

THE ROAD TO AN INTERNATIONAL AGREEMENT ON COMMERCIAL UTILIZATION OF OUTER SPACE

by

H. Priyatna Abdurrasyid *)

Discussing "commercial utilization of outer space", one should make prior study of the legal status of outer space. This legal status is set out in Space Treaty of 1967¹⁾ which by the international community is treated as "the Magna Carta of Outer Space",²⁾ even some principles, such as "the common heritage of mankind", "peaceful purposes", as *ius cogen*.³⁾ This treaty contains principles of the procedures of exploration and use of outer space, the moon and other celestial bodies. Several principles which in the opinion of the writer worth noting if commercial utilization of outer space is going to be discussed are as follows :

- Is not subject to national appropriation.

- Exploration and use of outer space should be carried on for the benefit of all peoples irrespective of the degree of their economic or scientific development.

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* Honorary Director, International Institute of Space Law.

- Outer space, including the moon and other celestial bodies shall be the province of all mankind.
- Outer Space, including the moon and other celestial bodies shall be free for exploration and use by all states.
- The moon and its natural resources are the common heritage of mankind.

Furthermore, this Space Treaty 1967 also outlines the purpose of exploration and use, i.e. as follows :

- 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.
- Outer space, the moon and other celestial bodies shall be free for exploration and use by all states without discrimination of any kind, on a basis of equality and in accordance with international law, including the Charter of the United Nations.
- Exploration and use shall be guided by the principle of co-operation and mutual assistance.

All countries including the developing countries, which although have not signed and ratified Space Treaty heretofore, in general honour the contents thereof.⁴⁾ The attitude adopted by all these countries has resulted from the fact that in reality the principles of this Treaty constitute the substance of the Declarations and Resolutions of UNGA far before this Treaty was established. Some are worth mentioning herein, for example Resolution 1148 (XII) of 14th November,

1957 to the effect that the sending of rockets into space should be undertaken exclusively for peaceful purposes⁵⁾; UNGA Resolution 1348 (XIII) 13th December, 1958 regarding "Questions of the peaceful uses of outer space⁶⁾"; Resolution 1472 (XIV) of 12th December, 1959 regarding "International Cooperation in the Peaceful Uses of Outer Space"⁷⁾; UNGA Resolution 1721 (XVI) of 20th December, 1961 regarding "International Cooperation in the Peaceful Uses of Outer Space⁸⁾"; UNGA Resolution 1962 (XVIII) of 13th December, 1963 regarding "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space"⁹⁾.

It appears that the principles set out in such previous Declarations and Resolutions as a whole constitute principles honoured by all, because morally states are bound by them¹⁰⁾. So that the inclusion of such principles in Space Treaty 1967 has aroused the observance of all technological advanced as well as developing countries. And if we follow the development of the exploration and use of outer space so far, there will be seen what was said by Michel BOURELY,¹¹⁾ as follows :

"If we attempt to characterize the evolution of activities in space over the 30 years which have elapsed since the launch of Earth's first artificial satellite, three periods can be identified : exploration, utilization and profitable exploitation. We can also say, in an equally simplistic way, that space activities with scientific and hence inherently neutral aims have been succeeded by activities in the general interest, aiming to make use of space for practical means Nowadays there is a dominant idea that space can be a source of gain for the economy and must, consequently, be opened to firms whose principal motivation is the making of profit".

In practice, the view of BOURELY has been widespread and has been supported by facts everywhere. It is only that if we notice the main stipulations applicable on outer space which form principles contained in Space Treaty 1967, can they accommodate the activities of this commercial utilization? To a greater extent if they are connected with Article II that outer space including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means. Whether or not the use or by any other means can be construed as legally justifying commercial utilization of outer space so far. One may commercialize something if he has the proprietary right to that something or at least is authorized to do so by the lawful owner of that right. In this case Space Treaty 1967 explicitly sets out that outer space is "the common interest of all mankind", or "the province of all mankind", so that it seems impossible for any one to own it or to act as the owner or a trustee, except for "the common interest of all mankind". The term "the common heritage of mankind" is in principle derived from the term "Res communis"¹²⁾, meaning things common to all which can never be Res exclusively owned by anyone. The term "the common heritage of mankind" is essentially equivalent to "the common interest of all mankind" and "the province of all mankind". As can be read in the Moon Agreement, in Article 4 a phrase "the province of all mankind" is mentioned, while in Article 11 "the common heritage of mankind". All such terms can be construed as seemingly giving the opportunity to get "the right to use", provided that such "right to use" is for "the benefit of all". Let us study the literal meaning of the word commercialization which according to BLACK'S Law Dictionary¹³⁾ is derived from the word commercialize (or commerce), meaning the exchange of goods, production, or property of any kind; the buying, selling and exchange of articles. While WEBSTER'S Dictionary of Synonyms¹⁴⁾ states

