Common Heritage of Mankind:

The Rise of Balancing Interests between the Developed and the Developing Countries and the Need to Revisit the Moon Agreement

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Abstract: With the rapid development of science and technology, exploration and exploitation of the moon and its natural resources has already been undertaken and realized by space faring nations, which put the Moon Treaty to a fundamental place since it is the only treaty that specializes in regulating outer space activities relating to the Moon and other celestial bodies till now. Though the Moon Treaty establishes a number of basic legal principles for the use and exploitation of extraterrestrial materials, only a few countries has ratified it, which has weakened the profound impact that the treaty should have had. Why is the treaty ratified by such a few nations? During the procedure of negotiations on the Moon Agreement, it is the basic difference on the terminology "common heritage of mankind" that barrier and should be responsible for the length of time it took from 1971 to 1979. Like the term in United Nations Convention on the Law of the Sea 1982, article 11 of the Moon Agreement is a product of compromises between different interest groups. However, by taking the probably heavy burden that article 11 might imposed on in the future into account, main space faring nations refuse to ratify the treaty and the Moon Treaty without participants of those nations has few influences on the regulation of activities taking place on the Moon and other celestial bodies. How can the Moon, its natural resources and the interest of the developing countries be protected with such a weak and intangible treaty? The Sea Convention entered into force twelve years after it was born, what is more, concessions and compromises were made through revision of its eleventh part. In order to better protect and use the Moon and other celestial bodies, it is time to revisit the Moon Treaty and take a second look at "common heritage of mankind", its status and its relationship with other principles governing activities of States on the Moon and other celestial bodies. Should the term still remain in the treaty or other efforts should be made to make the Moon Treaty a rather active and positive element on the governing of activities in outer space? These are the questions this essay intends to figure out.

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I. Introduction

On December 5, 1979 the General Assembly adopted without a vote the report, a resolution providing for the agreement governing the activities of States on the Moon and other celestial bodies, of the Special Political Committee. Thirty-one years have passed since the date the Moon Agreement was born. Unfortunately speaking, comparing with the rapid development of exploration and exploitation of the Moon and other celestial bodies, few improvements could be found out in the legal regime governing activities of States. The Moon Agreement entered into force on July 11, 1984 and only a few countries ratified it till now, which weakened the influence of the Moon Agreement to a great extent.

The reason why such a few nations willing to ratify the Moon Agreement lies in the following controversial problems, one is about the scope of the Moon Agreement, the other is the natural resources of the Moon, where the Agreement stipulates that "The Moon and its natural resources are the common heritage of mankind. "[1] Though hard and time-consuming work had been put into these issues, few results received during the negotiation of the draft agreement.

II. Common Heritage of Mankind: Most Controversial Issue During the Procedure of Negotiations on the Moon Agreement

It is known to all that the Moon Agreement is the latest born treaty among outer space treaties, by looking back to its drafting history we can find out the reason. On July 3, 1970, Dr. Aldo Armando Cocca, the representative of Argentina, proposed a "Draft Agreement on the Principles Governing Activities in the Use of the Natural Resources of the Moon and Other Celestial Bodies".[2] His proposal was put forward in the settings that the 1967 Treaty on Outer Space could not satisfy the regulation of activities relating to the Moon since the exploration of the Moon and its natural resources had already been taken on at that time. Later, the U.S.S.R. Minister for Foreign Affairs, A. Gromyko, in a letter to the Secretary General of the United Nations, requested that the 26th session of the General Assembly consider the

[1] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies. A/RES/34/68. Dec. 14, 1979. Article 11.
[2] Report of the Legal Subcommittee on the Work of the 11th Session. A/AC.105/101. May 11, 1972.

"Preparation of an International Treaty Concerning the Moon". The response was a resolution (2799, XXVI) which the General Assembly adopted on November 29, 1971 requesting that COPUOS and its Legal Subcommittee give priority to the question of elaborating a draft treaty on the Moon and make a report to its 27th session in 1972. Accordingly, this became a priority item on the agenda of the Legal Subcommittee which met in Geneva for its 11th session from April 10 to May 5, 1972.

