Dispute settlement in international space law : a multi-door courthouse for outer space

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Dispute Settlement in International Space Law

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Dispute Settlement in International Space Law

A Multi-Door Courthouse for Outer Space

Proefschrift

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To my parents

Lilian Heok Lung Tan & Joachim Soon Chye Goh

For their love, example and incandescence.

You'll wait a long, long time for anything much
To happen in heaven beyond the floats of cloud
And the Northern Lights that run like tingling nerves.
The sun and moon get crossed, but they never touch,
Nor strike out fire from each other nor crash out loud.
The planets seem to interfere in their curves -
But nothing ever happens, no harm is done.
We may as well go patiently on with our life,
And look elsewhere than to stars and moon and sun
For the shocks and changes we need to keep us sane.
It is true the longest drought will end in rain,
The longest peace in China will end in strife.
Still it wouldn't reward the watcher to stay awake
In hopes of seeing the calm of heaven break
On his particular time and personal sight.
That calm seems certainly safe to last to-night.

Robert Frost
On Looking Up by Chance at the Constellations

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Gérardine Meishan Goh
Leiden, 2006

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Introduction

A little over a hundred years ago, a patent examiner published four papers that would define 1905 as the *Annus Mirabilis* of Physics. A 26-year old Albert Einstein revolutionized modern physics with his publications on the photoelectric effect and the quantization of light,[1] Brownian motion,[2] the Special Theory of Relativity[3] and the law of mass-energy conversion.[4] In each case, Einstein intrepidly explained puzzling experimental results by carrying theoretical physics to its logical conclusions. This lay the groundwork of modern quantum and astrophysics and the elements for much of today's scientific and technological understanding of the Earth and outer space.[5]

A day before the world was introduced to the Special Theory of Relativity, it welcomed a little boy in Jönköping, Sweden. He would grow up to become one of the most admired pioneers of international peace and security. Dag Hammarskjöld was born July 29, 1905, exactly 6 years after the adoption of the 1899 Convention for the Pacific Settlement of Disputes.[6] In his terms as the Secretary-General of the United Nations, Hammarskjöld did much for international dispute settlement. He worked to alleviate Arab-Israeli tensions, established the United Nations Emergency Force (UNEF) in 1956,[7] and inter-

[1]Einstein, A., "On a heuristic viewpoint concerning the production and transformation of light", translation from the German article, "Über einen die Erzeugung und Verwandlung des Lichtes betreffenden heuristischen Gesichtspunkt", Annalen der Physik 17: 132 - 148 (1905)

[2]Einstein, A., "On the motion of small particles suspended in liquids at rest required by the molecular-kinetic theory of heat", translation from the German article, "Über die von der molekularkinetischen Theorie der Wärme geforderte Bewegung von in ruhenden Flüssigkeiten suspendierten Teilchen", Annalen der Physik, 17: 549 - 560 (1905)

[3]Einstein, A., "On the Electrodynamics of Moving Bodies", translation from the German article, "Zur Elektrodynamik bewegter Körper", Annalen der Physik, 17: 891 - 921 (1905)

[4]Einstein, A., "Does the Inertia of a Body Depend Upon Its Energy Content?", translation from the German article, "Ist die Trägheit eines Körpers von seinem Energiegehalt abhängig?", Annalen der Physik, 18: 639 - 641 (1905)

[5]For excellent accounts of the life and work of Albert Einstein, see Bolles, E.B., *Einstein Defiant: Genius versus Genius in the Quantum Revolution*, (2004); Stachel, J., *Einstein's Miraculous Year: Five Papers that Changed the Face of Physics*, (1998)

[6]International Convention for the Pacific Settlement of Disputes, The Hague, 29 July 1899, 32 Stat 1779

[7]UN General Assembly Resolutions 998 (ES-I) (4 November 1956), 1000 (ES-I) (5 November 1956), 1001 (ES-I) (7 November 1956) and 1125 (XI) 2 February 1957; UN Security

vened in the 1957 Suez Crisis. He was *en route* to negotiate a cease-fire to stop the fighting between non-combatant UN forces and Moise Tshombe's Katanga troops when he died in a plane crash near Ndola, Northern Rhodesia (now Zambia) in 1961.[8]

In the intervening century, Einstein's world of science and Hammarskjöld's world of international relations and law have resulted in a new subject of international discussion: the Settlement of Disputes relating to Outer Space. International space law itself is one of the youngest fields of international law, and effort has mainly been focused on the substantive part as opposed to the procedural part of the law. Space law, however, is maturing with space business, science and technology. Clearly, the development of procedures to settle disputes and ensure compliance with legal obligations and standards is becoming increasingly urgent.

Dispute Settlement in International Space Law

The existence of international law, with its rights, rules and regulations, is futile without an effective enforcement mechanism that provides a sufficient and adequate remedy. In the wake of the recent proliferation of international courts and tribunals, the focus in enforcement has shifted to ensure that binding decision-making in international law is effective and enforceable. This recent emphasis on international dispute resolution is especially keen in the arena of international space law, which has no sector-specific dispute resolution system.

International space law is particularly significant in the evolution of international dispute settlement due to its consideration of issues from an international and interdisciplinary perspective. These issues range from public international law and policies of regional and international organizations; to juridical dispute settlement and global governance; to fiscal entrepreneurship and business efficacy; and to scientific breakthroughs and technological advances. The legal framework concerning activities in outer space also transcends the usual focus of international law on States. The burgeoning importance of commercialization, together with the involvement of non-governmental and international organizations in space activities, calls for the re-consideration of the status of non-State actors on the international plane.

At the time of writing, the only disputes relating to space activities that have been submitted to legal settlement processes have only been on the domestic legal level.[9] Most of the other disputes have generally been resolved

Council Resolutions 111 (19 January 1956), 113 (4 April 1956) and 119 (31 October 1956)

[8]For excellent accounts of the life and work of Dag Hammarskjöld, see Fröhlich, M., *Dag Hammarskjold ünd Die Vereinten Nationen: Die Politische Ethik Des Uno-Generalsekretars*, (2002); Miller, R.I., *Dag Hammarskjöld and Crisis Diplomacy*, (1961)

[9]Gorove, S., *Cases on Space Law: Texts, Comments and References*, (1996)

through extra-legal procedures.[10] It does not appear that the lack of a sectorialized system of legal dispute settlement has had a negative consequence on the development either of space activities or of space law. However, it is submitted that the development of a framework for dispute settlement is becoming increasingly necessary for space law. Space activities are becoming more expensive and complex, involving more disparate actors and impacting larger segments of society. It is submitted that a sectorialized framework for dispute settlement will ensure the coherent evolution of the law in line with developments in the field. Further, it allows for the satisfactory and efficient resolution of disagreements that might otherwise create impediments in the use of outer space for the benefit of Humanity.

The lack of a dispute settlement régime in international space law does lead to an unprecedented opportunity for the law relating to international dispute settlement. Together with the boundary-crossing nature of international space law, the lack of a complete dispute settlement régime allows for the evolution of specialized and discrete dispute settlement system.[11] It allows for a comparative study of the various existing dispute settlement institutions to gather the best methods of juridical decision-making and enforcement. The interdisciplinary nature of space activities also obliges collaboration with other disciplines such as physics, economics, trade, diplomacy, information technology and engineering. This provides a unique chance for legal analysis and study so as to frame a workable dispute settlement system for the further development of public international law.

International Dispute Settlement

Third party international dispute settlement[12] processes are not new phenomena. Arbitration, good offices and mediation, inquiry and conciliation found expression early on in the Hague Peace Conventions.[13] International adjudication was institutionalized with the establishment of the Permanent Court

[10]Such "extra-legal procedures" have also been considered an alternative form of dispute settlement, depending on the definition of the term. This issue is dealt with *infra* in Chapter 2.

[11]The framework provided by the Convention on Liability for Damage Caused by Objects Launched into Outer Space (1972), adopted on 29 November 1971, opened for signature on 29 March 1972, entered into force on 1 September 1972, (1971) 961 UNTS 187, 24 UST 2389, TIAS 7762 is dealt with *infra* in Chapter 1. In that Chapter it is mooted that this framework, while laudable, provides only an incomplete mechanism for the settlement of disputes relating to outer space activities.

[12]The definition of "dispute settlement", including its legal and extra-legal procedures, is dealt with *infra* in Chapter 1.

[13]International Convention for the Pacific Settlement of Disputes, The Hague, 29 July 1899, 32 Stat 1779; International Convention for the Pacific Settlement of Disputes, The Hague, 18 October 1907, 3 Martens (3rd) 360, 36 State 2199

of International Justice.[14] States have subsequently reaffirmed the obligation to resolve disputes peacefully.[15] The UN General Assembly has also tried to facilitate access to third party procedures.[16] Until the 1980s however, usage of these dispute settlement processes remained infrequent.

The amount of party control over the process distinguishes the various types of dispute settlement processes.[17] Negotiation is normally conducted exclusively between the parties in dispute; the parties remain in control of the process, its content and the outcome. The role played by the third party varies in the other processes. In inquiry and fact-finding the third party performs an investigatory function.[18] The third party assists the parties in the conduct of the negotiations without offering an opinion as to the appropriate outcome in mediatory-type processes.[19] Conciliation mirrors mediation except that the third party offers non-binding advice as to outcome of the conciliation.[20] In arbitration and adjudication, the third party may give a binding decision. These processes are flexible. A third party may, with the parties' consent, modify these processes in a variety of ways.

Recently however, States' ambivalence towards third party dispute settlement has abated. UN-promoted initiatives[21] have arisen across the spectrum of international law.[22] Instead of establishing new processes, existing procedures were combined to make them more accessible and responsive to the disputants' needs.[23] Prominence has been given to dispute systems management within the developing framework of international and regional organizations.[24]

One of the greatest developments in international law in the last century is the proliferation of a variety of international courts, tribunals and other dispute settlement bodies. The most recent addition was in 1998, with the establishment of the International Criminal Court.[25] Together with an array of

[14]Statute of the Permanent Court of International Justice, 16 December 1920

[15]For example, General Assembly Declaration on the Principles of Friendly Relations between States, GA Res 2625 (24 October 1970)

[16]The General Act for Pacific Settlement of International Disputes, (26 September 1928) 93 LNTS 343, see Sohn, L., "Peaceful Settlement of International Disputes and International Security", (1987) Negotiation Journal 155

[17]This is explained in greater detail *infra* in Chapter 2.

[18]Plunkett, E., "UN Fact-Finding as a Means of Settling Disputes", (1969) 9 VJIL 154

[19]Touval, S. and Zartman, I., *International Mediation in Theory and Practice* (1985)

[20]See generally Cot, J., *International Conciliation* (1972)

[21]UN Doc. A/AC.182/L/68 (12 November 1990)

[22]see Chinkin, C., "The Peaceful Settlement of Disputes: New Grounds for Optimism?", in Macdonald J.,(ed.), *Essays in Honour of Wang Tieya*, (1993) 165 at 166; Highet, K., "The Peace Palace Heats Up: The World Court in Business Again?" (1991) 85 AJIL 646

[23]See generally Lauterpacht, E., *Aspects of the Administration of International Justice* (1991)

[24]*An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping* - Report of the Secretary-General; pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992, (17 June 1992) A/47/277

[25](1998) 37 ILM 999

human rights committees, commissions and courts, it is established to receive claims from States and individuals alleging violations of human rights norms.[26] Other mechanisms have been created to enable foreign investors to bring arbitral claims against State expropriation. Still more have been instituted to concentrate on disputes over environmental, maritime, economic and trade issues.[27] The marked increase in the number of international dispute settlement bodies is complemented by a growing readiness to have recourse to them.[28] This comparatively recent revolution is a striking phenomenon. There appears to be foundations for an international "judiciary" with increasingly extensive and intrusive powers.

The evolution of international dispute settlement appears to have occurred in five phases. In the first phase, there was the concept of a "just" war. This concept allowed the enforcement of rights and obligations between States through a legally-acceptable use of armed force. The second phase began with the acknowledgement of the importance of the peaceful settlement of disputes. International disputes were adjudicated solely between States and before *ad hoc* bodies set up to handle that specific dispute. The 1899 establishment of the PCA denoted the advent of the third phase, with the awareness of the urgency to establish a standing body. The fourth phase took place in the aftermath of the Second World War and led up to the early 1980s. It saw the establishment of the International Court of Justice (ICJ), regional bodies such as the European Court of Justice (ECJ), the European Court of Human Rights (ECHR) and the International Center for the Settlement of Investment Disputes (ICSID). The fifth phase was critically set in motion by five determinants: the establishment of various human rights commissions and tribunals; the World Trade Organization's (WTO) Dispute Settlement Understanding; the UN Convention on the Law of the Sea (UNCLOS), establishing the International Tribunal for the Law of the Sea (ITLOS); the compliance mechanisms established by the international environmental regime; and the evolution of the good offices of the UN Secretary-General as a direct alternative to the use of force.[29]

The first four phases in the evolution of international dispute settlement evinces three developments. First, there is the clear inclination away from the use of force as a dispute settlement mechanism. Secondly, there is also an evident trend away from the *ad hoc* constructions that had been predominant until

[26] McGoldrick, D., *The Human Rights Committee: its Role in the Development of the International Covenant on Civil and Political Rights*, (1991); Merrills, J.G., *The Development of International Law by the European Court of Human Rights* (1993)

[27] Augenblick, M. and Ridgway, D.A., "Dispute Resolution in International Financial Institutions", (1993) 10 Journal of International Arbitration 73

[28] Lauterpacht, E., *Aspects of the Administration of International Justice* (1991) at 9

[29] see Sands, P., Mackenzie, R. and Shany, Y. (eds.), *Manual on International Courts and Tribunals*, (1999) at xxviii. There the author (Sands) identifies four stages of development, focusing only in the peaceful settlement of disputes.

1907.[30] Thirdly, there is a palpable drift towards recourse to third party dispute settlement mechanisms. While limited in jurisdiction, these mechanisms nonetheless provided fora for international dispute settlement at the regional and global levels. The extensive network revealed an emergent readiness of States to affirm the role of third party dispute settlement in international political relations.

The fifth phase emerged with the advent of the 1980s and the creation of several new international dispute settlement bodies. These have a number of characteristics that suggest that international dispute settlement has entered a new phase.

First, recent events indicate a trend towards the establishment of dispute settlement mechanisms under specific treaty regimes, which have compulsory mandatory jurisdiction and binding decision-making powers. Examples include the mechanisms established under the 1982 UNCLOS and the 1994 WTO Dispute Settlement Understanding; the non-compliance mechanisms created in the ozone regime;[31] the inspection panels established by the World Bank; and the International Criminal Court. Second, the issue of compliance with legal obligations within specific treaty régimes has been increasingly tied to dispute settlement procedures. The topic of non-compliance with environmental obligations has received increased scrutiny, which has resulted in novel compliance regimes using non-contentious, non-judicial mechanisms. The non-compliance mechanism established under the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer[32] set the stage for further use in the context of other environmental agreements.[33] A third factor is that States are no longer the only players on the international plane. More international courts, tribunals and other dispute settlement bodies are accessible to individuals, corporations, non-governmental organizations, intergovernmental organizations and other associations. A particularly successful example of this is the establishment of the European Court of Human Rights and the adoption of Protocol 11[34] to the European Convention on Human Rights.[35] This is not without controversy. The traditional view of international law was that only States had *locus standi* on the international plane, and consequently, in international dispute settlement. With many dispute settlement tribunals now granting non-State actors

[30]Bowett, O., *Law of International Institutions*, (4th ed., 1982)

[31]See generally Szell, P., "The Development of Multilateral Mechanisms for Monitoring Compliance", in Lang, W. (ed.), *Sustainable Development and International Law*, (1995)

[32]16 September 1987, (1987) 26 ILM 154

[33]For example, the 1992 UN Framework Convention on Climate Change (1992) 31 ILM 822; and the 1994 Protocol to the 1979 Convention on Long-range Transboundary Air Pollution on Further Reduction of Sulphur Emissions (1994) 33 ILM 1540

[34]Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, (May 11, 1994), 33 LLM 943

[35]European Convention for the Protection of Human Rights and Fundamental Freedoms, (November 4, 1950), 213 UNTS 221

standing, the image of the State as the only actor on the international plane is slowly changing.

The proliferation of international courts and tribunals raises a myriad of issues.[36] The creation of these new mechanisms did not occur within a considered, structured framework of international dispute settlement. Questions raised include the relationship between these bodies, the subject of *litis pendens*, and the enforcement and appreciation of international decisions at the domestic level.[37]

Effective mechanisms for international dispute settlement need to be economic, non-coercive, open to all interested parties, and fair. It must be readily accessible to all and parties should deal at arm's length. International dispute settlement must balance three competing interests. Firstly, the result must be acceptable to all parties and must serve their interests.[38] Secondly, it should not offend third parties' interests and must uphold international law and community values.[39] Thirdly, it must achieve congruity in both process and outcome, ensuring a progressive and productive development of international law.[40]

The Multi-Door Courthouse System

Alternative dispute resolution (ADR) has become popular in many domestic jurisdictions.[41] The multi-door courthouse concept grew out of the ADR movement. The multi-door courthouse has been tested in domestic jurisdictions in the United Kingdom and parts of the United States, such as New Jersey, Houston and Philadelphia, and most notably in the District of Columbia.[42] It has been implemented in Australia, Canada, New Zealand, Singapore and other parts for the Commonwealth.[43] Analogies should not be too freely framed be-

[36]see generally Janis, M.W. (ed.), *International Courts for the Twenty-First Century* (1992); Merrills, J.G., *International Dispute Settlement*, (3rd ed., 1998); Guillaume, G., "The Future of International Judicial Institutions", (1995) 44 ICLQ 848

[37]It is instructive in this regard to compare the approach of the US Supreme Court in *Breard v. Greene* (1998) [118 S Ct 1352, 140 L Ed. 2d 529] with that of the Privy Council of the House of Lords in *Hilaire and Thomas* [Privy Council Appeal No. 60 of 1998, *Thomas and Hilaire*, (27 January 1998)]

[38]Menkel-Meadow, C., "Towards Another View of Legal Negotiation: The Structure of Problem-Solving", (1983) 31 UCLA Law Review 754

[39]Chinkin, C. and Sadurska, R., "An Anatomy of International Dispute Resolution", (1991) 7 Ohio State Journal of Dispute Resolution 39

[40]see generally Abel, R., *The Politics of Informal Justice* (1982)

[41]Shore, M.A., Solleveld, T. and Molzan, D., *Dispute Resolution: A Directory of Methods, Projects and Resources*, (July 1990) Alberta Law Reform institute, Research Paper No. 19

[42]d'Ambrumenil, P.L., *What is Dispute Resolution?* (1998); Henderson, S., *The Dispute Resolution Manual: A Practical Handbook for Lawyers and Other Advisers, Version 1.0* (1993)

[43]The MDC concept evolved mainly in the common law countries, and several highly qualified publicists have postulated reasons as to its evolution in these countries and non-

tween ADR in the domestic and international arenas. In domestic jurisdictions the purpose has been to seek informal alternatives to adjudication. These alternative range from inter-party negotiation without third party intervention to binding third party arbitration. In international law the focus is on developing political will and other incentives to have recourse to permanent and mandatory dispute settlement methods.[44] It is submitted however, that there are lessons learnt in the domestic context that are applicable on the international and transnational plane of dispute settlement.

It is proposed that an adapted version of multi-door courthouse is perhaps the most fitting step in the evolution of dispute resolution in international space law. The multi-door courthouse is a multifaceted dispute settlement center. It recognizes that particular cases, violations and disputants may be suited to particular dispute settlement methods. As options of advocacy and dispute resolution mechanisms proliferate, choosing the correct option becomes a problem in itself. The multi-door courthouse, in which these considerations are analyzed and diverted to the appropriate dispute resolution methods, has been an answer to this problem.[45] In this approach, disputants are channelled by intake screening to the correct "door" in the courthouse. The courthouse would make all dispute resolution services available under one roof, including the initial intake screening. The aims of the multi-door courthouse are to inform the parties of the available alternatives, to assist them in choosing the appropriate mechanism for their particular dispute, and to provide the mechanism to settle the dispute. Compliance with the intake official's referrals could be voluntary or compulsory.[46]

The initial screening of claims should come before an advisor legally qualified and specialized in the fields of international dispute resolution, outer space studies and international space law. Factors that will critically affect the recommendation of the dispute settlement mechanism include:

1. The interests, perspectives and relative positions of the parties;
2. The nature and consequences of the alleged violation or dispute arising;
3. The appropriateness of the efficacy, cost, credibility and workability of the proposed mechanism; and
4. The importance of the case to the development of international and national space law.

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emergence in civil law countries. See generally Lim L.Y. and Liew T.L., *Court Mediation in Singapore* (1997) at 31 and 33

[44]Mnookin R. and Kornhauser, L., "Bargaining in the Shadow of the Law: the Case of Divorce", (1979) 88 Yale LJ 950

[45]Sander, F.E.A., "Varieties of Dispute Processing" (1979) 70 FRD 111; Cappelletti, M. and Garth B., "General Report", Vol. I Bk. 1, in *Access to Justice* (Italy, 1979) at 515; American Bar Association, Report on Alternate Dispute Resolution Projects (1987)

[46]*ibidem* at 44 - 47

The success of the multi-door courthouse would depend largely then on the initial screening process. There is a real concern that the multi-door courthouse would lead to a new bureaucracy, which will send disputants from one method to another without genuine attempts to address their problems. However, the proposed adapted system will include a genuine analysis of the parties, facts, legal questions, and other considerations of the particular case, thus diminishing this concern.[47] Chapters 1 to 4 will show that the present methods of dispute settlement are inadequate. Chapter 5 then follows to illustrate that the development of the multi-door courthouse for disputes relating to space activities will create a coherent framework for dispute settlement and the evolution of space law.

The multi-door courthouse would result in efficiency savings in terms of time, money, effort and frustration. Parties can be channelled to the correct method of settlement, instead of going on a merry-go-round of inappropriate methods and consequently, ineffective and unenforceable decisions. Access to and legitimization of new methods of dispute settlement would likely increase through the use of the multi-door courthouse. A better understanding of the peculiar characteristics of the specific types of dispute resolution methods would result. It is therefore submitted that this model is the most suitable for the novel cross-boundary and inter-disciplinary issues that will arise in dispute relating to space activities.

There has been widespread scepticism as to the "effectiveness" of the enforcement of international law.[48] Like other branches of international law, international space law has no present permanent and specific means to secure its observance. Compliance with legal obligations can of course be enforced by the United Nations Security Council under its Chapters VI and VII mandate. However, recourse to the UN Security Council will be predicated upon the Security Council's finding that there exists a threat to international peace and security under Article 39 of the UN Charter. This is a valid means of ensuring compliance with international obligations relating to the use of outer space. However, it is submitted that many disputes that might otherwise still negatively impact upon the use of outer space for the benefit of Humanity will fall through the cracks if the Council cannot legitimately find that their continuance constitutes a threat to international peace and security.

Aside from compliance issues, the dispute settlement framework for space activities must also be able to address issues of international responsibility and reparation. Any breach of an incumbent obligation under international law, regardless of the subject matter of the obligation, entails international

[47]Lim, L.Y., "ADR - A Case for Singapore" (1994) 6 Singapore Academy of Law Journal 103

[48]Cheng, B., "The Contribution of Air and Space Law to the Development of International Law", (1986) 39 CLP 181

responsibility.[49] As the Permanent Court of International Justice held in the 1928 *Chorzów Factory case*, "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation".[50] The Court went on to say that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[51] The aspiration to bring about a *restitutio in integrum* may be frustrated by the fact that restoring the *status quo ante* is not feasible in realistic terms. When restitution in kind is ruled out, the duty to make reparation becomes a duty to pay financial compensation "corresponding to the value which a restitution in kind would bear".[52] Where necessary, the indemnity must also include "damages for loss sustained" beyond restitution in kind or payment in its place.

Under the Liability Convention, States that cause damage to other States' space objects are liable to pay compensation for such damage.[53] It is submitted that the proposed adapted multi-door courthouse would be tasked with allotting responsibility and liability for any act committed in outer space that causes damage, for dispute settlement in space-related activities, and for setting out the amount of compensation or the form of reparation necessary. This would allow a clear and unbiased account of the damage suffered and the corresponding reparation, and for the enforcement of the standards of international law in outer space. This proposal goes one step further than the Claims Commission envisaged presently in the Liability Convention.[54]

It is further submitted that the multi-door courthouse should be accessible to non-State actors, including intergovernmental organizations, non-governmental organizations, private entities and individuals. This will reflect the current and future reality that space activities have grown beyond the State domain.

Structure of the Multi-Door Courthouse System

The structure of the proposed multi-door courthouse is relatively straightforward. The following is a summary of the proposed dispute settlement frame-

[49] Report of the International Law Commission, 28th Session, [1976], ILC YB 1 at 96

[50] *Case concerning the Factory at Chorzów (Claim for Indemnity) (Merits)* (A/17 1928) 1 WCR 646 at 664

[51] *ibidem* at 677 - 8

[52] *ibidem*

[53] Convention on Liability for Damage Caused by Objects Launched into Outer Space (1972), adopted on 29 November 1971, opened for signature on 29 March 1972, entered into force on 1 September 1972, (1971) 961 UNTS 187, 24 UST 2389, TIAS 7762

[54] Note however, that it is not meant to replace the Claims Commission envisaged by the Liability Convention. See *infra* Chapter 5.

work.[55] Parties may avail themselves of the system by

1. depositing instruments of accession to the multi-door courthouse system,

2. including clauses in bilateral or multilateral agreements agreeing to resort to the system in the case of a dispute arising, or

3. submit a dispute to it on an *ad hoc* basis as and when such disputes may arise.

At the point of accession or submission of disputes, parties will independently indicate their preferred means of dispute settlement. Upon the submission of a dispute, parties are required to submit a confidential *compromis* together with their separate preliminary submissions on the case. Additionally, they are to submit a confidential statement of any political, economic, technical or other interests they may conceive from their perspective of the dispute. These documents will be passed through an interdisciplinary expert panel consisting of an odd number between three and five members for initial screening.

Based on these documents and their assessment of the dispute in its entirety, the expert panel will recommend a method of dispute settlement from a gradated scale. If the parties did not initially decide upon the same method of dispute settlement upon submission, the dispute is submitted to this recommended mechanism for settlement. This is done with the understanding that should this fail to resolve the dispute satisfactorily within a stipulated time, the dispute will be re-submitted to the panel's next choice of dispute settlement method. This next choice will be further along the gradated scale towards binding third party dispute settlement. Experience in international law has shown that the possibility of submitting the dispute to binding third party dispute settlement plays a significant role in motivating parties to come to an early resolution of the dispute. If this second recommended method fails again, then the dispute would be compulsorily submitted to binding third party settlement such as arbitration. Of course the initial screening process will also consider factors such as the impact of the decision on third parties and the development of international law. Should the outcome of the dispute potentially have less minor repercussions on these issues, then a public, binding method may be recommended from the start instead.

The parties must undertake in good faith to give effect to the settlement of the dispute. The multi-door courthouse also comprises a three-prong approach to enforcement, as well as procedures for interim measures if necessary. In summary these enforcement mechanisms are:

[55]The detailed structure of the proposed multi-door courthouse for outer space can be found *infra* in Chapter 5.

