

A study on Moon and other Celestial Bodies as Common Heritage of Mankind with special reference to Section 11 of Moon Treaty under Space Law Regime – A Glimpse

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“...unless Article XI is satisfactory, there is no justification for this treaty”¹

Rosenfield

“Article 11 should be omitted as it creates international bickering and impedes initiative for future development of the moon resources”²

Theodore E. Wolcott

Abstract: The 20th Century is the advent of atomic energy and the pleasant event of space exploration. The launching of Sputnik by the former Soviet Union in 1957 has signalled the beginning of space race between two superpowers. Since then, the outer space activities increased tremendously with the passage of time. The race that began as bilateral has now become multilateral with the entry of several other states to the field of outer space. The states have also started to carry on specific missions directed towards various celestial bodies existing in the solar system. There are lot of loopholes together with the economic and political interests of the states have acted as obstacles in the acceptance of the Moon Agreement by the states. In the light of tremendous uncertainties in the provisions, the Moon Agreement is signed and ratified by only 13 states. In addition, 4 more states have signed the Agreement but not yet ratified it. This number being negligible, there exist doubts as to the binding nature of the Moon Agreement in the international level. This rapid growth has necessitated a legal framework to regulate the activities in the field of outer space.

Keynotes: *Article 11 of Moon Agreement, Benefits and interest of all countries, Freedom of Exploration, Use and Scientific Investigation, Protection and Preservation of the Moon and Other Celestial Bodies*

INTRODUCTION

The interests of the world community in the moon and other celestial bodies to search for lands is an advent of outer space. Consequently it was realized that the major human activities such as exploitation of the

¹Supra note 40.

²Theodore E. Wolcott, ‘Reaching for the Moon’, Proceedings of the Twenty-third Colloquium on the Law of Outer Space, 21 - 28 September 1980, Published in 1981, pp. 87 - 88 at p. 87.

resources and human settlement on the moon and other celestial bodies could start at any point of time³. The space plans of both United States and the Soviet Union during early 1960s reflected their interest in the moon and other celestial bodies as a means to outweigh each other in the power race. The landing of the spacecrafts and subsequently man on the moon showed that the moon would be the first victim of power race⁴. Consequently, the moon became the first celestial body on which a separate legal regime was felt necessary⁵. Subsequently with the rapid technological development, need for a comprehensive law for other celestial bodies also became evident. The law governing the moon and other celestial bodies revolves around the novel concept of CHM. So the purpose of this Chapter is to look into the process of incorporation of the concept into space law and to discuss the space treaty provisions relating to CHM. Article 11 of the Moon Agreement forms the focal point of the Chapter, which is supplemented by other provisions of the space treaties.

ARTICLE 11 OF THE MOON AGREEMENT

The Moon Agreement is intended to confirm and elaborate the provisions relating to the moon and other celestial bodies contained in the earlier space treaties⁶.

³In 1959, Ad Hoc Committee on the Peaceful Uses of Outer Space noted in its report that major human activities on celestial bodies were not likely in the near future and therefore their regulation “did not require priority treatment.” [U. N. Doc. A/4141 (14 July 1959)] But with the rapid development of the technology, it soon became evident that the problem might crop up in the near future.

⁴This being the fact, despite moon being a celestial body, a specific reference is made to the ‘moon’ apart from other celestial bodies in the space treaties. By making such specific reference the Contracting Parties wanted to give much emphasis to the moon, which attracted the interests of most of the states

⁵GC. M. Reijnen, ‘The History of the Draft Treaty on the Moon’, Proceedings of the Nineteenth Colloquium on the Law of Outer Space, 12 - 15 October 1976, Published in 1977, pp. 357 - 367 at p. 357.

⁶The Outer Space Treaty, the Agreement on Rescue and Return of Astronauts and Space Objects, the liability Convention and the Registration Convention.

