The Artemis Accords Seek to Propel a New Industry

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On May 15, 2020, the United States National Aeronautics and Space Administration ("NASA") revealed the blueprint for the Artemis Accords ("Accords"), which are to form the basis of NASA's international partnerships with other international space agencies. Although the specific language of the Accords is not yet public, the Accords are envisioned as a set of "bilateral Artemis Accords agreements" that will promote international cooperation by establishing a "**common set of principles** to govern the civil exploration and use of outer space," including the principle that "**space resource extraction and utilization can and will be conducted under the auspices of the Outer Space Treaty**." This effort comes at the heels of U.S. President Donald J. Trump's April 6, 2020 Executive Order seeking to "encourage international support for the public and private recovery and use of resources in outer space, consistent with applicable law" ("Executive Order").

Other countries have previously pursued non-binding memorandums of understanding ("MOU"), including for the exploration and use of space resources. For example, in 2017, Luxembourg and the United Arab Emirates signed a MOU focusing on the exploration and utilization of space resources. Like the U.S., which passed a similar law in 2015, Luxembourg established a domestic legal and regulatory framework for space exploration and use of space resources in 2017, and the United Arab Emirates reportedly followed suit earlier this year. Space-faring nations like China and Russia are reportedly negotiating similar cooperation agreements.

As NASA pursues the bilateral Accords with other interested space agencies, what are five take-aways for private actors operating in this emerging industry?

(1) A Chance to Shape Specifics under the Accords

Since NASA plans on partnering with space agencies on an individual, bilateral basis, the framework is silent as to how they would apply directly to private companies. However, this does not mean private companies

cannot play a role in developing the content of the Accords, the principles of which may indirectly apply to the private sector through government contracts of signatory countries. The U.S. government frequently engages with Congress, stakeholders, and the public when negotiating trade and investment policy and a key question for the Accords will be how best to incentivize the private sector to explore and develop minerals in outer space. One way NASA already seeks industry feedback is through its National Space Council Users Advisory Group and its various "federal advisory committees" which include leading industry representatives. As we will discuss below, the U.S. will be negotiating these agreements over the next several months. Interested parties will have to act quickly if they hope to be involved in the development of the text of these bilateral agreements.

(2) Securing Regulatory Approval for Moon Missions is Still Largely Uncharted Territory

Any launch to extract outer space materials will require a license from the U.S. government (or other relevant government overseeing the enterprise). The exact approval process is unclear, but up until now the one private company that has received a license to land on the moon acquired it by applying to the Federal Aviation Administration ("FAA") and its Office of Commercial Space Transportation. The application process also involved input from NASA and the U.S. State Department before the FAA finally granted the launch license. Importantly, a launch licensure is different from traditional mining rights on Earth. Unlike traditional mineral extraction where the sovereign government owns the natural resources in question, a nation state has no sovereignty over celestial bodies. Thus, by licensing, the U.S. government is vetting non-government actors pursuant to Article VI of the Outer Space Treaty, under which it has an obligation to perform "authorization and continuing supervision" of commercial mission launches by its citizens/nationals. King & Spalding has expertise with bidding processes and challenges facing private-space industry leaders and can assist with navigating the current regulatory process along with any additional hurdles required by the Accords.

(3) Recognize That Financial Backers Will Be Wary

The space industry is inherently risky. Early space mining entrants like Planetary Resources, Moon Express, Asteroid Mining Corp., and Bradford Space, Inc. (formerly Deep Space Industries) largely failed to gain traction. By 2019, most of these space mining enterprises had stalled or been taken over by other companies that were more interested in acquiring their discreet technologies (like water-based propulsion) rather than maintaining the overall goal of exploiting outer-space resources. At the same time, interest in commercial opportunities of space has increased, especially for space start-ups. Bryce Technology has reported that start-up space ventures attracted $5.7 billion in financing of all types during 2019, breaking the $3.5 billion record set the previous year. The new Accords provide additional opportunity for increased stability, especially regarding the rapidly evolving legal and regulatory landscape in the U.S. and abroad. It remains to be seen which companies will be first movers in the Artemis Program, and whether they will be able to obtain the financial support of the private sector and governments.

(4) Hope for the Best, But Still Prepare for Disputes

The framework for the Accords focuses on common sets of principles meant to govern space exploration and use of outer space. However, should disputes eventually arise within contracts, licenses and concessions concerning space resource activities, companies operating in this sphere must also consider access to meaningful and binding dispute resolution methods. One such avenue is arbitration under the 2011 Permanent Court of Arbitration *Optional Rules for Arbitration of Disputes Relating to Outer Space Activities* ("PCA Outer Space Rules"). Arbitration has several advantages over domestic courts (*e.g.*, increased confidentiality, technical expertise of decision-makers, party autonomy), and the PCA Outer Space Rules specifically provide for complex disputes that may involve states, international organizations, and private entities. The Annex to the PCA Outer Space Rules provides model clauses that contracting parties may consider inserting in contractual agreements to provide for arbitration of future disputes.

(5) Monitor U.S. Efforts Between Now and October 3, 2020

NASA received approval to negotiate the Accords in May 2020. Although U.S. allies, and other countries like Luxembourg and the United Arab Emirates, are expected to join the Artemis Program, to date, no country has publicly acknowledged signing the Accords. Recently, on July 10, 2020, NASA and the Government of Japan signed a declaration of intent in support of the Artemis program. In the coming months, the U.S. Secretary of State will update the U.S. President on activities carried out under the Executive Order – including presumably the Accords – on October 3, 2020 (*i.e.*, 180 days after the date of issuance of the Executive Order). Such a progress report, if made public, will provide a litmus test on the success of the Accords, including whether there exists international support for the principle that space resource extraction and utilization must occur under the auspices of the Outer Space Treaty. The outcome of such efforts will determine what challenges and opportunities this emerging industry faces ahead.

King & Spalding has extensive experience in representing clients selling space-related products and services to governments. We welcome the opportunity to answer any questions you may have on the Artemis Accords and other emerging issues.

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