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PROBLEMS RELATED TO TIME IN THE DEVELOPMENT OF INTERNATIONAL SPACE LAW

Lotta Viikari

Researcher

Northern Institute of Environmental and Minority Law, University of Lapland

Rovaniemi, Finland

lotta.viikari@ulapland.fi

Abstract

Traditionally, international legal rules have been established through the adoption of treaties by states, and the five space treaties adopted in the 1960s and 1970s are no exception. Accordingly, the recent proposals for overcoming problems related to the management of space activities have often envisioned the conclusion of new treaties, even a general convention, on space law. However, the process of setting norms through international treaties has certain severe weaknesses, ones affecting space law as much as, if not more than, other fields. These include the lamentably common time lag between the drafting, adoption, and entry into force of international standards. Even if states manage to agree on certain provisions, by the time accords are implemented, the problems in question may have reached entirely new and different proportions and strategies that made sense when first proposed already represent “too little, too late”. This paper ponders the chances of making norms of international space law operative faster as well as the possibility of creating

instruments whose provisions can readily accommodate changing conditions. This treatment includes an examination of mechanisms such as interim agreements, self-correcting treaties, non-binding codes of conduct, “supranationally” adopted technical standards, and international certification mechanisms.

INTRODUCTION

International Treaty Negotiations

The time lag between drafting, adoption, and entry into force of international standards is one of the most serious weaknesses in traditional international treaty-making.¹ The negotiation phase alone can take years, particularly when trying to negotiate multilateral agreements on issues where scientific evidence plays a major role. On the one hand, negotiators must be given the time to obtain sufficient information if they are to understand a problem and come up with effective solutions; on the other, they may have to respond very quickly in order not to let a problem worsen or even become irreversible. Scientific evidence is always (to a greater or lesser extent) uncertain and scientific research expensive and time

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¹ Sand 1990, p. 14.

consuming and in practice states need to act despite such uncertainty if they want to make an agreement. This, however, complicates the treaty-making process considerably: states reluctant to agree on something may always invoke the argument that the scientific evidence available is not adequate and/or acquiring more accurate information is not economically feasible.²

Once adopted, an international agreement still has to undergo the ratification process in each signatory country, with a specified number of ratifications then needed for the instrument to become effective. This takes time. Moreover, an international convention in force sometimes remains ineffective in practice. This occurs, for example, when the adherents it has managed to gain are not significant enough in number or status vis-à-vis the type of activity regulated by the instrument. In addition to the problem of an instrument having the “wrong” States Parties, the individual provisions of an instrument may “go bad” by becoming obsolete due to changes of circumstances and/or technological or scientific development, for instance. At worst, the lengthiness of the negotiation process can eventually undermine the entire goal of an agreement.

The typically protracted nature of international negotiations, coupled with scientific uncertainty, is thus a principal reason for the failure of not only international treaty negotiations but also already negotiated and signed agreements.³ Different strategies exist to combat this problem and make the formation and adjustment of international agreements more fluid. Many give prominence to another time-related feature of multilateral negotiations today: their

ongoing nature. The outcomes of treaty negotiations are often not final, in the sense that the agreement reached is actually only the beginning of a dialogue. Within this dialogue, the initial agreement and its implementation can be further developed, taking into account the emergence of new scientific information, for instance.⁴

Probably the most obvious manifestation of the ongoing nature of multilateral negotiations is the convention-protocol approach, in which states first sign a treaty providing a general policy framework on a given subject. Only after that do they begin negotiations on more detailed protocols to give substance to the framework convention through concrete solutions to the problems identified by it. This approach has been commonly applied particularly in recent international environmental treaty negotiations⁵. However, the convention-protocol process also tends to be time consuming and can easily lead to a situation where countries find it very difficult to reach agreement on more specific follow-up protocols.⁶ In this paper, I will focus on strategies which have proven more effective in overcoming the various time-related problems in international treaty-making.

⁴ Chasek 2001, p. 30.

⁵ Such an approach has been applied, i.a., in the Vienna Convention on Substances that Deplete the Ozone Layer 1985 [26 International Legal Materials/ILM 1529 (1987)], in the subsequent Montreal Protocol on Substance that Deplete the Ozone Layer (26 ILM 1550) and in the four adjustments to the Protocol adopted in London (1990), Copenhagen (1992), Vienna (1995), Montreal (1997) and Beijing (1999).

