

AGORA: THE END OF TREATIES?

TREATY STASIS

Brian Israel^{*}

We shouldn't necessarily be concerned when international lawmaking is a victim of its own success. A trend in a given domain of international governance in which multilateral treaty-making gives way to bilateral and non-binding alternatives does not itself signal a decline in the influence or efficacy of international law. It may in fact be a normal symptom of a properly functioning international legal framework—as much a cause for celebration among international lawyers as for concern.

I wish to offer some brief reflections on this Agora theme, *The End of Treaties?*, from the perspective of a lawyer responsible for engineering international cooperation. I say “engineering” because international lawyers in this role must carefully weigh design tradeoffs in selecting among potential cooperative mechanisms, not unlike an engineer weighing the tradeoffs between materials in designing to a performance and cost specification. Like architects, international lawyers must also be attuned to the social dimensions of the arrangements they craft, but should ultimately privilege function above the aesthetics of legal form. Ugly international cooperative arrangements may nevertheless perform beautifully.

The Paradox of Treaty-making Over Time

For the major multilateral treaties at the heart of successful international governance regimes, the passage of time presents a paradox. On the one hand, the passage of time frequently brings technological advances that enable activities not expressly contemplated by the treaty. This in turn prompts questions about how “old” treaties apply to “new” capabilities and activities¹ as well as calls from some corners for international lawmaking to answer these questions. And yet with the passage of time the forces that make multilateral treaty-making an infeasible or unattractive option for addressing newly contemplated activities grow stronger. Thus, the apparent paradox of the successful multilateral treaty: up to a point, the older the treaty—the more that has changed since its negotiation and conclusion—the less likely it is to be updated through international lawmaking on the same level.

^{*} *Attorney-Adviser in the Office of the Legal Adviser, U.S. Department of State. The views expressed are personal and do not necessarily represent those of the U.S. Government.*

Originally published online 8 May 2014.

¹ Harold Hongju Koh, Legal Advisor for U.S. Dep't of State, [International Law in Cyberspace](#), USCYBERCOM Inter-Agency Legal Conference (Sept. 18, 2012).

Treaty Stasis

I submit that this paradox is at least partly a function of the ways a successful treaty shapes the options available to international lawyers charged with engineering international cooperation at various times over the treaty's life. But I should first note that my casual reference to "successful treaty" is not meant to trivialize (or wade into) the fascinating debate about how to measure success. What I have in mind for present purposes are treaties that anchor an international regime as classically defined by Stephen Krasner:² "principles, norms, rules and decisionmaking procedures around which actor expectations converge in a given issue-area." The decision tree for international lawyers seeking to address new developments not expressly contemplated by a treaty—let's call it Time 2—differs in two important respects from Time 1, before a successful legal framework was in place.

Risks of Fragmenting International Cooperation

The first difference at Time 2 is the risk that addressing new developments through international lawmaking will fragment membership in the treaty and dependent cooperative regimes. The membership of the most successful multilateral treaties tends to grow over time, adding to their influence and the stability of activities structured around them. The gravitational pull of treaties with a large membership may even influence the conduct of nonparties, cultivating an international regime extending beyond the treaty's parties. Opening up the legal framework at the center of such a regime—whether by amending the existing treaty or concluding a new one to replace or supplement it—risks undermining its stability.

For a multitude of reasons relating both to substance and process, it is extremely difficult to make even minor adjustments to most multilateral treaties without leaving some parties behind. At Time 2 it cannot be taken for granted that all parties would be in a position even to ratify the treaty in its present form. With the passage of time, national political winds may shift and matters addressed by the treaty may take on greater salience for certain parties, leading them to reevaluate their interests. Thus, even where it is possible for an objective observer to identify a minor technical adjustment to adapt a treaty to contemporary circumstances, it is difficult in practice to make such a surgical fix; once the treaty is open there is a significant risk of holdup as States jockey to renegotiate other provisions.

