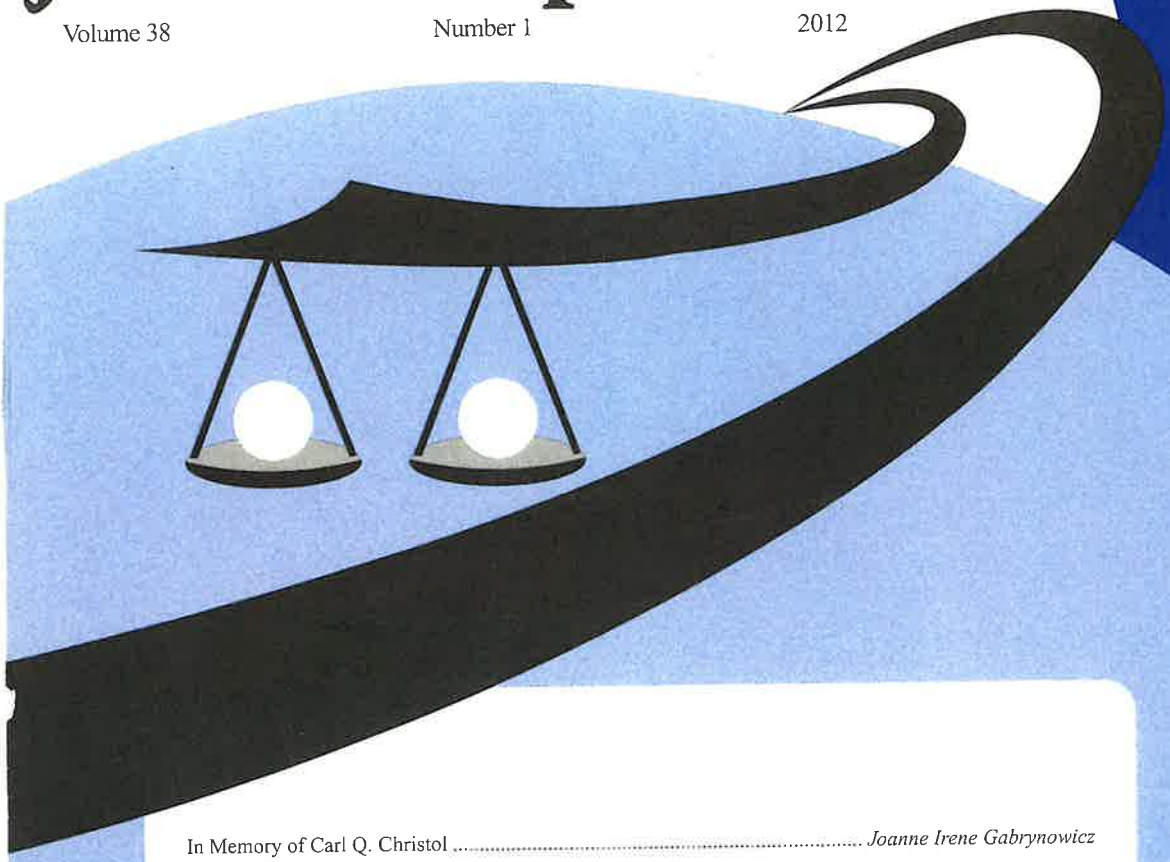
Journal of Space Law

Volume 38 Number 1 2012



JOURNAL

OF

SPACE

LAW

VOLUME 38, NUMBER 1

Spring/Summer 2012

JOURNAL OF SPACE LAW

UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW
A JOURNAL DEVOTED TO SPACE LAW AND THE LEGAL PROBLEMS ARISING OUT OF HUMAN ACTIVITIES IN OUTER SPACE.

VOLUME 38 **SPRING/SUMMER 2012** **NUMBER 1**

All correspondence with reference to this publication should be directed to the JOURNAL OF SPACE LAW, University of Mississippi School of Law, 481 Coliseum Drive, University, Mississippi 38677; jsl@olemiss.edu; tel: +1.662.915.6857, or fax: +1.662.915.6921.

JOURNAL OF SPACE LAW. The subscription rate for 2012 is $100 U.S. for U.S. domestic/individual; $120 U.S. for U.S. domestic/organization; $105 U.S. for non-U.S./individual; $125 U.S. for non-U.S./organization. Single issues may be ordered at $70 per issue. For non-U.S. airmail, add $20 U.S. Please see subscription page at the back of this volume.

ISSN: 0095-7577

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Bibliography:

IN MEMORIAM[1]
CARL QUIMBY CHRISTOL, 1913 - 2012

As I write this, a well used, dog-eared copy of *The Modern International Law of Outer Space* by the late Carl Q. Christol sits on my desk. Its dark brown cover indicates its serious and weighty subject while a collection of confetti colored "sticky" tabs adorn its pages: red for remote sensing; green for the province of all mankind principle; yellow for liability. It is the first book I bought when I began teaching space law in 1987. I was a new teacher in a new academic subject. Carl's book was my security and my comfort as well as my trusted source for much of the information I would continue to teach and research during the next 25 years. Although Carl was a prolific writer and his cumulative work product goes far beyond *The Modern International Law of Outer Space*, it is a major opus that continues to be used by my students and colleagues to this day.

I met Carl for the first time in 1991 at the 42nd International Astronautical Congress in Montreal, Canada and corresponded with him over the years. Carl was a lot like my well-

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[1] *Carl Quimby Christol Space Law Pioneer Dies at 98 (1913 – 2012)*, RES COMMUNIS (Feb. 24, 2012, 3:06 pm), http://rescommunis.olemiss.edu/2012/02/24/carl-quimby-christol-space-law-prioneer-dies-at-98-1913-2012/.

used copy of his book: multi-faceted. Carl's research and writing focused on international space law, international law, U. S. constitutional law, American foreign policy, security issues resulting from terrorism, and human rights. Like his book, Carl's thoughts were well grounded in exhaustive research. As I often tell my students, Carl's book is worth its weight in gold for the footnotes alone. In addition, like the "sticky" tabs on the book's pages, he was colorful. Carl's life, career, and service spanned from a homestead in the American west to the space age. He served in the Army in World War II including at the Battle of the Bulge; received a law degree from Yale; authored eight books and more than 100 scholarly articles; and, he became an icon of space law, among many, many other achievements.

Carl will be missed. When anyone in the space law community finds themselves missing Carl, I have a very special copy of his book that will let you visit with him for a little while.

Joanne Irene Gabrynowicz
Oxford, MS
22 June 2012

FOREWORD

By Joanne Irene Gabrynowicz[*]

This volume of the JOURNAL OF SPACE LAW has members of the new generation of space lawyers addressing long-standing questions in space law. In their respective articles, co-authors Elena Carpanelli and Brendan Cohen, and author Philip De Man address different aspects of benefits derived from space—what they are; legal and other obligations regarding them; how they are accessed; how they are used; and by whom.

In *A Legal Assessment of the 1996 Declaration on Space Benefits on the Occasion of its Fifteenth Anniversary,* (Declaration) Ms. Carpanelli and Mr. Cohen analyze the last major declaration of principles relating to space that was adopted as a resolution by the United Nations General Assembly. As they state in their article, resolutions of this kind are inherently non-binding. The authors then assess the legal value of the Declaration and consider whether if, over that last fifteen years, parts of it have become customary international law. They also examine whether the Declaration itself creates a legitimate expectation for States to abide by it. They conclude that, ultimately, the Declaration's primary value has been as a moral and political, rather than a *practical,* legal instrument.