This being the fact most of the provisions of the Moon Agreement are the replica of the provisions of the Outer Space Treaty. Rosenfield says, “there is no single provision or group of provisions worthy of a separate treaty”⁷. Some of the paragraphs, clauses or sentences in the articles of the Moon Agreement are new. But none of the article in the Moon Agreement is totally new. Article 11 is of special significance because of the fact that it contains some novel clauses that are not found in other space treaties. While speaking about the significance of Article 11, Rosenfield remarks that “The heart of the proposed Treaty is the Article XI provisions relating to exploitation of the resources of the moon and other celestial bodies. Without this provision the Treaty adds little to the treaties already in force”⁸. Article 11 primarily deals with the use, exploration and exploitation of resources of the moon and other celestial bodies⁹. The provision goes quite a few steps beyond the provisions of the Outer Space Treaty in dealing with the legal characterization of the resources of the moon and other celestial bodies¹⁰. This provision is the result of the knowledge of the fact that actual exploitation of the natural resources of the moon and other celestial bodies would be one of the most promising commercial prospects in the near future¹¹. However the text of the Article, being a compromise between opposing views on the status of the natural resources of the moon and other celestial bodies, is vague and has been subjected to differing interpretations¹².

CONDITIONS OF CHM IN SPACE LAW

⁷S. B. Rosenfield, ‘A Moon Treaty? Yes, But Why Now?’, Proceedings of the Twenty-third Colloquium on the Law of Outer Space, 21 - 28 September 1980, Published in 1981, pp. 69 - 72 at p. 71.

⁸ ibid

⁹Though the expression ‘other celestial bodies’ is not specifically mentioned, the provisions of the Moon Agreement are applicable to them by virtue of Article 1(1) of the Agreement. Article 1(1): The provisions of this Agreement relating to the moon shall also apply to other celestial bodies within the solar system, other than the earth, except in so far as specific legal norms enter into force with respect to any of these celestial bodies.

¹⁰D. Goedhuis, ‘The Conflicts in the Interpretation of the Legal Principles of the Moon Treaty of 1979’, Report of the Sixtieth Conference of the International Law Association, 29 August – 4 September 1982, Published in 1983, pp. 479 - 509 at p. 485.

¹¹H. L. Van Traa-Engelman, ‘The Moon Treaty - Legal Consequences and Practical Aspects’, Proceedings of the Twenty-third Colloquium on the Law of Outer Space, 21 - 28 September 1980, Published in 1981, pp. 73 - 77 at p. 75.

¹²P. P. C. Haanappel, ‘Article XI of the Moon Treaty’, Proceedings of the Twenty-third Colloquium on the Law of Outer Space, 21 - 28 September 1980, Published in 1981, pp. 29 - 33 at p. 29.

Article 11 of the Moon Agreement is the product of the efforts of the developing countries. However the differing interests of the developed and developing states have come in the way of its acceptance, especially by the developed states. The reluctance of the states to accept Article 11 has led to the non-ratification of the Moon Agreement by the majority of states. The states have also put forward their own interpretations to the provisions of Article 11¹³. The controversy on Article 11 has been particularly heated in the United States as it was considered to threaten its national interests¹⁴. The United States was of the view that the concept of CHM only denotes that access to land subject to the principle would be available to all, but did not embody any substantial rules or a predetermined legal regime to regulate activities. The developing countries, on the other hand, interpreted the principle as incorporating absence of private ownership rights, management by a multinational body and benefit sharing among all nations of the world, which the United States found adverse to its own interests¹⁵.

SPACE- ACTIVE STATE

The fact that none of the major space-active state is the member of the Moon Agreement brings forward the question as to the legal nature of CHM. It is also quite difficult to assert that a rule of customary international law is developed in relation to the concept of CHM in the governance of the moon and other celestial bodies. Some scholars argue on the customary international status of CHM on the basis of the fact that the Moon Agreement was accepted by every member of the COPUOS, including the US, in the COPUOS meeting¹⁶. However this is countered by the argument that the states accepted the Moon Agreement on the basis of differing interpretations of Article 11 of the

¹³Vladimir M. Postyshev, ‘WARC-ORB-85 and the Common Heritage of Mankind Concept in Space Law’, Proceedings of the Twenty-ninth Colloquium on the Law of Outer Space, 4 - 11 October 1986, Published in 1987, pp. 134 - 138 at p. 134.

