IS THERE A NEED FOR A COMPREHENSIVE CONVENTION ON OUTER SPACE LAW?

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I. INTRODUCTION

The foray of humankind into outer space in 1957 had triggered relentless scientific and exploratory efforts with the realization that outer space and celestial bodies are potential of tremendous use for humanity's welfare. One may, however, not lose sight of the fact that humanity is still governed by a system of states with sovereign equality as its fulcrum. Thus space activities so far remain mainly nationalistic even though the outer space has been declared and conceded by every State that it is a province of all mankind. Even the space superpowers such as USA, Russia and several others realized that individual efforts in space cannot match the sheer immensity of space, had to jointly work together as in the case of International Space Station (ISS). There is a growing feeling that only a rule based system of exploration and exploitation of outer space and celestial bodies would not only make much activities meaningful and accountable, but also result in an equitable distributory order of space benefits.

The United Nations played a crucial role in the law making process for space activities particularly through United Nations Committee on Peaceful Uses of Outer Space (UNCOPUOS) and the General Assembly.

Within ten years of the first Sputnik voyage, the Treaty on Principles Governing the Activities of States in the Explanation and use of Outer Space, including the Moon and other Celestial Bodies, 1967 (The Outer space Treaty) was adopted by the General Assembly.

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This was followed by Agreement on the Rescue of Astronauts Return of Astronauts and the Return of Space Objects Launched into outer Space (Rescue Agreement, 1968), Convention on International Liability for Damage caused by space objects (Liability Convention, 1972); Convention on Registration Objects Landed into Outer space (Registration Convention) 1975 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Agreement, 1979).

Further the General Assembly has adopted five instruments as Declarations and Principles such as : Principles Governing the use by States of Artificial, Earth, Satellites for International Direct Television Broadcasting, (The DBS Principles, 1982); Principles Relating to Remote Sensing of the Earth from Outer Space (The Remote Sensing Principles, 1986); Principles Relevant to the use of Nuclear Power Sources in Outer Space (The NPS Principles, 1992); and Declaration on International Cooperation in the Exploration and the use of Outer Space for Benefit and in the Interest of all States, 1996.

II. THE ORGANISING PRINCIPLES OF INTERNATIONAL SPACE LAW ISL

The structure of International Space Law (ISL) is composed of legally binding multilateral treaties (at least for the states parties) and normative principles expressing the consensus of the international community. The treaties and principles together constitute the basic grid of ISL claiming to be a corpus lex spatilis and producing the organizing principles for space activities conducted by states.

At the root of the ISL lies the OST. Some view the OST as the M*agna Carta* of ISL. In fact the OST is the transformation of the 1963 UN Declaration of Legal Principles Governing the Activities of states in the Exploration and Use of Outer Space. The OST is a fountainhead from

which flows the specific regimes of ISL. Each subsequent multilateral arrangement such as Astronauts Convention, liability Convention, Registration Convention etc. owe there origin to one or other specific principle enshrined in the OST. Article I of OST ensures the three 'freedoms' such as 'freedom of access', 'freedom of exploration' and 'freedom of use'. Before assuring these freedoms the OST ensures that the exercise of such freedoms should be carried out 'for the benefit and in the interests of all countries' and the exploration and use of Outer Space is the 'province of all mankind'. The freedoms are to be exercised on a non-discriminatory basis and equality of opportunity is guaranteed. Article II emphasizes upon a declaratory and binding tenet that the realm of outer space including moon and other celestial bodies would be out of national appropriation. In other words, no State or any private body under any state can make proprietary claim just because they happened to be there. Article III ensures that all space activities should be conducted in accordance with the principles of international law and the UN Charter and that such activities should reflect the interests of international peace and security. Article IV goes one steps further to specifically proclaim the orbit around Earth as a 'nuclear and WMD free zone'. States are obliged not to install or station nuclear or weapons of mass destruction in outer space or celestial bodies. The use by any State of the Moon and celestial bodies shall be exclusively for 'peaceful purposes'. No military build up is allowed. Nor any weapon testing allowed. The only concession given is that military personnel are allowed to undertake scientific research for any peaceful purpose. Article V regards Astronauts as envoys of mankind and mandates the states parties to the OST to not only render them all assistance in certain conditions and expects their safe return to the State of Registry. Articles VI and VII institutionalizes the general international law principles such as international responsibility and liability for natural activities in outer

