THE 1967 SPACE TREATY: THIRTY YEARS ON*

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Mr President, Members of the Board of Directors of the Institute, Distinguished Representatives of SAGAT Turin Airport, Honoured Guests, Friends, Colleagues, Ladies and Gentlemen:

I. Introduction

Thank you, Mr President, for your very kind and generous words about me. I don't know how deserved they are, but perhaps that make them all the more appreciated!

It is an immense honour for me to be asked by the International Institute of Space Law to attend this special dinner, co-hosted by SAGAT, to mark the 30th anniversary of the 1967 Outer Space Treaty,[1] and to say a few words on the theme of the Institute's 40th Colloquium on the Law of Outer Space which is dedicated to the celebration of this happy and worthy anniversary. I wish to thank the Institute most sincerely for this overwhelmingly gracious and wholly unanticipated invitation.

Ever since receiving this invitation, I have been trying hard to work out the job description of what I have been asked to do. Now, especially since, on the one hand, we have already heard both this morning and this afternoon, on this the first day of the Colloquium, a good number of extremely authoritative, valuable and learned papers on so many aspects of the Treaty, and since, on the other hand, we are all looking forward to enjoying the culinary delights of Turin that are awaiting us, it occurs to me that perhaps my piece may not be unlike the sort of minuscule dish that some restaurants like to offer you with the chef's compliments after you have chosen your food and wine. It is just something to keep you occupied while the food is being prepared, without holding up the dinner once it is ready.

That reminds me of the advice that used to be given. A speaker should follow the concept of a miniskirt. Now, now! I did not say miniskirt *tout court*. I said the concept of! The advice was that it should be short enough to be interesting, but long enough to be decent. However, that was said years ago when miniskirts first came on to the scene. Fashion has since moved on. If we have a look at the London fashion show last week, and the one that is going on this week a stone's throw away in Milan, minimalism is strictly *de rigueur*.

This being the case, I thought that, in order to meet the current requirement of decency, it would be sufficient if I were just to cover a single strategic point and then sit down. However, my wife, who has kindly agreed to

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come with me to Turin and who is with us this evening, quite rightly admonished me that this is not some catwalk celebration, but a gathering of the most eminent, distinguished and respected practitioners and scholars in the field of space law in the world, and that I should respectfully cover at least a couple more points.

Even so, in view of the fact that we already had, and shall continue to have, in the course of this Colloquium, a large number of extremely learned papers on the subject, I hope you will allow me this evening to simply share with you a few random thoughts on the 1967 Space Treaty, 30 years on, without going into details. Such details and any supporting arguments, if I may follow Steve Doyle's excellent example this morning and slip in a commercial, will probably all be found in my *Studies in International Space Law* which Oxford University Press is bringing out next month under the Clarendon Press imprint.

To start with, while we are here to celebrate the 30th anniversary of the 1967 Treaty, I think we all wish to take this opportunity of congratulating the Institute on its 40th Colloquium, which happily coincides with the 40th anniversary of man's first entry into space. In a masterpiece of planning, the Institute has scheduled this celebratory dinner, not only on the first day of the 40th Colloquium, but also, with perfect even-handedness, three days after the launching of Sputnik I, and three days before the coming into force of the Space Treaty.

II. The Space Treaty: 30 Years on

The consensus which emerged clearly from the various speeches at today's first two sessions of the Colloquium, with which I entirely agree, is that the 1967 Space Treaty is a truly remarkable instrument. It has successfully provided an indispensable legal framework for the exploration and use of outer space from practically the beginning of the space age. It was a great political and legal achievement.

On 10 October 1967, when the Treaty actually came into force, having been ratified by all the powers that mattered and more, everyone was able to utter a sigh of relief, and to rejoice that the superpowers were finally able, ten years after Sputnik I, to agree, first, that the agreed principles would take the form of a legally binding treaty instead of just a General Assembly resolution, secondly, that at least celestial bodies would be used exclusively for peaceful purposes, thirdly that no nuclear weapons or any weapons of mass destruction would be stationed anywhere in outer space, fourthly that there would be no race for colonies in outer space, and fifthly that all contracting States would assume direct State responsibility for national activities in space, protect the environment, pay for any damage caused, be helpful to one another, and try to do everything for the good of all. The Treaty met, if not entirely, at least in appreciable measure, some of the deepest concerns and keenest aspirations of the world at the time.

