THE END OF THE COLD WAR AND THE PROSPECTS FOR THE SETTLEMENT OF SPACE LAW DISPUTES

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Abstract

The end of the Cold War is likely to have a significant impact on the way international disputes are settled. The socialist states have traditionally been very reluctant with regard to the acceptance of compulsory arrangements for arbitration and adjudication. This paper identifies several reasons why this was the case. Some of the former socialist states have expressed a willingness to participate in dispute settlement arrangements, and others are likely to follow. This is an encouraging development, also with regard to space law, since the present arrangements for the settlement of space law disputes are not ideal. It is put forward that additional protocols to existing treaties, because of their specific nature, can probably be agreed upon more easily than would be the case with a completely new and general instrument for the settlement of space law disputes.

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1. Introduction

On 17 September 1987 the **Pravda** published an article by Soviet President Gorbachev in which he emphasized the importance of the United Nations, and in which he favoured a more intensive use of the International Court of Justice, especially with respect to the recognition of the Courts's compulsory jurisdiction. President Gorbachev envisaged an important task for the permanent members of the Security Council. He also advocated a more frequent use of the advisory functions of the Court.
The following year, in a speech to the United Nations General Assembly he confirmed this position as he announced the Soviet Union's intention to particularly expand its participation in the field of human rights. An area which, of course, had always been very sensitive in the relations with western states.
By a Decree of the Presidium of the Supreme Soviet, dated 9 or 10 feb. 1989[1], the Soviet Union recognized the jurisdiction of the Court, although this in fact involved the withdrawal of reservations, concerning disputes on the interpretation and application of six human rights treaties.[2]

This action, which was soon followed by the Ukranian SSR and the Byelorussian SSR (and later by Hungary), marked an important new development since it reflected a significant change in the attitude of the Soviet Union with respect to the conduct of its international relations.

The increasing importance and necessity for the Soviet Union of establishing good relations and working relationships with western states in view of its transformation into a working market economy must be taken to have been of great influence.

The decision of the Soviet Union was no doubt strongly influenced by the changes it was experiencing in the political, social and economic fields.

It also reflects the new thinking in the Soviet Union which stretched out to its foreign policy, as is witnessed by the recognition by President Gorbachev of the existence of "a system of universal law and order ensuring the primacy of international law in politics".[3]

In this respect it is all the more regrettable that the strongest western state has over the last years in its official policies shown indifference and even distrust of this system of universal law and the primacy of international law.[4]

The Soviet initiative marked an important development, as it signalled an equally important change. As far as the development of international law is concerned, with the revival of the United Nations, it illustrates the major impact of perestroika, and it symbolizes the end of the Cold War.

2. The socialist states and compulsory jurisdiction

The reason that all this is so remarkable and important, is that the socialist states have generally been very reluctant with regard to the acceptance of compulsory arrangements for arbitration and adjudication, disapproving in principle of all methods for the settlement of disputes other than negotiations.[5]

The (multilateral) treaties that do contain arbitration or adjudication clauses and to which e.g. the Soviet Union has become a party are few, and when they did they always made reservations to these clauses.[6]

This does not, however, mean that the socialist states never did accept compulsory jurisdiction. E.g. Poland did with regard to the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** of 1984; as well as with regard to the **Vienna Convention on the Law of Treaties** of 1969.

In the latter case, other socialist states, e.g. the Soviet Union, Bulgaria and Chechoslovakia, made reservations in relation to art.66, involving the compulsory jurisdiction of the International Court of Justice in matters relating to the application of rules of **ius cogens**.

This same issue again enormously complicated the negotiations on the **Treaty on the Law of Treaties Between States and International Organizations or Between International Organizations** of 1986, and almost resulted in the failure of the Conference.

3. Reasons for the rejection of compulsory jurisdiction by the socialist states

In analyzing the reasons behind the rejection of compulsory jurisdiction by the socialist states, we can identify a legal/doctrinal, a historical, an ideological and a practical argument.