that "commercial" may be used in reference to anything, which has to do with the buying or selling of commodities for profit, with their transportation, and sometimes, even with their production, or with business affairs in general. The CONCISE OXFORD Dictionary¹⁵⁾ states that "commerce" is the exchange of merchandise or services on a large scale. Therefore, a question arises whether Space Treaty of 1967 justifies commercial utilization of space by any state or the private sector. This Treaty by no means directly suggests that space may be commercialized. Remote sensing is not regulated by Space Treaty of 1967, however in reality this activity constitutes one of the ways of commercialization which is much practised by certain states, either governmental or non-governmental¹⁶⁾. See also the telecommunications area. Therefore, explicitly (by common practice)¹⁷⁾ countries have never presented any objection to space-related activities in respect of commercialization. For the sake of legal certainty, let us look into the provisions in Space Treaty of 1967 which may provide a loophole, which directly or indirectly asserts that outer space may be commercially utilized, or at least does not prohibit the same, of course by complying with the conditions which have been mutually agreed upon. If we read and study the principles contained therein, it appears that the Treaty, beside being guided by its standard principles, is also guided by the principles of philosophy of men in relation to the procedure of its utilization.¹⁸⁾ This is revealed through principles, such as "the common interest of all mankind", "the principle of peaceful co-existence among states and of establishing co-operation in the best possible manner in any of states efforts to accomplish the peaceful exploration and use of outer space". Let us go over the meaning of the words exploration and use.¹⁹⁾ Here it appears that the word exploration is always used in conjunction with the word use. Not a single state will use outer space if the use thereof is to its detriment. Moreover, if the word use is connected with the basis of philosophy, such as "peaceful",

"for the benefit of all people", "the common interest of all mankind", "broad international cooperation", etc. In this case, the word **use** accompanied by the principles of "the common interest of all mankind", "the province of all mankind", and "the common heritage of mankind" may also be interpreted as one of the ways of utilization of reasonable profit seeking (commercial), provided that the provisions set out in the Space Treaty are complied with. Is the principle of "freedom of exploration and use" for the benefit of "States" only and not for non-governmental bodies, organizations or private companies. If we look into the history of the formulation of this principle, there were 2 opposing opinions between the 2 super powers, and in this case the opinion of (the former) USSR who took the view that space activities were to be a "State monopoly".²⁰⁾ The USA, on the other hand, wanted to maintain the principle of free enterprise and therefore wished to avoid any limitation in any way. The compromise which resolved this dispute was in inserting the wording which become Article VI of the treaty, which contains the wordings : international responsibility for national activities in outer space,, whether such activities are carried on by governmental agencies or non governmental agencies. Another condition concerning the use of outer space is : "in accordance with international law, including the Charter of the United Nations". Before we proceed and analyze the words "including the Charter of the United Nations", Article 4 of the Moon Treaty should be noted first stating among others :

- The moon shall be the province of all mankind
- Exploration and use of the moon shall be carried out for the benefit and in the interest of all countries, irrespective of their degree of economic or scientific development;

Due regard shall be paid to the interest of present and future generations as well as to the need to promote higher standards of living and conditions of economic and social progress and development in accordance with the Charter of the United Nations (emphasis added).

Now examine carefully Article 55 of the Charter of the United Nations²¹⁾ to the effect that :

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote :

- a. higher standards of living, full employment, and conditions of economic and social progress and development
- b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion (emphasis added).

And Article 56 :

All members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55 (emphasis added).

The Legal Sub-committee²²⁾ at its 13th session, Agenda Item 5, New York, 25 March - 12 April 1991, DOC. A/AC.105/484, 5 April 1991, Annex III, have completed the report of the Chairman of the Working Group on Agenda Item 5 (Consideration of the legal aspects related to the application of the principle that the exploration and utilization of outer space should be carried out for the benefit and in the interest of all states, taking into particular account the needs of developing countries) It contains among others the following opinions :

- members are invited to submit their views as to the priority of specific subject under Agenda Item 5, and to provide information on their national legal framework, if they have any, relating to the development of the application of the principle contained in article I of the 1967 Treaty;
- the development of mechanism for financing international cooperation were of great importance;
- the Working Group should produce legal principles that would give guidance to the international cooperation and on sharing equitably and without discrimination the benefits derived from the exploration and use of outer space.
- to make operational a system of international cooperation under which developing countries could obtain access to outer space benefit;
- two principles should be respected, namely the equitable sharing of outer space benefits and the preservation of the space environment;
- the legal principle regulating the exchange of goods and services required for outer space activities should be formulated, and a market of space technology should be established.