1. Verification; consisting of

   (a) Treaty compliance regimes;

   (b) Inspection panels and party reports;

2. Supervision; consisting of

   (a) Good offices of the UN Secretary-General;

   (b) Compensation Commissions; and in the last resort

   (c) Referral of the dispute via the UN Secretary-General to the UN Security Council.

3. Procedural Issues in Settlement Enforcement.

It also provides facilities for confidence-building measures such as conflict avoidance mechanisms and a reasoned ongoing review of its own operations.

Implementation & Development of the Law

It is submitted that there are grounds for optimism for the implementation of a dispute settlement mechanism in international space law such as the multi-door courthouse. Political will, economic rationale, international cooperation and geo-political shifts all indicate that both public and private actors will be motivated to accede to such a mechanism.

The UN General Assembly declared that "the United Nations should provide a focal point for international co-operation in the peaceful exploration and use of outer space."[56] It is essential that the United Nations serve as the working crucible for the implementation of dispute settlement mechanisms for activities in outer space. In this context, this thesis proposes a Protocol for the Multi-Door Courthouse for Outer Space to the 1967 Outer Space Treaty. This Protocol draws on elements of the Liability Convention, the 1998 ILC Final Draft Convention on Settlement of Space Law Disputes, UNCLOS, the WTO Dispute Settlement Understanding, and other international dispute settlement instruments and institutions. The text of this proposed Protocol is in Appendix A. Appended to this proposed Protocol in Appendix B are suggested Model Clauses for inclusion in space-related agreements.

[56] Resolution 1721B-XVI

Overview of the Analytical Framework

This book presents a critical legal analysis of the institutional dispute settlement mechanisms in space law available at the international and transnational level. It frames this analysis both on the law relating to the peaceful settlement of disputes and on the evolution of institutional processes to settle disputes and ensure compliance with treaty obligations and international legal standards.

This research makes the following submissions

1. The existing dispute settlement mechanisms in international space law are inadequate to deal with the reality of present and future space activities;
2. There is an urgent need for a permanent, mandatory and sectorialized space law dispute settlement mechanism;
3. This mechanism should draw on the lessons learnt from the evolution of dispute settlement in international law;
4. The adapted concept of the multi-door courthouse system best fulfils the unique requirements demanded of a dispute settlement mechanism for space activities; and
5. The adoption of the proposed multi-door courthouse system will constitute one of space law's major contributions to the progressive development of international law.

The analysis is structured into three parts: Exploration, Evolution and Evocation. In ***Part One: Exploration***, the existing mechanisms of dispute settlement in international space law are discussed and assessed. (Chapter 1) The investigation then widens to consider the mechanisms for the peaceful settlement of disputes in general international law, and the applicability of these mechanisms to space law in particular. (Chapter 2)

Part Two: Evolution discusses the chronologically parallel developments in space activities and international dispute settlement. It deliberates on the changing paradigm of space activities and the need for a permanent, mandatory and sectorialized dispute settlement mechanism. (Chapter 3) It then comparatively analyzes recent developments in dispute settlement in comparable fields of international law. (Chapter 4)

Part Three: Evocation proposes the concept of the adapted multi-door courthouse system as the most appropriate mechanism for the settlement of space-related disputes. A brief typology of dispute settlement is contemplated before a case is made for the use of the adapted multi-door courthouse system. The structure of the proposed multi-door courthouse system is then illustrated. (Chapter 5) Suggestions are made as to the development of the law to implement the multi-door courthouse system. (Chapter 6) This book then concludes

that the adoption of the proposed multi-door courthouse system will be one of space law's foremost contributions to the advancement of international law. (Chapter 7)

While this research involves suggestions from outside the traditional confines of international law, it is grounded in the today's legal, economic and technological realities, and grows naturally out of the progressive evolution of international dispute settlement. It is by following Einstein's example and intrepidly taking the next logical step that international space law can ensure the peaceful uses of outer space for the common benefit of all Humanity. For as Hammarskjöld said, "It is in playing safe that we create a world of utmost insecurity."

Part One: Exploration

Chapter 1

Dispute Settlement in International Space Law

International law is inextricably connected to dispute settlement. The law provides the rules and justification for dispute settlement where prophylactic propositions flounder. International law stands apart from the international politics of power in these situations in two ways. First, it does not merely settle the dispute based on the relations of the parties *inter se*. Second, it supplies a logical norm that is endorsed by those whose conduct it governs. The settlement of the dispute aims to reconcile the relations and interests of the parties involved, while serving the ends of justice and fairness. Individual disputes may be decided using a plethora of differing mechanisms.

The exploration and use of outer space introduces many novel opportunities and dilemmas, and inspired insights are needed in the development of this new resource.[1] In particular, the settlement of space law disputes is a relatively new discussion in international law. Space law itself is still an embryonic domain of international law, and much energy has been directed to the substantive, as opposed to the procedural, part of the law. However, the significance of the settlement of space law disputes was acknowledged in various colloquia organized by legal academicians and practitioners around the world.

In the earlier exploratory phase of space activities, conflicting ideas in international space law signified only an abstract disagreement on legal principles. This did not impact significantly on actors' practical interests and the actual application of these legal principles. Disputes were more of an academic character. This situation will change with the burgeoning use of outer space and the escalating number of State and non-State actors involved in space activities. Disputes on diverse characteristics of space law cannot be left unresolved, permitting each actor to persist and act according to its own perspectives.

[1] Jasentuliyana, N., *International Space Law and the United Nations, A publication on the occasion of the Third United Nations Conference on the Exploration and Peaceful Uses of Outer Space (UNISPACE III)*, July 1999, Vienna, Austria, (1999), see particularly Chapter 8: Conflict Resolution in Outer Space at 215 - 223

Frequently these conflicting views and uses of outer space will be both theoretically and practically irreconcilable. Today, international space law confronts an intensifying clamor to construct practicable and just dispute settlement procedures that reflect the reality of contemporary international society.

The *modus operandi* of international space law is thus far better characterized as conflict avoidance rather than dispute settlement. While each is no less important than the other, it is submitted that these mechanisms occupy different time frames in the maintenance of peace in outer space. *Conflict avoidance* refers to the institution of mechanisms for cooperation and confidence building. Thus, conflict avoidance attempts to reduce the possibility of any disagreements in the use of outer space. *Dispute settlement*, on the other hand, refers to the framework that operates to resolve any such disagreements once they arise. Therefore, dispute settlement mechanisms are initiated upon the failure of conflict avoidance mechanisms to maintain peace. Both sets of mechanisms are indispensable to the maintenance of peace and security in outer space. The scope of this book focuses mainly on dispute settlement mechanisms. However, it acknowledges the significance of the link between these mechanisms by briefly considering the relationship between dispute settlement and conflict avoidance schemes in Chapter 6.

Efforts in conflict avoidance began with the launch of Sputnik I in October 1957. The United Nations established an *ad hoc* committee, which later became the United Nations Committee on the Peaceful Uses of Outer Space (UN COPUOS), to study quiescent conflict areas and resolve them in advance. The approach taken has been to aim to entirely avoid the conflict to begin with.

Possible problems were negotiated with the intent to reconcile contending interests and find solutions by consensus. Achieving consensus is useful, but often a tedious process. However, once agreement is reached, it enhances the likelihood of compliance, thus diminishing the probability of disputes. The negotiation history as documented in the *travaux préparatoires* of the five international space treaties negotiated within the UN COPUOS framework provide extensive proof as to the use of the consensus model to reduce and eliminate potential conflicts relating to outer space.

For example, the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies[2] aims to minimize the potential for conflict by declaring that outer space is free for "exploration and use by all States"[3] and by prohibiting any national appropriation of outer space "by claim of sovereignty, by

[2]Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, (1967), adopted on 19 December 1966, opened for signature on 27 January 1967, entered into force on 10 October 1967. (1967) 610 UNTS 205, 18 UST 2410, TIAS 6347, [hereinafter "Outer Space Treaty]

[3]Article I, Outer Space Treaty, see *supra* note 2

means of use or occupation, or by any other means".[4] The Treaty also agreed that the use of outer space "be carried out for the benefit and in the interests of all countries, irrespective of their economic or scientific development".[5] Other rules established in the Outer Space Treaty for avoiding conflicts include: the freedom to carry out scientific investigations in space;[6] that the moon and other celestial bodies will be used exclusively for peaceful purposes;[7] that the placing of nuclear weapons and weapons of mass destruction in outer space is prohibited;[8] international responsibility for national space activities;[9] that States are liable for reparation of damage caused by space objects;[10]and that the environmental balance of celestial bodies shall not be disrupted and that harmful effects to the earth's environment shall be avoided.[11] Part of the aspiration of these provisions is to eliminate potential conflicts over space resources and activities that otherwise might later have led to legal disputes.

One of the main elements that promoted such advance conflict avoidance procedures is that the exploration of outer space necessarily requires cooperation. For example, some space resources, while undepletable, are limited. The radio spectrum on which all space communication depends and the geostationary orbit on which most communication satellites are deployed are examples of these limited resources. These have to be equitably shared. States have to abide by the allocations made through the International Telecommunications Union (ITU). The alternative would be a state of conflict which would make the use of outer space much more precarious and difficult for all parties.

Hence, States have in advance cooperated in planning the use of these resources through the conclusion of a myriad of international agreements within the framework of the ITU World Administrative Radio Conferences for space communications (WARC - ST).[12] The ITU regulatory regime provides comprehensive regulations on the allocation of these resources. It also provides a sophisticated mandatory coordination system between various States to allocate the limited frequencies available and avoid harmful interference. The régime further also provides for the rules for the settlement of disputes that may nevertheless arise.[13]

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[4]Article II, Outer Space Treaty, see *supra* note 2

[5]Article I(1), Outer Space Treaty, see *supra* note 2

[6]Article I(3), Outer Space Treaty, see *supra* note 2

[7]Article IV, 2nd sentence, Outer Space Treaty, see *supra* note 2

[8]Article IV, 1st sentence, Outer Space Treaty, see *supra* note 2

[9]Article VI, Outer Space Treaty, see *supra* note 2

[10]Article VII, Outer Space Treaty, see *supra* note 2

[11]Article IX, Outer Space Treaty, see *supra* note 2

[12]Leive, D.M., *International Telecommunications and International Law: The Regulation of the Radio Spectrum*, (1970)

[13]Diederiks-Verschoor, I. H. Ph., "Legal Aspects Affecting Telecommunications Activities in Space", (1994) 1 Telecommunications & Space Journal 81; see also Goedhuis, D., "Influence de l'utilitsation des satellites en particulier ceux des telecommunications et des teledetections sur les relations internationals", (1975) 29 Revue francais droit aérien 378

Two other methods that have been undertaken to avoid conflicts in the use of outer space and its resources are:

- the institution of international and regional organizations; and
- the establishment of bilateral and multilateral cooperative space projects.[14]

Many space services are cross-boundary in nature and can be implemented and utilized more cost-effectively through wide cooperation. Examples of this include direct broadcasting, international telecommunications and meteorological services. Space activities are also expensive and require advanced technology that not readily available to all States. This has led to the willingness on the part of both States and non-State actors to integrate their resources and efforts in outer space.[15]

The International Telecommunications Satellite Organization (INTELSAT), the International Maritime Satellite Organization (INMARSAT), the Program on Cooperation in the Exploration of Outer Space for Peaceful Purposes (INTERCOSMOS), the International System and Organization of Space Communications (INTERSPUTNIK), the European Space Agency (ESA), the Arab Satellite Communications Organization (ARABSAT)[16] and the European Satellite Telecommunication Organization (EUTELSAT)[17] are prime examples of international and regional organizations that have been established to share space resources in a rational and coherent manner and avoid conflict situations.

Thus, international space law has taken a two-pronged approach. Firstly, it has undertaken the antecedent promulgation of legal norms and regulations aimed to reduce and eliminate potential conflicts. Concurrently, it aims to mobilize resources and technology to ensure access to outer space through mutually beneficial and inter-dependent arrangements. It appears that focus has traditionally been on conflict avoidance rather than on rules for the settlement of disputes that may arise.

An international régime that is deficient in coherent and effectual procedures for dispute settlement constitute an Achilles' heel in international law. This vulnerability is so critical that it easily reduces the efficacy of the law in that particular domain to naught. Further, the deficiency of appropriate fora and adequate rules of procedure also have an adverse effect on the settlement of potential disputes. This ultimately impedes the exploitation of outer space. A climate of confidence and legal certainty is an indispensable precondition,

[14]Edelson, B.L. and Pelton, J.N., "Can Intelsat and Intersputnik Cooperate?", (1989) 5 Space Policy 7

[15]see generally Lyall, F., *Law and Space Telecommunications*, (1989)

[16]Kries, W. von, "The Arabsat Agreement: Text and Comments", (1978) 27 ZLW 179

[17]At present, INTELSAT, INMARSAT and EUTELSAT have been privatized, and retain only a residual public character.

especially for commercial and private enterprise.[18] More generally relevant principles of liability and effective procedures for the peaceful settlement of disputes relating to space activities, if accepted by all States and non-States actors, would be instrumental in the development of effective and practicable international space law.[19]

A first notion of the dispute settlement mechanisms in international space law may be acquired from the basic instruments of space law. Yet, relevant provisions can only be found through recourse to the *travaux préparatoires* of these documents. Article 11 of the United States Draft to the Outer Space Treaty provided that "any disputes arising from the interpretation or application of this Agreement may be referred by any contracting Party thereto to the International Court of Justice for decision". The Soviet Draft however proposed that "in the event of disputes arising in connexion with the application or interpretation of the Treaty, the States Parties concerned shall immediately consult together with a view to their settlement".[20] There was no agreement on these two proposals.[21] This polemic of the two major space powers overshadowed the negotiations relating to dispute settlement in space treaties and agreements. As will be seen from the ensuing discussions, adaptations of both proposals were implemented. Aside from the 1972 Liability Convention,[22] all the other space law treaties elaborated within the framework of the United Nations are likewise taciturn on the subject.

The unresolved dispute as to the appropriate method of dispute settlement indicates the complexities in the area of the peaceful settlement of space-related disputes. Article III of the Outer Space Treaty, which provides that space activities shall be carried on "in accordance with international law, including the Charter of the United Nations", makes the provisions and procedures of the Charter and general international law applicable to space activities.[23] This

[18]Diederiks-Verschoor, I.H.Ph., "The Settlement of Disputes under Space Law", in Hague Academy of International Law / United Nations University (eds.), *The Settlement of Disputes on the New Natural Resources*, (1983), Workshop, The Hague 8 - 10 November 1982, (1983) at 85

[19]Cocca, A.A., "Law Relating to Settlement of Disputes on Space Activities", in Jasentuliyana, N. (ed.), *Space Law: Development and Scope* (1992) 191

[20]UN Docs. A/AC. 105/32, of June 17, 1966 (US) and A./6352 of June 16, 1966 (USSR). For text see: Jasentuliyana, N. and Lee, R.S.K., *Manual on Space Law*, Volume III, (1979) at 15 - 20

[21]von Margoldt, H., "Methods of Dispute Settlement in Public International Law", in Böckstiegel, K.-H. (ed.), *Settlement of Space Law Disputes: The Present State of the Law and Perspectives of Further Development*, Proceedings of an International Colloquium organized by the Institute of Air and Space Law, University of Cologne, September 13 and 14, 1979, (1980) 15

[22]Convention on Liability for Damage Caused by Objects Launched into Outer Space (1972), adopted on 29 November 1971, opened for signature on 29 March 1972, entered into force on 1 September 1972, (1971) 961 UNTS 187, 24 UST 2389, TIAS 7762, [hereinafter "Liability Convention"]

[23]Article III, Outer Space Treaty, see *supra* note 2

reference to general international law demonstrates that dispute settlement in space law is a sub-set within the panoptic field of international dispute settlement.

The Charter of the United Nations[24] is likewise reticent as to the obligation to actually settle disputes arising.[25] It states only that in a dispute, "the continuance of which is likely to endanger the maintenance of international peace and security, [the parties] shall, first of all, seek a solution" by one of the means mentioned, "or other peaceful means of their choice". This choice, according to the Friendly Relations Declaration, means that disputes are always resolved "in accordance with the principle of free choice of means".[26] This Riphagen Formula shows the fundamental quandary of inter-State dispute settlement: The free will and the agreement of parties involved in the specific dispute always governs the means of dispute settlement to be applied.[27]

What is however clear, is that the techniques used in international space law are not novel ones, but are old techniques of dispute settlement. In providing for the application of international law and the United Nations Charter to the exploration and use of space resources, the Outer Space Treaty imported all the traditional means of peaceful settlement. However, the space treaties and arrangements have also provided for specific procedures for settlement of disputes. These too, fall within the classification of traditional techniques of dispute settlement - consultations, good offices, mediation, conciliation, arbitration, claims commission and adjudication.

This chapter will proceed to critically assess the existing procedures of dispute settlement in international space law. It will look at the three UN treaties that contain provisions for dispute settlement: The 1967 Outer Space Treaty, the 1972 Liability Convention, and the 1979 Moon Agreement. It will then take a brief look at UN General Assembly resolutions, various inter-governmental and regional organizations' methods of dispute settlement, as well as provisions for dispute settlement in bilateral and project-based agreements. It will then analyze the recent efforts by the United Nations, the International Law Association, the International Institute of Space Law, and other organizations to establish an international instrument for dispute settlement in space law.

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[24]Charter of the United Nations, (1945) 59 Stat. 1031, UNTS No. 993 [hereinafter "UN Charter"]

[25]Article 2(3) and 33(1) of the UN Charter, *ibidem*

[26]Declaration of the Principles of International Law concerning Friendly Relations and Co-operation between States, (24 October 1970) GA Res. 2625 (xxv), Annex, (1970) 9 ILM 1292 and reproduced in Brownlie, I., *Basic Documents in International Law*, (4th ed., 1995) 36

[27]see generally Böckstiegel, K.-H. (ed.), *Settlement of Space Law Disputes: The Present State of the Law and Perspectives of Further Development*, Proceedings of an International Colloquium organized by the Institute of Air and Space Law, University of Cologne, September 13 and 14, 1979, (1980)

1.1 Assessment of Existing Procedures

Procedures for dispute settlement in international space law are few and far in between. There are no provisions for compulsory dispute settlement. The 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space[28] and the 1974 Convention on Registration of Objects Launched into Outer Space[29] both do not contain any special provision for the solution of conflicts. The 1972 Convention on Liability for Damage Caused by Objects Launched into Outer Space[30] constitutes an exception to this rule. For claims for compensation for damage, more elaborate regulations were consented to and a specific Claims Commission proceeding was instituted.

This peculiarity of international space law can be explained in the light of the opinions and political preferences of many governments at the time of the elaboration of the UN space treaties.[31] The majority of the delegations to UN COPUOS were averse to accepting undue or comprehensive obligations on this point of law. The original intention of the drafters of the UN space treaties was to outline general broad-spectrum principles and legal guidelines for future space activities.[32] Space activities then, were still in an experimental embryonic phase. Upon the occurrence of disputes or conflicts, governments preferred to resort to the traditional confidential, non-legal means of diplomatic intercourse. Governments evinced a patent partiality in such circumstances to initiate direct negotiations. They would only resort to mediation, conciliation or other non-binding dispute settlement procedures when those first negotiation attempts had failed to reach a solution. There was an obvious reluctance to have recourse to any binding third party dispute settlement mechanism such as arbitration or adjudication.[33]

The rapid advancement of scientific discoveries and technological progress was another motive for the lack of enthusiasm to incur additional obligations with respect to compulsory dispute settlement procedures. Political and eco-

[28]Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, (1968), adopted on 19 December 1967, opened for signature on 22 April 1968, entered into force on 3 December 1968. (1968) 672 UNTS 119, 19 UST 7570, TIAS 6599 [hereinafter "Rescue Agreement"]

[29]Convention on Registration of Objects Launched into Outer Space (1974), adopted on 12 November 1974, opened for signature on 14 January 1975, entered into force on 15 September 1976, (1976) 1023 UNTS 15, 28 UST 895, TIAS 8480

[30]see *supra* note 22

[31]Herczeg, I., "Introductory Report - Provisions of the Space Treaties on Consultations", (1974) 17 Proc. Coll. Law of Outer Space 141

[32]Sloup, G.P., "Peaceful Resolution of Outer Space Conflicts through the International Court of Justice: 'The Line of Least Resistance' ", (1971) 20 DePaul Law Review 618

[33]Poulantzas, N.M., "Certain Aspects of the Potential Role of the International Court of Justice in the Settlement of Disputes Arising of Space Activities", (1964) 7 Proc. Coll. Law of Outer Space 186

nomic interests steadily increased as to the development of the use of outer space. Remote sensing, direct broadcasting, telecommunications, the mineral exploitation of the Moon and other celestial bodies, as well as the extraordinary tactical advantages of the military use of outer space added to the mounting conflicting interests between States, both space-faring and non-space-faring. States' consciousness that their varied interests could in future mature into severe conflicts was undeniably a substantial persuasion for being opposed to all compulsory procedures, and for choosing the uninhibited maneuvering characteristic of negotiation and traditional diplomatic intercourse.[34]

Further, the growth of the use of outer space will see a rising number of States and non-States take part in space activities. As more actors become involved, there will also be a greater threat of disputes. For these different reasons, governments were opposed to compulsory procedures, such as arbitration and adjudication.[35]

In the framework of the UN space treaties, the closest approximation to mention of a dispute settlement mechanism is the word "consultation". This obligation could only consist of three phases, and is aimed more at preventing disputes than at settling them. These three phases are

1. Prior notification of the plan of space activities;
2. Right of the affected State to request consultation; and
3. Duty of the affecting State to enter into consultation.[36]

There are, however, other provisions in the treaties that could plausibly be used to denote a preference for the peaceful settlement of disputes. Further, later inter-governmental, regional and bilateral agreements have also established their own provisions for dispute settlement. The following sections consider these existing procedures for the settlement of space-related disputes.

1.1.1 The 1967 Outer Space Treaty and the UN Charter

The 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies[37] was the first major binding international space law instrument. However, in part due to the political climate of the day, it does not contain any

[34]Böckstiegel, K.-H., "Ein Überblick über die Quellen zur Entscheidung weltraumrechtlicher Streitigkeiten", (1978) 27 ZLW 18

[35]Böckstiegel, K.-H., "Arbitration and Adjudication Regarding Activities in Outer Space", (1978) 3 JSL 1

[36]Nakamura, M., "Consultation Regime in Space Law", (1992) 35 Proc. Coll. Law of Outer Space 411

[37]see *supra* note 2 In this section, all Articles, unless specified otherwise, refer to those in the Outer Space Treaty. see also Lachs, M., "The Treaty on Principles of Law of Outer Space, 1967 - 92", (1992) 39 Netherlands International Law Review 291

specific provisions for or references to the settlement of disputes.[38] Article III incorporates principles of general international law, including those in the Charter of the United Nations.[39] Accordingly, all the dispute settlement mechanisms admitted by general international law and the Charter, including the provisions of Chapters VI and VII of the Charter, are applicable to activities related to outer space. The Outer Space Treaty includes two other provisions concerning consultations in Article XI, and resolution of practical questions in Article XIII. [40] However, these provisions are more as a means of conflict avoidance rather than as a means for dispute settlement.

The Outer Space Treaty does not provide any particular machinery for the settlement of disputes in cases governed by its provisions. Article III of the Outer Space Treaty reads

> "States Parties to the Treaty, shall carry on activities in the exploration of Outer Space, including the Moon and other celestial bodies in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding."[41]

This signifies that the regulations and procedures for the settlement of disputes in general international law are applicable to disputes arising from space activities.

The UN Charter contains, in its Preamble and in several Articles, provisions relating to the settlement of disputes. Article 1(1) of the Charter states that one of the purposes of the organization is

> "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."[42]

Consequently, Article 2(3) of the UN Charter provides that

> "all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[43]

[38]Lachs, M., *The Law of Outer Space - An Experience in Contemporary Law-Making*, (1972) at 121

[39]See *supra* note 24

[40]see Cocca, A.A., Conference Statement made at *Solución de Controversias en Derecho Espacial* (Settlement of Space Law Disputes), Córdoba, Argentina, The Council of Advanced International Studies, (1981) at 73

[41]Article III, Outer Space Treaty, see *supra* note 24

[42]Article 1(1), UN Charter, see *supra* note 24

[43]Article 2(3), UN Charter, see *supra* note 24

These UN Charter provisions have been reaffirmed in several General Assembly resolutions calling for dispute settlement through peaceful means. These include inquiry, mediation, good offices, conciliation, arbitration, resort to regional agencies or arrangements, and adjudication by permanent international courts.

Flowing from Article 2(3) of the UN Charter, the Charter's Chapter VI is devoted to the pacific settlement of disputes. Article 33 provides that a party to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all seek a solution by various means, listed as:

> "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[44]

Although not specifically mentioned in Article 33, the practices of consultation and good offices are also valuable means to settle disputes and resolve a conflict situation in international relations. However, by subjecting the available means above to the special condition that the dispute be one that is "likely to endanger the maintenance of international peace and security", and also due to the non-committal nature of the obligation,[45] Article 33 does not appear to provide for an adequate means for the effective settlement of disputes in general.

The power and competence of the Security Council under Chapter VII of the UN Charter provides another avenue for dispute settlement. However, such involvement and any subsequent Security Council action is preconditioned by the likelihood of endangering the maintenance of international peace and security,[46] reducing it once again to a remedy to be used only in exceptional circumstances.[47]

Another route for the peaceful settlement of disputes is through adjudication by the International Court of Justice (ICJ), the principal judicial organ of the UN. The potential of the ICJ for the settlement of disputes relating to outer space cannot be understated.[48] This in particular because all members of the UN are *ipso facto* parties to the Statute of the ICJ[49]. Moreover, a State which

[44] Article 33(1), UN Charter, see *supra* note 24

[45] Parties are required only to "seek" a solution.

[46] Article 39, UN Charter, see *supra* note 24. It is beyond the scope of this book to consider the use of force in outer space, or the militarization of outer space. It is also outside of the scope of this book to consider armed enforcement of international law, as it focuses on the peaceful settlement of disputes.

[47] On the topic of the power and competence of the UN Security Council and its use and delegations of its Chapter VII powers, see generally Sarooshi, D., *The United Nations and The Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*, (1999)

[48] On the subject of the ICJ and its applicability to the settlement of disputes relating to outer space, see *infra* Chapter 2.

[49] Article 93, UN Charter, see *supra* note 24

is not a Member of the United Nations may become a party to the Statute "on conditions to be determined in each case by the General Assembly upon recommendation of the Security Council".[50]

Article 92 - 96 in Chapter XIV of the UN Charter are devoted to the ICJ and its procedures for dispute settlement. The effect of Article 94 of the Charter, which provides for compliance with decisions of the ICJ by each UN Member, is however, largely invalidated by the voluntary nature of the jurisdiction of the Court, expressed in terms that its jurisdiction "comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force".[51]

Compulsory jurisdiction is possible when parties so declare.[52] However, State practice reveals that only a small number of States have committed themselves in this respect. This severely restricts the number of cases eligible for compulsory jurisdiction by the Court, thus diminishing to a large extent the value of the Court for the effective settlement of disputes. This applies even more so to the area of space activities, as none of the space-faring States has recognized the jurisdiction of the ICJ according to the optional clause.[53] Another disadvantage in connection with the jurisdiction of the International Court of Justice is that only States may be parties in cases before the Court.[54] This restriction on the *locus standi* of potential disputants severely limits the usefulness of the Court in the field of international space law, especially in the light of the proliferation of non-governmental, intergovernmental and regional organizations, as well as the commercialization of activities in outer space.

