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The Planetary Crisis: Applicability of *Negotiorum Gestio*

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Abstract. *Negotiorum gestio* is originally a civil law concept. When an intervenor acts on behalf of, and for the benefit of, the principal without the prior consent of the principal, the intervenor is entitled to reimbursement of expenses. The concept of *negotiorum gestio* can provide a legal basis for it. Does the concept exist in international law? Although *negotiorum gestio* is rarely referred to in international law and its legal status is unclear, we can find it in some treaties like salvage conventions as well as some diplomatic practices like the reimbursement of expenses arising from the assistance to abate and prevent environmental damage to the Gulf after the Gulf War in the framework of the United Nations Compensation Commission. Moreover, the application of the concept of *negotiorum gestio* is indispensable for addressing planetary level crisis such as space debris and planetary defense. Even if international cooperation is difficult due to geopolitical situations, voluntary actions by a State acting in good faith to mitigate the crisis should be promoted. *Negotiorum gestio* can be the legal basis of such actions.

Keywords: *Negotiorum gestio*, general principle of law, environmental damage, space debris, planetary defense, good Samaritan law

1. Introduction

Negotiorum gestio is originally a civil law concept. When an intervenor acts on behalf of, and for the benefit of, the principal without the prior consent of the principal, the intervenor is entitled to reimbursement of expenses. Its essence can be summarized as follows. When the intervener acts with the predominant intention of benefiting the principal and the intervener has a reasonable ground for acting or the principal approves the act without such undue delay as would adversely affect the intervener, the intervener has a right against the principal of indemnification, reimbursement, remuneration or reparation if some conditions are satisfied.

The concept of *negotiorum gestio* is known in civil law systems, for instance in France, Italy, Germany and Japan.[1] It is generally said that *negotiorum gestio* is not known in common law, but it exists in the South African law and in the law of England in the area of salvage.[2] The European standard of the concept of *negotiorum gestio* is shown as benevolent intervention in another's affairs in the Draft Common Framework of Reference by

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1 In the Civil Codes of France, Germany, Italy and Japan, provisions concerning *negotiorum gestio* appear, respectively, at Articles 1372-1375, Articles 677-687, Articles 2028-2032 and Articles 697-702.

2 For the law in South Africa, *see* Leslie Rubin (1958), *Unauthorized Administration (Negotiorum Gestio) in South Africa*, Cape Town: Juta & Company. For the law in England, see D. Sheehan (2016), "*Negotiorum Gestio:* A Civilian Concept in Common Law?", *International and Comparative Law Quarterly*, 55:253-280.

the Study Group on a European Civil Code.[3] The concept of *negotiorum gestio* does not seem to be peculiar to European law. It is also a part of Islamic law. For instance, *negotiorum gestio* exists in Qatari and Iraqi laws.[4]

Does the concept of *negotiorum gestio* exist in international law? As distinct from unjust enrichment, which is sometimes referred to and is considered to be included in the general principle of international law[5], *negotiorum gestio* is rarely referred to in international law and its legal status is not clear. However, when we carefully check State practice, we can find that the concept of *negotiorum gestio* appears in some treaties like salvage conventions as well as some diplomatic practices like the reimbursement of expenses arising from the assistance to abate and prevent environmental damage to the Persian Gulf (Arabian Gulf) after the Gulf War in the framework of the United Nations Compensation Commission (UNCC). Also, the application of the concept of *negotiorum gestio* is indispensable and useful in carrying out planetary defense and in addressing planetary crisis such as space debris. Space debris are defunct space objects and the planetary defense is the prevention of the collision of comets and asteroids with the Earth.

2. *Negotiorum Gestio* in International Law

The concept of *negotiorum gestio* has a long history, although it was rarely invoked by states. Some states invoked the concept for the first time more than one hundred years ago in an inappropriate fashion. In the *Venezuelan Preferential* Case, Germany, the United Kingdom and Italy which blocked Venezuela as a mode of gunboat diplomacy invoked *negotiorum gestio* to claim the preferential treatment in the recovery of the Venezuelan debt.[6] Neutral States including Spain, the Netherlands, Sweden and Norway objected to it.[7] Despite the invocation of the concept by the parties to the dispute, the arbitral award dated 22 February 1904 is silent about *negotiorum gestio*.[8]

Nevertheless, it cannot be argued that the concept of *negotiorum gestio* is alien to international law. On the contrary, there are some, if not many, treaty rules which are based on this concept. The remaining part of this section cites three examples to illustrate the point.

