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IS SELLING LAND ON THE MOON ALLOWED IN CHINA?

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ABSTRACT

A couple of years ago, a Chinese company sold land on the Moon in Beijing. The company was fined and its license was revoked by Beijing Administration for Industry and Commerce (BAIC). The company also lost lawsuits against the decision of the BAIC. However, the Regulation which partially provided the legal basis for the decision on the case has been abolished since 2008. The CEO of the company is now planning to sell certificates for lunar land again. This paper analyses the plaintiff's arguments and the reasoning in the decisions of the BAIC and the Courts, including whether it is allowed to sell lunar land under domestic law and under international law.

I. THE CASE

A. The Case before Beijing Administration for Industry and Commerce

Beijing Lunar Village Aeronautics Science and Technology Company (BLASTC) was registered at Beijing Administration for Industry and Commerce as a legitimate company. It was licensed by the U.S. Lunar Embassy to be a sales agent in China mainly for the sale of lunar land.

Beijing Administration for Industry and Commerce (BAIC) found in its routine inspection that BLASTC was selling land on the Moon. Investigation revealed that BLASTC gained a total of CNY 14,304 by selling 48 acres of land on the Moon to 33 individuals for CNY 298 per acre from 14 to 28 October 2005. BAIC believed that BLASTC violated

Article 3 (1) (xi) of the Interim

Regulation on the Administrative Punishment for Speculation and delivered a decision on administrative penalty on 21 December 2005. Pursuant to Article 9 of the Interim Regulations on Administrative Punishment for Speculation and Article 15 (1) (xii), Article 15 (2) and (3) and Article 15 (8) of the Detailed Rules for the Implementation of Interim Regulations on Administrative Punishment for Speculation, BAIC ordered BLASTC to return the above said money to the purchasers. In addition, it imposed a fine of CNY50,000 on BLASTC and revoked its business license.¹

B. The Case before Courts

BLASTC refused to accept the decision and applied to the Beijing Municipal Government for administrative

reconsideration on 27 December 2005. After the Government had upheld the BAIC's decision on 20 February 2006, BLASTC launched an administrative proceedings against BAIC's decision at Haidian District People's Court.

(A) The plaintiff's claim²

The plaintiff claimed that, *inter alia*:

a. the plaintiff did not violate any laws.

(i) The plaintiff was a legitimately registered company. It was registered at BAIC and obtained a business license on 5 September 2005.

(ii) The plaintiff did not violate any space treaties. 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 1967 (Outer Space Treaty) states that outer space, including the Moon and other celestial bodies, is not subject to national appropriation. It made clear that the appropriation of outer space and the Moon by States is prohibited. The treaty is silent on the appropriation by private entities and individuals. Although the Moon Agreement expressly states that any part of the Moon or natural resources in place shall not become property of any natural person, and the natural resources are regarded as the "common heritage of mankind", only few countries have ratified the Agreement. China has not joined the Agreement. Therefore, the Moon is *res nullius* belonging to nobody. Dennis Hope, the founder of the U.S. Lunar Embassy (a company), registered the ownership of the Moon under a California law of 1862, paid related fees, and sent a letter to the United States, the former Soviet Union and the United Nations, declaring himself as the owner of the Moon and other planets of the solar system. Selling the land on the

Moon by Dennis Hope did not violate any law. Likewise, no laws and regulations restricted the sales of the land on the Moon in China. Consequently, selling lunar land was not illegal.

(iii) The plaintiff did not violate any domestic laws concerning restriction on the sales of certain stuff.

(iv) The land on the Moon does not fall within the category of the products under State franchise laws and should not be subject to special restrictions.

b. The sales contracts between the plaintiff and its customers are valid. The plaintiff and its customers signed the sales contracts on a voluntary and equal basis, which did not cause any damage to the legitimate interests of the State or third parties.

c. The administrative penalty imposed by the defendant was lack of legal basis. According to Article 3 (2) of the Interim Regulation on the Administrative Punishment for Speculation, other speculation disrupting the socialist economic order stated in Article 3 (1) (xi) shall be identified by the provincial administration for industry and commerce in accordance with national regulations and policies. However, no regulations and policies prohibiting the conducts of the plaintiff could be found.

d. The administrative sanction was obviously unfair. While nine countries in the Western hemisphere allowed selling the land on the Moon, the Chinese were not allowed. It was a serious unequal treatment.

e. The defendant did not have the mandate of law enforcement. First, the United Nations did not authorize the

defendant to supervise and manage the implementation of Outer Space Treaty. Second, if the plaintiff's conduct did violate the Outer Space Treaty, it should be under the jurisdiction of the United Nations Secretary-General or the Security Council. Third, no judicial interpretation of the Outer Space Treaty has been issued since its entry into force 39 years ago, not to mention that sales of the lunar land were defined as speculation.

