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SPACE LAW COMMITTEE

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REPORT

REVIEW OF SPACE LAW TREATIES IN VIEW OF COMMERCIAL SPACE ACTIVITIES

by Professor Maureen Williams
Rapporteur

SUMMARY: I. Introduction. II. Main conclusions of the four Introductory (Special) Reports. III. Comments on the Introductory Reports. IV. Comments of a general nature (by Professor Bin Cheng). V. The latest comments and suggestions. Unispace III. VI. Closing remarks by the Rapporteur. VII. Draft Resolution.

I. INTRODUCTION

Following the terms of reference emanating from the 68th ILA Conference, the Space Law Committee became involved with the commercial aspects of space activities which meant, as a first step, a review of the Space Treaties presently in force so as to establish the need for changes to keep pace with the present international context.

To this end four special rapporteurs were appointed as follows:

- Prof. Dr. Stephan Hobe: Special Rapporteur for the 1967 Space Treaty.
- The present writer: Special Rapporteur for the Liability Convention.
- Professor Vladimir Kopal: Special Rapporteur for the Registration Convention.
- Dr. Frans von der Dunk: Special Rapporteur for the Moon Agreement.

Furthermore, as in the past, the work of the Committee was supported by three eminent Scientific Consultants:

- Prof. Dr. Dieter Rex (Germany)
- Prof. Lubos Perek (Czech Republic)
- Prof. Humberto J. Ricciardi (Argentina)

For the purposes of the London Report, and according to the Resolution of the 68th Conference, it did not seem necessary to address the Astronauts Agreement at this stage. However, as will be seen later, some Committee members were of the opinion that this Agreement should be reviewed as well.

The four Introductory Reports were circulated to Committee members, including the Committee's Scientific Consultants, at the end of 1998. Comments were subsequently received by the Committee Chairman and the Rapporteur from Professors Dietrich Rex, Bin Cheng, Jasentuliyana, Seyersted and Kopal. These comments were received by the present writer during the first quarter of 1999.

In addition to these written exchanges within the Committee, relevant discussions took place between the Chairman, the General Rapporteur and a number of other members of the Committee at various meetings, in particular at the Colloquia of the International Institute of Space Law at Melbourne 1998 and Amsterdam 1999, at the IISL Workshop during the UNISPACE III Conference at Vienna 1999, and in exchanges and workshops at Toulouse, Paris, Vienna and Bremen within the context of "Project 2001 - Legal Framework for the Commercial Use of Outer Space" of the Institute of Air and Space Law of the University of Cologne in which some 92 experts from all over the world participate.

On these bases the present writer, as General Rapporteur of the Committee, prepared a Second Report which took into account these „comments on comments“ made by the above-mentioned distinguished members, which was cir-

culated in September 1999. Shortly afterwards further comments were sent in by Professor Kopal and Ambassador Finch which will be considered in the present text.

The Report of the Committee, in its third and final version for the London Conference, also includes references to the main conclusions reached at the Workshop on „Space Law in the Twenty-first Century“, organised by the International Institute of Space Law and the United Nations Office for Outer Space Affairs within the framework of the UNISPACE III Conference (Vienna, July 1999). On this occasion a number of our Committee members were called upon for various roles.

What follows is, therefore, the Third and Final text of the Space Law Committee Report to be submitted, after discussion at the London working session, to the 69th Conference of the International Law Association.

II. MAIN CONCLUSIONS OF THE FOUR INTRODUCTORY REPORTS

Due to space limitations, it is not possible to include the full text of the four Introductory Reports mentioned above. Thus, a short summary of the salient suggestions and conclusions of each will be given hereunder.

1. The 1967 Space Treaty (Prof. Dr. Stephan Hobe)

The Special Rapporteur considered this Treaty flexible enough to provide an acceptable framework for commercial space activities. Possible improvements included the suggestion to define „outer space“ and „space objects“, and to clarify the meaning of the common benefit clause enshrined in this text. Article VI (on international responsibility) was similarly considered in need of clarification concerning the commitment of States to implement national space legislation relating to authorisation and supervision of private activities in space. To correct this problem the author proposed the drafting of some kind of Explanatory Protocol as an annex to the 1967 Treaty . This new instrument should call upon States to enact national legislation on commercial space activities. As an alternative, Prof. Hobe would favour the drafting of a separate instrument to govern the activities of private entities in outer space.

This author drew attention to the coming into force of GATS and its specific „Annex on Telecommunication Services“ whereby WTO members are bound to allow all suppliers access to, and use of, public telecommunication networks and services including privately-leased circuits, on reasonable and non-discriminatory terms. This liberal market, Prof. Hobe observed, may well enhance the common benefit idea and therefore be consistent with the major objectives embodied in Article I of the 1967 Treaty . As to the dispute settlement system laid down by the Treaty, the writer seems inclined to move towards stricter and more specific rules, such as those adopted by the ILA in 1998 in Taipei (Revised Text of a Draft Convention on Dispute Settlement related to Space Activities

published in the Report of the 68th Conference of the ILA).

2. *The 1972 Liability Convention (Prof. Maureen Williams)*

In assessing the need for change, the author focused on three main issues, namely, the definition of damage, the applicable law and the rules on dispute settlement. Briefly, conclusions were as follows.

2.1 *The definition of damage (Article I of the Convention).*

This definition is wide enough and should not be changed. In spite of some gaps -deepened by the growth of commercial activities in space - these gaps do not justify the creation of new law today. Any change at this stage is likely to entail confusion rather than clarification.

2.2 *The applicable law (Article XII of the Convention)*

From the very beginning this question triggered one of the sharpest confrontations within the Legal Subcommittee of COPUOS. Article XII was, in the end, the result of a compromise moulded on the basis of epic encounters between the delegations. After overcoming not a few obstacles it was agreed that the compensation to be paid by the launching State should be determined in accordance with international law and the principles of justice and equity coupled with the obligation of a „restitutio in integrum“. Indeed, this Article should be seen as one of the greatest merits of the Convention in that, under extremely difficult circumstances, it succeeded in imposing an obligation to restore to the „status quo ante“. Yet, for reasons that are not always easy to ascertain, it continues to be a target for criticism.

The present writer considers that the reference to „international law“ in Article XII is not all that abstract. It encompasses both treaty law and customary law, as well as the general principles of law, as stated in Article 38 of the ICJ Statute. It is important to recall, in this connection, that whenever international tribunals were called upon to give a decision in accordance with international law, the task raised no great problems. Hence the conclusion that Article XII should be kept in its present reading which raises no problem of conflict of laws. If interpreted in good faith -an essential pre-requisite for the interpretation of any treaty - this formula , i.e. „international law and the principles of justice and equity“ seems clear and satisfactory in today's world to ensure, as the Preamble to this Convention declares, „the prompt payment of a full and equitable measure of compensation to the victim“¹.

¹ Article XII of the Liability Convention was exhaustively discussed in Córdoba, Argentina, in November 1989, at a meeting organised by Professor Manuel A. Ferrer, Director of the Institute of Air and Space Law and Telecommunications Law of Córdoba. Participants included Julio Barberis, Aldo Armando Cocca, Oscar Fernández Brital, Enrique Ferrer Vieyra, Ernesto Rey Caro, Mercedes Esquivel de Cocca and the present writer. After a lengthy debate, not devoid of dissenting opinions, the conclusion to keep Article XII in its present reading was reached by the meeting. The publication of a revised version of the proceedings is presently underway.

