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DOMINIUM LUNAE, PROPRIETAS LUNAE.

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Abstract.

Legal History has shown an extensive debate about the question whether the Moon (and other celestial bodies) could be annexed, appropriated, occupied or not, according to *lex lata*.

The *res nullius* theory was of the opinion that the Moon, like an uninhabited newly discovered terrestrial island, could be occupied. This was the opinion of (in alphabetical order) *Bin Cheng, Fasan, Haley, Jenks, Kovalev and Cheprov, Mc. Dougal, Rauchhaupt, Verplaetse,*, etc. and of the *American Bar Association.*

Another position was that of the *res omnium* communis or *res extra commercium* theory. The Moon were free for the use of all, like the high seas. That was the opinion -among others- of *Cocca, Diederiks Verschoor, Keating, Menter, Meyer, Munro, Smirnoff, Tamm, Valladao.* Both schools requested a solution *de lege ferenda,* preferably within the framework of UN.

This solution was found on Dec. 20., 1961 by the unanimously accepted United Nations General Assembly (U.N.G.A.) Resolution 1721/16 which negated the appropriation of any celestial bodies, and requested their use for peaceful purposes only.

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These principles were repeated in U.N.G.A. Resolution 1962/18. Finally the „Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies" of Oct 10., 1967 once more repeated these notions. Now, the non appropriability of celestial bodies was treaty law, and the said Space Treaty was signed and ratified by most Nations, including the space faring ones. Consistently, the following manned and unmanned Moon landings brought about no claim of sovereignty.

For eight years, the UNCOPUOS and its Legal Subcommittee (LSC) discussed a draft text for specific regulations regarding the Moon and other celestial bodies. It resulted in the Agreement Governing the Activities of States on the Moon and other Celestial Bodies of Dec. 18.,1979.

This agreement however, was not ratified by more than 9 Nations, and the Space powers were reluctant to do so. Especially the „Common Heritage of Mankind" principle made States cautious and reluctant.

On Dec 9., 1994 the U.N.G.A. decided not to take action regarding a revision of the Agreement, although the ten year period, foreseen for such a revision, had elapsed.

New deliberations and discussions are necessary in order to reconcile the interests of those States which reach the Moon and want to exploit its natural recources on the

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one hand, and the common interest of all terrestrial Nations in an appropriate sharing on the other hand. It would be detrimental for all mankind if due to an unclear legal situation the hiatus in expeditions to the Moon and other celestial bodies would be extended too long. It would be illogical to protect natural resources on the Moon more strictly than those on Earth. The Moon should remain free but ist natural resources should serve mankind.

1) A short Legal History

No one shall own the Moon!

This was the final result of a heated scientific debate in the late fifties and the sixties of our century. There were two -or rather three- legal theories about the juridical qualification of the Moon and other (accessible(1)) celestial bodies.

One was the *res nullius* theory, which said in short that the Moon and the planets- like uninhabited islands on Earth - were no mans land, and therefore could be occupied by any state whose expeditions landed there and hoisted that nations flag *animo occupandi*.

The other school was that of the *res omnium communis* theory. The Moon and other celestial bodies were free for the use of all nations, like the High Seas (or-by way of the Treaty-Antarctica). Therefore celestial bodies could not be occupied by any nation.

A third school gave the Moon a special legal status.

How, then, argued these schools? There were many scholars involved. To pay them tribute, a few quotations are in order, arbitrarily starting with the *res nullius* theory:

Haley, one of the creators of the Space Law Sciences, pointed out:
„The Moon may be alighted upon by human beings within the next five or ten years, and if in the meantime we do not reach an understanding concerning the Moon, the nations achieving this great scientific acquisition may well, under the classical principles of terrestrial international law, claim sovereignty over the Moon."(2)

Bin Cheng said very clearly:
„What of laws for the Moon and the planets? In law, extraterrestrial bodies are not greatly different from territories on the Earth which are not subject to the sovereignty of any State. Accordingly any State may annex such territories through effective occupation."(3)

