PhD Viva

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Adopted in March 2012, the Protocol to the Cape Town Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets ("SAP") has aroused many controversies in the space industry. This study conducts an in-depth analysis on the regulatory system of the SAP to find out its contributions and limitations. It first examines whether the provisions on creation, perfection, and enforcement of security interests in space assets and the associated receivables will contribute to reduce the risks in space financing. Then, it conducts case studies on relevance of the SAP for the US and China to see to what extent the SAP will change the scenario in the acquisition of space assets. Finally, it looks into the consensus-building process of the SAP to find out which factors undermined responsiveness of the SAP to space financing practices. This study concludes that the contribution of the SAP lies in the registration system that encompasses international interest in space assets and assignment of debtor's rights related to the international interest. It is thus inaccurate to claim that the SAP is more appealing to the needs of the start-ups and the developing countries, among which financings backed by the export credit agencies have been prevalent. If UNIDROIT were to elicit more support for the SAP, it is essential to conduct an investigation on the industrial practices and draw out the interactions between the SAP and the existing financing techniques.

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Since the start of the BIT program, the purpose of BITs was predominantly motivated by the sole objective of providing foreign investment protection mostly for the benefit of the capital-exporting, developed countries. The capital-importing, developing countries entered into BITs to attract foreign investment without a comprehensive awareness of the legal ramifications of BITs. However, the conclusion of FTAs with investment chapters such as the NAFTA expanded the narrowly conceived BIT goal of investment protection to include other purposes like investment promotion and liberalization. Prior to the NAFTA, carving out policy space in international investment agreements ("IIAs") was not a real concern until the NAFTA experience demonstrated that investor-State arbitrations could be initiated against not only developing, but also developed States. Moreover, the ICSID cases against Argentina have been instrumental in bringing attention to the need of host States to exercise regulatory power. These experiences helped to create an understanding for both developed and developing States. A significant legal consequence of concluding IIAs is that their sovereign right to regulate various aspects of public interest might result in a breach of the IIA. The objective of this research is to fill a meaningful gap in international investment law to enable States to better exercise their sovereign right to regulate by using the public order clause in the non-precluded measures provision of the US-Argentina BIT as a starting point. The questions asked in this study include whether a public order carve-out for public interest matters is emerging and, if so, whether the public order carve-out can equip host States with the flexibility needed to exercise their regulatory authority. This research makes the discovery that the concept of public order is undefined in international investment law making it difficult for investment tribunals to interpret the public order carve-out in a consistent and predictable manner. On one level, the notion of the right to regulate is being incorporated in the most current versions of IIAs without an appreciation of how it should apply in international investment law despite the lessons exemplified in the ICSID arbitrations against Argentina. On another level, BITs have been designed to usually only contain substantive obligations. Although the recent trend of IIAs is to include some variation of a general exceptions provision to limit the scope of the substantive obligations, the practice remains largely inconsistent and borrowed from the WTO/GATS jurisprudence. However, this research concludes that the inclusion of a standard public order carve-out specifically aimed at preserving the regulatory space of States should become a fixed feature of future investment treaties to better address the growing aggregate community interests of IIA stakeholders. This ultimately requires that the base values and concerns of the participants in international investment law be evaluated.