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Investment protection in outer space

by

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The space economy is growing rapidly. According to an April 2024 report by the World Economic Forum and McKinsey & Company, it will reach US$1.8 trillion by 2035. This growth is accompanied by increasing private investments—investments potentially covered by international investment law with corresponding obligations on host states of space investments.

At the international level, activities in outer space are governed by five international treaties. The 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the "Outer Space Treaty") sets out the main principles governing activities in outer space, such as the exploration and use of outer space for the benefit and in the interest of all countries (Article I), and the non-appropriation of outer space (Article II). International space law governs state activities in outer space but does not address private space activities directly. Instead, according to Article VI of the Outer Space Treaty, states are responsible for national activities in outer space, and national activities need to be authorized and continuously supervised.

Regarding liability, Article VII of the Outer Space Treaty provides that State Parties that launch or procure the launching of an object into outer space, and each state party from whose territory or facility an object is launched, are internationally liable for damage caused to another state party to the Treaty or to its natural or legal persons caused by the launched object or its component parts. This principle was further developed in the 1972 Convention on International Liability for Damage Caused by Space Objects (the "Liability Convention"), which imposes liability on "launching

States" for damage caused by their space objects in space when at fault, and under an absolute liability regime, if the damage is caused on earth. The Liability Convention contains a dispute-settlement mechanism in the form of a Claims Commission, which is, however, only available to states. International space law does not contain any direct recourse for private operators.

This is likely to become an increasingly important issue as the exponential growth of satellites being launched is raising questions over the growing risk of collisions. Already today, satellites often have to be moved in collision-avoidance maneuvers. In this context, private space operators are likely to increasingly look for alternative remedies to recover any damage their space investments might suffer. One avenue they are likely to consider is international investment law. Past investor-state dispute-settlement cases in the space sector arose out of India's revocation of a contract over leased S-band frequency spectrum and out of complaints over a provision contained in concession contracts for the use of Mexican geostationary orbital positions. Future cases are likely to concern both such intangible space investments as launching licenses or frequency rights, as well as tangible space objects in the form of hardware physically located in outer space.

Investment claims over the protection of assets physically located in outer space will likely raise concerns over their compliance with the common requirement in international investment agreements (IIAs) that an investment be made "in the territory" of the host state. Space being subject to the non-appropriation principle, the application of IIAs to physical space assets will require an interpretation of the term "territory" beyond physical boundaries. If this hurdle were to be overcome, states could be exposed to liability for breaching the "full protection and security" standard under IIAs. While international space law limits liability to damage caused to space objects of other states through fault, international investment law obliges states to protect foreign investments against harm caused by the state itself or by third parties. The applicable standard of protection required under the full protection and security standard typically obliges the host state of an investment to exercise due diligence in preventing harm from occurring to foreign investors and their investments.

The term "fault" is not defined in the Liability Convention and its meaning has yet to be determined by an international court or tribunal. Likewise, no court or tribunal has yet analyzed what the appropriate level of diligence is that a state is obliged to exercise to protect the physical integrity of foreign space investments. It is however likely that any analysis of whether a state acted with "fault" or exercised the diligence that was required would look at a state's compliance with its international obligation to authorize and supervise national space activities. Notably, the licensing of space activities provides a state with the possibility of imposing conditions to protect the space environment and thereby decrease the risks a space object constitutes for other space assets.

With investment claims being more easily enforceable than claims under international space law, states seeking to attract space investments should be aware of the potential applicability of IIAs to these investments and might thus want to apply the highest possible standards of supervision.

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