What one has to remember, however, is that that was 1967. In fact, apart from Article IV, much of the Space Treaty had been agreed upon in 1963 in the form of the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space[2]. By then, not a single satellite had yet been launched into the geostationary orbit, and even the Interim INTELSAT had not been established. Both came only a year later. Even by the time the Space Treaty was opened for signature in 1967, only France had joined the then space club of two with the successful launching of Astérix in 1965. The Chinese did not do so until 1970, and the United Kingdom only in 1971. Landsat I, the first remote sensing satellite, was launched only in 1972. Often it is not easy to remember how far we have come in the thirty years since 1967.

It is, therefore, hardly surprising if today the

1967 Treaty needs a thorough review in the light of all the changes in circumstances. This is not the time or place to go into details. The most important changes may perhaps be simply enumerated:

(i) phenomenal *advance in space technology*, as exemplified, for instance, by the current US Martian exploration with the spacecraft Pathfinder with its Sojourner rover vehicle, and Alpha the international project of a permanently manned International Space Station;
(ii) rapid development of the *commercial exploitation* of space and space-related activities, such as in the field of remote sensing, not to mention telecommunication and direct television broadcast by satellites; and
(iii) increasing participation of *private enterprise* in all aspects of space activities, including, for example, actual launching of space objects.

As Ambassador Jankowitsch was saying this morning, we have now entered the third phase in man's exploration and use of outer space. However, notwithstanding all these changes, what needs to be done is not a root and branch operation radically to transform and still less to replace the 1967 Treaty. Rather it is a case of judicious adjustments. These may be grouped mainly into three categories:

(i) *authoritative* and more precise or systematic differentiation, classification, clarification or *definition* of various terms and concepts;
(ii) *closer co-ordination* of the provisions, as well as these terms and concepts, of not just the 1967 Treaty itself, but in all the UN treaties and declarations on space;
(iii) specific amendments and *supplementary provisions* to take into account changes in circumstances since the signing of the Treaty.

Among the many issues that may be raised in reviewing the Treaty for updating, I shall limit myself this evening to merely three areas:

(i) Terminology;
(ii) Main areas of concern;
(iii) Conditions governing the successful making of international treaties and rules.

In order to save time, I hope that I may simply enumerate some of the points without further elaboration.

III. Terminology

1.Filling in *Lacunae*, e.g., "Outer Void Space"

Under the heading of terminology, one can mention first of all the task of filling in the many gaps that have revealed themselves over the years in the vocabulary of space law. For example, owing to a lead given by the 1967 Treaty, there is at present no convenient expression to describe the space in between all the celestial bodies. Thus, while the 1963 UN Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space[3] speaks of "outer space *and* celestial bodies", making a distinction between outer space and celestial bodies, the 1967 Treaty and after it all the other UN treaties and declarations always use the expression "outer space, *including* the moon and other celestial bodies", which means that the term "outer space" *includes* "the moon and other celestial bodies." As a result, whenever we refer to "outer space", we will be understood to refer also to all the celestial bodies in it, excluding perhaps the earth. There is no longer a simple expression to designate the space in between the celestial bodies. This is why I have been calling this space the "outer void space"[4]. I hope that this name will find general acceptance.

2. Clarifying and Defining Various Technical Terms

There is a long list of terms used in the 1967 Treaty and other UN treaties and declarations on

outer space that are crying out for clarification and definition. Example include "astronauts", "appropriate State", "debris", "national activities", "space objects", and a host of others. They have already received much attention in the literature of space. law.[5] There is no need to elaborate the point here, even if we may be referring to one or two of them later.

3. Two Perennials: "Outer Space" and "Peaceful Purposes"

Then there are those two perennial controversies, the definition and delimitation of outer space, and the proper interpretation of the meaning of "peaceful".[6] I think it is high time that they should be resolved, and these terms and concepts authoritatively defined. The ca'canny and obscurantism involved in delaying a definition of outer space, and the deliberate distortion of the word "peaceful" to mean not "non-military" but "non-aggressive" are the work of politicians and diplomats done, one suspects, at the behest of the military, who, at least in the latter case, may well have based their conclusions on some misreading of the law.[7] Speaking of the antics of some politicians and diplomats, one is reminded of what Sir Henry Wotton wrote in 1604 when he was on his way from England to Venice to take up his post as King James I's ambassador there:

> "A diplomat is an honest man, sent to lie abroad for the good of his country".

It seems to me that the time has come when we space lawyers have to make a determined effort to convince the powers that be that (a) clarity, precision and accuracy in the use of these and other terms are of paramount importance in the future development of space law and of space activities as a whole, and (b) shielding behind equivocation and the distorted meaning of words is no longer a healthy option.

