# By Any Other Means – Some Remarks to Interpretation of Article II Space Treaty

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**IAC – 06-E.6.2.A.08**

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I

To this day in six moon-landings only twelve astronauts touched the surface of the Moon. The last one 34 years ago. Next target is Mars – may be in some decades. Interplanetary travel is subject of science fiction.

Despite of realities, without human presence on the Moon and other celestial bodies clever business-men exploiting invincible human credulousness could establish a world-wide trade in outer space real estate.

The best-known space-broker is the company founded by Mr. Denis Hope. His website informs us that his "Lunar Embassy" is the only company in the world to be recognized to possess a legal basis for selling and registering extraterrestrial properties. A declaration of ownership was filed with the American government 26 years ago, to ensure legal basis for the sale of such properties within the confirms of our solar system. Mr. Hope also sent notice of his claim to the Russian government and the United Nations. (1) They did not protest – this silence proves that the Lunar Embassy deeds are valid. (Qui tacet, negat!)

Mr. Hope alleges that 2,524.728 people are already proud owners on the Moon – two former U.S. presidents and 40 NASA employees among them – 945.344 are Mars-owners. (2)

It is a satisfaction to know that Moon Embassy has never and will never sell a past or planned NASA landing site on any celestial body, and the moon Europa of Jupiter will be reserved as a heavenly national park. (3)



The website cautions against copy cat companies, "highly irresponsible pretenders", offering unauthorized products. One of them even calls themselves "consulate" to copy the Lunar Embassy.

A German pensioner Martin Jürgens protested against the activity of Mr. Hope alleging, that the Moon was donated to one of his ancestors by Frederic II (the Great). (4) An Italian woman claimed that Lunar Embassy sold two plots which she purchased from a company named "Celestial Garden". She sued for fraud and petitioned the White House. (5)

Gregory Nemetz U.S. citizen in 2003 filed a claim against NASA and the State Department. The NEAR Shoemaker spacecraft in 2001 landed on asteroid 433 Eros. As owner of this celestial body he demanded a parking-storage fee. This case Nemetz vs. U.S. has been the first case in United States courts concerning real property rights in outer space.

As a matter of fact, the business activity of the Lunar Embassy basically has nothing to do with space law. Mr. Hope and others do not own the Moon by a simple declaration of ownership Not even by registration of their claim anywhere. No legal systems of regulation of real property permit acquisition of property based upon nothing more than a claim of ownership. (6)

All civilized private law systems accept the roman law principles of property rights: possession needs both the intention (animus) and physical apprehension of a thing (corpus). (7)

Mr. Hope as previously other persons, science-fiction fan clubs who isolated without internet made the same, is no owner by mere declaration of ownership. Consequently he can

not transfer ownership in accordance with the Roman law principle "nemo plus juris transferre potest, quam ipse habet." (8)

## II

Absurd though it may appear, the Outer Space business of Mr. Hope as a catalyst contributed to discussions on real property right in the theory of space law. Namely to analysis of treaty law concerning possibility or prohibition of claim to property on real estates on the Moon and other celestial bodies.

The principle of non-appropriation as a fundamental rule of space law stated in Article II of the Space Treaty reads:

> 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

Article XI al. 2 of the Moon Agreement for the Moon and other celestial bodies within the solar system repeats it literally, adding in al. 3:

> 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 organization, national organization or non-governmental entity or of any natural person.

The Outer Space Treaty in Article II contrary to national appropriation does not refer to the acquisition of private property on any part of the surface of the Moon . The Moon Agreement excludes it expressis verbis. This difference could be interpreted in the way, that a contrario: the principle of Article II of the Space Treaty concerns only non-private appropriation.

The Space Treaty till today has been ratified by 97 the Moon Agreement only by 11 states, all being parties to the Space Treaty. In later case, due to this interpretation the parties to the Moon Agreement would be at least for the celestial bodies of the solar system in an unequal legal situation, being bound by a broader prohibition than other parties to the Space Treaty.