(B) The defendant's response³

The defendant responded that, *inter alia*:

a. BAIC found a clear fact that the plaintiff had sold 48 acres of lunar land to 33 persons from 14 to 28 October 2005 with a price of CNY 298 per acre and gained a total of CNY14,304 for the sales.

b. The defendant correctly applied the law and imposed appropriate penalty. Firstly, China ratified the Outer Space Treaty in December 1983. Article I of the Treaty states that "the exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries", and "shall be the province of all mankind"; "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." These provisions indicate that the land on the Moon belongs to the province of all mankind and the appropriation of outer space is prohibited. The international treaties that China has acceded are binding. By publicly selling the lunar land, the plaintiff violated the Outer Space Treaty.

Secondly, Article 132 of the Chinese Contract Law provides that "An object to be sold shall be owned by the seller or of that the seller is entitled to dispose."

The plaintiff sold the land on the Moon, but it is unable to provide the factual and legal basis for its ownership and its right to dispose it. Therefore, it could not prove the lawfulness of its business activities.

(C) The Courts' decisions⁴

The Haidian District People's Court did not admit the Moon Charter that the plaintiff submitted as evidence to prove that its business activities were authorized by the US Lunar Embassy and was lawful because the Charter was created by Dennis Hope. The Charter is not an international treaty and is not binding.

The Court identified that the main issue of the case is whether the plaintiff's act of selling the lunar land constitutes speculation. The Court has the same opinion as the BAIC's on the status of the Moon, namely, according to Articles I and II of the Outer Space Treaty, no State can claim ownership of the Moon. Therefore, the plaintiff's assertion of its lunar land ownership in China has no legal basis. When the lunar land ownership does not exist, land on the Moon can not become a commodity to be sold and bought. Although the plaintiff insisted that the land on the Moon had been purchased from American Dennis Hope and the land sales were licensed by the U.S. Lunar Embassy, in the Court's opinion, it would not change the illegality of the sales of the lunar land because of the illegal nature of the land ownership.

According to Article 3 of the Interim Regulations on Administrative Punishment for Speculation, speculation refers to the conducts in violation of State regulations and policies, disrupting socialist economic order for the purpose of reaping illegal profits, such as resale of restricted goods or items etc. In the

present case, the plaintiff has sold lunar land to which it does not have property right and the land on the Moon does not have the characteristics of commodity. Further, the plaintiff purchased the lunar land from Dennis Hope for 2 USD per acre and it sold the land for CNY 298 (about USD 42.5) each acre, making high illegal profits, which has seriously disrupted the normal order of market economy. Therefore, BAIC's finding that the plaintiff's conduct constituted speculation was appropriate. As a result, BLASTC lost its case at Haidian District Court. For the same reasons, its appeal was also rejected by Beijing First Intermediate People's Court.⁵

II. ANALYSIS

A. Selling Lunar Land Is not Allowed under Domestic Law

First of all, before selling something, one's ownership of the property must be established. BAIC is correct to state that one can not sell any object that does not belong to him. To establish one's property right to an object, the relevant provisions of national law are applied as Dr. Frans von der Dunk pointed out that "ownership over immovable property is ... a concept provided for by national laws that elaborate it in their own fashion as to all relevant details."⁶ A property right claim can not be legally protected without legal basis. In a similar case of Gregory Nemits v. United States, both the appellant and the respondent admitted that no provisions under US domestic law stipulated that one could acquire the ownership of asteroids.⁷ Land on the Earth within China's territory is State-owned assets. Under Article 80 of the General Principles of the Civil Law of China, "land may not be sold, leased, mortgaged or illegally transferred by any other means." State-owned land may be used under ownership by the whole

people or under collective ownership. The Chinese law precludes the concept of private ownership of land in China. If there are no legal provisions governing the acquirement of certain property rights, there will not have truly property rights as such.

