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BALANCING THE COMPETING INTERESTS TO RESOLVE THE IMPASSE OVER THE EFFECTS
OF THE COMMON HERITAGE OF MANKIND PROVISION IN THE MOON AGREEMENT

Abstract

Space law, especially the provisions of the Moon Agreement, has been influenced by developments adopted in the law of the sea with respect to the application of the common heritage of mankind (CHM) principle. It has been suggested that the principal factor restraining industrialised States from accepting the Moon Agreement is their fear for the implications of the CHM doctrine. It is respectfully submitted that the moratorium imposed on the exploitation of mineral resources until the regulatory regime foreshadowed under Article 11 has been implemented that poses the greatest obstacle. This moratorium and other restrictive provisions of the Moon Agreement do not exist under the Outer Space Treaty. Accordingly, a State that ratifies the Moon Agreement would be voluntarily subjecting itself to this moratorium.

Perhaps the next step towards an acceptable legal framework for mining activities is to consider the competing interests of various stakeholders on the issue and attempt to reconcile and balance their divergent concerns. In particular, to consider the following sets of competing interests:

(1) the polarised positions of the industrialised States and the developing States over the application of the CHM principles on celestial bodies;

(2) the continuing economic need for mineral resources for human development on the one hand and the need to impose sufficient environmental safeguards for the protection of the environment of the Earth and that of outer space and the celestial bodies;

(3) the commercial objectives of private mining ventures to maximise their commercial gain and the need to provide baseline public services to the international community, particularly the least developed States in furtherance of the global public interest;

(4) the desire to maintain a free market approach to law-making while ensuring that a number of commercial issues, such as harmful interference, the “paper tenement” problem, protection of intellectual property rights and the application of anti-trust principles are adequately regulated; and

(5) the need for dispute settlement mechanisms to settle disputes and enforce the law without creating an overly rigid regulatory environment in the development of space activities.

This paper attempts to balance such interests in an attempt to make it possible to adopt new legal principles in regulating the exploitation of mineral resources from celestial bodies. This is particularly the case in resolving the present impasse over the CHM doctrine and the provision of temporary property rights for such purposes, which would allow for the creation of an acceptable legal framework.