

# Common Heritage in Magnificent Desolation

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The defeat of the Moon Agreement in Congress in 1980 has become a central foundation myth of the citizen space activist community. In fact, the defeat owed much to the State Department's failure to sell it, and even more to corporate mining interests that were far more interested in the precedent it might set for seabed mining.

One problem with the term "common heritage of mankind" is that it seems to have substantially different meanings to different people. To some it conjures a highly communistic vision of the proceeds from resource exploitation being monetarily distributed to every human being. The record of negotiation on the Moon Agreement shows that the Soviet Union was more jealous of its planetary prerogatives than was the United States—or any capitalist for that matter—in that it was far from desiring the Third World to acquire the legal authority to dictate the disposition of extraterrestrial resources extracted by Soviet labor and which it therefore considered to be the property of the Soviet state.

Shortly after the agreement had been opened for signature in 1979, a small space enthusiast organization called the L5 Society mobilized political opposition to the agreement. The society had formed four years earlier with the goal of constructing at the Earth-Moon Lagrange point L5 a self-sustaining colony out of lunar materials based on Gerard K. O'Neill's ideas, and it saw the "common heritage" principles of the Moon Agreement as a barrier to the use of lunar materials for construction of the L5 colony and to the development of space in general. L5 Society contacted Leigh Ratiner, a Washington lobbyist who was then engaged in lobbying against provisions in the draft UN Convention on the Law of the Sea III (still being negotiated) pertaining to a proposed deep seabed mining regime similar to that envisioned in the Moon Agreement. Ratiner said that the Moon Agreement could be defeated for about \$100,000, which was certainly affecting the future of space law and policy on the cheap. Ratiner achieved what he set out to do, "to kill this treaty dead."

## I. The Quest for Consensus

In the 1970s, the international community negotiated two agreements to manage the natural resources of the international commons, i.e. natural resources in locations that were not subject to national claims of sovereignty. Of more immediate importance, because of the perceived accessibility of commercially valuable resources on the ocean floor, was the third United Nations Convention on the Law of the Sea (UNCLOS III). The less important of the two was the Moon Agreement. However, the international political-economic climate of the time was reflected in the negotiations of both treaties. The world map had changed a great deal since the beginning of the Space Age two decades earlier. The European colonial empires had dismantled themselves in the 1960s, giving rise to dozens of newly independent states. Many of these states were impoverished and saw the root of their underdevelopment in their exploitative economic relationships with the former colonial powers. These economic ties had largely survived the transition to independence; private interests in the former colonial powers owned most of the assets in the newly independent states and continued to extract the profits from those assets. Even long-independent states in Latin America pointed to an enduring pattern of economic dependence enforced by the relationship of the peripheral Third World (characterized by trade in low value-added primary goods) to the industrialized core (characterized by trade in high value-added services and manufactured goods). An informal coordinating mechanism known as the Group of

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77 formed, which eventually grew to include more than 120 less-developed countries. This group promulgated the New International Economic Order (NIEO), a broad program to change the existing rules of the global economy and enable the Third World to catch up with the developed world.

At the same time, however, there was growing concern over the “carrying capacity” of Earth. Could the environment withstand industrialization on a global scale? Where were the resources going to come from to sustain Earth’s billions at the same level of affluence as a few hundred million Japanese, Americans, and western Europeans? An answer to the “limits to growth” (Meadows *et al.* 1972) was the “high frontier” (O’Neill 1977) and the “deep frontier,” to seek new sources of minerals and energy beyond the sky and beneath the sea. Both the UNCLOS III and Moon Treaty negotiations were buffeted by this turbulent diplomatic struggle for jurisdiction over these distant resources and their direct bearing on future economic development. Several Latin American states, including, Brazil, Colombia, and Venezuela, regarded the status of natural resources in the Moon Agreement as an important step in the establishment of a NIEO (COPUOS 1977; 1977a; 1978a). With this agenda in mind, there arose the phrase “common heritage of mankind” to describe the legal character of the natural resources in the oceanic commons in the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction (UN 1971). It was then applied to the celestial commons in the negotiation of the Moon Agreement. The Third World wanted either the launching states capable of mining the planets to share some of benefits with the less fortunate of the Earth, or ensure that when future launching states emerged in the Third World, there would still be extraterrestrial resources available for them to exploit.