Even if the Chinese law allows natural persons to obtain private ownership of land in China, the ownership of lunar land will not meet the generally required two elements for the acquisition of possession, namely, "an intention to take the thing and some act of a physical nature giving effect to that intention".⁸ Both Hope and BLASTC only have intentions to obtain their property on the Moon, but they can not take any physical actions to actually possess the land on the Moon. Consequently, their claims of lunar land only satisfy the first element of the acquisition of possession, but lack of the second element. This is also the reason, in the Nemitz case, for which the US Ninth Circuit Appeals Court found that Nemitz had unilateral expectations for his ownership of Eros rather than a real property right that can be protected by law.⁹

Furthermore, since no State on Earth may extend its sovereign jurisdiction over celestial bodies,¹⁰ "without a national system in space, there is no way for a citizen to authenticate a claim".¹¹ National laws are only effective within the territory of a country without extraterritorial effect. The Moon and celestial bodies are beyond the territorial boundaries of any States, therefore a State can not effectively develop a national law on property rights to the land on the Moon. This view is also endorsed by the board of directors of the International Institute of Space Law (IISL). In a statement issued in 2009, it stated that "since there is no territorial jurisdiction in outer space or on celestial bodies, there can be no private

ownership of parts thereof, as this would presuppose the existence of a territorial sovereign competent to confer such titles of ownership".¹² Individuals are not allowed to obtain private ownership of land in China, let alone the ownership of the land on the Moon.

B. Selling Lunar Land Is not Allowed under International Law

BLASTC argued that since China is not a Contracting Party to the Moon Agreement, Article 3 of the Moon Agreement is not applicable to the case in China. The Outer Space Treaty reads that outer space and celestial bodies shall not be appropriated by States. It is silent on the private acquisition of lunar land and resources.

Although China has not ratified the Moon Agreement and China is not bound by the Agreement, it does not necessarily mean that individuals and private companies can obtain the ownership of lunar land.

Firstly, both BAIC and the Court quoted Article I of the Outer Space Treaty that "the exploration and use of outer space, including the Moon and other celestial bodies shall be the benefit and interests of all countries", "and shall be the province of all mankind." This provision is known as the principle of common interests. Technologically advanced countries should use outer space not only for their own interests, but also for the benefit and interests of all countries because most countries do not have the space technology and capability.¹³ States should cooperate in the use of outer space on a non-discriminatory basis; and States have the obligation to take into account the interests of other countries.¹⁴ Under the principle of common interests, seeking personal benefit or one country's benefits at the expense of the rights and interests of

other States in the exploration and use of outer space is not allowed. The principle that the Moon and its resources are common heritage of mankind in the Moon Agreement is closely related to the principle of common interests. As the preamble of the Moon Treaty states that the purpose of the Agreement is "to define and develop the provisions of" the four space treaties "in relation to the Moon and other celestial bodies", the Moon and its resources are common heritage of mankind in the Moon Agreement is the development of the "province of all mankind" in Outer Space Treaty. Accordingly, China as a State Party to the Outer Space Treaty shall respect the principle; even it is not a State Party to the Moon Agreement.

Secondly, Article I of the Outer Space Treaty also stipulates that "outer space, including 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 there shall be free access to all areas of celestial bodies". Article II of the Outer Space Treaty further provides that "outer space including the Moon and celestial bodies is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means". Professor Diederiks-Verschoor observed that "the ban on sovereignty remains clearly expressed as a fundamental factor in space law".¹⁵ The above mentioned provisions imply that not only sovereignty claim to any areas of outer space and the Moon is prohibited, but also any other measures that would impede States from free access to the Moon and other celestial bodies are not allowed. These include any monopoly in using outer space or any use of outer space oriented at purely national interests and thus tries to impede any accession of other countries.¹⁶ Space law, which prohibits national appropriation

of outer space and celestial bodies, shall necessarily prohibit nationals of States to appropriate outer space and celestial bodies. Otherwise, States will be able to circumvent their obligation of international law by authorizing its nationals to appropriate outer space or celestial bodies. The Nemitz case demonstrated that the private possession of celestial bodies would certainly impede States from free access to all areas of celestial bodies.¹⁷ Imaging if the U.S. Court supported the Nemitz's ownership claim of Eros, NASA at least had to notify Nemitz in advance that the US spacecraft was to fly over Eros. When the spacecraft landed on Eros or caused damage to Eros, NASA had to pay landing and parking fees or pay compensation as Nemitz claimed. If the spacecraft landed on a piece of land of a celestial body which belongs to a natural person of another country, NASA might be involved in foreign litigations. This would cause many problems and even conflict among States. The drafters of the Outer Space Treaty shall never expect it. In this regard, Dr. von der Dunk correctly commented that "the treaty, by forbidding nations from appropriating territory in space, essentially prevents individuals from doing the same."¹⁸

Thirdly, States have responsibility to ensure that space activities carried out by non-governmental entities are in conformity with international law and Outer Space Treaties. Article VI made it very clearly that "States bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried out by governmental agencies or by non-governmental entities" (private sectors), "and for ensuring that national activities are carried out in conformity with the provisions of" the Outer Space Treaty. This requires States Parties to the

Outer Space Treaty to authorize and continuously monitor the space activities carried out by non-governmental entities. According to the theory of state responsibility, all space activities authorized by a State are national space activities. Hence, by authorizing or approving a non-governmental entity's claim to property right to the Moon, a State will violate Article II of the Outer Space Treaty, and shall be responsible under Article VI of the Outer Space Treaty.

