

SPACE LAW SYMPOSIUM 2009

30th Anniversary of the “Moon Agreement”: Retrospect and Prospects

The Negotiation of the “Moon Agreement”

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Distinguished Chairpersons,
Ladies and Gentlemen,

It is a great honour and privilege indeed to be able to address this Symposium on the occasion of the 30th anniversary of the “Moon Agreement”. I am, in particular, highly pleased that this event takes place in the presence of the former Chairman of the United Nations Committee on the Peaceful Uses of Outer Space, the former Austrian Foreign Minister and Permanent Representative of Austria to the United Nations, Ambassador Peter Jankowitsch, as well as the current Chairman of the Legal Sub-Committee Professor Vladimir Kopal.

Let me add a personal note: thirty-six years ago I started my international career as an Austrian delegate to the Legal Sub-Committee and I later also served on the Main Committee under the wise guidance and most able chairmanship of Ambassador Jankowitsch. I also wish to mention that two of my present colleagues on the International Tribunal for the Law of the Sea – the most distinguished Judges from India and from Japan – have served together with me on the Legal Sub-Committee in the seventies. Everything I have since learned about multilateral diplomacy and international negotiations has had its origin in this important forum. As a delegate to the Legal Sub-Committee I was also personally intensely involved in the successful negotiations which in time led to the adoption of the “Moon Agreement”.

Ladies and Gentlemen,

It has rightly been stated that the development of general concepts of international law reflects the spirit of a given historic period. This is certainly also true of the concept of the “common heritage of mankind” which is inextricably linked to the “Moon Agreement”- e.g. the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of 5 December 1979. That concept also constitutes an essential element of the United Nations Convention on the Law of the Sea of 10 December 1982 adopted after eight years of particularly difficult negotiations which to a large extent centred on its implementation. It was the debates on a new law of the sea that also inspired the incorporation of the common heritage principle into the “Moon Agreement”.

Let me further point out that the idea of the “common heritage of mankind” is to some degree also reflected in the legal framework for the protection of the environment of Antarctica where reference is made to “the interests of all mankind”. A full application of that concept to that area would, however, at a minimum require the extinguishment of all national claims and the establishment of a more universal regime of administration and control. Such a development does, at least at present, not seem to be in sight. On the other hand it is obvious that key elements of the Antarctic Treaty of 1 December 1959 - such as peaceful international cooperation for scientific research and environmental preservation - have inspired the new legal regime for the oceans as well as the law of outer space.

The advent of the space age had made the international community aware of the need to develop a set of international principles to become later, as far as possible, legal rules governing space activities. This seemed all the more urgent in view of the accelerating “space race” between the United States and the Soviet Union, the only space powers at the time. In 1958 the United Nations General Assembly thus established an ad hoc Committee on the Peaceful Uses of Outer Space which eventually became a permanent Committee. In 1963 the General Assembly adopted the Declaration on Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space which provided the basis for the “Outer Space Treaty” – e. g. 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 27 January 1967. In this connection it should also be recalled that in February 1966 a Soviet

spacecraft had made its first “soft” landing on the Moon to be followed by the first U.S. lunar landing four months later.

The Outer Space Treaty until this very day constitutes the foundation of outer space law and can truly be called a “Constitution for Outer Space”. It declares 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” and that exploration and use “shall be the province of all mankind”. The Treaty further states in its Article II, the most fundamental provision, that “outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means”. Exploration and use is to be in accordance with international law, including the Charter of the United Nations, in the interest of maintaining “international peace and security” and promoting “international cooperation and understanding”.

While the notion of the “province of all mankind” seems to echo the principle of the common heritage of mankind it can also be said that its usage in the Outer Space Treaty denies rather than confirms any perceived status of outer space as “common heritage of mankind”. Nonetheless, several traces of that concept are to be found in that Treaty which besides non-appropriation and exclusive use for peaceful purposes also refers to the “common interest of all mankind” and the “benefit of all peoples” as major principles governing the exploration and use of outer space. Although the Outer Space Treaty did not establish any regulations for activities related to the exploitation or use of any natural resource of the Moon or other celestial bodies, it nevertheless to a certain degree already foreshadowed later developments.

