THE PROTECTION OF INVESTMENTS IN SPACE

ONE SMALL STEP OR A GIANT LEAP FOR INVESTORS?

Authored by: Tracey Wright (Partner) and Emily Wyse Jackson (Director) - Fieldfisher
Other members of the team include Yuliya Kupchenko (Director) and Sonia Morton (Senior Associate).

The fast paced development of the space industry and, in particular, the increasing participation of private commercial actors, has brought into reality ideas that not so long ago would have sounded like science fiction – the recreational space flights undertaken by Jeff Bezos' Blue Origin being a recent example. It has also, however, opened up a whole new world of potential legal disputes: not only between States, but between private investors or between investors and States. This article focuses on the latter category: investor State disputes.

Investments in space exploration and technology are, as a general rule, capital-intensive and inherently risky. If States want to attract private investment in this "new frontier", offering effective investment protection is vital. Existing investment protection treaties providing for investor State arbitration ("ISDS") offer a ready-made and well-tested means of facilitating such protection.

Star wars: the profile of space-related investment disputes

The key characteristics to be expected of space-related investment disputes include: (i) their highly politicised nature; (ii) the pioneering technology at the heart of them; and (iii) their being set against a developing legal framework.

ISDS is well suited to resolve such disputes.

The availability of ISDS and the importance a State places on its international obligations are therefore likely to be important factors for investors when deciding where to establish their space-related investments.

Politicised area:

Due to its obvious strategic and defensive significance for all States, coupled with the public attention it attracts, space exploration is a highly politicised area, which can impact the treatment of investments in that field. This is at the centre of the very purpose of ISDS and what it was designed to address: rather than requiring investors to bring their claims against a host State in that State's domestic courts or to rely on diplomatic protection, it is intended to provide investors with direct access to a neutral forum. The robust enforcement regimes under the ICSID and New York Conventions offer some comfort to investors in their 158 and 172 (respectively, as at February 2023[1]) Contracting States as to the likelihood of recovery on any award in their favour.

1 ICSID Convention: https://icsid.worldbank.org/about/member-states/database-of-member-states; New York Convention: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

Technical issues:

Almost by definition, many space-related investments will involve cutting edge, innovative technology. A key feature of ISDS is the opportunity for parties to participate in the selection of arbitrators.

Having adjudicators experienced in handling complex technical disputes (or with particular sectoral expertise) may be critical to the effective resolution of an issue.

Save perhaps in certain specialist courts, sectoral or technical experience cannot be guaranteed when bringing a claim in court, but may be a factor prioritised by an investor when nominating an arbitrator. In recognition of this and to assist parties in identifying suitable candidates, the Permanent Court of Arbitration ("PCA") has established a panel of arbitrators[2] with expertise in space-related disputes.

Technical disputes should also be governed by appropriate procedural rules. For example, technical witness evidence typically is key, so effective rules need to be in place to ensure it is delivered fairly and efficiently. Again, this is familiar territory for ISDS tribunals and the procedural rules of all major arbitral institutions (as well as the UNCITRAL Arbitration rules) contain provisions regulating expert evidence.[3] In 2011, the PCA published the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (the "Space Rules"). The Space Rules are based on the 2010 edition of the UNCITRAL Arbitration Rules, but with certain amendments intended to tailor them to the specific requirements of space actors. For example, they provide for the tribunal to request the parties (jointly or separately) to provide a non technical document explaining the background to any scientific, technical or other specialised information that the tribunal requires in order fully to understand the matters in dispute.[4] While there have been no reported ISDS cases under the Space Rules yet, principally because the existing network of treaties under which ISDS claims are brought do not provide for their application,[5] as the significance of the space industry continues to increase, States may begin to modify their treaty practice to accommodate better disputes in this sector. That said, given the flexibility built in to the leading arbitral rules and the continuing efforts made by institutions to ensure those rules keep pace with the evolving disputes landscape, it is debatable whether this is currently necessary.

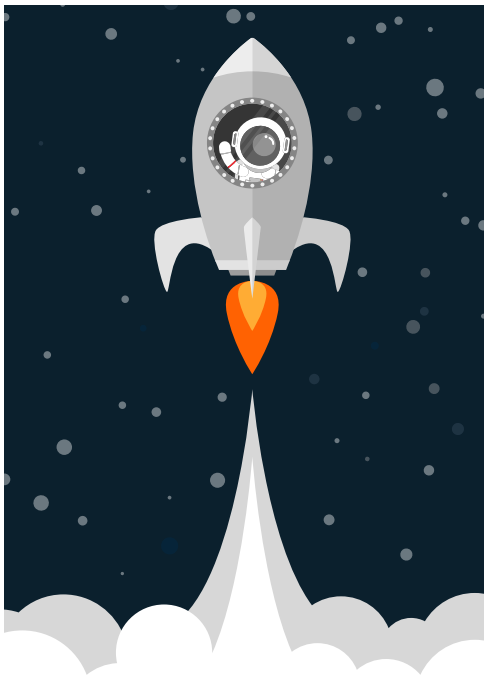
Developing legal landscape:

While steps have been taken towards an appropriate legal framework for outer space investments, there remain significant gaps in the international space law landscape (for example, in relation to the law applicable to property rights over space resources). As this body of law develops, complex issues in relation to the identification of the appropriate governing law(s) and the interpretation of novel legal provisions are expected to arise. Both of these obstacles are routinely tackled by ISDS tribunals handling disputes relating to other industry sectors. The rapidly changing regulatory environment applicable to energy investments is one example; this has been the backdrop to many ISDS cases. The ability to appoint an arbitrator with the competence and experience to navigate these potentially challenging legal issues is a key attraction of ISDS.

In Devas v India,[6] one of the few reported space-related ISDS claims to date, the claimants had been leased a portion of India's S band (part of the electro-magnetic spectrum) capacity to launch two satellites to provide multimedia services across India. The State owned lessor terminated the lease following a policy change that required all S band capacity to be reserved for State defensive and strategic purposes.[7] This dispute gave rise to multiple arbitration and court proceedings and a range of legal issues, which are beyond the scope of this article. Notably, however, despite the novel subject matter, the tribunal was able to analyse the claim in relatively conventional terms: for example, the claimants' qualifying investments were their shares in the Indian company that was party to the lease and their indirect partial ownership of that company's assets, including the lease itself.[8]

As shown by this early example, even without the widespread use of specific procedural rules or the existence of specific arbitral institutions focused on the resolution of space-related investment disputes, the existing ISDS framework is well-equipped and first in line to deal with these disputes.

Investors in the space industry – much like any other investor looking to invest funds overseas – would be well-advised to consider structuring their investments to benefit from investment treaty protection and the availability of ISDS in the event of a breach.



2 https://pca-cpa.org/en/about/panels/panels-of-arbitrators-and-experts-for-space-related-disputes/

3 See e.g. ICC Arbitration Rules 2021, Arts 25.2, 25.3, Appendix IV (b) and (e); ICSID Arbitration Rules 2022, Rules 38 and 39; UNCITRAL Arbitration Rules 2021, Arts 17.3, 27.2, 28.2, 29.

4 PCA Optional Rules for Arbitration of Disputes Relating to Outer Space Activities 2011, Article 27(4).

5 Most investment treaties refer ISDS disputes to institutions such as ICSID or the ICC, or to ad hoc arbitration under the UNCITRAL Rules.

6 CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited v India, PCA Case No. 2013-09.

7 CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited v India, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, paras 117 - 152.

8 CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited v India, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, paras 196 – 210. See also Deutsche Telekom AG v. The Republic of India, PCA Case No. 2014-10, Interim Award, 13 December 2017.