Varying the foundational rules of a treaty for some of the present parties—whether through amendments not in force or all parties, or a new treaty on the same subject—risks fragmenting dependent regimes. The move from a single set of rules for a given domain to different rules in force between different States may diminish the stability, clarity, and gravitational pull of the regime.

Options to Accommodate Change through Less Formal Means

The second difference at Time 2 is the options that a successful international legal framework afford international lawyers to accommodate change through means other than multilateral treaty-making. Relatively open-textured treaties that prescribe general principles supply a framework for answering the governance questions that inevitably arise over a treaty's lifetime with the advent of capabilities and activities not expressly addressed by the treaty. In such cases the treaty (or treaties) does not prescribe a single solution but shapes and constrains the universe of options. The treaty frames the edges of the puzzle. Filling in the puzzle may require additional cooperative mechanisms to coordinate the modalities of a new activity such as: declarations

² Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 3, 3 (Beth A. Simmons & Richard H. Steinberg eds., 2007).

or resolutions in multilateral fora memorializing a consensus on how a new activity is to be conducted within the international legal framework; bilateral agreements among States undertaking the activity; and what Harold Hongju Koh has termed “diplomatic law talk”³ to coordinate the application of the existing legal framework to new developments. The important point, which I illustrate below, is that a successful treaty affords options to address new developments through means other than multilateral treaty-making.

At Time 2, the combination of the *risks* of fragmenting a functioning regime and the *options* to accommodate change through other means results in a period of inactivity in multilateral international lawmaking in favor of other mechanisms for cooperation and governance. A treaty stasis, if you will.

Treaty Stasis in Outer Space Governance

International governance of outer space offers an instructive case study in treaty stasis. The cornerstone of the international legal framework for outer space, the 1967 Outer Space Treaty,⁴ was in place less than a decade after the launch of the first satellite into orbit. The Outer Space Treaty, which prescribes the foundational elements for an international regime for the use and exploration of space by a range of State and non-State actors, was developed on a global basis within the Legal Subcommittee of the UN Committee on the Peaceful Uses of Outer Space (COPUOS).⁵ In quick succession, three additional space treaties were developed in the COPUOS Legal Subcommittee, elaborating the Outer Space Treaty’s principles on, respectively, the rescue of astronauts in distress and the return of space objects,⁶ liability for damage caused by space objects,⁷ and the registration of space objects.⁸ These four core treaties comprising the heart of the international legal framework for outer space enjoy broad membership—the Outer Space Treaty, for example, has 103 parties and twenty-five signatories.⁹ A fifth treaty negotiated in the COPUOS Legal Subcommittee—the 1979 Moon Agreement¹⁰—never gained similar acceptance, with only 13 parties and four signatories,¹¹ a membership that does not include the most active space-faring States.

Since 1979, the COPUOS Legal Subcommittee has addressed the evolving uses and applications of outer space through legally non-binding mechanisms. In the 1980s and 1990s this took the form of Principles adopted by the General Assembly addressing new applications of space, such as remote sensing of the Earth from space,¹² and new technological capacities such as the use of nuclear power sources in space.¹³ More recent non-binding instruments developed in COPUOS and endorsed by the General Assembly provide

³ Harold Hongju Koh, *Address: Twenty-First-Century International Lawmaking*, 101 GEO L.J. Online 1 (2012).

⁴ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 UNTS 206.

⁵ Comm. on the Peaceful Uses of Outer Space, Legal Subcomm., on its 5th Sess., July 12-Aug. 4, 1966, Sept. 12-16, 1966, UN Doc. A/AC.105/39 (Sept. 16, 1966).

⁶ Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Apr. 22, 1968, 672 UNTS 119.

⁷ Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 961 UNTS 187.

⁸ Convention on Registration of Objects Launched into Outer Space, Jan. 14, 1975, 1023 UNTS 15.