Reverting to the Outer Space Treaty, it is instructive to note that two Articles provide for the responsibility of States Parties in the case damage caused by their activities in outer space. Article VI of the Outer Space Treaty provides that

> "States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or non-governmental entitiesThe activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervi-

[50] Article 94, UN Charter, see *supra* note 24

[51] Article 36(1), Statute of the International Court of Justice (1945) 9 ILM 510, [hereinafter "ICJ Statute"]

[52] Article 36(2), Statute of the International Court of Justice, *ibidem*

[53] von Margoldt, H., "Methods of Dispute Settlement in Public International Law", in Böckstiegel, K.-H. (ed.), *Settlement of Space Law Disputes: The Present State of the Law and Perspectives of Further Development*, Proceedings of an International Colloquium organized by the Institute of Air and Space Law, University of Cologne, September 13 and 14, 1979, (1980) 15 at 17

[54] Article 34, Statute of the International Court of Justice, see *supra* note 51

sion by the appropriate State Party to the Treaty."[55]

Article VI also provides for responsibility of international organizations, stating that responsibility for compliance shall be borne both by the organization and by the States Parties participating in such an organization. As the Outer Space Treaty provides the legal framework for all space activities and lays down all the fundamental principles of space law, violation of the Treaty would amount to violation of the outer space legal régime in general.

Similarly, the general doctrine on State responsibility provides that States are responsible for "internationally wrongful acts": acts violating obligations under international law.[56] International law in general is held to apply also to outer space.[57] Therefore, under Article VI, the concept of state responsibility for activities undertaken in outer space generally becomes operative whenever these activities violate obligations under international space law.

Article VI however diverges from the general doctrine of State responsibility. Article VI stipulates that States are equally responsible for private activities as they are for public ones. A State cannot claim to be exempt from international responsibility for private activities by arguing that it acted with "due care".[58] For the purposes of international responsibility, private space activities are without any proviso equated to the activities of States. This gives rise to a major impetus for States to take legislative action to authorize and continually supervise the private space activities of its nationals. In the event of any violation, the State itself will incur international responsibility for the act.

Apart from the general issue of international responsibility, States will also want to deal with the potential international liability, which arises from private space activities.[59] Liability in international space law, operates on the State level as well,[60] with no private liability involved - but distinctly from general international responsibility. Therefore, space law liability apart from its substantive contents presents a particular form of accountability in addition to responsibility.

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[55]Article VI, Outer Space Treaty, see *supra* note 2

[56]See Articles 1, 3 and 4 of the International Law Commission's Draft Articles on State Responsibility, ILC Yearbook 1980 Vol II 30 - 34; Brownlie, I., *The System of the Law of Nations* (1983), 22 - 31

[57]Article III, Outer Space Treaty, see *supra* note 2 and accompanying text; see also Lachs, M., *The Law of Outer Space* (1972), 14; Wassenbergh, H.A., *Principles of Outer Space Law in Hindsight* (1991), 15 and Hobe, S., *Die rechtlichen Rahmenbedingungen der wirtschaftlichen Nutzung des Weltraum* (1992) 75

[58]For the doctrine of Due Care, see Garcia Amador, F.V., "State Responsibility - Some New Problems", (1958), 94(2) Recueil des Cours 403

[59]For a discussion of the concepts of international responsibility and international liability in space law, see generally von der Dunk, F.G., "Liability versus Responsibility in Space Law: Misconception or Misconstruction?", (1992) 34 Proc. Coll. Law of Outer Space 363

[60]Articles II and III, Liability Convention, see *infra* section 1.1.2

Article VII deals directly with liability for damage. Article VII of the Outer Space Treaty provides that launching States of space objects are

> "internationally liable for damage to another State...or its natural and juridical persons by such object or its component parts on the Earth, in air space or in outer space, including the Moon and other celestial bodies."[61]

This clause is elaborated by the Liability Convention, affirming that States are the only entities[62] which can possibly incur international liability as "launching States" in international space law.[63]

Both Articles VI and VII stipulate on the scope of responsibility of States Parties, which is then expanded by the 1972 Liability Convention. However, neither provision gives an indication of how such responsibility would be enforced, or how disputes arising in regard to any potential damage caused by space activities would be settled. There is no provision for any dispute settlement mechanism in either of these cases. While dealing with the substantive part of the law involving liability, these two provisions do not give a clue as to the procedural law that might be invoked to enforce liability.

One article that does appears to provide for a procedure for dispute settlement is Article IX, which provides

> "In the exploration and use of outer space, including the Moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of cooperation and mutual assistance, and shall conduct all their activities in outer space, including the Moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty.
> . . .
> If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the Moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties . . . it shall undertake appropriate international consultations before proceeding with any such activity or experiment. A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party . . . would cause potentially harmful interference with activities in the peaceful exploration and

[61] Article VII, Outer Space Treaty, see *supra* note 2. See also Christol, C.Q., *The Modern International Law of Outer Space* (1982) at 90

[62] With the exception of course, of international intergovernmental organizations: See Article XXII, Liability Convention, see *supra* note 22, also see *infra* section 1.1.2

[63] Article I(c) Liability Convention, *ibidem*

> use of outer space . . . may request consultation concerning the activity or experiment."[64]

This means of preventing rather than solving a dispute is however, restricted to cases of potential harmful interference of space activities with the activities of other States Parties. The actual procedure to be followed is highly speculative. There is no follow-up as to the time frame stipulated, nor are States required to follow a particular procedure for these "consultations".

Another provision that provides some measure of procedure to be followed in the case any "practical questions" arise is Article XIII, which stipulates:

> "Any practical questions arising in connection with activities carried out by international intergovernmental organizations in the exploration and use of outer space, including the Moon and other celestial bodies, shall be resolved by the States Parties to the Treaty either with the appropriate international organization or with one or more States members of that international organization, which are Parties to this Treaty."[65]

This Article merely provides that in the case of practical questions arising, these should be resolved. This repeats in a manner specific to international intergovernmental organizations the obligation of States to resolve disputes.

An assessment of the provisions of the Outer Space Treaty communicates an adequate insight into the lack of provision for dispute settlement mechanisms in international space law. Only three clauses of the Outer Space Treaty concern conflict avoidance in outer space, one of which does so obliquely. Article IX provides a preventive measure. It imposes consultations when a dispute arises due to the space activities of different States. According to this Article, a State shall proceed to consultations when it has reason to believe that one of its planned activities or experiments would cause potentially harmful interference with the space activities of other States. It will not pursue these activities or experiments before these consultations have been held. Conversely, any State can request consultations, when it has reason to believe that the planned activities or experiments of another State may cause harmful interference with its own space activities. Article XIII supplements this by dealing with possible disputes regarding intergovernmental organizations. When these organizations are engaged in space activities and States encounter difficulties over practical matters, the latter may try to resolve them with the appropriate organization or with one or more of its States Members. Neither Article IX nor Article XIII provides any specificities on how these "consultations" are to be conducted, or how these "questions" are to be resolved.

[64] Article IX, Outer Space Treaty, see *supra* note 2
[65] Article XIII, Outer Space Treaty, see *supra* note 2

These two clauses of the Treaty do not introduce any innovation into the procedures for peaceful settlement of disputes.[66] Further, they do not provide for any other of third party dispute settlement. They both endorse the traditional practice of diplomatic intercourse, without recourse to the law. That a State proceeds by diplomatic channels to negotiations with another State when there is reason to fear that the latter is going to start a harmful activity prejudicial to itself is in the normal course of State action.

Article III obliquely introduces dispute settlement mechanisms to international space law through the invocation of general principles of international law and the UN Charter. While this presents a plethora of dispute settlement mechanisms for use in disputes concerning space activities, several insufficiencies must be stated. First, the reference to any dispute settlement mechanism is extremely indirect, and Article III implies rather than imposes any form for dispute settlement through the Outer Space Treaty. Second, the provisions in the UN Charter and in customary international law for the peaceful settlement of disputes are general motherhood principles of international law, and more than this is required in a novel, rapidly evolving field of law and activity. Third, even references to the UN Charter (and through that the Statute of the International Court of Justice) do not by any stretch of imagination institute any form of satisfactory dispute settlement mechanism. There is no binding obligation to submit disputes to any of these processes mentioned, nor is there any inkling of any inclination on the part of space-faring States to submit to the jurisdiction of the International Court. Fourth, it is questionable whether the traditional model of international dispute settlement through the UN Charter, where States exclusively play on an international plane, is suitable to space law. In the field of activity that transcends the conventional borders of international law, any construct for dispute settlement should be forward-looking. It should not simply plagiarize without thought the means of dispute settlement based solely on an increasingly outdated State-only model.

The provisions of the Outer Space Treaty do not add any novel means of dispute settlement that does not already exist in traditional diplomatic intercourse. From this point of view, the question may be raised whether these provisions are redundant. The Outer Space Treaty remains exceptionally traditional on the issue of dispute settlement and regrettably does not introduce any compulsory or progressive procedures into such a new branch of law as international space law.[67]

[66] This could well be attributed to the political climate due to the Cold War at the time of their negotiation.

[67] Bückling, A., "Weltraumrecht ünd internationale Gerichtsbarkeit", (1963) Juristenzeitung 500

1.1.2 The 1972 Liability Convention

The foremost breakthrough in providing for a specific, workable mechanism for dispute settlement relating to space activities was achieved in the 1972 Convention on International Liability for Damage Caused by Space Objects.[68] The Preamble of the Liability Convention recognizes:

> "the need to elaborate effective international rules and procedures concerning liability for damage caused by space objects and to ensure, in particular, the prompt payment under the terms of this Convention to victims of such damage."[69]

The negotiations leading up to the Liability Convention were difficult. The Legal Sub-Committee of UN COPUOS had to settle the very contentious matter of jurisdiction for claims not settled by diplomatic negotiations. Some delegations presented proposals providing for compulsory jurisdiction. The Belgian and the U.S. delegations proposed drafts for compulsory arbitration.[70] The Hungarian draft also provided for the establishment of an arbitral tribunal by agreement of the States concerned. Its competence, however, did not entail a settlement of the dispute by a decision which had the legal quality of a res judicata. The arbitral commission was conceived more to act as a conciliation committee.[71]

The Hungarian draft was supported by the delegations of the Soviet Union and the other Eastern European countries.[72] Their shared position evidently seemed motivated by their common unwillingness to accept compulsory dispute settlement procedures. They did not plan to renounce their sovereign freedom of construing international law according to their own legal and political opinions. This led to the drafting of the dispute settlement mechanisms becoming one of the most complex parts of the preparatory work. Several delegations from Western countries expressed their deep regret that a solution could not even be arrived at a process that did not contain legally binding force, but which should only settle the dispute on a moral and political basis. These critical observations were made in somewhat harsh terms by the Belgian and French delegates during the session of the 1970 Legal Sub-Committee meeting. In June 1971 there was eventually a joint draft by the Belgian, Brazilian and Hungarian delegations. This included a compromise and became the present

[68] see *supra* note 22. In this section, all Articles, unless specified otherwise, refer to those in the Liability Convention.

[69] Paragraph 4, Preamble, Liability Convention, see *supra* note 22

[70] Article 3 of UN Doc. A/AC.105/C.2/L.7/Rev. 3 ; Article X of UN Doc. A/AC.105/C.2/L.19

[71] Article XI of UN Doc. A/AC.105/C.2/L.10/Rev.1 and paragraph 17 of UN Doc. A/AC.105/37

[72] UN Doc. A/AC.105/C.2/SR.101 at 128

draft of the Liability Convention on the issue. The compulsory character of the dispute settlement mechanism was, however, discarded.

The Convention contains a system under Article IX to settle claims through diplomatic channels. Article IX provides

> "A claim for compensation for damage shall be presented to a launching State through diplomatic channels. If a State does not maintain diplomatic relations with the launching State concerned, it may request another State to present its claim with the launching State or otherwise represent its interests under this Convention. It may also present its claim through the Secretary-General of the United Nations, provided the claimant State and the launching State are both Members of the United Nations."[73]

The Liability Convention contains the most extensive regulation of dispute settlement available in the framework of international space law. A claim for compensation for damage can be presented by the claimant State to the launching State through diplomatic channels. It also provides for procedures in the event that there happens to be no diplomatic relations between the States concerned.

Articles XII to XX of the Convention specify the means for settling a dispute, including the basis for assessing damage, the form of compensation, and the negotiation and arbitration of claims in case of disagreement. Article XII prescribes

> "The compensation which the launching State shall be liable to pay for damage under this Convention shall be determined in accordance with international law and the principles of justice and equity, in order to provide such reparation in respect of the damage as will restore the person, natural or juridical, State or international organization on whose behalf the claim is presented to the condition which would have existed if the damage had not occurred."[74]

The basis for settling on the proper compensation has been understood to be the law of the State where the damage occurred. This position has been supported in the United Nations by Argentina, Australia, Canada, Italy, Japan, the United Kingdom and Sweden.[75] Article XII also provides that compensation should be sufficient to restore the situation "to the condition which would have existed if the damages had not occurred". This provision is the most complete definition of damage that has been offered in international law.

[73] Article IX, Liability Convention, see *supra* note 22
[74] Article XII, Liability Convention, see *supra* note 22
[75] UN Doc. A/AC.105/C.2/L.74

If no settlement of a claim can be reached through diplomatic negotiations within one year of notification, procedures will continue via the establishment of a Claims Commission under Article XIV. Article XIV provides:

> "If no settlement of a claim is arrived at through diplomatic negotiations as provided for in article IX, within one year from the date on which the claimant State notifies the launching State that it has submitted the documentation of its claim, the parties concerned shall establish a Claims Commission at the request of either party."[76]

The Convention subsequently provides the constitution of the Commission in Articles XV to XX. Article XV provides:

> "1. The Claims Commission shall be composed by three members: one appointed by the claimant State, one appointed by the launching State and the third member, the Chairman, to be chosen by both parties jointly. Each party shall make its appointment within two months of the request for the establishment of the Claims Commission."
> . . .
> 2. If no agreement is reached on the choice of the Chairman within four months of the request for the establishment of the Commission, either party may request the Secretary-General of the United Nations to appoint the Chairman with a further period of two months."[77]

If one of the parties does not make its appointment within the aforementioned period, the other party can request the chairman to form a single-member Claims Commission.[78] When a vacancy arises in the Commission, a replacement shall be provided in accordance with the same procedure.[79] The number of members of the Commission shall not be increased when there is more than one claimant State or launching State involved in the procedure. Each group of parties will collectively appoint its member of the Commission and if the designation is not made within the stipulated period of two months, the chairman shall constitute a single-member Commission.[80]

Upon the establishment of the Claims Commission in accordance with the Liability Convention, Article XVIII states that

[76] Article XIV, Liability Convention, see *supra* note 22
[77] Article XV, Liability Convention, see *supra* note 22
[78] Article XVI(1), Liability Convention, see *supra* note 22
[79] Article XVI(2), Liability Convention, see *supra* note 22
[80] Article XVII, Liability Convention, see *supra* note 22

> "The Claims Commission shall decide the merits of the claim for compensation and determine the amount of compensation payable, if any."[81]

All decisions and awards shall be based on a majority vote.[82] In so doing, the Claims Commission will determine its own procedure[83] as well as all administrative matters and its seat.[84] In determining its procedure, the Commission shall have due regard to the appropriate rules provided by the Liability Convention itself. It is obliged to give its decisions or award not later than one year from the date of its establishment. An extension of this period may be decided only where necessary.[85] The Convention does not contain a more precise condition for prolonging the activities of the claims procedure. However, an analysis inspired by the intent to carry out the obligation with good faith and due diligence clarifies that the extension should be for the purpose of reaching a settlement acceptable to the parties.

The Convention also contains an important provision regarding the binding force of the results of this procedure. Article XIX(2) provides that

> "The decision of the Commission shall be final and binding if the parties have so agreed; otherwise the Commission shall render a final and recommendatory award, which the parties shall consider in good faith. The Commission shall state the reasons for its decision or award."[86]

Further, Article XIX(4) stipulates that

> "The Commission shall make its decision or award public."[87]

This provision plainly specifies that the ultimate effect of the Claims Commission procedure depends on the parties' will. They can agree voluntarily to consider the final decision as legally binding or they can accept it as a recommendatory opinion. However, in the latter case its effect is again dependent on the free will of the States involved. All things considered, whether the final decision of the Claims Commission will have the significance of an arbitral award or be only a non-binding recommendation depends on the will of the disputing States Parties.

As to the expenses of the Commission procedure, Article XX states that

[81] Article XVIII, Liability Convention, see *supra* note 22
[82] Article XVI(5), Liability Convention, see *supra* note 22
[83] Article XVI(3), Liability Convention, see *supra* note 22
[84] Article XVI(4), Liability Convention, see *supra* note 22
[85] Article XIX(3), Liability Convention, see *supra* note 22
[86] Article XIX(2), Liability Convention, see *supra* note 22
[87] Article XIX(4), Liability Convention, see *supra* note 22

> "The expenses in regard to the Claims Commission shall be borne equally by the parties, unless otherwise decided by the Commission."[88]

Once more, there are no defined standards for the Commission's decision as to costs. It seems reasonable however, that gross or willful negligence or an intention to cause harm on the part of one of the States involved can constitute a reason for apportioning a greater amount of costs. This would be consistent with the usual consequence of an act committed *culpa lata*, for which the responsible party generally bears all unfavorable consequences.

The Liability Convention also gives consequence to the standing of international intergovernmental organizations. Article XXII(1) places international intergovernmental organizations on approximately the same level as States Parties if certain preconditions are fulfilled. These organizations are deemed to bear responsibilities similar to those of States Parties'.[89] In the event of joint and several liability with States, international intergovernmental organizations are deemed to bear a preferential responsibility during a period of six months. When an international intergovernmental organization acts as claimant, Article XXII(4) stipulates that its claim is to be represented by a State Member of the organization that is also a State Party to the Liability Convention.[90] This is markedly different from the traditional attitude of space law to other natural and juridical persons engaged in space activities that are not intergovernmental organizations.

The Liability Convention also specifies time limits for the presentation of claims. Article X states that

> "1. A claim for compensation for damage may be presented to a launching State not later than one year following the date of the occurrence of the damage or the identification of the launching State which is liable.
>
> 2. If, however, a States does not know of the occurrence of the damage or has not been able to identify the launching State which is liable, it may present a claim within one year following the day on which it learned the aforementioned facts; however, this period shall in no event exceed one year following the date on which the State could reasonably be expected to have learned of the facts through the exercise of due diligence."[91]

[88] Article XX, Liability Convention, see *supra* note 22
[89] Article XXII(3), Liability Convention, see *supra* note 22
[90] Article XXII, Liability Convention, see *supra* note 22
[91] Articles X(1) and X(2), Liability Convention, see *supra* note 22

The aforementioned time limits shall even be applied if the full extent of the damage is not known.[92] On this premise, the claimant State is entitled to amend its claim and introduce additional documents even after the expiration of these time limits. However, this ancillary right may not be availed of more than one year after the time the full extent of the damage was known.[93] It is submitted that it is perfectly reasonable that determined limitation periods are required for the presentation of claims. Dispute settlement processes must not be started many years after the event causing damage. This is because it becomes increasingly onerous to secure proof of the actual facts, and uncertainty on space liability is undesirable both for inter-State relations, and the development of the both public and commercial uses of outer space.

The Liability Convention also deals with the rule of exhaustion of local remedies. In classical international law, recourse to international tribunals for private entities must be preceded by an exhaustion of all local legal remedies. Standing before international tribunals is only permissible when the procedures of the local laws are exhausted.[94] The Liability Convention establishes an exception to this rule because it provides a method by which the claimant State, or the natural or juridical persons that it represents, need not exhaust, or even initiate, procedures for local redress. Article XI(1) states

> "Presentation of a claim to a launching State for compensation of damage under this Convention shall not require the prior exhaustion of any local remedies which may be available to a claimant State or to natural or juridical persons it represents."[95]

The Liability Convention only prohibits contemporaneous pursuit of the same claim for damage under Article XI(2).

Article XI confers a choice on the victim. It may choose to have its representative State bring its claim under the provisions of the Liability Convention. It may also do so itself before the courts of the launching State if the law of the launching State is more advantageous. The question may be raised though, whether the claimant may still apply the international procedure of the Convention after having pursued the claim before the national jurisdiction of the launching State. A positive answer seems to be contrary to the purpose of the Article, as it was aimed to provide an exception to the classical rule of international law. Its text clearly states that the "(presentation of a claim) shall not require the prior exhaustion of any local remedies". It also provided for the establishment of a simple process to settle these possible disputes. The under-

[92] Article X(3), Liability Convention, see *supra* note 22

[93] *ibidem*, Gorove, S., "Dispute Settlement in the Liability Convention", in Böckstiegel, K.-H., (ed.), *Settlement of Space Law Disputes*, (1980) 47

[94] *Norwegian Loans* Case (1968) ICJ Rep. 97; *Interhandel* Case, (1959) ICJ Rep. 27

[95] Article XI(1), Liability Convention, see *supra* note 22

taking of two procedures for the same claim would contradict this purpose.[96]

The Liability Convention does provide a detailed, intricate mechanism for the settlement of claims due to damage caused by space activities. Aside from introducing a procedure of dispute settlement into space law, it also transcends the traditional borders of classical international law and establishes creative exceptions that widen the scope of jurisdiction and accessibility of the Claims Commission.

The major deficiency of the Liability Convention however, lies in the fact that its decision shall only be final and binding if the parties have so agreed, which diminishes the decision to the status of an advisory award in all other cases.[97]

Moreover, only States, being party to the Liability Convention, can act on behalf of natural or juridical persons who have suffered damage. This leaves the initiation of any such action to the discretion of the relevant States. However, this condition is alleviated by Article VIII, entitling more than one State to present such a claim in the alternative, depending on its relationship with the juridical person who has suffered damage. The flexibility of the rule of nationality of claims is a significant step towards protecting the interests of private parties through international law. Nevertheless, private parties are still wholly reliant on States to initiate action in order to materialize their claims under the Liability Convention.

The means for presenting a claim however, are along the same lines as the usual customs of diplomatic intercourse. States that claim damage and compensation from another State generally initiates diplomatic negotiations as a first step. If no diplomatic relations exist between the States involved in the conflict, a third State may act as the representative of one of the parties.[98] The eventual function of the Secretary-General is a logical result the Convention being prepared and adopted within the framework of the United Nations.[99]

Nonetheless, there are lacunae relating to certain issues. The Liability Convention does not mention if the third State presenting the claim on behalf of the claimant State must also be a Party to the Liability Convention. It does act in accordance with a provision of the Liability Convention, and therefore it seems that it shall also be bound by it.[100]

Another issue concerns the presentation of claims against international organizations. Reservations may be raised as to the competence of the UN

[96] Gorove, S., "Dispute Settlement in the Liability Convention", in Böckstiegel, K.-H., (ed.), *Settlement of Space Law Disputes* (1980) 47

[97] Article XIX, Liability Convention, see *supra* note 22

[98] Marcoff, M.G., *Traité de droit international public de l'espace*, (1973) 551

[99] Cheng, B., "International Liability for Damage Caused by Space Objects", in Jasentuliyana, N. and Lee, R.S.K, (eds.), *Manual on Space Law*, (1979) Volume I at 133

[100] Cheng, B., 'International Liability for Damage Caused by Space Objects', in Jasentuliyana, N. and Lee, R.S.K, (eds.), *Manual on Space Law*, (1979) Volume I at 133

Secretary-General to present such claims, because these international legal entities are not Members of the United Nations.[101] Further, a similar doubt arises as to whether such an organization may present its claim by using the Secretary-General. Both questions may however, remain theoretical. States Members of such organizations that participate in space activities will usually be parties to the Liability Convention, and can always act as claimant States according to Article XXII(4).[102]

1.1.3 The 1979 Moon Agreement

The dispute settlement procedure provided by the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies[103] is uncomplicated. It does not contain any obligation for the compulsory submission of disputes to settlement procedures. Fundamentally, it is restricted to negotiation and mediation by the UN Secretary-General. However, this does not imply any binding obligation on States Parties to accept the settlement proposals of the highest administrative authority of the United Nations.

The USA Draft Proposal of the Moon Treaty[104] proposed the International Court of Justice as the institution for the settlement of disputes in connection with the interpretation and application of the Moon Treaty. This proposal however met with stiff resistance in the UN COPUOS, and was subsequently rejected from the final form of the Moon Agreement.

The dispute settlement provisions in the Moon Agreement begin with the landing of space objects and the placement and movement of personnel, space vehicles, equipment, facilities, stations and installations on the Moon.[105] The first consideration is the potential interference of States Parties with activities of other States Parties in this respect.

Article 8(3) of the Moon Agreement provides

> "Activities of States Parties in accordance with paragraphs 1 and 2 of this article shall not interfere with the activities of other States Parties on the Moon. Where such interference may occur, the State

[101] *ibidem* at 136

[102] For excellent discourses on the Liability Convention, see generally Haanappel, P.P.C., *The Law and Policy of Air Space and Outer Space: A Comparative Approach*, (2003), especially with regard to the comparative analysis of liability issues in air law and international space law; Diederiks-Verschoor, I.H.Ph., *An Introduction to Space Law* (2nd ed., 1997), in particular for the historical context and impact of the Liability Convention.

[103] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, (1979), UN Doc. A/34/664 (1979) [hereinafter "Moon Agreement"]In this section, all Articles, unless specified otherwise, refer to those in the Moon Agreement.

[104] A/AC.105/32 of 17 June 1966. Article 11 of the Draft Proposal reads: "Any dispute arising from the interpretation or application of this Agreement may be referred by any contracting party hereto to the International Court of Justice for decision."

[105] Articles 8(1) and (2), Moon Agreement, see *supra* note 103

> Parties concerned shall undertake consultations in accordance with article 15, paragraphs 2 and 3, of this Agreement."[106]

True to traditional form, this provision was aimed more at the avoidance of disputes that their settlement. Consultations between concerned Parties are mandated in the event such interference *may* occur, rather than for any settlement procedures to be taken once a dispute arises. A broader stipulation for the peaceful settlement of disputes is, however, provided in Article 15.

