

THE PERILS OF PLURALITY: REVISITING THE MAKING OF THE INTERNATIONAL LAW OF THE MOON

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ABSTRACT

The story of the negotiations leading up to the Moon Agreement is a story of the politics of State interest and the failure of diplomacy. Scholarship on the negotiating history of the Agreement informs that subjective political interests of States foiled the formation of binding legal norms. However, this article argues that what appeared as politics of State interest was, in fact, the subjective interplay of various understandings of international law by the States. States acted under the misperception that international doctrines are understood by all States alike, and did not take into consideration the plurality of international law. The subsequent scholarship which evolved around the Agreement also fails to consider this fact. The joint and cumulative effect of the damage caused by failing to recognize the plurality of international law may prove perilous to future negotiations on the Moon Agreement, if any at all.

I. INTRODUCTION

The Common Heritage of [Hu]mankind (CHM) clause in the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies¹ (Moon Treaty or Moon Agreement) has often been considered a cause of the failure of the Agreement.² The

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¹ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 18, 1979, 1362 U.N.T.S. 3 [hereinafter Moon Agreement].

² Carol R. Buxton, *Property in Outer Space: The Common Heritage of Mankind Principle vs. the First in Time, First in Right, Rule of Property*, 69 J. AIR L. & COM. 689 (2004).

CHM and its troubled existence in the Moon Agreement has been the subject matter of an impressive amount of research, which has studied the CHM-story from various perspectives: realpolitik, market efficiency, legal doctrine, property rights and North-South divide.³ This author believes that all such analyses are praiseworthy as they individually and collectively advance one's understanding of the CHM clause and the Moon Agreement and the failure of both to become widely accepted by the international community. However, there is one perspective that is rarely if ever addressed: that of diverging doctrinal approaches.

During the negotiation of the Moon Agreement, many States embraced a "normative approach" to international law. That is to say, they considered international law as a "set of norms (or rules) that have a characteristically legal quality and extend beyond the boundaries of internationally recognized entities in terms of both their jurisdiction and their grounds of legitimacy."⁴ For States which adopt this normative approach, international law influences State behavior through objective standards, both general and particular. This approach entails faith in the normative and regulatory power of treaties, the self-ordering and self-regulating potential of international custom and the ability of general principles recognized by legal systems to influence international norms.

Another set of States embraced a "rational approach" to international law. They understood international law as guidelines for rational behavior.⁵ They held the realist position that State interest is causal to State behavior. For such States, international law, rather than constraining behavior, provides necessary information on the *status quo*, which helps States to rationally modify their

³ See e.g., MARCUS G. SCHMIDT, COMMON HERITAGE OR COMMON BURDEN (1989); Gbenga Oduntan, *International Spaces: Legal Moral Basis of the Common Heritage Principle in Space Law*, in GLOBALIZATION AND COMMON RESPONSIBILITIES OF STATES (Koen de Feyeter, ed., 2013); Scott J. Shackelford, *The Tragedy of the Common Heritage of Mankind*, 20 STAN. ENVTL. L. J. 109 (2009); Stephen Gorove, *The Concept of Common Heritage of Mankind: A Political, Moral, or Legal Innovation*, 9 SAN DIEGO L. REV. 390 (1982).

⁴ AARON FICHTELBERG, LAW AT THE VANISHING POINT: A PHILOSOPHICAL ANALYSIS OF INTERNATIONAL LAW 41 (2008).

⁵ Rational approach refers to the stream of thinking which considers State behavior as driven by the self-interest of States over any other considerations. For details on the various credos of this stream, see e.g., JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

behavior to obtain outcomes that best fulfill State interests. They participated in the negotiations to obtain outcomes that increased their payoffs. Their behavior sometimes did not meet the normative standards set by international law; sometimes it was coincidentally met. Ultimately, rationalist States do not concern themselves whatsoever with normative compliance, unless such compliance is in their interest.

There was also a third approach exhibited during the negotiations. It was an “idealistic approach” that generally stems from the universalizing possibilities of international law. As per this approach, international law is a “universalizing system which reconceives the infinite particularity of human willing and acting.”⁶ International law is seen to have the potential to reimagine and reconstitute human society by “universalizing all the particulars of human behavior and transactions, translating them into general and abstract patterns.”⁷ This idealistic approach is not unique to any State—it was taken by many States during the negotiations.

This article submits that there was no meeting of minds between State parties to the Moon Agreement negotiation. Each State failed to understand the other States’ point of view due to their diverse approaches to international law. It is submitted that the plurality of approaches was not recognized by States and throughout the negotiations, States remained under the misperception that international doctrines are understood by all States in the same way.

While negotiations were marred by misperceptions and false assessments, the problem of pluralities did not end there. The negotiations and all that transpired therein became the raw material for scholarly articulation on the international law of the Moon.⁸ Scholars viewed the negotiations and recorded them through their respective internalizations of international law informed by the respective traditions to which they belong. The subjectivity of their analyses caused by their subjective understanding of international law led to their accounts misconstruing actual

⁶ PHILIP ALLOTT, *THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* 290 (2002).

⁷ Philip Allott, *Five Steps to a New World Order*, 42 VAL. U. L. REV. 99, 101 (2007).

⁸ Although the international law of the Moon is not a disciplinary category or specialized branch of international law, the expression is used herein in an epistemological sense of a set of laws on the Moon such that an analytical category is created.

State intentions and positions. What subsequently became the international law of the Moon became a travesty of reality.

To anyone skeptical about the presence of the three approaches to international law during the Moon Agreement negotiations as an all-inclusive, self-sustaining, unitary epistemological consciousness; it is submitted that the approaches, though not present then in their typological attributes, existed as constituent-stuff of an otherwise disorganized unity.⁹ In other words, the approaches were not present *qua* approaches but they were present *qua* fragments of ideologies, culture and laws of States. This article, however, brings those fragments under discernible approaches—*normative, rational* and *idealistic*, and situates the imbroglis surrounding the Moon Agreement in a new analytical framework.

In Part II, the article, by drawing on various State positions, confirms that the said three approaches were present during the negotiations around the Moon Agreement. By juxtaposing State positions, Part III demonstrates how States failed to assess the positions of other States due to their respective internalization of a given approach to international law. These failures caused States to misinterpret other State positions and respond misguidedly to them. Part IV presents the epistemological problem of scholars subjectively evaluating the negotiations by falling into the trap of pluralities. It is their discourses that ultimately became the international law of the Moon. In Part V, the article emphasizes how the assessment problem and epistemological problem are likely to impact future efforts, if any, to revamp the Moon Agreement.

This article engages with a negotiating history and relevant historical materials. However, this methodology does not limit the relevance of the analysis to a historical context only. The analysis does not disaffirm the continued presence of the plurality of approaches discussed here. States might have been understanding international law through one or another of the approaches, even before the negotiations and even after the negotiations. The plurality could be a fact even in contemporary times, although the article does not explicitly advance this point due to its limited analytical

⁹ On the constituents and qualities of epistemological consciousness, *see generally*, MIKAHAIL MIKAILOVICH BAKHTIN, ART AND ANSWERABILITY: EARLY PHILOSOPHICAL ESSAYS (Michael Holquist & Vadim Liapunov eds., Kenneth Brostrom & Vadim Liapunov trans., 1st ed. 1990).

focus. However, this analysis is meant to become a case in point for the plurality of international law.

II. ILLUSTRATING THE PRESENCE OF APPROACHES

A. *The Specificity of Normative Approach*

The Moon Agreement, known as “the ‘fifth star’ in the constellation of outer space treaties”¹⁰ was adopted by the United Nations (UN) General Assembly in 1979¹¹ and entered into force in 1984.¹² However, the first law on the Moon was contained in the Treaty on Principles Governing the Activities of States in The Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 1967, popularly known as the “Outer Space Treaty” (OST).¹³ In the OST the Moon is considered a definite region of the outer space and is, as outer space is, the “province of all [hu]mankind.”¹⁴ In a nutshell, under the OST: the exploration and use of the Moon and outer space is to be for the “benefit and in the interest of all countries [and] free for exploration and use by all States;”¹⁵ neither the Moon nor outer space is “subject to national appropriation by claim of sovereignty;”¹⁶ activities in space, and on the Moon, are governed by international law;¹⁷ the Moon and other celestial bodies are to be used “exclusively for peaceful purposes;”¹⁸ States are responsible for the activities of even their non-government entities therein;¹⁹ all activities must be implemented with due regard for the activities of others; and finally States must conduct activities in

¹⁰ Statement by Ambassador Richard W. Petree, U.N. Gen. Assembly Special Political Comm. on the Report of the U.N. Outer Space Comm. and the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, (Nov. 1, 1979) *reprinted in* 9 J. SPACE L. 161, 162 (1981)[hereinafter Petree Statement].

¹¹ G.A. Res. 34/68 (Dec. 5, 1979).

¹² Status of International Agreements relating to Activities in Outer Space as at 1 Jan. 2022, 2, U.N. Doc. A/AC.105/C.2/2022/CRP.10 See Carl Q. Christol, *The Moon Treaty Enters Into Force*, 79 AM. J. INT’L L. 163 (1984).

¹³ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

¹⁴ *Id.* at art. I.

¹⁵ *Id.*

¹⁶ *Id.* at art. II.

¹⁷ *Id.* at art. III.

¹⁸ *Id.* at art. IV.

¹⁹ *Id.* at art.VI.

such a manner as to avoid harmful contamination of the space environment.²⁰

In 1970, in the Legal Subcommittee on the Peaceful Uses of Outer Space (LSC), Argentina proposed that since the OST “does not establish regulations specifically for activities in the use of the natural resources of the Moon and other celestial bodies,”²¹ provisions must be established “with respect to the legal system for activities in the use of such resources.”²² In its proposal, Argentina also added that the principle of CHM with all its moral constituents shall be the dominant doctrine of the regime.²³

What may have prompted Argentina, is the need to have a certain level of specificity regarding the lunar regime, which was clouded by a complex interrelatedness and interdependence to the regime for outer space under the OST. N. Jasentuliyana and Roy S.K. Lee concisely articulate the surprising generality attributed to Moon in the OST:

The Moon and other celestial bodies come under the scope of application of the Treaty. It was perhaps presumptuous and inappropriate to consider in one single instrument such separate elements as outer space (which is not a res but an infinite ocean of ether), the Moon (only natural satellite of earth) and other celestial bodies (which represent finite and microcosmic entities). It was also surprising that the Moon and all the other celestial bodies were considered together ...²⁴

²⁰ *Id.* at art. IX.

²¹ Draft Agreement on the Principles Governing Activities in the Use of Natural Resources of the Moon and Other Celestial Bodies Preamble, U.N. Doc. A/AC.105/C.2/L.71 and Corr. 1, in U.N. Doc. A/AC.105/196, Annex 1, 21 (Apr. 11, 1977) [hereinafter Draft Agreement of Argentina].

²² *Id.* See Carl Q. Christol, *The 1979 Moon Agreement: Where It is Today?*, 27 J. SPACE L. 6, 7 (1999); FABIO TRONCHETTI, THE EXPLOITATION OF THE NATURAL RESOURCES OF THE MOON AND OTHER CELESTIAL BODIES: A PROPOSAL FOR A LEGAL REGIME 47 (2009).

²³ Draft Agreement of Argentina, *supra* note 21, art. 1. For the constituents of CHM, see CARL Q. CHRISTOL, THE MODERN INTERNATIONAL LAW OF OUTER SPACE 286-87 (1982).

²⁴ N. JASENTULIYANA & ROY S.K. LEE, MANUAL ON SPACE LAW VOL. 1 253 (1979)(citation omitted).

The call for specificity is in actuality a call for greater and “exclusionary normativity.”²⁵ The call for specificity is also a call for details.²⁶ And quite naturally, Argentina, through its draft agreement on the Moon, suggested that it sought a normatively rigid and impregnable regime—which has what Samantha Besson calls, “the *prima facie* reasons for action”—for the exploitation of the natural resources of the Moon which belong to the [hu]mankind.²⁷ The effort was likely designed to situate the Moon in the normative landscape of international law with a certain sense of “authority” to the latter.²⁸

B. The Social-Philosophical Process of the Idealist Approach

As said, what was a “fascinating and controversial issue,” which triggered polemical debates in the LSC during the Moon Agreement negotiations, was the concept of CHM.²⁹ It was again Argentina which initially proposed that “the natural resources of the Moon and other celestial bodies shall be the common heritage of all [hu]mankind.”³⁰ But since its introduction in the LSC, philosophical and ethical meanings were attached to CHM, which created a “romantic attraction” towards the concept.³¹ Over it, there came to exist a postcolonial melancholy amid the anxieties of a possible deprivation. The author, capturing the mood of States during the Moon Agreement negotiations as they are appeared from the negotiating history, has noted, “[t]he emerging state of affairs betokened a new imperialism aimed at the new frontier, one that

²⁵ The view that specificity strengthens normativity is supported by the contention that a specific standard as against a general standard is a “future-directed” intention to comply, whereas intention to comply with a general standard is a matter of “personal policy.” See DAVID COPP, *MORALITY, NORMATIVITY AND SOCIETY* 85-87 (1995). See generally Samantha Besson, *Theorizing the Sources of International Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* (Samantha Besson & John Tasioulas, eds., 2010).

²⁶ See DAVID COPP, *supra* note 25, at 85-87. See generally Besson, *supra* note 25.

²⁷ Besson, *supra* note 25, at 173. See also Draft Agreement of Argentina, *supra* note 21, art. 1.

²⁸ See JEAN D’ ASPREMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES* 31 (2011).

²⁹ TRONCHETTI, *supra* note 22, at 85.

³⁰ Draft Agreement of Argentina, *supra* note 21, art. 1.

³¹ MARIA GAVOUNELI, *FUNCTIONAL JURISDICTION IN THE LAW OF THE SEA* 140 (2007) (referring to CHM under the law of the sea).

appeared to be part of a natural order of the world and a game in which they [Third World States] were to be mere pawns.”³²

Possibly to resist this concept of lunar imperialism, some Third World States demanded a legal regime for the exploitation and redistribution of lunar resources. For example, in 1973, India proposed to establish a regime for the “orderly and safe development and rational management of the resources of the” Moon and “to ensure the equitable sharing by all States in the benefits derived therefrom, taking into particular consideration the interests and needs of developing countries.”³³ In its note to the Subcommittee, Argentina also emphasized that the profits accruing from the exploitation of the Moon must be equitably shared in “consideration of the needs and interests of developing countries.”³⁴ However, while some Third World States wanted a mechanism for the equitable distribution of the wealth of the Moon under the normative framework of international law, their claim was not driven by normative ambitions, but rather by an egalitarian idealism for a new international law.³⁵ As Kemal Baslar holds, the CHM-issue “can be seen as a reflection of slowly evolving egalitarian international law as a result of the demands of the newly decolonized Third World towards further changes in international law.”³⁶

What was that newness—the change—which some Third World States wanted to bring to international law through CHM? The claim for locating CHM in the normative landscape of international law was not to provide the concept of legality characteristic to global commons.³⁷ Nor was the claim for declaring the Moon CHM, as generally portrayed, a “sinister” claim for natural resources and technology transfer.³⁸ Rather it was a claim for a

³² S.G. Sreejith, *International Space Law: A Saga of Mankind’s Lost Aspirations—Introductory Episode*, 2 AALCO Q. BULL. 1, 9 (2006).