First, the concept of *negotiorum gestio* has been adopted in treaties concerning salvage. Article 2 of the 1910 Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea[9] provides that

3 Christian von Bar (ed.) (2006), *Principles of European Law: Benevolent Intervention in Another's Affairs,* Oxford University Press.

4 For the law in Iraq, *see* Dan E. Stigall (2008), "Refugee and Legal Reform in Iraq: The Iraqi Civil Code, International Standards for the Treatment of Displaced Persons, and the Art of Attainable Solutions", available at: https://www.fig.net/resources/proceedings/2009/fig_wb_2009/papers/acc/acc_1_stigall.pdf. For the law in Qatar, *see* M. Ammar Ghazal (2020), "The Varying Nature of "Surplus" in Legal Systems and Its Effect on the Scope and Nature of Surplus Lawsuit, Analytical Study of Qatari and French Civil Law Compared to Islamic Jurisprudence", *Kuwait International Law School Journal,* 8(31): 439-470, available at https://journal.kilaw.edu.kw/the-varying-nature-of-surplus-in-legal-systems-and-its-effect-on-the-scope-and-nature-of-surplus-lawsuits-analytical-study-of-qatari-and-french-civil-law-compared-to-islamic-jurispr/?lang=en (Arabic with English summary).

5 The Iran US Claims Tribunal, in the arbitral award of *Benjamin R. Isaiah v. Bank Mallet*, stated that "restitution theories such as unjust enrichment and *enrichissement sans cause* are found in the laws of many nations" and "in international law unjust enrichment is an important element of state responsibility". See Iran-United States Claims Tribunal (1983), *Benjamin R. Isaiah v. Bank Mallet,* Final Award No. 35-219-2, 30 March 1983, available at https://iusct.com/cases/final-award-no-35-30-march-1983/.

6 Germany's allegation is summarized as follows: "If the other powers claim the right to share equally in the advantages secured by the blacking powers for their claims, it is clear that, according to every principle of law and equity, they will have to refund part of the expenses incurred while the blockading powers acted as *negotiorum gestores* for them". See Government Printing Office (1905), *The Venezuelan Arbitration before the Hague Tribunal 1903*, at 826, 1096.

7 Spain refuted as follows: "In international relations, and particularly in case of forcible action, one essential element of the *negotiorum gesitio* must always be wanting, namely, the ignorance of the party benefited thereby. Spain, like the other neutral powers, had knowledge of the allied proceedings, and spontaneously assured Venezuela that she considered it neither necessary nor useful, as the Spanish delegate has shown in his case. Spain believed, and still believes, that she and her subjects would find redress for their grievances by ordinary and peaceful means, and has, therefore, derived no benefit from the action of the three allied powers". *Ibid.* at 1097.

8 The Venezuelan Preferential Case (Germany, Great Britain, Italy, Venezuela et al), 22 February 1904, Reports of International Arbitral Awards, vol. IX, at 99-110, available at https://legal.un.org/riaa/cases/vol_IX/99-110.pdf.

9 Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea, 23 September 1910, available at: https://treaties.fcdo.gov.uk/awweb/pdfopener?md=1&did=63899.

every act of assistance or salvage that leads to a useful result gives a right to equitable remuneration. It further states that no remuneration is due if the services rendered have no beneficial result. This provision clarifies "no cure, no pay" principle.

The 1989 International Convention on Salvage[10] provides for a special compensation for salvors for tackling environmental damage. Article 1 (d) defines damage to the environment as substantial physical damage to human health or to marine life or resources caused by pollution, contamination, fire and so on. Article 14 paragraph 1 provides that if the salvor has carried out salvage operations in respect of a vessel which threatened damage to the environment, s/he is entitled to special compensation from the owner of that vessel equivalent to his expenses. The inclusion of the environmental damage was followed by the Lloyd's Standard Form of Salvage Agreement (1980 version)[11] which introduced exception to "no cure, no pay" principle when environmental damage is involved.

Second, Article 5 of the 2001 Articles on Responsibility of States for Internationally Wrongful Acts[12] adopted by the International Law Commission (ILC) in 2001 has the element of *negotiorum gestio.* In the 1258th meeting of the ILC on 16 May 1974, Erias, a member of the body, as concerns Article 8[13] (now Article 5), stated that the purpose of this article was to attribute to the State certain acts performed on its behalf, either at the request of the State or because the person concerned had felt the need to perform them and the case was in the nature of the *negotiorum gestio* of Roman law.[14]

Third, the 1963 Vienna Convention on Consular Relations[15] provides in Article 31 paragraph 1 that consular premises are inviolable. But paragraph 2 provides an exception in the case of fire of the consular premise. In such situations, the consent of the head of the consular post may be assumed for the purpose of putting out the fire. It allows the receiving State, the intervenor, to act on behalf of the sending state, the principal. However, it seems to be a custom that the receiving State does not request the reimbursement of the costs to the sending state as international comity.