space and makes it clear the activities by corporate bodies will have to authorized and supervised by the concerned state party. In other words States are responsible and liable for breaches of international obligations or in the event of a damage caused by space object. The issues of jurisdiction over space objects and personnel are given to the State of Registry by Article VIII. Article IX injects the need for international cooperation, mutual assistance and regard and consultation among states parties.

Thus, whichever way one looks, the OST fulfils the primary task of providing a set of organizing legal principles for space activities. The OST has also been the result of active cooperation between the two original space pioneers the then USSR and USA. Majority of the members of the UN have adopted OST as binding and it continue to serve on the basic ISL framework.

III. PEREMPTORY NORMS/JUS COGENS OF ISL

The "common interest" principle contained in Article 1(1) of OST is a radical departure from the traditional national interests approach of international air law and has the elements of moral obligations towards others. For others the provisions of Article 1(i) is a principle of Jus Cojens. Relying on the ruling of International Court of justice (ICJ) in the *North Sea Continental Shelf* case that legal principles which are incorporated in treaties may become in course of time customary international law by virtue of Article 38 of the 1969 Vienna Convention on the Law of Treaties, some scholars have held that the principle 'common interest' contained in Article I(1) of the OST has become part of customary international law. Article 38 further recognizes that a rule set forth in a treaty would become binding upon a third State as a customary rule of international law if it is generally recognized by the State

concerned as such. Therefore, if not already fully established and accepted, Article I(1) of OST is a sure-shot candidate for being a principle of JUS COGENS on the criteria laid in Barcelona Traction case. In that case the ICJ held, describing by hierarchy of obligations, as follows :-

> An essential distinction should be drawn between obligations of the State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former or the concerns of all states. In view of the importance of the right involved, all States can be held to have a legal interest in their protection, they are obligations *erga omnes.*

Analysis of the principles contained in the OST particularly Articles 1, 2, 3 & 4, in the light of the above test laid down in Bercelona Traction case would persuade oneself that the principles contained in these Articles express obligations *erga omnes.* An expert of space law Carol Christol had stated :

> Article I(1) of the Space Treaty with its adoption of the common benefits and interest guarantee, can be supported (as an example of peremptory norms) because the provisions conform to the moral law in the sense that all human kind is to benefit unconditionally and because the terms are consistent with their spirit and the purposes identified in Article I paras 1 through 3 and Article 2 paras 1 through 4 of the UN Charter, as well as with complementary international agreement of less authority to the extent that the terms and beneficial to individuals the larger community and states, and when the provisions are found on moral principles contained in the foregoing paragraphs of Article 1and 2 of the UN Charter, such basic principles qualify for the status of peremptory norms of general international law."

Further the OST incorporates two other institutions of general international law into space law through Articles 6 and 7. These two articles incorporate unequivocally the principles of international responsibility and liability for damages caused to another state or its people by the launch or procurement of launch of an object into outer space. These two and other principles are complementary and supportive of the principle 'common interest' and makes states for their activities or their nationals in the province of all mankind accountable.

Common Heritage of Mankind

The principle of common heritage of mankind has been incorporated in Article 11 of the Moon Treaty as follows :

> The Moon and its natural resources are the common heritage of mankind

In order to operationalise this principle the Moon Treaty provides in para 5 of Article 11 –

> State parties to this Agreement hereby undertake to establish an international regime, including appropriate procedures; to govern the exploitation is about to become feasible.

Paragraph 7(d) emphasis the equitable sharing in the benefits derived from the natural resources of Moon :

> The interest and needs of developing countries, as well as efforts of those countries which have contributed either directly or indirectly to the exploration of the Moon, shall be given special consideration.

