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In the New Spectrum of Space Law, Will Biden Favor the Moon Treaty?

By Dennis O'Brien

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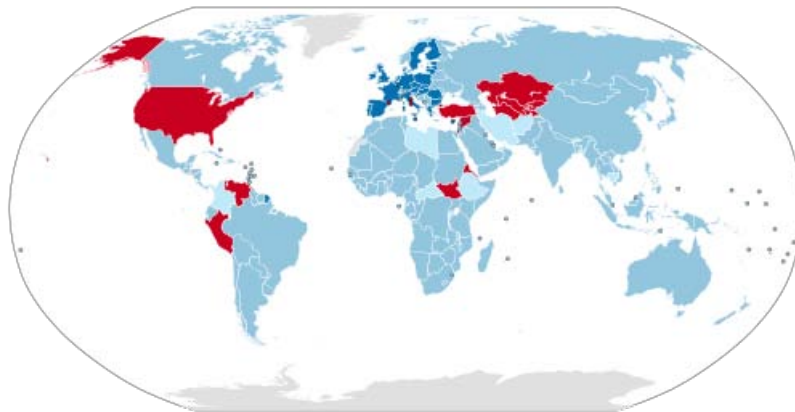
INTRODUCTION

The full spectrum of space law, from nationalist to internationalist, was on display at the Moon Village Association's annual symposium on November 8-9. But the question on everyone's mind was, what will be the effect of Joe Biden's election as the next President of the United States? He has already declared his intent to rejoin the Paris Climate Accords and the World Health Organization. A look at his Senate record gives us a hint concerning his space policy.

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approved the treaty in October by a 17-4 vote. "The oil and gas industry is unanimous in its support of the convention . . . I'm unaware of any ocean industry that has expressed opposition to this treaty." [1]

But the treaty was never ratified by the full Senate. Thirty-four Republican senators ultimately signed letters saying that they would never vote to ratify. Their main concern was language that described the seas as the "common heritage of mankind" and thus subject to international jurisdiction. [2] Since a two-thirds vote of approval (67 of 100) is required for ratification of any treaty, it was never brought up for a full vote. Since then, the CLOS has been ratified by 167 states (see map) and has become a pillar of customary international law. [3]



CLOS States Parties in blue, non-parties in red [3]

What can this tell us about how a President Biden will approach space law? A recent article in Time suggested that Biden would likely keep the Artemis Accords in place due to his belief in international agreements:

NASA recently announced the signing of the Artemis Accords, an international partnership to get to the moon, similar to the 15-nation consortium that built and maintains the ISS. In both cases, partner nations would provide hardware like habitation modules and cooperate to launch and maintain them. Biden spent no shortage of campaign-trail oxygen condemning Trump's flouting of international agreements like the Paris climate accord and the Iranian nuclear deal to make one of his first acts in office walking away from even a modest pact like Artemis. [4]

But that same continuity is not as certain when it comes to the Trump Executive Order of April 2020 that preceded the Accords and renounced the 1989 Moon Treaty:

Sec. 2. The Moon Agreement. The United States is not a party to the Moon Agreement. Further, the United States does not consider the Moon Agreement to be an effective or necessary instrument to guide nation states regarding the promotion of commercial participation in the long-term exploration, scientific discovery, and use of the Moon, Mars, or other celestial bodies. Accordingly, the Secretary of State shall object to any attempt by any other state or international organization to treat the Moon Agreement as reflecting or otherwise expressing customary international law. [5]

It is not necessary to renounce the Moon Treaty in order to support the Artemis Accords, which are

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essentially an interagency agreement. Indeed, the Accords can be viewed as a partial implementation agreement, an evolution of adaptive governance as called for in Article 11 of the Moon Treaty:

11.1. The moon and its natural resources are the *common heritage of mankind*, which finds its expression in the provisions of this Agreement, in particular in paragraph 5 of this article. . . .

5. States Parties to this Agreement hereby undertake to establish an international regime, including appropriate procedures, *to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible*. This provision shall be implemented in accordance with Article 18 of this Agreement. . . .*(emphasis added)*[6]

It is the use of the term “common heritage of mankind” and the perceived threat to national sovereignty that is the target of the Executive Order. It is the Executive Order that may well be the target of President-elect Biden.

The policies underlying the Trump Executive Order, the Artemis Accords, and the Moon Treaty are part of an emerging spectrum of space law agreements and proposals. At one end of the spectrum are the nationalists, such as the United States and Luxembourg, who believe that national law is adequate under a loose interpretation of Article II of the Outer Space Treaty, which prohibits national appropriation via claims of sovereignty or other means. [7] At the other end are the internationalists, like the Outer Space Institute [8] and the 18 countries that have adopted the Moon Treaty, who believe that a binding international agreement is needed. In the middle are those working on non-binding proposals/norms, sometimes called principles, building blocks, or best practices. These proposals are generally more comprehensive than national laws but lack the force of law or means of enforcement of international treaties. The most recent is the Best Practices for Sustainable Lunar Activity (BP’s) by the Moon Village Association (MVA).