Since then, the two major space faring nations, U.S.S.R. and U.S., made their proposals respectively at that time, while U.S.S.R. made a Draft Treaty Concerning the Moon[3] in 1971 and U.S. unveiled its Policy Proposals, in the form of working papers, in 1972. In the working papers presented by the U.S., however, extensive revisions were made to the U.S.S.R. Draft Treaty. Since the U.S.S.R. Draft applied solely to the Moon, the U.S. working papers claimed that the upcoming Moon Treaty should embody "other celestial bodies", a concept that had already been introduced in Outer Space Treaty in 1967, to its application. Moreover, revisions toward Article I of U.S.S.R. Draft were also made, which proposed that apart from international law, including the Charter of United Nations, activities carried out on the Moon and [other celestial bodies] shall also in accordance with "other treaties in force". Another revision also the most controversial one is made in its Working Paper 12 on April 17, 1972, it said in its first paragraph that:

> *The natural resources of the Moon and other celestial bodies shall be the common heritage of all mankind.*

When the U.S. Representative to the Legal Subcommittee, Herbert Reis, reported to the Legal Subcommittee on May 3, 1972 concerning the status of natural resources of the Moon and other celestial bodies, he stated that

> *On the broadest of generality, it seems right to state that such resources are part of the "common heritage of all mankind". This would parallel the policy proposed by President Nixon two years ago this month that all nations should regard the resources of the seabed lying beyond the point where the high seas reach a depth of 200 meters as the common heritage of mankind....We would also want to be careful to ensure that celestial body resources may be used where found for supporting life systems as, for example, in uses by astronauts of liquids or gases of a particular celestial body....At such a conference participants would need to bear in mind not only common goals of economic advancement but the*

[3] UN A/C.1/L.568, Nov. 5, 1971.

need to encourage investment and efficient development as well.[4]

Fundamental differences formed, and the prevailing opinion among delegates was in favor of the common heritage concept and a number of countries introduced proposals for declaring the Moon and other celestial bodies to be "the common heritage of all mankind." Notably the working paper proposed for discussion by Egypt and India on April 14, 1972, provided an Article VIII as follows:

> *(i) The Moon [and other celestial bodies] and their natural resources shall be the common heritage of all mankind.*
> *(ii) The exploration and use of the Moon [and other celestial bodies] and their natural resources shall be carried out in the interest of mankind as a whole and the benefits arising therefrom shall be made available to all peoples without discrimination of any kind.*
> *(iii) In the distribution of such benefits account shall 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 55(a) of the Charter of the United Nation, in the interests and requirements of the developing countries.*[5]

Though a consensus was reached and tuned out to be a 21 articles Draft Treaty approved by the Legal Subcommittee on May 4, 1972, the issue upon the issue of the common heritage of mankind was still under heat debate. The U.S.S.R. refused this concept to be introduced in the Moon Treaty based on the belief that this concept was used in a philosophical, rather than the legal sense. Besides, inheritance and succession in the civil law regime have a connection with property rights, since the Moon and other celestial bodies are not subject to national appropriation (article II of OST) and they cannot become any person's property. Thus, by including "heritage" in the Draft, there will be a logical confusion. In opposition to the attitude of the U.S.S.R., Sweden, Argentina, Austria and many other countries were in favor of the opinion that common heritage of mankind should be introduced in the Draft.

III. Reflections on the Sea Convention: its compromises and results

The concept, common heritage of mankind, was initiated by Ambassador Arvid Pardo of Malta, who proposed that the ocean's resources be "the common heritage of

[4] Statement by U.S. Representative Herbert Reis on the Work of the 1972 Session, U.N. Outer Space Legal Subcommittee. U.S. Mission, Geneva, Switzerland. May 3, 1972. 6 p.
[5] PUOS/C.2/WG(XI)/15/Rev.1.

mankind" and used for mankind's benefit on August 17, 1967.[6] After that, the U.N. General Assembly passed the Declaration of Principles Governing the Seabed Beyond National Jurisdiction[7] and in this declaration, two paragraphs of it require attention:

> *The Sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind....*

On the basis of the principles of this Declaration, an international regime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon. The regime shall, *inter alia* provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof and for ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration in the interests and needs of the developing countries, whether land-locked or coastal.