Jenks thought about our question convincingly::
„The ideal Arrangement would indeed appear to be that sovereignty over unoccupied territory in the moon or other planets or satellites should be regarded as vested exciusively in the United Nations. Failing such a solution, title to territory would have to be determined by applying the usual rules concerning discovery and occupation with any necessary adaptations, and problems analogous to those which arose during the partition of Africa, and even more closely analogous to those which have arisen more recently in the Antarctic, might well arise."(4)

Rauchhaupt pointed out:
„On the safe (and permitted) arrival at the uninhabited (or inhabited) territory the crew can claim it according to public international law, and they may make use of its national treasures as far as they are accessible. Unsystematic destruction or spoils ought to be illegal."(5)

McDougal wrote:
„Most claimants, while asserting their own rights to engage in such sharable activities, will probably acknowledge or at least not deny that others may do the same. Like many traditional claims in public and private international law, these claims will carry a promise of reciprocity, combined wherever possible with latent or expressed

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threats of retaliation or reprisal if the complementary promise is dishonored." *(6)*

Huss said sharply accentuated:
„Columbus stuck the Spanish Flag into the sands of a West Indies beach - and we or the Russians would be perfectly within the concept of international law to claim possession of the Moon by shooting our national flag there by rocket."(7)

The American Bar Association in 1959 had very carefully and extensively investigated the Legal Problems of Outer Space, and had found as follows:
„We may look to similar ventures in space. These should not be precluded by claims made on various grounds to 'sovereignty' over such bodies; nor should their acceptability depend on the recognition of any such claims."(8)

and had resolved:
„That in the common interest of mankind outer space should be open to all for exploration, research, development, navigation, and other comparable non-aggressive uses, and that celestial bodies should not be subject to exclusive appropriation."(9)

As for *myself,* I may quote the following sentence:
„The accessible Celestial Bodies are res nullius, because they have not yet been acquired for the Whole of Humanity."(10)

Lipson and Katzbach of the *American Bar Foundation* had done an enormously valuable work by gathering numerous points of view regarding Space Law Problems for NASA. From this very basic investigation I may quote the following sentences:
„Whoever gets to the moon first can claim it."

„Traditional conditions of acquisition of new territory are. 1)discovery; 2) symbolic annexation; occupation sufficient to insure the status of the claimed territory, will probably be applied to the Moon."(11)

Cocca, who was often cited as being against the possible occupation of a Celestial Body, wrote, demonstrating existing International Law:
„Neither can any terrestrial nation which might be able to carry out the successful occupation of the Moon extend its own sovereignty to cover it. It will have temporary supremacy in the sense that it will reap the benefits derived from the occupation of the Moon, but will not have sovereignty in the strictest sense."(12)

Kovalev and Cheprov expressed their points of view as follows:
„Man's conquest of the celestial bodies may pose the question of state Possession. This question, evidently, will be decided by taking into account the known method of international law in acquiring territory, namely, the law of 'first discovery' and 'occupation'."(13)

For the other. the *res omnium communis* theory, we may quote the following opinions:

Sir Leslie Munro stated clearly:
„that international law as we know it in respect to the acquisition of title by occupation and possession and settlement is not applicable to celestial bodies."(14)

The well known words of *Hammarskiold,*
„that outer space, and the celestial bodies therein, are not considered as capable of appropriation by any state. may be recalled (15).

Rivoire was against the possibility of occupation, writing:
„it would be an analogy to say that France and Switzerland lay claim to sovereignty over the depths of the ocean as their nationals were the first to penetrate to the bottom of the sea in bathyscaphes. This would be considered to be sheer nonsense, and it is no less ridiculous for a state to lay claim to sovereignty over a planet."(16).

Smirnoff stated:

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„We think that the classic principle of sovereignty of the State over the space above its territory has no application to outer space."(17).

Meyer reported about the ILA Conference in August, 1960:
„Mrs. Diederiks Verschoor (Netherlands) repeated, that the Celestial Bodies are res omnium communes, incapable of any occupation."(18).

