

FACULTY COLLOQUIUM

INTERSTITIAL SPACE LAW

Private space companies have begun to stake massive investments on the prospect of deriving commercial value from objects in outer space. The multinational asteroid-mining company Planetary Resources recently explained to a U.S. Senate Subcommittee that it will “conduct a historic and unprecedented mission to . . . prospect several near-Earth asteroids.” Amazon’s Blue Origin just launched a collaboration with German space companies to start a “permanent presence on the moon.” Elon Musk’s SpaceX intends to “focus all its engineering talent on building its Mars rocket.” Yet it is unclear whether these companies have a legal right to appropriate outer space materials for private commercial use. The controlling international law is a cluster of 1960s-era treaties, designed for the realities of cold-war space exploration. The centerpiece of the early treaties, the 1967 Outer Space Treaty, clearly specifies that materials cannot be appropriated for national use, but the treaty is silent on private commercial use. Exploiting the opportunity this silence affords, private companies have begun to advance their own interpretation of the treaty in addresses to lawmakers, press releases, and corporate disclosures. They have also acted as though their interpretation were law, pressing forward with plans to commercialize space, and seemingly content to gamble on the possibility that international law will develop in their favor. The paper argues that this practice merits our attention as one of the diverse ways private companies take roles in international lawmaking. Here, private companies are working on two levels. First, they are shaping the development of international customary law by exploiting the failure of nation-states to shut down their activities. Second, they are creating a body of practice that would constitute the building blocks for customary international lawmaking, if the private companies were governmental actors, raising the possibility of a private common law for space.

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Professor Durkee previously held positions at the University of Washington, where she was an associate professor of law, and Columbia Law School, where she served as an associate-in-law. She received her degree from the Yale Law School, clerked for federal court judges in the U.S., and began her career in the New York office of Cleary Gottlieb Steen & Hamilton, where she specialized in international litigation and arbitration. She recently served as managing editor of the peer-reviewed *AJIL Unbound* (2015-2018).

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31

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