Let me now turn to the developments in the field of the law of the sea during those years: In the 1960’s there was a sudden surge of interest in the exploitation of the seabed based on studies that a wealth of resources existed on the deep seabed with the most common minerals being cobalt, copper, manganese and nickel, recoverable from both mineral nodules and mineral crusts. At the same time, the idea gained ground that this “fortune on the seabed” should benefit mankind as a whole and not be left to the technologically advanced countries alone. The drive towards an internationalization of the deep seabed was to a large extent also motivated by the attempt to call a halt to the creeping jurisdiction of coastal States with respect to the seas, a concern shared by many developing and developed countries.

On 1 November 1967, Ambassador Arvid Pardo of Malta presented a Memorandum at the United Nations General Assembly which proposed that the seabed and the ocean floor beyond the limits of national jurisdiction be declared the “common heritage of mankind”, not subject to national appropriation, and reserved exclusively for peaceful purposes. In a parallel development Professor Aldo Amando Cocca, delegate of Argentina, had earlier in the same year stated in the Legal Sub-Committee that the international community had recognized the existence of a new subject of international law, namely, mankind itself, and had endowed it with the vastest common property – *res communis humanitatis* - namely outer space, including the Moon and the other celestial bodies.

In 1970 the General Assembly unanimously adopted the Declaration of Principles Governing the Sea-Bed and the Ocean Floor and the Subsoil Thereof, Beyond the Limits of National Jurisdiction which constituted an important basis for the future Convention on the Law of the Sea. The respective area as well as its resources were declared the “common heritage of mankind”, not to be subject to appropriation by any means by States or persons and to be reserved exclusively for peaceful purposes. The exploration of the area and the exploitation of its resources were to be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether landlocked or coastal, and taking into particular consideration the interests and needs of the developing countries. The General Assembly further decided to hold the Third United Nations Conference on the Law of the Sea as it had become obvious that besides elaborating legal rules for the international seabed area the traditional law of the sea also needed revision based upon a new consensus of the international community.

The history of the Moon Agreement began in the very same year with the first draft agreement being submitted by Professor Cocca on behalf of Argentina, which was supported by Egypt, India and the United States. That draft agreement declared the natural resources of the moon and other celestial bodies “the common heritage of mankind”. The benefits obtained from the use of the natural resources of these celestial bodies should be made available to all peoples without discrimination of any kind. In distributing such benefits, account should be taken of the need to promote the attainment of higher standards of living and conditions of economic and social progress and development, pursuant to article 55a of the Charter of the United Nations, in the light of the interests and requirements of the developing countries and

the rights of those undertaking these activities. The Argentine proposal also addressed the issue of natural resources defined as “all substances originating on the Moon and other celestial bodies” which also required a separate legal regime distinct from that applicable to those resources brought to Earth for use.

In 1971 the Soviet Union submitted a draft Moon Treaty according to which the exploration and use of the Moon are to be carried out with due regard for the interests of present and future generations. In accordance with the principles of the Charter of the United Nations, the threat of use of force or any other hostile activities on the Moon as well as the use of the Moon to carry out such activities in relation to the Earth are prohibited. The draft also reaffirmed the prohibition of the installation on the Moon of nuclear weapons and other weapons of mass destruction and of any other activities involving the use of the Moon for military purposes. It furthermore contained the principle of non-appropriation of the surface and subsoil of the Moon, but also clearly reflected opposition to the common heritage concept as well as to any provisions concerning commercial exploitation of the resources. The U.N. General Assembly in resolution 2779 (XXVI) of 29 November 1971 took note of that draft and called for further debate and elaboration of provisions for a treaty regarding the Moon, also calling for special rules to govern the use and exploitation of all natural resources and substances of the Moon and other celestial bodies, without, however, any mention of the common heritage principle.

The United States policy towards the Moon had from the beginning equally been based on the principle of exploration of the Moon and other celestial bodies for peaceful purposes only. The U.S. also wanted to ensure that astronauts could freely conduct scientific investigations of the Moon, the results of these activities to be made available for all mankind. The main objection to the Soviet draft related to the scope of the Treaty as it did not include the “other celestial bodies”. In 1972 the U.S. further submitted a proposal according to which the States Parties to a “Moon Treaty” were to recognize the importance of concluding agreements with respect to the utilization of the resources of the Moon and other celestial bodies if this would become a reality. To this end, a meeting of all States Parties should promptly be convened with a view to negotiating arrangements for the international sharing of the benefits of such utilization when one-third of the States Parties informed the Depository Governments of the Treaty that they considered that practical utilization of the resources of the Moon or other celestial bodies was likely to begin within two years following or had

already begun. Until such time, however, the use of natural resources “should continue to be unimpeded”. The United States thus opposed any moratorium regarding the exploitation of lunar resources already having been declared by the U.N. General Assembly with respect to the resources of the deep seabed which was, however, not considered binding by the United States as well as other industrialized countries.

