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Looking Back While Looking Up: A Review of Space Arbitration Topics

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Over the past several years, interest in space-related activities has boomed. Countries increased the number of missions undertaken. Moreover, private actors have become increasingly interested in space activities, particularly in the field of telecoms and satellites, but also advertising and space tourism. This increase in space activity brought with it a rise in discussions within the legal community concerning the resolution of space-related disputes. This article provides an up-to-date overview of recent discussions and developments.

Investor-State Arbitration for Investments in Space

A popular topic among dispute lawyers is whether arbitral tribunals can effectively resolve disputes over the interpretation of space treaties and the conduct of space operators through investor-state arbitration, i.e. arbitration claims pursued against a State by private actors pursuant to bilateral or multilateral investment treaties. In this context, however, one might wonder whether jurisdictional issues could arise for disputes related to satellites and spacecraft which limit the ability of private actors to enforce their claims via investor-state arbitration. This is because investment treaties generally only allow an arbitral tribunal to resolve disputes related to an "*investment*" made in the "*territory*" of a host State. For example, according to Article 25(1) of the ICSID Convention, the Convention applies to any legal disputes arising directly out of an "*investment*" between a Contracting State (i.e. the "*host State*") and a national of another Contracting State (i.e. the "*investor*"). Generally, the underlying investment treaty will stipulate that the term "*investment*" means assets invested by an investor in the "*territory*" of the host State.

Since space activities are not carried out within a host State's territorial borders, it becomes more complicated to determine whether the territoriality provisions of an investment treaty are satisfied. However, several arbitration tribunals have determined that activities carried out abroad may still satisfy an investment treaty's territorial requirements so long as the investment's territorial nexus concerns the host State (see e.g. Ambiente Ufficio S.p.A. v. Argentine Republic and SGS v. Philippines). In the context of space activities, if a satellite operator were to obtain a license from or sign concession agreements with States to use the said State's orbital slot or frequency bands for satellites, this could provide the satellite operator with investment protection if the investor's home country has concluded an investment treaty with that State.

Resolution of Space Collision Disputes

Another area of particular interest for dispute practitioners concerns potential space collision cases. Opening outer space to an increasing number of private entities and multiplying the number of space objects launched correlates to a vastly higher risk of collision, including with space vehicles, asteroids, and debris. We can expect to see disputes related to forced avoidance manoeuvres and space collisions. Since arbitration is well adapted to resolve international disputes that involve several jurisdictions and touch upon international law issues, it is the preferable dispute resolution mechanism to deal with these matters. Commercial arbitration is a creature of contract and is highly adaptable based on agreements between contractual parties. However, space accidents can happen between parties that are not contractually bound and – once a dispute has arisen – it can be difficult to mutually resolve the dispute by way of an arbitration. In such instances, a party might seek to enforce its claims before state courts, but said party is likely to face lengthy arguments over jurisdiction and applicable law. These issues become even more complicated if a claim is directed against a state or state-owned entity which may lead to questions of bias and sovereign immunity as well as the investor-state arbitration limits already discussed above. Clearly, the current situation is not satisfactory. It should be remedied through a multilateral treaty (which involves as many stakeholders as possible) to address the regulatory lacunae within space law, including the establishment of arbitration as a means of dispute resolution.

Inter-State Space Arbitration

Another topic which has interested the legal community is inter-state disputes related to space activities. The existing international framework for space law consists of five international treaties. The Outer Space Treaty was opened for signatures in 1967 and constitutes up until today the most important treaty. The other treaties are the Rescue Agreement from 1968, the Liability Convention from 1972, the Registration Convention from 1975 and the Moon Agreement from 1978. However, none of the treaties provide for arbitration. The provision that comes closest to dealing with dispute resolution in the international framework is Article 2(3) of the UN Charter which merely states that all Members shall settle their international disputes by peaceful means. That said, the International Law Association published a Draft Convention on the Settlement of Space Law Disputes in 1984. However, the text did not progress beyond the drafting stage. Consequently, there is no international treaty that provides for binding inter-state space arbitration to this day.

It is striking to see that outer-space law is today where international investment law was in the mid-1900s as far as dispute resolution is concerned. It is widely accepted that increased regulation of outer space activities is needed. Perhaps however, the development of investment arbitration can inspire confidence. After all, as a result of the increase in foreign investment in the 1950s, the international community was able to design an international investment framework. Thus, it is not unreasonable to expect that the current and future increase in space activities will lead to a set of international rules dealing with outer space disputes in the near future.

Arbitral Institutions and Space Disputes

Commentators from the international disputes community expect that the increase in space activities will not only facilitate agreement on an international framework for outer space dispute resolution, but will also further increase competition over the location of a center for such dispute resolution. One example is the UAE's new initiative to establish Courts of Space – tribunals dedicated to the resolution of disputes related to space activities. Is it possible that, in the future, this Court of Space could be what the ICC, the LCIA, and the many other well-renowned arbitral institutions represent for international trade today? Or will these pre-existing institutions be able to adapt and encompass space-related disputes effectively?

The need for an effective dispute resolution mechanism for space-related disputes has already been recognised by the PCA, which published the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities in 2011 ("*PCA Outer Space Rules*"). However, States and private entities continue to rely on diplomacy and amicable settlement to solve their disputes. As regards the private sector, this might be due to the small number of actors in the field which encourages each of them to maintain good relations with their future partners. However, this approach will become increasingly difficult as the number of private companies entering the field of commercial space use increases. For them, arbitration offers the best way to enforce their claims.

Looking Ahead

Although the legal issues discussed above will continue to be present in the coming years, I hypothesize that two issues will be particularly interesting for disputes: space-mining and insurance of space-related investments.

One of the most important space activities that will develop in the coming years is space mining. The potential of exploiting rare materials from celestial bodies is large enough to attract investors and is anticipated to start occurring within this decade. A plethora of legal questions arise concerning such activities:

- Who has the right to approach and explore a celestial body first? Can space enterprises acquire priority rights to get exclusive access to a certain celestial body or a certain area on a celestial body? Who would grant such exclusive access?
- Who acquires property rights to the mined materials?
- Without a guarantee that States will recognise their property rights, what incentive is there for entrepreneurs to invest in space exploration? As the extraction of rare materials in space is extremely expensive, investors need as much legal certainty as possible to facilitate their investments.

A second important and anticipated development is the rise of space-related insurance disputes in the coming years. Insurance company Mitsui Sumitomo Insurance recently launched an agreement with ispace (a global lunar resource development company) to provide the world's first lunar insurance policy covering risks arising from ispace's Mission 1 (the first privately-led Japanese mission to land on the lunar surface). As private actors continue to engage in space endeavours, it is likely that more insurance companies will adapt their offers to cover such products. But as this is an entirely new realm for insurance issues, it is likely that this will also give rise to novel disputes.

To keep up to date on future discussions concerning space-related disputes, stay tuned to updates from the Space Arbitration Association.

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