In *Rights Over Areas vs Resources in Outer Space: What's The Use of Orbital Slots?* Philip De Man delves deeply into the problem of reserving orbital capacity without actual use, which is also referred to as the "paper satellite" problem. Dr. De Man examines the two main competing forms of practice that are asserted by proponents to establish the legitimate use of an orbital slot. Although the practices are diametrically opposed to

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[*] Joanne Irene Gabrynowicz is the Editor-in-Chief of the JOURNAL OF SPACE LAW. She is also a professor of space law and remote sensing law and the Director of the National Center for Remote Sensing, Air, and Space Law at the University of Mississippi School of Law. Prof. Gabrynowicz was the recipient of the 2001 Women in Aerospace Outstanding International Award and the 2011 International Institute of Space Law's Distinguished Service Award. She is a Director of the International Institute of Space Law and a member of the American Bar Association Forum on Air and Space Law.

each other, both are perceived to be unlawful by different actors in the space community. Dr. De Man offers a thorough analysis of the applicable legal rules in order to shed some light on the broader underlying philosophy of the free use of outer space.

In his article, *The Mexican Space Agency*, J.H. Castro Villalobos describes the newly established Agency and the legislation that brought it into being. Among the many reasons for the Agency's establishment is the need to prioritize Mexican national space policy in accord with human development, peace, and international security—all subjects related to benefits derived from space. Señor Villalobos' article is accompanied by an unofficial translation of the Mexican law.

As a reminder that benefits can also be accompanied by problems, this issue of the JOURNAL OF SPACE LAW includes the *Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Outer Space Activities* (Rules) that were adopted in December 2011. These Rules were catalyzed, in part, by the recognition that events like the *Iridium-Cosmos* on-orbit collision may be on the rise as space is accessed for its benefits by an ever-growing number of space actors. His Excellency Judge Fausto Pocar, of the Permanent Court of Arbitration, offers the reader an introduction to the Rules that is intended to provide insight into the factual and intellectual processes of their development. Judge Pocar served as the Chair of the advisory group of experts that assisted in the Rules' development.

As always, a bibliography that contains the most recent developments in laws, regulations, cases, administrative decisions, articles, books, and reports in aviation and space law completes the volume.

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Volume 38, Number 2

The National Center for Remote Sensing, Air, and Space Law of the University of Mississippi School of Law is delighted to announce that it will publish Volume 38, issue 2 of the JOURNAL OF SPACE LAW in the second half of 2012.

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To be considered for the next issue, submissions should be received on or before October 14, 2012. However, the JOURNAL OF SPACE LAW will continue to accept and review submissions on an ongoing basis.

A LEGAL ASSESSMENT OF THE 1996 DECLARATION ON SPACE BENEFITS ON THE OCCASION OF ITS FIFTEENTH ANNIVERSARY

Elena Carpanelli[*]
Brendan Cohen[**]

I. INTRODUCTION

On December 13, 1996, in resolution 51/122, the United Nations General Assembly unanimously adopted the 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 (the Declaration on Space Benefits), thus concluding a ten-year discussion on the topic within the Committee On the Peaceful Uses of Outer Space (COPUOS) and its Legal Subcommittee.

In 2011, during its fifty-fourth session, the Legal Subcommittee "noted with satisfaction that [this year] marked the fifteenth anniversary of the adoption by the General Assembly of the [Declaration on Space Benefits]."[1] On this occasion, an assessment of the value of this Declaration and its past, present, and future contribution to the development of international space law and policy remains as important as ever. Since the 1960s, the world has become increasingly dependent on space applications, particularly those related to telecommunications,

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[*] LL.M. (Adv.) Air and Space Law, Leiden University, 2011; B.L.C. Università di Parma, 2009.

[**] J.D. Candidate, Stanford Law School, 2013; B.A., Yale University, 2005. The authors would like to thank Niklas Hedman and Sergiy Negoda of the United Nations Office for Outer Space Affairs for their guidance throughout the research and writing process. Despite their encouragement, support, and suggestions, the views expressed do not represent the views of OOSA, and any errors or omissions are attributable solely to the authors.

[1] Comm. on the Peaceful Uses of Outer Space, Legal Subcomm, *Rep. on its 50th Sess., 28 March–8 April 2011*, ¶ 16, U.N. Doc. A/AC.105/990 (Apr. 20, 2011).

global navigation satellite systems, and earth observation. The increasing commercialization of space activities, the expanding number of space actors, and the growing awareness of the role of space activities in promoting sustainable development and preventing natural and human-made disasters worldwide, lend a timeliness to the analysis of the principles embodied in the Declaration. The near future promises further technological growth and continuing privatization of space activities, factors that might lead to a shift in the traditional concept of space-faring nations and to new developments in the utilization and exploration of outer space. Additionally, the risk of orbit saturation due to the increasing exploitation of outer space may further the debate between current and potential users over the exact meaning of using outer space for the benefit of all countries. In this context, it is important to assess the way in which the Declaration on Space Benefits exerts its influence, in order to establish a clearer understanding of the underlying principles of "international cooperation" and "use and exploration of outer space for the benefit and in the interest of all States."

The present Article will first focus on the legal and political background behind the negotiation and adoption of the Declaration on Space Benefits and will then examine the legal significance of the instrument. On the basis of the assumption that, although not legally binding, recommendatory General Assembly Resolutions can still have legal effects, this Article will attempt to define the Declaration on Space Benefits' potential role in the consolidation and/or formation of customary rules of international law. It will next assess its characterization as an authoritative means of interpretation of pre-existing treaty law. Finally, it will consider the value of the Declaration insofar as it creates a legitimate expectation that States, acting in accordance with the general principle of good faith, will abide by it in the area of space exploration.

Even conceding that the Declaration on Space Benefits has some legal effect, the fact that the Declaration does not define terminology used and lacks any form of enforcement mechanism means its practical legal relevance is inhibited. For this reason, the Declaration serves its purpose much more strongly as a moral and political instrument than as a legal one. Accordingly,

the last portion of the present Article will be dedicated to analyzing its political and moral implications.

II. THE ORIGINS OF THE DECLARATION ON SPACE BENEFITS

A. Legal Background

In 1986, the Venezuelan delegation proposed a new agenda item for the Legal Subcommittee entitled "[e]quitable access by States to the benefits derived from space technology."[2] Developing nations, in particular, believed that a cornerstone for building any genuine international cooperation in the realm of outer space included precisely defining the scope of the access to these benefits.[3] Largely as a result of the vague terminology of Article I of the Outer Space Treaty[4] and the internal tension it contains in its first two paragraphs, these developing nations began to press for more stringent legal obligations governing international cooperation and the use of outer space for the benefit of all countries.[5]

Specifically, paragraph 1 of Article I of the Outer Space Treaty states that "the exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interest of all countries, irrespective of their degree of economic or scientific development and shall be the province of all mankind," thus re-affirming principles already set out in the 1963 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space[6] (hereinafter 1963 Declaration). In practical terms, by requiring that space activities are undertaken for the com-

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[2] Comm. on the Peaceful Uses of Outer Space, *29th Sess.*, ¶ 44, U.N. Doc. A/AC.105/SR.282, (Venezuela) (June 4, 1986).

[3] Comm. on the Peaceful Uses of Outer Space, Legal Subcomm, *28th Sess.*, ¶ 3, U.N. Doc. A/AC.105/C.2/SR.519, (Chile) (Apr. 10, 1989).

[4] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *opened for signature* Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

[5] *See* Nandasiri Jasentuliyana, *Article I of the Outer Space Treaty Revisited*, 17 J. SPACE L. 129, 129 (1989).

[6] *International Co-Operation in the Peaceful Uses of Outer Space*, U.N. Doc. A/RES/1962 (XVIII) (Dec. 13, 1963).

mon benefit of all mankind, the first paragraph of Article I of the Outer Space Treaty sets a general limit on the "free use and exploration of outer space without discrimination of any kind" recognized in paragraph 2.[7] In addition, Article I(1) has generally been interpreted to require international cooperation in the exploration and use of outer space, taking into account the interests of all States.[8] Nonetheless, the practical legal significance of this provision has been greatly debated. Two main issues have been particularly contentious: its legally binding force and the extent of its scope.