The insistence on enshrining the principle of the common heritage of mankind in a Moon Agreement and its rejection by the Soviet Union was the primary cause for the prolonged negotiations on such an agreement which lasted from 1970 to 1979. The respective discussions continued to be strongly influenced by the negotiations at the Third United Nations Conference on the Law of the Sea - which had begun in 1973 - on that very same subject. The developing countries contended that there were no valid reasons for not applying to the natural resources of celestial bodies, and, in particular, of the Moon, the same regime as for the seabed beyond the limits of national jurisdiction. They also insisted that the exploitation of lunar resources should be subject to an international authority to act on behalf of mankind – as was envisaged for the deep seabed. The Soviet Union considered it, however, unacceptable to transpose to space law general concepts and specific norms elaborated in other fields of international law and continued to reject the common heritage doctrine.

A working paper submitted by Egypt and India in 1972 reflected the growing acceptance of the common heritage doctrine and also introduced the concept of sharing of the benefits. The Legal Sub-Committee in the same year approved a draft text of a Moon Agreement on which work was to be pursued as a matter of priority. The draft, *inter alia*, stated that the Moon shall be used by all States Parties to the Agreement exclusively for peaceful purposes and there shall be freedom of scientific investigation. The exploration and use of the Moon shall be the province of all mankind and be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development. The draft agreement, however, also contained a number of brackets around still controversial provisions, in particular with respect to declaring the natural resources of the Moon and other celestial bodies to be the “common heritage of all mankind”. No consensus existed further whether the Moon Agreement should also apply to other celestial bodies.

In the following year India once again strongly advocated the application of the common heritage principle to the Moon and other celestial bodies, their subsoil as well their resources. Exploitation of these resources should not be done, except in accordance with the international regime to be established. The Soviet Union, however, continued to insist on not going beyond the concept of “province of mankind” contained in the Outer Space Treaty, while the United States once again rejected the idea of a moratorium regarding the exploitation of lunar resources.

In the course of formal and informal negotiations in the following years the views concerning the controversial issues could be considerably narrowed, the impasse concerning the principle of the common heritage of mankind, however, remained. In order to break the stalemate the Austrian delegate to the Legal Sub-Committee – which happened to be the speaker – in 1978 submitted an informal compromise proposal encompassing the results of all the previous negotiating efforts and offering a novel solution with respect to this main outstanding question. In 1979 the Outer Space Committee took note of the efforts the Legal Sub-Committee to complete the text of the draft treaty relating to the Moon and also noted that the Sub-Committee had based its discussions on the text of a tentative draft agreement elaborated through informal consultations by the delegation of Austria.

After examination of the Austrian draft by the Outer Space Committee under the chairmanship of Ambassador Jankowitsch and its further consideration by the U.N. Special Political Committee it became, with only very few changes, the final text of the Moon Agreement. An understanding was in particular reached at that stage in extending the scope of the Agreement to other celestial bodies within the solar system, other than the earth, except insofar as specific legal norms enter into force with respect to any of these celestial bodies.

. The core provision of the Moon Agreement, is article 11, paragraph 1, based on the informal Austrian compromise text, providing that “the Moon and its natural resources are the common heritage of mankind”, which finds its expression in the provisions of the Agreement and in particular in paragraph 5 of that article. According to that paragraph, States Parties undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the Moon as such exploitation is about to become feasible. This provision is to be implemented in accordance with article 18 which provides for

a review conference ten years after the entry into force of the Agreement on the basis of the common heritage principle and taking into account in particular any relevant technological developments. Article 11, paragraph 7, sets forth the main purposes of the future international regime which is to include an equitable sharing by all States Parties in the benefits derived from the resources, whereby the interests and needs of the developing countries as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the Moon shall be given special consideration. This provision thus contains a balanced definition of the notion of equitable sharing of benefits as it proceeds from the assumption that equity is impossible without special consideration of the efforts of States which have contributed to resource exploitation activity on the Moon.

The express link between the principle of the common heritage of mankind and the international regime to be established in the future as well as the specific limitation of the scope of that principle to the Agreement itself lay at the heart of the Austrian compromise text and was the basis for the general acceptance of its incorporation into the Moon Agreement. The implementation of the principle was realistically postponed until the time when a practical need therefore would arise. The developing countries subsequently no longer insisted on a moratorium with respect to the exploitation of the natural resources of the Moon until the establishment of an international regime.