The Moon Treaty, however, is in a serious crisis since hardly a dozen countries have become party so far in more than quarter of a

century. Such a un-enthusiasm amongst states has rendered this Treaty almost a non-starter in terms of operational reality. Moreover, the common heritage principle though articulating in a specific manner against the principle of national non-appropriation by states of the resources of space and in favour of common interest, it is ideologically and politically divisive. Why does the international community has put the Moon Treaty in freezing?

IV. UNFINISHED TASKS

Notwithstanding the fact that the OST enshrines the organizing principles of ISL one can see as it is debated within UNCOPUOS, that there exists a number of legal issues yet to be resolved even in terms of OST. Some of them are definitional problems relating to de-limitation of outer space, the scope of peaceful purpose, the concept of launching state, the problems of space debris, character and utilization of geostationary orbit etc. Further though there are other conventions such as Liability Convention, Registration Convention etc. providing specifically for the accountability of launching State, the definition problems still remain unresolved.

(a) Where does the Outer Space legally begin ?

The issue of boundary between the air and space is in from two perspectives. One is the functionalist view which argues that since the concept of space itself was not defined the absence of space boundary between air and space does not legally impede the space activities. Countering this, others argue that a definitive demarcation is essential between air and space so that there could be a vertical limit on sovereignty of a state. Though the issue has been on the agenda of UNCOPUOS, no resolution of the dispute in this regard is visible. It might

be of interest to note that some countries have through their domestic legislations placed arbitrary boundary limit of 100 kms. altitudes with regard to launching of objects into space as in the case of the Australian Space Activities Act, 1998. The erstwhile Soviet Union had twice expressed that the point 110 kms. above the sea level should be the dividing boundary between air and space. While there is no consensus so far among the states concerned the space faring nations may start unilateral legislative boundary lines with regard to space as was witnessed during the UNCLOS-III regarding the outer limits of territorial waters, EEZ & Continental Shelf. Such unilateral measures ultimately led to some consensus on this issue within UNCLOS.

(b) The Space Debris

While the meaning of Space debris is generally understood in functional manner, there is no legal regime to prevent the production of space debris. The scientific committee of UNCOPUOS has not registered any progress in this direction even though it has been struggling with the issue for more than 15 years. Meanwhile there are national mechanism have been put in place to reduce the production of space debris, as for instance, the United States Inter-Agency Space Coordination Committee (IADC). Whether the IADC guidelines would become a basis for discussion within the legal sub-committee is a matter needs to be awaited.

(c) What are Peaceful Purposes ?

Though this issue is not on the formal agenda of UNCOPUOS legal sub-committee, there is an urgent necessity to pay attention to this issue in the light of attempts by some states to treat space as a possible theatre of war. Whether the phrase peaceful means 'non-military

activities' simpliciter or 'non-aggressive military activities' as some sections have proposed? The UN General Assembly as early as during its 12th Session categorically resolved that space activities meant exclusively for peaceful purposes which has been later on incorporated in Article IV of the OST. However, the controversy remains on the precise and nature of the class or type of activities which could be called peaceful in order to distinguish it from non-peaceful or hostile acts. Where does scientific activity conducted by military personnel stand – peaceful or military? The legal classification of the nature of activities into peaceful and non-peaceful is urgently needed in view of the use of satellites for military purposes such as for communications as part of the war inputs as in the instance of Iraq war in 2003. Moreover, the terminologies in Article IV of the OST such as 'Weapons of mass destruction' etc. needs identification.

Irrespective of such legal inadequacy, the space activities continued to be carried out relentlessly in very practical manner. One of the reasons why definitions are not articulated in a manner acceptable to every one is because the conceptual difference amongst states in this regard. On the other hand, the space processes are understood as functional ones. This is not to argue that just because activities are carried out without definitional clarity with regard to some aspects of space that there is no need to attempt to clarity consolidate the definitions.