- such matters as equitable access to those goods and services by all states without discrimination, fair compensation payable for such access, and establishment of a system for the transfer of space technology (emphasis added).

The previously mentioned subject matters should be taken into account in the discussion of legal aspects of commercial utilization of outer space. The term "commercialization" has explicitly been reaffirmed in Agenda Item 5 through the opinions of a number of states. The opinion are as follows, among others :

- equitable access to those goods and services by all states without discrimination;
- fair compensation payable for such access;
- establishment of a system for the transfer of space technology
- to establish a market of space technology

Concluding Remarks.

In conclusion, let us look into the matter from the following point of departure : what is the benefit obtained from space technology. Space technology has brought unprecedented benefits to mankind, although up to the present day more for the developed than the developing countries. The problem faced by the developing countries is how to choose and develop national space systems, if they have any, for their maximum benefits. Certain benefits can be gained by these developing states,²³⁾ these are :

" Social improvement through the availability of better facilities such as telecommunications, television, weather forecasting, natural resources management through remote sensing, etc ;

Increase in the scientific knowledge about the Earth and its surroundings.

Increase in the study and application of better technology for their national reconstructions.

For example, possessing a telecommunication system via satellite has enhanced the development of Indonesia; although as one may have expected not only its commercial aspects which become conspicuous, but other aspects such as socio-cultural which become prominent, thus demanding juridicial attention. For industrially advanced states, especially the space powers which have been engaged in the export of space technology and other commercial utilization of outer space, it will become necessary to find ways and means of regulating their conducts by taking into account of the situation and conditions prevailing in the countries of export destinations. Although the export market for space technology, goods and services is still in its infancy, but trends indicate definite economic growth in prospect. In the western countries private companies are increasingly keen to find a foothold or increase their share in the ever-widening market. Competition in this market is sharpening. Political conflict is arising based on this competition and on the potential dual use of some space technologies for civilian and military purposes. There should be accepted regulations for instance, to be applied to technology using nuclear power. Private companies seek to undertake any activity that is institutionally and technologically feasible and that promises a high return on investment. But two factors may hamper the efficient commercial utilization of outer space,

first the lack of the necessary infrastructure, among others the legal regulations, and secondly the lack of viable commercial activities, that identify valid commercial use of space (activities) which are still relatively limited and the economic results remain below even the most optimistic estimates. And Space Law has only responded in a limited way to these activities. Space Treaty has brought forward the fundamental principle of freedom of enterprise, which is the basis of commercial utilization of outer space. But the basic principle has not been translated into national and international legislations except in a limited number of countries. On the other hand, the international community has experienced that today it is increasingly difficult to reach consensus on statutes to govern previous (and future) space activities. Therefore we must invent the most suitable and effective technique of space legislation and in this regard regulations on commercial utilization of outer space. Subsequently, the international community is obligated to elaborate the principles contained in the international consensus which has been reached, especially in regard to outer space as set out in Space Treaty of 1967. These efforts have long been made through UNCOPOUS and by non-governmental international bodies and in this case IAF, IAA dan IISL.²⁴⁾ All such efforts need legal certainty and similarity in the evaluation of the law. Even in commercial utilization of outer space we require legal certainty and similarity of opinion or interpretation of space law laid down on outer space. Therefore, the guiding legal principles set out in the preamble and articles of Space Treaty 1967 should be further elaborated, chiefly in regard to "for the benefit of all peoples irrespective of the degree of their economic or scientific development and international co-operation in the scientific as well as the legal aspects of the exploration and use of outer space for peaceful purposes".

Emphasis of elaboration of the Space Treaty contents can be given on the words "benefit of all people", "international cooperation", "peaceful purposes" and "friendly relation ". Various efforts and activities through commercial utilization of outer space can attain, as asserted by the Charter of the United Nations, higher standard of living, full employment and conditions of economic, social, health and related problems such as international cultural and educational cooperation, human right and clean world environment. It has been a system of legal establishment which has so far been adopted by UNCOPUOS, i.e. by way of elaborating the principles therein contained by creating specific rules, such as the conclusions of the Rescue Agreement 1968, the Liability Convention 1971, the Registration Convention 1976, the Moon Agreement 1984, the Principles Governing the Use by States of Artificial Satellites for International Direct Television Broadcasting. The Principles Relating to Remote Sensing of the Earth from Space and now there are being prepared principles of the Use of Nuclear Power Source in outer space and definition and delimitation of air space and outer space including the geostationary orbit.²⁵⁾ Specifically in matters relating to commercial utilization of outer space, it is high time legal principles were also prepared by UNCOPUOS.

