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INVESTMENT PROTECTION PROVISIONS IN NATIONAL LEGISLATION AND THEIR POTENTIAL TO ENSURE LONG-TERM COMPLIANCE OF NATIONAL SPACE LEGISLATION WITH THE PRINCIPLES OF INTERNATIONAL LAW, PARTICULARLY INTERNATIONAL SPACE LAW

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In the recent course of time, many countries have adopted national legislation relating to space activities. Most of them aim at establishing a legal framework designed to facilitate the commercialization of space activities. Given the recent development, private actors are to play a major role in the exploration and use of outer space. In considerations of national space legislations, it is worthy to address issues identified by investors as essential. According to UNCTAD (United Nations Conference on Trade and Development), apart from the economic determinants, regulatory and political stability are the most important foreign direct investment determinants. In other words, a stable regulatory environment is a fundamental pre-requisite for an adequate flow of new investments. Investment law has been recognized as a core policy tool to promote investment. Globally, there are more than 2300 bilateral investment treaties in force, according to UNCTAD. A key objective of investment law is to mitigate risks inherent in a future intervention of the host state. While most of the investment treaties contain a general phrase defining protected investment as "all assets", there are some examples of sector-specific treaties such as the Energy Charter Treaty. Given the specific characteristics of space activities, investment protection of investment in the space sector can significantly spur private investment. Against the background of a global backlash against investment arbitration and the ongoing debate on international investment agreement reform, it is hard to imagine an adoption of a space-specific investment agreement. However, international treaties are not the only source of investment protection. Many capital importing countries such as Egypt, South Africa, Jordan have adopted national laws including a similar level of protection accompanied by a consent to international arbitration. In consideration of emerging national space legislation, the paper seeks to explore the inherent limitation of national legislation in relation to stability and predictability. In this context, the paper addresses the potential of investment protection provisions in national space legislation as well as the potential of space investment law to ensure long-term compliance of national space legislation with the principles of international law, particularly international space law.

I. COMMERCIALIZATION OF SPACE ACTIVITIES

Governments are no longer the only actors having capabilities needed to explore and use outer space. Private actors will undoubtedly play a major role in the exploration and use of outer space in the near future. However, international responsibility for national activities, whether such activities are carried out by governmental agencies or by non-governmental entities, is borne by state parties to the Outer Space Treaty. Accordingly, states are required to make sure that national activities are carried out in conformity with the OST. Having said that, Article VI of the OST has significant implications for commercialization of outer space activities because states are explicitly obliged to authorize and supervise any non-governmental activities.[1]

New space technology development and subsequent engagement of non-state actors have already led to the adoption of national legislations setting an authorization procedure and a supervision regime in various countries.

II. INHERENT LIMITATION OF NATIONAL LEGISLATION IN RELATION TO STABILITY AND PREDICTABILITY

However, we have only little experience with the exploration and use of outer space. Fast-paced commercialization, evolving technological advances and international responsibility borne by states are likely to be translated into significant regulatory risk.

In addition, until detailed rules governing space activities are adopted at the international level, conditions under which these activities have to be carried out can only be derived from general principles of international

space law enshrined in the Outer Space Treaty. However, these principles are of general nature and vague character, far from being precise enough to serve as a legal basis for long-term investment decisions. To conclude, a combination of the OST's ambiguousness and international responsibility borne by states is likely to make outer space activities highly regulated and consequently risky. To conclude, private investors are likely to be exposed to various regulatory interventions.

III. ROLE OF INVESTMENT LAW

The primary objective of investment law is to provide foreign investors with protection of their investments against interference by the host state. Subsequent flow of capital is expected to enhance economic development of concerned countries.[2]

The source of contemporary investment law is bilateral investment treaties (BITs), investment chapters of free trade agreements (FTAs) and regional treaties (for instance the Energy Charter Treaty) or national legislation.[3]

In order to mitigate political risk, host states tend to deliberately renounce an element of their sovereignty. In particular, the desire to attract foreign investment has led most countries to provide investors with special legal guarantees such as protection against illegal expropriation, protection against discrimination, full protection and security, fair and equitable treatment.

Moreover, the limited usefulness of domestic courts has led to the widespread acceptance of arbitration between the foreign investor and the host state. Arbitration is understood to be faster than litigation in court, more flexible and less formal. Parties can select an arbitrator with an appropriate degree of practical experience. Moreover, there are very limited avenues for appeal of an arbitral award and arbitral awards are generally easier to enforce in other nations than court judgments.

Since 60s the use of international investment agreements has spread to the point that they are widely used throughout the investment world today. According to the UNCTAD, there are 2354 international investment agreements in force.[4]

IV. INVESTMENT PROTECTION IN AREAS BEYOND TERRITORIAL JURISDICTION IN OUTER SPACE

With regard to activities in the exploration and use of outer space, the application of international investment agreements may be questioned. Definition of investment often require investments to been made in the territory of the host state. In other words, investment protection usually requires a territorial nexus. One may also argue that outer space activities cannot not be classified as protected investments because outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.[5]

International investment treaties have not been designed to protect investments made beyond national jurisdictions. Unless such investments are explicitly declared as protected investments, international investment treaties can hardly accelerate investment in outer space activities.

V. NATIONAL LEGISLATION AS A SOURCE OF INVESTMENT PROTECTION

Domestic legislation is one of several ways to mitigate regulatory risk. Many capital importing countries such as Egypt, South Africa, Jordan have adopted national laws including a similar level of protection accompanied by a consent to international arbitration.

Since any amendment of an international treaty is conditioned by the consent of its contracting parties, bearing in mind highly fragmented network of bilateral investment treaties, investment protection provisions in national space legislation (a unilateral act) may appear to be an attractive source sector specific investment protection. Moreover, national space legislation may also contain a consent to arbitration. Such an arbitration can be governed under the PCA's Optional Rules for Arbitration of Disputes Relating to Outer Space Activities.

[1] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (adopted by the General Assembly in its resolution 2222 (XXI), opened for signature on 27 January 1967, entered into force on 1 October 1967) 610 UNTS 205 (Outer Space Treaty or OST).

[2] GOMÉZ, Katia Fach (2012). Rethinking the Role of Amicus Curiae. [online]. Fordham International Law Journal, Volume 35, Issue 2, Article 3, 2012.

[3] SORNARAJAH, M (2010). The international law on foreign investment. 3. ed. New York: Cambridge University Press, 2010.

[4] UNCTAD, International Investment Agreements Navigator <https://investmentpolicy.unctad.org/international-investment-agreements>.

[5] OST, Art II.