The **legal/doctrinal** argument, in addition to the basic presumption which underlies adjudication by the Court, that is, that its jurisdiction should be expressly recognized by the states party to a dispute, involves in particular concepts of sovereignty and sovereign equality, according to which states should mutually agree on procedures to be chosen for the settlement of any given dispute. This requires mutual consent in each individual dispute. Consequently, dispute settlement clauses should (and could) not be included in multilateral instruments but were to be placed in additional protocols, to which the socialist states subsequently tended not to become a party.

This position later concentrated on a particular aspect of international legal developments, i.e. the increasing importance and participation of non-state entities, first of all international organizations, as was the case with the 1986 Vienna Convention, and later, and even stronger, with regard to private companies, as is witnessed by the position of the Soviet Union in the negotiations leading to the **United Nations Convention on the Law of the Sea** (UNCLOS III) of 1982, viz. the multinational consortia.[7]

The legal/doctrinal argument differs from the following three as it represents a traditional approach to international law. It also stands for resistance against the erosion of the predominant position of states as the most important actors, and against developments which are felt to challenge the traditional paradigms of national sovereignty, particularly in relation to disputes involving the exercise of sovereign rights, including matters of jurisdiction.

Today, however, the world-community seems more prepared than ever before to question at least some of the traditional claims that certain issues fall exclusively within the domestic jurisdiction of states. Notwithstanding the fact that, thus far, this has remained mainly limited to humanitarian and human rights issues, and with limited results for that matter.[8]

Elements of this traditional view on the sovereignty of states can also be found in the positions held by several states which have gained their independence at a relatively recent stage. Many of these are developing states. However, it must be noted that at the time when the Pravda published the article by President Gorbachev, and when the Soviet Union withdrew its reservations to the six human-rights treaties, two-thirds of the declarations made under art.36 (2), the "optional clause", of the Statute of the International Court of Justice, had been made by developing

states, while not one of the socialist states had done so.[9]

The end of the Cold War is also becoming noticeable in this respect: two states, who previously belonged to the group of socialist states, have submitted declarations under the optional clause: Poland, already on 25 September 1990[10], and Bulgaria, on 24 June 1992. And more are likely to follow.

Of the States that have emerged from the former Soviet Union, Estonia has filed a declaration accepting the jurisdiction of the Court on 21 October 1991.[11]

It is still uncertain what position will be taken by the new states that have originated from the former Soviet Union. Of some states it is to be expected that they will join, as much as possible, existing arrangements. Of others, it is not yet quite clear whether unrestrained nationalism will prevent this, nor whether "old thinking" with regard to sovereignty will prevail.[12]

The **historical** argument follows from the minority position of the Soviet Union within the United Nations during the early years of the organization, that is, the years of western dominance. This has strongly influenced the Soviet position towards the entire United Nations-system, including the Court, and it continued to do so even when in the 1960's the numerical situation in the United Nations had already dramatically changed.[13]

The major changes that have taken place since the thawing of the Cold War did set in, and the solutions that since have been found for long-running regional conflicts, e.g. the First Gulf War (between Irak and Iran), Afghanistan, Angola, Namibia, and Cambodia, do suggest that there is little reason to believe that this will remain a decisive factor.[14]

The **ideological** argument is based on the concept of two different worlds and systems, that is, socialist and non-socialist. It implies that a fair outcome of third party adjudication, e.g. by the International Court of Justice, in disputes between states from these different worlds was not likely, if not impossible. This point of view also appears to have been overcome by the events of the last years. It does emphasize, however, the importance of faith in the international legal system, as was also illustrated by the reluctant attitude of many developing states after the Court's Judgment in the **South-West Africa Case** in 1966.[15]

Finally, there is a fourth, more general and **"practical"** reason. Generally, it can be said that states are not very eager to submit their disputes to adjudication or arbitration by a third party, e.g. the Court, unless they feel reasonably comfortable about the outcome, i.e. that they stand a good chance of winning their case. Therefore, when states do feel uncertain about the outcome, they will be more inclined to either opt for negotiations or other methods of settlement, or, even, to leave the dispute as it is. Unsolved disputes may sometimes provide wel-

come instruments for national political purposes.[16]

4. The end of the Cold War and the settlement of space law disputes

What is the relevance of the foregoing for the peaceful settlement of space law disputes? How can the end of the Cold War be of influence on the prospects for their peaceful settlement?