2.3 Dispute settlement (Article XIX). Non-binding awards as the rule?

The Special Rapporteur considered that the principle -embodied in Article XIX, second paragraph of the Convention – should be stated in reverse. In other words, that binding decisions should become the rule unless agreed otherwise –and in advance- by the parties to a dispute. This idea, however, will be further discussed under title III of this Report dealing with „Comments on the Introductory Reports“(by the members of this Space Law Committee in the first round of discussions following the Taipei ILA Conference).

3. The 1975 Convention on Registration (Prof. Vladimir Kopal)

Prof. Kopal suggested a number of steps to make this Convention more consistent with the present time. Inter alia, the following should be mentioned.

- an attempt to unify national registries kept by the launching States.
- to supplement Article IV of the Convention so that, besides reference to the launching State, the name and position of the subjects performing the launch and the subjects owning and/or operating the space object should be included.

As to the ways and means of implementing these changes, the author had in mind either

- (a) the negotiation of a legally binding instrument, or
- (b) a UNGA Resolution based on a COPUOS (Legal Subcommittee) draft.

The Special Rapporteur clearly identified the obstacles which formal amendments to this Convention may create, stemming mainly from double standards. Further, this course of action may run counter to the effectiveness of the Convention and could prompt States to abandon the system.

Concerning gaps in the Convention in the field of commercial space activities Professor Kopal underlined the need for appropriate requirements relating to the content of entries in national registries and information furnished for inclusion in the UN register. Both registrations –the author stressed – should be instrumental in clearly identifying not only the launching States but also other legal entities taking part in space activities. Moreover, sufficient information should be provided about the characteristics and extent of such activities which are relevant for the purposes of registration. Information should be equally compulsory in the case of substantial changes of the purpose and parameters of the registered space object.

Professor Kopal's overall conclusion is that the main issues arising from commercial activities in outer space are only vaguely related to the Registration Convention. Rather, they fall within the scope of the 1967 Treaty and the 1972 Liability Convention.

4. *The 1979 Moon Agreement (Dr. von der Dunk)*

One of the most radical conclusions of the Special Rapporteur was to discard this Agreement given the very weak support obtained since its adoption in 1979. It should be replaced by a new instrument more likely to achieve consensus from the international community. Dr. von der Dunk appears surprised by the fact that a large number of both industrialised and developing countries are not parties to the Agreement. This, in his view, is reason enough to replace it.

An interesting comparison is drawn by the author from the experience in the field of the law of the sea which resulted in the redrafting of Part XI of the 1982 Convention in 1994 on the basis of a compromise leading to an Agreement which implied, in Dr. von der Dunk's own words, a de facto amendment of this Convention. In this author's view this example should be borne in mind when assessing the need for changes to the Moon Agreement.

The Special Rapporteur included a number of provisions of the Moon Agreement which related, directly or indirectly, to commercial activities in space. Inter alia, mention should be made of the following.

- the reference to „use“ and potential „benefits“ to be derived from the „exploitation“ of natural resources of the Moon (Preamble to the Agreement).
- Article 2, speaking of „exploitation“ and „use“.
- Article 4, speaking of „use“.
- Article 5, speaking of „use“.
- Article 7, speaking of „use“.
- Article 8, speaking of „use“ and „exploitation“.
- Article 11, proclaiming the Moon and its natural resources as the „common heritage of mankind and referring to the „exploitation“ of natural resources.
- Article 15, speaking of „using“.

To this list the author adds examples of provisions indirectly related to this question, like „freedom of access“, „international responsibility for national activities“ and jurisdiction and control of States over their personnel and any relevant hardware. Like the previous Special Rapporteurs, Dr. von der Dunk considers telecommunication by satellites the commercial space activity par excellence and the lack of a precise definition of „space activities“ as a serious gap in the law.

III. COMMENTS ON THE INTRODUCTORY REPORTS

A number of comments and suggestions on the four Introductory Reports were subsequently received from Committee members including the Scientific Consultants and, in turn, commented upon by the General Rapporteur in her Second Report as follows.

1. The 1967 Space Treaty (Prof. Dr. Stephan Hobe)

1.1 Comments by Prof. Dr. Ing. Dietrich Rex

Both Professor Hobe and the present writer had the privilege of counting with the opinion of Professor Rex, Scientific Consultant of the ILA Space Law Committee and Chairman of the Scientific and Legal Subcommittee of COPU-OS. His views, mainly addressed to the question of liability and in turn closely linked to the issue of space debris, are both equally applicable to Prof. Hobe's Special Report (page 5, para 5 of the manuscript) and the present writer's (page 4, para 3 of the manuscript). Therefore, these comments will be considered under section 2 of this chapter which addresses the Liability Convention specifically.

1.2 Comments by Professor Bin Cheng

Professor Bin Cheng is particularly concerned by the gaps in the 1967 Space Treaty. Article VI, for example, is in urgent need of revision having in mind that States are made directly responsible for private national activities in space (including commercial activities). This means that not only acts committed by States would be breaches of public international law but arguably breaches of domestic law, both civil and even perhaps criminal. On this point Prof. Cheng refers us, for more details, to his recent study on "Article VI of the 1967 Space Treaty revisited: "International Responsibility", "National Activities" and "The Appropriate State"².

To match the suggested changes, in this author's view, Article VIII of the 1967 Treaty should be radically amended with a possible introduction of the concept of nationality for spacecraft. Similarly, the legal status of objects landed or constructed on a celestial body requires urgent attention³.

Finally -and by analogy with the rules governing international air law- Bin Cheng pointed out the advantages of States extending their applicable domestic laws, including criminal laws, to cover activities in outer space. This suggestion is based on a very rich bibliography on the matter produced by Professor Cheng⁴.

² See Bin Cheng, 1 *Journal of Space Law* 1998, pp.7-31.

³ See Bin Cheng, *STUDIES IN INTERNATIONAL SPACE LAW*, Oxford Clarendon Press 1997, chapters 17 and 18. Also, the present writer's review of this book in *I&CLQ*, Vol.48, Part I, January 1999, pp.238-241.

⁴ *Op.cit.* in note 3. Also, by Bin Cheng, „Crimes on Board Aircraft“, 12 *Current Legal Problems* 1959, „International Instruments to Safeguard International Air Transport. The Conventions of Tokyo, The Hague, Montreal and a New Instrument Concerning Unlawful Violence at International Airports“ (International Institute of Air and Space Law, University of Leyden and others, Conference Proceedings: Aviation Security, The Hague 1987, Leyden 1987), „Aviation, Criminal Jurisdiction and Terrorism. The Hague Extradition/Prosecution Formula and Attacks at Airports“ (Bin Cheng and E.D.Brown, eds., *CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF GEORG SCHWARZENBERGER ON HIS EIGHTIETH BIRTHDAY*, London, Stevens 1988.

