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THE MOON TREATY IN THE 21ST CENTURY

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ABSTRACT

Forty years after the Promethean achievement of Apollo 11, the major space-faring nations are showing a renewed interest in missions to the Moon. While in the 1960s, in the context of the Cold War, the decision to land humans on the Moon was perceived as a strategic political instrument between the two blocs, now in the 21st century, a considerably increased number of space actors complicates the scene with multiple sectorial and national interests. Security still predominates, although economic considerations also play an increasing role. The commercialisation and privatisation of space activities leads to new challenges which raise the issue of the role of the international legal framework.

In this context, the Agreement Governing the Activities of the States on the Moon and Other Celestial Bodies of 1979 (known as the Moon Agreement) should be able to play a relevant role. There are several political and legal questions that arise for discussion. At its forty-sixth session, the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS) decided to include a discussion on the activities which are being or to be carried out on the Moon and other celestial bodies in the forty-seventh session of the Subcommittee in 2008. The result is a joint statement by the State Parties to the Agreement. This paper addresses the questions raised during these discussions.

5 DECEMBER 1979: THE ADOPTION OF THE MOON AGREEMENT

As far as space exploration is concerned, the United Nations, through the efforts of the Committee on the Peaceful Uses of Outer Space (COPUOS) and its Legal Subcommittee (LSC), have taken the lead role in the development and codification of a body of law to govern the activities of space in this field. Its work began in 1961 with a declaration of the legal principles for governing space activities, and continued with the adoption of the five space treaties.¹

¹ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty, 1967), Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (Rescue Agreement, 1968), Convention on International Liability for Damage Caused by Space Objects (Liability Convention, 1972),

At the end of the 1960s, as soon as the perspective of mankind's landing on the Moon became a reality, the interest of the international community was heightened with respect to short or long-term peaceful or military gains to be made from the possible colonisation of the Moon and other celestial bodies.

In a letter dated 9 May 1966 addressed to the Chairman of the Committee on the Peaceful Uses of Outer Space,² the Permanent Representative of the United States of America requested an early

Convention on Registration of Objects Launched into Outer Space (Registration Convention, 1975), Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Agreement, 1979). For further information, see: <http://www.unoosa.org/oosa/en/SpaceLaw/treaties.html>.

² A/AC.105/32.

convening of the Outer Space Legal Subcommittee to prepare a “*draft treaty governing the exploration of the moon and other celestial bodies*” for submission to the General Assembly at its next session. Shortly after that request, the United States consulted with members of COPUOS, presenting them an outline of points for inclusion in the draft treaty.

At the same time, the Soviet Union Government submitted a “*draft treaty on principles governing the activities of space in the exploration and use of outer space, the moon and other celestial bodies*”³ for consideration by the General Assembly.

The Legal Subcommittee reconvened in its fifth session in July and then September of the same year⁴ and examined the two drafts as well as all proposals presented by the other Member States with respect to particular articles. Although an agreement was reached on a series of articles,⁵ there was no consensus on several others. The discussion was then adjourned and not reopened until June 1969 when, upon the proposal of Argentina, France and Poland, the Legal Subcommittee decided to include in its agenda an item dealing with new activities on the Moon and other celestial bodies, including a legal regime for governing their natural resources.⁶

Less than a year after Neil Armstrong’s first step on the Moon (20 July 1969), Argentina again submitted for discussion a proposal for a draft agreement.⁷ This included the provision that the Moon and other celestial bodies were to be declared a “*common heritage of mankind*”.