³³ India Working Paper, Draft Treaty Relating to the Moon, U.N. Doc. A/AC.105/101, ¶ 21, in U.N. Doc. A/AC.105/196, Annex 1, 11 (Apr. 11, 1977)

³⁴ Argentina Working Paper, Draft Treaty Relating to the Moon, U.N. Doc. A/AC.105/101, ¶ 21, in U.N. Doc. A/AC.105/196, Annex 1, 13 (Apr. 11, 1977)[hereinafter Argentina’s Reply].

³⁵ KEMAL BASLAR, THE CONCEPT OF THE COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW 164 (1998).

³⁶ *Id.*

³⁷ See SARAH WHATMORE, HYBRID GEOGRAPHIES: NATURES CULTURES SPACES 104-05 (2002).

³⁸ BASLAR, *supra* note 35, at 165.

“collective we,” a “we-ness” – not due to any extrinsic universe but due to an ontological oneness of humanity.³⁹

However, the emphasis of the States on the oneness of humanity through CHM was not a fall of international law into transcendental depths. It was rather a Hegelian approach that the long-lost experience of humanity of the oneness of the self and the other, the ontological unity, needs a “second-order representation” in the form of law for recreating it.⁴⁰ This Hegelian socio-idealism is espoused in the social-philosophical process of international law to transform the abstractedness of ontological universalism into an international social fact. In this process, some Third World States saw in international law a means to re-form the human consciousness.⁴¹ It was thus a transformation, intended in every way, of human consciousness through the actualizing potential of international law. This idealistic approach is quite explicit from the statement made by Argentina on CHM in the Subcommittee:

When the aspirations and needs of the peoples of the world arrive at a way of expressing themselves—in other words, when the point is reached where it is possible to establish what is desired—the matter enters into the legal sphere. What is desired necessarily tends to find expression in a principle or a norm which, on this issue, is always international.⁴²

The doctrine of CHM which found final inclusion in Article 11 of the Moon Agreement⁴³ (and the Third Worldism surrounding it) is thus a logical result of a “structural metamorphosis” of international law carried out by Third World States through the revolutionary social idealism of actualizing the ideal through law.⁴⁴

³⁹ WHATMORE, *supra* note 37, at 104.

⁴⁰ See WILLIAM E. CONKLIN, *THE INVISIBLE ORIGINS OF LEGAL POSITIVISM: A RE-READING OF A TRADITION* 47 (2001).

⁴¹ See Philip Allott, *Mare Nostrum: A New International Law of the Sea*, in *FREEDOM FOR THE SEAS IN THE 21ST CENTURY: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY* 49, 49 (Jon. M. Van Dyke et al. eds., 1993).

⁴² Argentina's Reply, *supra* note 34, at 30.

⁴³ Moon Agreement, *supra* note 1, art. 11 (“The moon and its resources are the common heritage of [hu]mankind.”).

⁴⁴ See generally Philip Allott, *Globalization from Above: Actualizing the Ideal Through Law* 26 *REV. INT'L STUD.* 61 (2000); ALLOTT, *supra* note 6, at 84.

C. The Realist Resistance to the CHM

The claim for declaring the Moon as CHM, however, found resistance from the Soviet Union and the United States.⁴⁵ The Soviet opposition primarily related to the “legal content” of CHM and hence, reflects little of a policy-oriented, preference-driven State position characteristic to realism.⁴⁶ The United States (US) found the CHM principle detrimental to the interests of the United States.⁴⁷ In a typical realist fashion of determining State interest (and State preferences thereof) through domestic influences, the US found CHM to “represent[] restraints on the US intention to harvest and exploit resources beyond any national jurisdiction.”⁴⁸ The anti-free-market approach of CHM was also found unfavorable to the interests of the US.⁴⁹

US opposition to the CHM in the LSC was also a result of larger undercurrents in American domestic circles. Some interest groups and stakeholders in the US did not want an agreement that declared the Moon as CHM and provided a mechanism for the redistribution of profits from lunar exploration.⁵⁰ Professional bodies in law, aeronautics and astronautics such as the American Aeronautical Society (AAS), the American Institute of Aeronautics and Astronautics and the American Bar Association (ABA) also took disuading, if not opposing, stances towards the Moon Agreement for similar reasons.⁵¹ The same was the approach of industrial interest groups like the National Association of Manufacturers, the Aerospace Industries Association and the National Ocean Industries Association.⁵²

⁴⁵ BIN CHENG, *STUDIES IN INTERNATIONAL SPACE LAW* 365 (1997).

⁴⁶ Union of Soviet Socialist Republics Working Paper, Draft Relating to the Moon A/AC.105/101, ¶ 21 (Mar. 28, 1973), in U.N. Doc. A/AC.105/196, Annex 1, 11 (Apr. 11, 1977)[hereinafter *The Soviet Opposition*].

⁴⁷ TRONCHETTI, *supra* note 22, at 59.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ A noteworthy example in this regard is the oppositions of L5 Society, a US based group of space enthusiasts. See CHRIS DUBBS & EMELINE PAAT-DAHLSTROM, *REALIZING TOMORROW: THE PATH TO SPACE FLIGHT* 27-30 (2011).

⁵¹ Thomas Gangale, *Common Heritage in Magnificent Desolation*, 46th AIAA Aerospace Sciences Meeting and Exhibit, 7-10 Jan. 2008, Reno, Nevada, at 6 (on file with the author).

⁵² M.J. PETERSON, *INTERNATIONAL REGIMES FOR THE FINAL FRONTIER* 167 (2005).

What prompted such opposition was the socio-economic costs the accession to the Moon Agreement might have brought upon the US Government. M.J. Peterson explains the then policy considerations at the governmental level: “Material calculations and normative considerations intertwined during the resource contention in ways that require careful disentangling before coming to firm conclusions about their relative impact on preference formation.”⁵³ Serious considerations were given to questions such as whether “Governments’ positions were generally consistent with a utility-maximizing comparison of net benefit under an open-access resource regime and under a controlled access resource regime administered by a global intergovernmental agency.”⁵⁴ And, as far the US was concerned, accession to the Treaty “would involve directly and indirectly the expenditure of large sums of money derived from the US taxpayer subject to no control by the United States.”⁵⁵

The US position on CHM and its resistance thereof to give precommitment to the Moon Agreement was a question of honoring domestic commitments to the US populace. Moreover, what the US saw in the claim for declaring the Moon as CHM was an imposition of costs on it.⁵⁶ That is, the US saw the claim as a strategic move—a strategic precommitment—by certain States to constrain the US and to make the US act in such a way that a zero-sum situation is obtained.⁵⁷ Baslar’s account of the CHM-claim makes it obvious that US concerns were not unfounded:

[T]he aim of the developing world was to formulate the common heritage of [hu]mankind in such a way that the result would be inimical to the *laissez-faire* mentality of the West. What the Third World wanted was not to share the minerals which are abundantly available under their feet, but to force the West through General Assembly resolutions to halt commercial mining activities on the moon.⁵⁸

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ BASLAR, *supra* note 35, at 128 (citation omitted).

⁵⁶ Steven R. Ratner, Precommitment Theory and International Law: Starting a Conversation, 81 TEXAS L. REV. 2055, 2058, 2059 (2003).

⁵⁷ *Id.*

⁵⁸ BASLAR, *supra* note 35, at 165.

The US, however, made an effort in the LSC to avoid a zero-sum outcome by demanding a production sharing mechanism on market-friendly lines, as stated by Herbert Reis in the LSC: "On the broadest level of generality, it seems right to state that such resources are part of the 'common heritage of all [hu]mankind' ... [However] we would need to contemplate a special treaty-drafting conference in the event of the discovery of commercially exploitable resources."⁵⁹ As far as the US was concerned, if not for the immediate creation of a mechanism for the commercial exploitation of lunar resources, at least a right to free scientific exploration of the Moon would provide Pareto improvement conditions and a Pareto progression.⁶⁰ This effort was to fail in the LSC, however, as was made obvious from the statement of Arnold Frutkin, Director of International Programs, NASA:

[N]atural resources of celestial bodies should be the common heritage of [hu]mankind, [] their *use for scientific purposes should continue to be unimpeded*; and [] parties should declare their willingness to participate in a conference on the international sharing of the benefits of utilization of those resources *at such time as utilization might appear to become practicable*.⁶¹

Whatever was the outcome of the CHM negotiations, what becomes a matter of interest is that legal considerations of the negotiating parties can be brought under one or another approach towards international law, which also can be seen reflected in the diplomatic stances taken by the parties. The naivety of viewing the others' position in one's discursive contexts and falling into the functional repertoire of their respective sphere, be it the deontological reasoning of normative approaches or the rational choices, are seen as leading to misconstructions which have the risk of

⁵⁹ Statement by US Representative Herbert Reis on the Work of the 1972 Session United Nations Outer Space Legal Subcommittee, US Mission, Geneva, Switzerland, May 3, 1972, *reprinted in pertinent part in* STAFF OF S. COMM. ON COMMERCE, SCI. & TRANS., 96TH CONG., REP. ON AGREEMENT GOVERNING THE ACTIVITIES OF STATES ON THE MOON AND OTHER CELESTIAL BODIES, PARTS 1 AND 2 14 (1980) [hereinafter SENATE REPORT ON THE MOON AGREEMENT].

⁶⁰ *See id.* at 24, 25.

⁶¹ Press Release, United States Mission to the United Nations, *Statement by Arnold W. Frutkin, Alternate US Representative before the U.N. Outer Space Committee*, 5 (Sept. 7, 1972)(emphasis added).

prompting false assessments about State behavior. More details of this process are in order.

III. FAILURE OF ASSESSMENTS IN THE NEGOTIATIONS

On a broader level of specificity, during the LSC discussion, three distinct positions concerning the Moon Agreement were demonstrated. First, the Soviet Union's opposition to the semantic construction of the CHM doctrine.⁶² Second, the US's opposition to the CHM for it being antithetical to the market liberalism advocated by the US.⁶³ And third, Third World States' desire for a CHM-regime – a normative framework for the exploitation, allocation and redistribution of lunar resources.⁶⁴ Of these three positions, it was the respective positions of the Soviet Union and Third World States that first came in conflict with each other. This was much before the US opposition to the CHM surfaced to challenge the socio-political standing of the Moon Agreement. As part of capturing the problem of false assessments by States of other States' approaches, this article first presents the negotiating positions—bargains, concessions, compromises and results—of the Soviet-Third World differences on the CHM doctrine. Later on, it presents the diplomatic conflict between the United States and the Third World bloc.

A. *The Third World Bloc versus the Soviet Union*

i. The Soviet Union's Idealist Approach

For the Soviet Union, the concept of CHM raised terminology issues.⁶⁵ What, according to the Soviet Union, was problematic about the CHM was, first, the effort to import bourgeois notions of property, inheritance and ownership into the CHM through the

⁶² For example, in his address to the Subcommittee Ambassador Piradov stressed that “we have referred to the juridical and political vagueness and lack of specificity in the concept [of CHM] ...” Comm. On the Peaceful Uses of Outer Space, Verbatim Record of its One Hundred and Fifty-Eighth Meeting, 8-10, U.N. Doc. A/AC. 105/PV.158, 8-10 (June 22, 1976).

⁶³ Arthur M. Dula, *Free Enterprise and the Proposed Moon Treaty*, 2 HOUSTON J. INT'L L. 3, 3 (1979).

⁶⁴ GUNNAR SKIRBEKK & NILS GILJE, A HISTORY OF WESTERN THOUGHT: FROM ANCIENT GREECE TO THE TWENTIETH CENTURY 104-05 (2001).

⁶⁵ The Soviet Opposition, *supra* note 46, at 12.

civil law notions of “heritage,”⁶⁶ and second, the effort to diminish the relevance of class struggle in the social process by homogenizing “[hu]mankind.”⁶⁷

The Soviet Union raised strong resistance to the term “heritage.” In its statement to the Subcommittee, the Soviet Union pointed out that “[w]e do not use the term ‘heritage’ in civil law. We use this word in the philosophical, rather than the legal sense.”⁶⁸ The Soviet statement further clarified that heritage entails a succession to property and subsequently leads to claims of ownership over the property.⁶⁹ And, the OST “unequivocally” prohibits any claim of ownership on the property,⁷⁰ rendering the Moon, including its natural resources, “a thing that belongs to nobody.”⁷¹ Thus, according to the Soviet Union, a prohibition on ownership of property and possession of heritage—a property, in fact—is illogical.⁷² Hence, in its Draft Treaty Concerning the Moon, 1971, the Soviet Union attributed *res extra commercium* status to the Moon.⁷³

The Soviet position was backed by strong ideological convictions. That is, the concepts of property and ownership for the Soviet Union were based on the Marxian view that any property which is privately owned supports only the bourgeois regimes.⁷⁴ Hence, the Soviets stood for the destruction of all private-owned property, read as bourgeois-owned property, which is used in the means of production controlled by the bourgeois.⁷⁵ However, under the Soviet system, there were circumstances when private ownership of property was socially legitimate, such as in the cases of state-owned property, ownership in consumer goods and when a property is

⁶⁶ *Id.* See J.I. Gabrynowicz, *The ‘Province’ and the ‘Heritage’ of Mankind Reconsidered: A New Beginning*, 2nd Conference on Lunar Bases and Space Activities, CDSITC Aerospace 691, 693 (1992). See also The Soviet Opposition, *supra* note 46.

⁶⁷ The Soviet Opposition, *supra* note 46, at 12. See generally Emilio Jaksetic, *Peaceful Uses of Outer Space: Soviet Views* 28 AM. U. L. REV. 482 (1979).

⁶⁸ The Soviet Opposition, *supra* note 46, at 12.

⁶⁹ *Id.*

⁷⁰ *Id.*, referencing the Outer Space Treaty, *supra* note 13, art. II.

⁷¹ The Soviet Opposition, *supra* note 46, at 12.

⁷² *Id.*

⁷³ USSR, *Draft Treaty Concerning the Moon*, art. VIII, Preparation of an International Treaty Concerning the Moon, U.N. Doc. A/C.1/L.568 (Nov. 5, 1971)[hereinafter USSR Draft Treaty].

⁷⁴ John N. Hazard, *Soviet Property Law* 30 CORNELL L. REV. 466, 467 (1945).