1.3 Comments by Dr. Nandasiri Jasentuliyana

The then Director of the UN Office for Outer Space Affairs focused his comments on the provisions directly or indirectly linked to commercial space activities in the context of the 1967 Space Treaty. To this end Dr. Jasentuliyana drew the attention to Article VI which establishes specific rules for the activities of non-governmental entities in outer space, underlining the fact that authorisation and supervision of the appropriate State Party to the Treaty is required. In the absence of these requirements the activity would be considered unlawful.

It therefore becomes important to correct a somewhat current misinformation whereby private entities are absolutely free to carry out space activities provided Article I, 1 of the Space Treaty is duly observed.

Article II of the 1967 Treaty is then addressed by Dr. Jasentuliyana, who indicates that nothing is said about “appropriation of territory”. The conclusion -coincidental with the prevailing doctrine- is that this Article is not broad enough to be applied to resources. On these grounds, it is considered premature to distinguish between “appropriation of territory” and the “taking of resources” as Prof. Hobe does in his Introductory Report (at page 5, para 1 of the manuscript). The present Rapporteur observes that the reference to “territory” as applied to outer space and celestial bodies is in itself a contradiction. Secondly, as will be seen later in Prof. Kopal’s comments, there is a certain confusion as to the meaning of the term “taking of resources” used by Prof. Hobe in page 5, para 1 of his Introductory Report manuscript.

Dr. Jasentuliyana then pauses on Article IX considering that, if read together with the obligations laid down in Article VI, namely international responsibility for national space activities and the key requirements of authorisation and constant supervision in the case of private entities, it is -indirectly at least-related to commercial space activities.

The above-mentioned author is also concerned by the gaps in the law and, particularly, the problems stemming from the fact that the delimitation of outer space is still pending. There is a general reluctance -especially within the Legal Subcommittee of COPUOS- to settle this question.

In addition, Dr. Jasentuliyana does not coincide with Prof. Hobe’s idea, developed under Section VI of his Introductory Report, that by adding an obligation for States to enact national space legislation the provisions of this Article would be strengthened in their application to commercial space activities. This is so, in Jasentuliyana’s view, for the very reason that States are internationally responsible and private entities require authorisation and permanent supervision to engage in space activities.

Dr. Jasentuliyana’s stand on the last point would be somewhat in conflict with Prof. Bin Cheng’s and the present Rapporteur’s position, both of whom see the various advantages of enacting national space law. (See, in this respect, Bin Cheng’s *STUDIES IN INTERNATIONAL SPACE LAW*” and the present author’s review of this book, cited above).

Be that as it may, if we take a close look at Dr. Jasentuliyana’s comments on

the foregoing point, particularly when stating that it would be “in the interest of States Parties to take whatever measures they deemed necessary for authorisation and supervision in safeguard of their international responsibility”, the two positions do not appear so far apart.

1.4 Comments by Professor Kopal

The writer of reference has made a number of sharp and very precise comments in connection with the Introductory Report on the 1967 Treaty. Yet, on the whole, this specialist tends to agree with Prof. Hobe’s general approach and, strictly speaking, the changes suggested to that Treaty are, in Kopal’s own words, minor ones.

Prof. Kopal observes, inter alia, that Article I, 2 of the 1967 Space Treaty speaks of “all States” (not “countries”), and points out the fact that this Treaty does not use the word “exploitation” at all (see Prof. Hobe’s Report at page 2, last paragraph and page 3, para 1).

In fact, the present writer believes that, at the time of the drafting of the 1967 Treaty, only the “exploration and use” of those areas were in mind. This leads almost naturally into the labyrinth of discussing the scope and implications of the terms “exploration”, “use” and “exploitation”, the intricacies of which are only too familiar to international lawyers today.

Prof. Kopal indicates that inverted commas should be deleted at page 3 in fine and at the beginning of page 4 of the manuscript of this Introductory Report where reference is made to the UNGA Declaration of 1966 as it is not a quotation proper. Similarly, this expert disagrees with Prof. Hobe’s restrictive idea that any emerging international rights and obligations are “solely posed upon the (launching) state” (page 4, section 2 of the manuscript of the Introductory Report): in fact, only some of the provisions of the 1967 Space Treaty refer expressly to the launching state, e.g. Article VII.

The statement appearing at the beginning of page 5 of the manuscript of Prof. Hobe’s Special Report, in the sense that the “taking of resources” is not hindered by the ban on national appropriation, is equally questioned by Prof. Kopal, who understands that the matter is neither within the spirit nor within the specific provisions of the Space Treaty. This specialist also disagrees with the title of section 4 (at page 5 of the manuscript of the Introductory Report) on the grounds that we should be consistent with the wording of the space treaties. Briefly, in Kopal’s view, it should say “objects launched into Outer Space” (not “brought” into...).

Likewise, Prof. Kopal disagrees with the statement appearing in Section III, point 4 (at page 8 of the manuscript) of the Hobe Report which refers to the end of the Mir mission after which Russia would be ready to join her US, Canada and ESA partners and participate in the building of an international space station which, in Hobe’s words, would start in 1999. “The continuation of Mir is uncertain”, says Kopal. And Russia has already become involved in the building of the international space station (ISS).

On the more specific question of gaps in the space treaties concerning commercial space activities Kopal holds, in no uncertain terms, that space treaties do not expressly provide for freedom of resource exploitation. This position coincides with that of Professor Cocca outlined in his answers to Professor Goedhuis's Questionnaire concerning the legal nature of the Moon samples brought to Earth in 1969 after the first manned landing⁵.

Finally, the commentator of reference voices his opinion regarding the recognition of certain rights and obligations, under international law, to private entities engaged in space activities. He quotes, by analogy, the system adopted for the mining of the seabed and ocean floor outside national jurisdiction which, as will be seen later on, is also referred to by Dr. von der Dunk in his Introductory Report on the Moon Agreement. As to the settlement of liability disputes Kopal believes it is now time to start thinking about access to some appropriate fora.

1.5 Comments by Professor Finn Seyersted

The above-mentioned Committee member sent in comments of a general nature which are mainly focused on the idea of establishing limited binding powers for intergovernmental organisations in outer space. This idea is based on Professor Seyersted's forthcoming book entitled COMMON LAW OF INTERNATIONAL ORGANISATIONS of which he appends a Table of Contents. Given the tenor of these comments the present writer feels they should apply to both the 1967 Treaty and the 1972 Liability Convention.

Seyersted holds that any such limited powers should be included in future space conventions in cases where this may promote common goals. This could perhaps be the case of the ILA International Instrument on Space Debris, a topic kept under permanent study by our Committee. Consequently, it is suggested to leave the question open for discussion at the London ILA Conference.

2. The 1972 Liability Convention (Prof. Dr. Maureen Williams)

2.1 Comments by Professor Dr. Ing. Dietrich Rex

Professor Rex directs his remarks to the question of space debris stating that damage likely to be caused thereby to the space environment cannot be covered by the Liability Convention. To this end he sees an urgent need for a new legal instrument in view of the huge economic importance of this problem. The object and purposes of this new instrument, in the mind of Prof. Rex, are that it should strictly limit the generation of further debris as far as economically feasible while, at the same time, it should not set obstacles in the way of beneficial space utilisation.

