Who can own the Moon?

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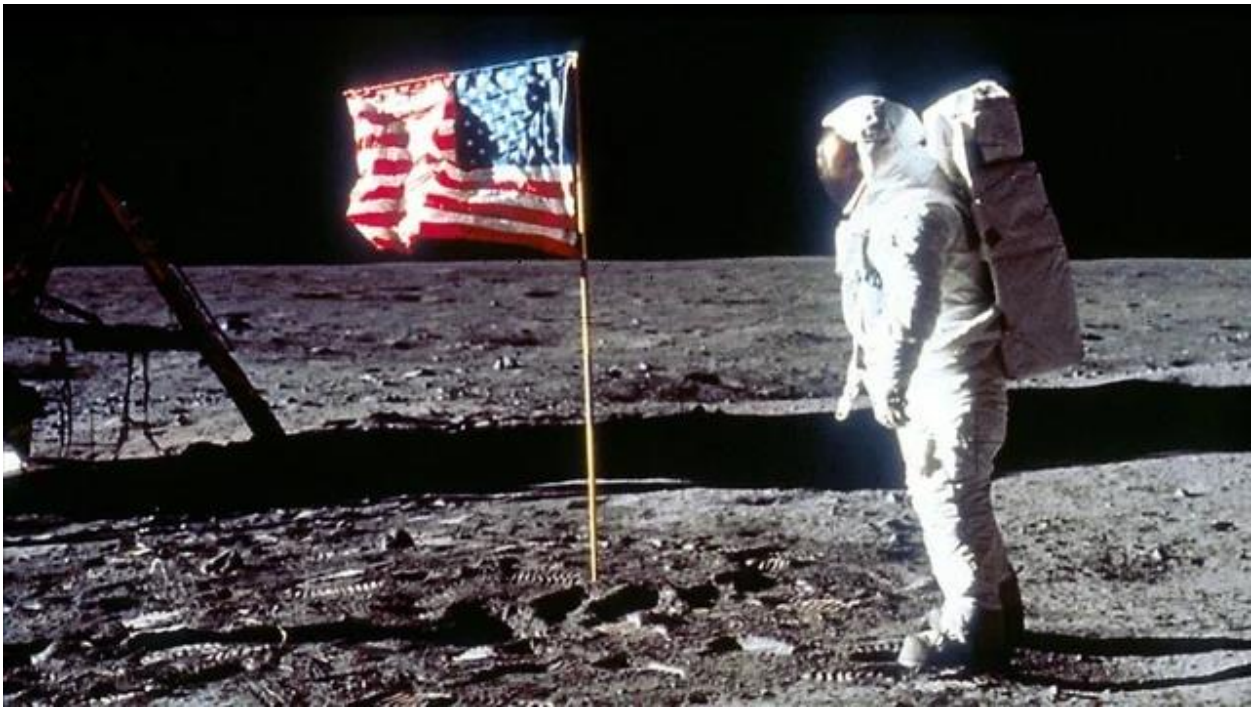

Since at least ancient times, governments have recognized that some natural property, like land, belongs to me, some belongs to all of us and some belongs to no one. Often, it's easy to figure out into which category a piece of land or property fits. Sometimes it's difficult. And sometimes it's almost impossible.

Over the past few months, the U.S. government has re-raised the issue of property rights on the Moon. While this may seem like a remote and obscure topic, in fact it is driven by specific business and government plans and large investments to establish bases and mines on the Moon within as little as five years. And the debate has implications for other important areas of international cooperation, competition and conflict.

As you would expect, the topic of ownership of land on the Moon is legally, politically, economically and technically complex. But some important underlying issues are not. And the underlying issues over property rights on the Moon are not very different from the issues underlying property rights on the deep sea beds, the Antarctic, the upper atmosphere, asteroids or planets — or property rights over Internet domain names, prime satellite orbits or other "global

commons." Nor should it be surprising that many nations tend to come down on the same side of these diverse debates over and over again.

Full disclosure: earlier in my career, I was involved in the UN Law of the Sea debate over property rights in the deep sea bed, and later in the international debate over property rights in satellite geostationary orbital slots, and more recently in international debates over property rights in Internet domain names and IP addresses.

And while numerous legal treatises, complex economic analyses, military evaluations and even political diatribes have been written about these international disputes over who "owns" or has the right to economically exploit such clearly non-national resources as the Moon, the Internet, satellite orbits, the deep sea beds and the Antarctic, we keeping coming back to a few key issues… on which equally reasonable and well-informed people disagree.

