

By Michael J. Listner

Let's Not Kill All the Lawyers Yet



In Shakespeare's play *Henry the 6th* an unmemorable character named Dick the Butcher utters one of the few unforgettable lines from the entire three-part production: "Let's kill all the lawyers." Dick promotes the Utopian idea supported by the promises of the treacherous Jack Cade who surreptitiously contends that all lawyers do is shuffle parchments back and forth in a systematic attempt to ruin the common people. Cade's demagoguery is simply a calculated plea to simple folks who want to be left alone. Yet, while one may recognize Cade's moral flaws, they still may sympathize with Dick's idea regarding lawyers in general.

After the April 24, 2012 announcement by Planetary Resources of its goal to mine near-earth asteroids, many lawyers questioned the legality of such an operation under the current body of international space law

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and noted legal deficiencies that would need to be addressed. These comments elicited echoes of Shakespeare when critics resounded with commentary on the applicability of the current body of international space law. Some called for a new legal regime to address such commercial activities, citing the restrictions the current regime might place on free enterprise and commercial space development. However, despite these criticisms, killing the lawyers at this juncture would not be wise, since someone must resolve

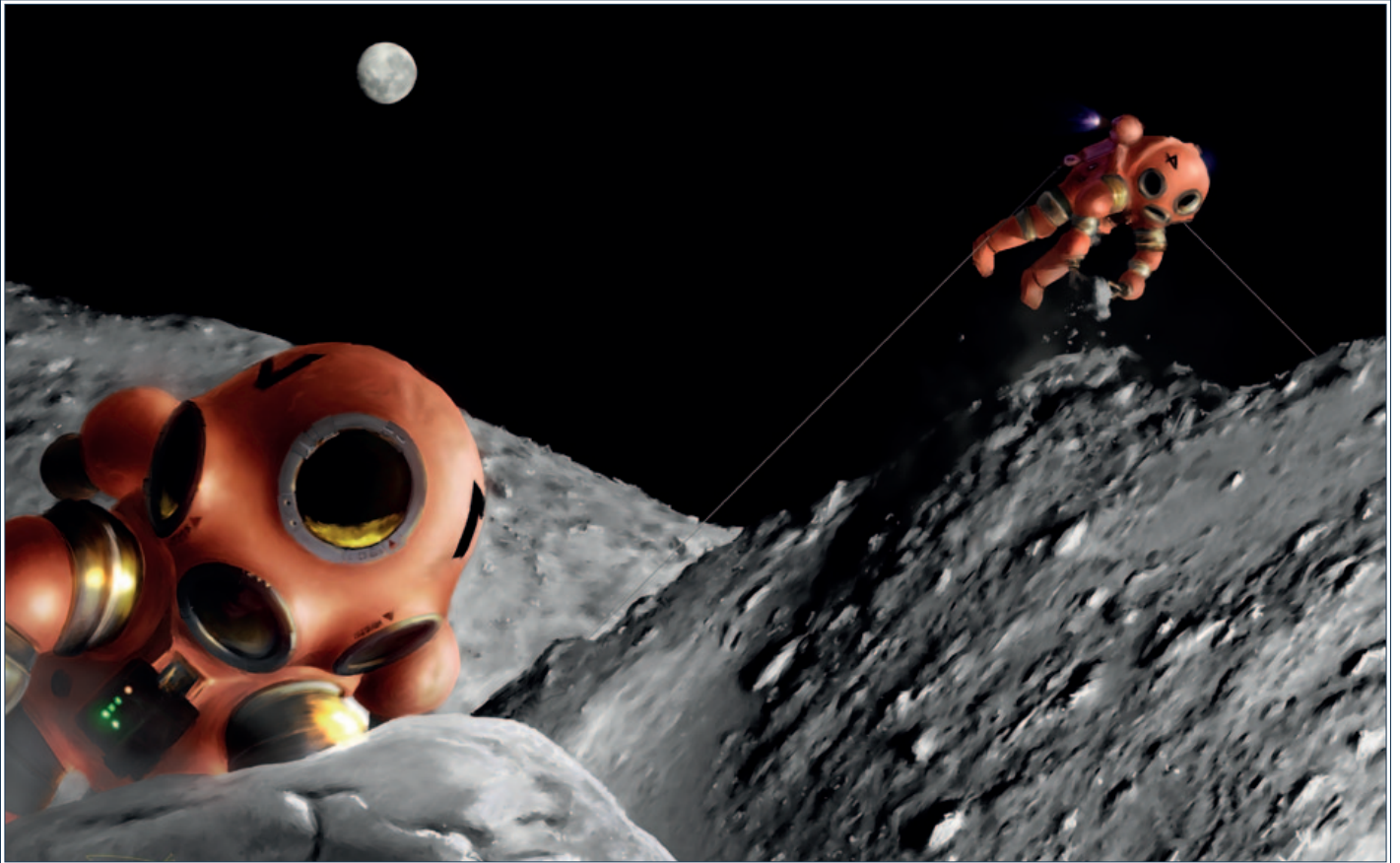
questions of applicability, and if need be, write the new laws that will allow Planetary Resources to make its goals a reality.