On this point the present writer understands that those requirements are met, to a great extent, by the 1994 ILA Instrument on Space Debris. Therefore, as observed in the case of Professor Seyersted's previous comments, this matter should be discussed in London.

⁵ See ILA CONFERENCE REPORTS, 54th Conference, The Hague 1970, Report of the Space Law Committee, pp.405-441, at pp.433-434.

The Scientific Consultant of our Committee is firmly against any amendment of the Liability Convention for the inclusion of damage caused by space debris. It is interesting to quote some of the reasons given by Prof. Rex on this question.

First, that damage to the space environment consists of a deterioration of regions of outer space around the Earth which may later lead to damage of space assets (delayed damage). Secondly, that it is technically not possible to trace damage back to an originator, especially in the case of smaller, untraceable debris objects released in large numbers by certain space missions, predominantly by private (commercial) space missions. The urgency of having a new instrument is grounded on the rapidly expanding market in the field of telecommunications, which will perhaps include up to twenty satellite constellations with possibly up to a thousand satellites together in the LEO region.

The present writer fully agrees that an international instrument to govern the matter of space debris should be first priority. The deficiencies of the 1967 Treaty and the 1972 Liability Convention on this matter have been exhaustively explained at the time of the drafting of the ILA International Instrument on Space Debris. As observed earlier, the London Conference will be an excellent opportunity to touch upon the topic once more.

2.2 Comments by Professor Bin Cheng

Professor Cheng's comments are directed to the present writer as Special Rapporteur on the Liability Convention. Hence, they will be answered in the first person.

I shall first deal with the definition of damage which, in my Introductory Report as well as in previous writings, I have considered to be one of the widest in contemporary international law. It covers damage caused by all related activities such as, for example, launching operations or the refuelling of space vehicles on Earth (section 4.1 of the manuscript of the Introductory Report on the Liability Convention).

Naturally, there are gaps in Article I of this Convention which I point out when listing some of the difficulties we may encounter to prove that certain types of environmental damage really come under the definition of damage given by the Liability Convention. The example provided by Professor Cheng in connection with the Cosmos 954 incident highly illustrates these uncertainties, which gave way for the Soviet Union to maintain that the settlement was outside the Liability Convention.

It should be borne in mind, however, that environmental damage caused by space debris is dealt with extensively in the 1994 ILA Instrument adopted in Buenos Aires at the 66th Conference. It is therefore hoped that the Legal Subcommittee of COPUOS will take this text into account when it finally addresses such a crucial question.

No doubt it would be ideal to have an even wider definition of damage in the Liability Convention but, at this stage, I think it is not justified to introduce

changes. The adoption of rules on space debris is, in the short term at least, a more urgent matter to be tackled. Perhaps the provisions of the ILA Instrument on the subject could be made clearer in order to apply to situations such as the one referred to by Bin Cheng. According to the terms of reference of our Committee, may I once again recommend the consideration of this question in London at the ILA 69th Conference (July 2000).

Secondly, I fully agree with our learned Professor that restoration to the “status quo ante” means “restitutio in integrum” (section 4.2 of the manuscript of the Introductory Report on the Liability Convention).

Thirdly, Professor Bin Cheng pauses on the very thorny question of dispute settlement and compulsory jurisdiction (section 4.3 of manuscript of the Introductory Report on the Liability Convention).

This problem, may I submit, has subsided today in a world no longer divided into two confronted political units. The days when the Soviet delegates would consistently refuse to consider any possibility of advancing in this field -I am strongly reminded of the 1968-9 Vienna Conference on the Law of Treaties- have been left behind.

Indeed, as our highly respected Professor points out, the time of the drafting of the Liability Convention was extremely difficult in political terms. The adoption of the text was a significant achievement for the progressive development of international law. In addition, a slight but important step forward was given in connection with the legal personality of international intergovernmental organisations engaged in space activities, particularly having in mind the well-known stand of the Soviet Union on this matter at that moment.

Just as realistic is Bin Cheng’s observation that it would have been of no use to get the USSR or, for the sake of the example, any other space power, to sign -and even ratify- a convention providing for compulsory jurisdiction and later reject the award if it did not favour its interests. No doubt, it was then preferable for all the space powers -in other words, those who had the technology- to become parties to the convention even if it meant a setback in the quest for compulsory mechanisms. Today, however, it is a an entirely different political scenario.

I shall go back for a moment to the days of my postgraduate studies at University College London. I was then -as I still am now- thoroughly convinced by Professor Bin Cheng’s arguments in favour of moving away from jungle law towards some kind of third-party dispute settlement system. At the 55th Conference of the ILA (New York, 1972), this renown international lawyer referred to a distinction one can make

“...between those different grades of international law according to its juristic quality, namely:

- (i) autointerpretation of the law
- (ii) arbitrable international law
- (iii) judicial international law...”

The prior acceptance of the principle of compulsory third-party settlement of international disputes -Professor Cheng explained- is not merely of procedural significance. It has an effect on the quality of the law as practised by States⁶.

The near-perfect treaty adopted in 1972 included all the space powers and was certainly preferable to a perfect treaty which, in practice, would not be effective. This was precisely what happened with the ambitious supranational dispute settlement system, with final and binding awards, established by the Andean Pact for part of Latin America: it was indeed perfect, but never managed to get off the ground.

Yet, as far as that near-perfect Liability Convention is concerned, it should be borne in mind that the mechanisms envisaged for dispute settlement were hardly made use of (perhaps, as far as I know, only made reference to, like in the Cosmos 954 incident) in spite of awards not being final and binding. The Claims Commission had no work to do.

It is true that Article XIX, second paragraph, of the Liability Convention contains an optional clause to this effect. Is this enough? I feel there is room for some improvement. The moment is propitious: the perceived need is possibly more dubious, as Prof Cheng indicates, particularly on the part of the space powers, but we should continue moving forward along these lines.

To sum up, and on the basis of the foregoing analysis, may I return to the CONCLUSION of my Introductory Report in connection with Article XIX (section 4.3 of the manuscript), namely that the option included in paragraph 3 of UNGA Resolution 2777 (XXVI) for the decisions of the Claims Commission to be binding should be strongly encouraged in accordance with Austria's recommendation made at the Legal Subcommittee of COPUOS in 1998. This mid-way solution would perhaps iron out some differences. It would not mean a retreat from the claim for final and binding awards, but merely a retreat from the insistence on the claim.

2.3 Comments by Dr. Nandasiri Jasentuliyana

After agreeing with the Special Rapporteur's conclusion that Article XII of the Liability Convention does not raise a problem of conflict of laws and that the principles of justice and equity are not as vague or abstract as part of the doctrine contends, Dr. Jasentuliyana suggests that further consideration should be given to Article XI of the Convention inasmuch as commercial activities in space are concerned. This Article specifically mentions and anticipates the possibility of other remedies being used in order to recover compensation for damage caused by space objects. The commentator of reference anticipates that, with the growth of commercial space activities and the present role of private entities in outer space, the pursue of claims through these alternatives will become more popular than recourse to diplomatic channels. These possibilities

⁶ See REPORT OF THE 55th CONFERENCE OF THE ILA, Report of the Committee on the Charter of the United Nations, at pp.334-7.

of alternative remedies may in turn make use of the provisions embodied in the Liability Convention.