First, it has been argued that, given its broad reach, vague content, and the difficulties related to its enforcement, the principle contained in Article I(1) would only impose a *moral* obligation on States that carry out space activities.[9] Others, however, have stressed that the wording of the provision unequivocally exerts *legally* binding power due to its contractual nature.[10] During the negotiating process leading to the Declaration on Space Benefits, the Chinese representative, for instance, stressed that while "[d]oubts had often been expressed concerning the legal scope of Article I of the Outer Space Treaty," his delegation believed "there were no grounds for claiming that it was merely a general declaration of intents."[11]

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[7] STEPHAN HOBE, BERNHARD SCHMIDT-TEDD,& KAI-UWE SCHROGL (eds.), COLOGNE COMMENTARY ON SPACE LAW, VOL. I 38 (2009); *see also* BIN CHENG, STUDIES IN INTERNATIONAL SPACE LAW 404 (1997).

[8] R. Arzinger, *Legal Aspects of the Common Heritage of Mankind*, *in* 22ND PROC. COLLOQ. L. OUTER SPACE 89, 89 (1979); *see also* U.N. Doc. A/AC.105/C.2/SR.519, *supra* note 3, at ¶ 13 (United States of America); Comm. on the Peaceful Uses of Outer Space, Legal Subcomm, *28th Sess.*, ¶ 3, U.N. Doc. A/AC.105/C.2/SR.520, (Nigeria) (Apr. 6, 1989).

[9] *See, e.g.*, Bin Cheng, *The 1967 Outer Space Treaty: Thirtieth Anniversary*, 23 ANNALS AIR & SPACE L. 156, 163 (1998); B. Maiorsky, *A Few Reflections on the Meaning and Significance of "Province of all Mankind" and "Common Heritage of Mankind" Notions*, *in* 29TH PROC. COLLOQ. L. OUTER SPACE 58, 59 (1986); V. M. Postyshev, *On the Question of Space Exploration for the Benefit of Humanity: A Modest Proposal*, *in* 33RD PROC. COLLOQ. L. OUTER SPACE 236, 238 (1990).

[10] *See, e.g.*, Marco G. Markov, *Implementing the Contractual Obligation of Article I, Par. 1 of the Outer Space Treaty 1967*, *in* 17TH PROC. COLLOQ. L. OUTER SPACE 136, 137 (1975).

[11] Comm. on the Peaceful Uses of Outer Space, Legal Subcomm, *28th Sess.*, ¶ 18, U.N. Doc. A/AC.105/C.2/SR.521, (China) (Apr. 11, 1989).

Second, even if one accepts the latter argument that Article I creates a legal obligation, the vagueness of the terms used still raises questions about the practical meaning of concepts such as "use," "exploration," "benefit and interests of all countries," and "province of all mankind."[12] One wonders, for instance, whether only the "exploration and use" must be beneficial, or also the resources resulting from this activity.[13] Moreover, does the use of the term "benefit" imply participatory rights for developing countries,[14] and if so, to what extent?[15] This uncertainty over the exact significance of the terms of Article I of the Outer Space Treaty was expressed by the Venezuelan delegation. In the context of the new agenda item concerning international cooperation in space, the delegate suggested that the Legal Subcommittee "might start by trying to elucidate a number of notions found in the Outer Space Treaty, particularly the scope of obligation set forth in article I."[16]

One of the reasons behind the vague formulation of Article I(1) is that States involved in the drafting did not share a unanimous view of the value and significance of the general principle of international cooperation in space activities[17] or the way it was specifically provided for in Article I(1). Developed countries mainly linked the idea of international cooperation to the need for mutual assistance in launches or astronaut res-

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[12] *See* Stephen Gorove, *Freedom of Exploration and Use in the Outer Space Treaty: A Textual Analysis and Interpretation*, 1 DENV. J. INT'L L. & POL'Y 93 (1971) [hereinafter *Freedom of Exploration*]; Ernst Fasan, *The Meaning of the Term "Mankind" in Space Legal Language*, 2 J. OF SPACE L. 125 (1974); *see also* Stephen Gorove, *Concept of Common Heritage of Mankind: A Political, Moral or Legal Innovation*, 9 SAN DIEGO L. REV. 390, 392 (1972); Comm. on the Peaceful Uses of Outer Space, Legal Subcomm, *28th Sess.*, ¶ 14, U.N. Doc. A/AC.105/C.2/SR.522, (Ecuador) (Apr. 7, 1989).

[13] *See, Freedom of Exploration*, *supra* note 12, at 102.

[14] HOBE, *supra* note 7, at 40.

[15] *See, Freedom of Exploration*, *supra* note 12, at 102.

[16] Comm. on the Peaceful Uses of Outer Space, Legal Subcomm, *27th Sess.*, ¶ 2, U.N. Doc. A/AC.105/C.2/SR.501, (Venezuela) (Apr. 6, 1988); *see also* U.N. Doc. A/AC.105/C.2/SR.519, *supra* note 3, at ¶ 3 (statement of the Chilean delegation, arguing that cooperation between developed and developing countries in outer space had been impeded by the lack of a precise definition of what benefits should be shared and the scope of the benefits).

[17] *The 1967 Outer Space Treaty: Thirtieth Anniversary*, *supra* note 9, at 162.

cues[18] and understood the benefit provision as a general "appeal" limiting the uncontrolled use of outer space but not restricting their right to define how to share the benefits derived from space activities.[19] In contrast, developing countries saw the principle of international cooperation, as it was worded in Article I(1), as a recognition of the developed countries' "obligation" to concretely share the "resources" obtained from space activities.[20]

Following the adoption of the Outer Space Treaty, this divergence in the understanding and interpretation of the significance of Article I(1) was evident both in State practice and in the debates in the Legal Subcommittee. The dispute ultimately led to Venezuela's proposal to introduce a new item on the Legal Subcommittee's agenda, specifically dedicated to analyzing the "legal aspects related to the application of the principle of the exploration and use of outer space for the benefit and in the interests of all States."[21]

B. Political Setting

The negotiation, drafting, and adoption of the Declaration on Space Benefits possessed a strong political dimension. Linked to the legal debate described above, the Declaration was rooted in several political developments, such as the increase in space-faring nations (with new countries, such as China and India, acquiring growing space capabilities)[22] and an accentuation of the debate between developed and developing nations in the forum of space.[23] In parallel with the developing countries' attempts to implement a New International Economic Order on

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[18] Nandasiri Jasentuliyana, *Ensuring Equal Access to the Benefit of Space Technologies for all Countries*, 10 SPACE POL'Y 7, 9 (1994).

[19] *Id.*; *see, e.g.*, Comm. on the Peaceful Uses of Outer Space, Legal Subcomm, *5th Sess.*, ¶¶ 4–5, U.N. Doc. A/AC.105/C.2/SR.64, (Italy) and ¶ 6 (France) (Oct. 24, 1966).

[20] U.N. Doc. A/AC.105/C.2/SR.521, *supra* note 11, at ¶ 35 (Brazil).

[21] Comm. on the Peaceful Uses of Outer Space, Legal Subcomm, *Rep. on its 28th Sess., 20 March–7 April 1989*, section 3, U.N. Doc A/AC.105/430 (Apr. 26, 1989); *see also* U.N. Doc. A/AC.105/SR.282, *supra* note 2, at ¶ 44 (Venezuela).

[22] Marietta Benkö & Kai-Uwe Schrogl, *History and Impact of the 1996 UN Declaration on 'Space Benefits,'* 13 SPACE POL'Y 139, 139 (1997).

[23] *Id.*

the global scene,[24] the debate over the obligations of space-faring nations to share the benefits obtained through space activities with other countries flourished within COPUOS and its Legal Subcommittee.[25] Although only a small group of developing countries was demanding new technologies at the time of the conclusion of the Outer Space Treaty, as the membership of COPUOS grew, this distributive conflict between developing and developed countries intensified, especially in the 1970s.[26] While developing countries advocated a broad interpretation of the principle of international cooperation and their right to participate in the apportionment of the benefits arising from space activities as essential tools for promoting economic development, developed countries defended the economic value of their efforts and investments by supporting a stricter understanding of the existing legal provisions.[27] This tension between different interests, although present at the beginning of the space era,[28] intensified once the potential commercial value of space activities became apparent. Consequently, the broader debate addressed issues of the access to geostationary orbit, the potential exploitation of the Moon and other celestial bodies, and the use of data from remote sensing activities.

