Identifying Elements of *lex mercatoria* in the Space Domain

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Abstract

Discussions of a *lex mercatoria* date back to medieval Europe and refer to the customs, practices and informal dispute resolution mechanisms adopted by merchants as a means of self-regulating their overseas trade. In its modern incarnations *lex mercatoria* has come to mean a body of law outside of or independent from state law, created and administered by and for commerce. The conceptual basis and validity of *lex mercatoria*, in particular its claim to autonomy from state law, has been a longstanding point of contention in legal scholarship and it is not within the scope of this paper to revisit or add to the debate. However, even without assuming the existence and validity of a fully-fledged corpus *lex mercatoria*, the existence of at least some transnational legal rules corresponding to the needs of international commerce is an undisputable fact (e.g. the UNIDROIT Principles). Furthermore, commercial necessity has on occasion resulted in improvisation by non-state actors to create pockets of norms, procedures and institutions in certain domains (e.g. cyberspace). We can therefore identify a possible mechanism for the creation of binding norms that supplements the established mechanisms in international and national law.

This paper shall first examine the factors that prompt merchants to 'self-govern' including: rapid growth in a transnational trade setting; new technologies or commercial activities; the absence or inefficacy of state norms and institutions and a preference for informal mechanisms for dispute resolution. We then consider the presence of these factors in the space domain and look for empirical evidence that the new generation of space merchants are creating their own norms, procedures and institutions to govern their commercial activities rather than relying purely on state-based systems.

Rapid progress in the space domain has left the prevailing legal regime looking tired and incomplete. The five space treaties struggle to be reinterpreted in accordance with new private sector initiatives. National law is limited, principally responding to the international responsibility of states for activities of their non-governmental entities through authorisation and supervision. When it comes to space commerce there are gaps in the existing legal regime and thus spheres of commercial uncertainty. Soft law instruments have arisen as one means of guiding conduct but essentially lacks binding force. The importance of this research is to examine whether commercial actors in the space domain are moving towards the sort of an independent mechanism for the creation of binding norms, procedures and institutions as discussed above.

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I. Corpus of *lex mercatoria*

I.1. What Is *lex mercatoria*?

To this day, the very origin of *lex mercatoria* is unclear. Some scholars think it already existed in Roman law, some go even further back to Egyptian times. At a minimum, it is safe to say that *lex mercatoria* as a legal mechanism existed in medieval Europe.[1] The flourishing of international trade in the Western Europe influenced formation of cosmopolitan mercantile law, which was based upon customs and applied by informal disputes settlement bodies of the various European trade organisations for cross-border disputes. Simplicity and certainty were necessary for international trade and therefore, *lex mercatoria* was created as a response to meet the new needs of the international commerce that could not be resolved by obsolete national rules.[2]

A similar trend can be seen today. The complexity of private international law regulations and outdated domestic law norms do not satisfy the requirements of the international business community.[3] On the one hand, treaty-making processes have become too complicated and ineffective. There are several reasons for this. The negotiating process can go on for many years, even decades due to different developing stages, economical, social and legal backgrounds of the participating states. Even when the treaty is finally negotiated, its ratification and implementation still remains highly questionable. All this leads to partial unification, to legal ambiguities where different interpretations of the same convention are possible, and to the practical obstacles of international trade. On the other hand, the supremacy of national law in international economic relations has been in decline since nineteen-sixties. Currently, there is a trend among contemporary traders to adopt alternative self-regulatory contracts in order to avoid the applicability of national law to their trades and transactions. Through commercial forms developed from this repeated transnational trade usage among private companies, such as standard clauses, self-regulatory contracts, and especially, choice of commercial arbitration for dispute resolution, "traders were creating their own regulatory framework independently from national law, the so-called new *lex mercatoria*".[4] Therefore, it can be concluded that the

1 "Lex Mercatoria", Ana M. L. Rodríguez, School of Law, Department of Private Law University of Aarhus; http://blogs.law.nyu.edu/transnational/2012/11/principles-of-contract-law-a-compilation-of-lex-mercatoria/.