“Common heritage of mankind” is not necessarily the same thing as the “province of all mankind” principle in Article I of the Outer Space Treaty. The latter was equated with “for the benefit of all mankind” in the US Senate hearings of that treaty (US Senate 1967), and the Soviet delegation to COPUOS construed the term to mean that “celestial bodies are available for the undivided and common use of all States on Earth, but are not jointly owned by them (COPUOS 1977b).” One problem with the term “common heritage of mankind” is that it seems to have substantially different meanings to different people. To some it conjures a highly communistic vision of the proceeds from resource exploitation being monetarily distributed to every human being. Ironically, Soviet law professor R. V. Dekanozov (1980) favors the term “international resources” to connote the nature of these resources as being not the province of an individual state, and available for acquisition as property. Nevertheless, Arthur M. Dula expressed the fear that “common heritage of mankind” would be interpreted as common ownership, and implied that the Soviet Union was behind this alleged limitation on free enterprise in outer space:

The United States will soon decide whether to sign and ratify the proposed U.N. ‘Moon Treaty’ designed to control all activities on all celestial bodies in the solar system other than the earth as well as the use of all trajectories to and around them. An analysis of the draft treaty shows that it would create a moratorium on commercial exploitation of the resources of the moon and other celestial bodies until a second, more comprehensive treaty for regulating such activities is concluded, and establish guidelines for this second treaty antithetical to the commercial development of outer space resources by private enterprise. This would allow the USSR and the Third World to decide when to expand commercial uses of outer space or whether to permit them at all. Like the Law of the Sea, which it closely parallels, this Law of Space would limit the basic legal rights that free enterprise will need to work effectively in space. The conclusion is that the proposed treaty is neither necessary, desirable, nor in the best interests of the U.S. and the free world (Dula 1979, 3).

Dula colors the entire history of space treaty negotiations in terms of communism versus capitalism, with the Soviet Union doing its best to do the United States at every opportunity:

As introduced by the U.S.S.R. in 1962, the [Outer Space Treaty] forbids free enterprise in space (Dula 1979, 5)...

The wording is deceptive. The ratified version of the Outer Space Treaty certainly does not forbid free enterprise in space, as evidenced by all of the free enterprise that has been conducted in space ever since. That an early Soviet draft declaration may have attempted to forbid free enterprise in space is irrelevant as a point of law to the Outer Space Treaty, and is irrelevant as a point of law to the Moon Agreement.<sup>2</sup> The argument that Dula attempts to make is political, not legal, and even that is highly suspect:

The [1971] draft Moon Treaty went through numerous minor changes within COPUOS over the next eight years. At the end of the 1979 COPUOS session consensus was reached on its present language (Dula 1979, 7).

This makes it sound as though the Soviet Union pretty much ended up with everything it wanted. But, Dula was not present at the negotiations, whereas US representative to COPUOS S. Neil Hosenball was there, year after year. Hosenball’s 29 July 1980 testimony before the Subcommittee on Science, Technology and Space of the Senate Commerce, Science, and Transportation Committee, paints a starkly different picture:

The Soviet Union throughout made a whole series of concessions, as I view it...

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<sup>2</sup> Also, the Soviet Union abandoned this proposal a year after they submitted it.

There was a provision in their draft treaty which our delegation believed could be interpreted to exclude the use of other entities than states or state organizations in exploitation or on exploration. That was subsequently dropped by the Soviet Union.

The Soviet Union wished to limit the treaty to the Moon. They subsequently agreed that the treaty would govern other celestial bodies. The Soviet Union for almost the entire period from 1972 until we finally reached consensus would not agree to common heritage language in the treaty. That one issue, I think, more than anything else delayed a consensus being reached....

If you examine the 1971 Soviet proposal, you will find some elements of the Soviet proposal in the final text, but there is a great deal of difference between what was in the Soviet proposal and what was finally agreed to (US Senate 1980, 51).