For instance, when Argentina proposed a draft for a new international agreement relating to the Moon and other celestial bodies in 1970,[29] developing countries saw an opportunity to deal with the issue of the equitable distribution of natural re-

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[24] Declaration on the Establishment of a New International Economic Order, U.N. Doc. A/RES/3201 (S-VI) (May 1, 1974).

[25] Edwin W. Paxson III, Note, Sharing the Benefits of Outer Space Exploration: Space Law and Economic Development, 14 MICH. J. INT'L L. 487, 487–88 (1992–1993).

[26] Marietta Benkö & Kai-Uwe Schrogl, *Article 1 of the Outer Space Treaty Reconsidered after 30 Years: "Free Use of Outer Space" vs. "Space Benefits," in* OUTLOOK ON SPACE LAW OVER THE NEXT 30 YEARS 67, 69-70 (Gabriel Lafferranderie & Daphné Crowther eds., 1997).

[27] *See id.* at 70.

[28] *See, e.g.*, Aldo A. Cocca, *Legal Status of Celestial Bodies and Economic Status of the Celestial Products, in* 7TH PROC. COLLOQ. L. OUTER SPACE 15, 15 (1964).

[29] Draft Agreement on the Principles Governing Activities in the Use of the Natural Resources of the Moon and Other Celestial Bodies, U.N. Doc. A/AC.105/C.2/L.71 (June 23, 1970).

sources in space.[30] Nonetheless, the drafting process was handicapped by the failure of developing and developed countries to reach an agreement.[31] The definition of the Moon and other celestial bodies as the "common heritage of mankind"[32] and the related equitable sharing by all States of the economic benefits drawn from extra-terrestrial resources[33] became the object of new debate and different interpretations. Under these circumstances, most States did not ratify the Moon Agreement.

The dissatisfaction of developing countries with the outcome of their efforts to ensure their portion of the benefits derived from the commercial use of space technology was likely one of the main driving forces behind the developing countries' proposal to create a new Legal Subcommittee agenda item. The Chilean delegate to the Legal Subcommittee expressed this sentiment just a few months before the United Nations General Assembly adopted the Principles relating to the Remote Sensing of the Earth from Space.[34] He noted, "that, after long years of hard work, the hopes of the developing countries had been dashed, since it had not been possible to reconcile the advances in space technology and the necessary international regulations to cover the uses of outer space."[35]

C. Outcome of the Negotiations: the Declaration on Space Benefits

Against this legal and political backdrop, the views of the developing nations had long diverged from those of the developed nations with respect to what they hoped to achieve with the Declaration. The debate intensified in 1991 with the presen-

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[30] Carl Christol, *International Space Law and the Less Developed Countries*, *in* 19TH PROC. COLLOQ. L. OUTER SPACE 243, 249 (1976).

[31] FABIO TRONCHETTI, THE EXPLOITATION OF NATURAL RESOURCES OF THE MOON AND OTHER CELESTIAL BODIES: A PROPOSAL FOR A LEGAL REGIME 56–57 (2009).

[32] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, *opened for signature* Dec. 18, 1979, 1363 U.N.T.S. 21 [hereinafter Moon Agreement].

[33] *Id.* at art. 11(7).

[34] Principles Relating to Remote Sensing of Earth from Outer Space, G.A. Res. 41/65, U.N. GAOR, 41st Sess., 95th plen. Mtg., U.N. Doc. A/Res/41/65 (Dec. 3, 1986).

[35] Comm. on the Peaceful Uses of Outer Space, Legal Subcomm, *25th Sess.*, ¶ 9, U.N. Doc. A/AC.105/C.2/SR.439, (Chile) (Apr. 3, 1986).

tation of a working paper that pushed for a redistribution of technologies in a way that gave preferential treatment to developing countries.[36] As other authors have noted, in this "regime of forced cooperation[,] . . . States would virtually have lost their freedom in choosing their cooperative partner[s] and in determining the modalities of such cooperation."[37]

Though the developing nations softened the language of forced cooperation over the next several revisions to this working paper[38] and developed countries pointed out that they were already engaged in multilateral and bilateral space projects with developing nations,[39] it was not until the presentation of a new working paper by France and Germany in 1995 that there was a significant breakthrough in the negotiation. The Franco-German paper emphasized that nations should be free to determine their level of cooperation, stressed that the manner of cooperation should be appropriate and efficient, and proposed several areas in which this cooperation could be conducted.[40] In light of these advances, the final text developed from a merger of the two proposals during the Legal Subcommittee session in 1996.[41]

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[36] *Principles regarding international cooperation in the exploration and use of outer space for peaceful purposes*, Working Paper submitted by: Argentina, Brazil, Chile, Mexico, Nigeria, Pakistan, Philippines, Uruguay, and Venezuela, U.N. Doc A/AC.105/C.2/L.182 (Apr. 9, 1991), at Annex.

[37] *See, e.g.*, TRONCHETTI, *supra* note 31, at 71; Marietta Benkö & Kai-Uwe Schrogl, *'Space Benefits' – Towards a Useful Framework for International Cooperation*, 5 SPACE POL'Y 5, 6 (1995).

[38] *See Principles regarding international cooperation in the exploration and use of outer space for peaceful purposes*, Working Paper submitted by: Argentina, Brazil, Chile, Colombia, Mexico, Nigeria, Pakistan, Philippines, Uruguay, and Venezuela, U.N. Doc A/AC.105/C.2/L.182/Rev.1 (Mar. 31, 1993); *see also Principles regarding international cooperation in the exploration and use of outer space for peaceful purposes*, Working Paper submitted by: Brazil, Chile, Colombia, Egypt, Iraq, Mexico, Nigeria, Pakistan, Philippines, Uruguay, and Venezuela, U.N. Doc A/AC.105/C.2/L.182/Rev.2 (Mar. 23, 1995).

[39] *See, e.g.*, Comm. on the Peaceful Uses of Outer Space, Legal Subcomm, *30th Sess.*, ¶ 25, U.N. Doc A/AC.105/C.2/SR.544, (United Kingdom) (Apr. 17, 1995).

[40] *Declaration on international cooperation in the exploration and use of outer space for the benefit and in the interests of all States, taking into particular account the needs of developing countries*, Working Paper submitted by: Germany and France, U.N. Doc A/AC.105/C.2/L.197 (Mar. 24, 1995).

[41] *Draft Resolution*, Working Paper submitted by: the Chairman of the Working Group, U.N. Doc A/AC.105/C.2/L.202 (Mar. 27, 1996).

In its final form, the Declaration on Space Benefits provides eight paragraphs, whose content can be summarized as follows:

- International cooperation in the exploration of outer space should be conducted for the "benefit and interest of all states . . . and shall be the province of all mankind." Particular account should be taken of the needs of developing countries;
- States are free to choose how they engage in this cooperation, but it should be on an "equitable and mutually acceptable basis";
- States with more advanced space programs should promote international cooperation, especially with countries with incipient space programs;
- Countries engaging in cooperative ventures should determine the mode that is most effective, "including, *inter alia*, governmental and non-governmental; commercial and non-commercial; [and] global, multilateral, regional or bilateral;"
- International cooperation should strive to accomplish three goals: promoting development of space science and its applications, fostering this development in interested states, and facilitating exchanges of technology on a mutually acceptable basis;
- Space applications should be considered when contemplating methods of international development;
- COPUOS should have a strong role in this exchange of information; and
- States should be encouraged to contribute to the UN Programme on Space Applications.