The board of directors of the IISL issued a statement on claims to property rights regarding the Moon and other celestial bodies in 2004. It emphasized that "the prohibition of national appropriation also precludes the application of any national legislation on a territorial basis to validate a 'private claim'." States Parties to the Outer Space Treaty "are under a duty to ensure that, in their legal systems, transactions regarding claims to property rights to the Moon and other celestial bodies or parts thereof, have no legal significance or recognised legal effect."¹⁹ In 2009, the board of directors reiterated that "any purported attempt to claim ownership of any part of outer space, including the Moon and other celestial bodies, or authorization of such claims by national legislation...is prohibited and unlawful".²⁰ Therefore, selling lunar land in China is not allowed under international law.

C. Argument on Unfair Treatment

Regarding the BLASTC's argument that it is unfair to forbid selling lunar land in China while selling lunar land is allowed in the other hemisphere of the world, we need to look at the purposes of the lunar deeds. The US Lunar Embassy described the lunar deeds as "novelty gifts", which means that they were "to be used for fun only".²¹ That was why NASA did not take any legal action in this affair.²²

By contrast, Mr. LI Jie, the CEO of BLASTC, declared that buyers of the lunar land would have the ownership of the piece of land on the Moon. In addition, they would have the right to the use of the land and the right to the mineral products within 3 km above and beneath the land they bought. After purchasing the land, if a lunar module happened to land on the purchased land, the owner could ask for an appropriate fee.”²³ This is really a misleading. The Moon is significant in the exploration of outer space. All States are encouraged to promote cooperation in the exploration and use of the Moon and other celestial bodies on an equal basis, rather than to make the Moon into an area of international conflict.²⁴ The Nemitz case also indicates that the US Courts do not support the real estate right claim to celestial bodies. Consequently, it can be foreseen that selling land on the Moon or a celestial body not for fun will be illegal and will be forbidden in the United States.

D. Whether the plaintiff's conduct of selling lunar land constitutes speculation?

Speculation was a crime in the Criminal Law of China in 1979 when China just adopted the reform and the open door policies. To strengthen the supervision and management of economic activities, to protect legitimate business and legitimate competition, to punish speculative activities and to safeguard the smooth progress of economic reform, the State Council promulgated the Interim Regulation on the Administrative Punishment for Speculation in 1987. The Regulation listed 11 conducts of speculation that there were no legal norms to govern at the time. Due to insufficient productive capacity and the shortage of many goods, the law and regulation did protect the

material demand of important industries and the interests of the majority of the consumers. However, crime of speculation has been deleted from the Criminal Law of China since 1997 when the economic situation in China had been changed tremendously. Most of conducts listed in the Interim Regulation on Administrative Punishment for Speculation were no longer illegal. Since selling lunar land did not fit any of the 10 clearly prescribed punishable conducts, the Courts and BIAC applied the vaguest provision in the Interim Regulation on Administrative Punishment for Speculation, i.e. “other speculative conducts which are disrupting the socialist economic order”, to this case. The Court is correct to rule that the plaintiff does not have property right to lunar land and the land on the Moon does not have the characteristics of commodity. It is also true that the plaintiff purchased the lunar land from Dennis Hope and sold them to make high profits. However, saying that this conduct “has seriously disrupted the normal order of market economy” and constituted speculation is not convincing. Lawyers voiced their view that the regulation for speculation was obsolete and should not be applied any more.

III. LOOKING TO THE FUTURE

On 15 January 2008, the State Council announced to abolish some administrative regulations including the Interim Regulation on Administrative Punishment for Speculation. The former CEO of BLASTC plans to sell certificates for lunar land again.²⁵ However, the abolishment of the said regulation does not necessarily mean that selling land on the Moon will be allowed in China. According to Article 142 of the General Principles of the Civil Law of China, treaties and international practices (customs) can be applied directly in civil law suits.

