COMMENTS

BY

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« International Regulation » and « International Practice » is the subject of this second working session.

But, in listening to the presentation of the two reports, I asked myself : « is this still space law ? » It must be ...

I have always felt that international regulation concerning communications satellites (and, in effect, concerning all space activities !) really comprises two basically different, and almost separate, regimes.

First : *the international law of the Space Environment,* reglementation with regard to activities in outer space (up there ...!) : the legal status of outer space and the celestial bodies, the right of States to launch satellites and other space objects into outer space, obligations and liabilities of the launching State, status and nationality of space objects, etc.

The development and elaboration of this international law of the Space Environment has been, in a very pragmatic way, dictated by the criteria of : « present need » and of « capability », as accepted by the international community.

This « space law » has largely been developed within the United Nations, namely within the General Assembly's Committee on the Peaceful Uses of Outer Space and its Legal Sub-Committee, and has followed the UN's usual, traditional pattern :

— the first step, after an initial exchange of views on sometimes new and surprising developments, is usually the elaboration of a set of general legal principles.

Indeed, with regard to the exploration of outer space, this significant first step was taken by the General Assembly already in 1963, when it adopted, unanimously, resolution 1962 (XVIII) entitled : « Declaration of Legal Principles Governing the Activities of States in the Exploration and use of Outer Space ». However, the law-formulating process should not normally stop there, whatever the opinions on the legal character of General Assembly resolutions may be.

In order to give these principles a legally binding character, they have to be elaborated and refined, and incorporated in general multilateral treaties.

So far, the United Nations have elaborated (as they have done in so many other fields) several treaties on the exploration and use of outer space :

A Treaty on Principles, and four others, each of them touching on specific aspects : liability, the care for the safety of astronauts, registration (that is : dissemination of information on who is doing what, out there ...) and the Moon-treaty.

They have all entered into force and are widely accepted as the main body of international space law. Their creators have worked hard to accomplish this, and are proud of it.

But the law-formulating process within the United Nations has gone on : several subjects have subsequently been placed on the agenda of UNCOPUOS and its Legal Sub-Committee, and have been launched on their way to incorporation in a resolution of general principles first, and in general multilateral treaties afterwards.

One of the first subjects to be taken on was exactly our subject of today : the regulation of the use of telecommunications satellites for direct television broadcasting. After years of, and it must be said bitterly divisive, debate, the General Assembly *did* finally adopt the Declaration of « Principles Governing the Use by States of Artificial Earth Satellites for Direct Television Broadcasting » in 1982.

These principles were, for instance, those of
— international co-operation,
— peaceful settlement of disputes,
— State responsibility,
— the obligation of prior consultation,
— notification to the UN,
— copyrights-regulation.

But has this set of principles been laid down in a draft treaty ? Not at all. The international community was (and is) not ready for it. The resolution was not adopted by consensus (1) and the divisiveness persists. We will hear more about that in the course of this afternoon's sessions.

Why ?

(1) General Assembly Res. 37/92, of 10 December 1982, adopted with 107 votes in favour, 13 against and 13 abstentions.

The States voting against the resolution were : Belgium, Denmark, Federal Republic of Germany, Iceland, Israel, Italy, Japan, Luxemburg, Netherlands, Norway, Spain, United Kingdom, United States.

Abstaining were : Australia, Austria, Canada, Finland, France, Greece, Ireland, Lebanon, Malawi, Morocco, New Zealand, Portugal, Sweden.

Because we had, in discussing the international regime for the use of telecommunications satellites entered into a *whole new and different kind of space law* : from the regulation of activities up there, we had touched down to face the regulation of a different kind of activities, basically terrestrial, but in one way or another connected with the use of outer space.

And there we were confronted with earth-bound problems : delimitation of national spheres of influence, if not territorial delimitation, access to commodities, claims of States to their own natural resources, questions with regard to a new international economic and information order ...

These problems were not created by the space age : they are the old and all too familiar problems of nation-States competing with each other in the economic as well as in the political and cultural field.

As Professor Christol describes it : « the direct television broadcast debate is merely a new phase of historic differences ».

There really seem then to be two levels of space law : « up there » and « down here ». We have mastered the regulation and the use of outer space as long as « use » means : opening up outer space for the launching of space objects into orbit and beyond.

But the uses of outer space have been rapidly expanding : they are now touching upon our everyday lives, on public and private enterprise, on the most fundamental national interests of States : they have *« touched down »* and first generation space law does no longer provide the answers to the problems surrounding direct broadcasting, or remote sensing of the earth by satellite.

We have entered a new era : an era of second generation space law, where we have, once more, to start *re*formulating existing international legal rules to make them applicable to what we could call the secondary uses of outer space.

From both of your papers, this is the message.

Somewhat astonished, as it were, Dr. von Noorden ends his paper by saying, and I quote :

> « So far, I have touched upon the law of treaties, the law of international institutions, the United Nations, the law of the sea and international air law. It might be thought surprising that I have referred only once to the Outer Space Treaty ; once to the ITU ; and not at all to the Registration and Liability Conventions ».