The driver behind the 2020 version of this debate is the very public U.S. proposal to negotiate a series of bilateral agreements with other countries over the right of businesses (or governments or individuals) to set up bases to mine the Moon for resources such as water, Helium-3 or rare earth minerals. This is an important outer space issue because almost every plan to advance into outer space for economic, political, scientific or humanitarian (or military) purposes requires arrangements years in advance over who owns what on the Moon.

It's also important because how we settle the questions of who can own what on the Moon has serious implications for who can own what in the Antarctic, the deep sea beds, asteroids, planets, Internet numbers and names, satellite orbits and so on.

So, what's the main issue?

During the 1960s, at the height of the Space race, the West and the Soviet bloc agreed to a truce over outer space (that was also accepted by non-aligned countries), resulting in the 1967 Outer Space Treaty. Among other important things, the treaty provides that the Moon and other celestial bodies may not be used for military purposes, may not be claimed as the territory of any country and may be explored and used by any country. At the time, the treaty's vagueness over property rights was understandable, but it led to significantly different interpretations of who can own (or have exclusive rights over) what in outer space. By the 1970s, as developing countries grew more numerous and better organized, their interests led to a refinement in the area of these property rights, often captured in the phrase " the common heritage of mankind."

This concept was built into both the 1982 UN Law of the Sea Treaty and the 1979 Moon Treaty (neither of which the United States ratified.) It implies — but does not explicitly state — that these resources are owned by all people and all nations and not by whichever country or business is the first to arrive and exploit them. And so began the modern debate that has recently been re-invigorated by the United States in its international Moon initiative, called the Artemis Accords.

The Artemis program is the American project to have an American-led mission to have humans return to the Moon by 2024; and the Artemis Accords is the American proposal to other countries to join this American-led effort by signing up for a series of ten principles that will be

embodied into binding international agreements. While all ten principles are important, the one that most touches on property rights and is arguably the most controversial is labeled "Deconfliction of Activities." It includes the notions of public notice of the location of any claimed activity and a (presumably enforceable) "safety zone" around that location. If this sounds a little like a gold rush in the American West or industrial fishing on the high seas before fishing treaties, that's because the underlying economic principles behind them are quite similar: Once I stake my claim, the resources in my claim belong to me. On the other hand, staking a claim on the Moon is quite different from the Moon Treaty's notion that the Moon is the common heritage (read common property) of all mankind.

Motivating the U.S. position is the calculation that no business, person or government would invest serious time and money into any type of Moon facility (base, mine, resort, etc.) if someone else could either take it away from them or build something right on top of it. Investors of any sort — especially for Moon projects that take a long time and a lot of money — need property certainty that they can rely on. And, while the Accords do not envision any national colonies on the Moon, a "notice of my location" and a "safety zone around it" are the next best thing. Like the ability to stake out land in the American West, the economic principle is: If I know it's mine and I can keep its rewards, then I will invest in developing it. Artemis Accords advocates dismiss an international Moon licensing or controlling organization as a death knell to progress in outer space.

It's not surprising that many countries with little possibility of their ever reaching the Moon see things differently. The "first come first served" principle inherent in the Artemis Accords suggests to them that anything worth using on, or taking from, the Moon will be quickly taken by wealthy and advanced American businesses and American billionaires or by the U.S. government. And, since they see no possible benefit for their nations or their own businesses in the American-led Artemis approach, they tend to oppose it and to promote the notion that the resources of the Moon are the common heritage of mankind. As such, the Moon's resources (and by implication the resources of many other "global commons") should either be held in reserve for all nations or controlled by some global organization that collects rents for the benefit of all countries. Even if it takes a while to do so.

This is essentially the same debate that the international community went through in the 1970s regarding the deep sea bed (and the Moon Treaty) and in the 1980s regarding the assignment of satellite geostationary orbital slots — and most likely will go through in the future regarding core aspects of the Internet, the Antarctic and other non-national resources. To oversimplify, the U.S. "won" the international debate over satellite orbital slots and "lost" the international debate over the deep sea bed. For this reason, this time around, the United States is aiming to collect allies for its approach, mainly by offering key nations the opportunity to join it in America's Moon mission… in return for their agreeing to the principles in the Artemis Accords, including "notice of location" and "safety zones."

"Where you stand depends on where you sit" was a favorite (Rufus Miles') aphorism of many political leaders from Lyndon Johnson to Nelson Mandela. Rarely does it apply more accurately to an international debate than it does to today's debate over the future of property rights on the Moon, and by implication several other important resources.

NOTE: This post has been updated from the original to correct the spelling of a name.

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