In accordance with the Principle of common heritage of mankind, the seabed resources exploration under the Sea Convention was controlled by "International Sea-Bed Authority" who would limit the amount of extraction so as not to impinge excessively on land-based mining. Moreover, the Sea-bed Authority itself could engage in mining through the establishment of a new entity called the "Enterprise". Finally, the Sea-Bed Authority would have the ability to compel states to transfer to it, on "fair commercial terms", mining technology that was not available on the open market. Private entities seeking access to a mining site would have to identify two sites, one for itself and one for exploitation by the Sea-Bed Authority either through the Enterprise or by some association with developing states. What is more, they will be taxed and the proceeds distributed to all states.

Obviously, heavy burden are imposed on the developed countries and those who possess the highly-developed technology to initiate the exploration and exploitation of the "area". Thus, the industrialized states viewed such an International Sea-Bed Authority as irrational, expensive and inefficient, and declined to sign the convention after it was adopted. Considering the condition of the existing technology at that time and the need to bring major industrialized countries back to the regime, further

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[6] UN Department of Public Information. Reference paper No. 18. A Guide to the New Law of the Sea, pp.7-8.

[7] General Assembly resolution 2749 (XXV). A/C.1;544. Adopted by a vote of 108 to 0 with 14 abstentions.

negotiations were conducted leading to a 1994 Agreement on the Implementation Part XI of the Seabed Provisions of the Convention on the Law of the Sea where radical revisions were made.

Twelve years passed, the controversial issue left by the Sea Convention was partial worked out through the revision of the Convention. The influence of an International treaty relies partially on the acceptance of it, thus, compromises and concessions have to be reached in order to better develop its value. A treaty with only one side of an interest group will not take an effect of balancing. So will the lessons learned from the Sea Convention pass a light on the Moon Agreement?

IV. Revisiting the Moon Agreement

The Moon Agreement, adopted in 1967, reaffirmed some of the principles introduced in Outer Space Treaty such as the Moon and other celestial bodies shall be used by all States Parties exclusively for peaceful purposes, principles of cooperation and mutual assistance in activities concerning the exploration and use of the Moon and other celestial bodies and so on. These principles play a fundamental role in the activities carried out by States Parties, however, the barrier caused by common heritage of mankind not only makes the international principles governing the use and exploration of the Moon and other celestial bodies of little value, but also puts the existing legal regime into inefficient operation. Without participating of major space faring nations, the Moon Agreement lacks a valid and efficient regime for cooperation in exploration of the Moon and its natural resources, which will cause money wasting, misunderstanding, conflicts between nations, private enterprises and international organizations.

According to article 18 of the Moon Agreement,

> *Ten years after the entry into force of this Agreement, the question of the review of the Agreement shall be included in the provisional agenda of the General Assembly of the United Nations in order to consider. However, at any time after the Agreement has been in force for five years, the Secretary-General of the United Nations, as depository, shall, at the request of one third of the States Parties to the Agreement and with the concurrence of the majority of the States Parties, convene a conference of the States Parties to review this Agreement. A review conference shall also consider the question of the implementation of the provisions of article 11, paragraph 5, on the basis of the principle referred to in paragraph 1 of that article and taking into account in particular any relevant*

technological developments.

In this way, the Moon Agreement intends to keep itself a dynamic legal system to adapt itself to the rapid development of outer space technology. However, common heritage of mankind destroys the major space faring nations' interest. Unless feasible commercial profit from the Moon is available or revisions are conducted, little chances will be seen to bring them back to the table.

Additionally, by introducing the principle of common heritage of mankind, the main purpose, on the side of the developing countries, is to allocate the proceeds derived from the Moon and other celestial bodies. However, the exploration of the Moon, like that of the Seabed, is rather an expensive and high risk adventure which requires cooperation with space faring nations. Besides, one of the main aspects of common heritage of mankind is to share the interests and obtain the fund and technology assistance from the industrialized nations. From the perspective of national interests, few countries will pass the Moon Agreement that imposes too much burden while few advantages , which results in the failure of the developing countries to acquire benefits from the Moon.

V. conclusion

The Moon is the only satellite of the Earth and the only celestial body that we can reach. In order to better use it and its resources, we need to avoid the potential dangerous of introducing an immature term into the legal field.

With the rapid development of science and technology, it is high time to revise the Moon Agreement to adapt it to recent development. A feasible project might be that a revision in the form of a proposal to be made and the issue of the revision to be put on the agenda of the Legal Subcommittee to make the Moon Agreement a more influential treaty in regulating activities relating to the Moon and other celestial bodies.