⁷⁵ *Id.* at 467.

collectively owned under a cooperative scheme.⁷⁶ If private ownership existed in forms other than these, the State, by virtue of the Soviet Constitution, could abolish such ownerships.⁷⁷

In the case of CHM, lunar property was certainly not open for private appropriation. Instead, the Moon and its natural resources were meant for “the undivided and common use of all States on earth.”⁷⁸ However, the Soviet Union held that, while international space law provides for the common use of lunar property, it does not provide for joint ownership of such property by the States under a cooperative scheme.⁷⁹ Moreover, the space law which governs the lunar property was the law of a “ruling class” devoid of any scope for the class struggle between the socialists and capitalists, a conflict that is the hallmark of the Soviet concept of law.⁸⁰ It is the dialectical possibility—the possibility for contestation and debate—of law that becomes the “means for achieving the goals of communism and advancing and extending revolutionary and national liberal movements.”⁸¹ Therefore, a law which is the will of a dominant class had nothing in it to prompt the Soviet Union to enter into an international cooperative framework such as the Moon Agreement. Emilio Jaksetic explains that it was very natural for the Soviet Union to reject the Moon Agreement because it deemed space law as “inconsistent with its notions of contemporary international law ... The Soviets can be expected to pursue their goal of establishing a ‘progressive law’ of outer space, including a progressive concept of the peaceful uses of outer space.”⁸²

What was the nature of that progressive space law envisioned by the Soviet Union? For the Soviets, an ideal space law would be informed by the proletarian struggle against bourgeois oppression and a proletarian urge for a social revolution to establish a socialist order for the peaceful use and exploitation of outer space.⁸³ Such a

⁷⁶ See generally *id.*

⁷⁷ *Id.* at 469.

⁷⁸ The Soviet Opposition, *supra* note 46, at 12.

⁷⁹ *Id.*

⁸⁰ See Jaksetic, *supra* note 67, at 484-90.

⁸¹ *Id.* at 488.

⁸² *Id.* at 492.

⁸³ See generally, Jaksetic, *supra* note 67. *Contra*. Robert D. Crane, *Basic Principles in Soviet Space Law: Peaceful Coexistence, Peaceful Cooperation, and Disarmament*, 29 L. & CONTEMPORARY PROBLEMS 943 (1964) (arguing that the seeming innocuous

stance, it should be presumed, was a natural reflection of the Soviet concerns about a bourgeois imposition of the capitalist means of production and modes of control with regard to space. However, the “dictates of expediency,” as Leon Lipson assesses, prompted the Soviet Union to accept in theory the international legal framework dominated by the ruling class.⁸⁴ Even then, the Soviet Union retained its conviction that law is a means of keeping alive the class struggle, that is, the struggle for ideological dominance between the socialist and capitalist class in which the former will triumph.⁸⁵ The triumph of the socialist class will see the twilight of the bourgeois law and the systems associated with it.⁸⁶

The abovementioned futurism of the Soviet Union is reminiscent of the idealist approaches’ revolutionary ambitions.⁸⁷ And for the Soviets, a law meant an “epistemological material” to be utilized for the reality of socialism to surpass the unreality of capitalism, very much as is in the idealist approach that law is a means for transcending the social materialist conceptions of human reality to a higher intellectual reality.⁸⁸ After transcending to the socialist bliss, law withers or becomes obsolete.⁸⁹

In its intermediary existence in law, the Soviet Union adopted a “compromise formula” according to which international law is “the complex of norms that regulate relations between states in the process of their *struggle and collaboration, or conflict and cooperation* and so on.”⁹⁰ The compromise formula was an assurance of Soviet participation in international affairs.⁹¹ To ensure that participation, the Soviets shaped the doctrine of “peaceful coexistence” which is a conceptual space for socialism to remain in a continuing struggle for dominance with other competing ideologies.⁹²

doctrines of Soviet space law is part of a social manifesto to import nationalist goals in space law).

⁸⁴ Leon S. Lipson, *The Soviet View on International Law*, 1 READINGS IN INT’L L. FROM THE NAVAL WAR COLLEGE REV. 101, 102 (1980).

⁸⁵ *Id.*

⁸⁶ *Id.* at 101.

⁸⁷ *See generally*, BAKHTIN, *supra* note 9.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Lipson, *supra* note 84, at 103 (emphasis in original).

⁹¹ *Id.*

⁹² *See* Nikita S. Khrushchev, *On Peaceful Coexistence*, 38 FOREIGN AFF. 53, 56 (1959).

It is with such ideological convictions and revolutionary zeal that the Soviet Union came to the Moon Agreement negotiations. That is, for the Soviet Union, the Moon Agreement was an opportunity to participate in an ideological debate, intending to produce a corrective outcome for the ideological differences.⁹³ Their disagreement on the concept of heritage exemplifies this stance, as Carl Q. Christol writes: the Soviet opposition to the constituents of CHM such as heritage, inheritance and property “was based on an unwillingness to introduce concepts found in civil law into international law.”⁹⁴ What the Soviets were actually onto was contrasting the socialist notions of *property as a means for subsistence through labor production* with the capitalist notions of *property as private capital which controls the means of production*.⁹⁵ In other words, the Soviets, by exploring the dialectical potential of the Moon Agreement, wanted to generate the antithesis of labor and capital, the very antithesis of socialism and capitalism, leaving the proletarian struggle for dominance alive.

In what is closest to the idealist approach, the Soviet effort was to give form to the shared expectation of the proletariat, by making use of the constitutive potential of law, and preparing an environment for revolution and a social takeover—human self-constituting *through* social self-constituting *through* the mutuality of shared expectations.

ii. The Normative Response to the Soviet Position

The Soviet resistance was appropriately responded to by a set of States including Third World States. First, they took issue with the Soviet declaration of the Moon as a *res extra commercium* and then with the Soviet opposition to the term “heritage,” and finally with the Soviet’s supporting of the concept of common province of [hu]mankind.

a. Opposition to Res Extra Commercium

Article VIII of the Soviet Draft Treaty on the Moon declared that: “[n]either States, international intergovernmental or non-

⁹³ See Jaksetic, *supra* note 67, at 489.

⁹⁴ CHRISTOL, *supra* note 23, at 292.

⁹⁵ *Id.*

governmental organizations and national organizations having the status of juridical persons or not, nor natural persons, may claim the surface or subsoil of the Moon as their property⁹⁶ This clause is an attribution of *res extra commercium* status to the Moon, an effort to abolish ownership of all forms under a legal system that the Soviet Union deemed as being controlled by the ruling class.⁹⁷ The Soviet Union further extended the *res extra commercium* status:

The emplacement of vehicles or equipment on the surface of the Moon or in the subsoil thereof, including the construction of installations integrally connected with the surface or subsoil of the Moon, shall not create a right of ownership over portions of the surface or subsoil of the Moon.⁹⁸

Here is an effort to prevent the private holding of property and commercial exploitation of the Moon by the capitalist means of production and control. However, natural resources were kept outside the scope of Article VIII because the Soviet Union felt that it was too premature to regulate the use of natural resources of the Moon, that is, before lunar mining becomes feasible.⁹⁹

But many State delegations watered down the *res extra commercium* status attributed by the Soviet Union to the Moon to mean *res communis* status.¹⁰⁰ Then, they criticized the Soviet Union for restricting the scope of Article VIII to the “surface or subsoil” of the Moon.¹⁰¹ The essence of their criticism was that the Soviet Union had excluded “natural resources” from the purview of Article VIII’s waiver of claims of ownership of lunar property.¹⁰² What the Third World and other delegations saw in the Soviet move was an effort to excluding natural resources from the purview of what they wanted to be *in toto* a CHM, rendering the natural resources of the

⁹⁶ USSR Draft Treaty, *supra* note 73, art. VIII(1).

⁹⁷ *But see* CHRISTOL, *supra* note 23, at 261 (arguing that declaring Moon as a zero-ownership zone renders it a *res communis*).

⁹⁸ USSR Draft Treaty, *supra* note 73, art. VIII(1).

⁹⁹ Comm. On the Peaceful Uses of Outer Space, Rep. of the Legal Subcomm. on Its Eleventh Session, U.N. Doc. A/AC.105/C2/SR.187, 8 (1972).

¹⁰⁰ *Id.*

¹⁰¹ CHRISTOL, *supra* note 23 at 262.

¹⁰² *Id.*

Moon *res nullius*.¹⁰³ These States were taken to a normative hermeneutical faith typical to normative legal systems that the narrower the semantics, the lesser the normative scope; and a “semantic broadening” in all probability enhances the normative scope.¹⁰⁴ And particularly in the case of treaties, the more expansive the text, the greater the interpretative scope to make the treaty fulfill its purpose.¹⁰⁵

This semantic-normative concern of certain States and the semantic solutions to normative problems that they have found in the Subcommittee is concisely captured by Christol:

The 1971 Soviet proposal sought only to prevent the “surface or subsoil” of the Moon from becoming the property of juridical and natural persons. It focused on tangible resources.

. . .

Article 8, par. 1 [sic] of the Soviet draft would have [] prevented States and other natural and juridical persons from obtaining property rights in the surface and subsoil of the Moon ... [However] [b]oth the Austrian drafts and the 1979 revision of the Legal Sub-Committee, [semantically] added considerably to the 1971 Soviet proposal.¹⁰⁶

The Soviet Union, however, resisted the diplomatic pressure. In this regard, speaking before the Subcommittee in 1974, Ambassador Piradov reiterated: “[T]here *should not be included* in the draft moon treaty a provision concerning the régime for the use and exploitation of the moon’s natural resources.”¹⁰⁷ But, subsequently, the Soviet Union was forced to considerably revise its draft to include the natural resources of the Moon within the scope of Article VIII.¹⁰⁸

¹⁰³ *Id.*

¹⁰⁴ Normative hermeneutics has to it acts of broadening and narrowing, that is, the act of particularizing a general for the particular to become again part of the general corpus of laws. SKIRBEKK & GILJE, *supra* note 64, at 104-05.

¹⁰⁵ For a discussion on the dynamics of texts, their interpretation and its normative effect, see ANTONIO CASSESE, *INTERNATIONAL LAW*, SECOND EDITION 178, 179 (2005).

¹⁰⁶ CHRISTOL, *supra* note 23, at 261.

¹⁰⁷ Comm. on the Peaceful Uses of Outer Space, Verbatim Record at Its One Hundred and Thirty-First Meeting, U.N. Doc. A/AC.105/PV.131, at 66 (1974) (emphasis added).

¹⁰⁸ CHRISTOL, *supra* note 23, at 262.

Indeed, Third World and other State delegations triumphed. As Christol puts it, “[t]he amendments to the Soviet proposal allowed for the acquiring of property rights in removable natural resources taken from the Moon.”¹⁰⁹ However, while the Soviet Union might have felt greater normative pressure to broaden the scope of Article VIII, as diplomatic records tell us, what prompted the Soviet Union to accept the inclusion of natural resources of the Moon to the *res nullius* status was the simple reason that lunar mining was a distant possibility, and that when it would become possible, the Soviet Union could go for a regime for the cooperative ownership and sharing.¹¹⁰ This is apparent from the optimism reflected in the statement of Mr. Maiorski, the USSR delegate to the LSC, made in 1977: “on the question of the status of the natural resources of the moon ... there should be prepared a separate legal document, let us say in the form of an additional protocol to the draft treaty relating to the moon.”¹¹¹

The Soviet Union also ensured that the final draft on the Moon Agreement had in it the Soviet reservation about the regime for the exploitation and sharing of natural resources. Thus, Article XI, paragraph 3 of the Moon Agreement was ultimately redrafted to read: “[t]he foregoing provisions are without prejudice to the international regime referred to in [] this article.”¹¹²

Thus, the Soviet Union agreed to the demands of Third World and other State delegations to include natural resources within the scope of its waiver of any claims of ownership because of the possibility they foresaw in the Moon Agreement for a socialist means of production, control and distribution of resources. That is, in a Marxian and social idealistic fashion, the Soviets saw in the treaty a dialectical possibility for resolving conflicts of ideas and interests so that such conflicts and interests “re-enters the general social process as a new datum,” which re-starts the treaty-making process yet again.¹¹³ The Soviet plan was to take advantage of the provision for the establishment of a Conference of the State Parties laid down in Article 18 of the Moon Agreement for reviewing the application

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Comm. On the Peaceful Uses of Outer Space, Verbatim Record of its One Hundred and Seventy-Fifth Meeting, U.N. Doc. A/AC.105/PV.175, 38-40 (July 25, 1977).

¹¹² Moon Agreement, *supra* note 1, art. 11(3).

¹¹³ Philip Allott, *The Concept of International Law*, 10 EUR. J. INT'L L. 31, 43 (1990).

of the Agreement.¹¹⁴ With treaties having such a continuing potential, the Moon Agreement would be a continuing process of the particularization of what has been laid down as a matter of general interest.¹¹⁵

However, for Third World and other delegations, bringing the Soviet Union to their terms could be seen as a diplomatic victory. And that victory was achieved through a process of *norm broadening through a semantic broadening* to include certain material facts under the proscriptions of the Moon Treaty. The States in question here seem to have acted on a Kelsinian credo that there is a causal connection between the semantics and normativity such that a “semantic interiorization” of “natural resources” within the waiver of ownership by States has created unassailable norms for the Soviet Union.¹¹⁶ That was, however, not in fact the case.

Responding to the Soviet position on natural resources, Third World and other States acted based on a “legal determinism” (normative absolutism) regarding the ways of the normative order. Nonetheless, the outcome of the negotiations was a *favorable* one, i.e., a case of a positive equilibrium. Even then, there was a stage when the Soviet Union’s idealist ambitions were assessed by certain States as a case of non-conformity with the norms which requires a normative treatment of semantic care. The normatively informed remedial action of semantic widening coincided with the Soviet Union’s assessment of the situation as fit to be kept in the “dialectical space” until the situation regarding lunar mining ripens to introduce public ownership of the means of production and distribution of lunar resources through cooperative enterprises.

*b. Resistance to the Soviet Opposition to the Expression
“Heritage”*

As said above, the main reason for Soviet opposition to the CHM was that the capitalist notions of property in international space law (and the concept of CHM to which it is interlinked) were

¹¹⁴ Moon Agreement, *supra* note 1, art. 18.

¹¹⁵ On the particularizing potential of treaties which are otherwise universals, See Allott, *supra* note 113, at 43.

¹¹⁶ On the causal connection between semantics and norms in the Kelsinian scheme of things, see Ulises Schmill, *Jurisprudence and the Concept of Revolution*, in LAW, MORALITY, AND LEGAL POSITIVISM 121, 124-26. (Kenneth Einar Himma, ed., 2004).

in contradiction to the socialist notions of property. According to the Soviets, property, except those which are used in the means of production, could be owned only under a joint ownership scheme like ownership through cooperative society.¹¹⁷ Therefore, the Soviets held that the Moon and its resources are not items that could be privately owned, and any claims of ownership, unless there is a scheme of cooperative ownership, were illegal *per se*.