(d) A Comprehensive Convention

A recent issue i.e. agitating some members within the UNCOPOUS is the problem of the format of law making in the field of ISL. A group of states have taken the view that instead of piecemeal legislative process, what is required is a single comprehensive convention on outer space and it is advocated on the basis of inspiration drawn from the conclusion

of the UN Convention on the Law of the Sea (UNCLOS 1982). They argue, as for instance, Ukraine, that-

> We are certainly actively in favour of developing a comprehensive convention in outer space. We believe that it is precisely this sort of avenue approach that will certainly correspond to the needs of the time and would allow us to improve and enhance the quality of international law and its development. We believe that we cannot just cut short agreements in effect. .....It will not allow us to ensure completely comprehensive coverage and regulation of the issues of outer space law.

It may be pointed that this view, however, underscores the fact that the development of a comprehensive convention would not mean a demand for revision of the basic norms and principles of international space law and that those principles would remain as the basis of such a comprehensive convention. Further, it is also stated that in the process of preparing the comprehensive convention attempts will be made to enhance the regulatory role of series of principles of international space law and other documents of the so-called soft law as part of international law. It is advocated in this regard that the convention on the law of sea would serve as useful paradigm.

There is of course counter arguments within the UNCOPUOS from some other members to the very idea of the comprehensive convention on the ground that what is required is to strengthen the current treaty regime by seeking more ratifications. However, the proposal for comprehensive convention is yet to reach the level of an item in the formal Agenda of UNCOPUOS.

The chief burden of this presentation is to analyse the proposal for the comprehensive convention and the analogy of UNCLOS from various angles. It has to be noted at the outset, that the analogy is not fully convincing in view of the basic difference in the very nature of activities that are carried out in the ocean and in the space in relation to earth. The consolidation of rules relating to oceans has taken several centuries and some rules had originated nearly two millennium ago. It will be recalled that Hugo Grotius the propounder of the freedom of seas was infact proclaiming the untrammeled freedom to navigate in high seas in a real trade war between the Netherlands on one hand and the Spain and Portugal on the other because the latter were proclaiming proprietary rights over a vast expanse of the ocean. Finally the argument of freedom of high seas won against the argument of closed sea advocated by John Selden of Great Britain. Secondly the upsurge for the comprehensive legal frame work of UNCLOS III was because there was already a tremendous corpus of customary international law had been consolidated by the international community and it was easy to codify them without much problem. The other factor which induced the idea of comprehensive ocean law was the awareness that the international sea bed is full of deposits of manganese, gobalt, zinc, copper etc. However, once the process started there was great disagreement on several issues between the developed and developing countries and particularly on the principle of 'common heritage of mankind' and the provision of the International Sea Bed Authority. Though the breadth of the territorial waters was 3 miles for long time, the UNCLOS negotiations witnessed two kind of claims, one for retaining 3 miles, and another for enlarging it to 6 miles. It is very interesting to note that quarrel about the breadth of territorial waters was finally settled at 12 nautical miles as a compromise! It is a pointer to note that the result of negotiation in a situation like this

seems to give surprise results which nobody could have visualized or proposed earlier.

(e) Indeterminacy of issues in UNCLOS III

Though UNCLOS III is a living paradigm of law for oceans, there are doubts lingering about the legal certainty with regard to some fundamental aspects. There exists a serious unresolved question as to whether worships ought to take prior consent from coastal states for innocent passage while passing through their territorial waters. The actual scope of the rights and obligations of the legal regime of marine scientific research is yet to be fully grasped in view of different interpretations from states. The prevention and punishment of the offence of piracy mechanically repeats the existing customary law without giving operational rules for actual prosecution etc. Finally the provision of four tier dispute settlement mechanism with a potential of fragmenting the law of the sea jurisprudence emanating from them. Moreover, a vast number of issues in relation to ocean management, such as marine pollution, shipping personnel, maritime affairs, etc. are not part of the UNCLOS III because most of these issues are dealt by independent specialized agencies or non-governmental maritime associations. Thus the comprehensive nature of the law of the sea convention can be questioned in view of the infirmities.