¹⁴It is also argued that the concept is antithetical to the economic development of space resources. Lynn M. Fountain, ‘Creating Momentum in Space: Ending the Paralysis Produced by the “Common Heritage of Mankind” Doctrine’, Connecticut Law Review, Vol. 35, Summer 2003. (www.westlaw.org)

¹⁵Grier C. Raclin, ‘From Ice to Ether: The Adoption of a Regime to Govern Resource Exploitation in Outer Space’, Northwestern Journal of International Law and Business, Vol. 17, No. 4, Fall – Winter 1986, pp. 727 - 761 at pp. 738 & 739.

¹⁶Armel Kerrest, ‘Outer Space: res communis, common heritage or province of mankind?’ [http://fraise.univ-brest.fr/~kerrest/IDEI/ Nice -appropriation.pdf (Accessed on 13 October 2006, 5:11 pm)]

Moon Agreement and therefore there was no *commun opinio juris*.

ABSENCE OF RECOGNITION

The absence of explicit or implicit recognition of state practice in this field also negates any consideration of CHM in its application to the moon and other celestial bodies as part of *jus cogens*¹⁷. But this should not be a reason for considering the concept of CHM as a mere political or philosophical concept with no legal content¹⁸, though it is true that the acceptance of the concept by the developed states is necessary to strengthen the concept in the legal sense. Despite the fact that a generalized assent of the states regarding CHM cannot be inferred, the sheer volume of resolutions, draft and effective agreements indicates nevertheless that the CHM is entrenched in contemporary international affairs, and that at least some aspects of the doctrine have attained legal status¹⁹. In this direction, it is also worth to note here that some of the elements of CHM are accepted by majority of the states under other treaty provisions.

BENEFITS AND INTERESTS OF ALL COUNTRIES

The Outer Space Treaty declares that the exploration and use of the moon and other celestial bodies shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development²⁰. The Moon Agreement repeats the same provision without any modification²¹. The provision strongly propagates the legal right of all states over the fruits of exploration and use of the moon and other celestial bodies²². According to the Soviet delegate to the COPUOS, the common interest clause is not just a statement of the rights of states, but a “guarantee that the interests, not only of individual states, but of all countries and of the international community as a whole, would be protected”²³. However the benefit and interest of all countries should not be misconstrued with the concept of CHM. The concept of CHM is much wider in its application. It encompasses the political units like states and covers

even the people in non self-governing territories²⁴. So benefit and interests of all countries is only a part of CHM and not CHM as a whole.

FREEDOM OF EXPLORATION, USE AND SCIENTIFIC INVESTIGATION

The principle of freedom as applicable to the outer space, the moon and other celestial bodies was rapidly established in the international relations, initially through the implied consent of the states and later through the General Assembly resolutions and space treaties²⁵. Both the Outer Space Treaty and the Moon Agreement explicitly state that the states are free to explore and use the moon and other celestial bodies and conduct scientific investigations therein²⁶. All the areas of the celestial bodies are subject to free access by the states without any discrimination. The principle of freedom under the space treaties is closely linked to the fact that the outer space, the moon and other celestial bodies are not subject to claims of sovereignty²⁷. The freedom of access, exploration and use of the moon and other celestial bodies are also available to natural and juridical persons other than states²⁸. However these freedoms are neither absolute nor unqualified²⁹. They are qualified by several restrictions imposed in both the treaties.

COOPERATION BETWEEN STATES³⁰

The above-mentioned freedom principle offers rights of freedom of access, exploration and use of the moon and other celestial bodies, and freedom of scientific investigation herein. However it is only some developed countries which can actually exercise these rights. International cooperation is necessary for the

¹⁷David S. Myers, ‘Is there a “Common Heritage of Mankind?”’, Proceedings of the Thirty-third Colloquium on the Law of Outer Space, 6 - 12 October 1990, published in 1991, pp. 335 - 337 at p. 336.

¹⁸See *Ibid.*, pp. 335 & 336.

¹⁹Supra note 32, p. 534.

²⁰Article I of the Outer Space Treaty.

²¹Article 4 of the Moon Agreement.

²²Bin Cheng, *Studies in International Space Law*, (Oxford: Clarendon Press, 2004) p. 234.