Article 15 provides for the consultation procedure as follows:

> "1. Each State Party may assure itself that the activities of other States Parties in the exploration and use of the moon are compatible with the provisions of this Agreement. To this end, all space vehicles, equipment, facilities, stations and installations on the moon shall be open to other States Parties. Such States Parties shall give reasonable advance notice of a projected visit, in order that appropriate consultations may be held and that maximum precautions may be taken to assure safety and to avoid interference with normal operations in the facility to be visited. In pursuance of this article, any State Party may act on its own behalf or with the full or partial assistance of any other State Party or through appropriate international procedures within the framework of the United Nations and in accordance with the Charter.
>
> 2. A State Party which has reason to believe that another State Party is not fulfilling the obligations incumbent upon it pursuant to this Agreement or that another State Party is interfering with the rights which the former State has under this Agreement may request consultations with that State Party. A State Party receiving such a request shall enter into such consultations without delay. Any other State Party which requests to do so shall be entitled to take part in the consultations. Each State Party participating in such consultations shall seek a mutually acceptable resolution of any controversy and shall bear in mind the rights and interests of all States Parties. The Secretary-General of the United Nations shall be informed of the results of the consultations and shall transmit the information received to all States Parties concerned.
>
> 3. If the consultations do not lead to a mutually acceptable settlement which has due regard for the rights and interests of all States Parties, the parties concerned shall take all measures to settle the

[106] Article 8(3), Moon Agreement, see *supra* note 103

> dispute by other peaceful means of their choice appropriate to the circumstances and the nature of the dispute. If difficulties arise in connection with the opening of consultations or if consultations do not lead to a mutually acceptable settlement, any State Party may seek the assistance of the Secretary-General, without seeking the consent of any other State Party concerned, in order to resolve the controversy. A State Party which does not maintain diplomatic relations with another State Party concerned shall participate in such consultations, at its choice, either itself or through another State Party or the Secretary-General as intermediary."[107]

The Moon Agreement offers in Article 8(3), by referring to the procedures elaborated in Articles 15(2) and 15(3), the means of consultations when activities of State Parties described in Articles 8(1) and 8(2) interfere with the activities of other States Parties on the Moon. As a result, consultation can be used to minimize conflicts over equipment and facilities on the Moon. Further, it allows States Parties that form their own system of checks-and-balances, but giving States Parties the right to request consultations with a Party who is derogating from, and possibly breaching, its obligations under the Moon Agreement.[108] Other States Parties which so request also have a right to take part in these consultations. These consultations should resolve the situation, as well as consider relevant third party interests. Other States Parties will be notified as to the outcome of the consultations. Article 15 presents again a form of conflict avoidance for Member States. Article 15(3) read with Article 2, invokes again all the traditional processes of international dispute settlement where a mutually acceptable settlement with due regard to the interests of third party States cannot be reached. In particular, Article 15(3) invokes the use of the good offices of the UN Secretary-General. Reference to the UN Secretary-General can be made without the consent of the other Party or both sides may convene to use any other procedure for resolving the dispute peacefully. It is submitted that this is a positive step in the right direction for the better enforcement of the rights and obligations under the Moon Agreement.

Thus, the Moon Agreement goes perhaps one step further than the provisions of the Outer Space Treaty. Its procedures may also potentially be more effective, especially when considering the use of the good offices of the UN Secretary General. However, it should be noted that as a matter of fact, the provisions of the Moon Agreement only apply to activities on the Moon and other celestial bodies, leaving activities elsewhere in outer space beyond its scope of application. Hence, while broader in the stipulated methods of dispute settlement available, the Moon Agreement is restrictive in terms of the territorial jurisdiction it covers.

[107] Article 15, Moon Agreement, see *supra* note 103
[108] Article 15(2), Moon Agreement, see *supra* note 103

On the other hand, it is noteworthy that the Moon Agreement provided a right of visit and control. A State Party to the Agreement has the right to assure itself that the activities of other States Parties fulfill the obligation imposed by this international agreement. Therefore Article 15 provides that the State Party may visit all space vehicles, equipment, facilities, stations and installations. An appropriate notice will however, be given to the Party concerned within a reasonable advance period to give the opportunity of having consultations on the proposed visit and to provide the opportunity to take all necessary precautions for securing safety and to prevent harmful interferences with normal activities. This is yet another example of the mechanisms of conflict avoidance, stopping just short of actual dispute settlement procedures, that characterize international space treaty law.

1.1.4 United Nations General Assembly Resolutions

There are three UN General Assembly resolutions that contain provisions relevant to the assessment in this dissertation. These are

1. 1982 Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting,[109]

2. 1986 Principles Relating to Remote Sensing of the Earth from Outer Space,[110] and

3. 1992 Principles Relevant to the Use of Nuclear Power Sources in Outer Space,[111]

Principle 7 of the DBS Principles states

> "Any international dispute that may arise from activities covered by these principles should be settled through established procedures for the peaceful settlement of disputes agreed upon by the parties to the dispute in accordance with the provisions of the Charter of the United Nations."[112]

Additionally, Principle 10 of the DBS Principles elaborates on the duty and right of States to "promptly enter into consultations" upon request.[113] Principles 13 - 15 of the DBS Principles also deals with the duty to enter into consultations upon request when a State intends to establish or authorize

[109](10 December 1982), UN GA Resolution 37/92, [hereinafter "DBS Principles"]
[110](3 December 1986), UN GA Resolution 41/65, [hereinafter "RS Principles"]
[111](14 December 1992), UN GA Resolution 51/122, [hereinafter "NPS Principles"]
[112]Principle 7, DBS Principles, see *supra* note 109
[113]Principle 10, DBS Principles, see *supra* note 109

the establishment of an international direct television broadcasting satellite service.[114]

Principle XV of the RS Principles states

> "Any dispute resulting from the application of these principles shall be resolved through the established procedures for the peaceful settlement of disputes." [115]

Further, the duty of States to consult is framed in Principle XIII of the RS Principles, where the sensing State shall, upon request of the sensed State, enter into consultations to make available opportunities for participation and enhance the mutual benefits to be derived therefrom.[116]

Principle 10 of the NPS Principles states

> "Any dispute resulting from the application of these Principles shall be resolved through negotiations or other established procedures for the peaceful settlement of disputes, in accordance with the Charter of the United Nations." [117]

This is in addition to Principle 6 of the NPS Principles, that States shall, as far as reasonably practicable, respond promptly to requests for further information or consultations sought by other States as to the re-entry to the Earth's atmosphere of a space object with nuclear power sources on board.[118]

UN General Assembly Resolutions generally have no binding legal force in international law.[119] However, it is submitted that States are bound by the principle of the peaceful settlement of disputes arising from space activities. This is because the relevant principles of the various UN General Assembly Resolutions have entered into customary international law. The International Court of Justice has taken cognizance of international custom as a source of law under Article 38(1)(b) of its Statute.[120] The principle of non-discriminatory access satisfies both prerequisite elements of *opinio juris* and State practice to enter into customary law.[121]

These dispute settlement provisions are framed in the context of United Nations General Assembly resolutions. UN General Assembly resolutions can

[114] Principles 13 to 15, DBS Principles, see *supra* note 109
[115] Principle XV, RS Principles, see *supra* note 110
[116] Principle XIII, RS Principles, see *supra* note 110
[117] Principle 10, NPS Principles, see *supra* note 111
[118] Principle 6, see *supra* note 111
[119] Valkov, C., "Problems and Results from Resolution 41/65 of the United Nations about Developing Countries", (1988) 31 Proc. Coll. Law of Outer Space 157
[120] *Asylum* case, (1950) ICJ Rep. 276 at 277 and *North Sea Continental Shelf* cases, (1969) ICJ Rep. 3
[121] Jennings R. and Watts A., (eds.), *Oppenheim's International Law Volume I*, 9th ed., (1992) at 27; Akehurst, M., "Custom as a Source of International Law" (1974) 47 BYIL 1

have an important effect in crystallizing and progressively developing international law.[122] This has been affirmed by this Court in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion[123], where it was noted that General Assembly resolutions

> "can . . . establish the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true... it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character."[124]

It is submitted that this is the case for these UN General Assembly resolutions regarding the duties of States to the international community in the peaceful settlement of disputes.[125]

The circumstances in which these resolutions were negotiated imply that the States Parties to the negotiations intended it to have legal effect. Several features show that the resolution is evidence of *opinio juris*. Firstly, the RS Principles and the NPS Principles were adopted by consensus instead of by vote, indicated that all States Members of UN COPUOS found consensus in their support for the terms of the various Principles.[126] The adoption of the UN General Assembly resolutions by consensus without any fundamental objections can be interpreted as evidence of *opinio juris*.[127] The ICJ in the *Nicaragua* case held that *opinio juris* could be deduced from the attitude of the States Parties towards General Assembly Resolutions,[128] stating that

> "[t]he effect of consent to the text of such resolutions may be understood as an acceptance of the validity of the rule or set out of rules declared by the resolution themselves."

Secondly, it is significant that the Member States of COPUOS were finally able to reach a consensus on the Principles. Representing a wide range of inter-

[122] Schwebel S.M., "The Legal Effect of Resolutions and Codes of Conduct of the United Nations" in *Justice in International law: Selected Writings of Judge Stephen M. Schwebel*, (1994) 499 at 502

[123] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep. 70

[124] *ibidem* at paragraph 70

[125] Gaggero, E.D., "Remote Sensing, in the United Nations: Reforming to the Way of Consensus" (1987) 30 Proc. Coll. Law of Outer Space 312

[126] The DBS Principles were adopted by votes, with some Member States voting against the adoption of the DBS Principles. It is however submitted that the reasons for these States' rejection of the DBS Principles were predicated on other provisions that those relating to dispute settlement - Principles 7, 10, 13, 14 and 15. The negotiations are documented in the *travaux préparatoire* of the DBS Principles.

[127] Suy E., "Rôle et signification du consensus dans l'élaboration du droit international", Yearbook, (1997) Institute of International Law, Pedone, Paris, Session of Strasbourg 1997, at 33

[128] *Military and Paramilitary Activities in and against Nicaragua*, (Merits) [1986] ICJ Rep. at para. 188

ests and demographic backgrounds,[129] the unanimity that led to the successful adoption of these Resolutions comprises important evidence of the opinio juris both of the seriously affected States and of the other interested States.[130] The extended debate in the negotiations leading up to their adoption signified that negotiating parties envisioned these resolutions to provide a legal framework for space activities.[131] If the resolutions were to have no legal binding effect, there would not have been a need for States to push their respective agendas so strongly.

Finally, the language is declaratory, demanding that States' activities "shall" or "should" settle their disputes by peaceful means, in the established methods of international law. This strongly declaratory language indicates a crystallized obligation as to the peaceful settlement of disputes concerning space activities.[132]

In addition to *opinio juris*, there must be "widespread, representative and virtually uniform state practice" to support a general principle entering into customary international law, particularly when a short period of time has passed.[133] State practice in this regard has been very instructive. There have been absolutely no instances of resort to the use of force in conflicts relating to outer space. Some situations of potential conflict have seen claims settled through diplomatic channels of negotiation and consultation, in accordance with these principles and the principles of general international law. One such diplomatic settlement took place following the events surrounding Cosmos 954.

Thus, it is submitted that these UN General Assembly resolutions have been particularly useful in one regard: they have crystallized the obligation to ensure the peaceful settlement of disputes in matters concerning outer space. This obligation has entered into customary international law. This is significant since customary international law binds all actors on the international plane, which includes States not members of the United Nations. Further, it can also be applied to non-State actors. Aside from this however, the General Assembly resolutions do no more than reiterate the basic methods of international dispute settlement already imported from general international law.

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[129] U.N. Doc. A/AC.105/C.2/l.113; U.N Doc. A/AC.105/C.1/WG.4/L.11

[130] Sloan, "General Assembly Resolutions Revisited", (1987) BYIL 39; *North Sea Continental Shelf* Cases, (*Germany v Denmark, Germany v The Netherlands*) [1969] ICJ Rep. at Para. 73

[131] see for example Kopal, V. "Principles Relating to Remote Sensing of the Earth from Outer Space: A Significant Outcome of International Co-Operation in the Progressive Development of Space Law", (1987) 30 Proc. Coll. Law of Outer Space 322 at 324

[132] Terekhov, A.D.,"UN General Assembly Resolutions and Outer Space Law", (1997) 40 Proc. Coll. Law of Outer Space 97 at 102

[133] *North Sea Continental Shelf* Cases, see *supra* note 130 at para. 73

1.1.5 Multilateral Agreements and Organizations

More propitious results are sometimes obtained within the framework of international organizations or by bilateral agreements and this phenomenon can also be observed in space law. Legal procedures with regard to disputes are conveniently established in various such international and regional organizations as the International Telecommunications Satellite Organization (INTELSAT),[134] the International Maritime Satellite Organization (INMARSAT),[135] the International Organization of Space Communications (INTERSPUTNIK), the European Telecommunications Satellite Organization (EUTELSAT), the European Organization for the Exploitation of Meteorological Satellites (EUMETSAT), the International Telecommunications Union (ITU), the Arab Corporation for Space Communications (ARABSAT), the European Space Research Organization (ESRO) and its successor, the European Space Agency (ESA). The means of dispute settlement provided by the constitutions of these organizations vary from negotiations to compulsory third-party arbitration. The choice of dispute settlement mechanism generally depends on the structure of the organization and the identity of the parties involved in the dispute. This section will consider these dispute settlement mechanisms.

Article 2 of the 1964 Interim Agreement of INTELSAT[136] and Article 14 of the Special Agreement[137] have provisions on dispute settlement, and further provisions were made in the 1965 Supplementary Agreement on Arbitration. The Interim Agreement provides for the appointment of an impartial tribunal to decide questions in dispute in accordance with general principles of international law, and it declares that the decision of such a tribunal is binding on all signatories to the Special Agreement.[138] The definitive 1971 Agreements include rules on procedures of the settlement of disputes in Article 18 of the main Agreement,[139] Article 20 of the Operating Agreement,[140] and Article 2 of Annex C, which provides for an arbitral tribunal. The decision of the tribunal is to be binding on all disputants and is to be carried out by them in good faith. The provisions of both the 1964 and 1971 Agreements also contain rules of procedure for dispute settlement.

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[134]INTELSAT has been privatized, becoming the private entity Intelsat, with a residual intergovernmental oversight agency known as ITSO.

[135]Like INTELSAT, INMARSAT has been privatized, with two corresponding portions Inmarsat and IMSO.

[136]Agreement Relating to the International Telecommunications Satellite Organization, August 20, 1971, 523 UST 3813, TIAS No. 7532

[137]Special Agreement Relating to the International Telecommunications Satellite Organization, August 20, 1964

[138]In the INTELSAT Agreement, the signatories are the operating entities of the INTELSAT system, and not States.

[139]see *supra* note 136

[140]Operating Agreement Relating to the International Telecommunications Satellite Organization, August 20, 1971, 523 UST 3813, TIAS No. 7532

The 1976 INMARSAT Convention[141] established in Article 3 that disputes should be settled by negotiation between the parties concerned, or be submitted to arbitration. Procedures for the settlement of disputes referred to in Article 3 of the Convention[142] and Article 16 of the Operating Agreement[143] are defined in the Annex in twelve Articles. According to Article 10, the decision of the tribunal shall be binding on all disputants and shall be carried out by them in good faith.

The 1985 European Telecommunications Satellite Organization (EUTELSAT) Convention provides in Article 20 for an arbitration procedure.[144] The 1986 Convention of the European Organization for the Exploitation of Meteorological Satellites (EUMETSAT) also provides for arbitration of disputes in Article 14.[145] Most recently, the Conference on Security and Cooperation in Europe adopted a "Procedure for Peaceful Settlement of Disputes" in February 1991.[146]

INTELSAT's compulsory third-party arbitration between States Parties, and between States Parties and INTELSAT, marks a significant chapter in the history of international intergovernmental cooperation. However, this compulsory procedure was not accepted for disputes between States and Signatories to the Operating Agreement. A compromised solution was reached instead by providing for arbitration on a voluntary basis.

The dispute settlement provisions of INMARSAT did not follow in the footsteps of INTELSAT's far-reaching concept of compulsory arbitration in disputes concerning the application and interpretation of the INMARSAT Convention.[147] However, it provides the option of arbitration as a means to settle disputes between States Parties, or between States Parties and the Organization, on a consensual basis and under certain preconditions. Similarly, the consent of both parties is required for arbitration in the case of a dispute arising between a Party and a Signatory relating to matters arising from the Convention and the Agreement. This recourse to arbitration however, does not require the prior negotiations to have taken place.[148] This is different from the situation of a dispute between Signatories or between Signatories and the Organization, when negotiations should first be undertaken. Subsequently, any

[141] Convention on the International Maritime Satellite Organization (1976) 1143 UNTS 105

[142] *ibidem*

[143] Operating Agreement on the International Maritime Satellite Organization (1976) 1143 UNTS 105

[144] Convention Establishing the European Telecommunications Satellite Organization EUTELSAT (1985)

[145] Convention for the Establishment of a European Organization for the Exploitation of Meteorological Satellites EUMETSAT (1986)

[146] (1991) 30 ILM 385

[147] see *supra* note 141

[148] see *supra* note 141

party may request for the dispute to be submitted to arbitration without the consent of the other party. If a dispute arising falls outside the Convention and the Agreement, submission to arbitration is again only possible after prior negotiations have been conducted, and have failed.[149]

It should be noted however, that the INTELSAT Agreement stresses that only legal disputes may be subjected to the procedures provided. The INMARSAT provisions are silent on the subject.[150]

The main difference between INTELSAT, INMARSAT and EUTELSAT regulations on disputes settlement is in the procedure itself. INTELSAT provides for institutionalized arbitration. However, the EUTELSAT Convention refers to ad hoc arbitration.[151] As EUTELSAT's arbitration tribunal establishes its own procedure, it also has the highest amount of flexibility. While the INMARSAT dispute settlement rules, like those of INTELSAT, stipulate that the decision of the tribunal shall be based on the Convention and the Operating Agreement as well as on generally accepted principles of law, the EUTELSAT Convention is silent on the subject of applicable law.[152]

The International Telecommunications Union (ITU) also provides rules for the settlement of disputes in its consecutive Conventions.[153] Those rules were founded on its 1989 Constitution.[154] Article 42 of the Constitution provides that Members may settle their dispute on questions relating to the interpretation or application of the Constitution, the Convention or the Radio Regulations in four ways:

1. by negotiation,

2. through diplomatic channels,

3. according to procedures established by bilateral or multilateral treaties concluded between them for the settlement of international disputes or

4. by any other method mutually agreed upon.[155]

If none of these methods of settlement is adopted, the dispute may be submitted to arbitration by any Member Party to the dispute. The Arbitration Procedure is included in Article 34 of the Convention.[156]

[149] see *supra* note 141
[150] see *supra* note 141
[151] see *supra* note 144
[152] see *supra* note 144
[153] October 25, 1973, General Regulations, 28 UST 2495 at 2589, TIAS No. 8572
[154] International Telecommunications Union, Final Acts of the Plenipotentiary Conference, Nice 1989, Nice, 30 June 1989
[155] *ibidem*
[156] see *supra* note 153

An Optional Protocol to the Constitution and the Convention[157] provides for the compulsory settlement of disputes through arbitration to be applied between Member Parties to that Protocol. The regulation however, is not practically effectual if a State Party that has committed itself to compulsory settlement later refuses to cooperate. This requirement is a consequence of one of the founding principles of the ITU Convention: that each State has the sovereign right to regulate its telecommunications. This overriding principle was repeated in its new Constitution in 1989.[158]

Article 50 of the ITU Convention generally provides for the settlement of disputes relating to the Convention through diplomatic channels, through agreed bilateral or multilateral procedures, "or by any other methods mutually agreed upon".[159] If the dispute cannot be settled by other means, Article 82 provides for arbitration through a number of different procedures, including arbitration by individuals or governments, and by a single arbitrator or a panel of three. The decision of the arbitrators is final and binding. Since this procedure can be blocked by the refusal of one party to select an arbitrator, an Optional Protocol on the Compulsory Settlement of Disputes provides for the Secretary-General to select the second arbitrator if necessary. In the field of space activities, it is important to note that these provisions apply only to disputes concerning radio-frequency assignments to satellites and the use of positions in the geostationary orbit.

Additionally, there are agreements for regional cooperation that include provisions for dispute settlement, again often leading to binding decisions.

The 1976 Agreement on the Arab Corporation for Space Communications (ARABSAT)[160] provides in Article 19 of its Agreement that the General Body of the corporation "shall adjudicate upon disputes between the corporation, on the one hand, and one or more members, on the other, or disputes among the members themselves".[161] This represents the only clear example of adjudication for dispute settlement in relation to space activities. Once a decision is reached on a dispute, it becomes effective within 90 days.[162]

The 1962 Convention for the Establishment of a European Space Vehicle Launcher Development (ELDO)[163] determines that if dispute is not settled by

[157] *ibidem*

[158] see *supra* note 153

[159] see *supra* note 153

[160] Agreement of the Arab Corporation for Space Communications (ARABSAT) (amended in May 1990), *Space Law and Related Documents*, U.S. Senate, 101st Congress, 2nd Session, 395 (1990)

[161] *ibidem*

[162] Ziadat, A.A., "Arabsat: Regional Development in Satellite Communications: Lessons from the Arabsat Venture", (1988) 37 ZLW 35

[163] Convention for the Establishment of a European Organization for the Development and Construction of Space Vehicle Launchers, Opened for Signature 29 March 1962, Entered into Force 29 February 1964, 507 UNTS 177 [hereinafter "ELDO Convention"]

the ELDO Council, an Arbitration Tribunal shall be set up, and its decisions shall be binding on the parties to the dispute. The 1962 Convention for the Establishment of a European Space Research Organization (ESRO) provides that a dispute not settled by the ESRO Council shall be submitted to the ICJ.[164] The 1965 Convention establishing a European Organization for Astronomical Research for the Southern Hemisphere and its 1975 Protocol provide for disputes to be settled by its Council or, if that is not possible, by the Permanent Court of Arbitration, whose decision is binding. Similarly, the 1969 Agreement Concerning the European Space Operation Centre refers to the settlement of disputes to an arbitration tribunal.

The successor to ELDO and ESRO is the European Space Agency. The European Space Agency was formed by the 1975 European Space Agency Convention.[165] ESA represents the classical structure of an intergovernmental organization, in contrast to hybrid organizations such as INTELSAT, INMARSAT and EUTELSAT. It is ESA's Council that represents the main organ for dispute resolution. However, if a dispute between Member States or between States and the Agency is not settled by the Council, it shall be submitted to arbitration upon request, unless the parties agree differently.

The United States is ESA's main partner in space cooperation. As such, it comes as no surprise that the United States National Aeronautics and Space Administration's (NASA) practice with regard to the cross-waivers of liability has become the standard custom of ESA. These cross-waivers constitute a very significant mechanism of conflict avoidance. Parties to these cross-waivers undertake not to initiate legal procedures for claims should any damage arise in the framework of the relevant cooperative agreement. These cross-waivers were first implemented in the 1970s. Such cross-waivers of liability are applicable within a partnership. It does not affect the rights of third parties, individuals or States in the event of damage occurring from space activities. ESA has also accepted the rights and obligations in the 1972 Liability Convention. Further, recent developments by ESA's Council have indicated a trend towards the acceptance by ESA and its Member States of arbitration and the process of the Claims Commission, subject to reciprocity. This process could be initiated pursuant to Articles XIV - XX of the Liability Convention.[166]

The ESA Convention includes provisions concerning an arbitration tribunal for dispute settlement. This is justified by the privileges and immunities granted to ESA as an international organization.[167] Article XVII of the ESA

[164]Convention for the Establishment of a European Space Research Organization, Opened for Signature 14 June 1962, Entered into Force 20 March 1964, 528 UNTS 33 [hereinafter "ESRO Convention"]

[165]Convention for the Establishment of a European Space Agency, Paris, May 30, 1975, (1975) 14 ILM 864 [hereinafter "ESA Convention"]

[166]see *supra* note 22

[167]see the ruling of the European Court of Human Rights in *Waite & Kennedy v. Germany*

Convention specifies that

> "[a]ny dispute between two or more Member States, or between any of them and the Agency, concerning the interpretation or application of [the ESA] Convention or its Annexes. . . which is not settled by or through the Council shall, at the request of any party to the dispute, be submitted to arbitration."[168]

This also applies to disputes arising from damage caused by the Agency, any other non-contractual responsibility of the Agency, or involving the Director General or a staff member of the Agency who can claim immunity from jurisdiction under the relevant provision of Annex I to the ESA Convention.

The arbitration procedure must be in line with Article XVII and with the additional rules adopted by the ESA Council pursuant to the ESA Convention.[169] These supplementary rules are comprehensive, defining the applicable procedure, the methods of establishment of the arbitration tribunal, and the documentation to be provided.

Article XVII of the ESA Convention lays down the following:[170]

1. The arbitration tribunal shall consist of three members: one to be nominated by each party, and the third, who shall be the chairman, to be nominated by the first two arbitrators;

2. other Member States or the Agency may intervene in the dispute with the consent of the arbitration tribunal if they have a substantial interest in the decision of the case;

3. the tribunal shall determine its seat and establish its own rules of procedure;

4. the award, which shall be made by a majority of the tribunal's members, shall be final and binding on the parties and not subject to appeal; and

5. the parties to the dispute shall comply with the award without delay.[171]

There is a levelled hierarchy on which ESA enters into legal relations. For different levels, discrete dispute settlement mechanisms can be developed. However,

(Application no. 26093/94) and *Beer & Regan v. Germany* (Application no. 28934/95), February 18, 1999

[168] see *supra* note 165

[169] Rules adopted by the ESA Council at its 66th meeting, October 1984

[170] Article XVII, ESA Convention, see *supra* note 165

[171] Farand, A., "The European Space Agency's Experience with Mechanisms for the Settlement of Disputes", in International Bureau of the Permanent Court of Arbitration (ed.), *Arbitration in Air, Space and Telecommunications Law: Enforcing Regulatory Measures*, The Permanent Court of Arbitration / Peace Palace Papers, PCA International Law Seminar, February 23, 2001, (2001) 145

ESA has chosen arbitration both for internal disputes between the ESA Member States as well as for ESA's external contracts and agreements.[172] ESA is a excellent instance of how the customary reluctance of States to submit themselves to binding dispute settlement mechanisms is diminished when they join to form an international organization.[173]

The question arises as to why the ESA Convention did not continue with the dispute settlement mechanism established by its predecessor, ESRO. Article XVI of the ESRO Convention[174] stipulated that a dispute which was not settled by the good offices of the ESRO Council should be submitted to the ICJ, unless the Member States concerned agreed to some other method of dispute settlement. The default dispute settlement machinery was adjudication instead of arbitration.

Arbitration unquestionably assures a more adaptable procedure that can be tailored to the individual needs of the parties. The typically confidential procedure also entails the avoidance of a potential loss of face.[175] On the other hand, adjudication as provided for by the ESRO Convention ensured access to an entrenched infrastructure, effective and operational rules of procedure, interim measures and a certainty and continuity in case law. These factors contribute to a greater degree of legal certainty. It is thus questionable whether the solution of arbitration adopted by the ESA Convention is the most appropriate one.

The ESA Convention also deals with treaty compliance. Article XVIII stipulates that any Member State that fails to fulfill its obligations under the Convention shall cease to be a Member of the Agency on a decision of the Council take by a two-thirds majority of all Member States. This provision flows from the general rule of public international law that a member State can be expelled from an international organization if it persistently derogates from its obligations towards the organization.