The Outer Space Treaty

Lawyers will be required to determine how the proposed plan by Planetary Resources to harvest resources from asteroids will implicate the Outer Space Treaty. The United States, which will likely serve as the launching State for Planetary Resources' activities, will ultimately be responsible for the activities performed in outer space by the company. This means that the United States will not only be responsible for approving the proposed activities, but lawyers will be pivotal to demonstrating to the rest of the international community that Planetary Resources' activities are consistent with the principles of the Outer Space Treaty. ▶▶



The Arkyd-101 space telescope developed by Planetary Resources will gather data from Near-Earth Asteroids to determine their commercial value. - Credits: Planetary Resources



Artist's conception of asteroid mining. - Credits: Phil Smith

Phil Smith is a freelance artist specializing in space subjects across a range of media. He is also a Senior Space Analyst with The Tauri Group based in the Washington, DC area.

Extraction of extraterrestrial resources is not prohibited per se by the Outer Space Treaty; however, such an activity could be prohibited if the extraction implicates a property interest, since the Outer Space Treaty prohibits the appropriation of outer space and extraterrestrial bodies such as the Moon and asteroids as sovereign territory. While there is no disagreement about sovereign nations claiming property rights in outer space, whether private individuals, including legal entities such as Planetary Resources, can make claims and appropriate these bodies and the resources within them is up for debate.

The crux of the debate is whether an exception that allows private ownership exists within the Outer Space Treaty. This question is a matter of continuing debate, with one side claiming that no such exception exists and the other claiming that it does. Until now, the debate has been abstract, and both sides have proffered arguments supporting their positions. However, with the potential of actual resource extraction occurring by the next decade, the stakes are substantially higher than winning an academic debate. Billions of dollars will

be invested to perform extraction missions on near-Earth asteroids, and if the status of private property rights is not settled, the United States government may be faced with the choice of either halting Planetary Resources' extraction activities or facing the possibility that it may be sanctioning an activity that could be illegal under international law, with the resultant diplomatic and political fallout. The ultimate answer to space property rights relies in part on how lawyers will interpret and apply the provisions of the Outer Space Treaty.

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The Liability Convention and Indemnity

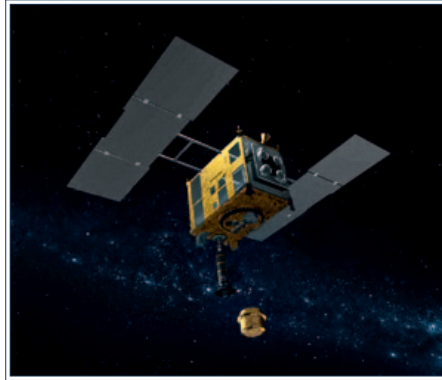
Another legal concern that will have to be addressed by the lawyers surrounds liability for any incidents arising out of Planetary Resources' activities. The Liability Convention has stood as a sentinel protecting the interests of other nations for damage caused by space activities both on the surface of the Earth and in outer space. However, the effectiveness of the Liability Convention is questionable.

The Liability Convention was first invoked during the Cosmos 954 incident of 1979, resulting in an agreement that, while based on the duties and obligations of the Soviet Union under both the Rescue Agreement and the Liability Convention, has been criticized since the Soviet Union never fully compensated the Canadian government for the amount agreed to. The concern is: if Planetary Resources' activities cause appreciable damage on the surface ►►

of the Earth, will the Liability Convention's precepts be sufficient to ensure fair and just compensation?

The question of effectiveness also applies to incidents that may occur in outer space as a result of Planetary Resources' activities. This second scenario, outlined in Article III of the Liability Convention, has yet to be tested. The incident between Cosmos 2251 and Iridium 33, which could have invoked this scenario of the Liability Convention, failed to trigger because there was insufficient evidence to determine which party was at fault and to what extent. With Planetary Resources' activities likely to increase the amount of traffic in both medium and low Earth orbit, the potential for accidents to occur will increase. The question is whether the Liability Convention, as it stands today is sufficient to address the potential incidents that could be caused by this activity.

Notably, the Liability Convention implicates government responsibility for the activities of those operating under its jurisdiction, and for any damages that may occur as a result. It is com-



The Japanese asteroid sampling spacecraft Hayabusa, which returned samples from asteroid Itokawa on June 13, 2010.

Credits: Jaxa/ISAS

mon practice for a launching State to require an entity performing outer space activities under its jurisdiction to provide indemnification for any damage that the government may have to pay compensation for. For example, the recent COTS mission with the SpaceX Dragon required that SpaceX procure an undisclosed amount of third-party liability insurance. However, with the magnitude and scope of activities

planned by Planetary Resources, the question is: what is the proper amount of insurance to post? Moreover, given the potential wealth that these mining operations will generate, should the amount of compensation made available to an aggrieved party go beyond what a government would offer as fair compensation?

Conclusion

While the words and sentiment of Dick the Butcher and Jack Cade may ring true with many when it comes to the role lawyers play, their role in resolving the legal issues that eventually will lead to the successful exploitation of extraterritorial resources by Planetary Resources and other entities will be pivotal. Not only does the current legal regime of outer space law need to be addressed, but the creation of new legal rules will be required. And in the end, if we kill all the lawyers, not only would injustice reign, but the dreams of harvesting outer space resources would die with them.

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