2 "Lex Mercatoria", Ana M. L. Rodríguez, School of Law, Department of Private Law University of Aarhus.

3 "Lex Mercatoria", Ana M. L. Rodríguez, School of Law, Department of Private Law University of Aarhus; http://blogs.law.nyu.edu/transnational/2012/11/principles-of-contract-law-a-compilation-of-lex-mercatoria/.

4 E.g. Schmitthoff, C.M., "Das neue Recht des Welthandels", RabelsZ 28, 1964, pp. 47-77; Goldman, B., "Frontières du droit et lex mercatoria", Arch.phil.dr. 9, 1964,

new *lex mercatoria* consists of four crucial elements: transnationality, standard forms of contract, international trade usage (which is the source of law) and arbitration.

I.2. Debate on Existence of Independent *lex mercatoria*

It is said that there are as many definitions of *lex mercatoria* as there are authors writing about it.[5] One of the main debates surrounding the *lex mercatoria* is concerning its very existence. Can it even exist independently from international private law and national laws? Can there be a global law which does not emanate from States? Authors dealing with this subject, tried to resolve this matter in numerous different theories. For example, Schmitthoff wrote that *lex mercatoria* is the "expression of both spontaneous and official unification by means of general conditions, trade usages, customs and international conventions"[6] and as such remains attached to national systems. On the other hand, Goldman's approach to the definition of *lex mercatoria* had a profound impact. He stated that, "arbitrators and parties could detach legal relationships from applicable national legal rules and submit these relationships to the *lex mercatoria*".[7] There are similarities between Schmitthoff's and Goldman's definitions as both of them agree that this body of law is composed of general conditions, usages, customs and international conventions, however, Goldman added a new, revolutionary component: the general principles of law. Following Goldman's approach, *lex mercatoria* is not dependent upon any national legal orders; it does not refer to any particular national jurisdiction, but is a self-governing set of rules within an international trade setting.

However, the debate on the origin of *lex mercatoria* and its substantive force has been questioned by many authors. Hence, the very existence of *lex mercatoria* has been referred to as only a "myth". The theory of legal pluralism successfully overcomes this objection on the lack of binding force. According to this theory, social groups, such as the community of traders, are also capable of producing legal rules.[8] In comparison with the national regulations, which are enacted by the legislator and therefore have an immediate binding force, and customary rules, which require *opinio iuris*,

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p. 89 et seq.; Goldstajn, A., "The New Law Merchant", J. Bus.L., 1961, p. 11; Kahn, Ph., La vente commerciale internationale, 1961; Fouchard, Ph., L'arbitrage commercial international, 1965; Stoufflet, J., Le credit documentaire, Paris, 1959.

5 http://blogs.law.nyu.edu/transnational/2012/11/principles-of-contract-law-a-compilation-of-lex-mercatoria/.

6 "Clive M. Schmitthoff's Select Essays on International Trade Law", Chia-Jui Cheng.

7 "The Applicable Law: General Principles of Law – the Lex Mercatoria", *in* Contemporary problems in international arbitration, Berthold Goldman (Julian Lew ed., 1986).

8 "Contemporary Problems in International Commercial Arbitration", Julian D.M. Lew (ed.), 1986, B. Goldman.

(the feeling to be bound) trade usages are a product of party autonomy. "They are contractual practices generally observed and used as a proof of the will of the parties" and parties have an option to exclude their application by an express stipulation in the contract.[9] As a result, commercial traders actually feel bound to take into the account the provisions of the *lex mercatoria*.