IV. Four Areas of Concern

If we look back at some of the concerns at the beginning of the space age, the thoughts uppermost in people's minds towards space can probably be divided into four categories:
(i) the arms race and the military use of outer space;
(ii) possible scramble for colonies or resources;
(iii) worries over responsibility and control, as well as over potential harm or damage; and
(iv) international co-operation and mutual assistance.

By and large, the concerns remain much the same today, although the perspectives may have changed over the years.

1. The Arms Race and the Military Use of Outer Space

First, the military use of outer space. For those in the 'fifties and the 'sixties who had only just witnessed the awesome role of air power and air supremacy in the relatively recent conflict, the first and foremost concern was from the military and strategic angle. To use an apt American expression, outer space brought with it a whole new ball game. For the protagonists, it was a question of how to contend and to contain. For third parties, it was how to prevent and to avoid a space war in which they might be embroiled, or of which they might become the victims. Hence, there was this tremendous popular clamour that outer space should be used exclusively for peaceful purposes. To this call the space powers paid lip-service, but with a great deal of mental reservation, inasmuch as their space efforts were then, perhaps even more intensely than now, directed primarily towards military ends.

Insofar as the demilitarisation of outer space is concerned, President L. B. Johnson hailed the 1967 Treaty as "the most important arms control development since the limited test ban treaty of 1963"[8]. 1963 was of course also the year when the General Assembly adopted the Declaration of Legal Principles,[9] the precursor of the 1967 Treaty. 1963 was moreover the year when the

General Assembly in resolution 1884 (XVIII) welcomed the statement of the two superpowers that they would not station nuclear weapons or other weapons of mass destruction in outer space, and called upon other States to follow suit. It will not escape notice that the only really substantive and important provision in the Treaty that is not in the Declaration of Legal Principles is Article IV. Yet Article IV(1) corresponds basically to resolution 1884. What this means is that what the two superpowers were unable to agree in 1963, and managed to do so only three years later in 1966 was Article IV(2), which restricted celestial bodies for use exclusively for peaceful purposes. This was then the breakthrough referred to by President Johnson.

However, much confusion surrounds the subject of the military use of outer space. Thus, only too often one hears and finds the assertion that under the Space Treaty, the whole of outer space, including celestial bodies, has been reserved for exploration and use exclusively for peaceful purposes. If we examine Article IV and the rest of the Treaty carefully, we will find that this is not true. Only the moon and other celestial bodies have been restricted by Article IV(2) to use "exclusively for peaceful purposes", but not outer void space. Under the Treaty, apart from the ban to station there nuclear weapons and other weapons of mass destruction, and, as they are reminded by Article III, subject to the ordinary rules of international law, including the Charter of the United Nations, contracting States are perfectly entitled to use outer void space for whatsoever military purpose they wish. They can put up there reconnaissance satellite, anti-satellite satellites, early-warning satellites, geodetic satellites, and any other weapon as long as it is not nuclear or capable of mass destruction. There is nothing in the Space Treaty as such which would, for instance, preclude projects like the United States' "Strategic Defense Initiative" (SDI), unless it turned nuclear or were to cause mass destruction.

What has befuddled the discussions on the military use of outer space during all these years has been the distorted use of the term peaceful to mean non-aggressive instead of its usual meaning of non-military. It is largely this double-talk which has allowed the false impression to be propagated that the whole of outer space, including both the celestial bodies and the outer void space, has been reserved by the Space Treaty for solely peaceful, i.e., to the uninitiated, non-military, purposes. This has in turn caused those concerned with using outer void space for military purposes, who have either not read Article IV of the Space Treaty, or have not read it properly, stubbornly to defend this abuse of the language.

If peaceful means non-aggressive, this would make the first sentence of Article IV(2), which provides that the moon and other celestial bodies can only be used "exclusively for peaceful purposes", completely meaningless, because, except for the specific prohibitions in the second sentence, the legal status of the moon and other celestial bodies would then be exactly the same as the outer void space, which, as we have just seen, can be used, and is being extensively used, for all kinds of activities for military purposes except of course for aggressive purposes. Under general international law, and especially Article 2(4) of the United Nations Charter, there is no place in the whole universe that States may lawfully use for aggressive purposes. Thus, to say that peaceful means non-aggressive is to deprive not only the first sentence of Article VI(2) of the Space Treaty, but also the word peaceful itself of all meaning.