The grammatical interpretation of Article II applying earth-bound legal terminology based mainly on Roman law principles may rise certain doubts. Legal notions linked to the tangible earth should be analyzed, in context with extraterrestrial conditions allowing rather per analogiam application of traditional legal terms.

"Appropriation" itself does not belong to the traditional international law terminology. It is connected with civil law "proprietas" being the result of appropriation.

"Claim of sovereignty" is undoubtedly an act of a subject of international law, an unilateral state act. Article II designates the effective implementation of claim of sovereignty occupation, as means of national appropriation.

"Occupation" in the international law terminology consists in establishing sovereignty over a territory not under the authority of any other state. Act of a state extending sovereign rights to a terra nullius. This international law occupation goes back again to the Roman law notion of acquisition of property (res nullius cedit occupanti). In this sense a non-national entity may be a "first person to appropriate an unappropriated thing". (9)

Article II prohibits *national* appropriation by use. From the viewpoint of the question whether this prohibition extends also to acquisition of real property by private entities can not be meaningless that the Space Treaty considered private space activities too. According to Article VI states parties to the treaty shall be responsible for national activities carried on by governmental agencies or by non-governmental entities.

Such activity may be a certain kind of *use* carried on by private entities prohibited by Article II as means of national appropriation. (10) In the debates of Space Treaty the relationship between use and appropriation was noted by the Belgian delegation suggesting Article II. It was their view that use of any kind does not produce a condition of titles to property in private law. (11) Though concerning "use of outer space" in Article I and use in this context there was no unanimity, this interpretation was not rejected.

Article II does not contain a taxative, itemized enumeration of means of national appropriation. It is exemplificative referring to denominated possible kinds of appropriation adding the words "by any other means".

The meaning of this additional words is disputed in space law theory. The analysis of the travaux préparatoire in the excellent paper of *R. J. Lee–F. K. Eylward* demonstrates that the formulation of Article II was focused on states and not on natural or juridical persons. Nevertheless several participating states affirmed the application of Article II to property rights. They had the opinion that "appropriation" included both the establishment of sovereignty and creating private law property. No state has positively stated that Article II does not extend to prohibit property rights on celestial bodies. (12)

Exclusion of appropriation by civil law claims as "other means" is accepted by majority of Authors. To quote some views:

The mere fact that Article II does not prohibit "private appropriation" does not give private entities authority to immovable real property (*W. N. White*). (13) If states cannot appropriate the extraterrestrial realms, than a fortiori neither can their nationals (*V. Pop*). (14) Article II prohibits also acquisition of private law property. It is clarified and completed by Article XI of the Moon Agreement (*A. Bueckling*). (15) The assertion of claims of ownership of areas of space including the Moon and other celestial bodies is contrary to the non-appropriation principle of Article II of the Outer Space Treaty (*P. M. Sterns–L. I. Tennen*). (16)

Some authors refer to a not meaningless aspect of excluding private appropriation. When Article II. would have application only to governmental entities it may be possible for states to circumvent the prohibitions contained in the Treaty singly by "privatizing" contravening activities (*R. V. Lee–F. K. Eylward*). (17) From establishing private property in a roundabout way exclusive rights of states could be derived (*W. Heymer*). (18)

The teleological and systematic interpretation supports these views. Purpose of Article II is to exclude any exclusive claims to outer space or parts thereof. Article I par. 1 states that outer space shall be free for exploration and use by all states without discrimination of any kind. Property involve exclusive right to possess and use something – in this case a certain part of the Moon or other celestial bodies, excluding others. Reading together the two provisions can be concluded, that private appropriation of any part of celestial bodies would be an "other means" in the sense of Article II and contrary to Article I of the Space Treaty.