⁹ Comm. on the Peaceful Uses of Outer Space, Legal Subcomm., Status of International Agreements relating to activities in outer space as at 1, Jan. 2014, UN Doc. A/AC.105/C.2/2014/CRP.7 (Mar. 20, 2014).

¹⁰ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 18, 1979, 1363 UNTS 3.

¹¹ See Comm. on the Peaceful Uses of Outer Space, Legal Subcomm., *supra* note 9.

¹² Principles Relating to Remote Sensing of the Earth from Outer Space, GA Res. 41/65 (Dec. 3, 1986).

¹³ Principles Relevant to the Use of Nuclear Power Sources in Outer Space, GA Res. 47/68 (Feb. 23, 1993).

guidelines for orbital debris mitigation¹⁴ and focus on implementation of the space treaties, including through national legislation.¹⁵ Beyond the United Nations, dozens of bilateral and trilateral international agreements structuring cooperation in the exploration and use of outer space are concluded each year by States and international organizations. The International Space Station is perhaps the most extraordinary example of international cooperation in space, both in terms of sheer technical achievement and an innovative legal framework¹⁶ that expressly plugs into the four core UN treaties on outer space.

I have written elsewhere¹⁷ about the lessons that may be drawn from this history toward identifying the optimal mechanism for cooperation—whether binding or non-binding—for a given collective action challenge. The focus of that study¹⁸ was international cooperation to utilize satellites in outer space for disaster management on Earth, an overall project that divides usefully into three phases and spanned four decades. I explained how the task facing the COPUOS Legal Subcommittee with the advent of remote sensing in the 1970s—at Time 2, if you will—differed fundamentally from its task at Time 1, in the 1960s, creating an international legal framework where none existed. At Time 2, the existence of the four core space treaties enabled Member States of the United Nations to successfully address remote sensing—a promising yet politically divisive capability at the time—through a legally non-binding mechanism: a set of principles¹⁹ developed in the COPUOS Legal Subcommittee and adopted unanimously by the General Assembly. Compared with the piecemeal acceptance over time that attends a multilateral treaty, this mechanism offered the virtue of a global consensus on the fundamental modalities of a new activity at a crucial moment in its development. A decade later, national space and science agencies seeking to harness remote sensing satellites for disaster management were able to build upon not only the international legal framework that enables the use of outer space, but also the international regime enabled by the Remote Sensing Principles, and were thus able to structure their remarkably successful cooperation on disaster management around an even less formal (and more agile) cooperative mechanism: the legally non-binding, agency-level International Charter on Space and Major Disasters.²⁰

Nevertheless, this reorientation of global space governance has elicited consistent appeals from the academy and some States for a return to multilateral treaty-making. Writing in 1989, Gennady Danilenko²¹ argued that the international community has unfinished business in constructing the international legal framework for outer space and must continue to develop new multilateral treaties. Last month,²² as the COPUOS Legal Subcommittee met in Vienna, a number of delegates made forceful appeals for the Legal Subcommittee to return to its days as an incubator for major multilateral treaties. Many of these interventions were premised on a belief that new space activities—which are alternately promising or frightening depending on one's outlook—will soon be technologically feasible and should be enabled and/or regulated through multilateral

¹⁴ Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space, UN Office for Outer Space Affairs (2010).

¹⁵ Recommendations on National Legislation Relevant to the Peaceful Exploration and Use of Outer Space, GA Res. 68/74 (Dec. 11, 2013).

¹⁶ Agreement between the U.S. and Other Governments Concerning Cooperation on the Civil International Space Station, Jan. 29, 1998.

¹⁷ Brian R. Israel, *Help from Above: The Role of International Law in Facilitating the Use of Outer Space for Disaster Management*, in *THE INTERNATIONAL LAW OF DISASTER RELIEF* (David D. Caron, Michael J. Kelly, and Anastasia Telesetky eds., 2014).