International space law may still constitute an overall framework for space activities, but for the regulation of the kind of activities under discussion today we have to come down again to the basic principles of public international law.

In this context, analogies with other questions (of transboundary air pollution, of non-navigational uses of international waterways, of international liability for injurious consequences arising out of facts not prohibited

by international law) may teach us something about the new problems with which international law is faced today.

In studying, for instance, the more recent work of the International Law Commission, we will find that new notions of international law present themselves, such as the « duty of prior consultation », « notification », « equitable utilization », « reasonable measures » ... in connection with all sorts of activities.

We will however also find that the incorporation of these new notions into existing international law, will necessitate prolonged and intensive efforts. It is good to hear today that so many of us are involved in doing just that !

I would now like to put a question to Mr. Dann :

given the possibility that national administrations will begin to compete heavily with INMARSAT on the telecommunications market, as you mention in your paper, do you think that the Organization will be able to continue to operate « on a sound economic and financial basis, having regard to accepted commercial principles » ?

Is it at all possible for intergovernmental organizations to operate on a sound economic basis ? Is decision-making under these circumstances not too sluggish and too heavy to be able to compete with private enterprise ?

Your example and experience would be of tremendous importance for other IGO ventures, such as the mining of deep seabed minerals by the International Seabed Authority.

And then I have a question with regard to Dr. Noll's paper. It was good to learn that the WARC-SPACE Conference, 1988 session, ended just over one month ago, has been successful insofar as ITU members have succeeded in reaching a consensus on the basic issues. It must have been hard work, but we are certainly to be congratulated on the results.

It is for instance very important that agreement has been reached on new procedures for coordination and notification in, as you describe it, « un climat généralement beaucoup plus détendu et serein qu'en 1985 ».

However, I fear that the introduction of the concept of « Multilateral Planning Meetings », or « réunions multilatérales de planification », has not really contributed to a *real solution* of the many bitterly divisive issues of earlier years, but has merely served to postpone the debate, to put these problems in cold storage, as it were.

But certainly, they will be taken out of there some day, and we will have to face them sooner or later ? Or has there really been a change of atmosphere ?

Discussion

Dr. F. Dann

This is a very fascinating problem.

When I said that INMARSAT must operate on sound commercial principles, this means two main things.

INMARSAT is intended to provide telecommunications without subsidies. There are for example many high frequency terrestrial maritime services operating in the world which are not economic. They only exist because they are subsidized by the coastal States. Now, INMARSAT will offer some services like maritime distress and safety services on a non-commercial basis ; they will be provided as a public service. Their exact funding is still a matter of doubt. But in general what it means is that we are not providing our services with government subsidies. The States are paying INMARSAT services for themselves and they are producing some return for use of capital to the signatories of INMARSAT.

The second aspect is that the Organization operates on the basis of sound financial management. We are exposed in a way that a commercial corporation is exposed to financial controls. We have auditors in just the way that they would audit for instance I.B.M.

As regards the question of whether we can be flexible enough as an international organization to compete in the modern world, I think that this should be answered in two parts. Yes, we do have certain disadvantages which I pointed out. However at the same time it should be said that the member States have foreseen this to some extent. That is why the management of the Organization is in the hands of the Council and not in the Assembly of Parties. The Council meets three times a year. It can meet more frequently if required. It can have specialized committees which discuss matters of detail and INMARSAT constantly keeps under review the relationship of the various organs within the Organization. Questions are constantly asked like : do we put too much of a burden on the Council ? How much could be delegated to the Directorate so that the decisions can be taken quickly and flexibly ? How much has to remain for the Council ? Do we distribute functions in the best way ? The Organization is constantly assessing its internal structure, its internal working methods. Therefore, yes, we can be optimistic about our ability to compete with commercial organizations.

Dr. A. Noll

Your doubt might be understandable. Nevertheless I think one has to bring it into the perspective of the 1985 Conference. The whole first session could have even been a complete failure. The basic elements of the concepts

of planning meetings were adopted only at the very last moment. Why was that ? One must not overlook the fight of the developing countries to get something out of this conference. They were happy to get at least the first results into the report. At the beginning of the conference the duality between planning on the one hand and the existing system was seen as a barrier that could not be breached.

Only through a remarkable effort of the conference, with new injections of ideas we came to the planning, whereby the first-come, first-served countries were ready to give in. For example, with regard to the Multilateral Planning Meeting (M.P.M.) quite a lot of concessions were made. There was a big fight as to whether the MPM should only be invoked at the end of any coordination procedure or could be invoked at any stage. After heated debates everyone agreed that MPM could be invoked at any stage. If the government in question wanted to use its allotment, it would have difficulties. This compromise is not a lip-service compromise. Il will be invoked in the future. After this concession from the North to the South we can be a little more optimistic.