The dispute settlement clauses in the ESA Convention have never been put to use it its history. This may be due to the dissuasive effect of dispute settlement clauses calling for final and binding disposition of a dispute through arbitration. Invoking arbitration clauses implies a considerable investment of time and money, and so the parties to an agreement of contract within the ESA framework are usually persuaded to settle their disputes at the first opportu-

[172] Bohlmann, U.M., "Experience of the European Space Agency with Dispute Settlement Mechanisms", in International Bureau of the Permanent Court of Arbitration (ed.), *Arbitration in Air, Space and Telecommunications Law: Enforcing Regulatory Measures*, The Permanent Court of Arbitration / Peace Palace Papers, PCA International Law Seminar, February 23, 2001, (2001) 157

[173] Böckstiegel, K.-H., "Streiterledigung bei der Kommerziellen Nutzung des Weltraums", in *Festschrift für Ottoarndt Glossner* (1994) 39 at 44

[174] Article XVI, ESRO Convention, see *supra* note 164

[175] Böckstiegel, K.-H., "Developing a System of Dispute Settlement Regarding Space Activities", (1992) 35 Proc. Coll. Law of Outer Space 27

nity.[176]

ESA has an extensive immunity from jurisdiction as stipulated in Article IV of Annex I to the ESA Convention.[177] This immunity is vital in the guarantee of ESA's autonomy. This is in turn essential to fully achieve ESA's objectives, since they involve political, legal and economic considerations and interests. This immunity is however somewhat compensated by the obligation to provide for arbitration in any written contact it concludes.[178] It cannot therefore, be rebuked for a denial of justice.[179] These written contracts, in the form of bilateral and project-based agreements, will be examined in the next section.

1.1.6 Bilateral & Project-Based Agreements

Bilateral agreements for cooperation in outer space also demonstrate the tendency to integrate dispute settlement provisions in agreements. Since it started work on bilateral programs, the United States' NASA has included provisions for dispute settlement in all of its cooperation agreements.[180]

NASA's bilateral agreements generally either stipulated consideration of the partner States' laws, or dispute settlement on the grounds of American law. One of NASA's earliest bilateral agreements was the 1963 United States-New Zealand Agreement on Aerospace Disturbances Research Program. NASA agreed in Article 5(b) to give due regard to the New Zealand Solicitor-General's recommendations for the settlement of claims determining liability and compensation. The 1964 United State-Nigeria Agreement on a Station for Space Vehicle Tracking and Communication provided in Article 13 that the US government would use its best efforts to adequately and effectively compensate Nigeria for any personal injuries or property damage arising, taking into consideration relevant Nigerian law. The 1967 United States-United Kingdom Agreement for a Tracking Station on Antigua provided that any claim for damage to property or injury to persons arising from acts or omissions of American personnel employed by or directly connected with NASA will be considered and

[176]Farand, A., "The European Space Agency's Experience with Mechanisms for the Settlement of Disputes", in International Bureau of the Permanent Court of Arbitration (ed.), *Arbitration in Air, Space and Telecommunications Law: Enforcing Regulatory Measures*, The Permanent Court of Arbitration / Peace Palace Papers, PCA International Law Seminar, February 23, 2001, (2001) 145

[177]see *supra* note 165

[178]Article XXV(1), Annex I, ESA Convention, see *supra* note 165

[179]see generally Lafferranderie, G., "L'immunité de jurisdiction des organisations internationals - l'exemple de l'Agence spatiale européenne, (1983) RFDA 13

[180]All U.S. Agreements can be found in Gorove, S. (ed.), *United States Space Law - National and International Regulations* (1982) and from Jasentuliyana, N. and Lee, R.S.K. (eds.), *Manual of Space Law* (1979) Volume 2 , more recent documents can be found online at the webpage of the United Nations Office of Outer Space Affairs, online at http://www.oosa.unvienna.org/SpaceLaw/multi_bi/index.html, Last accessed 04 January 2006.

settled in accordance with Section 203(b) of the US NASA Act[181], and as it may be amended. The 1976 United States-Seychelles Agreement on the Tracking Station on Mahe Island provided in Article 12, that any claim presented to the US government should be processed and settled in accordance with the applicable provisions of US law.

Other early NASA agreements that provide for dispute settlement by arbitration are the 1969 United States-Italy Memoranda of Understanding between the Universitá degli Studi di Roma (Aerospace Research Centre) and NASA for Launching Satellites from the San Marco Range. This called for prompt settlement of claims following the Model Rules on arbitral procedure of the International Law Commission. The 1970 Federal Republic of Germany-United States Agreement provided for the final settlement of disputes by arbitration following the 1958 Model Rules of the International Law Commission.

As regards European agreements,[182] the favored mechanism of dispute settlement appears to be arbitration. The Australia-United Kingdom-ELDO Interim Agreement provided that Member States would submit their disputes to arbitration. The decision of the arbitration tribunal would be final and binding on the parties. The ELDO-Belgium Agreement dealing with property and facilities states in Article 8 that any dispute should be settled in accordance with the arbitration procedure prescribed in Article 22 of the ELDO Convention. The 1972 France-Federal Republic of Germany Agreement for the Construction, Launch and Utilization of an Experimental Telecommunications Satellite included a provision for a final and binding settlement of disputes by arbitration. According to the Agreement, the President of the European Community Court of Justice would name the members of such a tribunal. The arbitration decision should have considered the law as mentioned in Article 38(1) of the ICJ Statute and Chapter III of the 1907 Hague Convention.[183]

Bilateral agreements involving Asian and Eastern European States seem to favor consultation as a means of dispute settlement instead. The 1972 Federal Republic of Germany-India Agreement on Cooperation Regarding Peaceful Uses of Atomic Energy and Space Research stipulated that disputes on interpretation or application of the Agreement shall be settled in consultation between the contracting parties. Article 6 of the 1988 United States-China Memorandum of Agreement on Liability for Satellite Launches also specifies

[181] 42 USC Sect. 2473

[182] All Agreements can be found in Böckstiegel, K.-H. (ed.), *Settlement of Space Law Disputes: The Present State of the Law and Perspective of Further Development*, (1980); and from Böckstiegel, K.-H. and Benkö, M. (eds.), *Space Law - Basic Legal Documents*, (1990); more recent documents can be found online at the webpage of the United Nations Office of Outer Space Affairs, online at http://www.oosa.unvienna.org/SpaceLaw/multi_bi/index.html, Last accessed 04 January 2006.

[183] Hague Convention for the Pacific Settlement of Disputes (1907) UNTS 6 (1971) Cmd. 4575

consultations as a means of dispute settlement. This is also the case as provided for in Article IX(3) of the 1999 Kazakhstan-Russian Federation-United States Agreement on Technology Safeguards Associated with the Launch of Russia of U.S. Licensed Spacecraft from the Baikonur Cosmodrome. Agreements concluded by the China National Space Administration with partner States also only stipulate negotiations and consultations as the means of dispute settlement.[184]

ESA and its predecessor, ESRO, entered into a myriad of bilateral agreements with its member States and other States concerning facilities for regional programs, including the European Space Technology Centre (ESTEC) in the Netherlands, the European Sounding Rocket Launching Range (ESRANGE) in Sweden, the Kongsjø Telemetry Station and the Andøya sounding rocket facilities in Norway, rocket launching facilities on French territory, the development and production of the Ariane-5 launcher with France, and the Woomera launching facilities in Australia.[185] These agreements generally provided that if a dispute arose that could not be settled amicably, the President of the ICJ would appoint a single arbitrator to decide the dispute and give an award. This award would be final and binding.

Other ESA-related international instruments designate *ad hoc* arbitration as the preferred mode of dispute settlement. For example, a single arbitrator is provided for in the European Agreement Concerning an Aeronautical Satellite Programme.[186] The conventional structure is a three-member panel, with one arbitrator picked by each side and one neutral member chosen by the two. Examples of this format include the Protocol on Privileges and Immunities of the European Space Research Organization.[187] However, the emphasis in this context has been placed mainly on conflict avoidance rather than on dispute settlement. These included the cross-waiver of liability clauses first developed by NASA and seem to have set the standard in international space activities. The motive for their insertion into international agreements dealing with space activities comes from the fact that space activities are still regarded as a highly hazardous industry. As such, insurance is either generally unavailable or prohibitively expensive. In this context, the inclusion of cross-waiver of liability clauses might have a positive impact by encouraging participation in space activities.[188] Nevertheless, a clause stipulating an appropriate and

[184]Some provisions online at http://www.cnsa.gov.cn/index.asp, in Chinese, (Last accessed: 04 January 2006)

[185]An excellent discussion of these agreements can be found at Lafferranderie, G., *International Encyclopedia of Laws: European Space Agency*, (1996)

[186]Article 3, European Agreement Concerning an Aeronautical Satellite Programme, December 9, 1971, 906 UNTS 3

[187]Article 27, Protocol on Privileges and Immunities of the European Space Research Organization, October 31, 1963, 805 UNTS 279

[188]Gorove, S., "Report on the Session of the Aviation and Space Law Section of the Association of American Law Schools in January 1991", (1991) 49(1) JSL 45

binding method for dispute settlement potentially arising in international co-operation is prudent. The agreements concluded between ESA and Romania, and Poland and the Czech Republic, respectively, contain both a cross-waiver clause and an arbitration procedure in the event that mutual consultations are not sufficient to settle a dispute.[189]

A 1998 Memorandum of Understanding between ESA and NASA provided that in the event of damage, the parties will be liable in accordance with the 1972 Liability Convention. In the event of any dispute relating to liability, NASA and ESA agreed to consult promptly on equitable sharing of any payments. If these consultations fail, an early arbitration following the 1958 Model Rules on arbitral procedure of the International Law Commission will be applied. It is notable that the Liability Convention was also mentioned in a 1974 Canada-United States agreement. The 1974 Agreement concerning Liability for Loss or Damage from Certain Rocket Launches stipulated:

> "In the event that a claim arising from out of these launches is not settled expeditiously in a mutually acceptable manner, the two governments shall give consideration to the establishment of a Claims Commission such as that provided for in Article 15 of the Liability Convention with a view to arriving at a prompt and equitable settlement."

The 1996 ESA-NASA Memorandum of Understanding on the Space Telescope Project, however, referred to settlement by the US authorities or to another form of resolution arbitration as the parties may agree.

This thesis then further considered the agreements concluded in the period 1995 - 2004 between ESA and other international organizations and institutions, governments, organizations and institutions of non-member States for the purpose of cooperating in the conduct of space activities.[190] ESA's practice has been consistent over the years. As such, an examination of agreements concluded over a longer period would have led to the same findings. A critical analysis of these agreements led to their categorization into two groups. A first category of agreements are those concluded with States of Central and Eastern Europe to establish a general framework for cooperation.[191] These agreements

[189] Agreement Between The European Space Agency and the Government of Romania Concerning Space Cooperation for Peaceful Purposes, (December 11, 1992) ESA/LEG/157; Agreement Between the European Space Agency and the Government of the Republic of Poland Concerning Space Cooperation for Peaceful Purposes, (January 28, 1994), ESA/LEG 164; Agreement between the European Space Agency and the Czech Republic Concerning Space Cooperation for Peaceful Purposes, (November 7, 1996), ESA/LEG 201

[190] These documents, including the 1996 and 1998 Memoranda mentioned above and those in the period not covered by the analysis, can be found via ESA's Official Documents Management Service, online at http://edms.esa.int/index.html, (Last accessed: 10 January 2006)

[191] See generally Kopal, V., "Cooperation Agreements with ESA, Central European View-

contain provisions for consultation between the parties whenever a question of interpretation or a dispute arises. Consequently, an arbitral tribunal is established for a final decision on the dispute. The usual approach is for each of the parties to name an arbitrator, with the third arbitration, who will chair the arbitral tribunal, to be named by the first two. The relevant provisions specify that in case of disagreement regarding the nomination of the third arbitrator, the President of the ICJ may be asked to nominate the third arbitrator instead. A second category of agreements concluded during this period concerned the interaction between ESA and technical organizations of Member States. These agreements contain similar clauses to those in the first category. However, generally the Chairman of the ICC, the President of the ICJ or the Secretary-General of the PCA are asked to nominate the third arbitrator in case of disagreement on this matter between the parties.

The most significant international partnership ever concluded for a technological and scientific project is that arising out of the 1998 Intergovernmental Agreement (IGA) concerning cooperation on the International Space Station (ISS), concluded between the United States, Russia, Japan, Canada and the European Partner encompassing eleven ESA Member States.[192] This replaces the corresponding 1988 Agreement (ISS Agreement) to which Russia was not a party.[193] ESA is the Cooperating Agency designated by the eleven participating ESA Member States to discharge the responsibilities of the European Partner.[194] This is achieved through various dedicated ESA optional programs carried out in accordance with the ESA Convention. The detailed obligations of ESA are set out in the 1998 ESA/NASA Memorandum of Understanding concerning cooperation on the International Space Station.[195] This is one of four similarly worded Memoranda signed in 1998 between NASA and each of the other Cooperating Agencies of the partner States.

It may be important to recall that ESA and NASA cooperated extensively on the Spacelab project in the 1970s, on the basis of an agreement dating from

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point", in *Legal Aspects of Cooperation between the ESA and Central and Eastern European Countries*, Proceedings of the International Colloquium, Charles University, Prague, September 11 and 12, 1997, (1998) 31

[192] Agreement among the Government of Canada, Governments of the Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America Concerning Cooperation on the Civil International Space Station, (1998) [hereinafter "IGA"]

[193] Agreement Among the Government of the United States of America, Governments of the Member States of the European Space Agency, The Government of Japan, and the Government of Canada on Cooperation in the Detailed Design, Development, Operation, and Utilization of the Permanently Manned Civil Space Station (September 29, 1988) [hereinafter "ISS Agreement"]

[194] At present there are sixteen full ESA Member States. However, the ISS is an ESA Optional Program, in which only eleven ESA Member States are participating.

[195] 1998 Memorandum of Understanding between ESA and NASA, see *supra* note 190, signed on January 29, 1998

1973.[196] The Spacelab Agreement was the trendsetter for the ISS Agreement and its successor, the IGA. The ISS project is one of unprecedented magnitude in terms of international scientific and technical cooperation. It is also to date the most expensive project ever undertaken on an international scale. The development of the International Space Station was valued at USD$60 billion in 2001, of which approximately USD$3.5 billion represents the European contribution. It is also expected that an equal amount will be spent by the partners on the operation and utilization of the Station during the 10 - 15 years of its exploitation.[197] Costs to operate the ISS is expected to overrun USD$5 billion annually after 2006.[198]

The International Space Station legal framework acknowledges the basic liability rules concerning space activities set forth in international space law treaties, such as the 1972 Liability Convention. However, it is a prime example of the phenomenon of "cross-waivers of liability" that have mushroomed in recent bilateral and multilateral space agreements. The IGA-established "cross-waiver of liability" prohibits any of the five Partners or their related entities (contractor, sub-contractor, user, customer) to initiate a claim against another Partner or its related entities for damage sustained as a result of International Space Station activities. Article 16 of the IGA provides

> " 1. The objective of this Article is to establish a cross-waiver of liability by the Partner States and related entities in the interest of encouraging participation in the exploration, exploitation, and use of outer space through the Space Station. This cross-waiver of liability shall be broadly construed to achieve this objective.
>
> . . .
>
> 3. (a) Each Partner State agrees to a cross-waiver of liability pursuant to which each Partner State waives all claims against any of the entities or persons listed in subparagraphs 3(a)(1) through 3(a)(3) below based on damage arising out of Protected Space Operations. This cross-waiver shall apply only if the person, entity, or property causing the damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations. The cross-waiver shall apply to any claims for damage, whatever the legal basis for such claims against:
>
> 1. another Partner State;

[196] see *supra* note 190

[197] Farand, A., "Legal Environment for Exploitation of the International Space Station (ISS)", in *International Space Station: The Next Space Marketplace* (2000) at 141

[198] David, L., "New ISS Study Warns of Increased Operating Costs", (19 February 2002), online at http://www.space.com/news/spacestation/rand_study_020219.html, (Last accessed: 10 January 2006)

2. a related entity of another Partner State;
3. the employees of any of the entities identified in subparagraphs 3(a)(1) and 3(a)(2) above.

(b) In addition, each Partner State shall, by contract or otherwise, extend the cross-waiver of liability as set forth in subparagraph 3(a) above to its related entities by requiring them to:

1. waive all claims against the entities or persons identified in subparagraphs 3(a)(1) through 3(a)(3) above; and
2. require that their related entities waive all claims against the entities or persons identified in subparagraphs 3(a)(1) through 3(a)(3) above.

(c) For avoidance of doubt, this cross-waiver of liability includes a cross-waiver of liability arising from the Liability Convention where the person, entity, or property causing the damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations.
(d) Notwithstanding the other provisions of this Article, this cross-waiver of liability shall not be applicable to:

1. claims between a Partner State and its related entity or between its own related entities;
2. claims made by a natural person, his/her estate, survivors or subrogees (except when a subrogee is a Partner State) for bodily injury to, or other impairment of health of, or death of such natural person;
3. claims for damage caused by willful misconduct;
4. intellectual property claims;
5. claims for damage resulting from a failure of a Partner State to extend the cross-waiver of liability to its related entities, pursuant to subparagraph 3(b) above."[199]

Each Partner is obliged to implement this cross-waiver in the contracts with its own contractors and sub-contractors. There are however, some exceptions to the cross-waivers of liability. Claims arising between a Partner and its own related entities, for example between the European Space Agency and one of its users, will be dealt with in contracts or sub-contracts that will not implicate the other Partners. Other exceptions to the cross-waiver of liability are included

[199] Article 16, IGA, see *supra* note 192

in Article 16(d) of the IGA. In practice, ISS users will be required to agree to an inter-party waiver of liability as part of their contract with ESA. This will provide that each party will not bring claims in arbitration or adjudication due to damage arising out of ISS activities.

In relation to dispute settlement mechanisms, a characteristic instance of equivocal resort to ad hoc dispute settlement mechanisms is provided for in the ISS Agreement. Article 23 of the ISS Agreement states that partner States should "consult with each other" on "any matter arising out of space station cooperation". Unresolved disputes "may" be submitted to "an agreed form of dispute resolution such as conciliation, mediation or arbitration".[200] The dispute settlement procedure in the ISS Agreement is similar to that provided for in Article 16 of ESA-NASA Solar Terrestrial Science Program agreement.[201] Article 16 provides

> "Should the [respective agency administrators] be unable to resolve such disputes, the issue will be submitted at the request of either Party to such other form of resolution or arbitration, binding or otherwise, as they may agree."

This equivocal reference to ad hoc dispute settlement mechanisms are again repeated in the IGA. Article 23 of the IGA provides

> "1. The Partners, acting through their Cooperating Agencies, may consult with each other on any matter arising out of Space Station cooperation. The Partners shall exert their best efforts to settle such matters through consultation between or among their Cooperating Agencies in accordance with procedures provided in the MOUs.
>
> 2. Any Partner may request that government-level consultations be held with another Partner on any matter arising out of Space Station cooperation. The requested Partner shall accede to such request promptly. If the requesting Partner notifies the United States that the subject of such consultations is appropriate for consideration by all the Partners, the United States shall convene multilateral consultations at the earliest practicable time, to which it shall invite all the Partners.

[200] Article 23, Agreement Among the Government of the United States of America, Governments of Member States of the European Space Agency, The Government of Japan, and the Government of Canada on Cooperation in the Detailed Design, Development, Operation and Utilization of the Permanently Manned Civil Space Station, (January 30, 1992), State Dept. No. 92-65, Hein's No. KAV 2382

[201] Article 16 of the the Memorandum of Understanding Between the European Space Agency and the United States National Aeronautics and Space Administration Concerning the Solar Terrestrial Science Programme, TIAS No. 12215

> 3. Any Partner which intends to proceed with significant flight element design changes which may have an impact on the other Partners shall notify the other Partners accordingly at the earliest opportunity. A Partner so notified may request that the matter be submitted to consultations in accordance with paragraphs 1 and 2 above.
>
> 4. If an issue not resolved through consultations still needs to be resolved, the concerned Partners may submit that issue to an agreed form of dispute resolution such as conciliation, mediation, or arbitration."[202]

There was only one diversion in the 1998 dispute settlement procedures from the 1988 version. In the 1988 Memorandum of Understanding, NASA could preferentially ask a partner for immediate implementation of a contested decision, pending settlement at a higher level. This preferential position was abandoned in the 1998 Memorandum, in which partners now have the right not to implement their part of a contested decision pending settlement.

Dispute settlement was one of the most contentious issues during the 1985 - 1988 negotiations on the ISS project. Some partner States argued that an international project of this scale could only be properly executed if legal certainty was provided by recourse to binding arbitration. Conversely, the US insisted that because of the sheer magnitude of the project and the enormous economic investment involved, it was in the parties' interests to settle their disputes at the lowest possible hierarchical level. This level was considered by the US to be before even the stage of formal inter-State consultations. Therefore, the US argued, recourse to binding arbitration was not necessary.

As a result, the approach to dispute settlement in ISS cooperation is fairly complicated. Daily operations and work is performed mainly through a number of technical cooperation bodies. These are organized in a hierarchical structure, with each coordinating the partners' responsibilities for various aspects of the project. The Memorandum provides that these bodies should have the autonomy to conduct their own activities and resolve their own disputes on the basis of consensus.

If a disagreement on a particular issue persists between two or more partners, a two-level consultation process was envisaged in the Memorandum. The dispute could be settled with a decision taken by the highest authorities of the Cooperating Agencies. At this stage an unsettled dispute could be submitted for consultation between representatives of the partner States concerned in accordance with the IGA. Finally, Article 23(4) of the IGA provides:

[202] Article 23, IGA, see *supra* note 192

> "If an issue not resolved through consultation still needs to be resolved, the concerned Partners may submit that issue to an agreed form of dispute resolution such as conciliation, mediation, or arbitration."[203]

This language of compromise indicates that there is leeway, despite there not being an obligation, for the partner States to submit their disagreement to a form of dispute settlement. This possibility can only be employed subject to a new ad hoc agreement between the interested parties as to the mechanism the dispute settlement process should take.

The present procedure with regard to the drafting of dispute settlement clauses for all arrangements concluded between ESA and its main space partner, NASA, in all areas of cooperation or other types of transactions, springs principally from the result of negotiations in the mid-1980s on the ISS project. The 1998 IGA has not altered the attitude to dispute settlement established in 1988. This indicates that the partner States agree that this approach reflects the most balanced compromise that could be attained in any circumstances.

The first step in settling a difference of interpretation or opinion on an issue takes the form of discussion within the operations or management structure established for the project. This usually comprises the engineers work together daily for the purpose of conducting the ISS activities. The second step involves possible consultations by Agency officials at the appropriate level. This is followed by a decision taken by the highest authorities of the Agencies. The third and final step requires a new specific dispute settlement agreement between the two disputing Agencies to be concluded before proceeding with formal dispute settlement through conciliation, mediation or arbitration.

The foregoing analysis leads to several conclusions. There is evidently no pattern of a particular preference of a certain dispute settlement mechanism in these bilateral and project-based agreements. Although many of the agreements were based on the negotiating experience of the ISS project, there seems to have been sufficient exceptions made for resort to dispute settlement mechanisms such as consultations and arbitration. There is a haphazard choice of dispute settlement mechanisms depending on the character and parties of the specific bilateral agreement. In large-scale cooperation projects with international partners however, the possibility of referring a dispute to arbitration or another dispute settlement mechanism is generally subject to the conclusion of a new separate agreement. However, the process leading to such a new agreement may cause yet another dispute between the parties.

There is significant mention of and recourse to international legal texts such as the Liability Convention and the UN Model Rules on Arbitration. However, it is contended that there are two dangers in the approach thus far taken

[203] Article 23(4)6, IGA, see *supra* note 192

by these bilateral and project-based agreements. The first is the danger of fragmentation of international space law. This is because all the procedures provided for are *ad hoc* procedures with no agreement as to the law applicable. This tendency to *ad hoc* approaches is ruinous for the certainty and coherence of international space law. Secondly, there is a danger of the imposition of national interpretations of international space law. This is due to the possible unsystematic application of certain preferred States' domestic laws. This provides another source of fragmentation of the law.

Given the chaotic slapdash taken towards the designation of dispute settlement mechanisms in international space law, there has been a renewed effort recently to establish an international instrument for the settlement of disputes in international legal circles. The next section will analyze these current efforts.

1.2 Recent Efforts in the Development of an International Instrument for the Settlement of Disputes in Space Law

The last twenty-five years have seen a renewed effort to establish an international instrument for the settlement of dispute relating to space activities. This section follows these efforts, in particular those of the United Nations, the International Law Association, and the International Institute of Space Law. It must be noted that there does not seem to be any consensus on reaching an agreement to establish a treaty régime for the settlement of disputes relating to space activities at this time.

1.2.1 The United Nations

In April 1996, in celebration of the fiftieth anniversary of the International Court of Justice, a Colloquium was held with the theme "Increasing the Effectiveness of the International Court of Justice".[204] Among the topics discussed was the ways by which the Court could be equipped to deal with developing areas of international space law. Some of the proposals raised include a special Chamber for space law disputes, such as the one established for environmental law disputes. It was questioned whether this Chamber could have fast-track procedures, speedy interim measures, and standing for international organizations. The questions of commercialization and non-State actors seemed to cast a pall on the utilization of the International Court as a forum for the settlement of dispute relating to outer space. However, it was correctly reiterated that the

[204] Peck, C. and Lee, R.S., (eds.), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court*, (1997)

International Court provided an available and perhaps sometime-suitable forum for the settlement of disputes relating to outer space.

The establishment of a new institutional framework for dispute settlement was recently discussed once more at the UNISPACE-III Technical Forum held in Vienna in July 1999.[205] It was recommended that efficient machinery for the settlement of legal disputes arising in relating to space commercialization should be elaborated. This machinery should consider the existing arbitration rules used in international business practice between private enterprises and between States and private enterprises in international commerce and investment within the framework of international economic law.[206]

The discussions at the UNISPACE-III Technical Forum on Space Law, July 1999[207] on possible dispute settlement mechanisms in the field of international space law are a component of continuing deliberations on the issue. The Technical Forum highlighted three main perspectives:

1. The existing treaties relating to outer space and space activities do not adequately address seminal issues of dispute settlement both in terms of the scope of space activities as well as participants in those activities.

2. Even with respect to their restricted focus, they do not go beyond interstate disputes.

3. There is a need to examine suitable dispute settlement mechanisms in respect of space activities with a view to encompassing those categories of space activities that are amenable to such special mechanisms.

1.2.2 The International Law Association: the 1998 Final Draft Convention on the Settlement of Disputes Related to Space Activities

The International Law Association (ILA) was established in 1873 in Brussels. Its Constitution mandated it to work towards the

> "study, elucidation and advancement of international law, public and private, the study of comparative law, the making of proposals

[205] Proceedings of the Workshop on Space Law in the Twenty-First Century, UNISPACE Technical Forum, July 1999 (1999) 179 - 194

[206] Malanczuk, P., "Possible International Regulatory Frameworks, including Legal Conflict Resolution in Expanding Space Commercialization", in Proceedings of the Workshop on Space Law in the Twenty-First Century, UNISPACE Technical Forum, July 1999 (1999) 181

[207] United Nations Office for Outer Space Affairs, Proceedings of the Workshop on Space Law in the Twenty-First Century, (New York, 2000) at 179 - 194

> for the solution of conflicts of law and for the unification of law, and the furthering of international understanding and goodwill."[208]

The ILA consists of lawyers from private practice, academia, government and the judiciary, as well as non-law experts from the commercial, industrial, financial and dispute settlement fields. It has consultative status as an international non-governmental organization with a number of UN specialized agencies. The ILA works mainly through its International Committees, which provide a forum for international discussion of the evolution of international law.

