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Up, up and away: Future legal regimes for long-term presence in space (2)

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THE NEED TO DEFINE THE “USE” OF OUTER SPACE IN ORDER TO DISTINGUISH  
“APPROPRIATION”

**Abstract**

The concept of ownership and all that it entails economically, emotionally and strategically is one of the most prized attributes of capitalism. The “act, state, or right of possessing something” affords its beneficiary the ultimate in control and security. But space law has set up an interesting dichotomy in terms of man’s capitalistic nature to assert ownership over spaces and things in outer space: Nations and their nationals are not permitted to own anything but are permitted to use everything in outer space, unless someone else is using it. This promise was made decades ago before the prospect of free use in space was a practical reality and in spite of its logical conclusion that indefinite use is permitted while appropriation is forbidden, with no way to distinguish the two. The encroachment of human need to control specific aspects of space is becoming more apparent. For example, the uniqueness of Shackleton crater on the Moon is spurring numerous suitors, with its presence of ice suggesting a business model for on orbit or cislunar fuel manufacture, refinement and supply, or an ideal site for an observatory powered by solar cells placed along the rim to provide continuous power or, alternatively, a lunar outpost – all of which are currently being planned. But they cannot all use it at the same time. Under our current regime, the actual technical ability to take “possession” of it accrues to the first one able to make it happen – not, perhaps, the scenario all states had envisioned to be “for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development.” This paper seeks to provide the legal underpinnings, using analogies from the Law of the Sea, for an argument that the altruistic motives that drove us to concede the free use, nonappropriation and ownership principles of Outer Space Treaty Articles I, II and VIII resulted in the problematic selection of “use” as the sole parameter for one’s right to control “space” in space. The result of encouraging men to arrive first in order to claim the “use” of a space may be nothing better than the naked race for a land grab that we had all hoped to avoid with the Outer Space Treaty.