However, the Soviet discontent with CHM's bourgeois base was put forward through the term "heritage" in the concept of CHM.¹¹⁸ They pointed out that in the socialist legal system, the term heritage is used in a *philosophical* sense.¹¹⁹ And by this, the Soviets were pitting the socialist notions of property against the civil law meaning of property, opening up room for a dialectical contrast. The Soviet position in this context is also idealist. That is, the utility that the Soviets attribute to law is an instrumental utility. That is to say, law in a Soviet system is a means of actualizing ideals through a dialectical tension, as Allott puts it in a social idealist vein: through dialectical possibilities, the law helps international society to transcend the confines of parochialism.¹²⁰ Allot further observes that "[l]aw achieves this wonderful feat of dialectical integration in an amazingly efficient way, day after day, year in, year out, like some marvelously engineered machine."¹²¹

The Soviet opposition was strongly responded to by Argentina with a sense of normative legalism by asserting that the term heritage in its philosophical sense is also used in international law: "[t]he Spanish term 'heritage' (*patrimonio*) is also used by modern international law in referring, for instance, to the 'patrimonial sea' (*mar patrimonial*)."¹²² Argentina also pointed out that "the whole substantive field of international law relating to State succession was available for guidance as to the meaning of heritage."¹²³ Their point was that there is hardly any substance in the Soviet Union's opposition to the term heritage for it being of a philosophical

¹¹⁷ See generally, Hazard, *supra* note 74.

¹¹⁸ See Gabrynowicz, *supra* note 66. See also The Soviet Opposition, *supra* note 46.

¹¹⁹ The Soviet Opposition, *supra* note 46, at 12.

¹²⁰ See Philip Allott, *The True Functions of Law in the International Community*, 5 IND. J. GLOBAL LEGAL STUD. 391, 398 (1998).

¹²¹ *Id.*

¹²² Argentina's Reply, *supra* note 34, at 14.

¹²³ CHRISTOL, *supra* note 23, at 293. See also *id.*

category, as Argentina would, later on, emphasize, “[t]here is no need to create anything new. The idea of heritage—which can even be tangible—has existed since olden times.”¹²⁴ On balance, Argentina’s explanations regarding the normative legacy of concepts and their semantics contexts missed the revolutionary teleology of “socialist legalism” of the Soviet Union.¹²⁵ Argentina’s assessment of and response to the Soviet position is a case of assessing State behavior prompted by idealism through a normative approach.¹²⁶

c. State Response to the Soviet’s Preference for the Common Province of [Hu]mankind

Interestingly, the Soviet Union, which opposed the CHM, did not object to declaring the Moon a province of humankind.¹²⁷ This was likely because “province” does not invoke the same property notions as “heritage,” as province is more of a large non-localized spatial expanse not open to claims of centrality. J.I. Gabrynowicz appropriately contextualizes the “general belief” that the concept of the common province of humankind “inhibits private enterprise because it interferes with an individual or corporate entrepreneur’s right to profit from the fruits of his or her labor in space.”¹²⁸ Moreover, the Soviets were well aware that in space law, the concept of common province of humankind is only declaratory in nature and has no doctrinal significance to bind any State under its authority.¹²⁹ What the Soviets wanted was to keep the Moon free from the private ownership system of market economies which the civil law-based CHM was threatening to lead to.

However, Argentina and the Third World bloc sensed an expansionist urge (superpower imperialism) on the part of the Soviet Union to keep the Moon open for private exploitation.¹³⁰ Not only that, Argentina felt that the concept of common province of

¹²⁴ Argentina’s Reply, *supra* note 34, at 14.

¹²⁵ On the niceties and nuances of “socialist legalism,” see Eric Engle, *Socialist Legalism in the Early USSR: A Formal Rule of Law State?*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1268555.

¹²⁶ *Id.*

¹²⁷ The Soviet Opposition, *supra* note 46, at 12.

¹²⁸ Gabrynowicz, *supra* note 66, at 692.

¹²⁹ *Id.*

¹³⁰ See E. Van Bogaert, *Moon Treaty: Achievements and Future Problems*, 34 *STUDIA DIPLOMATICA* 655, 659-60 (1981).

humankind was too nebulous on the question of a regime for the equitable allocation of resources.¹³¹ Therefore, along with the Third World bloc they asserted that a regime for international control (collective State ownership), and for the redistribution of wealth and technology among the nations is essential.¹³² The solution was found in CHM. Christol explains the position:

Argentina indicated that the CHM principle took into account the expectation that economic profits would be realized, that there would be an equitable sharing of such profits, that the needs of the LDCs would be taken into account in the sharing of profits, that this would necessitate the formation of a suitable international regime, and that this might lead to the creation of either international machinery or an international authority to give effect to such expectations.¹³³

Argentina's position is informed by its normative approach to international law. That is to say, Argentina displayed a "postcolonial syndrome" which is an obsessive faith in the subordination to rule of law. This faith in the rule of law was laid down in the Delhi Declaration, 1959, which held that under the rule of law, life, liberty and property of the people are safeguarded.¹³⁴ The Declaration also linked the fulfillment of the "legitimate aspirations" of the people with human dignity.¹³⁵ As per the normative approach to international law, this linkage between the aspirations of the people and the promises of law generates normativity.

In such a normative vein, Argentina and the Third World bloc persuaded the Soviet Union to accept the CHM, hoping to bring the Soviet Union under rule of law and thereby bind it tightly with the thick thread of normativity.¹³⁶ Argentina stated: "[t]he major merit of replacing the vague expression 'province of [hu]mankind' by the more meaningful expression 'common heritage of all [hu]mankind'

¹³¹ See Draft Agreement of Argentina, *supra* note 21, art. 1.

¹³² Timothy Nelson, *The Moon Agreement and the Private Enterprise: Lessons from Investment Law*, 17 ILSA J. INT'L & COMP. L. 393, 397 (2011).

¹³³ CHRISTOL, *supra* note 23, at 293-294.

¹³⁴ *The Rule of Law in a Free Society*, Clause I, in Report on the Int'l Congress of Jurists, New Delhi, India, Jan. 5-10, 1959, <https://www.icj.org/wp-content/uploads/1959/01/Rule-of-law-in-a-free-society-conference-report-1959-eng.pdf>.

¹³⁵ *Id.*

¹³⁶ See Argentina's Reply, *supra* note 34.

is that in so doing one has specified the commencement of an action, replacing an abstract statement by means of operating, within a specified legal framework.¹³⁷

Argentina's proposal to adopt the phrase "common heritage of all [hu]mankind was endorsed by Brazil, Chile, Indonesia, Mexico, Nigeria, Venezuela and a few other States.¹³⁸ They jointly asserted that an international regime for the equitable sharing of the benefits derived from lunar resources *inter alia* must be established.¹³⁹

As for the Soviet Union, rule of law was an unknown notion; for them, law is transient and, as E.B. Pashukanis held, exists for the sole purpose of being expended.¹⁴⁰ Hence, the Soviet Union viewed the proposed international regime as unfavorable towards its sentiments. Responding to the idea of an international regime under the rule of law, Ambassador Piradov pointed out that the idea of the Third World bloc is to internationalize space activities and to provide a supra-State nature to whatever body guides those activities.¹⁴¹ However, Mr. Kolossov clarified that his government agreeing to a CHM-based special international regime is "very doubtful."¹⁴² It is to be noted here that the Soviet Union was not *per se* against an international regime but was only against a regime which has CHM as its base, as is apparent from the statement of Mr. Kolossov: "doubts do arise ... with regard to the close link which ... exists between the proclamation of this principle [CHM] and the need to create a special international regime."¹⁴³

Later on in this LSC session, Austria submitted its own draft of the Moon Agreement¹⁴⁴ (Austrian Draft). While Article X, paragraph 4 of the Austrian Draft provided for the establishment of an

¹³⁷ *Id.* at 16.

¹³⁸ Comm. on the Peaceful Uses of Outer Space, Rep. of the Legal Subcomm. on its Fifteenth Session, U.N. Doc. A/AC.105/171, at 5-6 and Annex I, pp. 2-3 (1976).

¹³⁹ *Id.* at Annex I, p. 3.

¹⁴⁰ This position of Pashukanis is as it is presented in M.D.A. Freeman, *The Rule of Law: Conservative, Liberal, Marxist and Neo-Marxist: Wherein Lies the Attraction?* in PERESTROIKA AND THE RULE OF LAW 37, 38 (W.E. Butler, ed., 1991)

¹⁴¹ Comm. On the Peaceful Uses of Outer Space, Verbatim Record of its One Hundred and Sixty-Fourth Meeting, U.N. Doc. A/AC.105/PV.164, 8-11 (June 25, 1976).

¹⁴² Comm. On the Peaceful Uses of Outer Space, Verbatim Record of its One Hundred and Eighty-Fifth Meeting, U.N. Doc. A/AC.105/PV.185, 21 (July 11, 1978) [hereinafter Statement by Kolossov].

¹⁴³ *Id.*

¹⁴⁴ Austria, *Draft Treaty Relating to the Moon*, art. VIII, U.N. Doc. A/AC.105/L.74 (July 5, 1973).

international regime, regarding the CHM, paragraph 8 reserved the application of the doctrine for the decision of the conference of parties to be convened by the depository governments.¹⁴⁵ The Soviet Union had no qualms in accepting the Austrian Draft and it considered the Draft as “not a bad basis for a compromise solution.”¹⁴⁶ However, the Soviet representative stated that “we [] think that this text does need further study by our competent bodies.”¹⁴⁷

For Argentina and the Third World bloc, their effort in creating a rule of law regime was nearing fulfillment. They were in all optimism that at the conference of parties a normatively strong CHM regime could be established.¹⁴⁸ However, the Soviet Union perhaps saw in the compromise deal prospects of a cooperative enterprise in which each one shall, as per the Marxian dictum, “contribute according to his ability and receive according to his needs.”¹⁴⁹ But such a supreme socialist phase would be possible only after the increase of the productive forces with all-round development of the individual and the working class.¹⁵⁰ In the context of the Moon, the Soviets knew that such conditions simply do not exist and it would be appropriate to wait until favorable conditions of production come to exist. This position does not, however, mean that there would necessarily be desolation in the Soviet camp. The Soviet Union likely would have felt triumphant about whatever it had been able to achieve because as long as a CHM-based regime is not established, private ownership on the means of production remains unrealized—it is the first phase of socialism. This will be followed by governmental and collective undertakings under governmental control, which the Soviet Union hoped to achieve in the conference of parties.¹⁵¹

The Soviet Union’s effort at ideological contestation and correction, however, yielded international cooperation as they coincided with the normative goals of Argentina and the Third World

¹⁴⁵ *Id.*

¹⁴⁶ Statement by Kolossov, *supra* note 142, at 21.

¹⁴⁷ *Id.*

¹⁴⁸ *See generally*, Argentina’s Reply, *supra* note 34, at 14-16.

¹⁴⁹ *See* KARL MARX, CRITIQUE OF THE GOTHA PROGRAM 27 (2008).

¹⁵⁰ *See id.* at 26, 27.

¹⁵¹ *See* Vladimir Gsovski, *The Soviet Concept of Law*, 7 FORDHAM L. REV. 1, 36-37 (1938).

bloc. While assessments of each other's behavior were false, the outcomes, coincidentally, were favorable.

B. The United States Approach

Its actions and statements made it apparent that the United States did not want a CHM-regime for the Moon. However, the US disagreement with the CHM-regime had far more to it than the generally passed on information that the Moon Agreement and the regime it proposed was antagonistic to the *laissez faire* ideology and to the ways and means through which the United States could forge an unchallenged economic supremacy.¹⁵² As a result of its opposition to the Moon Agreement, conspiracy theorists have, among other things, accused the US of being solely responsible for defeating the Treaty.¹⁵³

This section reviews the various American positions on the Moon Agreement and shows that the United States' positions were driven by rationalist considerations. It then pits the US position against Third World responses to show that the former was a shift between normative and idealist approaches.

1. Moratorium or No Moratorium? False Assessments and an Uninformed Non-Consensus

It is known that notwithstanding its objection to a CHM-based regime, the United States did not want a moratorium on any type of activities on the Moon.¹⁵⁴ This is apparent from the declaration of the US delegate that "his country was not ready to agree on an 'expressed or implied' prohibition on exploiting the lunar natural resources prior to the international conference meeting and agreeing on the 'appropriate machinery.'"¹⁵⁵ What in fact the US wanted, according to the reports, was that the resources of the Moon be made available in "appropriate quantities" for scientific

¹⁵² See e.g., BASLAR, *supra* note 35, at 162.

¹⁵³ See generally Gangale, *supra* note 51.

¹⁵⁴ VIRGILIU POP, WHO OWNS THE MOON? EXTRATERRESTRIAL ASPECTS OF LAND AND MINERAL RESOURCES 147 (2008).

¹⁵⁵ *Id.* (citation omitted).

investigation, so that through “orderly attempts” there would mark an “experimental beginning.”¹⁵⁶

The reason for this US stance is likely to be primarily reputational, for space activities have always been performed for the sake of power, international prestige and reputation.¹⁵⁷ It is the case that such reputational payoffs are at their highest for private market transactions,¹⁵⁸ although their value in other domains such as research and development, national security and sports and games cannot be discounted. In the case of the Moon Agreement, the US position was that if the US opposition to the CHM leads to a moratorium on all commercial space activities, the United States would find itself part of a zero-sum situation.¹⁵⁹ If it agreed on the CHM, there would be an overall positive-sum situation due to the equitable allocation system of the proposed CHM-regime.¹⁶⁰ However, for the United States as a space leader, that is, one who has to be the major investor and exploiter, the situation would make it worse-off which could prompt a backout by the United States.¹⁶¹ The overall situation, in that case, would be that of a negative-sum.

Perhaps to deal with what is an impeding negative-sum situation, the United States shifted its focus from commercial exploitation of lunar resources (markets) to scientific investigation (research) on the Moon—a strategic move of lowering expectations and changing the level of stakes to overcome negative-sum situations.¹⁶² The focus on the scientific investigation thus helped the United

¹⁵⁶ See US Working Paper, U.N. Doc. A/AC.105/C.2(XI)/WP.12/ Rev.1, Art. VIII, April 14, 1972, in Comm. on the Peaceful Uses of Outer Space, Rep. of the Legal Subcomm. on its Eleventh Session, U.N. Doc. A/AC.105/101 (1972), Annex I, Proposals and other Documents relating to Agenda Item 3 (Questions Relating to the Moon). See also POP, *supra* note 154, at 147.

¹⁵⁷ See Nicholas D. Welly, *Enlightened State-Interest: A Legal Framework for Protecting the ‘Common Interest of All Mankind’ from Hardinian Tragedy*, 36 J. SPACE L. 273, 280 (2010).

