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Acquisition of Property in the Legal Regime of Celestial Bodies

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In this summer UPI reported that parcels on the Moon were offered for sale by a businessman from California. The seller claimed to be owner of the hither side of the Moon acquired by him under the Homestead Act. The price was very modest: USD 15.– only for one parcel. The news agency also reported that some 1600 persons really bought parcels on various fixed places on the surface of the Moon — allegedly well-known persons among them. The best news in silly season coming just at the right moment, the Hungarian press picked it up.

The next one: a German gentleman is going to launch a process against the American swindler. The Moon namely has been his family wealth since Frederick II ("the Great") King of Prussia had donated it to one of his forefathers. The deed of gift is to be found in the Bundesarchiv — the German Government has to search for it.

Acquisition of property, private ownership on the Moon? This basic questions are hidden in both funny stories.

The answer seems to be simple in an interview for radio listeners: the American businessman could not buy from and can not sell real estates to anybody on the Moon. Otherwise Frederick II conquered Silesia and obtained a part of Poland but never the Moon. Consequently he was not in the position to donate it to one of his worthy subjects. The Moon and other celestial bodies today are "res communis omnium" a certain kind of collective property of all mankind, it can not be occupied.

The space lawyer is right giving this summary explanation in good faith for the mass media. Nevertheless a critical analysis of the legal regime of celestial bodies for real cases does not result in such a clear-cut conclusion. This paper attempts to give voice to some doubts concerning positive law aspects of acquisition of property in this regime.

National appropriation in the Space Treaty

The theory of international law often applies civil (Roman) law notions for simpli-

fied labeling of analogous institutions. The original mode of acquisition of property in civil law has been the model for the original mode of acquiring territory. A state extends its sovereignty by the effective occupation of a territory which is not under the jurisdiction of any other subject of international law. (*Res nullius i. e. terra nullius cedit occupanti*) The development of this legal institution had been in close connection with process of colonization. All territories which were not under the sovereignty of a state recognized as belonging to the international community — regardless of the native population — were in view of colonizers terra nullius. Occupation as a unilateral legal act consisted of two elements: establishment of an effective dominion (corpus) and the intention of acquiring sovereignty (animus occupandi).

In the opinion of some authors in the early literature of space law the revival of this concept in the space exploration could not be excluded. This possibility was expressed e. g. by *J. G. Verplaetse*:

> As far as we can go back in history any res which is not under authority can be brought under authority. ...Therefore the obvious conclusion is that individual nations can obtain sovereignty over such parts of a celestial body upon which their power is properly vested. (1)

In the space law theory of the presatellite age, however, the view was predominant, that outer space could not be subject of national appropriation. Science, using the terminology borrowed from civil law, designated this status as *res communis omnium*. This character was underlined also by the term *res extra commercium*. (*B. Cheng, C. W. Jenks, R. Probst*) This theoretical approach in the post-satellite years 1957–1967 was confirmed by unanimously accepted UN.GA resolutions (1721/XVI, 1962/XVIII) and interstate practice. (2)

The Space Treaty was rather declarative in Article II.

> Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use occupation or by any other means.

No doubt, outer space, the Moon and other celestial bodies according to positive space law even before the first Moon landings were not "res nullius" as newly discovered territories on Earth in ancient times. The question, however, can not be evaded whether the status of "res communis omnium" does except objects "res corporales" from civil law appropriation. In other words: is the acquisition of property prohibited by Article II in the legal regime of celestial bodies?

The grammatical interpretation of the Treaty does not offer an unequivocal affirmative answer to this question. *National appropriation* does not belong to the traditional terminology of international law. It seems to be a space law term coming from UN resolutions. The phrase "national appropriation by..." demonstrates that the "means" are subordinated to this notion. It does not cover the occupation as an original mode of acquisition of property in civil law. All the more it can be only interpreted as a unilateral act of states extending their sovereign rights to a "terra nullius". (3)

Commentaries to the Space Treaty generally do not differentiate between two kinds of occupations under Article II. We find attempts to include civil law occupation into national appropriation indirectly e.g.: acquisition of property is only possible in the framework of a state jurisdiction which can not be extended to the celestial bodies. (4) Others refer to the discussions of the Legal Subcommittee of COPUOS. The delegates underlined there that by prohibition of national appropriation also

civil law exclusivity will be prohibited. Nobody before and after the Space Treaty represented an opposite view.

On the other hand: The chairman of the Space Law Committee of International Law Association circulated a questionnaire concerning legal nature of natural resources of celestial bodies. The answers were by no means consonant. *S. Gorove* and *A. A. Cocca* represented the view that Article II of the Space Treaty was applicable to natural resources of celestial bodies i. e. national appropriation in sense of civil law should be forbidden. According to the opposite view of *B. Cheng, E. Pépin, C. Horsford, S. M. Williams* the appropriation of natural resources merely formed part of the freedom of exploration and use of outer space. (5)

It is not meaningless to mention some facts of international practice. As a big achievement of *Apollo 11* mission U.S. astronauts collected and transported to earth 22 kg of Moon samples in 1969. The following Moon landings carried out the same task. In the same way the Soviet *Luna* space probes from 1970 on brought back samples from the Moon-surface taken by automatic instruments. These objects were appropriated by U.S. and Soviet authorities respectively and have been owned by them without objection from the international community.