⁶ Susskind 1994, p. 31.

² Chasek 2001, pp. 29-30.

³ See, Susskind 1994, p. 14.

Space law

In space law, the time lag problem is probably best illustrated by the 1979 Moon Treaty⁷, the negotiation of which lasted for nearly a decade. It then took an additional five years for the Treaty to gain the five ratifications necessary for it to enter into force⁸. Moreover, to date the Treaty has still not received enough (relevant) adherents to gain real importance in regulating the activities of the space-faring community⁹.

The reasons for the failure of the Moon Treaty are manifold and will not be examined here in detail¹⁰. However, many of them relate, in one way or another, to time, and similar problems are to be expected in any treaty negotiations in the field of international space law. While international treaty negotiations in general tend to be time consuming, space law negotiations in particular have the potential to occasion all the specific time-related problems described above: space activities rely heavily on science and technology; they may involve unforeseeable changes of circumstances; and continuous scientific-technological

⁷ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1363 United Nations Treaty Series (UNTS) 3.

⁸ The first five states to ratify the Treaty were Chile, the Philippines, Uruguay, the Netherlands, and Austria. The last lodged the fifth instrument of ratification with the UN Secretary-General on 11 July 1984.

⁹ The ten ratifying states of the Moon Treaty are: Australia, Austria, Chile, Mexico, Morocco, Kazakhstan, the Netherlands, Pakistan, the Philippines, and Uruguay. A further five nations have signed but not ratified: France, Guatemala, India, Peru, and Romania.

¹⁰ For a more detailed treatment of the subject, see, e.g., Viikari 2002, pp. 87-124.

development frequently changes our view of outer space and possibilities of utilizing it. The increasing globalization, privatization and commercialization of space activities complicate the situation further. It is no great surprise that the efforts to create new space treaties (after the Moon Treaty) have failed already when setting the agenda.

AVOIDING THE "TOO-LITTLE, TOO-LATE" PROBLEM

Interim agreements

Delays in the traditional ratification process may prove detrimental to the effectiveness of a treaty even in cases where there is no doubt about wide acceptance of the rules themselves¹¹. In order to avert this problem, states may agree, usually in the treaty itself or in an annexed agreement, to bring an international treaty (in full or in part) into operation on an interim basis, pending its formal entry into force¹². Such provisional application is a recognized procedure under the Vienna Convention on the Law of Treaties¹³, Article 25.1 of which says that "[a] treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed". Such an undertaking may, however, be denounced ("[u]nless the treaty otherwise provides or the negotiating States have otherwise agreed") if a "State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty" (Art. 25.2).¹⁴

¹¹ Sand 1990, p. 15.

¹² See, e.g., Reuter 1995, p. 68.

¹³ 1155 UNTS 331.

¹⁴ Even when there is no agreement to bring

Common rules of conduct

Another option is that states may desist from treaty-making altogether and recommend some sort of common rules of conduct instead. Such recommendations, resolutions and declaratory instruments have been widely applied in space activities. Their obvious advantage is that since they require no national ratification, the process leading to their adoption usually is far less painful than that required in the case of international treaties. However, the fact that they are relatively easy to make and are (generally considered¹⁵) legally not binding also introduces significant risks: the lack of formality makes them an attractive shortcut with possibly very little practical effect.¹⁶

Nevertheless, states have often treated non-treaty arrangements as well

treaty provisions into operation on an interim basis, there exists the (less demanding) duty of loyalty the negotiating States owe each other according to Article 18 of the Vienna Convention: "to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delay."

¹⁵ About the disputed distinction between international norms of hard- and soft-law status, see, e.g., Koivurova 2002.

¹⁶ Sand 1990, p. 16. On the other hand, the provisions of even legally binding international treaties may be formulated in such general terms that their implementation in practice is very difficult. This is also the case with many obligations set out in the United Nations space treaties.

with the utmost seriousness¹⁷. Negotiations aiming at the adoption of a "mere" soft-law instrument can be difficult and protracted, and the instrument finally adopted may resemble a well-formulated international treaty in completeness, detail and complexity¹⁸. Legally non-binding instruments may also be designed as tentative, flexible regimes that are similar to framework conventions which provide for their own development in stages¹⁹.