The ILA embarked on the study of the settlement of space law disputes as early as 1978.[209] Subsequently in the 1982 Montreal ILA Conference[210] a Resolution was passed recommending that the Space Law Committee begin work on preparing a Draft Convention on the Settlement of Space Law Disputes. This Draft Convention was to incorporate these basic principles:

1. The Convention should permit States to choose for its application between:

   (a) all space law disputes with other States Parties;

   (b) application to specific areas of space law as may be dealt with in specific bilateral or multilateral treaties;

   (c) certain categories of disputes or certain sections of the Convention, subject to such exceptions that the State may wish to claim.

2. The Convention should in one section provide for non-binding settlement methods, including advisory awards, but should in another section provide for binding methods of settlement upon application by one of the parties, if the other party does not agree with the consequences of such non-binding methods;

3. The Convention should provide States with a choice from among different settlement methods which, in the case of a binding settlement, should include adjudication by the International Court of Justice as well as administrated and *ad hoc* arbitration;

4. The Convention should provide that States Parties must select one method for binding settlement within the choices given;

[208] Constitution, International Law Association, as quoted in the "History of the ILA", online at the Association's website at http://www.ila-hq.org/html/main_about.htm. (Last accessed: 03 January 2006)

[209] For a report of the Manila Conference, see (1979) 7 JSL 63

[210] See generally 1982 Report of the International Law Association of the Conference held in Montreal, 29th August - 4th September 1982

5. The Convention should stress that States Parties have an obligation to satisfy the decisions of the tribunal chosen;

6. In the Convention or as an annex thereto a 'disputes settlement clause' should be drafted which could serve as a model to be included in future bilateral or multilateral treaties on space law.

The ILA Space Law Committee duly prepared to formulate a Draft Convention on the Settlement of Space Law Disputes. This was discussed at the 1984 Paris ILA Conference. The Draft Convention included a preamble and sections devoted to the scope of the Draft Convention's applicability, both non-binding and binding settlement procedures, and procedural rules for conciliation and arbitration. The Draft Convention also provided for an international tribunal for space law, with the specification that "in the tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured."[211] The scheme of instituting a novel, independent tribunal to manage space-related disputes was thus first considered by the ILA in 1984. As a result, a draft Convention on Dispute Settlement prepared by Professor Böckstiegel was adopted by the Space Law Committee at the 1984 Paris Conference.

The 1984 Draft Convention followed the dispute settlement procedure in the 1982 UN Law of the Sea Convention[212] and its Annexes, since "it represents the most recent indication of what is acceptable in present state practice". However it was clear that the law of the sea dispute settlement procedure had to be adapted to correspond with the different field of application.[213]

In the 1990 ILA Conference, the Space Law Committee continued to ponder questions such as environmental protection, extension of compulsory jurisdiction, a new international court for space law, a new convention on the settlement of space disputes and a new set of protocols on dispute settlement, as well as the political requirements for traditional non-binding procedures.[214]

The 1994 Buenos Aires ILA Conference considered whether the 1984 Paris Draft Convention should be amended or whether it was more expedient to draft a new instrument. The 1996 ILA Helsinki Conference unanimously decided to set aside the idea of drafting a new international instrument and agreed instead to adapt the 1984 Paris Convention. Finally, the 1998 ILA Taipei Conference

[211]The complete text of the Draft Convention is available in International Law Association, *Report of the 61st Conference* (Paris 1984), (1985) 325

[212]United Nations Convention on the Law of the Sea, December 10, 1982, UN Doc.A/Conf.62/122

[213]Kopal, V., "Evolution of the Main Principles of Space Law in the Institutional Framework of the United Nations", (1984) 12 JSL 12

[214]ILA Booklet, *Space Law Committee, Section B: Suggestions for the Future* (64th Conference, London, 1990), (1990) at 18

adopted the "Final Draft of the Revised Convention on the Settlement of Disputes related to Space Activities".[215]

The 1998 ILA Taipei Draft Convention reflected the affirmative features of these constructive deliberations. Within the framework of judicial settlement of disputes, it was proposed to create a new Chamber of the International Court of Justice to deal with disputes of commercial or privatized outer space activities and to establish a new International Tribunal for Space Law. In the form of extra-juridical settlement of disputes, the Draft postulated that conciliation and arbitration procedures should be accepted.

The idea was to start dispute settlement at a low level of compulsion so as to garner wider support. This meant establishing an obligation to settle the dispute, coupled with a free choice of means and shorter time limitation periods to prevent disputes from dragging on indefinitely. As a nod to international cooperation and the geometric growth of commercial space activities, both intergovernmental organizations and private entities should be allowed standing before the proposed dispute settlement mechanisms. All this should be achieved in as simple a manner as possible so as to avoid losing precious time and party support for the proposal in a maze of legal intricacies. The number of judges and quorum required should also be brought down to improve tribunal agility and reduce costs. Any decision taken by the dispute settlement body should be final and binding on the parties concerned.

Although the provisions of the Taipei Draft Convention speak for themselves, it would be instructive to highlight some of its most significant elements.

The Taipei Final Draft Convention under Article 1 applies to all activities in outer space and all activities with effects in outer space, if States and international organizations carry out such activities.[216] It also refers to the international obligations as laid out by the Outer Space Treaty on Member State. As such, it is also applicable to private and non-governmental entities via the States' continuing supervisory obligations.[217] The wide scope of application of the Convention can however, be constrained in various ways, while certain sections or articles of the Convention itself can be excluded.[218] This facilitates to a high degree the acceptability of at least a part of the Convention by the greatest possible number of States. It however does not override agreements in which parties have already agreed to submit to another procedure of peaceful settlement, if that procedure entails a binding decision.[219] This gives priority to antecedent dispute settlement procedures that have binding effect, and it is

[215]Final Draft of the Revised Convention on the Settlement of Disputes related to Space Activities, ILA, *Report of the 68th Conference, Taipei, Taiwan, Republic of China*, (1998) 249 - 267

[216]Article 1(1), Taipei Final Draft Convention, see *supra* note 215

[217]Article VI, Outer Space Treaty, see *supra* note 2

[218]Article 1(2), Taipei Final Draft Convention, see *supra* note 215

[219]Article 1(5), Taipei Final Draft Convention, see *supra* note 215

submitted, is significant in advancing the case for binding dispute settlement.

The Convention provides successively non-binding[220] and binding[221] settlement procedures. The non-binding settlement procedures deal with the obligation to exchange views,[222] focusing on negotiation or any other peaceful means of dispute settlement, or conciliation.[223] The conciliation procedure is extensively elaborated in a separate section of the Convention.[224]

The binding settlement procedures[225] are to be initiated at the request of any party to the dispute when no settlement has been reached following recourse to the non-binding procedures.[226] They offer a choice of means without any hierarchical structure, namely:[227]

1. the International Tribunal for Space Law, if and when such a Tribunal has been established;
2. The International Court of Justice; or
3. An arbitral tribunal, constituted in accordance with the provisions of the Convention.

The Convention contains extensively elaborated provisions in subsequent sections on the procedures of an arbitral tribunal and the International Tribunal for Space Law.[228]

The choice of procedure can be made when parties sign, ratify or accede to the Final Draft Convention by means of a declaration.[229] A Party, which is party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration as a means of dispute settlement.[230] Where parties have accepted the same procedure, the dispute will be submitted only to that procedure. However, if the parties to the dispute have not accepted the same procedure for the settlement of the dispute between them, it may be submitted only to arbitration, unless the parties otherwise agree.[231] In respect of scientific or technical matters, a provision of the Convention offers a court or tribunal the assistance of two technical experts, who would, however, have no voting right.[232]

[220]Section II, Taipei Final Draft Convention, see *supra* note 215
[221]Section III, Taipei Final Draft Convention, see *supra* note 215
[222]Article 3, Taipei Final Draft Convention, see *supra* note 215
[223]Article 4, Taipei Final Draft Convention, see *supra* note 215
[224]Section IV, Taipei Final Draft Convention, see *supra* note 215
[225]Section III, Taipei Final Draft Convention, see *supra* note 215
[226]Article 5, Taipei Final Draft Convention, see *supra* note 215
[227]Article 6(1), Taipei Final Draft Convention, see *supra* note 215
[228]Section V relates to the arbitration procedure; Section VI relates to the International Tribunal for Space Law, Taipei Final Draft Convention, see *supra* note 215
[229]Article 6, Taipei Final Draft Convention, see *supra* note 215
[230]Article 6(2), Taipei Final Draft Convention, see *supra* note 215
[231]Articles 6(3) and 6(4), Taipei Final Draft Convention, see *supra* note 215
[232]Article 8, Taipei Final Draft Convention, see *supra* note 215

Further the Final Draft Convention contains the possibility that all dispute settlement procedures specified in the Final Draft Convention shall be open to entities other than the parties, unless the matter is submitted to the International Court of Justice.[233] This increases accessibility of the mechanism beyond the traditional boundaries set by international law.

The Final Draft Convention stipulates that the applicable law includes its own provisions as well as other rules of international law that are not incompatible with itself.[234] Any decision rendered by a court or tribunal having jurisdiction under the Convention shall be considered as final and binding for all parties to the dispute.[235]

It is submitted that the Taipei Final Draft Convention is a definite progression in the development of the law relating to peaceful settlement of disputes in outer space. It is clear, succinct, and creative in its use of existing dispute settlement techniques. It also exhibits grave pragmatism in aiming for the widest possible party support, while acknowledging and adapting to the realities of current and future space activities. It is an important model for development of further innovations in the area of peaceful settlement of space-related disputes. However, it is submitted that the Taipei Final Draft Convention could go further in establishing a workable dispute settlement framework for outer space activities. It should give more weight to issues of accessibility and standing for individuals and small commercial enterprises engaged in space activities. It should also provide some means of universal applicability instead of resorting to the traditional State and intergovernmental organization dichotomy. Further, it should take into account the need for the inclusion of both law and non-law experts in the resolution of space disputes. Therefore, it is submitted that while the Taipei Final Draft Convention is a step in the correct direction, it should build upon the pragmatic creativity of the drafters and take a much bolder step in the development of a comprehensive dispute settlement framework for space activities.

1.2.3 The International Institute of Space Law

The International Institute of Space Law (IISL) was founded in 1960. It replaced the Permanent Committee on Space Law founded in 1958 by the International Astronautical Federation. The IISL's objectives include cooperation with international and national institutions in the field of space law, fostering the development of space law and social sciences, and the organization of various colloquia and competitions on the juridical and social science aspects of space activities. The membership of the IISL consists of individual and insti-

[233] Article 10(2), Taipei Final Draft Convention, see *supra* note 215
[234] Article 11(1), Taipei Final Draft Convention, see *supra* note 215
[235] Article 13(1), Taipei Final Draft Convention, see *supra* note 215

tutional elected members who are distinguished for their contributions to the development of space law.[236]

The IISL held its first Colloquium in 1958 in the Hague, the year after the launch of Sputnik I. Since then, legal scholars have scrutinized, deliberated and proposed measures for the settlement of disputes arising from space activities. Legal matters discussed varied from the creation of a special international fund to pay for damages caused by space objects[237] to the establishment of a special court to settle dispute arising from space activities. It has been suggested that an agreement providing for compulsory jurisdiction of space disputes, possibly by the ICJ, would be advantageous.[238] Conversely, it has also been maintained that compulsory jurisdiction of the ICJ faced severe political difficulties, especially since the United States has never accepted compulsory jurisdiction of the ICJ. It was mooted that establishing a new international arbitration court might be an improved approach.[239]

In 1980, a new court of arbitration for space law disputes was proposed. This arbitral tribunal would be open to claims from individuals and private enterprises, which cannot make claims under the Liability Convention. It was also suggested that if the Liability Convention were to be revised, the restrictive notion of liability should be broadened into the more extensive concept of responsibility.[240] While the political compromise that led to awards under the Liability Convention being merely recommendatory was acknowledged, the discussions have confirmed that the failure to ensure automatic legal binding effect of the Commission's awards was the major defect of the Liability Convention.[241]

The early 1990s saw the growth in the academic campaign for arbitration to be used as the default means of dispute settlement in space law. Many scholars wrote eloquent cases for the use of arbitration for the resolution of disputes.[242] These discussions crystallized into a new stage of consideration for

[236]Statutes, International Institute of Space Law, as quoted online on their website, http://www.iafastro-iisl.com/main%20pages/organization_1.htm, Last accessed: 04 January 2006.

[237]Rode-Verschoor, I.H.Ph., "The Responsibility of States for the Damage Caused by Launched Space-Bodies", (1958) 1 Proc. Coll. Law of Outer Space 103

[238]Beresford, S.M., "Requirements for an International Convention on Spacecraft Liability", (1963) 6 Proc. Coll. Law of Outer Space 21; Goedhuis, D., "Some Observations of the Present Legislative Procedure Applied to Outer Space", (1963) 6 Proc. Coll. Law of Outer Space 367

[239]Christol, C.Q., "Permissive Processes to Ensure the Reasonable Uses of Outer Space", (1965) 8 Proc. Coll. Law of Outer Space 27

[240]Böckstiegel, K.-H., "Settlement of Disputes on International Regimes Applicable to Space Activities", (1980) 23 Proc. Coll. Law of Outer Space 127; also see Cocca, A.A., "From Full Compensation to Total Responsibility", (1984) 27 Proc. Coll. Law of Outer Space 157

[241]Christol, C.Q., *The Modern International Law of Outer Space*, (1982), at 85

[242]Böckstiegel, K.-H., "Developing a System of Dispute Settlement Regarding Space Activities", (1992) 35 Proc. Coll. Law of Outer Space 27; White, W.N. Jr., "Resolution of Disputes

a new framework for the settlement of disputes in outer space.[243] Trends in geopolitical shifts and domestic laws and customs were also noted and debated.[244]

This led naturally to the turn of the century, where two issues were brought to the forefront. The first was the commercialization of space activities, and its impact on the structures and systems necessary for the peaceful settlement of disputes in outer space.[245] The second was a critical account of the experiences of dispute settlement mechanisms across the spectrum of international law, and the lessons learnt from these experiences.[246]

The IISL has indeed played an immense role in bringing together legal academicians and practitioners to ponder and creatively bring about novel solutions for the peaceful settlement of disputes arising from space activities. It has provided a crucible for the deliberations relating to this issue. Indeed, as many members of the IISL also sit on the Space Law Committee of the ILA, it is not too farfetched to say that the IISL did provide also a breeding ground for fertile ideas that found their way into the 1998 Taipei Final Draft Convention.

Arising in Outer Space", (1992) 35 Proc. Coll. Law of Outer Space 183; Böckstiegel, K.-H., "Arbitration of Disputes Regarding Space Activities", (1993) 36 Proc. Coll. Law of Outer Space 136; Boureély, M.G., "Creating an International Space and Aviation Arbitration Court", (1993) 36 Proc. Coll. Law of Outer Space 144; Safavi, H., "Adjudication and Arbitration of Disputes Regarding Space Activities", (1993) 36 Proc. Coll. Law of Outer Space 163

[243]Almond, H.H. Jr., "Disputes, Disagreements and Misunderstandings: Alternative Procedures for Settlement, Claims Process in Outer Space", (1993) 36 Proc. Coll. Law of Outer Space 125; Williams, S.-M., "Dispute Settlement and Space Activities: A New Framework Required?", (1996) 39 Proc. Coll. Law of Outer Space 61

[244]Ribbelink, O.M., "The End of the Cold War and the Prospects for the Settlement of Space Law Disputes", (1992) 35 Proc. Coll. Law of Outer Space; White, W.N. Jr., "Resolution of Disputes Arising in Outer Space", (1992) 35 Proc. Coll. Law of Outer Space 183; Sterns, P.M. and Tennen, L.I., "Resolution of Disputes in the *Corpus Juris Spatialis*: Domestic Law Considerations", (1993) 36th Proc. Coll. Law of Outer Space 172; Hošková, M., " "Tendencies of Dispute Settlement in Present 'Eastern European' Space Law", (1996) 39 Proc. Coll. Law of Outer Space 75

[245]Reif, S.U. and Schmidt-Tedd, B., "Legal Framework for Expanding Privatisation in Space: Views and Interim Results from the 'Project 2001' - Working Group on Privatisation", (1999) 42 Proc. Coll. Law of Outer Space 139; Gál, G., "State Responsibility, Jurisdiction and Private Space Activities", (2001) 44 Proc. Coll. Law of Outer Space 61; Castillo Argañarás, L.F., "Some Thoughts on State Responsibility and Commercial Space Activities", (2001) 44 Proc. Coll. Law of Outer Space 65; von der Dunk, F.G., "Space for Dispute Settlement Mechanisms - Dispute Resolution Mechanisms for Space? A Few Legal Considerations", (2001) 44 Proc. Coll. Law of Outer Space 442

[246]Farand, A., "The European Space Agency's Experience with Mechanisms for the Settlement of Disputes", (2001) 44 Proc. Coll. Law of Outer Space 453; Kerrest, A., "Dispute Resolution Mechanism for Damage Caused by Space Objects", (2001) 44 Proc. Coll. Law of Outer Space 462; Larsen, P.B., "Critical Issues in the UNIDROIT Draft Space Protocol", (2002) 45 Proc. Coll. Law of Outer Space 2

1.2.4 Other Organizations

Outside the framework of the United Nations, ILA and IISL, other organizations have also been busy contemplating the future of dispute settlement in international space law.

In 1979, a Round Table on the Settlement of Disputes on Space Law was held in Córdoba, Argentina, organized by the Council of Advanced International Studies. Five conclusions were reached at this meeting:

1. Every future international agreement, whether bilateral or multilateral, should contain a clause providing for the settlement of disputes;

2. A Convention governing specific matters in the field of space law should establish compulsory jurisdiction;

3. All judgments and awards shall be final and binding;

4. A means should be established to ensure the recognition and execution of judgments and awards; and

5. The scope of these conclusion should be, in the first stage, limited to subjects of public international law.

At that meeting it was concurred that neither a convention nor a general space law court with adequate procedures for the settlement of disputes existed.[247] A revision of the Liability Convention was proposed, involving the following proposals:

1. Particular emphasis should be placed on the urgent need for a legal body with competent jurisdiction to replace the present Claims Commission, which considers only compensation;

2. There should be an ensured execution of a sentence or an award of a decision as a fundamental principle of international legal security; and

3. The law applicable to the settlement of disputes should be determined in advance.

It was also contended that any decision of a tribunal should take into account the social, cultural, economic and other conditions of the injured party.[248]

That same year the 1979 International Colloquium on Settlement of Space Law Disputes - The Present State of the Law and Perspective of Further Development was held in Munich, Germany. It was considered the deepest research

[247]Sereni, A.P., *La jurisdicción international*, (1969) Universidad de Valladolid at 52

[248]Cocca, A.A., "To What Extent Are Future Procedures for the Settlement of Space Law Disputes Considered Necessary?", in Böckstiegel, K.-H., (ed.), *Settlement of Space Law Disputes: The Present State of the Law and Perspectives of Future Development*, (1980) 139

and analysis ever achieved on the subject. One of the most imperative queries dealt with was:

> "Which method of dispute settlement in space law can be considered as being most effective and which has the greatest chance of realization?"

Critical analysis also focused on the uncertainty in the meaning of the Liability Convention's provision that compensation should be determined "in accordance with international law and principles of justice and equity". There was also debate on the fact that individuals had no standing to make claims. Further, there was a general discontent that the dispute settlement provisions were not binding.[249] The most productive approach to solving these problems might be to focus on particular areas where compulsory procedures are more likely to gain support. This approach follows from the assessment of the INTELSAT and INMARSAT dispute settlement procedures. For some areas of international space law at least, third party arbitration is already compulsory. This situation can most probably be expanded to encompass other areas of international space law.

One conclusion of this 1979 Colloquium was that compulsory third-party settlement will ultimately be the necessary method of dispute settlement. However, "States can only be expected to be willing to accept this method for those areas of space law where a reasonable certainty as to the applicable rules exists", which implies that this will not be the case for controversial areas of space law.[250] Further, it was noted that "a great number of States may be found ready to accept compulsory third-party dispute settlement if they are given a choice between adjudication and arbitration".

A summary of the results of this Colloquium were:

1. In selecting the dispute settlement method most fitting and acceptable to States for a given type of case or a specific area of space law, a pragmatic endeavor seems most appropriate, while specific criteria should be used in the decision-making process;

2. Compulsory third-party settlement seems to be the method required, at least in certain, practically relevant areas of space law;

3. States can only be expected to accept compulsory third-party settlement in areas of space law where a reasonable certainty exists, and not in controversial areas;

[249] Gorove, S., "Dispute Settlement in the Liability Convention", in Böckstiegel, K.-H., (ed.), *Settlement of Space Law Disputes: The Present State of the Law and Perspectives of Future Development*, (1980) 10

[250] Böckstiegel, K.-H., "Settlement of Space Law Disputes", (1984) 12 JSL 136

4. A choice between adjudication and arbitration is likely to be acceptable to a great number of States;

5. Where such a combined system does not seem acceptable, settlement by the more flexible method of arbitration seems to be more appropriate;

6. Space lawyers have the responsibility to elaborate further criteria and alternative solutions which can be drawn upon by States;

7. If progress is at all possible, it will most probably be achieved in state practice, and in limited areas of space law, such as in space communications.

The issue of dispute settlement in the field of international space law continued to occupy the mind of space law for some time. Initiatives that took place included:

- 1981 Study on the Application of Establishing an International Satellite Monitoring Agency (ISMA);[251]

- The International Colloquium on the Settlement of Disputes on the New Natural Resources, The Hague, Netherlands, November 1981, which was organized by the Hague Academy of International Law and the United Nations University;[252] and

- A Symposium on "Conditions Essential for Maintaining Outer Space for Peaceful Purposes", The Hague, Netherlands, March 1984, organized by the IISL and the United Nations University.

In 1994 the Société Française de Droit Aérien et Spatial established an International Court of Air and Space Arbitration. It is conceptualized for the speedy and economic settlement of any disputes related directly or indirectly to air and space activities. This is currently the only international arbitration organization specifically for air and space. Arbitration costs shall be based on French standards, considered very reasonable in arbitration systems. As such, costs will be lower than in lawsuits in national courts of many countries or in certain other arbitration organizations. Its Rules of Arbitration cover two major points required by the specific nature of the subject matter:

1. the rules provide for an interim arbitration procedure which parties may implement when they deem urgent provisional measures are necessary; and

[251]Report of the Secretary General, U.N. Doc. A/AC 202/14, August 6 1981

[252]The report of this Colloquium can be found at Hague Academy of International Law / United Nations University (eds.), *The Settlement of Disputes on the New Natural Resources*, (1983), Workshop, The Hague 8 - 10 November 1982, (1983)

2. the Rules stipulate arrangements for appointing French and foreign experts listed according to their specialist areas and recommended by the Court.[253]

At the time of writing, this arbitral court has not been in use.

On February 23, 2001, the Permanent Court of Arbitration held its Third PCA International Law Seminar. The focus of the Seminar was "Arbitration in Air, Space and Telecommunications Law: Enforcing Regulatory Measures". Issues dealt with included the need for a mandatory supranational dispute settlement mechanism, experiences of existing dispute settlement mechanisms in organizations such as ESA and ITU, expedited procedures, and the use and procedures of arbitration as a method of dispute settlement for these fields of international law.[254]

1.3 Conclusion

The foregoing analysis shows that from the outset, the peaceful settlement of disputes relating to outer space has been repeatedly mentioned in various legal texts. There has also been some effort to incorporate the existing mechanisms for the peaceful settlement of disputes in international law into space law. Although the mechanisms put in place have not been undergone any baptism of fire in terms of actual usage, these mechanisms have thus far been sufficient for the majority of activities conducted in outer space. It is submitted however, that the existing system is unable to effectively solve many of the disputes that may arise in the future, given the complexities of the field of space activities.

That the main sources of dispute settlement procedures relating to outer space have been international treaties and agreements is a significant trait. International space law is in this context distinct from other areas of international law such as air and sea law, where national regulations and domestic practice have paved the way before international legislation was resorted to. Provisions made for dispute settlement relating to space activities began at the international level. However, the methodology taken to date has been able to minimize or eliminate conflicts which might otherwise lead to legal disputes.

International law, unlike domestic law, cannot be enforced automatically by judicial proceedings. Since international space law is such a new branch of international law, dealing with cutting-edge developments and technology, it is

[253]Diederiks-Verschoor, I.H.Ph., *An Introduction to Space Law* (2nd ed., 1999) at 148, see also Diederiks-Verschoor, I.H.Ph., "The Settlement of Disputes in Space: New Developments", (1998) 26 JSL 41

[254]International Bureau of the Permanent Court of Arbitration (ed.), *Arbitration in Air, Space and Telecommunications Law: Enforcing Regulatory Measures*, The Permanent Court of Arbitration / Peace Palace Papers, PCA International Law Seminar, February 23, 2001, (2001)

indeed astonishing that no novel techniques for dispute settlement have been elaborated. What is important, however, is that traditional techniques have been adopted to resolve potential disputes in an attempt to avoid any lacunae in the enforcement of international space law.

Analysis of the dispute settlement provisions in space agreements plainly reveals the degree to which States persist to be mistrustful of any impingement to their sovereignty. They are reluctant to submit disputes to adjudication and binding arbitration, particularly when these provisions are negotiated between States which have dissimilar political, economic and social interests and demography. However, there is a slow but clear shift in this attitude as States realize the contemporary political, economic and technical pressures necessitating the lifting of the veil of State sovereignty.

The increasing space activities of States, international organizations and private entities in outer space will undoubtedly lead to an increased probability of disputes. Novel mechanisms will be needed to deal effectively with these disputes. The development of an effective mechanism for the settlement of disputes arising in relation to the development of the exploration and exploitation of outer space has been the subject of global study by highly qualified publicists and international institutions. The direct access of private enterprises to space activities also raises new issues as to the reinforcement of existing systems through new constructs.

The 1998 Taipei Final Draft Convention may be a useful instrument for further consideration on whether an independent sectorialized dispute settlement mechanism should be established. The 1999 UNISPACE-III Technical Forum has recommended that UN COPUOS and the UN Office of Outer Space Affairs increase their links and coordination with other relevant international organizations, particularly the ITU, the World Trade Organization, the World Intellectual Property Organization, as well as with UNCITRAL. These UN bodies were also requested to initiate contemplation on the elaboration of efficient machinery for the settlement of legal disputes arising in relation to space activities and commercialization.