In trying to discuss it, it will be advisable to consider what was said by DIEDERIKS-VERSCHOOR²⁶⁾ ,as follows :

"Every branch of international law has its own particular rules and principles, and air law and space law are no exception. They each constitute an independent system of law. Nevertheless, it is possible to discern a certain relationship, a certain kinship, between the two. As each field of human endeavour becomes wider, expanding to a point where legal rules must be created, there is always a tendency first to resort to existing law. When, however, there are no precedents to fall back on, entirely new rules must be devised".

It is also interesting to connect what was said by EILENE GALLOWAY 27) with the establishment of these principles of commercial utilization of outer space, i.e. as follows :

"There are four types of international law relating to outer space, namely :

1. the law which applies solely to outer space (of course there is no problem here with sovereignty, as indicated above);
2. the law which applies to the earth, airspace and outer space, as an environment;
3. the law applies to functions performed in outer space, and occasionally including airspace; and
4. the law applies essentially to activities performed on the earth, as a consequence of the exploration and particularly the uses of outer space. Earth resources survey satellities come under this fourth category of international law.

So far, the international community always seeks to cooperate, whether among advanced technological states only, or with developing states through certain form in the effort to utilize space benefits. Even commerce is an interesting and useful form for the development and reconstruction of each state. Cooperation in commercial utilization of outer space through International Commercial, Business and Trade Law may well be carried out. The legal guiding principles in commerce are consistent with what are set out in the Space Treaty, viz for the benefit of all peoples irrespective of the degree of their economic or scientific development and broad international cooperation. Furthermore, there should also be noted the specific principles of Commercial Law, such as certainty, flexibility, knowability and reasonableness.28)

FOOTNOTES:

1. Treaty on Principles Concerning the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies, Done at London, Moscow, and Washington, January 1967.
2. See: LACHS, Manfred: The Law of Outer Space, Leiden, 1972
3. PRIYATNA, Abdurrasyid : Developing Countries and the Use of the Geostationary Orbit, ACTA ASTRONAUTICA, Special Issue, The Use of the Geostationary Orbit, Guest Editor Eilene GALLOWAY, Vol.17 Number 6, June, 1988.
4. Ibid.
5. BOCKSTIEGEL, Karl-Heinz, and BENKO, Marietta, Space Law, Basic Legal Document, Vol.I, Martinus Nijhoff Publishers, Dordrecht/Boston/London.
6. Ibid.
7. Ibid.
8. Ibid.
9. Ibid.
10. Supra Note 3.
11. BOURELY, Michel, Space Commercialization and the Law, Space Policy, Vol.4 Number 2 May 1988, p.131.
12. CHRISTOL, Carl Q., The Modern International Law of Outer Space, Pergamon Press, 1982,; also by the same Author, The Legal Common Heritage of Mankind : Capturing an Illusive Concept and Applying it to World Needs, Proceeding of the 18th Coll. on the Law of Outer Space, Sept. 21-27, 1975 Lisbon; Outer Space Exploitability, International Law and Developing Nations, Space Policy, Vol.6 Number 2 May 1990, GOROVE, Stephen, Studies in Space Law : its challenges and Prospects, Leiden, 1977, p.65.

13. Black's Law Dictionary.
14. WEBSTERS Dictionary.
15. THE CONCISE ORFORD Dictionary.
16. BOCKSTIEGEL, Carl-Heinz, Reconsideration of the Legal Framework for Commercial Space Activities, Proceeding of the 33rd Coll. October 6-12, 1990, Dresden, Germany; HE QIZHI, Legal Aspect of Commercialization of Space Activities, Proc, 33rd. Coll, Dresden, Germany.
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18. Supra Note 2.
19. Supra Note 16.
20. Supra Note 11.
21. Charter of the United Nations.
22. Doc. A/AC.105/484, 5 April 1991, Annex III.
23. RAJAN, Y.S., Benefits From Space Technology, A View from a Developing Country, Space Law, Vol.4 Number 3 August 1988., p.221.

24. JASENTULIYANA, Nandasiri, Space Law and the United Nations, Annals of Air and Space Law, Vol.XVII - 1992, Part I.
25. Ibid., Supra Note 3.
26. DIEDERICKS - VERSCHOOR, I.H.Ph., Similarities with and Differences Between Air and Space Law, Primarily in the Field of Private International Law, (Extract from the Recueil des cours, Vol.172).
27. Ibid
28. HOWEL, Rate A., ALLISON, John R., HENLEY, N.T, Business Law, 1982.