Article II consequently can be interpreted that the prohibition of national appropriation i.e. the "res communis omnium" character of celestial bodies do not involve the same legal status of objects on celestial bodies prohibiting the acquisition of property.

National appropriation and property in the Moon Agreement

The Agreement Governing the Activities of States on the Moon and other celestial bodies under the main principle "the Moon and its natural resources are the common heritage of mankind" has gone further in details of the principle of non-appropriation.

The freedom of scientific investigation involves restricted rights to appropriate certain objects:

> Article VI.
>
> 2. In carrying out scientific investigations and in furtherance of the provisions of this Agreement, the States Parties shall have the right *to collect and remove* from the Moon samples of its mineral and other substances. Such samples shall remain at the disposal of those States Parties which caused them to be collected and may be used by them for scientific purposes.

This wording carefully avoids such terms for objects collected and removed as property, ownership, though above stipulation grants certain rights of an owner to the states concerned.

Property rights are also implied in the rather moral obligation:

> ...States Parties shall have regard to the desirability of making a portion of such samples available to other interested States Parties and the international scientific community for scientific investigation,...

The last sentence of Par. 2 refers finally to right of use only:

> ...States Parties may in the course of scientific investigations also use mineral and other substances of the Moon in quantities appropriate for the support of their missions.

On the other hand the Agreement refers to property in a negative sense concerning materials for non-scientific purposes.

Article XI.

3. Neither the surface of the Moon, nor any part thereof or *natural resources* in place shall become property of any state, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person.

Property rights shall not be created by placement of personnel and installations on or below the surface of the Moon.

Above wording of Par.3 of Article XI *a contrario* could be hardly interpreted otherwise than prohibition of acquiring property does not concern *resources non-in-place. C. Q. Christol* concludes to my mind correctly:

> ...by the introduction of the term "in place" the negotiators intended to legalize the removal of natural resources from the surface or the subsurface of the Moon thereby *establishing the right* of ownership and of property in the possessor of such resources. (6)

At the same time Par.3 ends with the reservation: "The foregoing provisions are without prejudice to the international regime referred to in paragraph 5 of this article."

The acquisition of ownership and property rights over natural resources of the Moon is made in this way the subject of a caveat.

The international regime referred to in Par.5 does not exist. The Moon Agreement has been ratified by 8 states only, the most important space powers are not among them. (7)

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All things considered, from above analysis may be concluded that in the legal regime of celestial bodies following principles of appropriation in broader sense can be stated:

1. *National appropriation* i.e. extending sovereign rights to the Moon and other celestial bodies or any parts thereof is prohibited.

2. *Appropriation* i.e. acquisition of property on the Moon and other celestial bodies of removable objects within the limits of general principles of their legal regime is not prohibited.

Such principles are:
a) Exploration and use of outer space with *due regard to the corresponding interests of all other states.* (S.T. Article IX.)

b) Due regard *to the interests of present and future generations* (Moon Agreement Article IV.)

The principles *CHM* and *"province of mankind"* today can give an extremely general orientation in interpreting space law rules of acquisition of property on celestial bodies, though both are connected in treaty law with this problem.

Unfortunately mankind is not a subject of international law. It can not act as a legal person, can not launch a process, can not claim anything in his own name. The same is true also for the principle above under b) Coming generations have not a single "ombudsman" among us to represent their interests, which we can not understand in many respects. For our subject: it would be science fiction to speak about property rights on celestial bodies which some time in the future will be acquired by mankind itself.

Footnotes

1. Proceedings of Fourth Coll. IISL 1961, p. 323. Similar views: *F. Berber*: Lehrbuch des Völkerrechts, Vol. I. München-Berlin 1960, p. 345. *C. E. S. Horsford*: The Law of Space. Journal of British Interplanetary Society, 1955, p.144. *R. K. Woetzel*: Die internationale Kontrolle der höheren Luftschichten un des Weltraums, Bad Godesberg 1960, p. 79., *E. Bornecque-Winandy*: Droit de l'imperialisme spatial, Paris 1962, pp. 30-31. etc.

2. Statements after LUNIK-2 hit the Moon. (September 14, 1969) *G. Gál*: Space Law, Budapest 1961, pp. 188-189.

3. *H. Bittlinger*: Hoheitsgewalt und Kontrolle im Weltraum, Köln etc., 1988, p. 136. (hoheitliche Tätigkeit)

4. *M. Dauses*: Zur Rechtslage des Mondes und anderer Himmelskörper. Zeitschrift für Luft- und Weltraumrecht, 1975. p. 271.

5. See: *S. M. Williams*: The Exploitation and Use of Natural Resources in the New Law of the Sea and the Outer Space. Proceedings of Twenty-Ninth Coll. IISL 1986, p. 201.

6. *C. Q. Christol*: The Modern International Law of Outer Space, New York etc. 1982, pp. 262-263.

7. Space Law. Basic Documents. *K. H. Boeckstiegel–M. Benkő* Vol. 1 — A. V. 2