III. Legal Review and Analysis of the Declaration on Space Benefits

A. Introductory Considerations

The Declaration on Space Benefits was discussed and adopted during the period that is often called the "second law-making phase" of COPUOS and its Legal Subcommittee. After the adoption of the 1979 Moon Agreement, the creation of treaty-law that had characterized the work of the Legal Subcommittee since the conclusion of the Outer Space Treaty in 1967 ended, and the adoption of declarations of principles by the

United Nations General Assembly became the preferred form for regulating certain issues on which the international community was not yet ready to negotiate legally binding instruments.[42] Several factors may have played a role in the shift towards a non-binding regulation of space activities.

Especially in areas where there is a significant amount of uncertainty, the use of soft law instruments[43] can provide a way for the parties to learn about the impact of their agreements before formalizing them and instituting strict legal consequences.[44] This is particularly relevant to the field of space, in which there are currently many unknowns and technological and scientific developments continuously change the practical framework in which agreed legal obligations have to be set. Furthermore, "soft law facilitates compromise, and thus mutually beneficial cooperation, between actors with different interests and values, different time horizons and discount rates, and different degrees of power."[45] The discussions that ultimately led to the adoption of the Declaration on Space Benefits fit into this scheme, as the final form that was adopted by consensus significantly diminished the obligations that were in earlier versions of the working papers. The developed and developing nations certainly had divergent interests and goals. In this way, the use of a soft law agreement to govern international cooperation in

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[42] Sergio Marchisio, *The Evolutionary Stages of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS)*, 31 J. SPACE L. 219, 231 (2005). Four sets of principles were adopted in this second law-making period, namely: Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting, G.A. Res. 37/92, U.N. GAOR, 37th Sess., 100th plen. Mtg., U.N. Doc. A/RES/37/92 (Dec. 10, 1982); Principles Relating to Remote Sensing of the Earth from Outer Space, *supra* note 34; Principles Relevant to the Use of Nuclear Power Sources in Outer Space, G.A. Res. 47/68, U.N. GAOR, 47th Sess., 85th plen. Mtg., U.N. Doc. A/RES/47/68 (Dec. 14 1992); and 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, G.A. Res. 51/122, U.N. GAOR, 51st Sess., 83d plen. Mtg., U.N. Doc. A/Res/51/122 (Dec. 13, 1996) [hereinafter Declaration on Space Benefits].

[43] For a definition of "soft law," see, for example, ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 11 (2nd ed. 2010); WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 36 (6th ed. 2010).

[44] Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 435 (2000).

[45] *Id.* at 423.

space served the purpose of facilitating compromise between States with different space capabilities.[46]

On the other hand, the desires of developing countries to establish new legal regulations that would keep pace with technological developments and fill the *lacunae* of existing international legal instruments seem to have been frustrated by the adoption of a non-legally binding Declaration.[47] However, the legal relevance of the Declaration on Space Benefits cannot be underestimated.

Except for resolutions concerning internal administrative and financial issues, United Nations General Assembly resolutions cannot be considered binding upon Member States and do not create per se norms of public international law.[48] Even so, considerable debate exists over whether recommendatory General Assembly resolutions can have legal *effects*, especially when they assume the form of solemn declarations and are adopted by consensus. Different opinions exist, both among States and in doctrine, about the effective legal significance of these resolutions.[49] One view is that these resolutions are merely "recommendations," thus wanting any legal value and having at most moral or political effects.[50] A second view is that even if these

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[46] *Id.* at 448.

[47] *Consideration of the Legal aspects related to the Access of States to the benefits derived from the exploration and use of Outer Space,* Working Paper submitted by: the Group of 77 of the Legal Sub-Committee, ¶ 5, U.N. Doc. A/AC.105/C.2/L.162, (Group of 77) (Apr. 1, 1987).

[48] Some authors, however, consider General Assembly resolutions as a source of international law by themselves. *See* D. H. N. Johnson, *The Effects of Resolutions of the General Assembly of the United Nations*, 32 BRIT. Y.B. INT'L L. 97, 105 (1955–1956); *see also* Christopher Joyner, *UN Resolutions and International Law*, 11 CAL. W. INT'L L.J. 445 (1981). The authors of the present Article, nonetheless, do not agree with this view due to its inconsistence with the terms of Article 38(1) of the Statute of the International Court of Justice, which lists as primary sources of international law only international conventions, customs, and general principles of law recognized by civilized nations. Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat 1031.

[49] Andrei Terekhov, *UN General Assembly Resolutions and the Outer Space Law*, *in* 40TH PROC. COLLOQ. L. OUTER SPACE 97, 97 (1997).

[50] *But see* F. Blaine Sloan, *The Binding Force of a 'Recommendation' of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT'L L. 1, 1 (1948) (pointing out that some scholars take the extreme position that "no resolution can create either a legal or a moral obligation").

resolutions lack an element of "true obligation," they may still maintain a certain "legal relevance."[51]

The perspective that a General Assembly resolution carries some legal effects is generally supported by the jurisprudence of the International Court of Justice. Although it did not specifically indicate the reasons motivating its conclusions, the Court has acknowledged the legal value of General Assembly resolutions in the development of international law.[52] In particular, in the advisory opinion on the *International Status of South-West Africa*,[53] the Court observed that the United Nations General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples[54] contributed to and was part of the "development of law through the Charter of the United Nations and by way of customary law."[55] Hence, the Court seems to have recognized the potential legal effects of General Assembly resolutions, at least as a means of interpretation of treaty law or as a factor contributing to the consolidation or emergence of customary rules.[56]

Although not legally binding, General Assembly resolutions may play a significant role in the development of international law. The International Court of Justice, when deciding how best to decide disputes in accordance with international law, looks to customs, treaties,[57] and "general principles of law recognized by

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[51] Johnson, *supra* note 48, at 117.

[52] Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶¶ 52–59 (Oct. 16) (referring, for example, to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations).

[53] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31 (June 21).

[54] U.N. Doc. A/RES/15/1514 (Dec. 14, 1960).

[55] *See supra* note 53, at 31.

[56] Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 PROC. OF THE AM. SOC'Y OF INT'L L. 301, 303 (1979).

[57] *See, e.g.*, Faustino Pocar, *The Normative Role of UNCOPUOS*, *in* OUTLOOK ON SPACE LAW OVER THE NEXT 30 YEARS 415, 417 (Gabriel Lafferranderie & Daphné Crowther eds., 1997); *see also* Johnson, *supra* note 48, at 116 (arguing that General Assembly resolutions, although not sources of international law, display their "legal effect" as a means of determining the rules of international law).

civilized nations."[58] Non-binding resolutions can help clarify these sources of international law.

As far as custom is concerned, General Assembly resolutions might help establish obligatory rules by declaring and specifying pre-existing customary norms or by contributing, where followed by consistent State practice or expressions of *opinio juris*, to the establishment of new customary rules.[59] Additionally, under certain conditions, these resolutions could be regarded as a valuable means of interpretation of pre-existing (or even future) treaty provisions, insofar as they contribute to the clarification of rights and obligations expressed in conventions.[60] Finally, declaratory resolutions may create certain legitimate expectations that States should respect under the general principle of good faith.

The fact that the Declaration on Space Benefits was adopted as a General Assembly resolution means that we must consider its legal assessment within the framework described above. For this reason, and recognizing that General Assembly resolutions vary significantly in their scope and content, each of the possible legal hooks requires a thorough analysis to determine whether and to what extent it is of any relevance.

B. Principles of the Declaration on Space Benefits as International Custom

Article 38(1)(b) of the Statute of the International Court of Justice identifies a primary source of international law in "international custom, as evidence of a general practice accepted by law."[61] Two elements traditionally constitute customary law: State practice and *opinio juris*, the latter denoting a State's subjective belief that its conduct is prescribed as a legal obligation.[62]

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[58] Statute of the International Court of Justice, *supra* note 48, at art. 38(1)(a)-(c).

[59] Pocar, *supra* note 57, at 417; *see also* Marchisio, *supra* note 42, at 332.

[60] Pocar, *supra* note 57, at 420.

[61] Statute of the International Court of Justice, *supra* note 48, at art. 38(1)(b).