Moreover, examples from practice are contrary to the above mentioned allegations that *lex mercatoria* does not exist. This mechanism of law is actually being increasingly applied between trade partners, especially in commercial arbitration, where parties have a freedom of choice to regulate themselves which law is going to be applicable to their dispute.[10] In past years, arbitrators have applied the *lex mercatoria*, and national laws and in case law it has been recognized. Furthermore, international institutions and scholars have also reacted to the above criticism and they have taken on a role of unifying and standardising the general principles of this "transnational" law. In doing so, they have created law norms that are originating from model contracts, used as standard forms in commercial trade. As in medieval Europe, these standard forms gained popularity because of their flexibility and simplicity. International organisations that had a key role in this development and in the unification of international trade regulations are the International Chamber of Commerce (ICC), and the United Nations Commission for International Trade Law (UNCITRAL). For example: Article 17 ICC Arbitration Rules, Article 33 of the UNCITRAL Rules on International Commercial Arbitration, and Article 28 of the UNCITRAL Model Law on Arbitration, allow the arbitrator to apply non-national law if the parties so chose or in the absence of choice of the applicable law.

Furthermore, the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts (1994) are seen by many authors as a codification of *lex mercatoria*.[11] These sets of principles contain norms that cover almost all aspects of contract law and it has been contested that "in view of the fact that the Principles represent a system of rules intended to enunciate principles which are common to the existing national legal systems and best adapted to the special requirements of international commercial contracts, they could be considered as a sort of

9 "Théorie Générale des Usages du Commerce, Librairie Générale de Droit et de Jurisprudence", Paris, 1984, A. Kassis.

10 http://blogs.law.nyu.edu/transnational/2012/11/principles-of-contract-law-a-compilation-of-lex-mercatoria/.

11 "Uniform Law Review", K. Boele-Woelki, 1996, v. 4; "On the quality as lex mercatoria of standard contracts and general clauses established under the auspices of an international organisation", B. Goldman.

modern '*ius commune*' or what is commonly called '*lex mercatoria*'"[12] This codification enhances the usefulness of *lex mercatoria* even further as it provides for the rules to be more predictable, uniform and comprehensive, thereby repelling the traditional undermining that it is vague, incomplete and unforeseeable.

I.3. In Any Case: Alternative Mechanism for Creating Binding Law Norms

Taking into account all the different theories and arguments elaborated above it is possible to conclude that the existence of *lex mercatoria* is supported by the practice of international commercial arbitration in isolation from any doctrinal debate. This is mainly founded on three elements: the principle of party autonomy, the principle of good faith and the use of arbitration.[13] However, this paper isn't going to come down on one side or other of the debate. Even so, and even without assuming the existence/validity of a fully-fledged corpus of *lex mercatoria*, there are certain elements as transnational non-state norms, prevalence of arbitration etc. that correspond to the needs of international commerce and that are indisputable. Furthermore, commercial necessity has on various occasions resulted in improvisation by non-state actors to create pockets of norms, procedures and institutions in certain domains (e.g. cyberspace). Therefore, we can identify a possible mechanism for the creation of binding norms that supplements the established mechanisms in international and national law. A law that supersedes national and international law, a law beyond the State.[14] The appearance of these phenomena at least will be examined in relation to the space domain in the following chapters.

II. Factors That Induce Self-Governance

This paper will follow the above elaborated reasoning that commercial communities can also establish binding laws. Therefore, first it is necessary to examine factors that induce self-governing of the private sector.

II.1. Rapid Growth in a Transnational Trade Setting

One of the main features of today's global economic landscape are transnational companies (TNCs). Trans-nationality signifies that a national based company has overseas operations in two or more countries. Nowadays, they are among the world's biggest economic institutions. "A rough estimate suggests that the 300 largest TNCs own or control at least one-quarter of the

12 "40 Am.J.Comp.L", M.J. Bonell, 1992.
13 "Internationale Schiedsgerichte und lex mercatoria", Schulthess Polygraphischer Verlag AG, Zürich 1989, F. Dasser; "Festschrift für Clive M. Schmitthoff", Athenäum Verlag, Frankfurt (M), 1973, A. Goldstajn.
14 "The True Lex Mercatoria: Law Beyond the State", R. Michaels.

entire world's productive assets, worth about 5 trillion US dollars", which makes them the driving force of economic growth.[15] This influenced five new developments in the world trade setting: the rise of the private sector, rapidly advancing technologies that are completely changing the way of international production and organization, the globalization of firms and industries, the rising importance of service in the world economy, and regional economic integration.[16] At the very heart of these trends are TNCs, with their strongest contribution in the area of technology and trade. This allows them to set new policy agendas and to influence international politics.