In fact, the 1971 Soviet “Draft Treaty Concerning the Moon” did not even mention the “common heritage of mankind,” even though Argentina had proposed the language a year earlier (COPUOS 1970; Cocca 1970; Menter 1980). The record of negotiation shows that the Soviet Union was more jealous of its planetary prerogatives than was the United States—or any capitalist for that matter—in that it was far from desiring the Third World to acquire the legal authority to dictate the disposition of extraterrestrial resources extracted by Soviet labor, which it therefore considered to be the property of the Soviet people. Haanappel dismisses Dula’s fears of collusion against private enterprise as unfounded (Haanappel 1980). The truth is that the draft proposal that the US submitted on 17 April 1972 adopted the “common heritage of mankind” language (COPUOS 1972), which was consistent with the position that the Nixon Administration had taken in 1970 regarding the resources of the seabed. The Soviet Union continued to oppose the “common heritage of mankind” language in the Moon Agreement until a qualifying clause, “which finds its expression in the provisions of this Agreement and in particular in paragraph 5 of this article,” was appended on the last day of negotiation, thus drastically circumscribing its meaning. The Soviet position was that outer space was *res nullius* rather than *res communis* (which, given that it was the Communist Party that ruled the Soviet Union, is something of an historical irony<sup>3</sup>), meaning that the Moon and other celestial bodies were available for the undivided and common use of all states, but not jointly owned by them. No state had a legal claim on extraterrestrial resources that it did not itself obtain. Thus the Soviets adhered to the prior language of the Outer Space Treaty, “the province of all mankind,” which was also carried forward in Article 4, paragraph 1 of the Moon Agreement (Menter 1980). On the other hand, the documentary evidence shows that Italy, an industrialized, capitalist democracy, was Argentina’s staunchest ally in promoting a radical view of *res communis* (Rusconi 1969).

Dula also claims:

If ratified by the United States, the Moon Treaty’s provisions will control the activities of the United States, as well as those of all U.S. citizens and organizations, not only on the Moon, but also on every celestial body in the solar system (other than the Earth) and in the trajectories around and between them. It is hornbook law that any preexisting U.S. law or regulation contravening a ratified treaty is void (Dula 1979, 3).

Certainly, but just as certainly it is hornbook law that the last sentence only holds for self-executing treaties, whereas most treaties are non-self-executing in the eyes of US law and required federal legislation to execute the provisions of international law in US municipal law. Thus, the ominous warning that “the Moon Treaty’s provisions will control the activities of the United States, as well as those of all U.S. citizens and organizations, not only on the Moon, but also on every celestial body in the solar system (other than the Earth) and in the trajectories around and between them” can only succeed in frightening hornbook lawyers.

The Moon Treaty is vague, lengthy, and complex.... The language of its most important articles closely parallels language in the 1970 U.N. Resolution on the Deep Seabed and the draft Law of the Sea Convention (Dula 1979, 8).

“Lengthy and complex” compared to, for instance, the Law of the Sea Convention itself? Surely not! The basic UNCLOS III document runs 208 pages (76,000 words), not including subsequent amendments, whereas the Moon Agreement barely covers nine pages (just under 3,600 words). And, just what are the articles in the Law of the Sea Convention that “closely parallel” the important articles of the Moon Agreement? If such close parallels exist, it should be possible to perform a comparative analysis between documents, chapter and verse.. Yet, in a 33-page law journal article, Dula does not do this, nor does any other opponent of the Moon Agreement who claims parallels with the Law of the Sea Convention. One cannot choose but wonder why not.

Dula complains, as do others, that the Moon Agreement does not define the terms “celestial body” and “natural resources;” however, he does not use this observation to make any point whatsoever. One could make the similar observation that the Outer Space Treaty does not define the term “outer space.” For that matter, Part I of the Law of the Sea Convention defines several terms, but “sea” is not one of them. Also, one should bear in mind that every time one boards an aircraft, one is traveling in an environment that has no international legal definition. Are such

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<sup>3</sup> In fact, the Soviet Union’s objection was motivated in part by solid Marxist principles, which deny the right to inherit property. It argued from 1972 to 1979 against the inclusion of the “common heritage” principle on the basis that it could have no meaning, since the world cannot inherit what is not owned by any entity.

definitions necessary? Do we not understand what the air, the sea, and the Moon are unless we agree on tortuous legal definitions?

The “common heritage of mankind” term was being used in UNCLOS III then in negotiation, and that convention contained specific implementation criteria. The question thus arose whether “common heritage of mankind” meant the same thing in both treaties, and whether acceptance of the term in the Moon Agreement would lead to a lunar resources exploitation regime similar in scope to the one described in UNCLOS III.

The major controversy over the Moon Treaty concerns principally Article II(1) and (5). Paragraph 1 states that the moon and its natural resources are the common heritage of mankind.” This term is without specific, agreed definition, as evidenced by the remaining text of that paragraph, which says that the term “finds its expression in the provisions of this Agreement and in particular in paragraph 5 of this article (Finch and Moore 1980).”

Separation from the Law of the Sea was achieved for the Moon Agreement in that the “common heritage of mankind” term “finds its expression in the provisions of this Agreement;” in other words, for the purpose of the Moon Agreement, the “common heritage of mankind” only meant what the agreement itself meant, that meaning to be found in the text of the agreement itself, and to some extent in the negotiating history of the agreement. Fielding a question from the Senate Space Subcommittee, Hosenball writes:

[The Soviets] appear to feel that interpretation of the common heritage concept cannot be linked to precedents outside of the Moon Treaty, such as the Law of the Sea (US Senate 1980, 63).