3. Environmental Damage to the Persian Gulf and *Negotiorum Gestio*

On 8 April 1991, after the Iraqi aggression against Kuwait, the United Nations Security Council adopted Resolution 687[16]. In its paragraph 16, the Security Council reaffirmed that Iraq was liable under international law for any direct loss, or damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait. The Security Council further decided to create a fund to pay compensation for claims that fall within paragraph 16 and to establish a Commission that will administer the fund. As a result, the United Nations Compensation Commission (UNCC)[17] was established.

The F4 Panel of Commissioners of the UNCC reviewed claims for direct losses relating to environmental damage and depletion of natural resources resulting from Iraq's invasion and occupation of Kuwait. There were

10 International Convention on Salvage, 28 April 1989, available at: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800a58b3&clang=_en.

11 International Salvage Union (n.d.), "No Cure – No Pay", available at https://www.marine-salvage.com/overview/no-cure-no-pay/. For more details on Lloyd's Standard Form of Salvage Agreement, see https://www.lloyds.com/resources-and-services/salvage-arbitration-branch/forms-documents.

12 Articles on Responsibility of States for Internationally Wrongful Acts, 12 December 2001, available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

13 Article 8 provides: "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

14 International Law Commission (1974), *Yearbook of the International Law Commission—Summary Record of the 26th Session*, 1, at 35.

15 Vienna Convention on Consular Relations, 24 April 1963, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3.

16 UN Security Council Resolution 687, 3 April 1991, UN Doc. S/RES/687, available at https://www.un.org/depts/unmovic/documents/687.pdf.

17 *Ibid.* at Para 18. For information regarding the termination of the mandate of the UNCC, see UN Security Council Resolution 2621, 22 February 2022, UN Doc. S/RES/2621, available at https://digitallibrary.un.org/record/3958809?ln=en&v=pdf.

two categories of F4 claims. One was the regional claims, which means the claims by Gulf States which suffered environmental damage. The other was the non-regional claims, which means the claims by Western States of expenditures arising from their assistance to abate and prevent environmental damage.

The payment to the Western States for their expenditures can best be explained by *negotiorum gestio,* although the UNCC does not directly refer to it. Six Western States (Australia, Canada, Germany, the Netherlands, the United Kingdom and the United States) sought compensation for expenses incurred for assistance to abate and prevent environmental damage resulting from Iraq's invasion and occupation of Kuwait. The expenses were in relation to taking measures to respond to the oil spills, oil fires and other environmental damage or threats of environmental damage resulting from the invasion and occupation, including monitoring and assessment of the impacts of the oil spills and oil fires. The total amount of compensation sought in the non-regional claims was USD 43,302,236.[18] On 22 May 2022, the F4 Panel of Commissioners recommended USD 8,353,648 in total as compensation in lieu of the non-regional claims.[19]

4. Space Debris and Planetary Defense: Usefulness of *Negotiorum Gestio*

Space debris is a serious problem. It may pose even more serious risks in future in a context when space activities continue to increase. Space debris are twofold. One type is space objects or their scattered parts falling onto the surface of the Earth. The other type is space objects or its scattered parts collide with other space objects in the outer space.

One of the most serious incidents of the former was the Cosmos 954 Case[20]. On 24 January 1978, Cosmos 954, a nuclear-powered surveillance satellite of the then Union of Soviet Socialist Republics (USSR), crashed in the Northwest Territories of Canada. A huge amount of radioactive materials was scattered over a wide area of the Canadian territory. The clean-up operation called 'Operation Morning Light' was conducted jointly by Canada and the USA. The case revealed a defect in Article 5 of the 1967 Agreement on Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space[21] of which Canada, the USSR and the USA are States parties.

Article 5, Paragraph 2 of the Agreement provides that Contracting Party having jurisdiction over the territory on which a space object or its component parts has been discovered shall, *upon the request of the launching authority and with assistance from that authority if requested*, take such steps as it finds practicable to recover the object or component parts (emphasis added). Paragraph 5 provides that it is a duty of the launching authority to take care of the expenses incurred in fulfilling obligations to recover and return a space object or its component parts under paragraph 2.