## III

The "Lunar Embassy" alleges to have legal right to sell real property on the Moon based on registration of its claim in conformity with local (national) rules of procedures. This argument – if correct – would mean applying national jurisdiction to a celestial body. This follows more evidently from the allegation, that the claim has been footed also on the so called Homestead Act legislated by the Congress in 1862. This act at that time intended to stimulate the post-civil war westward movement giving to settlers public land for a nominal fee. (19) The Act is current, but the available land is restricted to Alaska and Territories (possessions of the United States) and by no means to the Moon and other celestial bodies.

In the Case U.S. vs. Nemitz the General Counsel of NASA refusing the claim of appropriation of an asteroid stated: it is unlike an individual's claim for seabed minerals, which was considered and debated by the U.S. Congress that subsequently enacted a statute The Deep Seabed Hard Mineral Resource Act expressly authorizing such claims. *There is no similar statute related in outer space.* This motivation raises the logical question: could the U.S. Congress in this way enact a statute authorizing U.S. citizens to appropriate an asteroid? (20) By no means. Article II excludes national appropriation. It includes the exclusion of application of national legislations. Hence no national laws on private ownership of immovable property or related issues could ever apply to the Moon and other celestial bodies.

In a background paper on "Extraterrestrial Property and Space Law: Facts and Fiction" circulated by the Moon Embassy we find the following pretentious statement: "On the Moon itself or on any other planets apart from the Earth, apart from the laws of the Head Cheese (Mr. Hope) currently no law exists". (21)

What really does not exist on the Moon is a Civil Code of Outer Space with rules of acquisition of real property, transfer of property etc. *W. N. White Jr.* author of excellent studies on this subject presented a remarkable Draft for a multilateral treaty regarding jurisdiction and real property rights in Outer Space. (22)

According to this uniform civil law regulation to be accepted by the parties to the multilateral treaty: "Private non-governmental owners who or which inhabit, maintain and/or operate a space facility for a period of at least one year shall be entitled to formal recognition and registration of certain rights designated "real property rights". Among them the right to exclude natural persons and legal entities from the space facility and its related safety zone, the exclusive right to appropriate resources in the same place, the right to sell real property rights to other natural persons or legal entities.

The treaty would admit acquisition of real property for private entities and states as well – excluding sovereign rights of owner states stating that real property rights which states confer pursuant to this treaty shall not provide the basis for any claims of territorial sovereignty in outer space and on celestial bodies.

The proposal provides creating a civil law order on the Moon and other celestial bodies named by the author "regime of limited property rights in the absence of territorial sovereignty", (23) or of functional property rights. (24)

A treaty of this kind accepting real property on celestial bodies, nevertheless, would be for parties to the Outer Space Treaty which do not adhere, inter alios acta. They could insist on the prohibitions of Article II. The limited property rights suggested would be based upon the jurisdiction conferred by Article VIII and not territorial sovereignty prohibited by Article II. As the author admits, the result is a new form of quasi property rights which are in reality a delegation of jurisdictional authority to their national citizens. (25) According to this conception states are free to enact property laws without seeking the approval of other states. Article VIII, however, is about jurisdiction of the state of registry over the objects and over any personnel thereof launched into outer space creating no property rights on the landing place of the space objects.

Enacting property laws for celestial bodies?

In his commentary to the case Nemitz vs. U.S. W. White states that the Outer Space Treaty is not self-executing under U.S. law and the case illustrates the need for governments to legally address the issue of property rights in their national legislation. S. T. should be implemented by national space legislation on property rights. (26)

I share the opinion of authors who refuge this interpretation of S. T. Article II is self-executing not needing national legislative actions to be operative. (27) National space acts do not implement space treaties in the sense of adding anything to the legal regime created by international space law. They intend e.g. to make rules of authorization and continuous supervision, or for domestic consequences of liability for national space activities.