In interviewing COPUOS delegates, Finch and Moore gained the general impression that “the phrase is in essence a continuation of the very general concept from the 1967 Outer Space Treaty of space as the “common province of mankind” with an attempt to move into language more commonly used in international law. They also observed that “no two delegations have said the term means the same thing at any given time.” They further state:

The essence of the concept of common heritage in the context of the Moon Treaty is said to lie in the existence of common, that is, equally shared, rights to explore and use the moon and its natural resources. It does not, however, connote specific implementing criteria or procedures (Finch and Moore 1980).

Eilene M. Galloway of the International Institute of Space Law (IISL) finds the same limitation of the meaning of the “common heritage of mankind” term:

Paragraph 1... provides that “the moon... and its natural resources are the common heritage of mankind...” a general principle implying that every person in the world has a stake in this heritage; but the paragraph continues with specifics: “which finds its expression in the provisions of this Agreement and in particular in paragraph 5 of this article.” Thus the general principle is to be limited in its implementation (Galloway 1980).

Since the “common heritage of mankind” term had no agreed definition, one commentator concludes that the term was “purely declaratory... and open to all interpretations (Bueckling 1979).” Since it has no agreed definition, neither can it have any legal force, nor is a state obliged to act against its interests on the basis of the term.

Even the man who introduced the term into space law in 1970, Aldo Cocca, the Argentine representative in COPUOS, reflects in a letter to Galloway:

...it is rather dangerous to crystallize in a definition the principle involved in a concept which is just being born in the new domain of Space Law, such as the “common heritage of mankind,” as it was established in the Moon Agreement.... I daresay it is not a matter of definition; I feel it must be the outcome of the implementation of the guidelines set forth in the agreement (US Senate 1980).

## II. The Done Deal... Undone

Meanwhile, there may have been some degree of rumor-mongering inside the Washington, DC beltway while the US State Department was preparing to sign the agreement and present it to the Senate for ratification. Charles Chukwuma Okolie cites Harold Almond, Senior Attorney-Advisor, International Law and Affairs Division, U.S. Department of Defense, as having written that Hosenball’s statements regarding the agreement did not reflect a consensus of opinion within the domestic politics of the US, and that members of the Senate Committee on Foreign Relations were displeased with the agreement. In the first place, Hosenball’s statements in COPUOS and its Legal Subcommittee are part of the official record of negotiation of the agreement, which under international law constitute a source for interpretation of the agreement that is secondary only to the text of the agreement itself. Whatever anyone else on the US domestic political scene might think about Hosenball’s statements in the official record is considerably less relevant. Secondly:

...Mr. Almond’s sources were not very accurate. It appears that he derived his impressions from a number of “speakers at several conferences in the Washington area who believe that the clauses in Article XI—those declaring the ‘Moon and its natural resources’ to be the ‘common heritage of mankind’ and those declaring that ‘the Moon is not subject to national appropriation by any claim of sovereignty, by any means of use of occupation, or by any other means’—effectively bar exploitation by private enterprise (Almond 1980).” We believe that Mr. Almond has misunderstood or misinterpreted his sources and thus made an erroneous analysis of the perception of the Moon Treaty in the legislative circles, as well as of

the facts surrounding the 1979 Draft Moon Treaty. We would like to remind him that, after all, the U.S. is the developer of the concept of common heritage of mankind; at least the use of the term was first employed by the U.S. in its official answer to Premier Nikita Khrushchov [sic] in 1957 after the Soviets had successfully launched the first artificial satellite into space (Okolie 1980).

Whatever might have been the perception of the members of the Foreign Relations Committee prior to Almond's remarks in January 1980, an effort to sink the Moon Agreement was already in motion. Shortly after the agreement had been opened for signature in 1979, a small space enthusiast organization called the L-5 Society mobilized political opposition to the agreement. The society had formed four years earlier with the goal of constructing at the Earth-Moon Lagrange point L<sub>5</sub> a self-sustaining colony out of lunar materials based on O'Neill's ideas, and it saw the "common heritage" principles of the Moon Agreement as a barrier to the use of lunar materials for construction of the L<sub>5</sub> colony and to the development of outer space in general. For some reason, L<sub>5</sub> members also feared that the agreement would limit the freedom of individuals and groups in space.