2.4 Comments by Professor Vladimir Kopal

As in the case of 2.1, 2.2 and 2.3 above, the first person will be used in this subsection, since it concerns the present writer's Introductory Report.

Only minor observations are made and no changes of essence suggested by Professor Kopal to the Introductory Report on the Liability Convention. For example, in connection with the application of Article VI of the 1967 Space Treaty to private activities in space (section 2 of the manuscript of the Introductory Report) Kopal questions whether this kind of responsibility should only concern activities of the launching subjects.

In fact, my reference to "launching entities" (paragraph 3 of section 2 of the manuscript) by no means excludes any other activities in space for which the State concerned should bear responsibility. This is confirmed when I summarise the principle as "freedom of action of private enterprises under the responsibility (supervision) of the State concerned".

In the second place, Professor Kopal recommends the use of the term "review" instead "revision", since it is a review that may lead to a revision and not otherwise. I can accept this suggestion and believe that Committee members should agree on the reach and implications of both these terms so that we have a uniform interpretation thereof in our field of work.

Further on, and from a historical standpoint, the commentator of reference does not accept the statement that the cold war was "at its peak" at the time of the adoption of the Liability Convention (section 3, paragraph 4, of the manuscript of the Introductory Report). Indeed, I should have said "in the midst of the cold war" or something along those lines. No doubt the dates provided by Dr. Kopal on the peaks of the cold war are of utmost precision. What I really meant was that there were no signs, at the time, of the cold war subsiding.

Like Professor Bin Cheng, Professor Kopal considers the possibility of enlarging the definition of damage contained in Article I of the Liability Convention. On this point I refer to my answers to Prof. Cheng's comments, namely that I would prefer to leave this Article untouched for the moment and deal with damage resulting from space debris in a separate instrument such as the ILA Instrument on Space Debris. The shortcomings of Article I of the 1972 Convention (as well as Article IX of the 1967 Space Treaty) in connection with damage originating from space debris were precisely the reasons for embarking on the drafting of the ILA International Instrument adopted by the 66th Conference.

As to Article XIX of the Liability Convention dealing with dispute settlement procedures, Dr. Kopal does not think that the rule of paragraph 2 of that Article can be stated in reverse (namely that awards should be binding unless otherwise stated by the parties beforehand). According to general international law, he observes, there is a free choice of means and the consent of States is always necessary for binding methods.

Fair enough. Such is the reading of Article 2 (3) of the UN Charter. However, it is precisely on these bases that States may well agree beforehand to binding methods within the framework of the Liability Convention.

Prof. Kopal is in full accord with the Special Rapporteur's position in the sense of encouraging the option for a unilateral declaration as provided in the second paragraph of UNGA Resolution 2777 (XXVI) cited above.

3. The 1975 Registration Convention (Prof. Dr. Vladimir Kopal)

3.1 Comments by Professor Bin Cheng

These comments are directed to sections 2, 4 and 5 of the manuscript of the Introductory Report on the Registration Convention.

In the first place Professor Bin Cheng agrees with the Special Rapporteur in calling for clarification of Article I on definitions. As Bin Cheng remarks, there is a problem concerning the connecting factor between the private commercial entity and the State, particularly as to the terms "a state which launches or procures the launching", which Kopal identifies as an outstanding problem also common to the Liability Convention. Would that link be nationality, domicile, residence, place of incorporation, place of business or something else? In this respect Prof. Cheng refers us, *inter alia*, to his book *STUDIES IN INTERNATIONAL SPACE LAW*, (Chapter 24).

Concerning gaps in the Registration Convention in connection with commercial space activities (which Kopal addresses in section 4 of the manuscript of his Introductory Report) Bin Cheng seems to agree with the Special Rapporteur that no substantial changes are required as the main issues arising from commercial space activities relate, rather, to the 1967 Space Treaty and the 1972 Liability Convention. In fact, there seems to be general agreement among our Committee members on this point.

Yet, as far as Article II (2) of the Convention is concerned some re-examination is by all means needed. Prof. Cheng explains it in clear and simple terms. This provision deals with the situation of two or more launching States in respect of a single space object, leaving it to them to determine which of them shall register the object by means of an entry in the registry it maintains. Some re-examination is definitely required. As Bin Cheng points out, this provision brings about the possibility of flags of convenience in international space law (See Chapters 23 and 24 of this author's book, quoted above). Similarly, Article VII dealing with the position of international intergovernmental organisations engaged in space activities should be revised taking into account their increasing participation in such activities.

Concerning section 5 of Prof. Kopal's Introductory Report manuscript "Options for Possible Improvement", Prof. Cheng fully agrees with the Special Rapporteur's assessment of the mood of the space powers contrary to the revisions of any of the space treaties. Both specialists agree that UNGA Resolutions such as, for example, the 1966 Declaration on International Co-operation, have

a better chance of success. Hence, the present writer adds, the option embodied in paragraph 2 of UNGA 2777 (XVI) to accept the binding nature of awards in the framework of the Liability Convention, would go a long way in redressing iniquities.

It is important, as proposed by the Special Rapporteur on this topic, to unify the national registries maintained by the launching States taking into account the needs arising from the growth of commercial activities in that area. Professor Cheng entirely agrees on this point. Additionally, a supplement to Article IV is suggested where many more details concerning the space object should be required. This could be implemented by negotiating a protocol to the 1975 Convention or by means of an UNGA Resolution.

4. The 1979 Moon Agreement (Dr. Frans von der Dunk)

4.1 Comments by Professor Bin Cheng

Article 4 (1) of the Moon Agreement is seen by the Special Rapporteur as an independent or third in-between régime, on the one hand, “res communis” or “res extra commercium”, and the “common heritage of mankind” on the other. This view is not shared by Professor Cheng for the reason that Article II of the 1967 Space Treaty has made outer space, including the moon and other celestial bodies, “res communis/res extra commercium”. Per contra, Article 11 (1) of the Moon Agreement clearly states that the Moon and all the other celestial bodies within the solar system other than the Earth, and their natural resources, are the common heritage of mankind. This implies a totally different régime.

These provisions, in Bin Cheng’s view, should be read together with those enshrined in the 1967 Treaty and 1979 Agreement whereby the exploration and use of outer space, including the moon and other celestial bodies, shall be the province of all mankind (in other words, a “res communis/res extra commercium”). Consequently, no intermediate régime could exist.

The distinguished commentator agrees with the Special Rapporteur that the commercial freedom of outer space is very important and that the only restriction imposed by the 1967 Treaty (Article IV (2)) is that it should be used for peaceful purposes exclusively. However, Bin Cheng observes that it would be misleading to think that this freedom to use celestial bodies extends to their natural resources. In fact, the purpose of the Moon Agreement is to govern the exploration, use and exploitation of their natural resources and it clearly distinguishes between two separate phases: exploration (Article 6 (2)) and exploitation (Article 11) with different rules applicable thereto.

