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The Exploration, Exploitation and Utilization of Space Resources: Regulatory and Policy Issues

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The views expressed in this presentation are done so in my private capacity and do not reflect the position or views of the Australian Government or any of its Agencies

The 'Phases' of International Space 'Law-Making'

- Outer space is not a 'lawless' frontier
- Customary International Law 1957-1967
- UNGA Resolutions 1960s
 - => major points reflected in a series of United Nations Treaties
- Treaties – through auspices of UNCOPUOS
 - Outer Space Treaty (1967)
 - Rescue Agreement (1968)
 - Liability Convention (1972)
 - Registration Convention (1975)
 - 'Cold War' context
 - Fundamental principles
 - Moon Agreement (1979)
 - coexisting with negotiations for UNCLOS (1982)
 - in context of decolonisation process
 - opposition by major industrialised powers
 - => inability to agree on further treaties
- 1980s =>
 - UNGA Principles
 - Increasingly complemented by 'hard' and 'soft' law guidelines – including TCBMs
 - 'bloc' positions (G77+ China, GRULAC, BRICS, NAM countries etc)
 - emergence of national law (approximately 30-40 States and counting ...)
 - 'new' customary international law on an ongoing basis?

Exploiting Natural Resources of Outer Space



- ❑ Non-appropriation – OST Art II
 - important 'non-colonization' principle
 - proactive rule to minimise risk of conflict
 - not introduced with resource exploitation in mind but now ...
 - ... relevant in discussions concerning future resource exploitation (including for non-State entities)

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

- ❑ Other 'natural resources' of outer space
 - Pragmatic application within Multilateral context
 - Geostationary Orbit

Article II Outer Space Treaty

Some Fundamental Questions?

- Meaning of 'appropriation'
- Applicability to Resource Exploitation?
 - Clarity provided by Moon Agreement Article 11?
- Applicability to non-Governmental entities
 - Generally accepted
 - International Responsibility under Outer Space Treaty Article VI

The Moon Agreement: Context



1970s →

- Existing geopolitical tensions
- Period of decolonization (under UN Charter)
- Concurrent discussions regarding the law of the sea
- Reaffirmation of important principles including 'non-appropriation'
- Anticipation of future 'benefits' from 'exploitation' of the natural resources of Moon (and other celestial bodies) (Preamble par. 5)
 - But how? → regime under the Moon Agreement
 - Not a matter of immediate urgency at the time
- Terms agreed through consensus but ... only 18 States Parties

Now →

- Renewed and more immediate interest in this issue due to emerging technology

Reconciling non-appropriation with the Moon Agreement

- 'common heritage of mankind' – Moon Agreement article 11(1)
 - affirmation of non-appropriation - Moon Agreement article 11(2)
 - In regulatory context where
 - Moon Agreement contemplates exploitation
 - Moon Agreement contemplates removal from moon and celestial bodies
 - Moon Agreement makes reference to 'property' rights for non-governmental entities / natural persons
 - Moon Agreement proposes international (administrative) regime to be established 'as such exploitation is about to become feasible'
- => 'extra-terrestrial exploitative rights' – analogous with terrestrial mining rights?

Responding to the Issues

- Multilateral Discussions and Agreements
 - Agenda item within LSC UNCOPUOS
 - Scheduled informal discussions within LSC UNCOPUOS (March 2020)
 - Moon Agreement
 - and
- National Legislation
 - USA Space Resources Exploration and Utilization Act 2015
 - Luxembourg Space Resources Act 2018
 - Others
 - and
- Other Discussions
 - Industry fora
 - The Hague International Space Resources Governance Working Group
 - Academic writings

The Risk



Will States agree on a framework for a Multilateral Regulatory Regime?

If so, on what basis?

Applicability of fundamental principles underpinning Moon Agreement? Other principles?



Impact of national regulation in the absence of an international agreement / Multilateral regulation based on consensus?



Worst case scenario - a potential challenge to the rationale underlying non-appropriation in its original and fundamental sense?

Crystal Ball Gazing: An Optimist's View



Avoiding the potential for any
conflict in space

→ Multilateral cooperation
involving States / UNCOPUOS
will be key to ensure the
interests of every stakeholder

The world has changed
significantly since 1979
Now the 'faintly possible'
may become 'highly
probable'

Fundamental issues:
* how do we view space?
* how *should* we view
space?

→ Fundamental
Policy/Regulatory
Decision to –
hopefully - proceed to
a new widely agreed
multilateral
framework