[62] *See generally* Tullio Treves, *Customary International Law*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶¶ 7–11, *available at* http://www.mpepil.com/subscriber_article?id=/epil/entries/law-9780199231690-e1393 (last visited May 12, 2012); Niels Petersen, *Customary Law without Customs? Rules,*

Consequently, even though the Declaration on Space Benefits has no formal legal power as a whole, certain principles may become vested with legal authority *erga omnes*, where they are supported by continuous and consistent State practice and where States regard them as constituting legal duties.

From this perspective, however, it is difficult to assess whether the principles of the Declaration reflect the actual commitment of the Parties to be bound by them, due to the conceptual tension of attempting to attribute legal effects to provisions that States deliberately chose to include in non-binding instruments.[63] Cutting in favor of the potential customary law value of the Declaration, though, is not only its adoption by consensus in COPUOS and unanimously in the General Assembly,[64] but also the presence of the term "declaration" in its title.

Manfred Lachs, former Judge of the International Court of Justice and Chairman of the COPUOS Legal Subcommittee, in referring to the 1963 Declaration, emphasized States' commitment to abide by General Assembly declarations by stating: "one cannot underestimate the value of these principles once they are adopted in a solemn Declaration by the General Assembly of the United Nations."[65] Similarly, Professor Kopal recognizes that declarations of principles adopted by the Legal Subcommittee could be regarded as expressions of "a legal conviction of all members of the world organization, or an overwhelming majority thereof, concerning their particular subject matter."[66]

Principles and the Role of State Practice in International Norm Creation, 23 AM. U. INT'L REV. 275, 280 (2008).

[63] Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850, 856 (1989).

[64] *But see* Schwebel, *supra* note 56, at 302 (expressing the view that the consensus requirement loses any practical value due to the fact that it is generally moved by political reasons and not by the real desire of States to abide by the principles expressed).

[65] Comm. on the Peaceful Uses of Outer Space, *5th Sess.*, U.N. Doc. A/AC.105/PV.24, 4–5 (Poland) (Nov. 22, 1963).

[66] Vladimír Kopal, *The Role of UN Declarations of Principles in the Progressive Development of Space Law*, 16 J. SPACE L. 5, 19 (1988). This was particularly true with regard to the 1963 Declaration, for which the terminology "Declaration" was used and the principles were explicitly referred to as "legal." *Id.* at 17.

According to the 1962 "Memorandum of the United Nations Office of Legal Affairs on the Use of the Terms 'Declaration' and 'Recommendation'":

> In United Nations practice, a "declaration" is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated. . . .
>
> . . . In view of the greater solemnity and significance of a "declaration," it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down binding rules upon States.[67]

It is clear from the above quotation that a General Assembly Declaration does not act per se as a source of custom. Nonetheless, due to its solemnity and significance, it constitutes strong evidence of the commitment of States to act according to its content. If this *opinio* is supported by consistent State practice, the principles embodied in the Declaration might become binding obligations by means of customary law. Consequently, the principles contained in a General Assembly Declaration can assume legal relevance by declaring or consolidating pre-existing customary rules or by representing emerging *opinio juris* that, where supported by continuous and coherent State practice,[68] can lead to the formation of new customs.[69]

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[67] 18 U.N. ESCOR, ¶¶ 3–4, U.N. Doc. E/CN.4/L.610 (1962), (*quoted in* Bin Cheng, *The United Nations and Outer Space*, *in* STUDIES IN INTERNATIONAL SPACE LAW 91, 133 (1997).

[68] Some authors propose that, in the new institutionalized framework of international relations, customary rules would directly descend from States' *opinio juris* as embodied in General Assembly resolutions, thus obviating any need for further State practice ("instant custom" doctrine). *See* Joyner, *supra* note 48, at 457. This understanding appears not only to conflict with the view expressed by the United Nations Office of Legal Affairs, but also raises questions about States' deliberate choice to use a non-binding instrument and the General Assembly's lack of legislative powers. In addition, despite the fact that the instant customary law doctrine was first proposed by Professor Bin Cheng with reference to the earliest resolutions on outer space, Cheng, *The United Nations and Outer Space*, *supra* note 67, the International Court of Justice has been reluctant to adhere to it. Indeed, even where the Court practically concentrated its analysis on the subjective element of *opinio juris*, as in the *Nicaragua Case*, Military

As to the first point, some of the principles embodied in the Declaration on Space Benefits seem to merely restate pre-existing treaty law and confirm previous State practice. For instance, Paragraph 1 recognizes that:

> International cooperation in the exploration and use of outer space . . . shall be conducted in accordance with the provisions of international law . . . [and] shall be carried out for the benefit and in the interest of all States, irrespective of their degree of economic, social or scientific and technological development, and shall be the province of all mankind.

Without repeating the debate over the moral or legal value of such general provisions and the difficulties relating to their enforcement, it could be argued that a restatement of principles, where so broadly formulated, might be regarded as consolidating their customary law nature.[70] Some evidence to support this argument rests on the inclusion of similar provisions in the Outer Space Treaty and their consequent application to multilateral and bilateral relations.[71] The lack of debate during the negotiating process leading to the adoption of the Declaration itself constitutes further evidence. In that context, while considerable discussion took place as to the practical content and application of these principles, no State questioned their general validity.

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and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, 101 (June 27), it formally reiterated the traditionally two-fold approach of international customary law as constituted by both State practice and *opinio juris*, *id.* at 183, and recognized that a General Assembly declaration only indicates a State's *opinio juris* as to the existence of customary international law on the subject, *id.* at 191 (referring to the Declaration on Principles of International Law and Co-operation among States in accordance with the Charter of the United Nations (G.A. Res. 2625 (XXV)). Based on the above considerations, the Declaration on Space Benefits has to be regarded as a solemn expression of States' commitment to abide by its principles. Nonetheless, these principles can acquire a legal value by means of custom only to the extent that they declare and thus consolidate pre-existing customary rules or express a general *opinio juris* followed by and crystallized in subsequent State practice.

[69] Chinkin, *supra* note 63, at 857.

[70] TRONCHETTI, *supra* note 31, at 26.

[71] *See, e.g.*, Agreement between the Government of Australia and the Government of the Russian Federation on cooperation in the field of the exploration and use of outer space for peaceful purposes, pmbl., May 23, 2001, 2438 U.N.T.S. 43916.

Similar considerations may also apply to the Declaration's principle that cooperation should take into particular account the needs of developing countries.[72] Looking at related previous State practice and *opinio juris*, we could argue that the consensus reached on the inclusion of this provision in the Declaration on Space Benefits cemented its pre-existing general acceptance. Article 11(7) of the Moon Agreement, foreseeing the potential establishment of an international regime to govern the exploitation of the natural resources of the Moon and other celestial bodies, states that "the interest and needs of the developing countries . . . shall be given special consideration." Regardless of the small number of nations that are party to this Treaty,[73] the relevance of this provision lies in the fact that the Moon Agreement was adopted by consensus within COPUOS. In addition, the principle that the needs of developing countries should be given special consideration is also contained in Principles 1 and 6 of the Direct Television Broadcasting Principles and in Principle II of the Remote Sensing Principles. Although intrinsically lacking binding force, these instruments, in the same way as the Declaration on Space Benefits, can constitute evidence of the general perception and practice of a given principle of law, thus acquiring binding effects by means of custom.

Broadening our perspective slightly, it is worth noting that the principle that international cooperation in space activities should take into particular account the needs of developing countries could also be read as a specific application of a more general international legal obligation to the space sector. This concept is expressed in international instruments such as United Nations General Assembly resolutions 1803 (XVII) ("Permanent Sovereignty over Natural Resources"),[74] 3384 (XXX) ("Declaration on the Use of Scientific and Technological Progress in the Interest of Peace and for the Benefit of all Man-

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[72] Declaration on Space Benefits, *supra* note 42, at ¶¶ 1 and 3.