Furthermore, recommendations by the UN General Assembly (such as the sets of space principles adopted by UN General Assembly Resolutions) and other "soft-law" instruments may become "consolidated" by later international practice. Such instruments are often referred to even in juridical proceedings. They may also serve as "forerunners of treaty law" and inspire various types of mechanisms for intergovernmental cooperation. The same applies to instruments adopted by other prestigious international organizations. Even declaratory instruments by non-governmental expert groups may gain influential status, an example being the work of the International Law Association on several legal issues (including the ILA Draft Convention on Space Debris from 1994). Indeed, there exist numerous sets of technical standards, codes of conduct and guidelines which have become benchmarks for international and national standard-setting worldwide despite their lack of formal intergovernmental

¹⁷ See, e.g., Hillgenberg 1999, p. 499. There is no significant difference in the extent to which treaties and non-treaty arrangements are complied with in practice. Hillgenberg 1999, p. 502.

¹⁸ See, Hillgenberg 1999, pp. 506-507.

¹⁹ Hillgenberg 1999, p. 501.

acceptance as legal norms.²⁰

“Technical standards”

One more opportunity to sidestep the ratification problem is to delegate powers to adopt and regularly amend “technical standards” (contained in technical annexes) to a specialized intergovernmental body where these amendments do not require state ratification.²¹ In particular, multilateral treaties in areas where natural and scientific development plays an important role - such as space law - often need to be adapted to reflect this progress. However, the more parties there are to a treaty regime, the more difficulties the normal unanimity rule in international treaty-making will entail. Even where agreement on a particular amendment is possible, the revision may still prove too cumbersome to allow timely adaptation of the treaty to changing needs. Consequently, many modern international treaties contain provisions which stipulate that revision is possible by a qualified (in some cases even simple) majority of States Parties or by a decision of an intergovernmental body of some sort.²²

Although it is not likely that states would acquiesce to full-fledged supranational bodies in the management of space activities, such a regulatory regime (albeit on a limited scale) is already familiar in space utilization, namely in the work of the International Telecommunication Union (ITU). The ITU has a Constitution and a Convention²³

(containing the main treaty provisions, the amendments of which require state ratification), but international standards are placed in separate “technical annexes” and “regulations” that are periodically revised in intergovernmental meetings without having to be ratified.²⁴

Yet, bypassing ratification (and other domestic approval procedures) to expedite transnational decision-making through delegated transnational standard-setting also means bypassing traditional parliamentary controls. This may seem undemocratic. One way to increase democracy in the case of such regimes is to entrust the new control functions to a “supranational” parliamentary body such as the European Parliament (within the EU system). An alternative solution is that even when full ratification is not required, new international standards might still be made to require some kind of national endorsement, either through explicit acceptance by state governments or the possibility for states to “opt out” of a standard (or amendment) by a specific date.²⁵ The latter approach could provide a starting-point for space law regimes also in cases where ITU-type “supranational” regulation does not seem acceptable to the international community.

Self-correcting treaties

Considering the significant uncertainties related to space activities - both in terms of natural phenomena and technological developments - space law could also benefit from the example of “self-correcting” treaties with open-ended

²⁰ Sand 1990, pp. 16-17.

²¹ Sand 1990, p. 17.

²² See, e.g., Reuter 1995, pp. 134-135.

²³ These instruments can be accessed at <http://www.itu.int/aboutitu/basic-texts/convention.html> and <http://www.itu.int/aboutitu/basic-texts/constitution.html> [15Sept2004].

²⁴ Sand 1990, p. 17. A similar approach has been used extensively in the field of environmental standard-setting worldwide in both global regimes and regional agreements. *Ibid.*

²⁵ Sand 1990, pp. 17-18.

commitments in the form of “self-adjusting” treaty provisions able to incorporate new scientific knowledge as it emerges. The conventional international treaty obviously does not have the capacity to respond to such changes rapidly enough.

This approach resembles the “technical standards” solution, but interesting and potentially effective practices to this end can be found in international environmental law, for example, where many instruments include built-in review schedules, facilitating openness and adaptiveness to change²⁶. Instead of confining themselves to routine inspection of the instruments, these review clauses enable policy reorientation and even institutional change in the light of knowledge and experience to be gained in the future. This development seems to foreshadow also a more general trend of increasingly “fluid” regimes capable of responding quickly to growing scientific understanding and progress.²⁷

RECIPROCITY

International standards

Also worth discussing in this context are certain regulatory mechanisms whose operation is the responsibility of national administrative bodies. The salient instruments here - again commonly used in international environmental regimes -

²⁶ See, e.g., the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (26 ILM 1550), 1988 Sofia Protocol to the Convention on Long-Range Transboundary Air Pollution (28 ILM 212), 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal [28 ILM 657 (1989)].