In his comments, Professor Bin Cheng clearly advances in the elucidation of the common heritage of mankind régime. All uses to be made of the moon and other celestial bodies, unless prohibited by the Treaty, form an integral part of the “common heritage of mankind” which, in this author’s view, is “nothing but a label for the totality of the provisions of the Moon Treaty”. “Use”, he adds, “clearly grants no independent right to resources”.

Another question concerns the discussion surrounding the existence of a moratorium, stemming from the Moon Agreement, on the exploitation of resources. On this point, which is answered in the negative, both the Special Rapporteur and the commentator see the advantages of further clarification. This conclusion also applies to the problems of liability specific to activities on celestial bodies.

Also to be addressed, in the opinion of Professor Cheng, is the meaning of the word “their” in Article 12 when reference is made to jurisdiction and control by States Parties over their personnel, etc. and the relation of this provision to Article VIII of the 1967 Treaty dealing with jurisdiction.

The commentator then directs his attention to section 5 of the manuscript of the Introductory Report where Dr. von der Dunk analyses the options for possible improvements and solutions. The alternative raised by the Special Rapporteur is harsh, viz. either to improve or to replace the Moon Agreement.

The latter idea, in Prof. Cheng’s view, is not unattractive. Yet, from a practical angle it appears full of uncertainties. On the other hand, having already a Treaty on the Moon is a fact that should not be overlooked or minimised. Despite its ineffectiveness this Treaty was approved by consensus at COPUOS and the UN General Assembly at the time of submission. Moreover, it is in force even though the number of ratifications is low. No doubt, as Bin Cheng says, it would be better to try to revive it than to destroy it.

The comparison which the Special Rapporteur makes between the difficulties encountered by the Moon Agreement and by Part XI of the Law of the Sea Convention (which led to the 1994 Agreement on the Implementation of Part XI) appears opportune. The common denominator is precisely the scope and implications of the concept of common heritage of mankind. Perhaps a similar course of action should be taken in connection with the Moon Agreement. Bin Cheng seems inclined to accept this idea.

On this question Professor Cheng suggests that the ILA -and, later on, COPUOS- try to draft some realistic rules to amend Article 11 (5) of the Moon Agreement. This provision - which envisages the establishment of an international régime to govern the exploitation of the natural resources of the Moon - should be made more acceptable to the international community and, particularly, to the major and medium space powers today. Perhaps, as Professor Cheng reflects, this would ease the ratification of the Moon Agreement itself.

4.2 Comments by Dr. Nandasiri Jasentuliyana

This specialist, in addressing the Introductory Report on the Moon Agreement, sees the concept of the “common heritage of all mankind” as the striking feature of this international text. Concerning the concept “province of all mankind” he observes that it has been so far accepted by almost 100 States (which have ratified the 1967 Treaty) and thus does not share the so-called “weakness” of the Moon Agreement as a whole.

As to the commercial aspects requiring consideration in the context of the

Moon Agreement, Jasentuliyana points out that the provisions of this Agreement are somewhat wider than in the preceding treaties (inter alia, the reference in Article 1(2) to orbits “around the Moon or other trajectories to or around it”, and also to “celestial bodies within the solar system other than the Earth” are quoted).

4.3 *Comments by Professor Kopal*

This author differs with the Special Rapporteur on the interpretation of certain provisions in the 1967 Space Treaty and the Moon Agreement.

The first objection is directed to section 2 of the manuscript of the Introductory Report and concerns terminology. Professor Kopal points out that the Moon Agreement speaks of “exploration” in addition to “exploitation” and that only the fifth paragraph of the Preamble and Article 11 (5) refer to the exploitation of the natural resources. The commentator adds that the terms “exploration”, “use” and “exploitation” have different meanings which should be interpreted in the light of the usual practice applied to the discovery and mining of natural resources.

Following these remarks Kopal makes a number of subtle distinctions in connection with Article 11 of the Moon Agreement considering that the provisions in paragraphs 7/8 are generally misinterpreted by overlooking the existence of one of the parties which should be given special consideration, namely

those countries which have contributed, whether directly or indirectly, to the exploration of the Moon.

The inclusion of the latter criterion is considered, by Kopal, of major importance.

Another comment refers to the interpretation given by the Special Rapporteur to Article 14. Professor Kopal fails to see what is exactly meant by the assertion “These provisions basically ensure that states can be held accountable in the international level for certain categories of private commercial activities as a kind of substitution for direct application of public international space law”. In trying to elucidate this statement Kopal quotes a general principle of law, i.e. “*lex specialis derogat legi generali*” which would imply that the provisions of the Space Treaty and the Liability Convention prevail over the rules of general international law on State responsibility.

Section 5 of the manuscript of the Special Report is also the object of some criticism on the part of this commentator who appears surprised by the recommendation of the Special Rapporteur (a national of the Netherlands) to discard the Moon Agreement and replace it by a new instrument. The Netherlands is one of the few countries parties to the Moon Agreement, as Prof. Kopal underlines, and even though any person has the right to submit his/her views, as a group we should be cautious in endorsing them.

Finally the commentator refers to the analogy made by the Special Rapporteur with the Law of the Sea Convention, observing that the special

international régime laid down in that instrument differs substantially from the one established by the Moon Agreement. In fact, insofar as the Law of the Sea is concerned, the whole “Area” (seabed, ocean floor and subsoil thereof, beyond the limits of national jurisdiction) is the common heritage of mankind (which would also include “exploration”). Conversely, the Moon Agreement only made “exploitation” of the Moon resources subject to a -future- international system.

IV. COMMENTS OF A GENERAL NATURE (BY PROFESSOR BIN CHENG)

At this point it seems interesting to refer to a number of general comments made by Professor Bin Cheng on various aspects of our common task. These comments include scope, general approach, terminology, co-ordination between the different treaties, idealism to be tempered with realism and views on a quasi-legislative procedure. They will be listed in the same order followed by their author.

1. As to scope, the inclusion of the 1968 Astronauts Agreement is suggested to evaluate the need for changes brought about by the rapid development of space activities.

2. In connection with the general approach we are referred to chapter 25 of the book *STUDIES IN INTERNATIONAL LAW* (Oxford Clarendon Press 1997) dealing with the commercial development of space and the need for new treaties.

3. Concerning terminology, Professor Bin Cheng proposes the adoption of a new term: “outer void space” which he coins to describe the empty space in between all the celestial bodies which at present has no name of its own⁷.

4. The co-ordination between the various treaties is equally a matter of concern to Professor Cheng. Various examples are given, for example, the duty to return rescued space objects under the Space Treaty (Article VIII) to the State of registry and, under the Astronauts Agreement (Article 5.3), to the launching authority. Similarly, doubts are expressed on the compatibility of Article 12 of the Moon Agreement with Article VIII of the Space Treaty.

5. Idealism to be tempered with realism. This almost perfect blend has characterised most of Professor Cheng’s writings. In this case we are referred to his comments on Dr. von der Dunk’s Special Report concerning the alternative to improve on, or to discard, the Moon Agreement.