The 1972 Liability Convention is the space treaty with the most elaborate provisions for dispute settlement. However, it fails to ensure binding decisions. Since its adoption a pressure group has emerged in favor of compulsory jurisdiction and the enforcement of awards. In particular, there is a prevalent recognition of the urgent need for a sectorialized international mechanism for the settlement of space disputes. International space law has entered a new phase in its history with the demand for a specialized dispute settlement machinery that is able to handle the issues and complexities of space activities. This phenomenon will likely continue and dominate, as increasing numbers of factors make this demand progressively more urgent.

Since the methods for the peaceful settlement of disputes in international

law have been repeatedly inserted into space law agreements, the next Chapter will consider the elements, principles and methods of international dispute settlement, and the applicability of these mechanisms to disputes arising from activities in outer space.

Chapter 2

Applicability of International Dispute Settlement Mechanisms to Space Law

One of the primary purposes of the United Nations, enshrined in Article 1(1) of its Charter, is to

> "bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".[1]

To that end all Members of the United Nations are to

> "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations".[2]

In particular, all Members undertake to

> "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered".[3]

These "peaceful means" are dealt with in Chapter VI of the UN Charter, which deals specifically with the Pacific Settlement of Disputes. Article 33 states that

> 1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security,

[1] Article 1(1) Charter of the United Nations, (1945) 59 Stat. 1031, UNTS No. 993 [hereinafter "UN Charter"]

[2] Article 2(4), UN Charter, see *supra* note 1

[3] Article 2(3), UN Charter, see *supra* note 1

> shall, first, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
>
> 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.[4]

The peaceful settlement of disputes was endorsed by the United Nations General Assembly repeatedly, notably in the Friendly Relations Declaration of 1970[5], and in the 1982 Manila Declaration on the Peaceful Settlement of International Disputes.[6]

In adopting its 1982 Manila Declaration on the Peaceful Settlement of Disputes[7] the General Assembly underlined in particular "the need to exert utmost efforts in order to settle any conflict and disputes between States exclusively by peaceful means" and that "the question of the peaceful settlement of disputes should represent one of the central concerns for States and for the United Nations". The importance of the peaceful settlement of international disputes is even more imperative in today's space age.[8]

The central purpose of the law is to settle issues of concern to the community it governs.[9] International law uses both substantive and procedural rules to settle these questions among the international community. Procedural rules perform two indispensable roles. Firstly, they offer the methods by which to interpret, apply and enforce the substantive rules of law. Secondly, they are used to settle controversies in areas where the existing substantive rules are unclear or deficient.[10] This is especially important in international space law because of the relative youth of the field. Procedures for the settlement of disputes relating to international space law will allow both the enforcement of the existing framework of space law, and the progressive evolution of a field

[4]Article 33, UN Charter, see *supra* note 1

[5]Declaration of the Principles of International Law concerning Friendly Relations and Co-operation between States, (24 October 1970) GA Res. 2625 (xxv), Annex, (1970) 9 ILM 1292 and reproduced in Brownlie, I., *Basic Documents in International Law*, (4th ed., 1995) 36

[6]Manila Declaration on the Peaceful Settlement of International Disputes, (15 November 1982) GA Res. 37/10 (1982), 21 ILM 449

[7]UN General Assembly Resolution 37/10, (15 November 1982), 51 UN GAOR Supp. 261, UN Doc. A/37/51

[8]Bilder, R.B., "An Overview of International Dispute Settlement", (1986) 1 Journal of International Dispute Resolution 1

[9]O'Connell, M.E., "New International Legal Process", (1999) 93 AJIL 334 at 336; Sohn, L., 'The Future of Dispute Resolution', in MacDonald, R.St.J. and Johnston, D.M., (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory*, (1983), 1121

[10]O'Connell, M.W., "Introduction", in O'Connell, M.E., (ed.), *International Dispute Settlement*, (2002) xi

of law that governs one of the most rapidly developing areas of international society.

Generally, States have been very hesitant to limit their sovereignty by submitting *in abstracto* to binding third party dispute settlement. The prevalent tendency is to regard only minor conflicts and technical issues to be suitable for binding third party dispute settlement. Nonetheless, States have concluded a number of general multilateral instruments aiming at the peaceful settlement of disputes.[11] These include the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes. As of 23 May, 2005, 105 States were still bound either by the 1899 or the 1907 Conventions, or by both.[12]

States are more inclined to accept general dispute settlement procedures in respect of disputes concerning a specific field.[13] The 1972 Liability Convention is typical of a new form of compromissory clause acceptable to States. The Claims Commission provided for functions as little more than a conciliation body unless the parties agree to accept its decision as a binding award.

Third party dispute settlement procedures also appear to be more acceptable to parties if jurisdiction is limited by geography as well as subject matter. Several regional instruments also provide for such procedures. These include the 1948 American Treaty on Pacific Settlement (Bogotà Pact),[14] the 1957 European Convention for the Peaceful Settlement of Disputes,[15] the 1964 Protocol of the Commission of Mediation and Arbitration of the Organization of African Unity,[16] the 1992 Convention on Conciliation and Arbitration Convention Within the CSCE[17] and the 1993 OAU Mechanism for Conflict Prevention,

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[11] see generally Oellers-Frahm, K. and Wuehler, N., *Dispute Settlement in Public International Law: Texts and Materials*, (1984)

[12] Annex 1, 104th Annual Report of the Administrative Council of the Permanent Court of Arbitration, (2004), available online at http://www.pca-cpa.org/ENGLISH/AR/annrep04.htm (in English) and at http://www.pca-cpa.org/FRENCH/RA/annrep04fr.htm (in French), (Last accessed: 04 January 2006).

[13] Oellers-Frahm, K., "Arbitration - A Promising Alternative of Dispute Settlement under the Law of the Sea Convention?", (1995) 55 ZaöRV 457

[14] 30 UNTS 55, de Maekelt, T.B., "Bogota Pact (1948)", (1992) 1 EPIL 415

[15] 320 UNTS 243. The European example is to date perhaps the most extensive and established regional peaceful dispute settlement framework, with the institution of the European Community, the European Union, the European Court of Justice, the European Court of Human Rights and all their attendant frameworks. For an excellent overview of the European system, see generally Brown, L.N., *The Court of Justice of the European Communities* (1989); Plende, R., "Rules of Procedure in the International Court and the European Court", (1991) 2(2) EJIL 1; Mowbray, A., *Cases and Materials on the European Convention of Human Rights* (2001); and Leach, P., *Taking a Case to the European Court of Human Rights* (2001)

[16] (1964) 3 ILM 1116

[17] (1993) 32 ILM 557, see Bardonnet, D., (ed.), *The Peaceful Settlement of International Disputes in Europe: Future Prospects*, (1991)

Management and Resolution.[18] Some bilateral[19] and multilateral treaties also include specific dispute settlement clauses[20] relating to the interpretation and application of the treaty in question.

This Chapter will critically analyze the traditional methods of international dispute settlement.[21]

It begins with a general overview of the public / private international law dichotomy, and of the general elements and purposes of international dispute settlement. This brief background will provide the context for the consideration of the applicability of these mechanisms of international dispute settlement to disputes relating to outer space.[22] The classical means of international dispute settlement examined in this Chapter are

1. Negotiation;
2. Consultations;
3. Inquiry & Fact-Finding;
4. Mediation & Good Offices;
5. Conciliation;
6. Arbitration;
7. Claims Commissions; and
8. Judicial Settlement.

In each case, a brief overview of the process will be critiqued in the light of its experiences on the international plane. Each of these processes will then be assessed as to their applicability to disputes arising from activities in outer space.

2.1 The Elements of International Dispute Settlement

"International dispute settlement" is used interchangeably with the phrases "international dispute resolution" and "peaceful settlement of disputes". All

[18] UN Doc. A/47/558. See Hilf, J.,"Der neue Konfliktregelungsmechanismus der OAU", (1994) 54 ZaöRV 1023

[19] Blumenwitz, D., "Treaties of Friendship, Commerce and Navigation", (1984) 7 EPIL 484

[20] Fox, H., "States and the Undertaking to Arbitrate", (1988) 37 ICLQ 1

[21] For a comprehensive overview of the main methods of international dispute settlement procedures, refer to the United Nations Handbook on the Peaceful Settlement of Disputes (1992), and see generally Collier, J. and Lowe, V., *The Settlement of Disputes in International Law: Institutes and Procedures*, (1999)

[22] Jains, M.W. (ed.), *International Courts for the Twenty-First Century* (1992); Guillaume, G., "The Future of International Judicial Institutions", (1995) 44 ICLQ 848

three phrases refer to ending disagreements on the international plane without resort to armed force. The study of international dispute settlement consists of four considerations: international disputes, the disputants, the substantive obligations requiring peaceful settlement, and the methods synthesized in international law for resolving disputes without force or coercion.

As general international law and international space law in particular start to pay more attention on compliance, enforcement and resolution, it is opportune to re-evaluate the applicability of international dispute settlement mechanisms to disputes arising from space activities. This directly raises for contemplation the definition of the constituents of a dispute. Merrills has suggested:

> "A dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another."[23]

Evidently the subject matter of a dispute arising from space activities will be distinctive from other disputes arising in other areas of international law. This may have a bearing on the choice of any dispute settlement mechanism. This is especially given the level of technological and scientific uncertainty, and the huge economic investment associated with some activities in outer space. Another crucial factor relating to space activities is that many of them involve national security aspects such as dual-use technology, reconnaissance and espionage, as well as global navigation and positioning for military purposes. These factors have to be considered in association with the application of legal principles and equity typically used by international dispute settlement mechanisms in arriving at an appropriate and just settlement of disputes in other areas of international law.

2.1.1 Justiciability: Legal & Non-Legal Disputes

Not every international disagreement is amenable to international dispute settlement. To be suitable for legal settlement, a dispute must first be justiciable. A dispute is justiciable if it fulfils two requirements:

1. A specific disagreement must exist, and

2. The disagreement is of a kind that can be resolved by the application of rules of law.

These two elements were affirmed by the Permanent Court of International Justice in the *Mavrommatis Case*,[24] where it held that

[23] Merrills, J.G., *International Dispute Settlement*, (3rd ed., 1998) 1

[24] *Mavrommatis Palestine Concessions (Greece v. U.K.)*, (1924) PCIJ Ser. A, No. 2, 11

> "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."

The result of this judgment is the decision to understand "dispute" as meaning a legal dispute, or *différend d'ordre juridique*. A legal dispute in a technical and realistic sense is accordingly, one that has been thus processed, or reduced, into a form suitable for decision by a court of law.

Historically, the firm principle was that some disputes are non-justiciable and thus excluded from the jurisdiction of tribunals. This approach is reflected in Article 36(2) of the Statute of the International Court of Justice. It sets out the Court's jurisdiction enumerating the disputes it could consider, including:

> "All legal disputes concerning:
> a. the interpretation of a treaty;
> b. any questions of international law;
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
> d. the nature or extent of the reparation to be made for the breach of an international obligation."[25]

In the *Hostages case*[26] the Court held that

> "legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and longstanding political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them."

The Court clarified that the probability that a properly submitted question of law or fact is also part of a larger overall political issue cannot prevent the Court from dealing with the point that is properly it.[27] This was reaffirmed in the *Nicaragua case*[28] , where the United States argued that the case was inadmissible before the Court because it would violate the doctrine of "political question". The Court rejected this argument, holding that there was no such doctrine in international law. Today, courts, tribunals and other dispute

[25] Statute of the International Court of Justice (1945) 9 ILM 510, [hereinafter "ICJ Statute"]

[26] *United States Diplomatic and Consular Staff in Tehran Case, US v. Iran*, (1980) ICJ Rep. 3 at 20

[27] Jennings, R., "Reflections on the Term 'Dispute', in Macdonald, R.St.J. (ed.), *Essays in Honour of Wang Tieya*, (1993) 401

[28] *Case Concerning Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. U.S.)*, (1984) ICJ Rep. 392 at 492 para. 84

settlement bodies handle disputes of every imaginable type so long as they involve a question of law or fact. The mechanisms of negotiation, mediation and conciliation do not even restrict themselves as such.[29]

The Court opined in the *South West Africa* case that a mere conflict of interests without more cannot constitute a dispute.[30] It later noted in the *Headquarters Agreement* Case[31] that the definition of the term "dispute" is important because the obligations in the area of international dispute settlement revolve around disputes. In an Advisory Opinion, the Court affirmed that "whether there exists an international dispute is a matter for objective determination".[32] The principle of objective determination of the existence of a dispute was subsequently reaffirmed by the International Court in, *inter alia*, the *South West Africa* cases[33], the *Tunisia-Libya Continental Shelf* (Revision) case[34], the *Headquarters Agreement* case[35] and the *East Timor* case.[36] The trend of the Court to apply this objective determination test, and to find an argument supporting the finding that a dispute existed is so patent that there is a rebuttable presumption that a dispute exists if one party so asserts in referring it to the tribunal.[37]

The second criterion of justiciability is that the dispute should be capable of solution by the application of a decision rooted in legal reasoning.[38] This means that dispute must be of a legal nature, to which a tribunal can apply rules of law to decide its outcome.[39] There have been reflections by highly-qualified publicists as to which causes of action are "legal" and thus justiciable.[40] A

[29]See for example, Article 297 and 298 (Part XV) of the United Nations Convention on the Law of the Sea, UN Doc. A/CONF.62/122.

[30]*South West Africa* Cases (Ethiopia, Liberia v. South Africa) (Preliminary Objections), (1962) ICJ Rep. 319 at 328

[31]*Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, (1988) ICJ Rep. 12 (Advisory Opinion)

[32]*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, (1950) ICJ Rep. 65; Second Phase (1950) ICJ Rep. 221. The dictum was applied again in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Preliminary Objections), (1996) ICJ Rep. 595 at 614

[33]see *supra* note 30

[34]*Continental Shelf (Tunisia v. Libyan Arab Jamahiriya) Application for Revision and Interpretation*, (1985) ICJ Rep. 192

[35]see *supra* note 31

[36]*East Timor* case (Portugal v. Australia)(1995) ICJ Rep. 90

[37]see generally Collier and Lowe, *supra* note 21

[38]see the Report on the Notion of Arbitrability by Judge Huber in *British Claims in the Spanish Zone of Morocco*(1925) 2 UNRIAA 615. Arbitrability and justiciability were interchangeable, in Judge Huber's view.

[39]See in particular the Dissenting Opinion of Judge Higgins in the International Court of Justice's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Rep. 226 at 583 - 4

[40]These include Brownlie, I., "The Justiciability of Disputes and Issues in International Relations" (1967) 42 BYIL 123; Merrills, J.G., "The Role and Limits of International Adjudication", in Butler, W.E. (ed.), *International Law and the International System* (1987);

comprehensive list of "legal" disputes is impossible to assemble. It is however plain that legal dispute settlement mechanisms should not decide on disputes that are obviously not legal. A purely political dispute entirely without legal content, for example, has been held non-justiciable by the International Court.[41] However as mentioned above, the mere fact that a non-legal issue surrounds a legal dispute will not prevent a tribunal from ruling on the legal aspects of the dispute.[42]

A further criterion of justiciability that has been imposed is that the dispute must remain in existence to the point the judgment or award is given. Most international tribunals decline to rule on disputes that are hypothetical or have become moot. Cases in which the International Court have refused to rule *in abstracto* or because the case had become moot include the *Northern Cameroons case*[43] and the *Nuclear Tests case.*[44]

A contrary attitude is however adopted by some tribunals, particularly the European Court of Human Rights and the Courts of Justice of the European Communities. Specifically, the European Court of Human Rights has held in *Ireland v. United Kingdom* that its function was "not only to decide those cases brought before [it], but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention".[45] In its judgment, the Court took the view that one of its functions was also to protect the fundamental character of rights and obligations provided for by the European Convention on Human Rights.[46] This was in view of the fact that the institutions established to uphold the rights and obligations established by the Convention served also to ensure that they were properly enforced and evolved in line with ambient developments in contemporary society. It is submitted that the dispute settlement mechanism for international space law should emulate this approach. This is especially in light of the fact that international space law is a young field of international law. In the context of the burgeoning use and exploration of outer space, it

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and Mosler, H., "The Area of Justiciability", in Makarczyk, J. (ed.), *Essays in International Law in Honour of Judge Manfred Lachs* (1984) 409

[41] *Asylum* Case (Colombia v. Peru) (1950) ICJ Rep. 266 ; *Haya de la Torre* case (Colombia v. Peru) (1951) ICJ Rep. 71 at 83. See also the *South West Africa* cases (Second Phase) (1966) ICJ Rep. 6, in particular the Judgment of Judge Jessup at 546

[42] *United States Diplomatic and Consular Staff in Tehran* (USA v. Iran)(1980) ICJ Rep. 3 at 20. Cf. *Nicaragua v. United States* (Jurisdiction and Admissibility)(1984) ICJ Rep. 392 at 439

[43] see the Separate Opinion of Judge Fitzmaurice in *Northern Cameroons* case (Cameroons v. United Kingdom) (1963) ICJ Rep. 15

[44] *Nuclear Tests* cases (Australia v. France; New Zealand v. France) Judgement (1974) ICJ Rep. 253 and 457; in particular see the opinions of Judges Jiménez de Arechaga and Waldock; see also Rubin, A.P., "The International Legal Effects of Unilateral Declarations" (1977) 71 AJIL 1.

[45] *Ireland v. United Kingdom*, (1978) ECHR Ser. A vol. 25 at 62

[46] European Convention for the Protection of Human Rights and Fundamental Freedoms, (November 4, 1950), 213 UNTS 221 [hereinafter the "European Convention"]

is important that legal institutions continue to clarify, maintain and advance the legal framework of international space law. This can be very efficiently achieved through the pronouncements of a dispute settlement mechanism.

2.1.2 The Public *versus* Private International Law Dichotomy

The reality of international dispute settlement juxtaposes fundamentally inter-State procedures, such as recourse to the ICJ, with characteristically "private", non-State procedures such as international commercial arbitration. This Chapter will review inter-State, private, and mixed disputes to correspond with the actuality both of international dispute settlement and international space law.

There are two groups of mechanisms for the settlement of disputes: those established by public international law and those by private international law. From the legal and practical perspective, those two systems are different in scope and sanction. Space activities managed by States and government agencies in their sovereign capacity as *acta jure imperii* are subject to international law. Commercial or private law acts are considered *acta jure gestionis* and do not enjoy immunity from the jurisdiction of domestic courts of another State.

Most of the international disputes submitted to the various dispute settlement processes are commercial. These disputes generally stem from contracts between States and private corporations. If the dispute concerns the way in which the State has behaved toward the corporation, two possible bases of claims may arise. Firstly, that the State has breached the contract, and secondly, that the State is responsible for a violation of public international law. The contract action would usually be brought before an arbitral tribunal by the parties to the contract. The public international law action might be pursued by the corporation's national State through the inter-State procedures offered by the international legal system.

There are some restrictions on the choice as to which action, whether contractual or public, the aggrieved parties may choose to pursue. The contractual breach may not amount to a violation of international law. Considerable limitations are also imposed by the rule on the exhaustion of local remedies. However, the various procedures do operate concurrently in contemporary international law. At many stages parties have a choice as to how to proceed. They can determine whether to provide for a clause for the settlement of disputes arising from the contract. If they have so provided, and the procedure does not proceed acceptably to one or both parties, the question of further action before an international tribunal may arise. In that case the corporations' national State will become involved. Both States will have a myriad of procedures available to them in the international legal system. These international legal procedures provided generally limits the applicable law to rules of general international

law, including international treaties, customs and general principles of law as stipulated by Article 28(1) of the ICJ Statute. Exceptionally, the dispute may be decided *ex aequo et bono*, if the parties so agree.

International institutions also increasingly use their own methods to settle disputes. Various UN specialized agencies and inter-governmental organizations that promote international cooperation in functional spheres such as space activities have their own procedures for settling disputes between their members. These mechanisms provide good examples of study as to whether they may be workable tools to assist in the resolution of disputes arising from outer space activities.

International space law can no longer be concerned exclusively with State activities in outer space. Much of its scope is unequivocally concerned with the position and activities of private entities and international organizations. However, the roots of international space law stem primarily from a law between States. Hence, States remain the primary subjects of space law. This paradigm is now shifting in reaction to the intensive commercialization of space activities by private enterprises.

Many space companies are established in various different countries. Contracts relating to activities in outer space[47] and activities with effects in outer space have been signed between various public and private actors. These have to rely on international commercial arbitration to settle any disputes arising. The arbitration procedures of private international law may be more appealing to private space entities than arbitration in public international law. This is because these entities would be more familiar with commercial practices in their usual transactions in space management and operations. However, the fundamental basis of international space law is rooted in its laudable historical principles of preserving outer space for the benefit of all Humanity. Therefore, it is submitted that particularly in international space law, the practicality of commercial customs and laws should be counterbalanced with the public nature of its foundations.

2.1.3 Consensual Nature of International Dispute Settlement and Party *Bona Fides*

International dispute settlement in international law is consensual by nature. However, a growing number of multilateral conventions require parties to agree to some form of compulsory dispute settlement upon accession. This leads to parties increasingly being brought in front of international tribunals without specifically giving consent. Moreover, parties are finding themselves obliged to answer for violations of international law in domestic courts as barriers to

[47]Kayser, V., "Private Involvement in Commercial Space Activities", (1994) 37th Proc. Coll. Law of Outer Space 327

jurisdiction are systematically removed. The case of *Filartiga v. Pena-Irala*[48] is the *locus classicus* of the trend towards the interpretation and enforcement of international law in domestic courts. These developments have eroded the central principle of consent in international dispute settlement.

Public international law also leaves the selection of the dispute settlement mechanism and its forum to the will of the parties. Aside from the free choice of means, parties can choose the simultaneous use of several means as well. The ICJ supported this general principle in the *Aegean Sea* case when it held that negotiations could continue even while adjudication was underway, because the

> "fact that negotiations are being actively pursued during the present proceedings, is not, legally, any obstacle to the exercise by the Court of its judicial function".[49]

The UN General Assembly has reiterated these principles on several occasions.[50]

However, parties to disputes brought before international courts and tribunals are traditionally limited to States and international organizations. Only very exceptionally are private entities and individuals granted standing before international tribunals. Private entities and individuals are not considered a complete subject of international law. They may however be directly bestowed with international rights and obligations, making them subjects of international law. As such, they may have the right of direct access to international tribunals.[51] In this respect, private enterprises engaging in commercial activities in outer space will have more opportunities to avail themselves of the mechanisms of dispute settlement before international law.

With the ever-increasing use of dispute settlement mechanisms in international law, new principles are emerging. The most important of these is arguably the principle of party *bona fides*. Participation in dispute settlement must be undertaken in good faith. Good faith is "directly related to honesty, fairness and reasonableness. . . and it is determined at any particular time by the compelling standard of honesty, fairness and reasonableness prevailing in the international community at that time".[52]

The requirement of party *bona fides* is found throughout dispute settlement agreements and has been affirmed by the ICJ. The Vienna Convention on the Law of Treaties, for example, provides that:

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[48] *Filartiga v. Pena-Irala*, (1980) 630 F.2d 876, 2nd Cir.

[49] *Aegean Sea Continental Shelf* (Greece v. Turkey), (1978) ICJ Rep. 3 at 12

[50] see the Annex of the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, see *supra* note 5), and the Annex of the Manila Declaration on the Peaceful Settlement of International Disputes, see *supra* note 6

[51] Jennings, R. and Watts, A., *Oppenheim's International Law*, Vol I. (1979) at 17

[52] O'Connor, J.F., *Good Faith in International Law*, (1991) at 121

> "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[53]

Thus where a dispute settlement obligation is a treaty-based one, States must perform in good faith. The WTO Dispute Settlement Understanding provides explicitly that,

> "If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall. . . enter into consultations in good faith"[54]

The Iran-US Claims Tribunal decided in *Case No. A21* that the United States had to provide for the enforcement of Tribunal decisions in domestic courts to fulfill its good faith obligations.[55]

This requirement of *bona fides* also extends to non-binding dispute settlement procedures. The ICJ found in the *Fisheries Jurisdiction* case that Iceland, Germany and Britain had customary law-based obligations to conduct negotiations in good faith.[56]

Further, The proper function of any dispute settlement mechanism depends on participants acting in good faith. This alone qualifies *bona fides* as a general principle of dispute settlement.[57]

The mainly judicial-based structure of the existing framework of international dispute settlement may not be the most effective mechanism for disputes arising from space activities. In disputes with vital political, economic and technical implications, non-judicial settlements may often be the more effective solution. The conjecture that judicial and arbitral methods best serve the peaceful co-operation and co-existence of actors involved in space activities reveals three flaws. Firstly, it is based on the assumption that the dispute will be depoliticized and can be decided entirely on legal grounds. In the vast majority of cases, this will likely not be the case. Secondly, it is based on the idea that objective legal norms are valid for all cases of the same type. Such norms may lack codification and consolidation in space law, especially in areas that are either controversial or novel. Thirdly, it presupposes that a decision can be taken on purely legal grounds, and that the settlement of the dispute will see a victor and a loser. In most disputes relating to outer space, the practicability

[53] Article 26 Vienna Convention on the Law of Treaties (May 23, 1969), 1155 UNTS 331

[54] Final Act embodying the Uruguay Round of Multilateral Trade Negotiations (1994) 33 ILM 1143, Article 4 Understanding on Rules and Procedures Governing the Settlement of Disputes (1994), Annex 2 Article 3 *ibidem*, WTO Agreement (1994) 33 ILM 1224 at 1228

[55] *The Islamic Republic of Iran v. The United States of America*, DEC 62-A21-FT, reprinted in 14 Iran-U.S. Claims Tribunal Reports, (4 May 1987) 324

[56] *Fisheries Jurisdiction* Case (U.K. v. Ireland) (Merits), (1974) ICJ Rep. 3 paras. 75 and 78

[57] Cheng, B., *General Principles of Law as Applied by International Courts and Tribunals*, (1953) Part II: Good Faith

of the decision may depend entirely on scientific, technical or economic factors, and the settlement may not entirely be based on a zero-sum gain model. It is with these three considerations as a backdrop that this Chapter now turns to the study of the various mechanisms of international dispute settlement and assesses their applicability to disputes arising from activities in outer space.

2.2 The Present Basic Framework of International Dispute Settlement: Principles, Methods and Applicability

This section briefly describes the definitive characteristics of the methods of peaceful settlement of disputes in international law. It then critically analyzes them, and assesses their applicability to disputes arising from space activities.[58] The assessment of these procedures will consider five main questions:[59]

1. How do disputes arise? This considers how grievances become gradually articulated into claims and then disputes. For a dispute to occur, a party must

   (a) perceive itself to be injured;

   (b) decide some other party is responsible;

   (c) form a sense of entitlement to some kind of redress; and

   (d) formulate a specific claim which is rejected by the other party.

   It is important to understand what triggers the various stages of this process, and how legal norms shape the parties' perceptions and actions.