¹⁸ *Id.*

¹⁹ See Principles Relating to Remote Sensing of the Earth from Outer Space, GA Res. 41/65 (Dec. 3, 1986).

²⁰ See INTERNATIONAL CHARTER SPACE & MAJOR DISASTERS.

²¹ Gennady M. Danilenko, *Outer Space and the Multilateral Treaty-Making Process*, 4 *BERKELEY TECH. L.J.* 217 (1989).

²² Comm. On the Peaceful Uses of Outer Space, Legal Subcomm., Draft Report on its 53rd Session, Mar. 24-Apr. 4, 2014, paras. 23-27, UN Doc. A/AC.105/C.2/L/294 (Mar. 27, 2014).

treaty-making. With orbital debris looming large on the space governance agenda, one suite of newly contemplated activities that has captured the imagination of some diplomats and legal scholars—and is frequently the subject of calls for renewed international lawmaking—is so-called active debris removal (ADR). The basic concept of ADR is to capture nonfunctional spacecraft or fragments thereof and either de-orbit them or place them in a higher “graveyard” orbit.

Illustrating the Risks and Opportunities that Contribute to Treaty Stasis

The four core space treaties establish a basic legal framework for all activities conducted in outer space, including rules on ownership of objects launched into outer space, jurisdiction and control over space objects, and liability for damage. They thus supply a framework in which a State capable of removing a given object from space and all States with a legal interest in that space object may enter into an arrangement addressing all legal issues that may arise between them (e.g., consenting to the removal of the object from space and apportioning liability for damage to third States). This may take the form of a bilateral or trilateral agreement among participating States, a routine tool for structuring international cooperation in space, dozens of which are concluded each year within the overall framework of the four space treaties. The international legal framework of those four treaties protects the interests of any third States that suffer injury, whether in space or on Earth, in the course of such an operation.

Why not amend the treaties to expressly address the removal of nonfunctional space objects or negotiate and conclude a new treaty on active debris removal? The bar for amending major multilateral treaties is generally high. The Outer Space Treaty provides that amendments will enter into force for those States accepting them only upon acceptance by a majority of States parties (i.e., 52 parties at present). As described above, even minor technical amendments bring the risk of holdup by States seeking to renegotiate other aspects of the bargain.

The space treaties’ principles on ownership, jurisdiction and control, and liability are at the heart of the international regime for the use and exploration of outer space, and hundreds of international agreements, as well as the national laws, regulations, and operating procedures of many States, are organized around these foundational principles. Adjusting these principles to facilitate ADR—whether by amending the existing treaties or concluding a new one—is almost certain to lead to a situation in which different States are bound by different rules on the fundamental legal aspects of the regime for outer space. Such fragmentation in turn risks diminishing the stability of the regime and the predictability of activities ordered around it.

None of this is to suggest that a treaty on ADR or other newly contemplated space activities is a legal impossibility. Rather, it is to offer a brief glimpse into how the presence of an established international legal framework for space influences the decision tree of international lawyers addressing such developments. Opening up the legal framework is not without risks, and the framework affords options to address the legal aspects of ADR through other means, such as bilateral agreements. This being the case, if and when ADR becomes a reality, we should not be surprised (or concerned, necessarily) if States elect to manage it through a mix of bilateral and non-binding mechanisms, rather than multilateral international lawmaking. This layering of bilateral and non-binding mechanisms atop multilateral treaties is common across issue areas and has proven to be an effective approach to adapting a legal framework to evolving circumstances over time.

The Limits of Treaty Stasis

Treaty stasis is the product of the risk that new multilateral treaty-making will interrupt ongoing international cooperation and options to accommodate new developments through other means. We should not expect to find treaty stasis where one of these elements is not present.