Wider questions, including military uses, were introduced into the discussions by a new draft treaty proposal of the USSR in 1971⁸ in which, among other things, the principle of space as an *international area of common use* was reiterated. The United Nations General Assembly placed the subject as a separate item on the agenda of the Legal Subcommittee for priority consideration at its 1972 session.⁹

While informal and behind-the-scenes discussions took place, the work of the Legal Subcommittee on producing a draft treaty continued. There were in total 16 proposals from the United States and nine from other countries in addition to the Argentine and Soviet ones. Following the finalisation of extensive negotiations on the agenda item in the COPUOS and its Legal Subcommittee, the draft agreement sponsored by 38 delegations was adopted by the Special Political Committee of the General Assembly on 2 November 1979¹⁰ and by the General Assembly itself on 5 December 1979 in Resolution 34/68,¹¹ in both cases by consensus without a vote. The agreement was opened for signature and ratification by the Secretary General of the United Nations on 18 December 1979. On that date, the Agreement was signed by 6 nations (Chile, France, Romania, the Philippines, Austria and Morocco) at the United Nations Headquarters in New York.¹²

THE INSPIRATIONAL PRINCIPLES OF THE MOON AGREEMENT

The 21 principles of the Moon Agreement adopted by consensus by the UN Member States (after 7 years of negotiation) presents an effort on the part of the 152 nations involved to establish a basic legal

³ A/AC.105/35 Annex 1, pp. 10 and 11.

⁴ A/AC.105/35, 16 September 1966.

⁵ A/AC.105/C.2/L.16.

⁶ Two proposals were made by Poland (A/AC.105/C.2/L.53) and Argentina (A/AC.105/C.2/L.54) on the same date - 13 June 1969. They were later amalgamated (A/AC.105/C.2/L.66), and still later a joint proposal was made by Argentina, France and Poland (A/AC.105/C.2/L.69) which was adopted by the LSC.

⁷ A/AC.105/C.2/L.71 and Corr. 1.

⁸ A/83/91.

⁹ GA Res. 2779(XXVI), para. 2, of 29 November 1971.

¹⁰ See A/SPC/34/SR.20 (2.11.79), paras. 9 and 10; Report of the Special Political Committee, A/34/664, paras. 8 and 9.

¹¹ A/34/PV.89 (Prov.), pp. 7-10.

¹² See UN Press Release L/T/3439, 23 March 1983.

framework for the exploration and later exploitation of the Moon and other celestial bodies and reflects the United Nations' general commitment to the ideals of peace and development through international cooperation.

The Agreement provides broad and general guidelines since at that time, it was recognised that more particular provisions would become possible only once the reality of space was better known.

Several considerations guided the drafting of the Agreement:

1. One major consideration was that the prepared treaty should assure that the Moon and other celestial bodies were used exclusively for peaceful purposes. In line with the basic principles of the Charter of the United Nations as well as of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (known as the Outer Space Treaty), the Moon Agreement was clearly designed to ban any non-peaceful use of space, and it explicitly prohibits any threat or use of force or any other hostile act or threat of a hostile act. At that time, the provisions were considered as providing a basic assurance that outer space would be used for peaceful purposes only.

2. Another major consideration was that the Moon Treaty should protect the right of all people to a share of the resources of outer space, and to secure for developed and developing countries alike the opportunity to benefit from space activities. Along these lines, the treaty established that those resources should be regarded as the common heritage of mankind. It has been pointed out that this concept replaced the vague expression "province of all mankind" of the Outer Space Treaty. The expression "common heritage of mankind" implies, according to its authors, the element of a "beneficial domain" which includes the enjoyment of, profit from, and partaking in

space benefits which had been excluded by the provision of the Outer Space Treaty.

3. The third major consideration that guided the drafting is reflected in the provision for the freedom of exploration and use of the Moon and other celestial bodies and the encouragement of scientific investigations thereof. The Moon Treaty is designed to permit governmental as well as private entities to explore and use the Moon and other celestial bodies in an orderly manner. It specifically establishes the right to collect and remove samples from the Moon and other celestial bodies to support scientific missions.

Since its adoption, vigorous national debates have taken place in many countries. In attempting to elaborate an international agreement of such magnitude, every nation participating in that process had to make compromises in the hope of creating a more effective global policy, with the result that not all specific interests could be satisfied by the final document. This is certainly true of the Moon Agreement. However, while criticising it, one should be reminded of its larger significance and of the general spirit and intent with which it was elaborated.