V. THE SPECIAL FEATURES OF ISL

The evolution of ISL is on an entirely different footing. The chief factor in the promotion of new legal concepts in this field is the arrival of sophisticated technologies that are applied for space activities which propel different types of activities both peaceful and military which in turn need the legal regulation for orderly and predictable conduct of the

participants. In a short span of 40 years, the ISL has emerged as an independent lex specialis with five multilateral treaties and five general assembly declarations.

The pace of evolution and development of ISL depends very much on the actors/participants in the real world space activities, the type of scientific and commercial benefits driven etc. The community expectation is a very important element in the ISL from the very beginning. The ISL through its treaties has made it clear that states alone are the primary subjects of law in this field. The OST makes it clear that it does not prohibit participation of the private player in the exploration and use of outer space, the states are mandated to authorize their national players for space activities and also be responsible for supervising continuously such authorized activities / players of non-governmental nature. Further the state responsibility / liability are attached to the state party for damages caused by its nationals to space objects of other states or the populations.

Of course, international organizations have now come to be recognized as subjects of international law which applies to the ISL. The International Telecommunication Union, the European Space Agency are also subjects of space law. However, the legal status of INTELSAT is doubtful one whether it could be a subject of international law or not in view of the change in its character. INTALSAT which was till recently a international public body has become a completely international private body due to the privatization of its activities. At the same time even as a private body it will do business with sovereign governments and their instrumentalities thereby involving legal questions of transnational character.

(a) Changing profile of players

The profile of space faring nations is fastly changing in view of increased participation of states around the world. First, it was the then Soviet Union followed by the USA who were two space powers who could dictate terms to others in space affairs. Now more than 30 countries possess significant capacities in space activities and build space industries. There are roughly about 10 countries who can provide launch services. Though presently USA, Russia and China are the major space powers with an ability to indulge in more space activities (while the first two are experienced in manned space flights, China has already sent its taikonaut recently into space). The fact that European Space Agency, France, India, Israel and Japan have become launching states also reflects the geographical distribution of launching nations.

Private companies in western countries are playing an increasing role in the commercial area of space activities. The space technology is applied in number of commercial applications such as telecommunications, remote sensing and geographical information systems and global satellite navigation systems etc. Number of states are also operating in the field of remote sensing on commercial basis, e.g. Canada, France, India, Israel and Russia as well as the USA have their own commercial satellites collecting data and selling them commercially. Moreover, the commercial satellite systems play a major role in wars, these days. During 1991 Persian golf war about 25% of the military communications for the US Army was provided by commercial satellites companies which had grown to roughly 85% in the 2001 war against Iraq. It appears that this public-private/security commerce combination would work further closely. Infact a military commentator stated "one day we may find ourselves defending against armed attacks

supported by commercial satellite companies possibly even the same companies supporting our forces".

It is expected that the private industry in space would influence the governmental policies with regard to ISL evolution precisely the way in which mineral companies in western countries influenced their governments during the negotiation of UNCLOS once it was realized that the ocean bed contained mineral deposits.

In this context, one may venture to say that the experiences of the establishment of Enterprise the mining arm of International Sea Bed Authority might be repeated once the international community thinks of operationalizing the 'common heritage of mankind' principle enshrined in article 11 of the Moon Treaty which says that an international mechanism would be established to actualize the concept of 'common heritage of mankind'.

(b) Move towards domestic legislation

The proliferation of the space faring nations has infact brought nationalistic activities to the fore at the cost of international initiatives which has resulted in enactment of several domestic space legislations articulating their national security and commercial interests. The importance of this trend has been noted by the Third United Nations Conference on the Exploration and Peaceful uses of Outer Space (UNISPACE-III), 1999 as follows :-

> The need for effective laws and policies on space activities, not just on an international level but also on the national level is becoming clear to the increasing number of states now actively involved in the field of space.

The American Astronautical Society in 2001 stated :-

> The accessibility and integration into our daily lives of numerous commercial application in space, include satellite telephony, direct–to–home television, high speed internet connectivity, tele-medicine, distance learning, a remote sensing of the earth, global; positioning and navigation and materials processing or a testament to that fact. Yet for private entities investors expand their business model and to reach for the next new application, they will need to see predictable, transparent and flexible international and domestic legal framework within which they may operate their businesses and protect their investments.

