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TABLE OF CONTENTS

TRIBUTES

TRIBUTE TO EMMANUEL GAILLARD (1952-2021)	<i>Philippe Pinsolle Yas Banifatemi</i>	1
IN MEMORY OF MARTIN J. HUNTER (1937-2021)	<i>Alexandre Vagenheim</i>	5

ARTICLES

¿PUEDE EJECUTARSE UN LAUDO CON UNA REPARACIÓN NO PECUNIARIA BAJO EL CONVENIO CIADI Y/O BAJO LA CONVENCION DE NUEVA YORK?	<i>Alonso Bedoya Denegri</i>	11
A CRITICAL ANALYSIS OF LEGITIMATE EXPECTATION VIS-À-VIS EU BLOCKING REGULATIONS	<i>Niyati Ahuja Naimeh Masumy</i>	25
LOOKING TO THE PAST FOR THE FUTURE: INTERNATIONAL INVESTMENT LAW AS A FRAMEWORK TO PROTECT PRIVATE ACTORS IN OUTER SPACE	<i>Vivasvat "Viva" Dadwal Charles "Chip" B. Rosenberg</i>	52
REPROGRAMING GEOPOLITICAL FIREWALLS: TECHNOLOGICAL NON-PROLIFERATION AND THE FUTURE OF INVESTOR-STATE DISPUTE SETTLEMENT	<i>Jason Czerwiec</i>	57

BOOK REVIEWS

INTERNATIONAL COMMERCIAL ARBITRATION IN THE EUROPEAN UNION BRUSSELS I, BREXIT AND BEYOND BY CHUKWUDI OJIEGBE	<i>Sarah Vasani Daria Kuznetsova</i>	141
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THE TROUBLE WITH FOREIGN INVESTOR PROTECTION
BY GUS VAN HARTEN *Fernando Tupa* 148

ITA CONFERENCE PRESENTATIONS

KEYNOTE REMARKS:
REGULATING ARBITRATOR ETHICS:
GOLDBLOCKS' GOLDEN RULE *Constantine Partasides, QC* 155

A REPORT ON THE PANEL
"ENERGY ARBITRATIONS: DIALOGUE BETWEEN
EUROPE AND THE AMERICAS" *Konstantin Mishin* 169

A REPORT ON THE PANEL
"COMMERCIAL ARBITRATIONS RELATING TO
REGULATORY CHANGES" *Lena Raxter* 176

YOUNG ITA

A REPORT ON THE PANEL
"ARBITRATION & INSOLVENCY: WHEN THEORY
MEETS PRACTICE" *Alicia Yeo* 193

REPORT ON #YOUNGITATALKS EVENT:
THE PSYCHOLOGY OF WITNESS EVIDENCE AND
ITS ROLE IN TRIBUNAL DECISION-MAKING *Alexander Westin-Hardy* 203

REPORT ON #YOUNGITATALKS EVENT:
MÉXICO Y EL ARBITRAJE DE INVERSIÓN *Juan Pablo Gómez-Moreno* 207



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LOOKING TO THE PAST FOR THE FUTURE: INTERNATIONAL INVESTMENT LAW AS A FRAMEWORK TO PROTECT PRIVATE ACTORS IN OUTER SPACE

by Vivasvat “Viva” Dadwal & Charles “Chip” Rosenberg

I. INTRODUCTION

In November 2021, Russia’s anti-satellite missile test drew global condemnation when the resulting debris from the destruction of its Cosmos 1408 satellite threatened to collide with other objects in Earth’s orbit, including the International Space Station and SpaceX’s Starlink satellites.¹ Anti-satellite tests—which also have been conducted by China, India, and the US—are just one example of actions that have the potential to cause significant injury to persons and damage to spacecraft and satellites. As the space industry evolves and more States and private actors become involved, the needs and expectations of its players will change. This article discusses the current legal protections available to private actors in outer space and recommends that the international community look to international investment law as a framework to protect private interests in space.

II. STATUS QUO

The existing regime of international space law, like many traditional forms of international law, does not govern private actors. Instead, the 1967 Outer Space Treaty assigns States with the ultimate responsibility of supervising “national activities” in outer space, whether such activities are performed by “governmental agencies or by non-governmental entities.”² The 1972 Liability Convention, which has been ratified by nearly 100 States including the United States and most space-faring nations, expands on the liability regime for damage caused by space objects.³ It

¹ Tereza Pultarova, *Space debris from Russian anti-satellite test will be a safety threat for years*, SPACE.COM, Nov. 16, 2021, <https://www.space.com/russia-anti-satellite-test-space-debris-threat-for-years>.

² Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, art. VI, 18 U.S.T. 2410; 610 U.N.T.S. 205; 6 I.L.M. 386 (1967).

³ Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, 861 U.N.T.S. 187, 10 I.L.M. 965 (1972) [hereinafter “Liability Convention”].



contains rules and procedures for apportioning responsibility and ensuring “prompt payment” of compensation to victims.⁴ International rights and remedies for such “national activities” in space are overwhelmingly state-centric.