Meyer himself was one of the most famous scholars voting in the same direction. He wrote for instance:
„Celestial Bodies are for me not res nullius, but res omnium communes and therefore not occupable."(19)

A third group gave its opinion that the Moon has a special legal status:

Knauth said:
„The fact that the Moon does not pause permanently in the area of any one sovereign is not material. Like an aircraft in flight, it passes from the space area of one sovereignty to the space area of another. While it is in the space area of a certain sovereign. However temporarily it is subiect to that sovereign at least in the legal sense."(20)

And *Rinck* wrote, being of the same opinion:
„. . . that the sovereignty of any State reaches as far as the attractive power of the Earth. That gives broad consequences. The Moon moves within the gravitational field of the Earth. It passes through different spheres of sovereignty . . . it is . . .no res nullius, because it is within different zones of sovereignty."(21)

Cocca stated correctly, that the Moon is Earth's natural Satellite and that there is a relationship of dependence or of physical subjection. He continued:
„This fact must be taken into account by jurists in order to study its legal position under the aspect of servitudes, and not under the aspect of annexation of territory in Space."(22).

Analogously thought *Tamm:*
„The moon, though, is a natural satellite of Earth attracted to the Earth and its orbit. The moon, then, as a satellite, is within the sphere of influence of the Earth, therefore subject to its control, and, to that extent, a natural possession of Earth os an entirety."(23).

These opinions, practically of three groups of scholars, then, were the starting point for trying to find a solution. The United Nations took over that task (24).

2) Work and its progress within the UN.

On Oct 4., 1957 the then USSR started successfully the first terestrial artificial satellite, namely Sputnik 1. The Space Age had begun.

On Nov. 13. the same year, The USA and other Nations requested at the UN the creation of a new system of control in order to watch over the use of outer space for exclusively peaceful purposes(25). The USSR on the other hand requested on March 15., 1958 the prohibition of the miliotary uses of outer space(26).

On Dec. 13., 1958 the UN General assembly passed a - not unanimous - Resolution, to create an Ad Hoc Committeefor the Peaceful Uses of Outer Space which was requested, *inter alia* to study legal questions in connection with the exploration of outer space.Its report mentioned questions regarding the exploitation of the celestial bodies(27). But discussions continued and brought about the unanimous U.N.G.A. Resolution of Dec. 20., 1961(28), from which I may quote the following passages:

„Outer Space and the celestial bodies are free for the exploration and use for all States in conformity with international law

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and are not subject to national appropriation"

With this a principle was generally accepted which solved the dispute: Celestial Bodies (the Moon was not mentioned specifically) should not be appropirated, not be occupied and were thus, *res omnium communes.*

The following U.N.G.A. Resolutions held this principle upright(29).

Quite consistently, the notion of unappropriability of celestial bodies was not sincerely questioned when the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space , Including the Moon and other Celestial Bodies (The Space Treaty) was discussed And its Art. II. thus reads as follows:

„Outer Space, including the moon and other celestial bodies, are not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means".

This was -though the most important one- not the only provision of the Space Treaty, dealing with topics of ownership. The freedom of exploration and use (not of exploitation),the peaceful purposes principle, the notion of cooperation, of noncontamination the authority of states to be maintained over their nongovernmental entities etc was agreed upon for the Moon and other celestial bodies as well as for Outer Space itself(30). Thus, when *Armstrong* and *Aldrin* landed on the Moon on July 20., 1969, they hoisted the US Flag but they did not claim sovereignty, nor was this done by the US government on this occasion or on the occasion of later manned landings.

On Nov. 29, 1971 the U.N.G.A. Resolution 2779(26) requested the UNCOPUOS and its Legal Subcommittee to work on a text for a treaty on the Moon and other Celestial Bodies. In the following discussions (31)the principle of non-appropriation was never questioned. And thus, Art 11(2) of the Agreement Governing the Activities of States on the Moon and other Celestial Bodies of Dec 18., 1979 reads:

„ The Moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means."

This principle had remained and is valid still although not many Nations have signed and less even ratified the Moon Agrement (32). It is one of those principles which are treaty law since the Space Treaty, and which are not questioned. And it is enforced by a new notion, namely that *„Neither the surface nor the subsurface of the Moon, nor any part thereof or natural resources in place , shall become property of any State, international intergovernmental or non-governmental organisation, national organisation or non-governmental entity or of any natural person*(33).