The sooner the United States and all the others who embrace this spurious interpretation of the word peaceful can be persuaded to abandon it, and the sooner the proper interpretation of peaceful can be embodied in an authoritative definition in the Treaty the better. It would greatly contribute to clear thinking and to saving this useful term from being reduced to utter

meaninglessness.[10]

As to the substantive issue of arms control in outer space, what with the latest plan to test ground-based anti-satellite laser weapons,[11] the UN General Assembly in its resolution 51/123 last December quite rightly expressed its concern "about the possibility of an arms race in outer space".[12] Now that the "Evil Empire" has collapsed, and the Cold War has finally been banished with the signing this May of the Founding Act of Mutual Relations between NATO and the Russian Federation,[13] there is obvious room for agreement on drastic arms control not only in outer void space, but also in general; for it is well recognised from the beginning, arms control in space cannot be divorced from disarmament on earth.[14] With outer space now providing hitherto unavailable means of verification, it is earnestly to be hoped that outer space can act as the catalyst that will greatly facilitate and accelerate the task of reaching agreement.

There is, however, obviously some demarcation problem between COPUOS and the Conference on Disarmament.[15] At the beginning of COPOUS, it was the Soviet Union that insisted on excluding all disarmament issues from COPUOS. Nevertheless, as we have seen, between the 1963 Declaration of Legal Principles and the 1966 negotiations, the Soviet Union was finally persuaded, no doubt by the United States, to include Article IV in the Space Treaty. One can only hope that the two bodies can co-operate to prevent an arms race in outer space, and, if at all possible, to reduce and regulate the use of outer void space for military purposes. A proper definition of the term peaceful would obviously be a step in the right direction.

2. Scramble for Colonies or Resources: Occupation v. Appropriation

Secondly, at the beginning of the space age, there was a strong demand especially from the non-space powers that outer space and celestial bodies should not be subject to national appropriation. Some were motivated by anti-colonialism, others wished to discourage a colonial war, and yet others did not want to see the spoils of outer space fall irretrievably and exclusively into the hands of the space powers.

The principle of non-appropriation of outer space and of celestial bodies quickly met the agreement of the superpowers, who at the time were far from sure which of them was to land on the moon first. The principle was adopted unanimously in General Assembly resolution 1721 A (XVI) in 1961. Only the insistence of the United States prevented it from taking the form of a treaty. Eventually it was the fear that the Soviet Union might be the first to make a landing on the moon that prompted the United States to change its attitude towards resolutions versus treaties in space-law making, and in May 1996 actually to call for the conclusion of a treaty to prevent any nation from claiming sovereignty over the moon or any other celestial bodies. It was this that led to the conclusion of the 1967 Treaty.[16] Article II on non-appropriation is thus one of the Space Treaty's chief *raisons d'être*, and what brought it into *de facto* existence in the astonishingly short time of a little over seven months, the text having been adopted by the General Assembly on 19 December 1966.

The complete freedom of outer space and of celestial bodies for exploration and use by all thus established in Article II is supplemented by Article I which inter alia specifies "free access to all areas of celestial bodies".

Insofar as the principle of non-appropriation is concerned, while Article II speaks of no national appropriation by means of use or occupation, and Article I of free access to all areas of celestial bodies, the line in fact, if not in law, between

occupation and appropriation is often difficult to draw. This applies to orbits in outer void space as well as to celestial bodies. The problems arising from the continuous occupation of prime slots in the geostationary orbit, and the phenomenon of paper satellites fall into this category. It is to be hoped that the current efforts in COPUOS and in ITU to resolve them may reach early fruition. In due course, the same problem will apply to occupation of portions of celestial bodies when exploitation becomes possible. The Moon Treaty has not really resolved it. Further consideration is required.

3. Worries Over Responsibility and Control, as well as Over Potential Harm or Damage

Thirdly, especially at the beginning, excitement over space was tempered with grave apprehension of the unknown. While space activities were greeted with wonderment, and astronauts were treated almost as superhuman, there were also serious qualms whether some space activities might irreparably damage the space environment, or grievously contaminate, or even destroy the earth, and wipe out all life on it. Moreover, on a more down-to-earth level, having been brought up to believe that what goes up must come down, people were uncomfortable with the thought that tons and tons of metal objects were to whirl round and round over their head, and were worried over the damage which such objects might caused them or their property when they were to fall down. The feeling was that everything connected with space needed to be strictly controlled by States, which should also be made responsible for any adverse consequences.

When it comes to control of and responsibility for space activities, these are covered basically by the revolutionary principle in Article VI of the Space Treaty which makes the contracting States directly responsible internationally for national space activities, by whomsoever carried on. At the same time, Article VII makes all the contracting States responsible for the launching of a space object directly liable for any damage which the space object may cause to third parties. Both these principles already appeared in the 1963 Declaration, as well as the rule in Article VIII which places space objects and their personnel under the jurisdiction of the State of registry. Article IX of the Treaty now adds a specific duty on contracting States to avoid harmful contamination of either outer space or the earth. Moreover, Article XIII makes it clear that the Treaty provisions apply to contracting States whether they carry on space activities individually or jointly with other States.