[73] Thirteen, as of this writing in July 2012. *See* Treaty Status Index, UN OFFICE FOR OUTER SPACE AFFAIRS, http://www.oosa.unvienna.org/oosatdb/showTreatySignatures.do (last visited May 12, 2012).

[74] G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217, at pmbl. (Dec. 14, 1962).

kind")[75] and 41/128 ("Declaration on the Right to Development").[76] While each of these is a non-binding instrument, when considered together, they might be indicative of the customary law nature and the binding force of certain obligations.

Thus, the inclusion in the Declaration on Space Benefits of the principles that recognize the need to carry on space activities for the benefit of all mankind and to take into particular account the needs of developing countries in this respect can substantiate the existence of customary law principles, as supported by previous State practice and other evidence of *opinio juris*.

The scenario differs, though, when analyzing the other principles of the Declaration on Space Benefits, in particular Paragraphs 2, 3, and 4. Read together, these paragraphs state the absence of any mandatory form of international cooperation and assert the need to develop cooperative ventures that take into consideration both the interests of developed and developing countries. Putting aside any consideration of the practical significance and application of these provisions, we must determine whether the dual right and duty of space powers to determine their level of cooperation and to set equitable contractual terms for this cooperation can be regarded as expressing general customary law principles. One cannot deny that international cooperation in space activities has generally developed according to these principles since the beginning of the space era. Despite this expression of state practice, however, when considering earlier expressions of *opinio juris*, there was no clear manifestation of the States' unanimous recognition of the binding nature of these principles. On the contrary, as already highlighted, the controversy over the legal strength and specific terms of guidelines for international cooperation in space activities was ultimately the *raison d'être* behind the negotiations of the Declaration on Space Benefits.

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[75] G.A. Res. 3384 (XXX) U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034, at pmbl. and ¶ 4 (Nov. 10, 1975).

[76] G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/RES/41/128, at pmbl. and art. 4(2) (Dec. 4, 1986).

Nonetheless, the fact that these principles do not declare or consolidate pre-existing customary rules does not prevent them from becoming expressions of new *opinio juris*, agreed upon by both developed and developing countries. Where followed by consistent State practice, they would have already come to define new customary rules, or may do so in the future. This continuous State practice by the international community would demonstrate the shared perception that certain provisions of the Declaration fill an international normative gap or supply missing legal needs,[77] thus attaching the legal nature of international customs to these principles.

An examination of State practice following the adoption of the Declaration on Space Benefits indicates consistency between States' actual conduct and the principles enshrined in the Declaration. For example, the development of international cooperation in space activities on an equitable and mutually acceptable basis has been fostered through various bilateral agreements.[78] This principle has also been affirmed in multilateral contexts such as UNISPACE III,[79] during which States acknowledged the advantages of working together for common goals and identified bilateral and regional agreements, program-specific agreements, and transnational commercial activities as mechanisms to follow in order to enhance international cooperation in space.[80]

Similarly, paragraph 7 of the Declaration on Space Benefits, which advances the idea that the role of COPUOS should be strengthened as a forum for sharing information on space activities, was applied practically when the Legal Subcommittee

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[77] *See* Joyner, *supra* note 48, at 463.

[78] *See, e.g.*, Agreement between the Government of the Federative Republic of Brazil and the Government of Ukraine on technology safeguards associated with participation of Ukraine in launches from the Alcantara Launch Centre, pmbl., Jan. 16, 2002, 2298 U.N.T.S. 40946.

[79] Third United Nations Conference on the Exploration and Peaceful Uses of Outer Space (UNISPACE III), held in Vienna from 19 to 30 July 1999, U.N. Doc. A/CONF.184/6 [hereinafter UNISPACE III]; *see, e.g.*, Report on the United Nations/Brazil Workshop on Space Law on the theme "Disseminating and developing international and national space law: the Latin America and Caribbean perspective," (Rio de Janeiro, Brazil, Nov. 22-25, 2004), ¶ 27, U.N. Doc. A/AC.105/847, (Feb. 8, 2005).

[80] UNISPACE III, *supra* note 79, at 19.

agreed to add new agenda items like "General exchange of information on national legislation relevant to the peaceful exploration and use of outer space"[81] or "Information on the activities of international intergovernmental and non-governmental organization relating to space law."[82]

More generally, COPUOS Member States have further reiterated their acceptance and perception of the value of the general principles contained in the Declaration as part of the discussion within the Committee.[83] This is evident, for example, in the 2011 COPUOS "Report on international cooperation in promoting the use of space-derived geospatial data for sustainable development," according to which, "[i]n building up national infrastructure to use space-derived geospatial data for sustainable development, States should act in accordance with . . . the Declaration [on Space Benefits]."[84]

Fifteen years have elapsed since the adoption of the Declaration on Space Benefits and subsequent State practice has shown a general observance of the principles embodied in the instrument. Nonetheless, considering the unavoidable arbitrariness of the concepts of "state practice" and "customary law," it is too early to affirm with certainty that some of these principles can be regarded as international customary rules, especially in the absence of a decision by an international tribunal or their subsequent codification into a treaty.

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[81] This agenda item was agreed upon by COPUOS at its 46th session and subsequently endorsed by the General Assembly in its resolution A/RES/62/217 (Dec. 22, 2007). *See, e.g.*, Comm. on the Peaceful Uses of Outer Space, Legal Subcomm, *Rep. on its 47th Sess., 31 March–11 April 2008*, ¶ 131, U.N. Doc. A/AC.105/917 (Apr. 18, 2008).

[82] This agenda item was agreed upon by COPUOS at its 42nd session and subsequently endorsed by the General Assembly in its resolution A/RES/45/77 (Dec. 12, 1990). *See e.g.*, Comm. on the Peaceful Uses of Outer Space, Legal Subcomm, *Rep. on its 39th Sess., 27 March–7 April 2000*, ¶ 27, U.N. Doc. A/AC.105/738 (Apr. 20, 2000).

[83] *See, e.g.*, Draft Report of COPUOS on the implementation and recommendations of UNISPACE III, ¶ 9, U.N. Doc. A/AC.105/L.255 (Apr. 13, 2004).

[84] *Report on international cooperation in promoting the use of space-derived geospatial data for sustainable development*, ¶ 36, U.N. Doc. A/AC.105/973 (Mar. 21, 2011).

C. *The Declaration on Space Benefits as an Authoritative Means of Interpretation of Pre-existing Treaty Law*

The legal relevance of the Declaration on Space Benefits might also rest on its use as an authoritative means of interpreting Article I(1) of the Outer Space Treaty, whose terms are expressly recalled in the title of the Declaration.[85]

According to Article 31(3) of the Vienna Convention on the Law of Treaties,[86] whose provisions apply *erga omnes* and retroactively by means of their customary law nature,[87] when interpreting a Treaty, one should consider the context along with "(a) any subsequent agreement between the parties regarding the interpretation of the treaties or the application of its provisions; [and] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

The term "agreement" in Article 31(3)(a) does not limit the applicability of the provision to subsequently ratified treaties, but extends its scope to informal agreements such as those recorded in the minutes of a meeting or a press release.[88] According to Judge Weeramantry's dissenting opinion in the *Kasikili/Sedudu Case*,[89] the mere "understanding" between the parties would also qualify as an "agreement" within the meaning of Article 31(3)(a).[90] Regardless of whether one agrees with this last view, however, it is evident that a General Assembly resolution, especially where unanimously adopted by States, can fit within the broad interpretation generally attributed to the word "agreement" in Article 31(3)(a). In addition, while some authors believe that only acts performed with the intent to es-

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[85] TRONCHETTI, *supra* note 31, at 62.

[86] The Vienna Convention on the Law of Treaties, May 23 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

[87] *See, e.g.*, Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), Judgment, 1991 I.C.J. 53, ¶ 48 (Nov. 12); Gab íkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, ¶ 46 (Sept. 25).

[88] Hazel Fox, *Article 31(3)(a) and (b) of the Vienna Convention and the Kasikili/Sedudu Island Case, in* ISSUES OF TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON, 59, 63 (Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris, eds., 2010).