May I quote as a conclusion ILA Resolution 1/2002: "What is by no means permitted is any kind of national appropriation of areas of the Moon and other celestial bodies. Any claims to private property on the Moon and other celestial bodies undermine this clear prohibition of self-executing character. States are therefore even under a legal obligation to prevent the coming into existence of such private claims to property in order to avoid their international legal responsibility." (28)

**Footnotes**

1.) http://archives.cnn.com/2000/tech/space/11/20/lunar.land
The Hungarian agency of L. A. sold Moon plots "cheepest real estate in the Universe" for abt. USD 8–180!
2.) http://www.lunarembassy.com/lunar/shops.lasso
Lunar Embassy World Headquarters website informed us that Mr. Hope on 19th May 2006 has survived a plan crash "much to the great delight of over 2 million lunar property owners".
3.) http://www.lunarembassy.com/ls/lespacelaw.e.shtml
4.) Mr. Hope in a CNN interview 20th November 2000: "he sent me a long letter in German which roughly translated said I should cease and send him all money I had made".
5.) *W. N. White*: Interpreting Article II of the Outer Space Treaty. Proceedings IISL Coll. 2004, p. 171
6.) *W. N. White*: Nemitz vs. U.S. The First Real Estate Property Case in the United States Courts. Proceedings IISL Coll. 2004, p. 342
Witty comparison of *V. Pop*: Masai tribesmen claim they own all the cows by divine command. If a claim alone would entail ownership, this would entitle the Masai to universal cattle ownership. In: Extraterrestrial Real Estate: Debunking the Myth. Proceedings IISL Coll. 2004, p. 335
7.) *Th. Collettsanders*: The Institutes of Justinian. London etc. 1948, p. 131
8.) In Hungarian Civil Code § 117 "... property can be acquired from its owner."
9.) *J. A. C. Thomas*: Textbook of Roman Law. Amsterdam etc. 1976, p. 93
10.) *M. A. Dauses*: Das Weltraumrecht im Rechtsgefüge. Beiträge zum Luft- und Weltraumrecht. Festschrift zu Ehren von Alex Meyer. Köln etc. p. 293 "Acquisition of exclusive territorial rights by uses". H. B. Bittlinger: Hoheitsgewalt und Kontrolle im Weltraum. Köln etc. 1988, p. 136
11.) *C. Q. Christol*: The Modern International Law of Outer Space. New York etc. 1982, p. 40
12.) *R. J. Lee–F. K. Eylward*: Article II of the Outer Space Treaty and Human Presence on Celestial Bodies. Proceedings IISL Coll. 2005, pp. 95–96
13.) *W. N. White*: Implications of a Proposal for Real Property Rights in Outer Space. Proceedings IISL Coll. 1999, p. 371
14.) *V. Pop*: Extraterrestrial Real Estate: Debunking the Myth. Proceedings IISL Coll. 2004, p. 336
15.) *A. Bueckling*: Der Weltraumvertrag. Köln etc. 1980, p. 61
16.) *P. M. Sterns–L. I. Tennen*: Private Enterprise and the Resources of Outer Space. Proceedings IISL Coll. 2005, p. 247
17.) Note 13, p. 96
18.) *W. Heymer*: Rechtsfragen der Nutzung des Weltraums und der Himmelskörper durch Privatunternehmen. Festschrift A. Meyer p. 376
19.) *M. Martin–L. Gerber*: Dictionary of American History. Totowa–New Jersey 1981, pp. 292–293
20.) Cit. in *W. N. White* Note 6, p. 340
21.) http://www.lunarembassy.com/ls/lespacelaw.e.shtml
22.) *W. N. White*: Proposal for a Multilateral Treaty Regarding Jurisdiction and Real Property Rights in Outer Space. Proceedings IISL Coll. 2000, pp. 245-253
23.) Note 13, p. 371
24.) Idem: Real Property Rights in Outer Space. Proceedings IISL Coll. 1997, p. 381
25.) Note 5, p. 176
26.) Note 6, p. 349
27.) Note 16, p. 249
28.) ILA Res. 1/2002 with Regard to the Common Heritage of Mankind Principle in the Moon Agreement by Professor Dr. Stephan Hobe. Proceedings IISL Coll. 2005, p. 536