

Committee Newsletter | Fall 2016, Issue No. 1

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Message from the Chair

Greetings Air & Space Law Committee Members!

By way of introduction, my name is Philippine Dumoulin, and I will be the YLD Air and Space Law Committee Chair for the 2016-2017 year. I am currently a law clerk at Pillsbury Winthrop Shaw Pittman in the Aviation, Aerospace & Transportation practice group in Washington, DC. I am also a 2013 graduate from the McGill University's *Institute of Air & Space Law*. This is my second year on the Committee, and my first year as Incoming Chair.

First and foremost, thank you for choosing to become a member of our fantastic committee, or for continuing your membership with us in the coming year. I am honored and excited to serve you in this role, and I am hoping I will be able to meet some of you at our events we are planning this year!

Like my predecessor, Dayan Hochman, who did a fantastic job last year on the committee, I would like to focus on growing our membership base and increasing membership value to our members. We strive to help students and young professionals venture in this niche area and we will continue to offer ways for you to get involve and meet practitioners. The American Bar Association (ABA) Forum on Air & Space Law, the International Aviation Women's Association, the McGill University *Institute of Air & Space Law*, and many others are great partners to expand networking opportunities available to our members.

We have several exciting programs coming up for you. The first one is the ABA YLD 2016 Fall Conference on October 20-22, 2016 in Detroit, MI. The Homeland and National Security Committee (HNSC) is hosting a panel on "Enemy at the Gate: Emerging Security, Economic, and Legal Challenges to Airport Security" on October 21, 2016. This is a one-hour CLE program. The Air & Space Law Committee is co-sponsoring the event and is helping the HNSC prepare the panel. The next on the list is a Meet & Greet networking event, which will be held in Washington, DC, hopefully before the end of the year. I hope this will be an opportunity to meet you in person and get your feedback on how you would like the Committee to help. The date, time, and location will be announced shortly so keep an eye open for listserv communications.

Until then, thank you for being a member of the Air & Space Law Committee and do not hesitate to contact me with any questions and suggestions.

I look forward to having a very positive and productive year with all of you. Happy Fall Holiday season!

Best,
Philippine Dumoulin
2016-2017 Chair
ABA YLD Air & Space Law Committee
philippine.dumoulin@pillsburylaw.com

YLD Aviation and Space Lawyer Featured Practitioner: Francisco Castillo-Ruiz



Francisco Castillo-Ruiz currently serves as YLD Air & Space Law Committee Content Editor. He recently joined the Office of the Chief Counsel of the Federal Aviation Administration (FAA) where he works for the Regulations Division. Prior to joining the FAA, he founded and co-chaired the Aviation and Aerospace Practice Group of McConnell Valdes, LLC, Puerto Rico's largest law firm, ranked as a tier 1 Chambers firm. While at McConnell he handled aviation and aerospace matters involving airlines, airports, aviation service providers, fixed based operators, business & private aviation, unmanned aircraft systems (UAS), permit procurement, regulatory, enforcement, and liability issues. He also represented clients in corporate and regulatory matters related to mergers and acquisitions and corporate restructurings.

Mr. Castillo attended McGill University's *Institute of Air and Space Law* where he obtained his LL.M. He is a Professor Masao Sekiguchi Fellow having been selected as an outstanding student in the Master's program at the Institute of Air and Space. His Juris Doctor was awarded by the University of Puerto Rico School of Law having completed the same with a Magna Cum Laude distinction. He holds a Bachelor's Degree from the University of Notre Dame's Mendoza School of Business with a concentration in Finance, and a Minor in Portuguese and Brazilian Studies. He is fluent in English, Spanish, and Portuguese, and proficient in French.

In 2016 the Annals of Air and Space Law of McGill University published his LL.M. paper titled "Property and privacy issues arising from the integration of civil and commercial drones into the domestic airspace of the United States of America" which was supervised by Dr. Paul S. Dempsey. He is admitted to practice law in the State of New York, the District of Columbia, and the Commonwealth of Puerto Rico.

Is Space Mining A Taboo? Dimitra Stefousi

*“I’m just a soul whose intentions are good,
Oh Lord, please, don’t let me be misunderstood”*
-The Animals-

In November 2015 the U.S. introduced Title IV of the Commercial Space Launch Competitiveness Act (“Title IV”), the first legislation dedicated to space mining. The *Space Resource Exploration and Utilization Act of 2015*,¹ as it is cited, triggered various reactions internationally, both positive and negative, and brought the issue of space resources to the forefront of space law academia. The Act confirmed that space mining is becoming reality and, as it often happens with innovative space endeavors and proposals, the responses were diverse, reflecting reasonable legal questions, as well as considerable concerns with regard to the incentives behind such activities.

The most controversial point of Title IV is paragraph 51303, “Asteroid Resource and Space Resource Rights”. The provision reads that U.S. citizens engaged in commercial recovery of space resources are entitled to any resource obtained, including to possess, own, transport, use, and sell the resource obtained. Legal scholars are divided on the legality of the provisions of Title IV. On the one hand, the right to appropriate extracted resources was interpreted as violating the non-appropriation principle of Article II of the Outer Space Treaty (“OST”),² which prohibits commercial utilization of material from asteroids and celestial bodies. On the other hand, paragraph 51303 was viewed as in accordance with international space law, since there is no explicit prohibition of appropriation of *extracted* resources, especially since the Act mentions that the U.S. by all means denounces any sovereignty rights in outer space.³

¹ Space Resource Exploration and Utilization Act, 51.513 U.S.C., par. 51301-51303, 2015.

² U.S. space-mining law seen leading to possible treaty violations, 27 November 2015, <http://www.cbc.ca/news/technology/space-mining-us-treaty-1.3339104>.