²⁷ Sand 1990, p. 36.

are environmental permits, impact assessment, environmental labels, and the like. These are generally based on reciprocal recognition of licenses and permits by competent national authorities or international certification.²⁸ The domestic authorities responsible for the functioning of such mechanisms usually are successful in their task, provided that there is enough compatibility between and mutual recognition of procedures as well as cooperation between specialists in different states.

In space activities, some sort of international type-approval for space objects might be considered. This approval could be based on factors such as certified compliance with uniform (internationally agreed) emission standards (for spent fuel, waste, etc.) or end-of-lifetime disposal capabilities (for the entire space object). The competent national agencies could then apply these standards when considering licenses for space objects and/or types of space activities²⁹. On the European Union level, even the option of actual harmonization of national space laws has been discussed. The objective is to make the European space sector more effective and competitive by, among other things, reducing the attractiveness of

²⁸ See, e.g., Sand 1990 pp. 22-23 and 26-28.

²⁹ For comparison, see, e.g., Sand 1990, p. 23, on the licensing of imported cars in Europe under the 1958 Geneva Agreement concerning the Adoption of Uniform Conditions of Approval and Reciprocal Recognition of Approval for Motor Vehicle Equipment and Parts [the agreement is now called Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts which can be fitted and/or used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of These Prescriptions (E/ECE/324, Rev. 2 E/ECE/TRANS/505)].

“authorization-shopping” due to different requirements, costs and fees in the process of applying for various permits to carry out space activities³⁰.

Epistemic communities

Reciprocity is also an essential factor for the success of most international agreements, particularly in the form of effective information sharing and permanent, direct contact among the various national actors entrusted with implementation of these instruments. These networks are often referred to by the term “epistemic communities”. They may include both scientific and administrative (management) authorities. Often they also include non-governmental sectors, such as industry, research institutions, and environmental groups.³¹ International organizations provide an important arena for this purpose, and staff members of an organization may themselves be part of the epistemic community. Instead of focusing on states, the concept of epistemic community highlights the role of single individuals and their abilities to change the attitudes of political decision-makers and the public.³²

States are already required to share information about factors potentially affecting the space activities of others - on a general level - by Article IX of the Outer Space Treaty, for instance. Due to the inherently international nature of space

utilization and the major risks involved, it is obvious that cooperation is essential and that epistemic communities play a significant role in space activities. There is a broad range of international (governmental and non-governmental) bodies which contribute to the functioning of these epistemic communities. Their work should be encouraged and better supported (in terms of financial and other resources). International scientific cooperation in this area should be intensified also because it is likely to build general confidence and encourage the consideration of further steps of collaboration, thereby generating valuable stimuli for the future development of space law. Additionally, enhanced cooperation is likely to provide an improved basis for monitoring, which is needed for securing the implementation of any future agreement.³³ Indeed, there are various international bodies in the space sector (above all UNCOPUOS and its sub-committees) which have a major role in the development of space law from agenda setting through implementation of the agreed instruments.

CONCLUDING REMARKS

In principle, a general convention governing the activities of the various entities operating in outer space sounds appealing, provided that such an instrument would attract sufficiently broad acceptance by the relevant actors. In practice, however, such a convention is not likely to materialize in the near future. The lengthiness of the international treaty-making process is one among the many obstacles to the development of the international law of outer space. If we are to overcome some of the hindrances

³⁰ Gerhard 2000, p. 12. One suggestion is that states develop a single application form which could be used when submitting applications to the different national regulatory authorities for the same mission (similar to the Combined Application Form of the European Radiocommunications Office for Telecommunications). Ibid.

³¹ Sand 1990, p. 29.

³² Breitmeier 1997, p. 91.

³³ See, Sand 1990, pp. 29-30.

identified in this regard, mechanisms such as interim agreements, non-binding codes of conduct, "supranationally" adopted technical standards, and self-correcting treaties should be carefully examined. International certification mechanisms could also prove feasible. Above all, one should never disregard the fact that there cannot be effective international space law without broad international cooperation.

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