According to Eilene Galloway, when COPUOS reported the final text of the agreement to the General Assembly in July 1979:

The first reaction was surprise because some interested people had assumed that the Moon Treaty would never achieve consensus; others were alerted for the time to United Nations international space activities. The issues that have arisen for discussion during the past year are different from those which were ultimately reconciled within the United Nations. A regrettable aspect of the debate over issues is that much of the information published and distributed on this subject contains factual errors, short changes presentation of "the whole truth," and generally suffers from lack of an objective research base.

Without doing any research, some writers assumed that the United Nations had put something over on the United States, whereas there is a clear record that the United States achieved in the Moon Treaty all the major points of its policy as pursued by the Nixon, Ford and Carter administrations. In 1972 the United States proposed formally the concepts of the common heritage of mankind and an eventual international regime.... A strange element in the present situation is that the opponents of some of these proposals waited for eight years before voicing their objections.

I have worked with research materials on public affairs for several decades and have never before encountered a subject about which there has been so much misinformation and misinterpretation as that on the proposed Moon Agreement.

...[M]uch of the material produced during the past year has been emotional, intemperate, speculative, one-sided and often inaccurate (US Senate 1980, 175-178).

The opening shot in the battle of the Moon Agreement occurred when the previous L-5 Society president Keith Henson (husband of then-president Carolyn Henson) declared with considerable intemperance (Michaud 1986, 90-91):

On the Fourth of July 1979 the space colonists went to war with the United Nations of Earth.... The treaty makes no provisions for the civil rights of those who go into space. In fact, it authorizes warrantless searches.... The treaty makes about as much sense as fish setting the conditions under which amphibians could colonize the land.

Other space enthusiast groups joined in condemning the agreement and the people who negotiated it. The Space Futures Society, allied with the L-5 Society, is particularly vitriolic in its letter, written by its director of public information Michael Calabrese, to the Senate Space Subcommittee:

...[N]o agency of office of our government has a definitive understanding of this treaty....

...[T]he treaty as it presently exists, not only operates against the best interests of the United States, it serves the interests of the Soviet Union.

Ever since the publication of Lenin's writings before the 1917 revolution, it has been the strategy of the Soviet Union to separate the West from its energy and industrial resources....

The federal government of the United States is almost totally ignorant of the value of space, its potential for development as an industrial base or its economic benefits. There is a basic lack of understanding in terms of just what the American ability in space is and what it means to this nation and the free world. It is this condition in the thinking of the American government that creates much of the benefits for the Soviet Union in this treaty (US Senate 1980, 233-234).

Calabrese heaps abuse on the Carter administration in apparent ignorance of the fact that the Moon Agreement was already in nearly its final form when Jimmy Carter took office in January 1977, and the fact that the final two years of negotiation centered on the Soviet Union's obstinacy over the "common heritage of mankind" principle.

In August 1979, Carolyn Henson contacted Leigh Ratiner, a Washington lawyer and lobbyist, who was then engaged in lobbying against provisions in the draft UNCLOS III (still being negotiated) pertaining to a proposed deep seabed mining regime having some parallels to the mining regime envisioned in the Moon Agreement. Ratiner had directed the Interior Department's Office of Ocean Affairs in the Ford administration, and was later instrumental in crafting the Reagan administration's position on the UNCLOS III seabed mining issue. Since the issues in the two treaties were similar, at least on a superficial level, the normative objections were seen to be similar and mutually reinforcing. Ratiner told Henson that the Moon Agreement could be defeated for about \$100,000, which was certainly affecting the future of space law and policy on the cheap, but after all, the Moon Agreement opposition was really riding on the momentum of the much larger issue of the UNCLOS III seabed mining issue. In September

1979 the society's board voted to oppose the agreement despite its support by board member and international lawyer Edward R. Finch, and hired Ratiner. Society members organized a campaign of letter-writing to and telephoning key members of the US Senate in an effort that continued into 1980. It helped that Ratiner was a friend of Representative John Breaux (D-LA), chair of the House Subcommittee on Fisheries, Wildlife, and Environment, who invited him to testify against the agreement. From this appearance, Ratiner gained enough credibility to approach staffers of the Senate Foreign Relations Committee, which would consider the agreement once the administration signed it. He prepared a draft letter from the committee to Secretary of State Cyrus Vance, which formed the basis of a letter signed on 30 October 1979 by committee chair Frank Church (D-ID) and ranking minority member Jacob Javits (R-NY), urging that the United States not sign the agreement:

After a decade of negotiation at the Law of the Sea Conference, the set of draft treaty articles now before the Conference sets forth an interpretation of the "common heritage" which does not conform to the national interest of the United States or of other countries with free enterprise/free market economies, particularly as they relate to such matters as production limitations, technology transfer, dispute settlement and competition with the proposed international "Enterprise (US Senate 1980, 83)."<sup>4</sup>

The senators objected to the Moon Agreement on the basis of the perceived similarities between it and the Law of the Sea. What similarities? The Moon Agreement contains no language regarding "production limitations, technology transfer, dispute settlement and competition with the proposed international "Enterprise." Nevertheless, Representative Breaux, who opposed the seabed mining language in UNCLOS III, sent a similar letter to Secretary Vance. All of this occurred as the agreement came up for action by the UN General Assembly, where it passed with the support of the United States. At that point, however, Vance suspended action on the agreement. The State Department formed an interagency group to study the agreement, and it was never signed (Michaud 1986, 91-2; Godwin 2005). Ratiner achieved what he had set out to do, "to kill this treaty dead (US Senate 1980, 113)." Ever since, the American space enthusiast community has pointed to the defeat of the Moon Agreement in the United States as one of its greatest triumphs. However, historian Michael A. G. Michaud reflects:

It seems clear that members of Congress (and Ratiner) opposed the treaty primarily for Law of the Sea reasons and not because they were advocates of space development. Their major concern was to prevent restrictions on seabed mining. Support for the treaty was weak and unorganized outside a small group of international lawyers involved in its negotiation and some sympathetic academics; it was relatively easy to kill. What L-5 should have learned from this experience is the value of weak interest groups having more powerful allies. "L-5 was the tail on a very large dog," comments [space colonization advocate] Thomas Heppenheimer (Michaud 1986, 92-93).

Looking outside the self-congratulatory hype of the space enthusiast community, it becomes obvious that larger issues defeated the Moon Agreement. A broader perspective of the international political-economic issues of the day reveals the actual role of the L-5 Society as having provided useful foot-soldiers and a few platoon leaders for the command of a Beltway insider in the opening battle of a campaign whose ultimate objective was the defeat of the UNCLOS III seabed mining regime. The "smoking gun" in this plot is the testimony of Marne A. Dubs, chairman of the Committee on Undersea Mineral Resources of the American Mining Congress, and vice-president of the mining firm, Kennecott Development Corporation:

I believe if we sign that treaty, for example, that it would seriously interfere with our remaining arguments on the Law of the Sea Conference as far as negotiating a more acceptable agreement (US Senate 1980, 135)

Ronald F. Stowe, chairman of the Aerospace Law Committee, Section of International Law, American Bar Association (ABA), testifying before the Senate Space Subcommittee regarding the Moon Agreement and its purposes, states:

Proponents of nonratification appear to justify their recommendation principally with the argument that, in their view, the United States has been taken to the cleaners in the Law of the Sea negotiations, and we should therefore refuse to participate in any comparable exercises.

In my view, that suggests an unacceptable futility and self-fulfilling anticipation of defeat (US Senate 1980, 69).

Nevertheless, the Ratiner strategy worked brilliantly. Even the ABA Section of Natural Resources Law fell for it, which is hardly surprising, given that its report showed detailed knowledge of the Law of the Sea negotiations, but no knowledge whatsoever of the Moon Agreement's negotiating history (US Senate 1980, 82-85). The upshot was that the ABA, being split in its stance, was unable to take a position one way or another. Among the aerospace professional organizations, the American Astronautical Society declared its opposition to the agreement, while the American Institute of Aeronautics and Astronautics waffled (US Senate 1980, 85-103).

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<sup>4</sup> The "Enterprise" was to be an entity of the United Nations, mining the seabed and allegedly distributing its profits internationally according to some sort of socialist scheme, which allegedly would be given preferential treatment by the International Seabed Authority, thus driving out competition from privately-owned corporations.

In the end, not only was the Moon Agreement never signed by the US, but when UNCLOS III was eventually opened for signature in 1982, the US did not sign it either. An Agreement Relating to the Implementation of Part XI of the Convention, meant to address concerns over the proposed seabed mining regime, entered into force in 1996, yet still the United States has not signed.

Remarkable though the L-5 Society's effort was, it must also be noted that no launching state has ever ratified the Moon Agreement, and only two—France and India—have signed it. Certainly Ratiner and the L-5 Society effectively leveraged their influence inside the Beltway, but it is highly doubtful that they can take credit for what happened (or did not happen) in other national capitals. What else might account for this lack of enthusiasm? When work on the Moon Agreement began in 1970:

...there seemed to be a pressing need for space law because of the active Moon exploration programs of the United States and the U.S.S.R. during the 1960s, and it could not be foreseen that such programs would diminish during the 1970s. In the case of all other functional space programs, law and technology developed in tandem or not very far apart and this was an essential element in our success (Galloway 1980).