In accordance with this Article, if Canada had requested the USSR to recover the scattered debris in the Canadian territory, the USSR had to do it. But this option is diplomatically difficult to adopt because the activities of the USSR in the Canadian territory may be a threat to the national security of Canada, particularly in the cold-war period. Canada and the USA recovered the debris. But there is no provision in the Agreement which enables Canada and the USA to demand the USSR to pay the expenditure incurred for the clean-up actions. Nevertheless, the USSR and Canada settled the matter bilaterally through a bilateral Protocol dated 2 April 1981. The USSR

18 United Nations Compensation Commission (2002), "Report and Recommendation Made by the Panel of Commissioners concerning the Second Instalment of "F4" Claims", UN Doc. S/AC.26/ 2002/26, 3 October 2002, at 33, available at https://digitallibrary.un.org/record/478962?v=pdf.

19 *Ibid.* at 48. The total number of claims and the amount claimed by Western States were: Australia 2 claims (USD 20,099), Canada 2 claims (USD1,252,329), Germany 4 claims (USD 28,717,109), Netherlands 1 claim (1,974,055 USD), the United Kingdom 1 claim (USD 2,219,315), the United States (9,119,329 USD). The amount recommended were: Australia USD 7,777, Canada USD 529,923, Germany USD 2,038,256, Netherlands 0, the United Kingdom USD 1,891,857, the United States USD 3,885,835.

20 Disintegration of Cosmos 954 Over Canadian Territory in 1978—Protocol Between the Government of Canada and the Government of the Union of Soviet Socialist Republics, 2 April 1981, available at https://www.unoosa.org/oosa/en/ourwork/spacelaw/nationalspacelaw/bi-multi-lateral-agreements/can_ussr_001.html.

21 Agreement on Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, 19 December 1967; https://www.unoosa.org/pdf/gares/ARES_22_2345E.pdf.

agreed to pay three million Canadian dollars to Canada towards the full and final settlement of the matter.[22] Although the legal basis of the payment is not made public, it is considered to be *ex gratia* payment because the USSR did not admit responsibility.

The lack of a provision concerning *negotiorum gestio* is, therefore, a serious defect of this Article. It is not realistic to add a new provision in the Agreement as the revision of space-related treaties and agreements are almost impossible. Application of the concept of *negotiorum gestio* as a general principle of law is important when a similar case appears in the future.

Negotiorum gestio appeared in this case at another point as well. Canada did not include to the claim against the USSR the expenses incurred by the US in relations to the Operation Morning Light. Thus, arises the question of the US's entitlement to get reimbursed. In this regard, it is instructive to refer to the draft prepared by the legal advisory division where the concept of *negotiorum gestio* is mentioned in the following manner: "...one who voluntarily incurs expenses by performing work or services which are "necessary" to another cannot recover the costs in the absence of legal authority to incur them. This concept of *negotiorum gestio* which comes from Roman law and has been accepted in international law, is not useful in the claim because Canada continuously kept control of the search, recovery, removal, testing and clear-up operations".[23]

The author's opinion is different from this legal opinion. First, the US could claim the payment of the costs based on *negotiorum gestio.* Second, Canada could claim the the costs including the costs incurred by the US from the USSR based on *negotiorum gestio.*

With regard to the space objects or its scattered parts which collide with other space objects in the outer space, a key issue, in the context of this article, is how to share the cost of mitigation.

Some states are enthusiastic in launching space objects which take into consideration debris mitigation, but other states do not mind the spread of debris. As some space debris can be traced, it is reasonable to assume on a *pro rata* basis the approximate proportion of debris. The cost sharing among states should be based on this assumption. It is consonant with the polluter pay principle (PPP), a basic principle of international environmental law.

If a state voluntarily recovers space debris arising from space activities of another State which originally owes the recovery in accordance with the PPP, the former state can request for reimbursing the expenditure incurred for recovering the debris in accordance with *negotiorum gestio.* Clarifying this rule will be a great contribution for a better space environment in the future.

5. Planetary Defense: *Negotiorum Gestio* and Good Samaritan Law

The collision of near-Earth objects (NEOs) with the Earth is not limited to the world of scientific fictions. On 26 September 2022, NASA's Double Asteroid Redirection Test (DART)[24] successfully impacted its asteroid target. This was the first planetary defense test in the world.[25] Legal issues concerning planetary defense have been considered by at least some space lawyers.[26] The concept of *negotiorum gestio* is useful in the context of planetary defense as discussed below.