[89] Kasikili/Sedudu Island (Bots. v. Namib.), Judgement, 1999 I.C.J. 1045 (Dec. 13).

[90] Kasikili/Sedudu Island (dissenting opinion of Judge Weeramantry), at ¶ 24.

tablish a legal relationship could qualify as an "agreement" under Article 31(3)(a)[91] – thus indirectly excluding non-binding General Assembly resolutions from the scope of this provision – this view clashes both with the use of the general term "agreement" in the text of the Convention and with the jurisprudence of international tribunals.[92]

The Declaration on Space Benefits could also be regarded as "subsequent state practice" under the terms of Article 31(3)(b).[93] The never-ending doctrinal debate over the exact scope of State practice in international law notwithstanding, the majority of legal scholars see not only actual conduct, but also "paper practice" (*e.g.*, declarations or written agreements), as state practice.[94] Furthermore, even if the term "practice" generally implies that a State's conduct has occurred with a certain frequency,[95] there is nothing that formally excludes a State's declaration, a one-time occurrence, from being relevant as State practice. This is especially true, considering that the language of Article 31(3)(b) implies that the reiteration of certain conduct only functions to demonstrate that the parties agree to a given treaty interpretation.[96] Consequently, where a one-time action expresses the agreement of the parties, as in the case of the Declaration on Space Benefits, this conduct would qualify as "state practice" under Article 31(3)(b). Nevertheless, even if one rejects the latter argument and accepts that State practice exists only as a sum of consistent and continuous acts, the adoption of the Declaration on Space Benefits retains indicative value of exist-

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[91] ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 162 (2007); *see also* MUSTAFA KAMIL YASSEEN, L'INTERPRÉTATION DES TRAITÉS D'APRÈS LA CONVENTION DE VIENNE SUR LE DROIT DES TRAITÉS [TREATY INTERPRETATION ACCORDING TO THE VIENNA CONVENTION ON THE LAW OF TREATIES] 44–45 (1976).

[92] *See, e.g.*, United States-United Kingdom Arbitration Concerning Heathrow Airport Users Charges, Award of 30 November 1993, 102 I.L.R. 216; The Kingdom of Belgium, The French Republic, The Swiss Confederation, The United Kingdom and the United States v. The Federal Republic of Germany, Award of 16 May 1980 (Young Loan Case), 59 I.L.R. 495 (*quoted in* LINDERFALK, *supra* note 91, at 171–73).

[93] Pocar, *supra* note 57, at 419.

[94] Petersen, *supra* note 62, at 278.

[95] MARK E. VILLIGER, COMMENTARY ON THE 1969 CONVENTION ON LAW OF TREATIES 431 (2009).

[96] LINDERFALK, *supra* note 91, at 166.

ing State practice with respect to a certain interpretation of a treaty provision.

There are, however, two possible objections to the applicability of Article 31(3)(a) and (b) to the case at hand.

First, the general rules of interpretation set out in Article 31(3) "can only be invoked if all the parties of the treaty have been involved in the interpretation of a treaty provision or if one or more of the parties have been involved by means of an instrument or subsequent state practice to which the other parties have agreed."[97] The Declaration on Space Benefits was negotiated and adopted by consensus in COPUOS. The fact that the number of States that were (and still are) members of COPUOS is far less than the number of States that have ratified the Outer Space Treaty[98] might cast doubt on the validity of using the Declaration as an authoritative interpretation of Article I of the Outer Space Treaty. Nonetheless, the Declaration on Space Benefits was unanimously adopted as a Resolution of the General Assembly; hence, all the Parties of the Outer Space Treaty (all of whom are Members of the General Assembly) indirectly consented to it. Accordingly, the Declaration on Space Benefits would express the agreement of all the Parties to the Outer Space Treaty, regardless of the fact that only some of its Parties were part of its negotiation and adoption in COPUOS.

Second, there may be doubts as to whether the Declaration on Space Benefits can be viewed as an agreement "*regarding*" the interpretation of the Outer Space Treaty or as State practice "*in the application*" of this Treaty. For an agreement to be "regarding the interpretation of a treaty," it is necessary that its purpose is to clarify the meaning of a treaty or to set guidelines for its application.[99] State practice "in the application of [a] treaty" refers instead to any measure taken by a State on the basis of the interpreted treaty.[100] Is the interpretation of Article I(1) of the Outer Space Treaty the purpose for which the Decla-

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[97] VILLIGER, *supra* note 95, at 429.

[98] As of this writing in July 2012, COPUOS has 71 Member States and the Outer Space Treaty has 101 States Parties and 26 Signatories. For up-to-date information on treaty status, see Treaty Status Index, *supra* note 73.

[99] LINDERFALK, *supra* note 91, at 162.

[100] *Id.*

ration on Space Benefits was negotiated and adopted? Can this Declaration be regarded as a measure taken by States on the basis of the Outer Space Treaty? That the wording of Article I(1) of the Outer Space Treaty appears in both the title and the first operative paragraph of the Declaration on Space Benefits supports affirmative answers to these questions. In addition, as previously noted, it was the uncertainty over the vague wording of Article I(1) of the Outer Space Treaty that led developing countries to insist on the inclusion of a new item on the agenda of the Legal Subcommittee and that dictated the terms of the negotiations leading to the adoption of the Declaration. Furthermore, the strong link between the Declaration on Space Benefits and the need to clarify the exact meaning of Article I(1) of the Outer State Treaty is further confirmed by the fact that, as a first step in the drafting process, States were asked to report on any national legal frameworks related to the application of this provision.[101] Nonetheless, the question of whether such elements are enough to describe the Declaration on Space Benefits as an agreement whose main purpose is the interpretation of Article I of the Outer Space Treaty or as an action taken as a result of the Treaty is at least debatable, especially considering that no specific mention of this (agreed) intent appears either in the text of the Declaration or in its drafting records.

D. The Declaration on Space Benefits and the Duty of States to Act in Good Faith

The Declaration on Space Benefits might acquire legal relevance because when States adopted it, they created a legitimate expectation in the minds of other Parties that they would act in good faith. Despite the debate over the nature and effect of good faith in international law, it is evident that if this principle is considered a source of law,[102] a State's conduct can acquire legal significance from the expectation that the State would act in

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[101] U.N. Doc. A/AC.105/C.2/SR.519, *supra* note 3, at ¶ 1.

[102] In particular, good faith would fall under the terms of "general principles of law recognized by civil nations." Statute of the International Court of Justice, *supra* note 48, at art. 38(1)(c).

conformity in the future. It has been pointed out that good faith in its objective sense "is a powerful source of obligations, attaching *ex lege* certain consequences to certain courses of conduct."[103] These obligations arise because good faith requires that when one acts in a certain way so as to create a reasonable expectation in another party, that party should be able to rely on its expectation, regardless of the actor's real intent.[104] Historically, this interpretation seems supported by the *bona fides* principle's roots in natural law, which was conceived to induce States to consider the legitimate expectation of other international actors.[105]

If this acceptation of good faith is applied to the case at hand, a State's acceptance of the Declaration on Space Benefits could be regarded as carrying legal consequences regardless of its intent to be legally bound by it. As a result of the expectation created in the international community following the adoption of the Declaration, States would be required to respect the principles of international cooperation in space activities to which they had agreed. The reliance generated would be stronger for COPUOS Member States, due to their involvement in the negotiation and adoption of the Declaration within the Committee. On the other hand, it would not be limited to COPUOS Member States because of the Declaration's later unanimous adoption by the General Assembly. In addition, this expectation would apply both to the current and future space powers and, according to the terms of the Declaration, implies compliance with certain principles of international cooperation by both developed and developing countries.

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[103] Robert Kolb, *Principles as Sources of International Law (With Special Reference to Good Faith)*, 53 NETH. INT'L L.R. 1, 19 (2006).

[104] *See id.* at 17.

[105] Anthony D'Amato, *Good Faith*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 599, 600 (Rüdiger Wolfrum ed., 1992).