In fact, by 1970, the United States had already slammed the door on a sustained manned lunar exploration program by capping Saturn V production as 15 flight items (the last two were never even flown). Also dropped had been plans for an American manned landing on Mars in the early 1980s. Yet, the Moon Agreement was proposed and work on it dragged on, year after year. By 1979, it had been seven years since *Apollo 17*, the last lunar expedition, and the last Saturn V launch vehicles were on static display for tourists. The Soviet Union had abandoned its L3 manned lunar landing program in 1972, and development of its N1 launch vehicle in 1974. What had appeared to many to be so close at the beginning of work on the agreement was now decades in the future. "Many states failed to ratify the Moon Treaty because they felt that it was premature (Danilenko 1989)." Or more accurately, its time had come and gone, and its second coming looked to be a long way off.

During hearings on the agreement, Harrison H. Schmitt (R-NM), the only person to walk on the Moon and sit in the United States Senate, questioned its relevance:

There is no space policy that relates to this treaty. There is none. What is the frame work for this analysis? That is what I don't understand. I am not necessarily opposed to the treaty. I would like to know where the administration is coming from on this and what kind of recommendations we might expect to have here so we can better prepare to receive them (US Senate 1980, 34).

Robert A. Frosch, NASA Administrator, confessed to "massive indifference" to the agreement (US Senate 1980, 40).

Stanley B. Rosenfield of the New England School of Law, who based his opposition to the agreement on his interpretation of Article 11, states:

The heart of the proposed Treaty is the Art. XI provisions relating to the exploitation of the resources of the moon and other celestial bodies. Without this provision the Treaty adds little to the treaties already in force.... The conclusion seems inevitable that unless Art. XI is satisfactory, there is no justification for this treaty.

It is not likely that it will be possible to exploit such resources for some years into the future. It may be desirable to have a treaty in place when it becomes feasible to exploit the resources of outer space. However, there is no value in rushing through an agreement, the terms of which are ambiguous and in which the most important terms are left to future agreement (Rosenfield 1980).

Rosenfield's is a curiously circular argument: there is no point in rushing into an agreement to reach further agreement in the future!

Gennady M. Danilenko suggests that the underlying problem with the Moon Agreement was the process that produced it. First, the broadly multilateral scope of the negotiations did not produce a consensus on the meaning of the agreement itself. Secondly, Danilenko points to the inherent dangers in anticipatory lawmaking.

With respect to the "common heritage of mankind" phrase (Article 11, paragraph 1) and the provision to undertake the establishment of a governing regime (Article 11, paragraph 5), Danilenko notes, "The radically opposed interpretations of these provisions indicate the absence of common intent." These "radically opposed interpretations" suggest that the process that gave rise to the agreement was flawed, as COPUOS members should have hammered out consensus on the controversial passages prior to opening the agreement for signature. Furthermore, that there are such "radically opposed interpretations" suggests that the agreement itself is flawed if it cannot "be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the agreement in their context and in light of its object and purpose (1969 Vienna Convention on the Law of Treaties, Article 31, paragraph 1)."

Both the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (Partial Nuclear Test Ban Treaty), which contains some language pertaining to outer space, and the 1967 Outer Space Treaty, were the product of negotiations between the three major nuclear powers and space powers of the time: the UK, US, and USSR. Thus the precedent was set for the most directly interested states establishing

principles and instruments of space law. The failure of the broadly multilateral 1979 Moon Agreement, and the lack of any new treaty in the nearly three decades since, gives some weight to the argument that any future agreement must at least have the blessing of the space powers, if not be negotiated and concluded among them exclusively.

However, there are several weaknesses in Danilenko's analysis. To begin with, the negotiation record clearly shows that consensus finally was achieved among the negotiators themselves regarding the legal meaning of the Moon Agreement; that onlookers interpreted the agreement according to their own political agendas is something else entirely. Although Danilenko references Article 31 of the Law of Treaties, he fails to consider Article 32, which requires the negotiation record to be taken into account where the means of interpretation specified in Article 31 lead to a conclusion that is either ambiguous or ridiculous. Secondly, in the broadly multilateral negotiation of the Moon Agreement, the main obstacle to consensus was one of the launching states: the Soviet Union. The other major launching state, the United States, agreed early on to the "common heritage of mankind" language, whereas the Soviet Union blocked consensus until in 1979 it accepted compromise language offered by Brazil, as recounted by Hosenball:

The Soviet Union, for almost the entire period from 1972 until we finally reached consensus, would not agree to "common heritage" language in the treaty. That one issue, I think, more than anything else, delayed a consensus being reached (US Senate 1980, 51).