II.1.1. In the Space Domain

In the space domain similar developments are also noticeable. In the past decade there has been a significantly higher level of involvement of the private sector in space activities. Some authors even state that the private sector has become the dominant actor in space.[17] Furthermore, new technologies are being developed, which lower the costs of production and in that way change organization of firms. These private space companies are trying to scale their businesses to operate globally (e.g. Spire, a satellite company, which provides service in data collection, analysis for warning about elementary disasters and for fighting piracy, now has offices in San Francisco, Glasgow and Singapore). There are also prominent examples of regional economic integration in space sector. These highlighted examples are: European Space Agency (ESA) and Asia-Pacific Regional Space Agency Forum, (APRSAF). ESA is an international organisation with 22 Member States, which coordinates the financial and intellectual resources of its members and undertakes programmes and activities that go beyond the scope of any single European country. APRSAF consists of space agencies, governmental bodies, international organisations, private companies, universities, and research institutes from over 40 countries and regions. It organizes four working groups – Space Applications, Space Technology, Space Environment Utilization, and Space Education, in order to share information about the activities and future plans of each country and region in these respective areas.[18]

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15 "A Brief History of Transnational Corporations", Global Policy Forum, 2000, J. Greer and K. Singh.

16 "World Economic Issues at the United Nations: Half a Century of Debate", p. 210, 2002, M. Rahman.

17 "The Impact of New Developments on International Space Law (new actors, commercilazation, privatization, increase in number of "space-faring" nations, etc.)", 2010, S. Hobe; Excerpt from a new Handbook on Space Law, F. Von der Dunk, "The Democratization of Space" in Foreign Affairs, May/June 2015, D. Baiocchi and W. Welser IV.

18 www.aprsaf.org/about/.

II.2. New Technologies and Commercial Activities

Technological breakthroughs are often created by spontaneous and serendipitous discoveries and ideas, which expand fast as new realms of human activities open up, many times far in advance of governance mechanisms and institutions. To clarify how development of technology influences development of commercial activities, this paper will give an example relatively close to outer space technology. Evolution of internet and in turn evolution of cyberspace, had the same background as the beginning of space technology buildout. Initially, the system that we know now as internet was primarily for government and government body exclusive use. However, with the technological growth, in the late 1980s, the first internet service provider (ISP) companies were formed and nowadays ISPs are now exclusively private. Similarly, with the on-set of cyberspace (transnational) trade, the Internet Corporation for Assigned Names and Numbers (ICANN) was established. This is also a private corporation licensed under the laws of the U.S. State of California that exercises a regulatory authority of global reach, without an international treaty law specifying its jurisdiction.[19]

II.2.1. In the Space Domain

In the first phase, space activities were carried out exclusively by governmental authorities (predominantly of the two major powers at the start of the Space Age – the US and Soviet Union). The main reason being that launching a rocket, deploying a satellite or sending manned missions into space were extremely costly projects and they could only be financed by states. Today, fifty years later, thanks to the technological development, lowering of cost of access to space and to the "availability of small, energy efficient computers, innovative manufacturing processes, and new business models for launching rockets", the outer space environment has opened up to the private sector – even for start-ups.[20] In other words, lowering the costs of manufacturing and launching of space objects has made the domination of private sector possible. For this new phase, the so-called 'Second Space Race', this decade could see expansive private sector growth, just as the late 1990s and early 2000s did during the internet bubble.[21] Dozens of companies are in the running to secure contracts with national agencies and compete in the international market (*e.g.* NASA is increasingly open to working with the private sector in its human space exploration plans. Companies like SpaceX and OneWeb are big examples of satellite constellations that do not even

19 ESPI Perspective 56, "Is there space for the Un? Trends in outer space and cyberspace regime evolution", L. Martinez.

20 "The Democratization of Space" in Foreign Affairs, May/June 2015, p. 98, D. Baiocchi and W. Welser IV.