THE MOON AGREEMENT IN THE 21ST CENTURY

Forty years after the unprecedented achievement of Apollo 11, the major space-faring nations are again showing interest in missions to the Moon. At the beginning of the 21st century, various countries press ahead with plans for human space exploration: the United States, China, India and Japan are developing lunar exploration programmes, and Canada, Germany, the Russian Federation, the United Kingdom, the European Space Agency and others have revealed their future plans for the human and robotic mission exploration of both the Moon and Mars.

We are at the threshold of a new era of space exploration in which mankind's use

of outer space will expand and diversify rapidly with a considerably increased number of space actors pressured by sectorial and national interests. Security issues still predominate, although economic considerations now play an increasing role. The commercialisation and privatisation of space activities leads to new challenges and their vast potential raises the need for being able to plan and act with a more specific and rational direction, as well as the issue of the role of the international legal framework.

Moreover, space exploration and its practical applications are, by their very nature, of global concern and will require to an ever-increasing degree the cooperation of all nations. This is certainly the ultimate aim of the heads of 14 space agencies who, on 31 May 2007, met to coordinate their exploration planning. The result of the discussion is a document entitled the “*Global Exploration Strategy*”. Some words of this strategy are particularly elevating: “*this new era of space exploration will strengthen international partnerships through the sharing of challenging and peaceful goals*”.¹³

In this context, the Agreement Governing the Activities of the States on the Moon and Other Celestial Bodies could be able to play a relevant role. The Moon Agreement represents an effort on the part of the international community to establish conditions promoting the peaceful uses of the Moon and other celestial bodies. But there are several political and legal questions that arise for discussion. While more specific laws or regulations governing outer space need to be added as the realities of space warrant such provisions, some of the core principles of the Agreement continue to be the object of debate. As of today, only 13 states have ratified the Moon Agreement and an additional four have signed but not ratified it.

LEGAL IMPLICATIONS

As pointed out above, the most important concern at the time of the drafting of the Moon Agreement was to ensure the peaceful and equitable exploration of outer space – the first essential phase which would serve as the foundation of later efforts. The Moon Agreement is therefore designed to encourage resource development, and the only major constraint imposed by the treaty is the requirement that the Moon and other celestial bodies and their resources be used for peaceful purposes only.

The Agreement also specifies that the State Parties must take measures to prevent the disruption of the existing environmental balance in space (art. 7, para. 1); to allow the designation of international scientific preserves for which special protective arrangements may be made (art. 7, para. 3); to ensure concrete and positive forms of cooperation concerning assistance to persons on the Moon (art. 10); to establish conditions facilitating activities of states on or below the surface of the Moon (art. 8) such as scientific investigations (art. 6) or the installation of personnel, stations and other objects (art. 8 and 15, para. 1); to define their international responsibilities (art. 14); and to establish peaceful means for resolving disputes, including provisions for consultations in enforcing treaty obligations (art. 15, paras. 2-3).

While some of these provisions are similar to those of the Outer Space Treaty, several changes and innovations were made. Some of the new provisions have helped to clarify issues which were left unresolved by the Outer Space Treaty. Article 1, for example, sets out the cosmographical scope of the Agreement, stating that “*the provision [...] relating to the Moon shall also apply to other celestial bodies within the solar system, [and] shall include orbits around or the trajectories to or around it*” (art. 1, paras. 1-2).

¹³ See

http://esamultimedia.esa.int/docs/GES_Framework_final.pdf.

Other new provisions are still the object of debate in relevant fora and constitute the reason why several countries which actively participated in the drafting of the Moon Treaty did eventually not sign it. Cases in point are articles 4 and 11. Article 4 repeats the provisions of the first article of the Outer Space Treaty (OST), stating that the exploration and use of the Moon shall be the *province of all mankind* and shall be carried out for the benefit and in the interest of all countries. This principle is related to the principle of the *non-appropriation* of the Moon and other celestial bodies enshrined in article 11, which contains the most novel and at the same time controversial provision of the Moon Agreement.