Since 1967, the rise in non-governmental space activities has been beyond belief. Whilst the need for governmental control as envisaged in Article VI of the Space Treaty will always remain necessary, there is need to define which State is responsible for whose and which space activities. At present, both the term national activities, and the term appropriate State in Article VI give rise to a great deal of uncertainty.[17]

Moreover, the extent of the concept of international responsibility is far from clear.[18] We know that contracting States have to assure that national activities conform to provisions of the Treaty, and that they must subject non-governmental national activities to authorisation and continuing supervision. But does their responsibility for non-governmental national activities extend to beyond compliance with the Treaty and through Article III of Treaty with rules international law, including all treaty obligations, to compliance with rules of municipal law, both civil and criminal, including even contractual obligations? And, notwithstanding the fact that Article VI speaks of the "appropriate State" in the singular, does international responsibility fall in fact on all the States which may qualify as launching States?

Switching from Article VI to Article VIII of the

Treaty, one finds that Article VIII on jurisdiction is by no means free from ambiguity. Thus, one may well ask whether, according to Article VIII, the jurisdiction of the State of registry of a space vehicle extends to persons who do not form part of that vehicle's personnel? For instance, what is the legal position of an astronaut of State A nationality, part of the crew of a spacecraft registered in State B, assaulting an astronaut of State C nationality, part of the crew of a spacecraft registered in State D, after the two spacecraft docked in outer space and the former astronaut was visiting the latter spacecraft? Or someone visiting a moon station operated by another State? And how about a space tourist?

Moreover, the interpretation which has been given to Article II of the Registration Convention further weakens the link between the State of registry of a space vehicle and the vehicle itself, as well as all those on board. At present, flags of convenience can be easily established, and it may sometimes be difficult to ascertain which State exercises jurisdiction over which space object and over which persons on board.[19]

Furthermore, the effect of Article VIII is further eroded by some of the other subsequent UN treaties on outer space, which often resort to different connecting factors. Launching, including all the different aspects of it, nationality of the astronaut, and ownership of the space object, and possibly even employment can all come into play.[20] There is probably much to be said for reverting to the traditional concept of nationality, while at the same time tightening the rules on registration.[21]

Consideration needs also to be given to the legal status and registration of installations and manned or unmanned stations on celestial bodies, as well as regulation of and liability for activities carried on in them. There should be better co-ordination between control and responsibility, and generally some redefining and perhaps adjustment of the extent of international responsibility especially for non-governmental activities, in view of the almost phenomenal increase in private commercial space activities.

On the other hand, because of the rapid proliferation of space activities, the suggestion of setting up machinery and procedures for the elaboration of standards and recommended practices along the lines of ICAO (International Civil Aviation Organisation), WHO (World Health Organisation) and IMO (International Maritime Organization) to regulate and co-ordinate especially the technical aspects of international space activities is to be welcomed.[22] What is needed is probably a high-powered and compact unit, where the different interests are duly represented.. To such a body, subjects such as the use of nuclear-powered sources, space debris, and collision now being considered by COPUOS can perhaps with advantage be entrusted.

If a quasi-legislative opting-out procedure is adopted, States which do not opt-out of specific regulations, should be made responsible for their compliance, implementation and enforcement. In order that such measures are effectively implemented and enforced in the case of non-governmental space activities, States may need to be reminded, encouraged and perhaps even bound by treaty to extend their domestic laws to persons and objects under their jurisdiction in outer space, just as aviation found it necessary to adopt the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft.[23]

4. International Co-operation and Mutual Assistance

Finally, in mankind's exciting new venture into the hitherto unknown, while there was obviously rivalry between, and later among, the space powers, there was also probably on the part of all, a recognised need for mutual assistance and co-operation. Of course, what everyone had in

mind may not have been the same. The space powers would like to see the maximum of co-operation in their space activities from everyone, affording them tracking and other facilities, including, if need be, the right of passage for their space objects, and assistance to their astronauts or space objects in distress. Near-space powers would like a helping hand to get into space, whilst they and non-space powers would all like to share in the benefits of space.

