

# Incentivising Commercial Space Activities through International Investment Arbitration

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Ever looked up at the night sky and wondered...what is the regulatory and dispute settlement regime that governs commercial activities out there? Well, it might be about time you did. This post celebrates October's World Space Week by looking at the developments in the legal framework regulating commercial space activities and how the investor-state dispute resolution (ISDS) regime can incentivise investment in this growing field.

## **World Space Week 2020: 'Satellites Improve Life'**

In 1999, the United Nations General Assembly declared 4-10 October as the World Space Week, celebrating: the launch of the first human-made Earth satellite (1957); the signing of the Outer Space Treaty (1967); and the contributions of space science and technology to the 'betterment of the human condition.' Some twenty years later, World Space Week 2020 celebrates satellites – a timely theme given our increasing dependence on virtual technology.

Despite technological advances, however, launching objects into space remains a

costly investment. As promising space start-ups continue to be bought out, Amazon CEO Jeff Bezos has identified the exploitation of lucrative resources in space as an imperative step in developing the “infrastructure” necessary to turn space exploration into a commercially viable industry for investors. Yet, much like the regulation of deep-sea mining, the regulation of space mining remains an extremely young - and therefore risky - field of international law.

## **International Space Law**

The keystone of the international legal framework governing space is the ‘Outer Space Treaty’. The Treaty has been ratified by 110 countries and notably designates space as ‘the province of all mankind’ and prohibits claims of sovereignty. Yet, despite being groundbreaking for its time, the Treaty’s provisions are inadequate to regulate modern commercial space activities. Namely, the treaty is silent on the recognition of property rights over space resources. Without a guarantee that States will recognise their property rights, what incentive is there for private companies to invest in space exploration? While the subsequent Moon Agreement attempted to clarify this silence by proposing a regime for regulating (and restricting) space mining activities, it has not succeeded in gaining widespread international support.

In response to this lacuna in the law, States have begun to assert their own interpretations of the Outer Space Treaty in an effort to attract investment in the space mining industry. In April, the United States rejected the idea of outer space being a ‘global commons’ in a contentious executive order which declared it the ‘policy of the United States to encourage international support for the public and private recovery and use of resources in outer space.’ The U.S. argues this interpretation only recognises private property rights without asserting sovereignty, and is therefore consistent with the Outer Space Treaty. Despite criticism, this interpretation has been followed by Luxembourg and the United Arab Emirates which, alongside the U.S., have enacted domestic legislation recognising property rights in space resources. Such legislation has resonated with industry. To date, the Luxembourg Government has signed agreements to develop space mining technology with the Japanese space robotics company iSpace, The United Arab Emirates, and New South Wales, Australia.

However, this year, an International Open Letter on Space Mining was penned to the United Nations criticising such unilateral approaches. Instead, the letter advocates for a multilateral process for governing space resource exploration similar to that of the deep seabed. The aim, the letter states, is to avoid ‘separate, possibly inconsistent, governance frameworks’ and ‘marginalizing input from developing and non-spacefaring States’.

Clearly, the space law field remains torn between domestic ‘Wild West’ legislative developments and gradual advances towards a comprehensive multilateral alternative. Assessing the likelihood of these alternatives, investors are left trying to predict their capacity to exploit natural resources in space as the regulatory regime shifts below them.

## **Testing the Boundaries of Investment Arbitration**

This year’s World Space Week theme - ‘Satellites Improve Life’ - hints at a potential solution to the ambiguities involved in space mining and commercial space activities more broadly. Investment arbitration cases concerning satellites have begun to enter the ISDS sphere and illuminate the capacity for investment arbitration to supply applicable guiding principles for commercial space activities, as well as significant substantive protections to investors.