Although the measures for planetary defense including the smash of the NEOs, should hopefully be done globally and within the framework of the United Nations, in reality, geopolitical tensions make global cooperation difficult. In this situation, if a state voluntarily takes measures for the planetary defense in good faith, it is desirable

22 International Legal Materials (1981), Canada-Union of Soviet Socialist Republics: Protocol on Settlement of Canada's Claim for Damages Caused by "Cosmos 954", 20(3): 689.

23 Government of Canada (1980-1981), Archives of the Government of Canada, Cosmos 954-Legal Aspects (No. Dossier 66-7-COSMOS 954-Legal), Tome 4, at 243-244.

24 For details on DART, see https://science.nasa.gov/mission/dart/.

25 NASA (2022), "NASA's DART Mission Hits Asteroid in First-Ever Planetary Defense Test", available at https://www.nasa.gov/press-release/nasa-s-dart-mission-hits-asteroid-in-first-ever-planetary-defense-test.

26 Space Mission Planning Advisory Group (SMPAG) Ad-Hoc Working Group on Legal Issues to SMPAG (2020), Planetary Defence Legal Overview and Assessment, Doc. No. SMPAG-RP-004, available at https://www.cosmos.esa.int/documents/336356/336472/SMPAG-RP-004_1_0_SMPAG_legal_report_2020-04-08.pdf; Irmgard Marboe (ed.) (2021), *Legal Aspects of Planetary Defence,* Leidon and Boston: Brill Nijhoff.

to establish a rule for that state to receive the payment of the costs of such measures. The legal basis of such a rule could be drawn from *negotiorum gestio.*

As to the planetary defense, Good Samaritan law (or *negotiorum gestio* in emergency)[27] also has an importance role to play. Good Samaritan law gives legal protection to a person who gives reasonable help to another person in an urgent situation. Domestic civil laws and penal laws generally recognise this principle.[28] Although Good Samaritan law mainly appears in medical law, it can be applied in the context of planetary defense. Even if the measures of a state for the planetary defense accompanies collateral damages to third parties, the former is immune from the compensation for such collateral damages.[29]

The 2000 Charter on Cooperation to Achieve the Coordinated Use of Space Facilities in the Event of Natural or Technological Disasters[30], which was adopted among the main space agencies in 2000, provides in paragraph 5.4 that the parties shall ensure that associated bodies which, at the request of the countries affected by a disaster, call on the assistance of the parties undertake to confirm that no legal action will be taken against the parties in the event of bodily injury, damage or financial loss arising from the execution or non-execution of activities.[31] This rule is considered to be based on Good Samaritan law (or *negotiorum gestio* in emergency).

6. Conclusion

International law is an evolving international public good. Although the concept of *negotiorum gestio* is overlooked or forgotten in today's international law, it can and should play an important role in dealing with planetary crisis. The author apprehends that the geopolitical situation would make international cooperation difficult even when there exists a planetary crisis. Voluntary actions by a state acting in good faith to mitigate the crisis should be promoted. Applying *negotiorum gestio* in such cases may promote mitigating measures.

The motto of international lawyers should always be "think ahead, act for humanity"[32]. We should not be too prudent to introduce a forgotten but useful concept to save the Earth.

27 Although there is no provision directly providing *negotiorum gestio* in emergency in the Draft Common Framework of Reference by the Study Group on a European Civil Code mentioned above, it appears in civil laws of some States. In the Japanese Civil Law, Article 698 provides: "If a Manager engages in the Management of Business in order to allow a principal to escape imminent danger to the principal's person, reputation or property, the Manager shall not be liable to compensate for damages resulting from the same unless he/she has acted in bad faith or with gross negligence". It is possible to place this provision as a mode of Good Samaritan law.

28 In Japan, Article 37 paragraph 1 of the Penal Code provides: "An act a person was compelled to take to avert a present danger to the life, body, liberty or property of oneself or any other person is not punishable only when the harm produced by such act does not exceed the harm to be averted; provided, however, that an act causing excessive harm may lead to the punishment being reduced or may exculpate the offender in light of the circumstances". This provision, as well as Article 698 of the Civil Code, is consonant with the concept of Good Samaritan law.

29 On this point, see Frans von der Dunk (2021), "The 2010 Report on the Legal Aspects of NEO Threat Responses and Related Institutional Issues", *in* Irmgard Marboe (ed.) (2021), *Legal Aspects of Planetary Defence,* Leidon and Boston: Brill Nijhoff, at 120-138, 129.

30 Charter on Cooperation to Achieve the Coordinated Use of Space Facilities in the Event of Natural or Technological Disasters, 25 April 2000, available at https://www.refworld.org/docid/41de7e544.html.

31 *Ibid.*

32 This phrase is the slogan of Tokai University.