The situation today, as far as the settlement of space law disputes is concerned, is not ideal. Some treaties do provide for procedures, others do not.[17] The provisions are not always very clear, e.g. concerning the position of international organizations[18], that is non-state actors. And sometimes they are not very explicit, e.g. where the execution of awarded claims is concerned, that is where their binding quality is involved, as is the case with the Liability Convention.[19]

There is in fact little experience with the settlement of space law disputes by means of existing treaty provisions, other than in cases involving Telecommunications-issues. The major case involving liability was was, of course, the re-entry on 24 January 1978 of the Cosmos 954 in the earth's atmosphere and the resulting deposit of radioactive debris on Canadian territory. The Canadian government, in its claim for compensation from the Soviet Union, explicitly referred to the Liability Convention. However, the Protocol between Canada and the Soviet Union of 2 April 1981, only establishes that the Soviet Union shall pay 3 million Canadian dollars to Canada "in full and final settlement of all matters connected with the disintegration of the Soviet satellite Cosmos 954 in January 1978." The Protocol contains no reference to the Liability Convention. There has been much discussion whether the incident was in fact solved under the Liability Convention or not. It has now become widely accepted, and admitted by experts from the former Soviet Union, that it was not.[20]

For many years it has been realized that the increasing access to Outer Space and the rapid development of its uses, as well as the potential consequences, necessitate more elaborated, more specific and even compulsory arrangements for the settlement of disputes. Also, the increasing importance and participation of non-state actors make it imperative to find a way to involve these actors.

At the same time, the overall picture is one of increasing international cooperation. It is clear that e.g. the future cooperation between the European Space Agency and Russia will require specific regulations for the settlement of disputes. There will be new issues to regulate, e.g. the use of Nuclear Power Sources (NPS) on the Moon (or on other celestial bodies).

The developments that have taken place since the Cold War has ended, appear to suggest that agreement on dispute settlement procedures can more easily be reached than before.
The time has come to pick the fruits of the new international relations-tree and rapidly to undertake action in this respect. However, no time should be wasted. The more so, since it cannot be excluded that the developments in the former Soviet Union will take a direction that will, again, leave little room for the creation of international instruments arranging for the compulsory settlement of (space law) disputes.[21]

It is put forward here for consideration that instead of trying to create one new instrument entirely devoted to the settlement of space law disputes, the expansion and elaboration of existing arrangements, through the incorporation of compulsory arbitration and/or adjudication procedures, involving international organizations and even private actors, may turn out to be a more promising approach.
This can be done through the use of additional protocols to existing treaties, which, because of their specific nature, can probably be agreed upon more easily than will be the case with a completely new and more general treaty.[22] Another advantage is that the existing space treaties, which generally appear to be considered almost "sacrosanct", will in this way remain intact and untouched.

What the exact contents of the additional protocols should be, let alone what they will be, is difficult to predict. For one, however, it is clear that they will have to be realistic, that is flexible, in allowing states to choose the procedure they prefer, that is, find the most appropriate.
It is, therefore, not unlikely that such protocols will include several options for the Contracting Parties, comparable to the solution that has been chosen for the UN Convention on the Law of the Sea (UNCLOS III) of 1982.
In this Convention, the freedom of choice of means was reduced to **a priori** acceptance of any of several enumerated means: the International Court of Justice, arbitration, a Special Tribunal (for the Law of the Sea), or even special arbitration for specific types of disputes.
A similar approach has been chosen by the Space Law Committee of the International Law Association (ILA) for its **Draft Convention on the Settlement of Space Law Disputes**[23], and it is suggested to draw on the experience of such an eminent group of scholars.