Several countries around the world who are parties to the outer space treaties have made domestic legislations. They are Argentina, Australia, Brazil, Canada, Chili, France, Germany, Italy, Japan, Norway, Russian Federation, South Africa, Spain, Sweden, Ukraine, United Kingdom of Great Britain and Northern Ireland and the United States of America. There is no uniformity in the form or content of this legislation. They simply represent their national interest and the need to legally regulate them. While some of them have made comprehensive monolithic legislations others have preferred separate and independent legislations based on issue such as registration, launching, liability, insurance etc. Some of them are intend to give United Nations Treaties on Outer Space the force of law in those countries. Some of them have enacted legislations to create national space agencies, registries of space objects etc.

(c) The Private International Law & ISL

The commercial aspect of space activities is dominated by the private corporations who own satellites and having a telecommunication business to the tune of one trillion US dollars. Sometimes they deal with sovereign states in selling the satellite images, data and provide

communication services. They enter into contracts for assisting armed forces. Such situation raises private international law questions when the corporations are present in two independent companies. Moreover the states themselves are seeing the necessity of addressing some of the private law issues. Unlike the early era of space law which witnessed an emergence of international public law, the increasing commercialization and the lack of legal frame work to deal with the international private commercial dealings and international public private commercial dealings, has made it necessary to develop the suitable legal frameworks on this hybrid situation. The recent Convention on International Interests in Mobile Equipment and its Draft Protocol on Matters Specific to Space Assets is an example of the trend of making private international law conventions with regard to the commercial space activities across borders.

(d) Relying upon the UN General Assembly

The first 15 years of space law making witnessed a series of multi-lateral treaties addressing the fundamental issues. However, there is a total abdication of treaty making as a format in space law after the Moon Treaty in 1979. However, it should be noted that the 1967 Outer Space Treaty was based on the 1963 UN General Assembly declaration of the principles of space law. Starting from 1982 to 1996, the General Assembly adopted the following resolutions with governing principles on certain space activities, they are, Principles Governing the use by States of Artificial, Earth, Satellites for International Direct Television Broadcasting, (The DBS Principles, 1982); Principles Relating to Remote Sensing of the Earth from Outer Space (The Remote Sensing Principles, 1986); Principles Relevant to the use of Nuclear Power Sources in Outer Space (The NPS Principles, 1992); and Declaration on International

Cooperation in the Exploration and the use of Outer Space for Benefit and in the Interest of all States, 1996.

There are no agreed reasons for the shift in the format of law/norm making from treaties to General Assembly declarations, yet the fact remains that after Moon Treaty and its utter failure to enthuse its acceptance as treaty, the international community has perhaps chosen not to go for treaty-making process.

In this context it may be pointed out that there is basic problem with regard to the general international law as to what are its sources. Is the provision of Article 38(1) of the Statute of ICJ exhaustive? Is there any hierarchy in the sources outlined therein? It must be kept in mind that the adoption of Article 38(1) of the Statute of ICJ was a mechanical process wherein the framers of UN Charter, 1945 had adopted the provisions of Article 38(1) from the permanent Court of International justice. The newly independent countries never had a chance to articulate the sources of international law for a long time even after the Charter was adopted and the situation continues to be so. Perhaps Article 38 (1) will have to be re-formulated in the light of the changes in the subjects of international law and participation of non-governmental organizations in international law making and in the light of the analogy of articulating the fundamental principles of even charter as expressed in Article 1 & 2 of the UN Charter through the 1970 Declarations on Friendly Relations.