In the Space Treaty, Article IX clearly stipulates that contracting parties should be guided by the principle of international co-operation and mutual assistance, in all their activities in space. Article V provides for assistance to astronauts in distress, Article IX for consultation in order to avoid harmful interference with one another's peaceful space activities, Article X for opportunities to observe one another's space flights, and Article XI for at least in theory the spontaneous total disclosure by the contracting parties of the nature and even results of all their peaceful space activities. Finally to cap it all is the famous Article I which enjoins that all space activities shall be carried out "for the benefit and in the interests of all countries", and that contracting States, in scientific investigations in outer space "shall facilitate and encourage international co-operation".

From this point of view and speaking of the extension of domestic law into space, it is of interest to note that, although, for example, Article V(2) of the Treaty specifies an obligation on astronauts of contracting States to render all possible assistance to astronauts of other contracting States, the Treaty does not specifically lay a duty on any particular contracting State through its domestic law to ensure that such assistance is always given. What space law can do would be, for example, to take a leaf from international air law where Annex 12 to the Chicago Convention (Search and Rescue) lays down specific rules and procedures, which contracting States that do not opt out have to implement, setting out what pilots-in-command of aircraft of their registry will have to do when they observe either another aircraft or a surface craft in distress, or intercept a distress call from another aircraft.

In this connection, apart from possibly adopting the quasi-legislative procedures of ICAO, WHO, and IMO, space law might think of further borrowings from related fields of international law and activities, particularly in the field of international co-operation and mutual assistance, on which the 1967 Treaty has laid much stress. A great deal can be learnt, for example, from international air law, and international nuclear law.[24]

At the same time, it seems to me that what one needs to guard against is being unrealistic. The first years of the Space Treaty coincided with a period when the economic consciousness and expectations of the developing countries were steadily rising. There was a degree of militancy which manifested itself in successive UN General Assembly resolutions on natural resources, culminating in the proclamation of the New International Economic Order and the Charter of Economic Rights and Duties of States.[25] What it amounted to was an attempt to translate the kind of social conscience and pressure which may exist in homogeneous domestic societies and which cause legislation to be made providing for assistance and benefits to be given to the disadvantaged sections of society, to an essentially heterogenous horizontal society like the international political and legal system. In international society, members are sovereign, and are motivated almost exclusively by self-interest. They are not subject to any higher authority which can compel them to be munificent towards their poorer and weaker brethren without discrimination. The United Nations General Assembly certainly has no such power. They need to be persuaded that it is in

their interest to do so, and at the moment this can probably be done more easily in individual and concrete cases than in a blanket fashion.

In Article I of the Space Treaty on the subject of international co-operation, the space powers paid lip service to the surging expectations of the time of the developing countries. Some countries and commentators have ever since tried very hard to give Article 1 an excessively literal interpretation involving a legally binding obligation. Such efforts can hardly be said to have succeeded, although there have been, as we all know, a good number of bilateral and plurilateral co-operative and even collaborative arrangements based on mutual interests and mutual consent. Thirty years on, and after ten years of discussion, a more realistic attitude seems to have manifested itself in the 1996 Declaration on International Co-operation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States.[26] The key provision is probably to be found in the first part of paragraph 2:

> "States are free to determine all aspects of their participation in international cooperation in the exploration and use of outer space on an equitable and mutually acceptable basis. Contractual terms in such cooperative ventures should be fair and reasonable . . ."

In other words, international co-operation is to be voluntary, and it is to be on "fair and reasonable" terms to be negotiated and agreed upon between the parties on either a multilateral or bilateral basis. This said, one should on the other hand equally remind States with space capabilities that it must be in their long term interests that space technology and space benefits are shared to the widest extent possible. Even the most mercantilist State must realise that in the long run one must be better off living in a world not populated by hungry mouths, but by well-to-do clients. From this point of view, both the '67 Treaty and the United Nations can doubtless play useful roles in promoting international co-operation in order to achieve that objective.

V. Conditions Governing the Successful Making of International Agreements and Rules

This brings me to my last point that I hope to make. The study of space law has taught me that in a horizontal legal system like international law, in order successfully to forge an international agreement or to build up a rule of international law, three conditions have to be met.