5. Conclusion

In sum, the developments we have witnessed since the Cold War has ended, suggest that the prospects for the settlement of disputes are good. It can be expected that many of the former socialist states will withdraw their reservations to existing treaties and to Optional Protocols involving compulsory settlement of disputes.

Where treaties do not (yet) include such provisions, the chances that they can be included must now be deemed better than they have been for decades. However, where the settlement of space law disputes is concerned, it is suggested here, for the reasons indicated above, that we will have to consider the possibility that directing efforts at the drafting of additional protocols to existing treaties instead of trying to create a general and encompassing treaty, may prove to be the more fruitful way.

That this approach is not limited to treaties dealing with the uses of Outer Space, but has become necessary in many fields, is illustrated by the following quote from Judge Manfred Lachs, who, in his closing remarks at the 1990 Colloquium on the Peaceful Settlement Of International Disputes in Europe, of the Hague Academy of International Law, has stated[24]:

"What we have to do lies first of all in institutionalizing certain instruments of co-operation and adapting them to changing conditions of life and growth and making them change whenever necessary. This is the task which faces the lawmakers and legal advisers."

Notes

1. There seems to be some confusion about the precise date. According to G. Shinkaretskaya, Prospects For Judicial And Arbitral Procedures For The Soviet Union, in D. Bardonnet (ed.), **The Peaceful Settlement of International Disputes in Europe: Future Prospects**, Proceedings of the 1990 Colloquium of the Hague Academy of International Law, Nijhoff, Dordrecht, 1991, (hereinafter: **Proceedings Colloquium 1990**), p.464, n.12, referring to **Vedomosti Verhovnogo Soveta SSSR**, No.13, 1989, the Decree was dated 9 February 1989.
But according to W. Goralczyk, Changing Attitudes Of Central And Eastern European States Towards The Judicial Settlement Of International Disputes, in **Proceedings Colloquium 1990**, pp.490-491, referring to UN Doc. A/44/171, Annex, the date should be 10 February 1989.

2. These treaties are:

- Convention on the Prevention and Punishment of the Crime of Genocide of 1948;
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949;
- Convention on the Political Rights of Women of 1952;
- International Convention on the Elimination of All Forms of Racial Discrimination of 1965;

- Convention on the Elimination of All Forms of Discrimination against Women of 1979;
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

3. As quoted in W. Goralczyk, **Proceedings Colloquium 1990**, op.cit. supra n.1, p.489.

4. Cf. the withdrawal on 8 October 1985 of the US declaration under art.36(2) of the Statute of the International Court of Justice. A recent ground for worry is the US Supreme Court decision in the Alvarez-Machain case, in which the Court held that the United States did not violate its extradition treaty with Mexico when, instead of seeking his extradition, US agents abducted a man and brought him to the United States for trial. However, among international lawyers in the United States there is a widespread concern regarding these developments. See e.g. **ASIL Newsletter**, August-September 1992, at 1-2.

5. The only treaty containing a provision for arbitration to which the Soviet Union, the leading state in the group of socialist states, became a party after WW II, was the Convention Regarding the Regime of Navigation on the Danube of 1948, although the body charged with the disputes was formally called "conciliation commission".
Cf. G. Shinkaretskaya, **Proceedings Colloquium 1990**, op.cit. supra n.1, p.459.

6. Idem.

7. Cf. W. Goralczyk, in **Proceedings Colloquium 1990**, op.cit. supra n.1, pp. 486-489.
Note, however, that the Soviet Union has opted for arbitration when they signed UNCLOS III, albeit with all the reservations allowed in the Convention. See G. Shinkaretskaya, A Changing Attitude Towards International Adjudication in the Soviet Union, **Leiden Journal of International law**, Vol.3, No.3, Dec.1990, 59-66, at 62-63.