6. A quasi-legislative opting-out procedure -which Prof. Cheng suggests the Committee should work on- is proposed for the regulation and co-ordination of, especially, the technical aspects of international space activities along the lines of ICAO and IMO. We are reminded that Dr. N. Jasentuliyana had already put

⁷ For more details, a number of articles are listed in Bin Cheng’s comments to this Special Report, inter alia, „Introducing a new term to Space Law: outer void space“, *Korean Journal of Air and Space Law* 1999. Also Bin Cheng, *STUDIES IN INTERNATIONAL SPACE LAW*, at p.527, „The Outer Space Treaty: Thirtieth Anniversary“, *23 Air and Space Law* 1998, and others.

forward a proposal of the kind⁸. This would be helpful for the future developments of space activities, especially in the commercial field.

V. THE LATEST COMMENTS AND SUGGESTIONS – UNISPACE III

Following the distribution of the Second Committee Report in September 1999 Professor Kopal and Ambassador Finch made a number of useful comments and produced clever suggestions in connection with the Report and the Draft Resolution to be submitted to the London Conference. Brief reference will be made to the major issues involved.

Professor Kopal's remarks on the Second Report are mostly of a formal nature and relate particularly to terminology and details of the kind. They have been duly taken into account in the preparation of this Third Report and, if necessary, may be further considered at the London Conference.

Ambassador Finch, whom we welcome as a new member of this Committee, based his contribution on the UNISPACE III Workshop on Space Law in the Twenty-first Century (Vienna, July 1999) and particularly on Session 5 of this meeting dealing with Privatisation and Commercial Uses of Outer Space. He also focused on the development of Project 2001 (based in Cologne University and extensively referred to during the UNISPACE Workshop) of which our Chairman, Professor Böckstiegel, is the Director.

In his comments to the Second Report of the ILA Space Law Committee Ambassador Finch stated that there are no reasons to justify the review of the 1968 Astronauts Agreement today nor is there any need to amend the 1967 Treaty.

The above-cited specialist observes that there are excellent points of interpretation involved in connection with Prof. Hobe's position on the 1967 Treaty and Professor Dietrich Rex's remarks on space debris which should be followed up in London next July. Similar considerations apply to the Liability Convention which, as mentioned at the outset, was re-examined by the present writer in her capacity as Special Rapporteur and elaborated further in her answers to the ensuing remarks made by Professors Rex (particularly on space debris), Professor Bin Cheng, Dr. Jasentuliyana and Prof. Kopal. All this is part of the present Report for the London Conference.

Concerning Ambassador Finch's reference to space debris, it seems opportune to recall that Professor Böckstiegel, in his Commentary Paper to the UNISPACE III Vienna Workshop (see Session 8, p. 199 et seq. of the Proceedings, UNISPACE III, Technical Forum) and in his statement to the COPUOS in June 1995 as ILA representative, makes detailed reference to the provisions of the Buenos Aires International Instrument and to its presentation to the 66th ILA Conference in Buenos Aires in August 1994.

On the question of private/national activities in space, including those of a com-

⁸ See N. Jasentuliyana „Celebrating Fifty Years of the Chicago Convention Twenty Five Years after the Moon Landing. Lessons for Space Law“, 19-II AASL 1994, at p.429.

mercial nature, Ambassador Finch believes that States should be held fully responsible under the several outer space treaties and should be in charge of the licensing and monitoring of any such activities. The legal status of objects landed or constructed on a celestial body comes under State responsibility and, in the case of international objects, the state remains, as in the present, „the launching State“.

The advantages and disadvantages of extending domestic laws into outer space, with the possible inclusion of criminal laws, to cover space activities, are carefully evaluated by Ambassador Finch. Furthermore, he fully supports Dr. Jasentuliyana's view in the sense that State authorisation under Article VI of the 1967 Treaty is equally applicable to NGOs and, further, supports the idea that if Articles VI and IX of the 1967 Treaty are read together, the key requirements of State authorisation and constant supervision of private activities are strengthened.

As to the scope of Article II of the 1967 Treaty, the learned commentator endorses the view that it is not applicable to the taking of resources and refers to his country's reservation, prior to the signature and ratification of the Treaty, whereby once resources are removed from the Moon or a celestial body, they become the property of those removing such resources.

However, one should not escape the fact that this position -reflected in the US reservation- was firmly upheld by the space powers in the sixties in an entirely different international scenario. It no doubt means interpreting the „first-come-first-served“ principle to its ultimate consequences and appears rather controversial in the light of later developments. Indeed, there are gaps in the law and it is obvious that lacunae of the kind give way to political interpretations. Yet, it is debatable whether the action of placing resources from the moon or a celestial body on the market –in other words, the „commercialisation“ of these resources on Earth- is fully consistent with Article II of the 1967 Treaty and its underlying philosophy, particularly if read together with Article 11 of the Moon Agreement. It may be true that this Article is the very reason for the reluctance to ratify the Moon Agreement as was the case with Part XI of the Law of the Sea Convention. However, it is perhaps going too far to interpret Article II of the 1967 Treaty as enshrining the principle of „first-come-first-served“ in such absolute terms.

Ambassador Finch recommends that other States follow the US position on that matter as it has now become customary international law of outer space. Nevertheless, it appears somewhat difficult to accept this course of action today. When Moon soil was removed and transported to Earth „some thirty years ago“ those samples, to the best of our knowledge, were not placed on the Earth market but, rather, made available to the international scientific community⁹.

⁹ This brings to mind a nowadays historical Questionnaire circulated by Prof. Goedhuis (then Chairman of the ILA Space Law Committee) on the legal nature of the Moon samples brought to Earth and distributed to all countries after the first manned landing. Opinions were divided within the Committee. For some members this was an act of courtesy; for others, an enforceable obligation stemming from the 1967 Treaty. See REPORT OF THE 54th CONFERENCE OF THE ILA, The Hague 1970, pp.405-441.

Perhaps further law should be created on the matter without this meaning an amendment of the Treaty on General Principles.

The possibility of States enacting national legislation on this subject seems desirable -albeit not an obligation- for spacefaring countries in the learned commentator's view. This leads him to the above-cited general conclusion on which most of the Committee members agree, i.e. that the 1967 Treaty should remain as it stands.

Concerning Professor Kopal's Special Report on the Registration Convention, Ambassador Finch suggests further elaboration on the terms „launching State“, „emerging rights“ and „obligations“. As to Prof. Seyersted's stand on the limited binding powers of international organisations in the framework of the 1967 Treaty and the 1972 Liability Convention, the present commentator understands the question should be left to States the national duty and legislation of States Parties.

Ambassador Finch next addresses the need to have a treaty on space debris observing that by 2020 technology and law on this topic should be better synchronised so as to reach a realistic agreement. On this point, it should be recalled that the ILA Space Law Committee has agreed to keep the matter under permanent review following the 1994 Buenos Aires Conference where the ILA International Instrument on Space Debris was adopted.

Inasmuch as dispute settlement is concerned, Ambassador Finch feels that Claims Commission binding awards under the 1972 Liability Convention can never be achieved. In a practical approach he agrees with the idea that States should be encouraged to agree beforehand to binding decisions within the framework of the Liability Convention.