Article 11 stipulates that the Moon and its natural resources are the "*common heritage of mankind*". This term does not appear in the OST, although the underlining ideas are certainly there. The term has appeared for the first time in the Moon Agreement and was initially suggested by Argentina, but proposed formally by the United States in 1972. Since the exploitation of the natural resources of celestial bodies other than the Earth is about to become feasible, Article 11 aims at ensuring that all nations enjoy equal rights in exploiting and benefiting from space resources. Moreover, it makes clear that the parties to the treaty intend to enter into negotiations for establishing a mutually acceptable international regime governing the exploitation of the mineral and other substantive resources which may be found on the surface or subsurface of a celestial body (paragraph 5, article 11 and reiterated in article 18). This regime will serve to provide a framework for various nations and non-governmental enterprises to pool their creative energies and cooperate in seeking the best means of exploration and development. The establishment of the international regime would be the task of a conference convened

by the UN at the request of one third of the State Parties to the Moon Treaty.

This last article of the Moon Treaty has received special attention from several countries. The main criticisms are related to the principle of the "common heritage of mankind", and several discussions - held since the adoption of the Agreement - have centred on the structure and power of the above-mentioned international regime. According to article 11, the regime will be developed by all nations which are parties to the Moon Agreement, and the treaty itself is open to all states for signature.¹⁴ The purpose of the future international regime recognises the equitable sharing of the benefits derived from any resources in space, and special consideration is given to the efforts of the countries which contributed either directly or indirectly to the exploration of these resources, as well as to the interests and needs of developing countries.¹⁵

THE ROLE OF COPUOS AND ITS LEGAL SUBCOMMITTEE

As set out by article 18 of the Agreement, ten years after its entry into force, COPUOS considered the question of a first review of the Agreement and the prospective of the establishment of an international regime at its thirty-seventh session in 1994. After the discussion, the Committee recommended to the General Assembly at its forty-ninth session that the Assembly should take no further action at the time.¹⁶

Today, the intensive discussion of a possible revision of the Moon Agreement and in particular of article 11 is becoming topical, as numerous new realities of international and national space activities, including growing commercialisation and the appearance of new actors, have had an

¹⁴ Article 11, para. 5, art. 18, and article 19, para. 1.

¹⁵ Article 11, para. 7.

¹⁶ General Assembly Resolution 49/34.

impact on the interpretation of the concept of the “common heritage of mankind”.

The ongoing discussion in the United Nations Committee on the Peaceful Uses of Outer Space and its Legal Subcommittee reflects these needs. Already in 2004, at the forty-third session of the Legal Subcommittee, the International Institute of Space Law (IISL) and the European Centre for Space Law (ECSL) were invited by Member States to hold a symposium on space law entitled “New developments and the legal framework covering the exploitation of the resources of the Moon”.¹⁷ In 2007, the High-Level Panel on Space Exploration held a meeting to discuss the ongoing and planned exploration programmes including the projects aimed at returning to the Moon.¹⁸

At the forty-sixth session of the Legal Subcommittee, some delegations expressed the view that consideration should be given to the reasons behind the low participation of states in the Agreement Governing the Activities of the Moon and Other Celestial Bodies, and that efforts should be made to resolve any identified obstacles to participation.¹⁹

In order to do so, the Working Group on the Status of Application of the five United Nations Treaties on Outer Space agreed to:

- address the activities currently being carried out or to be carried out on the Moon and other celestial bodies in the near future;
- identify the international rules governing the activities on the Moon and other celestial bodies; and
- assess whether the existing international rules adequately address the activities on the Moon and other celestial bodies, also incorporating information from states already parties to the Moon Agreement about the benefits of adherence to that Agreement.