8. Cf. the intervention after the Second Gulf War in Northern-Irak to protect the Kurds, and the debates on intervening in the civil war in Somalia and in the conflict in Yugoslavia. On Northern-Irak see e.g. P. Malanczuk, The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War, in **European Journal of International Law**, Vol.2, No.2, 1991 at 114-132.

9. At the time of writing there are 56 declarations under the "Optional Clause" in force. The only permanent Security Council member bound by a declaration under art.36(2) is the United Kingdom. France withdrew its declaration in 1974, after the Nuclear Tests Cases, and the United States did the same in 1985 because of the Nicaragua Case.

10. The Polish declaration contains some interesting reservations, e.g. concerning disputes with regard to the pollution of the environment unless the jurisdiction of the [ICJ] results from the treaty obligations of [Poland]. See W. Goralczyk, **Proceedings Colloquium 1990**, op.cit. supra n.1, at 491-496.

11. Apparently, Bulgaria, Czechoslovakia, and Poland have been actively withdrawing their reservations to dispute settlement clauses and procedures to treaties to which they are parties. However, I lack more precise information.

12. Note that these states are not Newly Independent States. United Nations practice and the 1978 and 1983 Vienna Conventions on the Succession of States (although both not in force) clearly deny that status to states which become independent after secession or separation. This has particular consequences for succession in respect to treaties.

13. See e.g. E. McWhinney, The New Thinking On The United Nations And Contemporary International Law, in E. McWhinney, D. Ross, G. Tunkin and V. Vereschchetin (eds), **From Coexistence to Cooperation, International Law and Organization in the Post-Cold War Era**, Nijhoff, Dordrecht, 1991, at 22.

14. See e.g. G.R. Berridge, **Return to the UN. UN diplomacy in regional conflicts**, Macmillan, Houndmills, 1991; and **Resolving Regional Conflicts: International Perspectives**, I. William Zartman, ed., **The Annals** of the American Academy of Political and Social Science, Vol. 518, November 1991.

15. South-West Africa Case, Second Phase, ICJ Reports 1966.

16. An example would be the outbreak of the war over the Malvinas / Falklands Islands.

17. For a survey of international instruments containing dispute settlement provisions, see e.g. K.H. Böckstiegel (ed.), **Settlement of Space Law Disputes** - The present state of the law and perspectives of further development, Carl Heymanns Verlag, Köln, 1980.

18. See S. Gorove, Dispute Settlement in the Liability Convention, in K.H. Böckstiegel (ed.), **Settlement of Space Law Disputes**, op.cit. supra n.17, at 43-50.

19. Idem.
Text of the Convention on International Liability for Damage Caused by Space Objects, a.o. in 961 **UNTS** 15.

20. For the texts of the Protocol and the Canadian Statement of Claim, see Böckstiegel K.H. & Benkö, M, **Space Law - Basic Legal Documents**, Nijhoff, Dordrecht, Vol.I/1, A.VI.2.2.

21. For our purposes, the former SU is still the most important of the former socialist states. However, with respect to launches the relevant states now are Kazachstan and Russia, who respectively own 84% and 6% of the Baikonur Cosmodrome.

22. Note that a general treaty on the settlement of space law disputes, as referred to in this article, should be distinguished from a new and general convention on the peaceful settlement of international disputes. On the latter see e.g. Louis B. Sohn, Preparation Of A New Treaty For The Settlement Of International Disputes, **Leiden Journal of International Law**, Vol.3, No.3, Dec.1990, 51-57.

23. Text of the ILA Space Law Committee's First Draft of the Convention on the Settlement of Space Law Disputes a.o. in Annex to H. van Traa-Engelman, **Commercial Utilization of Outer Space - legal aspects**, diss., University of Utrecht, 1989, pp.263-287.

24. M. Lachs, Closing Remarks, **Proceedings Colloquium 1990**, op.cit. supra n.1, p.668.