It is thus possible to engineer around treaty stasis by building into a multilateral treaty amendment mechanisms that mitigate the risk of fragmentation. One approach common to regulatory treaties is to separate the list of regulated subject matter (e.g., species, pollutants) expected to evolve over time into one or more annexes subject to review and amendment by a conference of the parties or an international organization. For example, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)²³ or the tacit acceptance procedures for amendments to the Annexes to the International Maritime Organization's Prevention of Pollution from Ships (MARPOL)²⁴ and Safety of Life at Sea²⁵ Conventions. Such mechanisms facilitate fine-tuning to keep the treaties in sync with contemporary circumstances without the risks attendant to opening up the overall legal framework set out in the treaties.

Similarly, we should not expect to observe treaty stasis where the existing treaties do not afford options to accommodate present circumstances through means other than multilateral treaty-making. For example, where States' desired approach to a new development diverges fundamentally from the principles or rules prescribed by a treaty—where it is not a matter of filling in the puzzle, but changing its outer edges.

A "Glass Half-full" Account? A Glass Fuller for Some States than Others?

I have suggested that what I describe as treaty stasis may be a symptom of a functional international legal framework—that a period of inactivity in multilateral treaty-making does not necessarily equate to a *governance* stasis or a waning influence of international law. The bilateral agreements and political arrangements employed to extend the legal framework to specific activities and contemporary developments may serve to reinforce and strengthen this framework. States' reticence to tinker with a treaty to address later-arising developments may reflect their judgment that the treaty is crucially important to its present and future activities. But at this stage it is instructive to ask *which States?* Clearly some States favor multilateral treaty-making to address future space activities. Is a State's comfort level with treaty stasis simply an artifact of power, with greater comfort among those with confidence in their capacity to muscle through, in word or deed, their preferred interpretation of the prevailing legal framework at any given time?

My own observation is that the States that rely most on a given international legal framework to conduct activities within its domain are also most comfortable with treaty stasis. The perceived risk that new international lawmaking will upset the stability of a functioning international regime is one of the twin forces resulting in treaty stasis, and those that rely most concretely and immediately on this regime will feel those risks most acutely. By contrast, those States that rely less on the existing legal framework because they do not participate directly in the activities it governs may perceive less risk in reopening the legal framework.

Independent of overall State interests, whether an individual State representative or commentator regards treaty stasis as a glass half-empty or half-full often reflects, in my view, that individual's view of the intrinsic value or political utility of international legal mechanisms relative to efficacious alternatives. It is not uncommon for a State representative to press for legally binding form in cases where it is unnecessary or counterproductive in order to demonstrate seriousness to domestic audiences. Treaty stasis also seems to

²³ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 UNTS 243.

²⁴ International Convention for the Prevention of Pollution from Ships (MARPOL), Nov. 2, 1973, 1340 UNTS 184.

²⁵ International Convention for the Safety of Life at Sea (SOLAS), Nov. 1, 1974, 1184 UNTS 3.

cause an identity crisis for some international lawyers. Last month, in the COPUOS Legal Subcommittee, a number of delegates pointedly questioned what purpose the *Legal* Subcommittee serves if not to negotiate treaties.

At the outset, I stated my own view that an important role for international lawyers, as engineers of international cooperation, is to weigh the tradeoffs of potential cooperative mechanisms (e.g., agility, inclusiveness) and ascertain the optimal mechanism in any given case.²⁶ To be students of the materials science of international relations, focused on crafting the arrangement that will best achieve the desired cooperative outcome, not clouded by a sentimental attachment to legal mechanisms or swayed by the aesthetics of legal form.

Whether multilateral treaty-making is the optimal mechanism for cooperation in a given case is, of course, partly a function of the prospects for domestic approval in each cooperating State. One might question whether the dimming of those prospects in some States has distorted what is optimal in practice far from what should be optimal in theory.

In any event, my conclusion remains that treaty stasis does not necessarily indicate a breakdown of international cooperation or governance in a given issue area. It may in fact be a symptom of an international legal framework functioning as designed.

²⁶ See Israel, *supra* note 17.