THE RESPONSE OF THE STATE PARTIES TO THE MOON AGREEMENT

In response to this call for action, some of the State Parties to the Moon Agreement (Austria, Belgium, Chile, Mexico, the Netherlands, Pakistan and the Philippines), at the forty-seventh session of the Legal Subcommittee held in March 2008, presented the “*Joint statement on the benefits of the adherence to the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies by States parties to the Agreement*”.²⁰

This joint statement is based on the experience of the State Parties to the Agreement and emphasises a number of aspects and considerations concerning the benefits of Member States from becoming parties to the Agreement, with the purpose of providing “*the UN Committee on the Peaceful Uses of Outer Space with elements for reflection in the framework of its activities aimed at the development and wider application of outer space law*”. It takes into consideration the main issues related to the Moon Agreement such as the fact that “*some States regularly question whether the Agreement is part of international law or should be considered to be on the same level as the other four United Nations treaties on outer space*” or the poor participation of States.

In answer to the first issue, the statement recalls that the Agreement was registered according to article 102 of the UN Charter, entered into force on 11 July 1984, and therefore considers the Moon Agreement as part of international law. The statement also comments that it offers a dedicated international legal framework commented by the UN General Assembly and accepted by the international community.

The statement provides a commentary on the Agreement, emphasising that some

¹⁷ A/AC.105/C.2/2004/CRP.11.

¹⁸ See <http://www.unoosa.org/oosa/COPUOS/2007/panel.html>.

¹⁹ A/AC.105/891, Annex I.

²⁰ A/AC.105/C.2/L.272.

provisions unique to the Agreement are of *“particular interest for the implementation of projects, activities and missions either because they provide a better understanding of or a complement to principles, procedures or notions enshrined in the other outer space treaties that are applicable to the Moon and other celestial bodies²¹ or because they facilitate international scientific cooperation”*.²²

Concerning the principle of the “common heritage of mankind” contained in article 11, the State Parties of the Moon Agreement point out that this is the only provision within the UN outer space treaties which foresees the possibility of exploiting resources in outer space. In so doing, the provision offers an obvious legal solution. Moreover, it is underlined that the Moon Agreement, following a constructive approach, leaves the responsibility to define, set up and implement an international regime responding to the status of the common heritage of mankind and to other principles of outer space law to the involved states for which the exploitation of the Moon’s and other celestial bodies’ natural resources becomes feasible. In particular, it is highlighted that the *“Agreement does not pre-exclude any modality of exploitation, by public and/or private entities, nor forbids commercial treatment, as long as such exploitation is compatible with the requirements of the Common Heritage of Mankind regime”*.

The statement encourages states that have signed but not yet ratified the Agreement as well as other states to become parties to it, stressing that the Agreement represents a *“mutual commitment to seeking a multilateral solution”*, in particular *“considering their possible involvement in forthcoming missions and projects aimed at exploring celestial bodies”*.

²¹ See article 1, paras. 1 and 2; article 3, para 4; article 7, paras 1-2; and articles 10, 12, 13, 14 and 15 of the Moon Agreement.

²² See article 5, paras 1-3; article 6, paras. 2-3; and article 7, para. 3 of the Moon Agreement.

WHAT’S IN THE NEAR FUTURE?

The initiative taken by the State Parties to the Moon Agreement was welcomed by some delegations of COPUOS during its fifty-first session held in June 2007.²³ Those delegations expressed the view that *“the consideration of the joint statement by the Legal Subcommittee at its forty-eighth session might assist in finding a mutually acceptable approach on legal issues relating to the exploration of and the use of the resources of the Moon and other celestial bodies”*.

The new perspectives of the use of the Moon for the needs of mankind have been a central issue in the discussions in COPUOS this year, and they will continue to be debated in the forthcoming session of its Legal Subcommittee. In particular, they raise the need for an open discussion on whether the Moon Agreement still holds valid solutions for those issues, or whether it would need to be revised in order to adapt it to the new frontiers of space law.

This is in line with the proposal made by the delegation of Austria at the forty-seventh session of the Legal Subcommittee that an interdisciplinary seminar on issues related to the Moon Agreement should be organised before the Subcommittee holds its session next year.

Note: United Nations documents quoted in this article are available from the website of the United Nations Office for Outer Space Affairs at www.unoosa.org and from the Official Document System of the United Nations at documents.un.org.

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²³ A/63/20, paras 177-180.