The Best Practices were presented November 9 at MVA’s Annual Workshop & Symposium, hosted online this year by the Cyprus Space Exploration Organization.[9] Unlike the Artemis Accords, the BP’s apply to all lunar actors, not just the contractors working for the Artemis-partnered space agencies. And, also unlike the Accords, the BP’s support all private activities, including science and settlements, not just the extraction of materials (space mining). The Best Practices are currently undergoing international consultation and will be presented at the April 2021 meeting of the United Nations’ Committee on the Peaceful Uses of Outer Space in Vienna; MVA is an official observer of COPUOS.

Mike Gold, the acting Assistant Administrator at NASA, spoke glowingly of MVA’s efforts to develop broad Best Practices for lunar activity. He described the

Artemis Accords as part of that process, an “implementation” of the responsibilities of the United States and its partners under the OST and the Registration Convention. He called for “peace and prosperity for all of humanity in outer space”; noted that “national and international institutions have not always been crafted with the private sector in mind, and need to evolve”; and concluded that “the world needs the hope, inspiration, and optimism that lunar exploration can deliver.” Other plenary speakers noted the twin goals of “peace and sustainability” and asserted that “international cooperation in outer space will foster peace on Earth.” [10]

A broader defense of the Artemis Accords was the focus of a video presentation by Michelle Hanlon, president of For All Moon kind. [11] The video, recorded before the U.S. election, started by noting a gap in the current framework space law - the lack of support for private activity, even as advances in technology make space resources attractive to private actors. The Artemis Accords, she explained, are an affirmation by eight countries that Article II of the Outer Space Treaty (the prohibition against appropriation/sovereignty) does not apply to the extraction of materials (space mining) by private actors, that such activity can proceed under national law. Like the Trump Executive Order, Professor Hanlon dismissed the Moon Treaty as “flawed”. But even this full-throated defense of the nationalist model ended on an international note: If countries can agree on preserving cultural heritage sites on the Moon (which the Accords promote), it will open the door for agreement/cooperation in other areas.

At the other end of the spectrum was a video from The Space Treaty Project which argued that the Moon Treaty, with the proper implementation agreement, would provide hard-law international support all private activity (including science and settlements, not just the extraction of materials) while protecting essential public policies. [12] It does this by defining the “utilization of natural resources” in Article 11 of the Moon Treaty to include the use of land on the Moon for any private purpose, including science and settlements. In short, if a country adopts all five outer space treaties and requires its nationals to abide by their terms, then any private activity authorized and supervised by that country will be given priority rights for their lunar activity. There are also provisions for dispute resolution, choice of law, and cultural/historic preservation, a basic framework to allow humanity to begin using the Moon while leaving details for further evolution of “adaptive governance”.

Most of the symposium was about returning to the Moon in general, focusing on technical and human/social topics. But two other presentations had legal implications. One applied antitrust law to lunar activity, asking if anticompetitive behavior is a form of “harmful interference”. It also questioned the “safety

zones” of the Artemis “club” and instead called for regulation of lunar activity via international agreement, including the monetary sharing of the benefits of outer space. [13] The other presentation asserted that the Artemis Accords were lacking in environmental stewardship for the Moon and beyond, that we might “destroy a Martian aquifer” if commercial activities were allowed to proceed without regulation. [14]

All of the videotaped presentations were produced prior to the U.S. election, so none reflected the new political reality or the apparent swing of the pendulum away from the nationalist model and toward the internationalist model. President-elect Joe Biden’s support of the Convention on the Law of the Seas, with its use of the “common heritage of mankind”, suggests that he will also support the Moon Treaty and its call for an international legal framework to support and regulate private activity on the Moon and beyond. It should be no surprise if he cancels the Trump Executive Order renouncing the Moon Treaty on his first day in office. Indeed, he might even sign the Moon Treaty itself and elevate its status in customary international law, even if 34 senators choose to block its formal ratification.

There is a new world for space law, both literally and figuratively. The Moon Village Association’s annual symposium showcased many paths toward the future, from nationalist to internationalist, with their own Best Practices trying to move the effort forward. Humanity has reached a most pivotal moment as we prepare to become an interplanetary species.

(Dennis O’Brien is a space lawyer and president of The Space Treaty Project. The Project is an institutional member of the Moon Village Association; Mr. O’Brien is part of their Coordination & Cooperation working group, which produced the Best Practices for Sustainable Lunar Activities.)

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