¹⁵⁸ *Id.* at 280, 281.

¹⁵⁹ SENATE REPORT ON THE MOON AGREEMENT, *supra* note 59, at 323 (discussing the potential effect of a moratorium and comparing with experience of the seabed mining programs).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² For a discussion on the game situations and the strategies to overcome them, see MALCOLM McDONALD KENNETH WARD & BRIAN DAVID SMITH, *MARKETING DUE DILIGENCE: RECONNECTING STRATEGY TO SHARE PRICE* 131-33. (2007). See also Brad Spangler, *Positive-Sum, Zero-Sum, and Negative-Sum Situations, Beyond Intractability*, available at <http://www.beyondintractability.org/essay/sum>.

States avoid a negative-sum situation of a complete moratorium on all lunar activities. Moreover, the United States likely understood that as long as commercial exploitation of lunar resources does not begin, it would not fall into the positive-sum situation (in which the United States would be worse off) posed by the resource allocation system of CHM. Then again, active scientific investigations on the Moon would help the United States prevent the situation from lapsing into negative-sum.

The aforementioned shift was not simply a shift from a high-stake situation (market) to a low-stake situation (research) to reduce the reputational stakes and prevent the negative-sum outcome. It was also meant to create an agreement with “efficient terms,” providing for an incremental shift to a positive-sum situation whereby the United States has Pareto superiority.

To elaborate, as preferred by the United States, the scope of scientific investigation in the Moon Agreement was drafted in such a manner that by “scientific investigation” the Treaty meant a “basis” for the commercial exploitation of lunar resources.¹⁶³ As such, in the Moon Agreement, the term “freedom of scientific investigation” means a State has the right to: “collect on and remove from the Moon samples of its mineral and other substances,”¹⁶⁴ retain such samples of minerals for further scientific purposes,¹⁶⁵ use appropriate quantities of minerals for supporting the purposes of missions,¹⁶⁶ and establish crewed and uncrewed stations on the Moon.¹⁶⁷ Once, the Treaty terms were laid down, the United States’ representative Ambassador Richard W. Petree pushed the scope of scientific investigation even further. He stated that “by setting

¹⁶³ See Petree Statement, *supra* note 10, at 162.

[T]he draft Moon Treaty also is, in its own right a meaningful advance in the codification of international law dealing with outer space, containing obligations which are of both immediate and long-term application in regard to such matters as the safeguarding of human life on celestial bodies, the promotion of scientific investigation and the exchange of information, relative to and derived from activities on celestial bodies, and the enhancement of opportunities.

Id.

¹⁶⁴ Moon Agreement, *supra* note 1, art. 6(2).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*, art. 9(1).

forth now the purposes governing exploitation of natural resources, uncertainty is decreased and both States and private entities may now find it possible to engage in the arduous and expensive efforts necessary if exploitation of the natural resources of the celestial bodies is ever to become reality.”¹⁶⁸

As such, the United States set the ground for a non-zero-sum (positive-sum) situation. Further, to transcend to Pareto superiority, the United States asserted that paragraph 7 of Article 11 of the Moon Agreement, which provides for an international regime for the orderly and safe exploitation and the rational management of the resources of the Moon, “recognizes that an equitable sharing of the benefits ... necessitates giving special consideration to those who have contributed directly to the exploration of the moon as well as to the needs of developing countries and those who have indirectly contributed to the moon's exploration.”¹⁶⁹ Thus, from the threat of a zero-sum situation, which demanded a trade-off for recovery or improvement, the United States created an agreement with efficient terms. N. Jasentuliyana underlines this rationalist position and the diplomatic success it had from that position:

The Moon Agreement, as it stands, [...] represents a solid basis upon which further space legislation can continue. Independent of its origins the Agreement now represents the expression of the common collective wisdom of all member States of the United Nations and it responds, in particular, to the needs and possibilities of those that have already advanced their technologies into outer space.¹⁷⁰

However, the United States claimed success not simply because it avoided a moratorium, but because a moratorium on all exploitation of lunar resources, which was found not consistent with the State-interest of the United States, was avoided.¹⁷¹ That is, the United States was aware that Article 11 of the Moon Agreement leaves sufficient room for a CHM-based regime, which, if

¹⁶⁸ Petree Statement, *supra* note 10, at 163.

¹⁶⁹ *Id.*

¹⁷⁰ SENATE REPORT ON THE MOON AGREEMENT, *supra* note 59, at 324.

¹⁷¹ See generally Stanley B. Rosenfield & Delbert D. Smith, *The Moon Treaty: The United States Should Not Become a Party*, PROC. ANNUAL MEETING OF THE ASIL, April 1980, pp.162-70.

effectuated, will have the United States worse-off.¹⁷² Hence, a moratorium on the commercial exploitation of lunar resources was an optimal strategy for the United States up until negotiations are started anew in the conference of parties. But a complete moratorium on all lunar activities would have reputational costs, which could sink the United States into a negative-sum situation. By pitching on the minimalism of scientific investigation on the Moon—a trade-off between market gains and reputational costs—the United States reinstated the situation to non-zero-sum, and therefrom transcended to Pareto superiority by creating an agreement in efficient terms.¹⁷³

In response to the United States' position that there be no moratorium, the Third World bloc argued that the language of the Moon Agreement is sufficient enough to impose a moratorium on all commercial activities on the Moon.¹⁷⁴ For example, provisions such as paragraph 5 of Article 11, which relays that a regime for the exploitation of lunar resources is yet to be established, and paragraph h2 of Article 6, which restricts the use of lunar resources to “scientific purposes only” have the effect of a moratorium on commercial lunar activities.¹⁷⁵ The argument of the Third World States was that if there is no pre-regime moratorium, technologically advanced countries would have sufficient leeway for exploiting the resources before the regime is established.¹⁷⁶ According to them, “the exploitation of lunar resources shall be carried out only in accordance with procedures and rules established by an international regime.”¹⁷⁷ Only a functional international regime can break the moratorium.

The situation was ironic as far the Third World States were concerned, that is, even after gaining a CHM clause in the Moon Agreement, they had to ask for a moratorium – for what was hard-earned was too vague to be fairly determined or enforced, which

¹⁷² See Moon Agreement, *supra* note 1, art.11 (7) (d).

¹⁷³ *Id.*

¹⁷⁴ This was obvious from the Indonesian position on CHM. As quoted in the Remarks by John B. Breaux before the Centre for Strategic and International Studies, Feb. 19, 1980. See SENATE REPORT ON THE MOON AGREEMENT, *supra* note 59, at 321. See also RICKY J. LEE, LAW AND REGULATION OF COMMERCIAL MINING OF MINERALS IN OUTER SPACE 274 (2012).

¹⁷⁵ See Lotta Viikari, *Natural Resources of the Moon and Legal Regulation*, in MOON: PROSPECTIVE ENERGY AND MATERIAL RESOURCES 519, 542 (Viorel Badescu, ed., 2012).

¹⁷⁶ See TRONCHETTI, *supra* note 22, at 55.

¹⁷⁷ *Id.*

aggravated the fear of a unilateral regime.¹⁷⁸ Hence, the Third World States wanted, as if as an assurance, that technologically advanced countries become parties to the Moon Agreement and participate in building a regime that is beneficial for all members of the United Nations.¹⁷⁹ In other words, they sought an official moratorium until the proposed international regime is established.¹⁸⁰

There were also other provisions in the Moon Agreement that evoked anxiety among many Third World States. For example, in paragraph 3 of Article 11, which deals with the prohibition on ownership of natural resources, only natural resources which are “in place” are prohibited from private ownership, leaving undefined the status of the samples of natural resources collected and removed from the Moon for scientific purposes or other purposes.¹⁸¹ This clause, according to many Third World States, opens scope for the inference that such samples “once removed, becomes the property of the collecting state.”¹⁸²

Moreover, there was a troubling sense of nostalgia for many Third World States which was evoked by the diplomatic experiences they had during the negotiation for the United Nations Convention on the Law of the Sea (UNCLOS).¹⁸³ Therein also, negotiators had to grapple with a CHM-regime and questions regarding the existence of a moratorium.¹⁸⁴ The situation, opines Virgiliu Pop, might have been sparked by the UNCLOS-related General Assembly Resolution 2574 (XXIV), which declared that pending the establishment of the international regime, States and other pertinent actors shall refrain from “all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the sub-soil thereof.”¹⁸⁵ In sum, a moratorium which was declared in circumstances parallel to that of the Moon Agreement prompted many Third World States

¹⁷⁸ See PETERSON, *supra* note 52, at 161.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See POP, *supra* note 154, at 144.

¹⁸² *Id.*

¹⁸³ *Id.* at 147.

¹⁸⁴ See Helmut Tuerk, *The Idea of the Common Heritage of Mankind*, in *SERVING THE RULE OF INTERNATIONAL MARITIME LAW* 156, 170-71 (Norman A. Martinez Gutierrez, ed., 2010).

¹⁸⁵ POP, *supra* note 154, at 147; See also GA Res. 2574 D (XXIV)(Dec. 15, 1969).

to believe that there is a moratorium on commercial lunar mining as well.

Revisiting the Third World bloc position, three characteristics attributable to normative systems (which make the Third World bloc's approach normative) are apparent. First, the type of legal reasoning employed by the Third World States is what may be called "simple normative," that is, their reasoning proceeded in a "humdrum," unchanging and unidirectional manner.¹⁸⁶ They deemed social reality as having been embodied in the rule in all its fine simplicity as if the description of a certain situation in a rule is conclusive and free from the need for any extra-legal evaluation.¹⁸⁷ This was particularly obvious in the Third World position on the moratorium, whereby all doubts regarding the existence of a moratorium was based on the language of the treaty.¹⁸⁸ The Third World approach resembles the normative faith that a rule, in whatever form it is, is a "consensual linguistic domain."¹⁸⁹

Second, while relying on the language of the Moon Agreement to assert that there is a moratorium, that is, even when following the semantic plainness of the Moon Agreement—the simple normative—the Third World States wanted an interim moratorium declared in the best interest of humankind.¹⁹⁰ In other words, their self-subjection to the rules went beyond the pull of the semantic objectivity of the simple normative but had an interest-base to it.¹⁹¹ At this juncture, the Third World States departed from the simple

¹⁸⁶ See PAUL F. DIEHL & CHARLOTTE KU, *THE DYNAMICS OF INTERNATIONAL LAW* 49 (2010).

¹⁸⁷ See J. Aguilo-Regla, *Introduction: Legal Informatics and the Conceptions of Law*, in *LAW AND THE SEMANTIC WEB: LEGAL ONTOLOGIES, METHODOLOGIES, LEGAL INFORMATION RETRIEVAL AND APPLICATIONS* 18, 20 (V. Richard Benjamins et al., eds., 2005). See also SEBASTIAN URBINA, *LEGAL METHOD AND THE RULE OF LAW* 130 (2002) (drawing on Carlos S. Nino).

¹⁸⁸ See e.g., POP, *supra* note 154, at 146 ("The language of Art. 11.5 has been subject to [...] scrutiny as to its prohibiting or not the exploitation of the lunar resources prior to the establishment of a regime."); Finch Edward R Jr. & Amanda Le Moore, *The 1979 Moon Treaty Encourages Space Development*, *Proceedings of the 23rd Colloquium on the Law of Outer Space*, 1999, pp. 9-11 ("[L]anguage specifically calling for moratorium was, at least in two instances, rejected during the negotiations of the Moon Treaty").

¹⁸⁹ See Martin Neumann, *Cognitive Architectures of Agent Systems and Social Mechanisms of Emergence and Immersion*, *Proceedings of the AISB Convention*, 2008 (on file with the author).

¹⁹⁰ See JULIAN HERMIDA, *LEGAL BASIS FOR A NATIONAL SPACE LEGISLATION* 37-38, fn.254. (2004).

¹⁹¹ *Id.*

normative approach to a “substantivized” approach (not any less normative, though) by which pertinent substantive values and interests inject meaning and purpose into law.¹⁹² The substantivized approach, as a qualitative improvement from the simple normative approach, comes with a greater sense of legalism, that is the “ethical attitude” (an optimism regarding the constitutive potential of law) and an enhanced faith in rule of law.¹⁹³

The interest-driven claims of the Third World States for a moratorium are not, however, comparable to the policy-driven pursuit of preferences in idealist approaches to international law. While both remain choices, the choice-category of the latter is the rational choice favoring self-interest and the former is analogous to what Perry Dane identifies, as a “normative choice for its normative sake.”¹⁹⁴ Regardless, the Third World States combined both the approaches; first, they dutifully followed the semantic imperatives of the Moon Agreement and then they added their value choices—expectations, so to say—to those imperatives, to generate a “normative vista” (as part of the substantification): a real-world of rights, duties and relations.¹⁹⁵

Third, the reliance on the experiences in lawmaking for the UNCLOS produced a nostalgic recurrence of a particular context. Though nostalgia as such has hardly been considered as a cause of norm-formation, the presence of a legal memory to contain the normativity was never disputed by the supporters of normative reasoning.¹⁹⁶ In the case of the negotiator’s reversion to the UNCLOS-experiences in the LSC, it was a resort to the practice of a “transhistorical” search in the legal memory for the coherence of legal doctrine and legal texts—nothing but a “nostalgic lapse”—a practice characteristic of normative legal reasoning.¹⁹⁷

Against the United States’ denial of a moratorium, the Third World States felt a loss of coherence of the doctrinal ensemble of Article 11 – for according to them, the text of Article 11 imposes a

¹⁹² See Aguilo-Regla, *supra* note 187, at 21.

¹⁹³ *Id.*

¹⁹⁴ Perry Dane, *The Natural Law Challenge to Choice of Law*, in *THE ROLE OF ETHICS IN INTERNATIONAL LAW* 142, 162 (Donald Earl Childress, ed., 2012).

¹⁹⁵ *See id.*

¹⁹⁶ CHRISTOPHER HUTTON, *LANGUAGE, MEANING AND THE LAW* 181 (2009).

¹⁹⁷ *See id.*

moratorium.¹⁹⁸ And then came the nostalgic lapse, finely captured by an Assessment Study: “The Moon Treaty ... *like* the [...] Law of the Sea would delay or prevent commercial investments in space activities ... The eventual outcome of the Law of the Sea [would] have an important bearing on the shape of the future outer space regime.”¹⁹⁹

Again, the lapse to UNCLOS also resulted in an intertextual reading of the CHM in the Moon Agreement. However, what is meant by intertextual here is the legal reasoning by analogy—a type of reasoning common in legal doctrine—employed by the Third World bloc.²⁰⁰ Such a reading is apparent from the statement of Mr. Vallata, a Mexican delegate:

If the sea-bed and the ocean floor beyond limits of national jurisdiction have been recognized as the common heritage of [hu]mankind we can find much logic in the statement that all areas [including the Moon and its natural resources] outside the limits of State jurisdiction by their very nature also constitute the common heritage of [hu]mankind and are subject, therefore, to an equitable and binding distribution of their benefits.²⁰¹

In the present case, intertextuality between the Moon Agreement and UNCLOS must have produced an intertextual ambiguity such that a troubling sense of *déjà vu* fell over many of the Third World States. The circumstances which led to the moratorium on the commercial exploitation of seabed and the resources thereof were felt to be present in the case of Moon also. It was based on such an evaluation that the Third World bloc held that there is a moratorium on the commercial mining of lunar resources.²⁰²

¹⁹⁸ As a support to this observation, see Carl Q. Christol, *The Common Heritage of Mankind Provision in the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, 14 INT'L LAW. 429, 475-77 (1980).