(i) perceived need on the part of the States concerned;
(ii) due representation of the dominant section of international society having special concern in the subject-matter; and
(iii) a propitious political climate.[27]

First, the States concerned must feel a need for the agreement or rule. They must feel that it is in their interests to do so. All that one can hope is that all the persons concerned will understand and pursue their countries' long-term and broader interests, and will not seek short-term success or personal glory to the detriment of those interests, and that the dominant section of international society will not abuse their dominant position. Insofar as we lawyers are concerned, while naturally those who represent clients, whether governmental or private, have to protect their clients' interests to the best of their ability, I think we all also owe a duty to our profession to ensure that whatever is done is, to use the phrase of the International Co-operation Declaration, "fair and reasonable". If I recall correctly, it was a famous son of this beautiful country, and of this illustrious city we are in, Count Camillo Benso di Cavour, who once said, What scoundrels would we not be if we do for ourselves what we do for our country? We are, however, no longer in the turbulent days of

fighting for national unity. I do not think it is in a State's long term interests in whatever negotiations to drive for what in domestic law might be branded as unfair contract terms. In particular, representatives of powerful States would do well to remember that international negotiations are not like a domestic adversarial process where there is a judge to curb forensic excesses. This said, one needs also to remember, on the other hand, the ancient proverb as put by Dr Samuel Johnson, "One man may lead a horse to the water, but twenty cannot make him drink". This saying is particularly apt when it comes to attempts to change the behaviour of States, big or small, through treaties, when they see no national interest in accepting the obligations the treaties involve, however desirable or even imperative the objectives of the treaties in question may be from the international point of view. The number of poorly ratified treaties unfortunately testify to this sorry tale.

As for due representation of the dominant section, experience has shown that, in any international treaty-making or rule-making, due weight has inevitably to be given to the views of those whose co-operation is indispensable to the working of the treaty or rule, including those which are, in the words of the International Court of Justice in the *North Sea Continental Shelf Cases*, "specially affected".[28] It is only a truism to say that in any society, the law always represents the will of the dominant section.[29]

Finally, as regards a propitious political climate, experience has also shown that even where a given rule or treaty is felt by all the States specially affected as reasonable or even desirable, it is unlike to come to fruition unless the international political situation is propitious for it to be born. Each of the five treaties relating to outer space drawn up by the United Nations proves this.[30] At this moment, as mentioned before, the Cold War has been officially buried. Despite some local turmoils, the overall political barometer reads "Fair-set". On this auspicious 30th anniversary of the Space Treaty, with Mir circling over us, and the International Space Station being on its way, both outstanding exemplars of international co-operation in space, redoubled efforts ought to be made by all, both in and outside the United Nations, to prepare space law, including all the existing UN treaties and declarations, for the New Millennium. May we wish this enterprise Fair Wind and Godspeed.

Notes

1. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. London, Moscow, and Washington, 27 Jan. 1967. Adopted by UN General Assembly resolution 2222 (XXI) on 19 Dec. 1966, opened for signature on 27 Jan. 1967, entered into force on 10 Oct. 1967. 610 UNTS p. 205.

2. Resolution 1962 (XVIII).

3. Resolution 1962 (XVIII).

4. See B. Cheng, *Studies in International Space Law* (Oxford: Clarendon Press, 1997), e.g., p. 327.

5. See, e.g., the many papers on the subject in successive IISL Colloquia on the Law of Outer Space in Cumulative Index of the Proceedings 1958-94 (UN Office of Outer Space Affairs, *Space Law: A Bibliography*, UN Doc. A/AC.105/636. New York: UN. 1996), under "Definitions". See also Cheng, *op. cit.* in note 4 above, Ch. 18 (pp. 492-509), Ch. 23, s. II (pp. 598-602), Ch. 24, s. III.C (pp. 634-6).

6. Regarding the former, see *op. cit.* in note 4 above, Ch. 14 (pp. 425-56), and *Space Law: A Bibliography*, cited in note 5 above, under "Definition/Delimitation of Airspace and Outer Space". Regarding the latter, see Cheng, *op. cit.*

in note 4 above, Ch. 19 (pp. 513-22), and *Space Law: A Bibliography*, under "Definition".

7. See further Cheng, *loc. cit.* in previous note.

8. 55 *Dept. of State Bull.* (1966), p. 952; statement released on 8 Dec. 1966, when agreement was actually reached between the major space powers. See *op. cit.* in note 4 above, p. 215.

9. Resolution 1962 (XVIII).

10. See further *op. cit.* in note 4 above, Chs. 19-20 (pp. 513-38); see also B. Cheng, "Military Use of Outer Space: Article IV of the Space Treaty Revisited", paper presented to the International Conference on Air and Space Policy, Law and Industry for the 21st Century: The Utilization of the World's Air Space and Free Outer Space in the 21st Century, Seoul, 23-25 June 1997, organised by the Korean Association of Air and Space Law. The proceedings are being published.