However, there is another legal notion to be found in the Moon Agreement which has given rise to many disputations. It is the sentence that the Moon and ist natural resources are the „ common heritage of mankind"(34), enforced by the request to establish an „international regime" for the exploitation of the Moons natural resources(35).

On the other hand, there seemed to be no doubt that State Parties should have the right to collect and remove samples of Moon material from our natural satellite, for scientific purposes and to use such materials in quantities necessary to support of their missions(36).

And the installation of stations etc. on or below the surface of the Moon was permitted, even for extended periods(37). Anyway, this should not lead to the acquisition of a kind of ownership(38).

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There remained one unclear point: Was exploitation of natural resources of the Moon permitted, even though an „international regime" had not yet been established, or was such exploitation prohibited?

Hosenball was of the opinion that there was no moratorium intended for using the Moons natural resources before the said establishment.(39). And COPUOS agreed in its report about the draft agreement *„that article 7 is not intended to result in prohibiting the exploitation of natural resources which may be found on celestial bodies other than the Earth, but, rather, that such exploitation will be carried out in such a manner as to minimize any disruption or adverse affect to the existing balance of the environment"*(40).

3) The Basis for a new Start.

Apparently, this was not enough to calm the doubts of the great space powers. And thus, they did not ratify or even sign the Moon Agreement.

Here the matter rests. When at the UN according to Art.18 of the Moon Agreement the question came up whether to renegotiate the Agreement, it was unanimously decided by the General Assembly on Dec. 9., 1994, upon recommendation of the COPUOS and it Legal Subcommittee (LSC), not to take action on such a revision(41).

However, in its Resolution of 5,Feb. 1996, the U.N.G.A.invited *„States that have not yet become parties to the international treaties governing the uses of outer space to give consideration to ratifying or acceding to those treaties;"* And here, the Moon Agreement is expressedly mentioned (42).

Thus, *Gorove* was right when he pointed out that the Moon Agreement had failed to receive sufficient support from the space faring nations largely due to ist provisions dealing wth the exploitation of lunar resources which were to be regarded as the „ common heritage of mankind".(43)

The problem seemed to be not very pressing at the moment. But that could change rapidly. For on the one hand we have a Moon Agreement that obviously is not accepted by most states. On the other hand, the U.N.General Assembly invites the states to sign and ratify (among others) this very Agreement. And thirdly, the possible revision of the Agreements text is (at least) postponed. This somehow unclear situation invites scholars to investigate possible solutions. It is therefore quite appropriate that the IISL has put this question on this years agenda, The continued efforts of IAA, and the committee under the chairmanshipt of *Koelle*(44) demonstrates that soon manned or unmanned space missions might reach out to the Moon or even Mars, It might become vital to clarify a situation which seems to be at present detrimental for the progress of space travel to the Moon and other celestial bodies.

It is necessary to come to the heart of the matter. It is necessary to reconcile the interests of those States which would reach (again) the Moon and want to exploit its natural recources on the one hand, and the common interest of all terrestrial Nations in an appropriate sharing of those resources.on the other hand. This reconciliation is necessary and it is not impossible. To exploit what is needed to assist space travel, to create stations on the Moon, even maybe to cover costs of going to our natural Satellite seems unavoidable and should be clearly permitted in an unambiguous language. To exclude other, especially developing Nations from going there later, for doing their own research, and even their own exploitations, should be prohibited at the same time in a language equally clear.

It would be detrimental for all mankind if due to an unclear legal situation the hiatus in expeditions to the Moon and other celestial bodies would be extended too long. And it would be illogical to protect

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natural recources on the Moon more strictly than those on Earth. The Moon should remain free, free of appropriation. But its natural resources should serve all mankind. And he who can bring them down here, should be assured and rewarded by a clear space legal contractual regulation.

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A/AC.105/C.2/1996/CPR.2 (prepared for participants only) of March 15., 1996. There were ratifications listed only by the Nations of Australia, Austria, Chile, Mexico, Morocco, The Netherlands, Pakistan, Philippines, and Uruguay. Signed but not ratified was the Agreement by France, Guatemala, India, Peru and Rumania.

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