¹⁹⁹ SOLAR POWER SATELLITES 158, 159 (1981) (emphasis added) <https://space.nss.org/wp-content/uploads/1981-OTA-Solar-Power-Satellites.pdf>.

²⁰⁰ Jan M. Broekman, *Analogy in the Law*, in LEGAL KNOWLEDGE AND ANALOGY: FRAGMENTS OF LEGAL EPISTEMOLOGY, HERMENEUTICS AND LINGUISTICS 217, 221 (Patrick Nerhot, ed., 1991).

²⁰¹ Comm. On the Peaceful Uses of Outer Space, Verbatim Record of its One Hundred and First Meeting, U.N. Doc. A/AC.105/PV.101, 113 (Sep. 3, 1971).

²⁰² Support for this conclusion can be found in the United States response that “if it is estimated that there is such uncertainty [the moratorium] ... consideration could be

A review and evaluation of these States' positions show us the assessment problem from a different perspective. However, for the case herein, the outcome is not favorable—State positions simply did not correspond or coincide.²⁰³ The United States stood firm for no-moratorium and the Third World bloc for moratorium. No consensus was reached on this point in the LSC. Nevertheless, what is interesting about the assessment problem in this context is that it is the optimism, which is shared by both groups, about a future international regime for resource exploitation and allocation, that shaped their respective positions.²⁰⁴ That is, the United States wanted the regime to be run along the lines of liberal market, and the Third World bloc wanted it on the CHM lines which “resemble most closely the ‘Natural Law School’ of space law.”²⁰⁵ Whatever followed was an output of this common motive.

The legal nature of the interim period was somewhat baffling. The question was whether it should be of a liberal or egalitarian character. However, it was quite natural for the United States to start building a liberal market regime and for the Third World bloc to build an egalitarian architecture.²⁰⁶ The United States proceeded along those lines only. Hence, leaving no scope for a future trade-off (i.e., at the time when the regime is established), the United States created a deal on efficient terms. What the United States felt as appropriate for the interim period was to ensure that there occurs a fair transition from minimal/optimal market conditions to a business-friendly regulatory regime.²⁰⁷ For such a transition to happen, the United States wanted activities of a certain sort to happen during the interim period.²⁰⁸ Hence, the United States had to declare no-moratorium on lunar activities—very much a strategic decision.

given to handling the situation along lines similar to those being considered by the Congress for the deep seabed minerals.” SENATE REPORT ON THE MOON AGREEMENT, *supra* note 59, at 75.

²⁰³ See Kim Alaine Rathman, *Sharing the Harvest of the Skies: Outer Space Commercialization and Third World Development*, 3 SOC'Y PHILOSOPHY & TECHNOLOGY 4 (1998).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

However, for the Third World bloc, in all their normative faith, the Treaty language was meant to be inviolably respected. When treaty language is uncertain, one can, however, “venture out” to construct meanings.²⁰⁹ But in the case of the Moon Agreement, the uncertainty existed because the so-called “provisional application” clause was cast in a soft language of “not to be legally bound to provisionally apply the Treaty.”²¹⁰ Hence the Third World bloc had little scope for venturing out to stop others from carrying out activities on the Moon.²¹¹ Caught in this dilemma, they likely saw the United States declaring no-moratorium as if commercial activities were soon to commence on the Moon at the violation of CHM. Thus, the rationally thought-out strategic decision-making of the United States appeared to the Third World bloc as the former taking advantage of the uncertainty in the language of the Moon Agreement—amounting to a normative breach by the United States. As a response, the most pertinent option before them was to demand an official moratorium.

Even though the assessments by each party about the behavior of the other can somehow meet somewhere, no consensus was reached on the moratorium issue then. Not only was there no consensus, but the non-consensus was also poorly informed. In other words, clearly, no breach of norms, as the Third World bloc anticipated, was intended by the United States, although they wanted a regime of a certain kind for the future. In the same vein, the United States proceeded with a one-sided—preference-based—assessment of the situation, ignoring the normative conceptions of international law.

At this juncture, it is worthwhile to think that had the States informed about the understanding of the type of international law which the other State had internalized, the outcome may have been different. To be specific, had the Third World States known that the United States’ no-moratorium position is a strategic move driven by reputational and prestige factors and a cost-based preference-pursuit, perhaps they would not have resisted the no-moratorium position in the fashion that they did. Otherwise, perhaps the Third

²⁰⁹ See Anneliese Quast, PROVISIONALLY APPLIED TREATIES: THEIR BINDING FORCE AND LEGAL NATURE 221-22 (2012).

²¹⁰ *Id.*

²¹¹ *Id.*

World bloc would have yielded to a more or similar cost-efficient alternative arrangement for the interim period without transgressing normative foundations. Then again, had the United States been aware of the possible normative consequences of their cost-based action, they could have modified their preference, without much (or with less) trade-off between material cost and reputational cost. The collective suboptimal outcome, as it was in the case of the Moon Agreement, due to the rational actions of the United States, could have been avoided.²¹²

2. The Final Moments and the Death of the Moon Agreement

It is the height of paradox that the much ambitious concept of the CHM caused the death of the Moon Agreement. The paradox is particularly surprising given that the entire negotiations of the Moon Agreement were centered on the CHM. Not only that, a treaty instrument was also drafted with a fair dose of CHM in it. However, a few turns of events—happenings and counter-happenings—after the drafting of the Treaty and the post-drafting contemplations prompted big policy swings which rendered the CHM a burden for the State parties. Particularly after the disagreement regarding the presence of a moratorium, the misunderstandings between the State parties widened, worsening the assessment problem.

As far as the Third World bloc was concerned, the uncertainty regarding the legal nature of the interim period was disconcerting.²¹³ There were also widespread concerns about the prospective international regime, which produced, what E.E. Weeks and M.K. Force call, a “knee-jerk prejudice” against the regime.²¹⁴ This was aggravated by the infamous statement by Mr. Hosenball before the LSC.²¹⁵ Speaking on the United States’ approach to the legal nature of the interim period and the proposed regime, he declared that the United States’ plan is, as paraphrase by Christol, to make a “transition from experimental to pilot programs, and from pilot programs to commercial activity ... Through such permissible activity the

²¹² See Sun-Ki Chai, *Rational Choice: Positive, Normative and Interpretative*, available at <http://www2.hawaii.edu/~sunki/paper/ratjust.pdf>.

²¹³ See Edythe E.E. Weeks & M.K. Force, *Tidying up the Moon Treaty Prior to Construction*, 53 PROC. INT’L INST. SPACE 169 (2010).

²¹⁴ *Id.* at 173.

²¹⁵ CHRISTOL, *supra* note 23, at 303.

feasibility of further exploitation would be determined. Once this feasibility has been demonstrated, the negotiation of the proposed regime could be initiated.”²¹⁶

For the Third World bloc, which has its own fine prejudices about the international regime, the United States’ approach, as it was reflected in Mr. Hosenball’s statement, seemed like a unilateral resolution to install liberal market principles for lunar exploitations.²¹⁷ This appeared so ridiculous an intention that it could devastate the “cosmopolitan conceptualization” of CHM—that is of a global-level benefit and burden sharing—which many of the Third World States envisaged for the proposed regime.²¹⁸ The Third World bloc hence asserted that Article 11 of the Moon Agreement provides for “equitable sharing” of resources which means “equal distribution by all States of the benefits derived from the exploitation of the natural resources of the Moon.”²¹⁹ The United States, however, rejected the Third World interpretation of equitable sharing as being utopian socialism and asked for a “less direct interpretation of the idea of ‘sharing.’”²²⁰ Not only that, the United States interpreted Article 11 as providing a base for free market liberalism.²²¹ As if in support to this position, Ambassador R.W. Petree stated that the Moon Agreement has enhanced the opportunities for “free and equal exploration, use, and exploitation of the Moon and its natural resources ... allowing for scientific and commercial activity respecting the Moon and its natural resources.”²²²

As discussed earlier in this article, it was not simply the equal sharing of resources that many of the Third World States meant by the CHM, but through the concept they advanced “legitimate aspirations to achieve more equitable solutions” under a new, perhaps

²¹⁶ *Id.*

²¹⁷ See BASLAR, *supra* note 35, at 163-64.

²¹⁸ See Ellen Hey, *Interdependencies, Conceptualizations of Humanity and Regulatory Regimes*, in HUMANITY ACROSS INTERNATIONAL LAW AND BIOLAW 244, 263 (Britta van Beers et al., eds., 2014).

²¹⁹ TRONCHETTI, *supra* note 22, at 58.

²²⁰ Bryon C. Brittingham, *Does the World Really Need New Space Law?*, 12 OREGON REV. INT’L L. 31, 39 (2003).

²²¹ *Id.*

²²² CHRISTOL, *supra* note 23, at 310 (citations omitted).

revolutionary, international law of humankind.²²³ The claim for moratorium and thereby the efforts to prevent commercial mining by the developed countries was only part of such a scheme. M. Bedjaoui points out that the Third World claims related to the CHM were not, as widely believed, an effort at realpolitik to obtain a favorable diplomatic quotient.²²⁴ Instead, they were meant to make the high ideal of “human good” part of the normativity of the pursuit of “the legitimate interest of all countries and for the benefit of all States.”²²⁵ Scott J. Shackelford echoes this sentiment: “[d]escriptions of the principle range from proclamation of a social and political ideal to a legal requirement that *must* benefit all humanity. ... In its most positive form the CHM epitomizes the aspiration of friendly and cooperative international relations to manage communal resources for the common good.”²²⁶

This social idealism of the Third World States, which manifested through the claim for equitable allocation of the lunar resources, was likely interpreted by the United States as a strategy for receiving unjust enrichment. Moreover, the fall to collective suboptimal conditions due to the moratorium issue had disturbed the United States, as a commentator noted, the United States analysis demonstrated that the language 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 enterprise²²⁷

To avoid further suboptimal outcomes, the United States’ decision-makers had to modify their policy choices, as Jennifer Sterling-Folker conceptualizes the best strategy after suboptimal conditions: Decisionmakers who are confronted with the problem of

²²³ See BASLAR, *supra* note 35, at 164. See generally M. Bedjaoui, *Classism and Revolution in the Elaboration of the Principles and Rules of Space Law*, in PERSPECTIVES ON INTERNATIONAL LAW 441, 463 (Nandasiri Jasentuliyana, ed., 1995).

²²⁴ *Id.* at 457.

²²⁵ *Id.*

²²⁶ Scott J. Shackelford, *The Tragedy of the Common Heritage of Mankind*, 28 STANFORD ENVIRONMENTAL L. J. 109, 149 (2009)(emphasis in original).

²²⁷ *Id.* at 16.

suboptimal outcomes “have to actively carry through [lessons from past decisions] in their subsequent choices and behavior.”²²⁸ Moreover, a major qualitative change that they should bring in subsequent decision-making is to avoid patterns through which suboptimal outcomes are produced.²²⁹ However, further assessments of the outcomes done by sub-agencies for the United States criticized the pro-Treaty stance of the United States Government as being naïve. As Michael Calabrese of the Space Futures Society, a space enthusiast group, put it:

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.²³⁰

Alongside the critics, activist groups like the L-5 Society applied pressure on the United States’ decision-makers to avoid the mistake of entering into coordination games, though coordination strategies were, in theory, the perfect strategy to optimize conditions.²³¹ Yet, to avoid “recidivism,” as Sterling-Folker refers to a lapse to preceding patterns of decision-making, the United States decided to altogether drop the negotiations.²³²

The United States had taken such a decision, for in its assessment, the Third World States wanted an unjust enrichment through the CHM.²³³ The United States observed that the CHM is so unfairly organized that it was set to create an “anticommons,” wherein cost for mining was to be assumed by the United States and the benefit shared with everyone.²³⁴ Since the costs outweigh the benefits, the United States would be worse off in the deal.²³⁵ Any collective action through the proposed regime also did not seem

²²⁸ JENNIFER STERLING-FOLKER, THEORIES OF INTERNATIONAL COOPERATION AND THE PRIMACY OF ANARCHY 122 (2002).

²²⁹ *Id.* at 122-23.

²³⁰ Gangale, *supra* note 51, at 5 (citations omitted).

²³¹ *See id.* at 5-7. *See also* STERLING-FOLKER, *supra* note 228, at 122 (discussing strategies to optimize conditions).

²³² *Id.*

²³³ Benjamin David Landry, *A Tragedy of the Anticommons: The Economic Inefficiencies of Space Law*, 38 BROOKLYN J. INT’L L. 523, 531 (2013).

²³⁴ *Id.* at 527-28.

²³⁵ *Id.* at 528.

to be a viable option then, given the problem of “anticommons” on one side and the high transaction cost the regime could impose on the other side.²³⁶ Finally, the United States Congress decided not to sign or ratify the Moon Agreement.²³⁷

For the Third World bloc, it was a fall from high hopes to disillusionment. Their idealist vision for a universalism of “common human good” in the self-ordering of humanity, which they sought to achieve through the CHM, was lost before the cost-based assessments of the United States.²³⁸ However, were the underlying rationales for the respective positions of each group known to the other, there would have been, perhaps, better outcomes.

It is true that there was uncertainty regarding the proposed regime, which was felt by both groups notwithstanding their varied internalizations—normative, rationalist and idealistic. But it has been the practice in law—normative or rational choice model—that subjects of the law who encounter uncertainty reflexively try to pull through counteractions to extinguish uncertainty.²³⁹ However, uncertainty—vague information and uncertain outcomes—also distorts efficient behavior such that subjects resort to different, often suboptimal, strategies according to their respective assessments.²⁴⁰ Both the United States and the Third World bloc did the same. As far as the United States was concerned, apparent uncertainty about the nature of the regime and the possible payoffs prompted the nation to move towards risk aversion such that some level of optimality is obtained—and hence, the United States abandoned the Moon Agreement.²⁴¹ And the Third World States saw the United States trading in a legal uncertainty, thereby extinguishing their hopes for a common good and to build a normative architecture that suits their convenience, which was not in fact the case—but the Third World States also left the Moon Agreement.²⁴²

²³⁶ *See id.* at 528.

²³⁷ *Id.* at 531 n.34.

²³⁸ *Id.* at 534, n. 58.