11. See "US ready to unleash Star Wars laser", *The Times* (London), 3 Oct. 1997, p. 12, cols. 1-8. MIRACL (Mid-Infra-Red Advance Chemical Laser) will be tested, firing two pulses at a military satellite 260 miles above the earth. Cf. also 8(38) *Space News* (6-12 Oct. 1997), headline on p. 1: "Pressure from Senate Majority Leader Trent Lott (R-Miss.) might result in a quintupling of the budget for the U.S. Air Force's Space Based Laser program. See page 4.".

12. International Co-operation in the Peaceful Uses of Outer Space, resolution 51/123, 13 Dec. 1996, Preamble, para. 5.

13. Paris, 27 May 1997, 36 *International Legal Materials (ILM)* (1997), p. 1006.

14. Cf. US Senator Gore before the UN First Committee, 3 Dec. 1962: "The question of military activities in space cannot be divorced from the question of military activities on earth", cited in *op. cit.* in note 4 above, p. 515.

15. Cf. UN, *Report of the Committee on the Peaceful Uses of Outer Space*, GAOR, 52nd Sess., Supplement No. 20 (A/52/20), 1997, para. 25.

16. See *op. cit.* in note 4 above, Ch. 9, ss. II and III.A (pp. 215-20).

17. See *op. cit.* in note 4 above, Chs. 23 and 24 (pp. 598-640).

18. See *op. cit.* in note 4 above, Ch. 24 (pp. 621-40).

19. See further *op. cit.* in note 4 above, Ch. 24, ss. H and I (pp. 626-30).

20. See B. Cheng, "Space Objects and Their Various Connecting Factors", in Gabriel Lafferranderie and Daphné Crowther (eds.), *Outlook on Space Law Over the Next 30 Years* (The Hague: Kluwer, 1997), pp. 203-15.

21. Cf. *op. cit.* in note 4 above, Ch. 17 (pp. 475-91).

22. Cf. N. Jasentuliyana, "Celebrating Fifty Years of the Chicago Convention: Twenty-Five Years after the Moon Landing: Lessons for Space Law", 19-2 *Annals of Air and Space Law* (1994), p. 429; B. Cheng, *The Law of International Air Transport* (London: Stevens, 1962), Ch. 3, s. 2 (pp. 63-7).

23. 704 UNTS, p. 219; ICAO Doc. 8364. See further B. Cheng, "Aviation Criminal Jurisdiction and Terrorism: The Hague Extradition/Prosecution Formula and Attacks at Airports", in B. Cheng and E. D. Brown (eds,), *Contemporary Problems of International Law: Essays in honour of Georg Schwarzenberger on his eightieth birthday*. (London: Stevens. 1988), pp. 25-52.

24. Cf. *op. cit.* in note 4 above, Ch. 3: From Air Law to Space Law, pp. 31-51; Ch. 4: International Co-operation and Control: From Atoms to Space, pp. 52-69. See also Cheng, *op. cit.* in note 22 above, Ch. 4, s. D: International Co-operation and Facilitation, pp. 145-70.

25. UN General Assembly resolution 3281 (XXIX), 12 Dec. 1974, Charter of Economic Rights and Duties of States, 14 *ILM* (1975), p. 251. Before that, UN General Assembly resolution 1803 (XVII), 14 Dec. 1962, UN *Yearbook* (1962), p. 503; resolution 2185 (XXI), 25 Nov. 1966, 6 *ILM* (1967), p. 147; resolution 3016 (XXVII), 18 Dec. 1972, 12 *ILM* (1973), p. 226; and resolution 3171 (XXVIII), 17 Dec. 1973, 13 *ILM* (1974), p. 238, all on Permanent Sovereignty over Natural Resources; resolutions 3201 (S-VI) and 3202 (S-VI), 1 May 1974, Declaration and Programme of Action on the Establishment of a New International Economic Order, 13 *ILM* (1974), p. 715.

26. Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of all States, Taking into Particular Account the Needs of Developing Countries, General Assembly resolution 51/122, UN GAOR, 51 Sess. (1996). See J. S. Thaker, "The Development of the Outer Space Benefits Declaration", XXII-I *Annals of Air and Space Law* (1997) 537-58.

27. See further *op. cit.* in note 4 above, Epilogue, s. IV (pp. 687-94).

28. *ICJ Rep. 1969*, p. 3, at p. 43.

29. Cf. B. Cheng, "How Should We Study International Law?", 13 *Chinese Yearbook of International Law and Affairs* (1994-5), pp. 214-18, s. II: What is Law? On p. 215, eight lines from base, "Savigny" was a slip of the pen for "R. v. Ihering".

30. See *op. cit.* in note 4 above, Epilogue, s. IV.B (pp. 690-1).