³ International Institute of Space Law, Position Paper on Space Resource Mining, 20 December 2015, <http://www.iislweb.org/docs/SpaceResourceMining.pdf>.

In addition to the question regarding its legality, the Space Resource Exploration and Utilization Act was also contested due to its unilateral adoption. The enactment of such legislation without prior international consultation has been perceived negatively. Criticisms are not only based on the non-appropriation principle,⁴ but also raise concerns that the utilization of resources could be carried out in a manner contrary that is to the benefit and interest of all countries, as mandated by Article I of the OST. Whether this means that space mining will distort the pricing and trade in commodities markets, or that other States will be prevented from participating in such activities, it is voiced that space mining might even resemble a new sort of colonialism.⁵ However, one of the private companies involved in space resources, Deep Space Industries, a U.S.-based business, recently signed an agreement of cooperation with MxSpace to develop commercial space technologies, including asteroid mining and other space-based operations.⁶ Even without these collaboration initiatives, could it be claimed that companies of a certain State should not opt for specific types of space activities, such as space mining, on the ground that other States have not yet developed such capacity? Along the same lines, should participation of the private sector be limited or automatically associated with ulterior motives, only because of the sector's profit-driven motives? Private actors are by nature focused on the generation of profit. Their purpose is to identify and develop business opportunities, and cover their operational costs. In the field of space mining, the latter are substantial.

The space resources industry, limited, for now, is a dynamic field. The potential benefits stemming from the industry's development has attracted governmental support, which seeks its stabilization and growth.⁷ The policy shift and related regulatory enactments and revisions were primarily promulgated and promoted by the industry itself, which was seeking to secure

⁴Article II, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 610 U.N.T.S. 205, 1967 (Outer Space Treaty).

⁵ Olavo Bittencourt, Reactions to US National Legislation: The View of Emerging Space Powers, Symposium on Legal Aspects of Space Resources Utilization, April 2016.

⁶ Mexican commercial space company MxSpace and international asteroid mining company Deep Space Industries to sign historic agreement at the 67th International Astronautical Congress, September 2016, <https://deepspaceindustries.com/mxspace-partner-deep-space-industries/>.

⁷ Luxembourg is also looking to be the first European State to introduce national legislation on space mining, in order to attract relevant business initiatives, <http://www.spaceresources.public.lu/en/index.html>.

the well-being of its business. Space activities in general, and space mining in particular, are risky, both in terms of technology and cost. It is therefore essential that companies involved enjoy a degree of legal certainty while procuring and financing their projects. At the same time, national space law is considered by the U.S. as an application of the provision of Article VI of the OST, namely that a State should authorize and continuously supervise activities of its nationals, for which it bears international responsibility.

A contentious legal basis, along with the lack of multilateral discussions, offer many reasons to oppose this Act. So far, the Space Resources Exploration and Utilization Act has been severely criticized, while in the future the application of the Act's provisions might prove that its wording and content are flawed. Moreover, the aforementioned concerns brought up skepticism and preoccupation with the issue of space mining in general.

The current U.S. regulatory regime appears to be in favor of private space mining activities. Nevertheless, these missions are still some time away from realization. Technology as well as business models for the commercial use of space resources are still under development. So far, the intentions of the space mining industry and the law and policy makers are good, but occasionally misrepresented. It is unclear how the relevant laws will be applied by the time these projects are ready to be launched. Until then, the discussion should remain open to both sides and arguments, and focus on the actual way this industry is planning to operate.

The purpose of this paper is not to justify or condemn the laws on space mining, but rather to give an alternative perspective on an issue that might be heavily debated in theory, yet regardless of that, rapidly developing in practice. The Outer Space Treaty was adopted in an era where current technological developments were not foreseen. In any case, the space sector is moving rapidly, and the legal discussion should focus on the essence of the matters, the efficient regulation of space mining, with an open mind and flexibility.

*The views and opinions expressed are those of the author of the paper and do not reflect the position of any affiliated organization. Responsibility for the information expressed lies strictly with the author, who is writing under personal capacity

Upcoming Aviation and Space Law Events:

- **Wernher von Braun Memorial Symposium**, Oct 25-27, 2016 (Huntsville, AL): <http://astronautical.org/events/vonbraun/>
- **ABA CLE: Drones and UAS: Regulatory Update and What's Next on the Horizon for Users and Owners**, Oct 26, 26 (Online): <http://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=256208883>
- **Drone Law Seminar**, Nov 2, 2016 (Atlanta, GA): <http://www.theseminargroup.net/seminardetl.aspx?id=5631>
- **Aviation and Space Law: From Cockpit to Courtroom**, Nov 3-4, 2016 (Washington, DC): file:///C:/Users/mbottomly/Downloads/-IL204000-otherlinks_files-2016AviationBrochure-Final2.pdf
- **ABA Aviation and Space Finance Conference**, Dec 8, 2016 (New York, NY): <http://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=258945846>
- **International Drone Expo**, Dec 9-10, 2016 (Los Angeles, CA): <http://www.intdroneexpo.com/>
- **Aviation Law and Insurance Symposium**, Jan 18-20, 2017 (Orlando, FL): <http://www.alisymposium.com/>
- **International Air Transport Association Legal Symposium 2017**, Feb. 21-23, 2017 (Washington, DC): <http://www.iata.org/events/Pages/legal-symposium.aspx>
- **ABA Update Conference**, Feb. 24, 2017 (Washington, DC): http://www.americanbar.org/groups/air_space/events_cle.html

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**American Bar Association
2016 Annual Meeting
San Francisco, CA
August 4-9**

For more information and to register go to: <http://www.americanbar.org/calendar/annual.html>