The legal significance of the General Assembly Resolution has been a controversial issue from the late 60s and continuous to agitate the international community because of the fact that the UN General Assembly is the most democratic and representative body of the

international community. Its near unanimous / consensus resolutions have much more bearing on the international law making process than the opinion of publicists, as a source or as evidence of international law. This issue is very important in the context of the law making process regarding space activities and in the context of the desire for comprehensive treaty in this regard. In any case, it should be noted that ICJ has relied on General Assembly resolutions on important issue of establishing whether the principle of non-use of force in international relations is a principles of *jus cogens* as in the Nicaragua case. Further several General Assembly resolutions have become the source of future treaties in the areas of criminalizing genocide, protecting human rights and environment. This trend is likely continue.

(e) The Golden Rule 'Consensus' no more available

The first era of law-making for space activities was initiated by the USA and the erstwhile Soviet Union because of their mutual fear and suspicion. They had demonstrated explicit tendencies of international cooperation which was infact inspiring to many other countries who were not space faring nations. The agreed basis within the UNCOPUOS was consensus for reaching agreements. This consensus rule was successfully applied for all the five treaties and some of the General Assembly principles. The departure from the consensus rule was visible when the DBS principles were negotiated particularly with regard to issue of contest between 'freedom of use' and 'prior consent' regimes. Finally it was accepted that there should be 'prior consent' from the receiving state which was not the case with regard to remote sensing and this resolution was also voted in the General Assembly. It is another departure. The other instance that can be cited to demonstrate the case of failure of consensus is the attitude of states in not ratifying the Moon Treaty, which was earlier negotiated and adopted by consensus.

There are issues of unilateralism and extra territorial application of domestic laws and monopoly purchase of satellite images. The United States of America has resorted to extra territorial application of its domestic laws and some of the soft law instruments such as NTCR to pressurize third countries like Russian Federation from supplying cryogenic technology to the GSLV launching vehicles by India. Further using its economic ability it has sought to monopolize the distribution of commercial satellite images on certain occasions. It is said that during the 2001 war in Afghanistan, the United States purchased exclusively the rights to all images acquired over Afghanistan by the high resolution IKONOS-2 Satellite in order to prevent the satellite company, Space Imaging from selling its pictures elsewhere. Although the company could have felt wonderful about the monopoly purchase but the issue is that the existing remote sensing principles insist on the acquisition of the satellite images on a non-discriminatory basis. But if one single country purchases everything, the non-discriminatory principle is made redundant.

(f) Minority Versus Universal Law

Historically a minority (an elite group) of states made / influenced the evolution of ISL. There was unity of purpose which resulted in consensus as a basis even between the ideologically opposed superpowers i.e. USA and the erstwhile Soviet Union. Therefore, the early era of ISL was so fruitful that it witnessed several binding instruments and normative declarations. Even today, a minority of states being the direct stakeholders are influencing the outcome or even the deadlock of the emergency a legal instrument with regard to ISL. Though the profile of space faring nations has geographically and economically changed from the early days still a vast majority of the

countries are not having any direct stake as of now. If the ISL has to be democratic, egalitarian and universal, the participation of non-space faring nations is a must in a more material sense of equality.

On the other hand, the near universal participation of UNCLOS III was that the maritime powers numbering a few were not the only stakeholders. Those coastal states which were never maritime powers had at the same time considerable stakes economic, sovereign and environmental stakes in the then expanding jurisdiction with regard to territorial waters, exclusive economic zone, continental shelf. Besides the land locked states and geographically disadvantaged states were also stand to benefit from the emerging economic dividends through the law of the Sea Convention. Finally everyone had the potential of receiving some benefits from the proceeds of the International Seabed Authority doing business with regard to the minerals in the international seabed. In that sense, the common heritage of mankind principle was seen as almost reality. In any event, the UNCLOS III was called a 'package deal' in view of strident conflicts and conscious compromises from various contesting interests.

There are no such parallels in the space law making process. The question therefore is how to brought this very participatory process everyone and particularly those who are not really interested any more in space law.