²³U.N. Doc. A/AC.105/C.2/SR.57 (12 July 1966) p. 12.s

²⁴Christopher C. Joyner, ‘Legal Implications of the Concept of Common Heritage of Mankind’, *The International and Comparative Law Quarterly*, Vol. 35, No. 1, January 1986, pp. 190 - 199 at p. 195.

²⁵Supra note 148, p. 430.

²⁶Article I of the Outer Space Treaty and Article 6 of the Moon Agreement.

²⁷Paul B. Larsen, ‘Moon and Mars Exploration and Use’, *Proceedings of the Forty-seventh Colloquium on the Law of Outer Space*, 4 - 8 October 2004, Published in 2005, pp. 370 - 376 at p. 371.

²⁸Supra note 160, p. 220.

²⁹Narendra Singh, ‘Legal Status of Outer Space’, in R. C. Hingorani (ed.), *International Law Through United Nations*, (Bombay: N. M. Tripathi Private Limited, 1972) pp. 125 - 130 at p. 127.

³⁰See generally E. Kamenetskaya, ‘Cooperation Among States in the Exploration and Use of Outer Space - One of the Basic Principles of International Outer Space Law’, *Proceedings of the Nineteenth Colloquium on the Law of Outer Space*, 12 - 15 October 1976, Published in 1977, pp. 299 - 302.

exercise of these rights by the developing countries³¹. So cooperation is undoubtedly a major theme of international space law³². This need for international cooperation was recognized by the scholars even before the beginning of space flights³³. Though the extent of such cooperation is not specifically mentioned, the space treaties contain several provisions on international cooperation in carrying on activities on the moon and other celestial bodies³⁴. In fact the need for cooperation between the states is highlighted in all the five major treaties relating to the outer space.

PROTECTION AND PRESERVATION OF THE MOON AND OTHER CELESTIAL BODIES

The duty to protect and preserve the moon and other celestial bodies and the resources therein is one of the major qualifications to the freedom to use, explore and exploit the moon and other celestial bodies. The present generation's rights to use and enjoy the fruits of the exploration and exploitation of the moon and other celestial bodies should not infringe the rights of the succeeding generations. Therefore, since from the beginning of technological advancement resulting in extraterritorial exploration of the cosmos, the protection of the celestial environment has become an area of concern for professionals in the scientific community³⁵. The intensive exploration of the moon and other celestial bodies has confronted international law with the new problems relating to the development of legal principles and norms designed to prevent the harmful effect of the human activities on the moon and other celestial bodies.

CONCLUSION

The concept is applied only in the governance of the moon and other celestial bodies and not in the

governance of the outer space as a whole. Further as discussed in this Chapter, the provisions relating to CHM are subjected to varying interpretations by the states depending on their self - interests. The failure to provide a clear definition of CHM and postponement of the establishment of the international regime to govern the natural resources of the moon and other celestial bodies constitute major deficiencies in the Moon Agreement. The ambiguous nature of the Moon Agreement is further accentuated by the provision allowing the States Parties to collect and remove samples of minerals and other substances from the moon and other celestial bodies for scientific investigations and for using them in support of the scientific missions.

³¹Supra note 95, p. 133.

³²Jonathan F. Gallo way, 'Cooperation, Conflict and Competition in Space Law', Proceedings of the Forty-sixth Colloquium on the Law of Outer Space, 29 September - 3 October 2003, Published in 2004, pp. 2 - 8 at p. 2.

³³John Cobb Cooper, Schachter, Meyer, Welf Heinrich, Prince of Hanover and Joseph Kroell were the early scholars who urged that international cooperation is the only means to achieve and guarantee peaceful use of space and travel therein, and therefore immediate steps be taken toward achieving such cooperation. See Stephen E. Doyle, 'Concepts of Space Law Before Sputnik', Proceedings of the Fortieth Colloquium on the Law of Outer Space, 6 - 10 October 1997, Published in 1998, pp. 3 - 13 at p. 4.

³⁴Supra note 95, p. 133.

³⁵Patricia M. Sterns and Leslie I. Tennen, 'Protection of Celestial Environments Through Planetary Quarantine Requirements', Proceedings of the Twenty-third Colloquium on the Law of Outer Space, 21 - 28 September 1980, Published in 1981, pp. 107 - 120 at p. 107.