21 "10 Major Players in the Private Sector Space Race", N. Gerbis.

depend on the NASA funding. Also companies like PlanetLabs and DigitalGlobe, that are independent providers of earth observation data).[22]

II.3. Preference for Informal Mechanisms for Dispute Resolution

Nowadays, the vast majority of international commercial disputes are settled through arbitration.[23] International trade contracts, as well as standard contracts, usually contain the arbitration clauses. The reasons behind this are that national law sometimes is tied to overly formalistic and abstract legal rules, while arbitration bases its decisions on equity, taking into consideration the whole of the relationship between the parties and other requirements from equity, and has the freedom not to be bound by the previous interpretation of statutes and court decisions. Another advantage of arbitration is the great expertise of the arbitrators. They themselves were often merchants, who fundamentally understand/understood commercial considerations and practices, and they only consider the private interests of the parties before them; they do not allow public norms to trump the will of the parties.[24] Furthermore, in arbitration parties alone can define procedure and arbitral decisions offer parties the much-needed privacy and secrecy; rulings of arbitrators are not publicly printed.

II.3.1. In the Space Domain

Up till now, there have not been any proper space disputes or they have been but they remain unknown to the public. The reason behind this is, that disputes that have arisen in the space arena have usually been dealt through diplomatic channels (Kosmos 954 dispute) and seldom through legal dispute resolution mechanisms. However, as private commercial interests became more important in space activities, space law (both domestic and international) has begun to incorporate other areas of law, such as property, contract, and intellectual property law.[25] Apart from article XIV of the Liability Convention (LC), which offers parties an alternative dispute mechanism, there are no other provisions in treaties that deal with this subject. Therefore, the Permanent Court of Arbitration (PCA) answered to the burning need for specialized rules of arbitration for matters relating to the conduct of outer space missions and in 2011 adopted the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (Rules). These Rules represents a formal mechanism that has been established to resolve space-related international disputes, not only between nations, but also disputes between private parties whose activities involve outer space

22 "Exploration and the private sector", The Space Review, 2014, J. Foust.
23 Investment Treaty Arbitration as Public International Law, p. 52, E. De Brabandere.
24 "The True Lex Mercatoria: Law Beyond the State", p. 9, R. Michaels.
25 "Patent Infringement in Outer Space in Light of 35 U.S.C. §105: Following the White Rabbit Down the Rabbit Loophole", T. U. Ro, M. Kleiman and K. Hammerle.

activities.[26] Outer space activities can include disputes arising from acts taking place on Earth, and therefore, concerns all the disputes relating to the construction and launching of communications satellites together with the investments relating to that industry.

II.4. Inefficiency of State Norms and Institutions

The development of standard forms of contracts among commercial actors is evidence of the inefficiency of state norms and institutions. There are different type of standard contract forms: standard condition drafted by individual enterprises, standard conditions issued by trade associations (*e.g.* General Trade and Conditions for the Sale of Goods and for Machines FIDIC), and general conditions and standard form contracts drowned by international organizations (*e.g.* UNCITRAL).[27] These standard forms exist between domestic law and foreign law. For example, the UNIDROIT Principles contain an important opening clause for supranational mandatory norms in Article 1.4. Arbitrators may frequently use UNIDROIT Principles, as one of many bodies of legal rules to which they look for guidance.

