by nationals of HCPs or from the territory of HCPs.
>
> 2. Any HCP, on depositing its instrument of ratification, may declare
> (a) that it excludes from the applicability of this Convention space activities of a specific kind described in such declaration,
> (b) that it limits the applicability of this Convention in certain space activities or to specific areas of space law as may be dealt with in such declaration,

(c) that it will not be bound by certain sections or articles of this Convention described in such declaration.

13. Article 10, paragraph 2 of the Paris Convention provides

> The dispute settlement procedures specified in this Convention shall be open to entities other than HCPs unless the matter is submitted to the International Court of Justice in accordance with article 6.

14. Article 50, paragraph 3 of the Paris Convention establishes

> With a view to the speedy dispatch of business, the Tribunal shall form annually a chamber composed of five of its elected members which may hear and determine disputes by summary procedure. Two alternative members shall be selected for the purpose of replacing members who are unable to participate in a particular proceeding.

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