As to the Registration Convention the specialist of reference underlines a question that had not been addressed so far, namely to amend the Convention -by means of a Protocol- introducing the idea of a „timely launch reporting“ by States to the UN Secretary-General Registry. This thought is in line with the views voiced at the 1999 UNISPACE III Vienna Workshop, particularly Session 8 on „Maintaining the Space Environment“ where the need for a more effective Registration Convention was clearly perceived by the participants. It would be equally desirable, to this end, to clarify the scope and implications of a „launching authority“ in the context of the Space Treaties presently in force.

On the Moon Agreement, Ambassador Finch points out that „laboratories, exploration and research space manufacturing“ are not exploitation. This raised a further question: what would these activities be then? Could they be viewed as „use“ of outer space, pursuant to the language of the 1967 Treaty where the word „exploitation“ does not appear one single time? This takes us back to Bin Cheng's remarks on Dr. von der Dunk's Special Report on the Moon Agreement when stating that „use clearly grants no independent right to resources...“

After discarding the possibility of analogies between international space law and the law of the sea, Ambassador Finch refers to the term „outer void space“ coined by Bin Cheng (See part V of this Report „Comments of a general

nature“ by Prof. Cheng) , considering –albeit without giving reasons – that there is no need to introduce this new terminology. Nor does he think it necessary to solve the outstanding question of the definition and delimitation of outer space right away.

Finally, for the London Conference, this specialist suggests the discussion of a combined air-outer space approach, possibly along the lines of the Chicago Convention.

VI. CLOSING REMARKS BY THE RAPPORTEUR

The constant growth of commercial space activities shows how right the ILA was in taking up this topic. Over the past two years, our Committee’s work was focused on the consistency of the rules and principles embodied in the four major Space Treaties with the present international reality. The first target consisted in establishing whether changes to the 1967 Space Treaty, the 1972 Liability Convention, the 1975 Registration Convention and the 1979 Moon Agreement were justified at this stage.

With this objective in sight -as explained at the outset- four Special Rapporteurs were appointed to deal with the initial task. From the comments and suggestions received from Committee members following the First and Second Reports circulated in 1998 and 1999, respectively, and the discussions held at the UNISPACE III Workshop (Vienna, July 1999), as well as other meetings on the subject at the international, regional and domestic levels, the following overall conclusions may be drawn.

The 1967 Space Treaty, so rightly referred to as the Treaty on General Principles or the Magna Carta of Space should, precisely for these reasons, remain untouched. A high number of the Committee members seem to agree on this point in spite of, *inter alia*, the ambiguities of Article VIII on jurisdiction, the vagueness of Article II in connection with the appropriation of natural resources from celestial bodies or the shortcomings of Article IX concerning the protection of the environment.

Similar considerations are applicable to the 1972 Liability Convention. The desirability of having binding decisions from the Claims Commission is indisputable and indeed remains the ultimate objective of all dispute settlement systems today. Yet, at this stage, it appears advisable to follow the tradition of this Committee and, where highly sensitive issues are concerned, advance cautiously up the scale. It therefore appears sensible –for the immediate future at least- to encourage States to make a declaration, on the basis of reciprocity, in accordance with paragraph 3 of UNGA Resolution 2777 (XXVI) as well as with the Austrian proposal to the COPUOS made in 1998 whereby the binding nature of Claims Commission awards is accepted for future conflicts. Hence, as observed earlier (when dealing specifically with this Convention) this course of action merely implies a retreat on the insistence for reversing the principle of Article XIX, 2nd paragraph, without losing sight of the final -and no doubt ideal- target

of advancing towards compulsory mechanisms.

The 1975 Registration Convention, *per contra*, is in need of further support. There is general agreement on this question in most circles. As discussed previously, there are a number of improvements suggested by the Special Rapporteur and by the Committee members. The weaknesses of the Convention were also a recurring note at different sessions of the Vienna Unispace III Workshop. Ideas – most of them of a practical nature- to correct the present situation veer between the adoption of an UNGA Resolution or a separate Protocol to supplement the Registration Convention. The clarification of Article 1 on definitions, together with the duty to provide information on launchings – and, moreover, that this information should be both complete and timely – appear as priorities in the field.

No doubt the 1979 Moon Agreement has been the least successful of the four Space Treaties reviewed. The main trouble, accordance to the general feeling, is raised by Article 11 of this Treaty. The Special Rapporteur goes as far as suggesting that the Agreement as a whole should be discarded. Other suggestions were put forward in a more moderate tone recommending the amendment of this Article. To this end, the example provided by Part XI of the Law of the Sea Convention -which originated similar trouble in connection with the Area and its resources and was subsequently modified by means of an Agreement- has been the object of frequent reference by the specialists.

Indeed, all four treaties contain rules applicable to commercial space activities which have been identified in the previous pages. Yet, it is the 1967 Space Treaty and the 1972 Liability Convention that are more directly linked to this question. It is also possible to streamline a few of these rules within the context of the Moon Agreement; however, it is the scarce number of ratifications what makes this Treaty, in practice, ineffective. Therefore, in what direction should the work of this Committee proceed?

The discussions and conclusions underlying the Vienna UNISPACE III Workshop on Space Law for the XXI Century are indicating that international law should keep pace with the unrelenting growth of commercial space activities. This trend was equally perceived in October 1998 in Concepción, Republic of Chile, on the occasion of the UNISPACE III PREP CONF for Latin America and the Caribbean. At this meeting delegations were familiar with the question and described their countries' experiences in connection with the increasing role of private entities in the field.

A number of institutions have taken up –or resumed- research on the subject in recent years. *Inter alia*, the Colloquia organised by the International Institute of Space Law of the International Astronautical Federation are reflecting a similar trend. In like manner Project 2001, centered in the Institute of Air and Space Law of the University of Cologne and dealing with the legal framework for the commercial use of outer space. This Project is well underway and has created a network of important international dimensions. In Argentina, the Chair of Public International Law of the University of Buenos Aires is presently

involved in a three-year Project entitled Dispute Settlement in Contemporary International Law, where dispute resolution arising from commercial space activities is given pride of place and is also leading to various doctoral theses on the subject. On the regional level, the Instituto Iberoamericano de Derecho Aeronáutico y del Espacio y de la Aviación Comercial (which brings together Spanish-speaking countries and has the status of a UN Consultative Agency) has become aware of the implications of the commercial sides of space activities. This topic raised a stimulating discussion at its last annual Conference (Panamá, October 1999) within the framework of dispute settlement and commercial space activities.

It is suggested that the next step in our Committee's task should be the follow-up of the subject and the precise identification of provisions in the revised Treaties which require changes to match the present international reality in the field of outer space.

Insofar as space debris and dispute settlement are concerned, the ILA Space Law Committee should continue to keep these topics under study. In accordance with the practice of this Committee, we should work in close co-operation with COPUOS and its two Subcommittees in all three topics in which we are now immersed.

Hence the suggested terms of reference for our future work which are reflected in the Draft Resolution annexed to this Report. We thank you all for your most valuable comments and ideas and very much look forward to discussing the various issues during our Working Session in London next July.

VII. DRAFT RESOLUTION (final version) as annexed.

Buenos Aires, 7 March 2000.

NOTE: The Rapporteur is grateful to the University of Buenos Aires and to The British Council/Antorcha for their support to pursue research on these topics.