VI. THE PROBLEMS IN TREATY MAKING IN GENERAL INTERNATIONAL LAW

The process of treaty making is no more a pleasant task for the international community in view of the challenges that the treaty making process is witnessing. Though states, as the main subject of international law are the one who has the legal personality and

competence to make law-making multi-lateral treaties, they are not able to achieve much in this regard with that technical competence. In reality there is a despondency and stagnation in international law making through treaties. In any event, it is nobody's case that multi-lateral treaty is the only and exclusive source of international law. On the other hand, Article 38 (1) while talking about source of international law provides a cluster of sources so that the law relating to a particular dispute could be located in one of the sources. Further, though treaty is the most explicit formal instrument of international law in view of the difficulties that treaties face in terms of delayed entry into force, reservations and declarations and emergence of subsequent customary law diluting some aspects of the treaties in force and the need to amend them from time to time etc. make them a tedious and frustrating exercise. Today, one single country can weaken the multi-lateral treaty making process and render it ineffective, if it refuses to join or even takes step to neutralize the treaty's effect by choosing unfairly, bi-lateral method with the parties to multi-lateral treaty. It has happened in the case of Rome Statute Establishing International Criminal Court where the USA has sought to enter into bi-lateral treaties with several member states against the spirit and content of the Rome Statute just because the USA did not want to be a party to it. It has happened so in the case of Land Mines Treaty, Kyoto Protocol etc. Even regarding the UNCLOS, the USA had refused to sign and managed to change several provisions to suit its national interest and yet not joined the convention. In the case of space law, USA being a main player and US companies are having big stakes and hold in the commercial aspects of space activities, it would be meaningless to keep the USA away from any law-making process. On the other hand, when the USA participates it will like to have the treaty the way it wants. It is indeed an extremely frustrating situation for majority of the nations who would like to have a rule based

system both in general international law and specific regimes such as the space law.

The international community has been working through, more or less as an alternate, the recent phenomenon of 'soft law' method. Soft law can be in writing not amounting to treaties but non-binding instruments including the declarations and conference decisions of international conferences and UN General Assembly. The soft law instrument has been very successfully tested as an alternate method to reach political and normative consensus on pressing problems of mankind such as environmental protection and sustainable development. Extensive studies have been done by scholars to show that soft law mechanism is emerging to fill the legal void due to the stagnating process of treaty making. If UN General Assembly resolutions are seen as source of soft law, there are several occasions in which UN General Assembly resolution have become direct precursors to later multi-lateral treaties. The ICJ itself has relied on such soft law instruments as G.A. Resolutions to clarify whether a norm has attained the status of jus cogens or not. The international space law community which is eager to create a lex specialis / special branch of law must take cue from the developments with regard to general international law and ought to work out suitable alternates to the treaty process.

VII. CONCLUSIONS

Infact there are no conclusions that could be confidently placed before this House. What the paper has sought to do is to bring to the fore the changing profile of players and changing nature of interests in space activities and the trends and challenges, deviations and stagnations that the evolution of ISL has witnessed so far. In its efforts to bridge the community values and commercial interests, the

international community has not succeeded beyond putting in place the organizing principles of international space law. Given the intensity of commercial and military intentions of the players, the issue of how to bring permanent peace to space and then to earth is also a divisive issue for law making. The paper has also tried its best to show that the analogy drawn from the UNCLOS for establishing a comprehensive convention on outer space would not succeed either as format or a precedent. The nature the scope and the players are peculiar in the field of space. They alone can decide the format and the contents of the instrument of law in this regard. It has to come from within, which is a slow and painful process because it is also a dialectical process where contradictory forces work towards unity.

Finally, it is placed for consideration whether a comprehensive UN General Assembly resolution could be formulated in the light of the experiences in the last one and a half decades and in the light of the deadlock within the UNCOPUOS. Such a General Assembly resolution could be imagined and worked out in the pattern of the 1970 UN General Assembly Resolution on Principles of International Law and Friend Relations which indeed has become a referring point for everyone to clarify some of the concepts enshrined in the UN Charter particularly in Articles 1 and 2. One has to remember that the 1967 OST designated as *Magna Carta* of ISL was directly borne out of 1963 General Assembly Resolution. It is submitted that between the present deadlock and an unrealizable comprehensive treaty, it is better to work towards a middle ground.

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