Articles I and II of the Outer Space Treaty prohibit any real property right claim to the Moon. Therefore, the status of the land on the Moon remains the same. It can not become a commodity to be sold and bought in China. Besides, it is interesting to note that the former CEO of BLASTC does “not promise the certificates for lunar land ownership will truly correspond to a piece of land on the Moon” any more. Now, he declared that “it is only a certificate, a craft or a gift.”²⁶

¹ Decision on Administrative Punishment of Beijing Administration for Industry and Commerce, 21 December 2005.

² Administrative Decision of Haidian District People's Court, Beijing, 12 October 2006, pp.2-5.

³ *Ibid.*, pp.5-7.

⁴ *Ibid.*, pp.9-13. Administrative Decision of Haidian District People's Court, Beijing, 9 November 2006.

⁵ Administrative Decision of Beijing First Intermediate People's Court, 16 March 2007.

⁶ Henry R Hertzfeld & Frans G von der Dunk, Bringing Space Law into the Commercial World: Property Rights without Sovereignty, 6 *Chi. J. Int'l L.* 8, p.94.

⁷ *Rer Kelly, Nemitz v. United States, A Case of First Impression: Appropriation, Private Property Rights and Space Law before the Federal Courts of the United States.* *Journal of Space Law*, 2004, 30(2):297, pp. 303-305.

⁸ Virgiliu Pop, Lunar Real Estate: Buyer Beware, at http://www.spacefuture.com/achive/lunar_real_estate_buyer_beware.shtml.

⁹ *Rer Kelly, Nemitz v. United States, A Case of First Impression: Appropriation, Private Property Rights and Space Law before the Federal Courts of the United States.* *Journal of Space Law*, 2004, 30(2):297, pp. 303-305.

¹⁰ Stephan Hobe, *Outer Space as the Province of Mankind-An Assessment of 40 Years of Development*, ICAC-07- E6.5.04.

¹¹ Richard Stenger, Prime lunar real estate for sale -- but hurry, November 20, 2000, at <http://archives.cnn.com/2000/TECH/space/11/20/lunar.land>.

¹² Statement of the Board of Directors of the International Institute of Space Law (IISL), 22 March 2009, available at <http://www.iislweb.org/docs/Statement%20BoD.pdf>.

¹³ He Qizhi & Huang Huikang, *Space Law*, Qingdao Publisher, 2000, p.45.

¹⁴ He Qizhi & Huang Huikang, *Space Law*, Qingdao Publisher, 2000, p.41.

¹⁵ I. H. Ph. Diederiks-Verschoor, *An Introduction to Space Law*, Kluwer, 1993, p.23.

¹⁶ Stephan Hobe, *Outer Space as the Province of Mankind-An Assessment of 40 Years of Development*, ICAC-07- E6.5.04.

¹⁷ Nemitz asserted private property rights in asteroid 433 “Eros”. He claimed that the landing of the NASA spacecraft infringed his private property rights and that he should be compensated. See *Rer Kelly, Nemitz v. United States, A Case of First Impression: Appropriation, Private Property Rights and Space Law before the Federal Courts of the United States.* *Journal of Space Law*, 2004, 30(2):297, pp.297-298.

¹⁸ Richard Stenger, Prime lunar real estate for sale -- but hurry, November 20, 2000, at <http://archives.cnn.com/2000/TECH/space/11/20/lunar.land>.

¹⁹ Statement by the Board of Directors of the International Institute of Space Law (IISL) On Claims to Property Rights Regarding The Moon and Other Celestial Bodies, 2004, available at: http://www.iafastro-iisl.com/downloads/Staement_Moon_2004.doc.

²⁰ Statement of the Board of Directors of the International Institute of Space Law (IISL), 22 March 2009, available at: <http://www.iislweb.org/docs/Statement%20BoD.pdf>.

²¹ Virgiliu Pop, Lunar Real Estate: Buyer Beware, at http://www.spacefuture.com/achive/lunar_real_estate_buyer_beware.shtml.

²² *Ibid.*

²³ Can Lunar Land Be Sold? Available at http://www.law0512.com/lawyer/lawyer_1257.html.

²⁴ The preamble of the Moon Agreement.

²⁵ Former CEO of Lunar Embassy Sells Umbrella, Available at http://news.xinhuanet.com/fortune/2009-09/03/content_11990185.htm.

²⁶ Former CEO of Lunar Embassy Sells Umbrella, He Used to Be Punished for Selling Lunar Land, available at http://edu.ifeng.com/news/detail_2009_09/03/431822_0.shtml.