Harmonised rules for emerging private initiatives in space?: in quest of fair, equitable and commercially viable rules for extraterrestrial mining

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Traditional concept of harmonisation

• Traditional theory of harmonisation
  • Originating in the uniform law movements of 19th Century
  • Divergence of law as problem; common set of rules as the goal
  • Focus on private law (commercial law): autonomy from the sovereign states’ regulatory power

• Reality: influence of policy
  • Industrial property and copyright
  • Private air law
Policy implications of harmonisation

• Increasing policy implications
  • UNCITRAL Guide on PFI
  • Legal Guide on contract farming (Unidroit-IFAD-FAO)
  • Secured transactions: intention to facilitate investment in emerging and transition economy
  • Intellectual property and public policy (mandatory license / sovereignty over genetic resources)

• How to reflect the public policy in harmonised trade law?
  • Internationally recognised public policy
  • Divergent public policies among states
“New Space” and extraterrestrial mining and harmonised rules

• Space activities as the frontier of commercial businesses
  • Extraterrestrial mining (extracting resources from asteroids and other celestial bodies) as one of the planned activity

• Public policy embodied in public international law
  • Outer Space Treaty (OST) Art.I: “for the benefit and in the interest of all countries”
  • OST Art.II: prohibition of national appropriation by claim of sovereignty
Divided policies about extraterrestrial mining

• US: Commercial Space Launch Competitiveness Act (CSLCA) of 2015
  • Affirming entitlement to “possess, own, transport, use, and sell the asteroid resource or space resource”
  • Subject to international obligations of the US

• Luxembourg’s bill on the exploration and use of space resources

• Criticisms based on the concept of “common heritage of mankind” (as in the Moon Agreement)

• The Hague Space Resources Working Group
Hypotheticals

• Case 1. Sales among parties with different policies
  • One of the parties being in a state that denies private extraterrestrial mining

• Case 2. Sales between parties in states with similar but different policies

• Case 3. Confiscation of extraterrestrial resources
  • By a State denying private right to such resources

• Case 4. Launch contract for mining spacecraft

• Case 5. Competing licenses from different states
Solution by harmonised rules

• Substantive rules plus dispute resolution rules
• For substantive rules:
  • Respecting foreign person’s rights
    • Inspiration from the Paris Convention on industrial property rights
    • It may be useful in Case 3, but not valid for cases 1 & 2
• Mutual recognition of other countries’ policy
  • Useful in cases 1, 2 and 4
  • Minimum requirement to be commonly complied with
Disputes resolution mechanism for extraterrestrial mining activities

- The harmonised rules for extraterrestrial mining must also include rules on dispute resolution.
- Because the public policy embodied in public international law should be reflected in the resolution of the disputes.

• Arbitration rules of PCA
• Need for rules applicable to disputes between private parties
• UNICITRAL Model Law on arbitration as starting point?
• Collaboration of UNICITRAL and UNOOSA
Arbitration rules of PCA

• In the 1990’s, Permanet Court of Arbitration (PCA) adopts Optional Rules.
  • Between Two States (1992),
  • Two Parties of Which Only One is a State (1993),
  • International Organizations and States (1996),

• In 2011, Optional Rules for Arbitration of Disputes relating to Outer Space Activities was created. The Rule reflects specifications of international space law.

• The award of PCA will be affected by the public international law including UN Space Treaties.
Need for rules applicable to disputes between private parties

• PCA optional rules has multiple advantage for the resolution of space-related disputes;
  • flexibility of choosing arbitral panel and procedures
  • preservation of confidentiality of sensitive information
  • final bindingness of the award and enforcement by the New York Convention
  • reflection of public international law to the award

• However, **PCA cannot solve disputes between private parties even if the optional rules are cited.**
UNICITRAL Model Law on arbitration as starting point? (1/5)

• The dispute resolution mechanism for extraterrestrial mining requires 2 elements;
  1. Applicability to the dispute between private parties
  2. Possibility of referring to public policy embodied through public international law (UN Space Treaties).

• International commercial arbitration fulfills the 2 requirements, because it
  1. will be utilized for all combination by private party, state and international organization.
  2. can refer public international law through; (1) apply national substantive law affected by public international law and (2) apply public international law directly.
UNICITRAL Model Law on arbitration as starting point? (2/5)

(1) National substantive law

• Many space-faring states establish national space legislation in order to
  • implement international responsibility in Art.6 of OST (International responsibility for non-governmental entities),
  • embody national space policy. (eg. US Commercial Space Launch Competitiveness Act (H.R. 2262))

• National space legislation will be selected as an applicable law in International Commercial Arbitration.

• In Case 1 and 4, the award depends on the applicable national substantive law.
UNICITRAL Model Law on arbitration as starting point? (3/5)

(2) Public International Law - 1

• All of the public international law can not apply to the arbitration.
  • A view was expressed that only the principle of law such as “pacta sunt serbanda” can apply to international commercial arbitration.
  • In Case 2, the validity of sales contract was denied with referring to Article I of the OST. If it is considered as principle of law, it will be referred to the award.

The first and second principles of the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (1963)

“for the benefit and in the interests of all countries” in Article I of Outer Space Treaty (1966)

Declaration of Space Benefit (1996)
UNICITRAL Model Law on arbitration as starting point? (4/5)

(2) Public International Law - 2

• In Case 3 and 5, application of public international law to the arbitration is controversial issue.
  • Both private parties act legally in accordance with national legislation of respective state. The reason of the conflicts is the difference between the national laws.
  • Private parties need to require that the government of the state where they are incorporated consult with the other state, based on the Article IX of OST.
  • but, there is doubt whether public international law like Article IX is applied to the arbitration.

Article IX: “a State Party “shall undertake appropriate international consultations before proceeding with any [...] activity or experiment”, when [---] an activity or experiment planned by it or its nationals in outer space would cause potentially harmful interference with activities of other States Parties. “
UNICITRAL Model Law on arbitration as starting point? (5/5)

(2) Public International Law - 3

• In order to make sure of the application of public international law in arbitration for the extraterrestrial mining, *drafting new Model law is necessary.*

• This Model law should include
  • substantive rules (cf. UN Convention on Contracts for the International Sale of Goods (CISG)).
  • procedural rules regarding dispute settlement where public international law can be applied (cf. The PCA Optional Rules relating to Outer Space Activities (2011)).
Collaboration of UNICITRAL and UNOOSA

- Collaboration between the UNCITRAL and UNOOSA (Office for Outer Space Affairs) will be valuable, as OOSA has the expertise in space law.
  - cf. Collaboration between OOSA and the International Civil Aviation Organization (ICAO) about civil aviation, sub-orbital flights etc.

- The UNISPACE+50, the 50th anniversary of the first UNISPACE conference in 1968 is a good opportunity.
  - analyze the relationships between UN Space Treaties and a possible Model Law under the auspices of UNCITRAL.
Conclusion

• When views of states are divided (as in the case of extraterrestrial mining):
  • Harmonised rules required to solve possible disputes among private parties
  • Need to reflect public policy (embodied in public international law) in such harmonised rules
    • Mutual recognition of policies subject to minimum requirement
    • Dispute resolution procedures that can take into consideration the common public policy
  • UNCITRAL’s role in collaboration with other UN bodies / international agencies expected