For example, a “launching State” has absolute liability for damage caused by its space object “on the surface of the earth or to aircraft in flight,” and fault-based liability for damages that are caused “elsewhere than on the surface of the earth”—i.e., in space.⁵ However, the Liability Convention provides no guidance for what constitutes “fault” in the context of outer space. Likewise, only States may present claims for monetary compensation, which must be done through diplomatic channels. Failing settlement through negotiations, a three-person “Claims Commission” may be established, which has the power to issue a “final and binding” “decision” (but only if the parties agree) or a “recommendatory award” (if the parties do not wish to be bound by the Commission’s decision).⁶

III. CHALLENGES

The existing regime of international space law runs the serious risk of leaving private actors out of luck. States are often reluctant to advance claims against other States, and even those who advance such claims may find unclear the standards under international space law. The Liability Convention has only been used once, and that dispute was settled. In 1977, radioactive debris from a Soviet surveillance satellite Cosmos 954 landed in Canada. Concerns about possible nuclear contamination led the Canadian Government to locate and recover parts of the Soviet satellite. Approximately one year after the incident, Canada presented a claim against the Soviet Union for CAD\$6 million based primarily on the Liability Convention, but also on general principles of international law.⁷ In 1981, following negotiations, the two States signed a protocol under which the Soviet Union agreed to pay Canada CAD\$3

⁴ *Id.*

⁵ *Id.* art. IV.

⁶ *Id.* arts. XIV, XIX.

⁷ Canada: Claim Against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954, Feb. 8, 1978, 18 I.L.M. 899, 905.



million.⁸ The protocol contains no indication of the basis of the settlement, and the majority of the provisions of the Liability Convention were left untested.

A private investor who suffers harm as a result of a space maneuver (such as an anti-satellite missile test) could bring its claim before the courts of the launching State or seek assistance from another State (most likely its home State) to bring a claim under international law. Under the first avenue, the investor would rely on domestic laws of compensation (assuming they exist) for damage caused by the State without regard to where the damage occurred (in space). Under the second avenue, the investor would have to rely on the discretion of a State to espouse its claim under international law. If the harm occurred in outer space, this would involve proving that the launching State was at “fault” for the harm caused, which may be challenging since the Liability Convention does little to establish a fault standard or a standard of care relevant to activities in outer space. In the event the launching State were to decline negotiations, a Claims Commission would have to be established to adjudicate the dispute, but its decision would be final and binding only if the disputing States agreed.

IV. A WAY FORWARD?

We begin from the premise that private investment in space is to be expected, and that a clear and consistent legal regime for private actors is required to promote responsible, peaceful, and sustainable use of outer space. But what obligations, rights, and remedies should private actors have against States in outer space? In our opinion, international investment treaties (such as bilateral investment treaties) may provide a framework for a stable, rules-based regime that encourages and sustains private investment flows in outer space.

Not long ago, a private actor who wished to assert a claim against a foreign State for breach of customary international law was required to petition its home State to espouse its claim. The shortcomings of “gunboat diplomacy” and the political

⁸ Protocol Between the Government of Canada and the Government of the Union of Soviet Socialist Republics, Apr. 2, 1981, https://www.unoosa.org/oosa/en/ourwork/spacelaw/nationalspacelaw/bi-multi-lateral-agreements/can_ussr_001.html.



considerations inherent in diplomatic protection led States to conclude modern investment treaties. Today, there exist thousands of investment treaties offering private investors substantive protections and a right to direct recourse against the host State. In many cases, foreign investors are not even required to exhaust local remedies before initiating an investment treaty claim. This uniquely structured regulatory framework has become a common method for resolving international investment disputes.

The space industry is no stranger to international arbitration. For example, in 2010, the Permanent Court of Arbitration adopted optional rules for resolving outer space disputes.⁹ As we have written previously, the PCA Rules offer space actors the same tailored procedural rules that parties commonly use in international arbitration.¹⁰ However, we believe that international investment law has much more to offer the space industry. Specifically, the investment treaty regime provides examples of substantive protections and forum design choices from which we can draw two conclusions. First, States generally agree on providing foreign investors and their investments certain internationally accepted protections in their own territory. These include the right to full protection and security, protection against arbitrary or unreasonable treatment, and the right to be treated fairly and equitably. These standards may serve as the starting point for a discussion about private actors' minimum legal protections *vis-à-vis* States' own "national activities" in outer space. Second, even when dealing with private actors, States consistently prefer confidential, neutral, and binding forms of dispute resolution. As on Earth, such dispute mechanisms have the potential to promote the rule of law and market-oriented space policies by treating private interests in outer space in a transparent and predictable manner. The evolving regime of international space law would do well to integrate private actors both as the subjects of protection and as direct

⁹ Permanent Court of Arbitration, *Optional Rules for Arbitration of Disputes Relating to Outer Space Activities* (2010) [hereinafter "PCA Rules"].

¹⁰ Charles Rosenberg & Vivasvat Dadwal, *The 10 Year Anniversary of the PCA Outer Space Rules: A Failed Mission or The Next Generation?*, KLUWER ARB. BLOG, Feb. 16, 2021, <http://arbitrationblog.kluwerarbitration.com/2021/02/16/the-10-year-anniversary-of-the-pca-outer-space-rules-a-failed-mission-or-the-next-generation/>.



participants in dispute resolution.

V. CONCLUSION

International investment has spurred prosperity and economic development around the world. Legal protections that are responsive to the needs of private actors in space have the potential to do the same. These developments are particularly timely as an increasing number of States, like the United States, are contemplating ways in which to strengthen global governance of space activities and “uphold and strengthen a rules-based international order for space.”¹¹



In our view, the time has come for the international community to more seriously consider new international legal instruments that are aimed at promoting and protecting private investment in outer space. International investment law offers a compelling framework to protect private interests in space.

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¹¹ The White House, *United States Space Priorities Framework*, Dec. 1, 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Space-Priorities-Framework--December-1-2021.pdf>.



INSTITUTE FOR TRANSNATIONAL ARBITRATION

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Table of Contents

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