This disagreement would have occurred without the involvement of the non-launching states in the negotiation of the Moon Agreement, although perhaps it would have been resolved more expeditiously.

Danilenko's second point, regarding anticipatory lawmaking, is on firmer ground. He suggests that anticipatory lawmaking is advantageous to some states:

...[F]rom a political-legal perspective, the anticipatory approach provides states lacking space capabilities better opportunities for an increased role in law-making. Furthermore, the anticipatory approach prevents unfavorable developments in actual practice which may be relied upon by space powers in order to establish effective patterns of behavior reflecting their preferences. In view of this, it is not surprising that, at the official level, the major proponents of early negotiations on space issues are the developing countries who feel that preventative regulation enables them to exert a greater influence on the law-making process (Danilenko 1989).

Nevertheless, there are risks to anticipatory lawmaking:

International space law is based on anticipatory regulation, which produces rules to govern topics that might arise only in the future.... The Moon Treaty was negotiated at a time when the activities of states in the exploration and exploitation of the natural resources of the moon were very limited.... Subsequent experience indicates that anticipatory regulation may be less appropriate in the formulation of detailed policies regarding complex technical and economic issues.

...[W]hile anticipatory regulation may be useful for the establishment of a broad legal framework for future space activities, it is dangerous to rely on it too heavily in cases which require detailed regulation of complex technical or economic issues. Early negotiations are usually carried out without substantial knowledge about the subject-matter under discussion. As a result, the law-makers are forced to conduct negotiations based on a number of assumptions about future technological developments, trends in practice and resulting national interests.

The tension between the pressure for anticipatory normative solutions and the dangers of premature regulation became particularly evident in the course of negotiations relating to the legal regime governing the exploitation of the natural resources of the moon. The majority of negotiating states supported the idea of an early normative response to future problems. Other countries, including those specially affected, tried to point out that, at the current stage of development of exploration of the moon, there were no material prerequisites for the detailed regulation of the relevant issues (Danilenko 1989).

The Soviet representative in the Legal Subcommittee of COPUOS emphasized that only:

...practical experience in the use of the resources of celestial bodies would make it possible to formulate well-founded normative provisions to regulate that aspect of space activity. Otherwise, there [is] a danger that legal norms lacking any practical value might be adopted, norms that would have no relationship to the real tasks and trends of moon exploration and would therefore hamper rather than stimulate that activity, thus having a retrogressive effect (COPUOS 1975).

Frosch philosophized:

I am not, as a personal matter, very partial to inventing legalizations in which no one has any experience. That seems to me to be an interesting theoretical exercise, but it is likely that when one arrives at the situation, it is a different situation than was invented beforehand, and may or may not be applicable.

So, I guess I would describe my personal view in the matter as "massive indifference."

I am considerably more concerned with the question of whether we go ahead to develop the technological capabilities and the knowledge to do some exploitation, and if that develops in such a way that we need a new kind of legal regime. Then, it would be useful to negotiate such a thing at a time when there is some knowledge to base it on. I recognize there is a school of thought that opposes my view and says the only time you can negotiate a sensible treaty is when nobody has yet developed a personal interest in it. That is the point at which people can be either neutral enough or, if you like, indifferent enough so they will make the necessary compromises to get a treaty. As soon as somebody has an advantage or a particular interest, then it gets very hard to negotiate treaty law. So you ought to get at it before that happens. My

problem is that we seem to be getting at it before anybody understands what they are talking about. That may be all right, I do not know (US Senate 1980, 40).

The point that Frosch overlooks is that the Moon Agreement merely provides for the possibility of future negotiation on the details of a regime, which by definition would begin “as such exploitation is about to be come feasible,” i.e., when everybody “understands what they are talking about.”

In any case, in holding out for a severe circumscription of the meaning of “common heritage,” the Soviet Union ran out the clock on the Moon Agreement. However, a quarter century after the battle of the Moon Agreement, as the United States contemplates a return to the Moon in the next decade, this time with the intent of a sustained program, possibly leading to commercial development, the question remains: was the defeat of the agreement a good thing? Also, regardless of its merits vis à vis the trends in the American and Soviet manned space programs in the early 1980s, a new question arises: does it now make sense to reconsider the agreement?

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