²³⁹ *See generally* Anthony D’Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1 (1983)

²⁴⁰ *Id.* at 4-5, 37.

²⁴¹ D’Amato, *supra* note 239, at 15.

²⁴² *See id.* at 43-45.

IV. FALSE ASSESSMENTS BECOMING AN EPISTEMOLOGICAL PROBLEM: THE INTERNATIONAL LAW OF THE MOON

The false assessments and the resulting outcomes were not the end of the play of perspectives—the politics of perspectives did not simply stop with each State wrongly understanding the other and with the failure of the negotiations. From the end of the negotiations continued the scholarly work of recording of the negotiations to become what has come to be called the international law of the Moon. In other words, after the completion of negotiations, both the negotiations and their outcomes started getting expressed in scholarly works as theories, doctrines, assertions, claims, anxieties, skepticism, dissents and criticism. Here, one must remember that knowledge production in general is not a process free from scholarly biases and their epistemological internalizations—there are inevitable imperative variables which naturally creep into any type of human knowing, virtually influencing and determining the nature of knowledge. Hence, occurrences which happen in their finest objectivity, when getting recorded by the scholars, receive a subjective quality as well as generality. In the case of the Moon Agreement also, various occurrences (the interstate interaction regarding the Moon) have been recorded by the scholars, with their own respective internalizations of international law—normative, rationalist and idealistic—and with a fine generality typical to scholarly products, which have become the international law of the Moon.

Although this article presented the assessment problem with an analytical specificity, for presenting the epistemological problem (caused by the plurality of approaches), it takes a somewhat generalized approach. That is, it does not warrant a revisit to each and every State interaction analyzed as part of the assessment problem. Yet, as the epistemological problem is a natural effect of the assessment problem, this article is not poised to altogether start a new analysis. Hence, it takes the three State positions, rather the broader attitudes of States—the Soviet resistance to the CHM, the United States opposition to the CHM and the Third World support for the CHM (in the respective order)—salient during the Moon Agreement negotiations.

First, this article presents the Soviet Union's opposition to the semantic construction of the CHM doctrine. Second, it discusses the US's opposition to the CHM for it being antithetical to the market

liberalism advocated by the US. And third, it presents the Third World States' support for a CHM-regime, a seemingly normative framework for the exploitation, allocation and redistribution of lunar resources.

A. Epistemology of the Soviet Position on the Moon: Normative Assessment of Idealism

The socialist idealist position of the Soviet Union on the ownership of lunar resources, on the term heritage and on the CHM as a whole was opposed by the Third World States on normative grounds. Notwithstanding the diplomatic differences, coincidentally, the outcome of the interaction—occurrence, so to speak—was favorable. That much is a known story. However, scholarly recording of the many occurrences, call it the oversight of scholars or due to their yielding to the pull of their own epistemological internalizations, failed to appreciate the internalizations of the States, and thus produced opinionated commentaries on the international law of the Moon, which are far off from real State intentions and actual facts. A few examples follow.

The Soviet's first participation in the Moon Agreement negotiation was through the submission of a draft treaty. The draft, which was substantially different from the final Moon Agreement, from a Soviet perspective, was meant to realize the proletarian interest on the Moon.²⁴³ The draft, irrespective of the specific issues it addressed, mainly intended to create a legal relationship of a “dialectical character” for a peaceful coexistence of States, as a step towards the actualization of a certain determination of common interest.²⁴⁴ However, this Soviet position in the draft and the differences it had with other drafts and State positions in the LSC had delayed the conclusion of the Moon Agreement, but for the final coincidental favorable outcome.²⁴⁵

Recoding this particular interstate interaction, Bin Cheng, in a work that the author considers to be an authoritative “first voice” on space law, observes that the Soviet draft can only be viewed as a move to “head off” the other State initiatives.²⁴⁶ Instead of trying

²⁴³ See Allott, *supra* note 113, at 36-37.

²⁴⁴ *Id.*

²⁴⁵ CHENG, *supra* note 45, at 359-60.

²⁴⁶ *Id.* at 359.

to find out the ideological motivation behind the Soviet move, Chen focuses on the semantic differences that the Soviet draft had with other similar drafts:

In contrast to the original Argentine draft, the Soviet proposal (i) applied only to the Moon but not to other celestial bodies, and (ii) did not deal with the problems of resources. These were two of the issues which held up agreement on the Treaty for seven years.²⁴⁷

Another contentious stance taken by the Soviet Union in their draft treaty was the waiver of any claims of ownership of lunar property because the Soviets deemed private ownership of property as a “source of power” for the bourgeoisie and as a means for perpetuating capitalist regimes.²⁴⁸ If private ownership of property is destroyed, the bourgeois will not be able to find its position of power, and society would move to socialist echelons.²⁴⁹ This social idealist position of the Soviet Union and the subsequent objection it had from certain States was given a normative reading by Christol.²⁵⁰ He records:

By supporting the *res communis* principle [which is in fact not true], and by specifically urging that private property or ownership rights might not be acquired in the surface or subsoil of the Moon,” the Soviets were in fact accepting a part of a fundamental element of the more wide-ranging CHM principle.²⁵¹

Christol calls this position of the Soviet Union a “self-denying one” ...²⁵² His observation is on the basis of a straightforward reading of the raw outcomes of the interaction of States, considering only the positivistic essentials—such as language, context, etc. — which are too specific for the meta-ideological generalities which were at the base of the Soviet position.²⁵³ Christol’s conclusion on the Soviet position is that, going by the semantics of the Soviet’s draft treaty, the Soviets were “not in total opposition to the CHM principle.”²⁵⁴ In his recording of the law of the Moon, the Soviet

²⁴⁷ *Id.*

²⁴⁸ See Hazard, *supra* note 74, at 466-67.

²⁴⁹ See *id.* at 467.

²⁵⁰ See generally CHRISTOL, *supra* note 23.

²⁵¹ *Id.* at 168.

²⁵² *Id.* at 457.

²⁵³ *Id.*

²⁵⁴ *Id.*

Union's internal incoherence—an absence of normative intelligibility—was to a large extent responsible for the slow pace of negotiations.²⁵⁵

As noted, the Soviets are criticized for excluding any reference to the CHM in their draft treaty.²⁵⁶ The reason for this exclusion and their subsequent resistance to the CHM, according to the Soviet Union, was to prevent the free rider problem from occurring and forestall the “laissez-faire capitalist exploitation of the natural resources of outer space.”²⁵⁷ Hence, they took a “middle ground” — that of the space, including the Moon, becoming an “international arena for common use.”²⁵⁸ The idea was to keep things on hold until the juridical nature of CHM became clear for legal relations to form.²⁵⁹ Once the legal actors (stakeholders) reach the “pattern of potentiality” of the possible legal relations among actors, the legal status of the Moon would become determinable.²⁶⁰ Such was the depth of idealism of the Soviet Union that it not only escaped the normative attention of other States but also that of the commentators who recorded the particular occurrence.

Missing the true intent of the Soviet Union, Cheng records the negotiation as if there is a normative error caused by the Soviets. Cheng noted that “[o]ne of the Soviet objections to the adoption of this concept [CHM], from the purely technical and legal point of view, was probably its lack of legal definition and the consequential danger of alleged rules and obligations being deduced from it in time to come.”²⁶¹ It is true that while questioning the juridical nature of the CHM, the Soviet Union questioned the semantic structure and implication of the CHM concept, however, as became apparent while presenting the assessment problem, that was not due to any normative concerns as Cheng records.²⁶² Against the recordings of Cheng's, a commentator has cautioned:

²⁵⁵ *Id.*

²⁵⁶ Jaksetic, *supra* note 67, at 504.

²⁵⁷ *Id.* at 505.

²⁵⁸ *Id.* See also Dekanozov, *Some Questions of Juridical Nature of Areas (Spaces) Withdrawn from State Sovereignty*, 1 SOVIET Y.B. INT'L L. 203 (1973) (discussing the Space Treaty of 1967 and common use).

²⁵⁹ Dekanozov, *supra* note 258, at 203.

²⁶⁰ See Allott, *supra* note 113, at 36.

²⁶¹ CHENG, *supra* note 45, at 366.

²⁶² *Id.* at 366-67.

[I]t is difficult to determine to what extent Soviet writings on space law are political puffery intended to be expendable in practical diplomatic negotiations and to what extent they are based on ideological premises not subject to compromise. The consistent invocation of Soviet Marxist-Leninist ideology indicates that the writings should be taken at face value. Otherwise, one risks serious error by dismissing the ideological components as superfluous rhetorical devices.²⁶³

But again, taking for a normative value, the Soviet resistance to the CHM, which actually was due to the possibilities for private ownership that the CHM offered, another commentator has concluded that the Soviet position on CHM was driven by concerns about State sovereignty which prompted the Soviet Union to oppose the concept: “the Moon Treaty did not attract Soviet support since the accord was viewed less as a vindication of its legal policies and more as an attack on its sovereignty.”²⁶⁴

The Soviet Union’s was not the only case of an idealist position receiving a normative assessment and epistemological recording.²⁶⁵ The United States’ rational positions were also given a normative interpretation.²⁶⁶

*B. The United States as the Antihero of the Law of the Moon:
Normative Assessment of Rationalism*

It is by now easily argued that the United States got itself mis-assessed on its position regarding the moratorium and on its effort to recover from the suboptimal conditions created by the disagreement on the existence of a moratorium. But it can also be argued that all actions of the United States apropos of the Moon Agreement were due to its desire to maintain cost-equilibrium, which is subject to an over-generalized scholarly recording. Today, concerning the CHM, an epistemology exists in which the United States is a self-interested actor and a killer of the Moon Agreement.²⁶⁷

In a somewhat milder criticism of the United States’ position, Baslar records that the objection that the United States had for

²⁶³ Jaksetic, *supra* note 67, at 505.

²⁶⁴ Shackelford, *supra* note 226, at 148-49.

²⁶⁵ *Id.* at 113, 152-53

²⁶⁶ *Id.*

²⁶⁷ *Id.*

CHM was of an “ideological nature,” which is shaped by the interests of private enterprises.²⁶⁸ Later, Baslar demonstrates that it was deep-rooted national interest, exacerbated by cross-linkages to the UNCLOS negotiations, that prompted the United States to support the private enterprises and oppose the CHM.²⁶⁹ Baslar writes critically of the United States that they preferred a *laissez faire* mode of economy which supported free markets to a Keynesian model economy which offers an opportunity for developing countries because “*laissez faire* doctrine was the perfect philosophy to rationalize American hegemony.”²⁷⁰ Baslar concludes, rather easily, that “therefore they [the United States] did not accept ratifying the Moon Treaty.”²⁷¹

True, the United States’ choices were driven by State interest. However, “State interest” from a rationalist perspective is neither a cause for breach nor a ground for condemnation as in the case of centralized inter-State normative systems.²⁷² Rather, as per the rationalist approach, State interest is a “causal determinant”—a choice motivation—which gets influenced by domestic considerations.²⁷³ Therein, State interest is the “interest of citizens translated by the political process into government policy.”²⁷⁴ Eric Posner clarifies how this position is reflected in international law:

Whatever the case, it seems sensible to assume that trade law reflects state interests in advancing the prosperity of exporters and import-competitors, human rights law reflects people’s altruism, the law of the sea reflects merchant and other commercial interests, and so forth. In general, states seek to maximize the wealth and security of their people . . . , and this general policy manifests itself in particular trade, human rights, security, and other foreign policies.²⁷⁵

²⁶⁸ BASLAR, *supra* note 35, at 128.

²⁶⁹ *Id.* at 124-28.

²⁷⁰ *Id.* at 126.

²⁷¹ *Id.*

²⁷² Eric Posner, *International Law and the Disaggregated State*, 23 FLA STATE U. L. REV. 834-35 (2005).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

In the case of the Moon Agreement also, the United States trailed along the lines of their foreign policy and the precepts of realism. Their adoption of pro-market strategies regarding the CHM was part of the pursuit of State interest only. However, Baslar and many other scholars' criticism of the United States' position miss the rationalist internalization of the United States, indicting them for acting in self-interest which the scholars deemed as normative breach. As Jasentuliyana records with an oversimplification, the CHM and the international regime of resource allocation "were contentious points during the negotiations of the Moon Agreement [which] kept the major space powers from ratifying it, though adopted by consensus in the General Assembly."²⁷⁶ What might have prompted these scholars for such recordings is the normative sensibility that subjective State-interest, and its pursuit thereof, is antithetical to the sense of international community.²⁷⁷

Some scholarly works have recorded that the United States had let external sub-political influences play a vital role in determining their State interest.²⁷⁸ That is to say, they assert that State interest regarding the Moon Agreement was not simply shaped by US foreign policy but also by interest group pressures—to the extent of lobbying—allowing sub-political strategies to determine State interest.²⁷⁹ Chris Dubbs and Emeline Paat-Dahlstrom succinctly present the lobbying done by L5 Society, an interest group, to influence the United States Congress:

The L5 Society hired a Washington lobbyist, who trained key L5 [Society] members to circulate through the halls of Congress explaining opposition to the treaty. The society launched a publicity and letter-writing campaign, and in short order [a society member] threw together a telephone tree to inundate Congress

²⁷⁶ Nandasiri Jasentuliyana, *Future Space Applications, Including the Future Framework within the United Nations*, in *THE USE OF AIR AND OUTER SPACE COOPERATION AND COMPETITION* 369, 378 (Chia-Jui Cheng, ed., 1998).

²⁷⁷ The finest reflection of this normative sensibility is in Art.103 of the United Nations Charter which states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. Charter § 103. See Jure Vidmar, *Norm Conflict and Hierarchy in International Law*, in *HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS* 13-41 (Erika De Wet & Jure Vidmar, eds., 2012).

²⁷⁸ See generally Gangale, *supra* note 51.

²⁷⁹ *Id.*

with calls ... [T]he United States ultimately refused to sign the treaty.²⁸⁰

Critical of this influence on the United States, Shackelford has recorded that:

The United States did not ratify the Moon Treaty due to intense lobbying by several space industrialization special interest groups, a decision that was made in the face of a US State Department report indicating that the Moon Treaty was “the best possible structure for regulating activities which governments may now or in the future engage in on the Moon or elsewhere in space.”²⁸¹

Thus, going by the epistemology of the law of the Moon, the United States, in rejecting the Moon Agreement, had not only acted in State interests (self-interest) but had also let the State interest yield to sub-political pressures.²⁸² However, State interest being shaped by factors exogenous to foreign policy is not uncommon in liberal democracies (the political version of legal rationalism), for in liberal democracies like the United States, State interest is an “aggregation of individual and group preferences.”²⁸³ Hence, sub-political strategies like interest group pressures in shaping State interest in order to achieve a certain preconceived outcome are custom-measures in rationalist approaches.²⁸⁴ It is this rationalist pragmatism which the United States had followed regarding the CHM and which the commentators have overlooked while holding the United States responsible for the failure of the Moon Agreement.²⁸⁵

Whatsoever was the rationale behind the United States’ position, in the recoded epistemology of the law of the Moon, the United States is the antihero who “kill[ed] the Moon Treaty dead.”²⁸⁶

²⁸⁰ CHRIS DUBBS & EMELINE PAAT-DAHLSTROM, *supra* note 50, at 29.