The application of investor protections to investments in space was successfully applied in CC/Devas v India. The contract between Mauritius-based Devas and Antrix (the commercial arm of India’s space agency) provided for the licensing of a frequency of satellite spectrum (S-band) for the provision of high-speed Internet services. These S-band frequencies facilitate weather radars, surface ship radars, and some communications satellites, and are, therefore, highly prized. In 2011, Antrix terminated the contract, citing ‘essential security interests’ identified by India’s Cabinet Committee on Security. The tribunal was faced with a difficult question: did India’s military have a genuine need to exclusively reserve the satellite’s S-band capacity or was it a ‘pretext to concoct a *force majeure* event that would enable Antrix to terminate the contract on advantageous terms.’ The Tribunal found that by terminating its contract with the investor, India had unlawfully expropriated the investor’s investment and breached the obligation to provide fair and equitable treatment under the BIT. However, the Tribunal

accepted that India's legitimate national security interests did partially motivate its decision to terminate the contract, thus finding that India expropriated Devas' investment only insofar as it was not motivated by essential security interests (40 per cent).

Despite the unconventional investment - a satellite orbiting Earth - the tribunal's reasoning towards the application of the ISDS regime appears relatively routine.

First, you might well wonder why unique territoriality issues would not arise for satellites. After all, most BITs require an 'investment' in the 'territory' of the host state. Moreover, Article II of the Outer Space Treaty prohibits a state from claiming sovereignty in space. Article III of the Treaty nonetheless provides that any object launched into outer space by a State shall be within the 'jurisdiction' and 'control' of that State. Yet, this may not overcome extraterritoriality issues. Instead, it might be argued that any commercial space activities would be operating outside of the 'territory' (even if within the 'jurisdiction' or 'control') of any state. The Outer Space Treaty provisions on 'control' over space-based activities nonetheless encourage States to develop licensing regimes to authorise and supervise the launching of objects into space. It is these provisions that assist to resolve the territoriality conundrum when such investments are linked to claims under investment treaties.

In fact, in *CC/Devas v India*, this question of extraterritoriality was not even raised, which suggests that the relevant question is whether the foreign space *company* or the geographical *basis* of the investment is within the territory of the host State. As stated in *SGS v Philippines*, even those activities that are primarily carried out abroad may satisfy a BIT's territorial requirements provided the investment's territorial nexus is the Host State. Accordingly, extraterritoriality issues are unlikely to arise where the owner of a satellite is operating out of the host State.

Secondly, the *CC/Devas v India* Tribunal was analysing very conventional property rights; namely, licences. Whenever respondent States take steps to regulate the activities of licensees vis-à-vis their space operations, questions of treaty breach are particularly likely to arise. Domestic instruments regulating commercial space activity almost universally specify licensing requirements. These licenses are intended to vet proposed orbits and ensure satellites are retired safely, thereby reducing the amount of space junk orbiting Earth. However, licensing requirements also mean that States are potentially regulating foreign investments, which would

allow investors to invoke substantive protections to constrain how their host states engage with them and their investments. For instance, in the pending ICSID case *Eutelsat v Mexico*, the French telecommunication company Eutelsat brought a claim against Mexico in 2017 for requiring Eutelsat to reserve a greater amount of their satellites' megahertz capacity than Eutelsat's competitors. This, Eutelsat claims, is a breach of the requirement to accord fair and equitable treatment under the Mexico-France BIT.

Given the significant protections afforded by BITs, these cases may begin to lay down the principles for ISDS' default application to commercial space activities beyond licensing disputes. Indeed, as more host States create and recognise property rights in space resources under domestic legislation, such rights (with their basis in domestic law) could one day be the subject of investment treaty claims.

## **A Developing Field**

To the main theme of this article: can the ISDS regime incentivise and regulate investment in commercial space activities? The cases discussed indicate that despite the seemingly quixotic nature of commercial space mining and exploration, the issues faced by investors in these activities are quite familiar; that is, jurisdictional issues, questions of expropriation, and FET requirements are all issues the ISDS regime is well-adapted to solve. Thus, as ISDS is well equipped to further the global rule of law even beyond the globe, the regime may prove to be the natural default mechanism for solving commercial space activities between investors and States. So, although it may seem a while off, when it does come time to add 'space arbitrator' to your CV, investment arbitrators are sure to feel right at home.