The Moon Agreement was adopted by the General Assembly on 5 December 1979 and entered into force on 11 July 1984. It cannot be seen in isolation from the legal regime established by the Outer Space Treaty on the provisions of which it is based and which it supplements, in particular by introducing the concept of the common heritage of mankind into outer space law. The Agreement on the one hand contains provisions that reiterate or develop the principles set out in the Outer Space Treaty, on the other hand provisions that are unique to it and contribute real added value with respect to the other outer space treaties.

Thus far the Moon Agreement has only been adhered to by 13 States and signed by 4 others despite repeated calls by the General Assembly. The Agreement was, however, from the very beginning perceived as an objective legal regime to be valid for all States and not only the States party to it. This was the reason why only five ratifications were considered necessary for its entry into force. The adoption by consensus of the Moon Agreement at the Committee level and subsequently without a vote by the General Assembly seemed to

confirm that view – which has since also been doubted in view of the very limited number of ratifications and accessions. Some States regularly question whether the Agreement is part of international law and should be considered to be on the same level as the other outer space treaties.

Ladies and Gentlemen,

Since its entry into force thirty years ago the Moon Agreement has certainly been languishing, the principal reason obviously being the fact that the enthusiasm for exploiting the natural resources of the Moon which had been so marked at the time of its adoption had soon begun to wane. On the positive side it is to be noted that at present efforts are being undertaken attempting to strengthen the legal regime enshrined in the Moon Agreement by encouraging wider participation. To this end, in spring 2008 a group of States Parties to the Agreement issued a joint statement on the benefits of adhering to it, pointing out that in conjunction with the Outer Space Treaty it was helpful to States Parties in rejecting the “idle claims to property rights” that had surfaced in recent years. The Agreement had adopted an “intelligent approach” regarding the exploitation of natural resources, leaving to the States involved the responsibility for the establishment of an international regime in accordance with the principle of common heritage of mankind and other principles of outer space law at the time when the exploitation of the natural resources becomes feasible. Such a regime should be established and implemented by taking into account simultaneously the relevant political, legal and technical facts, possibilities and requirements existing at that time.

The statement also clarifies that the Moon Agreement does not preclude any modality of exploration, by public or private entities or prohibit the commercialization of such resources, provided that such exploitation is compatible with the principle of a common heritage of mankind. It is further noted that to date no other solution allowing the possible exploitation of the natural resources of celestial bodies has been proposed under the provisions of the United Nations treaties on outer space.

To sum up, let me point out, that important aspects of the principle of the common heritage of mankind – non-appropriation, peaceful use of the international commons and protection of the environment – which are also to be found not only in the Convention on the Law of the Sea and the Moon Agreement, but also in other international instruments - have

from the outset been generally accepted. The appropriate regime of utilization of areas beyond or outside national jurisdiction for the benefit of mankind as a whole has, however, given rise to divergent views in the past and may do so in the future. The regime originally foreseen in the Convention on the Law of the Sea with respect to the exploitation of the international Seabed Area was eventually brought in line with political and economic realities.

With respect to the Moon Agreement, any attempt to frame an international regime regarding the utilization of the resources was purposely avoided, in part also in view of the problems that had arisen in the law of the sea. The drafters of the Moon Agreement were conscious of the fact that they were trying to legislate for a rather distant future. They therefore limited themselves to enshrine general principles in the Agreement and leave the details to when time would be ripe. The principle of the common heritage of mankind would, however, certainly not have found its way into the Moon Agreement had it not been for its acceptance in the new law of the sea.

Although a certain interest in the natural resources of the Moon has manifested itself, any commercial exploitation of these resources is still nowhere in sight. The review conference which was supposed to take place ten years after the entry into force of the Moon Agreement has thus never been convened. For many countries, including the major space powers, therefore, at present there does not seem to be any particular need or urgency to adhere to this Agreement. Nevertheless, in order to underline the basic principles laid down in it and to dispel any doubts that its provisions were meant to constitute a legal regime to be respected not only by the States Parties but by all the members of the international community, it would seem highly desirable to significantly expand its membership.

Today, the concept of the common heritage of mankind can be considered a fundamental principle of international law, enshrined in the United Nations Convention on the Law of the Sea and the Moon Agreement. Nevertheless the question may be legitimately asked if and when we will ever see it translated into a tangible economic reality.

I thank you for your kind attention!