²⁸¹ Shackelford, *supra* note 226, at 147-48 (citations omitted).

²⁸² *Id.* at 154.

²⁸³ See Annie Marie Slaughter, *International Law in a World of Liberal States*, 5 EUR. J. INT’L L. 503, 516 (1995).

²⁸⁴ See *id.* at 508.

²⁸⁵ *Id.*

²⁸⁶ Gangale, *supra* note 51, at 6 (quoting Leigh Ratiner, a US lobbyist).

*C. The Fair Share Due to the Third World—Normative
Assessment of Idealism*

Mostly during the negotiations in the LSC, the Third World States had taken normative positions. It is also the case that, in some of these instances, due to their rigorous observance of normative prescriptions, they failed to appreciate the ideological internalizations of other States. However, regarding the CHM, the Third World States, albeit followed the normative/positivist style of deontological reasoning, had a rather holistic view of the CHM – a holism of human self-becoming through the potentialities of a legal order. This departure of the Third World States, however, missed the focus of scholars who recorded the interaction between the relevant Third World countries and other States.

One noteworthy example of the abovementioned oversight is the scholarly recording on the subject of the Third World claim for the equitable allocation of resources.²⁸⁷ The Soviet writer Gennady M. Danilenko records that the developing States believed that the developed countries need to share with them the resources of the Moon on an equitable basis.²⁸⁸ The logic behind this claim, according to Ricky J. Lee, is the Third World anxiety that “by exploiting resources in the common property of humankind, the industrialized States are depriving the developing States of the mineral resources of which they are proud part owners.”²⁸⁹

This recording means to say that the Third World States had deemed the CHM doctrine as vesting them with a certain type of ownership, a part-ownership of a domain (which is by virtue of them being members of humankind), managed by humanity or by a trustee-representative, and “any benefit flowing from such management must be shared amongst all humanity.”²⁹⁰ Christol conceptually adds to this material dimension of the Third World claim that CHM “seeks through agreement to achieve the goal of equitable

²⁸⁷ Gennady M. Danilenko, *The Concept of the “Common Heritage of Mankind” in International Law*, 13 ANNALS AIR & SPACE L. 247, 249 (1988).

²⁸⁸ *Id.*

²⁸⁹ LEE, *supra* note 174, at 15.

²⁹⁰ Christopher Garrison, *Beneath the Surface: The Common Heritage of Mankind*, 1 KESTUDIES 1, 18, (2007).

allocation of ... resources and benefits with particular attention to the needs of the less developed countries.”²⁹¹

These positions raise the question: Whether the Third World States were asking for a material distribution of the lunar resources, perhaps using ethical constants to obtain a moral quotient? Gbenga Oduntan records that this was in fact the case.²⁹² He puts that, based on the claim of the Third World States that:

It is better to adopt the [Rawlsian] ‘Theory of Justice’ ... to explain the fact that inequalities of wealth and authority are irrelevant to the imperatives of maintaining compensating benefits for everyone and, in particular, to the least advantaged members of the society ... [This] division of advantages should be such as to draw forth the willing cooperation of everyone taking part, including if not particularly those who are less well situated.²⁹³

However, by endorsing the CHM, the Third World States perhaps did not mean to be the supplicants scholars have made them.²⁹⁴ It is true that they made a claim for equitable sharing of lunar resources but that did not mean a material distribution of resources.²⁹⁵ Christol later modified his previous position that the CHM entails resource allocation and states that the claim for the CHM has a utilitarian oneness to it:

It has been perceived [through the CHM] that all human beings are members of the human race no matter whether they live in the ‘North’ or the ‘South’, whether their loyalties are given to technologically advanced or disadvantaged states, and whether their ideologies support the cause of freedom or statism.²⁹⁶

The CHM is a cause and call for marshalling the humanity to start a post-colonial “fairness revolution.”²⁹⁷ And quite

²⁹¹ CHRISTOL, *supra* note 23, at 286.

²⁹² GBENGA ODUNTAN, SOVEREIGNTY AND JURISDICTION IN AIRSPACE AND OUTER SPACE: LEGAL CRITERIA FOR SPATIAL DELIMITATION 214 (2011).

²⁹³ *Id.*

²⁹⁴ *Id.* at 213-14.

²⁹⁵ *Id.* at 214.

²⁹⁶ CHRISTOL, *supra* note 23, at 287.

²⁹⁷ *Id.* at 453.

appropriately, the CHM is replete with fairness-models, including, among others, *res communis humanitatus*, interest of the human-kind and sustainable maintenances of heritage. Among all these “the sense of sharing has come to be considered as a precursor of a global fairness revolution.”²⁹⁸

In fact, it was because of such a motivation—the sense of fairness—that the Third World States found contentment in the language of paragraph 7 of Article 11 of the Moon Agreement which provided for an equitable allocation of the lunar resources, taking into account the interests and needs of the Third World States.²⁹⁹ There was a reactionary revisionism on the part of the Third World States which, regrettably, was taken literally by the scholars to mean an “abrasively strident” demand for contribution in cash and kind.³⁰⁰

Deeper down this revolutionary zeal of the Third World States was an idealist faith in the transformative power of international law – the power to overcome the tiring authority of an unjust system of control and domination. There was also among them the idealist optimism that the universalizing potential of CHM would help redeem humanity of all colonial parochialism.

The abovementioned idealism of the Third World States regarding the CHM was also recorded by certain insightful scholars. For example, according to Christopher C. Joyner, aside from the active legalism of the Third World States, there was a more “extremist version” which has its base in the ideology of the New International Economic Order (NIEO).³⁰¹ He has further recorded that the NIEO-form of CHM “would substantially alter and significantly modify the legal attributes, as well as institutional character, of a CHM regime.”³⁰² However, when it comes to foreseeing the results of a NIEO-based CHM, Joyner discounted the socio-ontological transformation meant by the Third World States and went on to record that under a radical form of CHM, “if mineral resources were exploited from the region, any profits derived from those activities would accrue to ‘all [hu]mankind’, with preferential

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *See id.* at 452.

³⁰¹ Christopher C. Joyner, *The Legal Implications of the Concept of the Common Heritage of Mankind*, 35 INT'L & COMP. L. Q. 190, 192-93 (1986).

³⁰² *Id.* at 193.

treatment in their distribution being given to developing countries.”³⁰³ Though Joyner rose to recognize the idealist justification in the Third World States’ position, ultimately he too yielded to the normative way of thinking to believe that the NIEO-based claim of the Third World States were meant to create super-rights to acquire a fair share in the lunar resources.³⁰⁴

D. Epistemological Problem Restated

The epistemological problem pertains to the knowledge of international law—the formation, authenticity and appropriateness of knowledge. By “knowledge of international law” what we have deemed throughout this article is scholarly recordings of the various routine interactions by States within the scope of a given treaty. It is this knowledge that later on helps States or other relevant actors, as the case may be, design their behavior or modify their previous behavior.

However, a treaty is not the only form of international cooperation. In other words, treaty is not the only medium through which States interact. Yet, most of the contemporary knowledge of international law is laid on international treaties—they are not only the primary source of international law but also the primary knowledge of international law. But no international treaty can be effectively functional unless it has the “working information” necessary for States to act upon the treaty. This working information is the scholarly recordings on the treaty, e.g., previous State interactions, possible future interactions, potential interrelationship with other treaties and scope of the trans-application of the treaty. From such a perspective, scholarly recordings graduate to become the substance of the knowledge of international law, though it is only a secondary source of international law as per the source doctrine.³⁰⁵

This article is also aware that knowledge formation in international law can happen though other sources of international law such as custom, general principles of law and decisions of

³⁰³ *Id.* at 192-193.

³⁰⁴ *Id.*

³⁰⁵ See generally Michael Peil, *Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice*, WASHINGTON UNIVERSITY IN ST. LOUIS LEGAL STUDIES RESEARCH PAPER NO. 12-07-03, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2115529

international courts and tribunals.³⁰⁶ However, there is no more optimum a vantage point than a treaty if one wants to observe interstate interactions in their finest verities, for treaties provide the “system of equilibrium” that best reflect the interplay of law and power.³⁰⁷ Hence, a treaty and the knowledge surrounding it, became the focus of this analysis.

V. CONCLUSION

In the case of negotiations leading to the Moon Agreement and its CHM clause, the assessment problem was found to be quite prominent. States interacted with each other with their own respective internalizations of international law, squarely missing each other’s standpoints, but for certain coincidental favorable outcomes. The mistaken standpoints passed in through the scholarly mill to become the knowledge of international law of the Moon. However, in reporting the occurrences during the negotiations, whatever objectivity scholars could have claimed, was lost because of their internalization dismissing other States’ standpoints; and they recorded occurrences based on their subjective understanding of international law. The scholars also indicted States for dismissing the positions of other States which the scholars deemed—informed by their respective internalization of international law—to be a breach. That much, but for a few historical analyses, the epistemological problem did not aggravate further since the Moon Agreement has become dysfunctional.

However, the epistemological problem will get a new dimension if we assume that the negotiations of the Moon Agreement resume from where they were left. Then, States will turn to the scholarly recordings presented above, for such recordings provide the background information on the Moon Agreement, what we have mentioned above as international law of the Moon. However, the presently recorded international law of the Moon is not a homogeneous epistemic discourse, because law of the Moon is not uniformly understood by the States. For example, for the Soviet Union, the

³⁰⁶ Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1031.

³⁰⁷ See Amnon Lev, *The Transformation of International Law in the 19th Century*, in RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW 11, 123-28 (Alexander Orakhelashvili, ed., 2011).

international law of the Moon is meant to be expended in the process towards the overcoming of capitalist tendencies to exploit the Moon and the building of a regime based on a cooperative scheme. For the United States, international law of the Moon—a model of failed negotiations—imposes costs high enough to invite suboptimal conditions. And for the Third World States, it is a grand normative architecture, which has the potential to realize some of the highest human ideals, and through them a just society. Regardless, the above review of recordings on State positions in the LSC shows that international law of the Moon is more or less a normative structure/narrative which certainly has left a meta space for the interplay of legal and socio-ethical considerations.

In this analysis it can be predicted that the United States in further negotiations will adopt maximum cost enhancing strategies so that cost equilibrium is maintained, if not for Pareto optimal conditions.³⁰⁸ They might make a UNCLOS-style move to a pro-market regime and a production and sharing mechanism like the International Seabed Authority (ISA).³⁰⁹ There is a probability that more aggressive policies on competition, production and distribution than the UNCLOS are adopted.³¹⁰ On balance, given the suboptimal conditions in which the United States had to exit from the negotiations, in future negotiations, State interest is likely to prevail over consideration for a globally efficient regime.³¹¹ However, considering the United States' position in the international law of the Moon – that of a potential violator – its future strategic moves are less likely to be considerably viewed.³¹² The Third World States may try to bind it with demands for greater commitments and thicker normativity. By such a move, for the Third World States on the one hand, the United States pro-market moves could be controlled, and on the other hand, the CHM could be made normatively even stronger.

³⁰⁸ See Landry, *supra* note 233, at 540-42.

³⁰⁹ *Id.*

³¹⁰ See Eric Posner & Alan O. Sykes, *Economic Foundations of the Law of the Sea*, 104 AM. J. INT'L L. 569 (2010).

³¹¹ See Alan O. Sykes & Eric Posner, *Economic Foundations of the Law of the Sea* 26 (John M. Olin Program in L. & Econ., Working Paper No. 504, Dec., 2009) (on file with the author).

³¹² *Id.*

On a brighter side, the United States might try to relax its previous positions. That is, it can allow for the creation of a competitive regime whereby a State's agency, like the "Enterprise" in the law of the sea, can compete on free market lines with the United States or any potential exploiter within a regulatory framework.³¹³ In this case, perhaps the global efficiency regime (that would come to exist) and the associated cost-cuts (e.g., the reduction in reputational cost) can reduce costs that the agency may impose. However, even if the Third World States – which are normatively informed, unaware of the cost-based approach of the United States, and discreet about the potential violator – respond to the latter's move, they will possibly demand for a stronger regulatory control on the competition, which may include cost-imposing monitoring mechanisms. A response such as this has every chance of missing the rationalist strategy of the United States and can impose costs on it.

If the initiative to resume the negotiations comes from the Third World States, they will count on the socializing possibilities of the CHM because of the scope in the Moon Agreement for socio-ethical consideration of fairness and equality to find discursive routes to enter the normative domain of law. Christol has expressed optimism towards such an approach: "It would be worse than blind to attempt to avoid the impact of such considerations [...] when it comes to a meaningful appraisal of the CHM provisions of the Moon Treaty."³¹⁴ It would be an effort to generate idealist images in the normative memory of international law—it would amount to a cross discursive induction.³¹⁵ Despite being unsure about the success of that move towards idealist legalism, it is certain that the rationally pragmatic realism of the United States will see abysmal cost in what is for the Third World, "positive idealism." Richard Posner outright denies any likelihood of a compromise with idealism: "An idealistic law-and-economics vision is Hell of hedonistic markets governed, along with everything else in life, by private bureaucratic law unmitigated by any more due process than the private bureaucracies find it desirable to allow."³¹⁶

³¹³ See generally *id.* at 19-23.

³¹⁴ CHRISTOL, *supra* note 23, at 287.

³¹⁵ *Id.*

³¹⁶ RICHARD POSNER, OVERCOMING LAW 441 (1995) (quoting "Bureaucracy, Liberalism, and Community—American Style," 79 NW. UNIV. L. REV. 900, 919 (1984)).

Perhaps the United States might not reconsider a return to renegotiate the Moon Agreement, knowing that it is a cause for the death of the Treaty, unless huge reputational gains come in the way of the United States. The Third World States also might not reconsider the Agreement, which, irrespective of its normative aura, was rejected for the inefficiency it may have in liberal markets. Thus, the international law of the Moon is disappointing from both sides: it promotes distrust against the United States while representing the Third World States as supplicants of the proceeds of others' labor. In fact, instead of focusing on the internalizations behind State positions (that of legalism, pragmatism and idealism), knowledge formation in the law of the Moon has been around finding "ideological consistency" and in securing doctrinal consensus.³¹⁷

On balance, the assessment problem and the epistemological problem have emerged because international law exists in a plurality of approaches. Each approach is sustained by a discourse community which remains ignorant about the other. These problems would have not arisen had there been a uniform way of knowing international law or at the very minimum, certain means for States to know the internalizations of other States.

³¹⁷ Weeks & Force, *supra* note 213, at 174-75.