II.4.1. In the Space Domain

As stated above, we are currently in the midst of a Second Space Race, but instead of the states playing the primary role, the private sector has become the driving engine of technological development. At the same time, the legal framework (the five treaties: The Outer Space Treaty, the Rescue Agreement, the Liability Convention, the Registration Convention, the Moon Agreement) governing all space activities, which was created forty years ago, has become to a large degree outdated and insufficient.[28] Law is lagging far behind technological advancement, which is creating a dangerous legal vacuum. This means firstly, that there is a lack of binding regulations for new planned space missions. Secondly, that there is a lack of binding regulations concerning the role of private sector in these new planned space missions. Consequences thereof are that these legal uncertainties are slowing down possible technological advancement, preventing higher investments from the private sector and discourage states to sufficiently support private industries by issuing required licenses. States are often not interested in adopting new binding regulations and transcending legal gaps. The reason behind this lies in the fact that states do not wish to have more responsibility and liability. Although private actors do conduct space missions, the legal framework remains state-oriented according to Art VI of OST. Hence a state is

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26 A new paradigm for arbitrating disputes in outer space, The Space Review, 2012 M. Listner.

27 "The True Lex Mercatoria: Law Beyond the State", R. Michaels.

28 "The Impact of New Developments on International Space Law (new actors, commercilazation, privatization, increase in number of "space-faring" nations, etc.)", 2010, S. Hobe.

internationally responsible for governmental as well as non-governmental activities in this realm.
Therefore a tendency towards weaker normativity in the space field has developed. Soft law (debatable if it can be called law at all, but that is beyond the scope of this paper) is the only kind of regulations that has been created in the past thirty years. However, soft law is not enough. It diminishes the safety and sustainability of future space activities, it does not represent one of the sources of international law and it leaves important areas without binding norms, which allows for dangerous "grey areas" to arise. This is supported by the example of the Inter Agency *Space Debris* Coordination Committee (IADC) space debris mitigation guidelines. These guidelines are not legally binding and therefore pose no obligation for states or private companies to follow it, even though it is in the interest of the whole of humanity to preserve space as a unique natural source.
Even if not binding, provisions contained in soft law can have various impacts. In some cases they may represent *opinion juris*, which may lead to creation of customary international law when it is combined with practice. However, in relation to contemporary activities that are undertaken by the private sector, actions of private sector actors cannot constitute state practice. This all leaves private sector with insufficient legal mechanisms to create binding law that will further encourage private investments in arena of space activities.

III. Traces of *lex mercatoria* in the Space Domain

Considering the necessary elements to constitute the law beyond states, created by the usage of the private sector, one can note that there are two cases in the space domain where this phenomenon is arguable.
The first example is the cross-waiver clause in contracts among private. This clause is in line with general legal principle of liability in space (established by space treaties), however, it goes beyond the scope of the LC and regulates details that this convention does not cover, that are necessary for new space missions.
Cross-waiver clause originates from commercial launch service contracts. Since 1988 Commercial Space Launch Act requires cross-waivers, to preclude liability of launchers.[29] In the case Martin Marietta vs. INTELSAT the US district court decided that not only ordinary negligence but also gross negligence was precluded among contracting parties.[30] This was established so that plaintiffs would not to be able to sue for damages on every imperfect space launch. This principle exceeded the liability regime under the LC. It

29 §2615(a)(1)(c), Commercial Space Launch Act.
30 Martin Marietta Corp. v. International Tele-communications Satellite Organization (INTEL-SAT), Civil Action No. MJG-90-1840 (D.Md. Nov. 19. 1991).

developed from launch contracts and became an essential prerequisite for any cooperation between privates. In this way, partners are waiving liability between themselves for possible accidents in orbit, and are therefore, encouraged to work together. None of the partners will make any claim against the other or against their contractors, subcontractors, and employees of the other and each Party shall bear its own risk of loss.[31]

Private space industry needs a large degree of protection as long as the financial risks may threaten their existence.[32] Commercial sector needs to advance and technology needs to be developed. In order for that, commercial companies need to have legal certainties to invest. Only way for them to invest is if they know that they can send their technology in space as a part of a bigger project, undertaken by someone else, and that they are not going to be held liable in the case that their piece caused damage. Therefore, cross-waiver clauses have become necessary in contracts among privates. Currently they have a wide spread use. For this reason it is arguable that this usage constitutes a different legal mechanism for creating binding law, one that is needed by private when states remain silent.

The second example is the third-party liability clause. For any private wishing to launch a satellite, first a national license needs to be obtained. Part of that process involves showing that the private is at acceptably low level of risk of fault under the LC in the event of the orbital collision. This is primarily done by private company if it shows that it is complying with *e.g.* ISO standards, space debris mitigation guidelines etc. As a further prerequisite, they also need to take out third-party liability insurance for launch.[33] This policy is designed to address liability arising from damage that occurred on Earth as a result of a launch failure, damage from the re-entering of a satellite and damage in space that occurred due to debris impact or collision with another satellite.[34] Nowadays, third-party liability clause is usually included in every launcher service contract. Inspired and encouraged by this industry practice, states are now thinking of making it part of their national licensing process. UK is the first state that introduced third-party liability as a mandatory condition for obtaining a license under national law.[35]

Based on these two examples, it is even imaginable to solve space debris problem by using this method, an alternative legal method that derives from a commercial sector. States that do not wish to bind themselves further, national provisions that are dealing with debris problem are rarely adopted and soft law is not enough. However, private actors are the driving force of

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31 17.5.1 Martin Marietta and INTELSAT Contract.

32 "The Martin Marietta Case or how to Safeguard Private Commercial Space Activities", 1993, p. 6, T. L. Masson-Zwaan.

33 "Space debris: On Collision course for insurers?", Swiss Re.

34 "Space debris: On Collision course for insurers?", Swiss Re.

35 Outer Space Act 1986.

all space activities nowadays. If it would become a common practice among the private sector to have a compulsory clause in launching contracts that dictates for anybody that wishes to launch a satellite to have a detailed solution for its satellite at the end of its life, then we could actually move forward in mitigating the issue of space debris in a binding way.

IV. Importance of the New Approach

Today, when it is necessary to be quick and cost efficient in order to achieve new high-profile missions and to remain competitive on the market, it is essential to support private actors as the driving engine. The grounds behind the importance of commercial actors nowadays is that private organizations are, on balance, better managed, more agile, more innovative, and more market responsive than governmental agencies. The role of national agencies has decreased considerably as they are usually unable to fulfil on time set targets within the planned budget. Therefore, this Second Space Race concerns building innovative, competitive, sustainable and inspirational space enterprises that can secure a leading position in scientific, explorative and technological development. The technology and the cultural climate determined are "propitious for a new space age, the first real commercial space age".[36] For these reasons, the private actors also have a stake in finding ways in resolving the emerging legal issues and developing the missing legal framework.

Just looking at the practice, private companies need to obtain national licenses in order to conduct their planned space missions, and states often refuse to issue them if their mission presents a step in the unexplored where a legal void exists. Therefore, they need new hard law norms. States are not inclined to adopt any new international space law binding norms. While in the nineteen-seventies, nations initially had a strong will to negotiate, sign and ratify the treaties, with every next treaty this will became weaker. The last treaty of the five, the Moon Treaty (1979), is seen as the first sign of the declining importance of the UN for space law drafting. Lack of states' will (as abovementioned), lack of treaty-making climate and non-binding soft law created legal stalemate and uncertainties, which discourage commercial sector. This stalemate if prolonged may result in the slowing down of technological development and less number of break-through space missions. Therefore, it is important for private actors, the "traders of the space domain", to have this alternative way of producing legal norms and creating among themselves necessary legal certainty.

36 "Financing for commercial space: asset-backed financing, international space law and the Unidroit draft protocol on space assets", 2010, p. 10, S. Johnson.