2. What actions are parties likely to take once the dispute arises? This question contemplates the reasons for the parties' choice of dispute settlement mechanism. It also looks at any internal or external pressures likely to

[58]For excellent discussions of each of these procedures, see Merrills, J.G., *International Dispute Settlement* see *supra* note 23; and Sohn, L.B., "The Future of Dispute Settlement", in MacDonald, R.St.J. and Johnson, D.M. (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrines and Theory* (1983) 1121

[59]These five criteria are adapted from the study hypotheses of various qualified publicists on international dispute settlement and domestic dispute resolution. For a detailed account of these issues, see generally *inter alia* Watts, A., "Enhancing the Effectiveness of Procedures of International Dispute Settlement", (2001) 5 Max Planck YB UN Law 21; Weston, B.H., "Regional Human Rights Regimes: A Comparison and Appraisal", (1987) 29 Vanderbilt Journal of Transnational Law 585; Brus, M. et al (eds.), *The United Nations Decade of International Law: Reflections on International Dispute Settlement*, (1991); Merrills, J.G., *International Dispute Settlement*, (2nd ed., 1991); Pazartzis, P., *Les Engagements internationaux en matière de règlement pacifique des différends entre Etats*, (1992); Schachter, O., *International Law in Theory and Practice*, (1991)

influence the parties in settling the dispute, and whether parties' perceptions of the dispute is likely to change in the process of settlement.[60]

3. Do particular parties tend to evolve special dispute settlement systems procedures to deal with their disputes? The focus here is whether specialized fields or environments affect the parties' choice of dispute settlement methods. Factors that are significant include

   (a) the extent of the interaction and interdependence of the actors involved;

   (b) whether the actors are in a continuing relationship with each other; item their relative bargaining power and ability to exert influence on each other;

   (c) their geographical and political relationship to each other and to third parties;

   (d) the similarities or differences in their political, cultural or economic ideology;

   (e) the history of their relationship and the methods of dispute settlement used in the past; and

   (f) their respective commitments to international law and the principle of the peaceful settlement of disputes.

4. What is the effect of third parties on the dispute settlement process? This examines the motivations for third parties to intervene in the dispute settlement process, and whether such intervention will have a beneficial or deleterious effect on the process itself.

5. What is the range of outcomes for different kinds of disputes? This issue concerns itself with the consequences of the dispute settlement processes. The question is the overall effect the settlement of the dispute will have on the parties and on the general framework of the law.

2.2.1 Consultations

Consultation and prior notification is one of the most useful dispute settlement and conflict avoidance techniques.[61] This procedure requires a party that is considering adopting a policy or taking an action that might adversely affect

[60] This could happen if the parties have exchanged briefs and discovered the strengths and weaknesses of the other party's arguments, or when a preliminary question, such as jurisdiction, has been resolved. See e.g. *Nationality Decrees in Tunis and Morocco (France v. U.K.)*, (1923) PCIJ ser. B. No. 4 (Advisory Opinion of 7 February 1923)

[61] Kirgis, R., *Prior Consultation in International Law: A Study of State Practice*, (1983)

another party, to inform the other party of its intentions and to discuss the matter beforehand to avoid any potential disputes arising.

Some advantages of consultation are

1. Consultation advocates a pre-emptive and early resolution of a dispute. Consultation permits parties to identify and attempt the settlement of potential problems at an early stage. This allows action before parties' positions become rigid and polarized and differences become more critical and intractable. This is especially vital in disputes arising from space activities, where the early resolution of any potential dispute avoids the escalation of the problem into an international conflict, as well as soaring political and economic costs.

2. Consultation may give the party proposing action a better understanding of how its proposed policy may adversely affect the other party. This might lead it to abandon the policy, or to vary it so as to avoid or limit harm to the other party. In the communal environment of outer space, actions by one party may have huge implications for others. In line with the principle of reciprocity, parties are likely to try to avoid actions that might incur retaliatory counter-actions by other parties, to the detriment of all.

3. Consultation provides an opportunity for the affected party to take measures of its own to avoid or reduce the potential harm. This is especially significant in space activities, as it might lead to enormous savings of costs incurred later to remedy the situation.

4. Consultation shows an attitude of goodwill, good faith and good neighborliness. This is good for confidence-building, and establishing a climate favorable to dispute settlement and cooperation in outer space more generally.

But consultation also has certain drawbacks and limitations. For example

1. Consultation assumes that the party considering action cares about not harming the other parties that might be affected. This may not be the case, especially in space activities potentially affecting national security or involving massive costs and economic gain.

2. Consultation implies that a party is willing and able to change its proposed policy or action. However, if it is already irrevocably committed to a particular policy or course of action, then nothing can be gained by consultation. This is particularly significant in space activities for two reasons. States and private entities have a custom of publicly announcing their policies some ten years in advance. Secondly, space activities generally entail technology development and planning many years in advance,

and by the time actors notify as to their intentions, it may already be too late to change their proposed course of action.

3. Consultation may result in delay or publicity, diminishing the usefulness of a proposed policy or action that may be particularly dependent on urgency or secrecy for its effectiveness. Again, this may not be conducive to many national space programs, and certainly not to many commercial space programs, where there is a very short entry-to-market window before competition sets in.

4. Consultation may permit the other potentially affected actors to take steps to obstruct or frustrate the implementation of the proposed policy or action. This is not in the interests of the notifying actor, and such considerations may well prevent the prior notification and consultation on any course of action to begin with.

The use of the consultation procedure is provided for in Article XI of the Outer Space Treaty, which provides for "appropriate international consultations" in cases involving "potential harmful interference with activities of other States Parties".[62] Under this provision, the State conducting such activity, "shall undertake" consultations before proceeding with any such activity if it believed its activities or those of its nationals might cause such interference. This may be regarded as a binding obligation in view of the use of the declaratory word "shall". Further, it is provided that a State that might be affected "may request consultations concerning the activity or experiment". However, as mentioned in the Chapter preceding, the drafters of Article XI of the Outer Space Treaty meant for such consultations to take place as a conflict avoidance, rather than dispute settlement, mechanism. There are also no detailed procedures supplied for such consultations, and it is entirely left to the State to decide what "appropriate" consultations involve.

2.2.2 Negotiation

Negotiation[63] is the method by which most international disputes are settled. The ICJ affirmed the "fundamental character of this method of settlement" in the *North Sea Continental Shelf* cases[64], endorsing the opinion of its pre-

[62] Article XI, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, (1967), adopted on 19 December 1966, opened for signature on 27 January 1967, entered into force on 10 October 1967. (1967) 610 UNTS 205, 18 UST 2410, TIAS 6347, [hereinafter "Outer Space Treaty"]

[63] See generally de Waart, P.J.I.M., *The Element of Negotiation in the Pacific Settlement of Disputes* (1973); Iklé, F.C., *How Nations Negotiate* (1964); and Lall, A., *Modern International Negotiation* (1966)

[64] *North Sea Continental Shelf* cases, (1969) ICJ Rep. 3 at 48

decessor, the Permanent Court, in 1924.[65] Negotiation is evidently the principal, standard and preferred method of settling international disputes. Except in cases where the dispute is directly submitted to adjudication, arbitration or conciliation by prior agreement, negotiation is generally an indispensable component of any dispute settlement process. In fact, the use of other procedures, including adjudication, is usually preceded, accompanied by and arranged through negotiatory processes.

However, active negotiations are not a hindrance to the utilization of other settlement procedures, as the ICJ held in the *Aegean Sea*[66] and *Nicaragua*[67] cases. International law does not require negotiations to be exhausted before other dispute settlement procedures are sought. In fact, negotiation is also included in many contracts and international agreements as an obligation of prior consultation[68], a means of settlement, or as a preliminary to other methods of dispute settlement.[69] Negotiations have also been formalized through the establishment of permanent commissions.[70] In some cases, negotiations were obliged by judicial decisions, for example by the ICJ in the *North Sea Continental Shelf*[71] and *Fisheries Jurisdiction*[72] cases. An unjustifiable failure to fulfill the obligation to negotiate could be considered a breach of international law, resulting in sanctions being imposed.[73]

Negotiation has recently been brought to the forefront in both the international plane and in domestic jurisdictions as a type of Alternative Dispute Resolution - an alternative to judicial settlement. Highly qualified publicists have developed systems in which the kinesics of negotiation can be more effectively employed as a legal form of international dispute settlement.[74] This echoes the judgment of the ICJ in the *North Sea Continental Shelf cases*. The Court held that the parties to a dispute are under an "obligation so as to conduct themselves that the negotiations are meaningful".[75] Specific obligations to negotiate may also arise under a treaty, such as Article 283 of the 1982 UNCLOS.[76] This aspires to keep disputing parties in contact, requiring

[65] *Mavrommatis Palestine Concessions* case, (1924) PCIJ Ser. A. No. 2 at 11 - 15.

[66] *Aegean Sea Continental Shelf* case, Judgment (1978) ICJ Rep. 3

[67] see *supra* note 42 at 440

[68] See generally Kirgis, F.L., *Prior Consultation in International Law*, *supra* note 61, also in Article XV(1) of the Outer Space Treaty, see *supra* note 62

[69] See Collier and Lowe, *supra* note 21 at 21

[70] For example, the Canada-US International Joint Commission established under the 1909 Treaty Relating to Boundary Waters and Questions Arising Along the Boundary, (1909) 36 Stat. 2448.

[71] see *supra* note 64

[72] see *supra* note 56

[73] *Lac Lacnoux* (France v. Spain) (1957) 24 ILR 101 at 127

[74] see Plantey, A., *La negociation internationale: principes et methodes*, 2nd ed., (1994); and Bühring-Uhle, C., *Arbitration and Mediation in International Business*(1996)

[75] *North Sea Continental Shelf* cases, see *supra* note 64 at 47

[76] see *supra* note 29

them to exchange views at different stages of the dispute and even afterward to implement the final settlement.

Simple negotiation is an in-person interaction to settle a dispute without third party assistance. However, rules exist even for simple negotiation. Once an actor consents to participate in an international dispute settlement procedure, it is obliged to proceed in good faith. International law is also applicable to negotiation, despite its informal character.[77] Rules of international law that govern negotiation range from the obligation to negotiate to the limits on the proper subjects of negotiation. International law, for example, clearly curbs a State's right to form agreements that violate *jus cogens* principles, such as the prohibition on the use of force. International law also limits the right of two States to alter multilateral agreements without the consent of some or all other parties to the agreement.

Negotiation is a process where the parties directly communicate and bargain with each other in an attempt to agree on a settlement of the issue. By choosing this technique, the parties retain the maximum control of the process and outcome. It is for this reason that parties, especially States, have evinced a clear preference for negotiation to other methods of third party dispute settlement.

Reasons that attract parties to the use of negotiation as a method of dispute settlement include:

1. Negotiation is a low-risk mechanism for dealing with disputes. Parties retain maximum control over both the process and outcome, since they preserve the option to walk away from the negotiation and not agree. In comparison, third party involvement involves a risk of reducing the party's flexibility and freedom to choose its course of action, and raises the possibility of an undesirable outcome. In high-risk areas of activity, such as those in outer space, party autonomy to reach the most flexible solution is highly prized.

2. Negotiation places the responsibility for settling the dispute on the parties themselves. They are in the best position to work out a sensible, practical and acceptable solution. Many issues in space activities may carry confidential technical questions, and negotiation allows disputes arising to be settled solely by the parties.

3. Negotiation is most likely to result in the most accepted and stable outcome. Since any agreement reached by negotiation is freely agreed to by the disputing parties, instead of an imposition by third parties, it is likely to have maximum acceptability and stability. Due to the relatively small community of actors involved in space activities, it is important

[77] Lachs, M., "International Law, Mediation and Negotiation", in O'Connell, M.E., (ed.), *International Dispute Settlement*, (2002)

that any settlement contribute to the maintenance of good working and cooperative relationships between the parties.

4. Negotiation does not fall into the zero-sum fallacy that some binding third party mechanisms, such as adjudication, do. It favors compromise and accommodation between the parties, rather than a zero-sum win/lose situation. This approach is most likely to preserve good long term co-operative relations. In particular, disputes arising from space activities involve many complex technical and economic issues, and the resolution of these disputes may not entail a zero-sum gain situation.

5. Negotiation is generally simpler and less costly than other dispute settlement methods. It can be more easily carried on in a confidential manner. Moreover, negotiation develops cooperation-fostering and confidence-building attitudes, procedures and relations between the parties, which lead to better dispute-management possibilities. Such "faster, cheaper, better" methods of dispute settlement are in line with the general attitudes towards streamlining costly space activities.

However, negotiation also has limitations and disadvantages. These include

1. Negotiation cannot assure the settlement of the dispute. Where parties' positions are too diametrically opposite and neither is willing to compromise, negotiations may reach an impasse. Settlement of the dispute may become impossible without third party intervention to assist in reaching a compromise, or to decide the matter. In disputes arising from space activities in particular, the prolonging of a dispute is extremely undesirable, given the various national security, economic and international relations issues concerned.

2. Negotiation may be manifestly unfair. A negotiated settlement may reflect only the parties' relative bargaining powers, instead of the legal or equitable merits of their respective positions. Thus, in a dispute where one party has a much weaker position, it may be better for it to choose other dispute settlement techniques with third party intervention and support from legal principles.

3. Negotiations are intrinsically political and subject to an array of pressures from various special interest groups. These may complicate, delay or hinder negotiations, or even make it politically impracticable for the party to compromise where it might otherwise do so in its own interests. Where this is the case, third party intervention may relieve the parties of the direct responsibility for a compromise and thus make settlement possible. The use and exploration of outer space has captured the imagination of

the public, and has led to a myriad of interest groups.[78] As such, it is foreseeable that actors in the space field will face multitudinous pressures that might prevent the early and compromised settlement of the dispute.

4. Negotiation precludes the assistance of special expertise in cases where technical facts are necessary. The parties' resources may be inadequate to investigate facts or data instrumental for a potential solution of the dispute. Third party intervention may be helpful in this respect, especially in space activities, that involve cutting-edge technology and scientific data.

Problems with negotiation become more complex in disputes arising from commercial space activities. As private enterprises are not subjects of international law, they are not subject to obligations under international space law. Most importantly, commercial space industry is generally uncomfortable with direct governmental intervention into the operations of their commercial space activities. Diplomacy and negotiation are seen as methods used by a State to exercise diplomatic protection in respect of their nationals under international law. On the other hand, issues raised in disputes arising from space activities generally lie on the international plane and cannot be resolved by a simple reference to domestic law.[79] Nevertheless, negotiation allows the verification of State responsibility for its nationals' actions in outer space, as specified in Article VI of the Outer Space Treaty.[80] Therefore, the question as to whether negotiation is a suitable method for dispute settlement arising from space activities is a thorny and complicated one without a straight answer.

2.2.3 Inquiry and Fact Finding

Inquiry and fact-finding in general does not involve the application of rules of law.[81] Inquiry can settle a factual or technical dispute. If the dispute however involves legal questions, then inquiry will assist in settling it. Inquiry acts "to facilitate a solution of. . . disputes by elucidating the facts by means of an impartial and conscientious investigation".[82]

Inquiry and fact-finding are used in international law for a variety of purposes,[83] including the decision-making processes of international organizations.[84]

[78] See the interest groups that almost prevented the launch of the Voyager and Galileo probes, due to nuclear power sources onboard. See generally Gorove, S., *Cases on Space Law: Texts, Comments and References*, (1996); and Gorove, S., *United States Space Law: National and International Regulation*, (1982)

[79] Brownlie, I., *Principles of Public International Law*, 5th ed., (1998) at 406

[80] Article VI, Outer Space Treaty, see *supra* note 62

[81] see generally Bar-Yaacov, N., *The Handling of Disputes by Means of Inquiry* (1974)

[82] Article 9, Hague Convention for the Pacific Settlement of Disputes (1907) UNTS 6 (1971) Cmd. 4575

[83] Lillich, R.B. (ed.), *Fact-Finding Before International Tribunals*, (1992)

[84] Report of the UN Secretary-General on Methods of Fact-Finding, UN Doc. A/6228, (2

Many international disputes turn entirely on disputed questions of fact. An impartial inquiry is a useful method of reducing the tension and narrowing the area of disagreement between the parties. In inquiry and fact-finding, disputing parties request the formal intervention of a third party, to determine particular facts or to conduct an impartial examination of the dispute. The purpose of the inquiry is to produce an impartial finding of disputed facts. This paves the way for a negotiated settlement. The report of a fact-finding body is normally non-binding, although it may have an important effect on the settlement of the dispute. Most inquiry and fact-finding bodies are *ad hoc*, but sometimes a permanent body established in advance by agreement for certain kinds of disputes.

Inquiry finds its roots in the International Commissions of Inquiry provided for in the 1907 Hague Conventions,[85] which elaborated upon provisions in the 1899 Hague Convention.[86]

Article 9 of the 1907 Hague Convention describes the task of a commission of inquiry as "to facilitate a solution. . . by means of an impartial and conscientious investigation".[87] Article 35 of the same Convention limits its report "to a statement of facts" that "has in no way the character of an award".[88] More recent instruments however, give inquiry and fact-finding bodies powers to evaluate the facts legally and to make recommendations. Examples of this include the 1977 Additional Protocol I to the 1949 Geneva Red Cross Conventions, and the 1982 UNCLOS.[89]

These provisions in the Hague Convention were a consequence of the case of the *Maine*. In that case, a United States warship mysteriously exploded in Havana harbor, leading to the 1898 Spanish-American War. It has been postulated that an impartial inquiry into the cause of the explosion could have avoided the bloodshed of the war that followed.

A successful instance of inquiry commissions established under the 1899 Convention was the commission that investigated the 1904 *Dogger Bank* incident.[90] In that case the Russian Baltic Fleet fired upon the British Hull trawler fleet fishing on the Dogger Bank in the North Sea during the Russo-Japanese War. An impartial commission comprising experts from other States was establish to determine fault. The report of the Commission was accepted by the United Kingdom and Russia, settling a dispute that threatened to bring

April 1966)

[85]Articles 9 - 36, 1907 Hague Convention, see *supra* note 82

[86]Articles 9 - 14, 1899 Hague Convention for the Pacific Settlement of Disputes UKTS 9 (1901) Cd. 798

[87]Article 9, 1907 Hague Convention, see *supra* note 82

[88]Article 35, 1907 Hague Convention, see *supra* note 82

[89]Article 90, 1977 Geneva Protocol, (1977) 16 ILM 1391; Article 5, Annex VII of the 1982 UNCLOS Convention, see *supra* note 29. Also see Kussbach, E., "The International Humanitarian Fact-Finding Commission", (1994) 43 ICLQ 174

[90]Scott, J.B., *The Hague Court Reports, First Series* (1916) at 404

the United Kingdom into war with Russia.[91] Due to the substantial amount of time spent by the *Dogger Bank* inquiry on establishing the Commission's procedure, the 1907 Conventions expanded the Articles dealing with inquiry to include more detailed procedural provisions.[92] *Ad hoc* commissions have also proved successful in settling disputes in other cases.[93]

Inquiry and fact finding have also been extensively utilized by international organizations. For example, the UN Security Council sent a fact-finding mission to the Seychelles in 1981 to investigate the involvement of mercenaries in an invasion.[94] In 1984 the UN Secretary-General sent a fact-finding mission to investigate the use of chemical weapons in the Iran-Iraq Gulf War.[95] The Council of the International Civil Aviation Organization also set up an inquiry into the 1983 destruction of Korean Airlines Boeing 747.

In 1963 the UN General Assembly passed a resolution on fact-finding in the maintenance of international peace and security.[96] Another resolution was passed in 1968 requesting the Secretary-General to prepare a register of experts who could be employed in fact-finding.[97] Further, in 1988 the General Assembly passed the Declaration on the Prevention and Removal of Dispute and Situations which may threaten International Peace and Security. The Declaration established the Special Committee on the Charter and on the Strengthening of the Role of the Organization. Due to the report of this Committee, it passed another Resolution and Declaration on Fact-Finding by the UN General Assembly on 9 December 1991.[98] This Declaration defined fact-finding as any activity intended to acquire thorough knowledge of the relevant facts of any dispute or situation that the competent United Nations organs need so as to effectively exercise their functions in relation to the maintenance of international peace and security. However, the use of fact-finding missions is subject to the consent of the State whose territory it is to be sent. Considerable practical and legal difficulties will arise if the territorial State refuses to grant consent.[99] This is the case even in disputes arising from space activities, where the State

[91] Anglo-Russian Agreement of 1904, UKTS 13 (1904) Cd. 2328 at 97

[92] Articles 9 - 36 or the 1907 Convention provides these procedural provisions, expanding on Article 9 - 14 of the 1899 Convention. See *supra* notes 86 and 82

[93] See for example the Commission created between the United Kingdom and Denmark relating to the *Red Crusader* case in 1960. For the agreement to refer the matter to the Commission see (1992) 30 ILM 422; the Commission's Report can be found at (1993) 31 ILM 1.

[94] UN SC Res. 496 (1981)

[95] UN SC Res. 598 (1987)

[96] UN GA Res. 1967 (XVIII)

[97] UN GA Res. 2329 (XXII). The register was completed and issued in September 1968.

[98] UN GA Res. 46/95 (1992) 31 ILM 235

[99] For example, see the Security Council resolution setting up the on-site inspection of the Iraqi weapons program in 1991. (UN SC Res. 687(c) para. 8, 3 April 1991) For a commentary on this, see Gray, C., "After the cease-fire: Iraq, the Security Council and the Use of Force" (1994) 65 BYIL at 152 - 7.

carrying out such activities may well refuse to allow the initiation of fact-finding missions on its spacecraft or installations in outer space.

In relation to disputes relating to space activities, inquiry and fact-finding may well prove vital. Space activities necessarily involve high technological and scientific data. Further, much of the evidence that pertains to the dispute will likely need expert interpretation to be of use to the legal professionals working to settle the disputes. As such, it is submitted that inquiry and fact-finding bodies are indispensable in settling space disputes. Any recommendation made by inquiry and fact-finding bodies should be evaluated in the light of legal principles. To that end, inquiry and fact-finding commissions set up should also include at least one legal professional. This is because it is especially important that the rule of law be enforced in a newly developing field of international law such as space law. Settlements based only on issues of fact run the risk of fragmenting the legal framework governing activities in outer space.

2.2.4 Mediation and Good Offices

Mediation and good offices[100] are especially expedient when the animosity between the parties is so great that direct negotiations are unlikely to be successful. An intervening third party facilitates the dispute settlement by "reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance".[101] In mediation a third party intervenes to reconcile the disputants' claims and advance a compromise solution.

The difference between mediation and good offices is that in mediation the mediator takes active steps to settle the dispute. Good offices on the other hand, occurs where the third party acts to initiate or continue negotiations, but does not actively participate in the settlement of the dispute.[102] In practice however, they are both very similar procedures. Nonetheless, the 1899 and 1907 Hague Conventions do differentiate between the two processes.[103] Article 33(1) of the UN Charter does not specifically mention good offices, although the UN Secretary-General has frequently undertaken good offices intervention. Mediation and good offices both require the consent and co-operation of the disputants. Proposals from the third party are not binding, requiring the parties' consent to be implemented.[104]

A mediator has to enjoy the confidence of both parties. It is often difficult to find a mediator who fulfils this requirement. The dispute between Argentina

[100] See generally Touval S. and Zartmann, L.W. (eds.), *International Mediation in Theory and Practice* (1985)

[101] Article 4, 1899 Hague Convention, see *supra* note 86

[102] Bindschedler, R.L., "Good Offices", (1995) EPIL II 601

[103] McGinley, G.P., "Ordering a Savage Society: A Study of International Disputes and a Proposal for Achieving their Peaceful Resolution", (1984) 25 Harvard ILJ 43

[104] Probst, R.R., "'Good Offices' in the Light of Swiss International Practice and Experience", (1989)

and Chile over the implementation of the *Beagle Channel* award,[105] was one such case. The arbitral award in favor of Chile by the ICJ[106] was politically unacceptable to Argentina. Both parties eventually accepted a mediatory settlement proposed by the Pope, which was not based on the law.

Mediation was also employed to great success in other situations. One such example was the role of Algeria in 1980 in the diplomatic hostages dispute between Iran and the United States. Both parties did not maintain direct diplomatic relations. With the assistance of Algeria the Algiers Accords was concluded, leading to the establishment of the Iran-United States Claims Tribunal in 1981.[107]

Mediation and good offices have been provided for in several treaties, including the 1948 Pact of Bogotá[108], the Pact of the League of Arab States[109], the 1964 Charter of the Organization of African Unity[110] and the 1959 Antarctic Treaty[111]. The UN Secretary-General has frequently performed good offices, *inter alia* in 1964 in Cyprus, Kampuchea in 1989 and Afghanistan in 1988. Mediation is also extensively used in mixed and purely private law disputes.[112] Prominent mediation efforts include the initiatives taken by Germany at the 1878 Berlin Congress, the USSR's undertakings in the 1966 conflict between India and Pakistan, the United States' efforts in the Arab-Israeli conflict in the 1978 Camp David peace negotiations between Israel and Egypt, those of the European Union and NATO in Macedonia,[113] and Norway's intervention in Sri Lanka.[114]

Parties' consent to mediation is not necessarily required initially. However, effective assistance cannot be provided without it. There are no general rules of procedure for the mediation of disputes,[115] unless there is a clear initial agreement for them. Mediation is thus akin to flexible negotiations with the participation of a third party. A mediator can also provide financial support and other valuable assistance in the implementation of the agreed solution. In

[105] *Beagle Channel Arbitration*, (1978) 17 ILM 632; Moncayo, G.R., "La Médiation pontificale dans l'affaire du canal Beagle". (1993) Receuil des Cours 242

[106] (1978) 17 ILM 634

[107] Algiers Accords, text at (1981) 20 ILM 223

[108] Articles IX - XIV, American Treaty on Pacific Settlement (1948) 30 UNTS 55

[109] Pact of the League of Arab States, (March 22, 1945) 70 UNTS 237

[110] Charter of the Organization of African Unity, (May 25, 1963), 479 UNTS 39, reprinted in (1963) 2 ILM 766

[111] Antarctic Treaty 1959, opened for signature at Washington December 7, 1959. 97 UKTS Cmd. 1535, 402 UNTS 71 [hereinafter "Antarctic Treaty"]

[112] Bühring-Uhle, *Arbitration and Mediation in International Business* (1996)

[113] Kaminski, M., "Fighting in Macedonia Puts Pressure on NATO: EU to Consider Political-Mediation Steps", Wall Street Journal Europe, (19 March 2001)

[114] "Norway Steps Up Sri Lanka Peace Efforts as Troops, Rebels Clash", Agence Francais-Presse, 6 June 2001

[115] Freedberg-Swartzburg, J.A., "Facilities for the Arbitration of Intellectual Property Disputes", (1995) 8 Hague YIL 69

the 1951 - 1961 dispute between India and Pakistan on the waters of the Indus basin, the World Bank mediated a successful resolution.

While there are no general rules regulating the processes of mediation and good offices, good faith nevertheless applies to the extent it does for all dispute settlement procedures. However, there seem to be some counter-indications in the case of mediation. The WTO Dispute Settlement Understanding for example, provides in Article 4 for consultations and explicitly mentions the obligation of good faith. Article 5, providing for mediation, does not mention good faith.[116] It is submitted however, that good faith is a necessary requirement for any dispute settlement mechanism to be effective. As such, the omission in Article 5 of the WTO Dispute Settlement Understanding is probably more an oversight by its drafters than any indication to the effect that the principle of good faith does not apply to mediation.

Mediation is not always easy. The mediator may find that taking an active role in settling the dispute may endanger the relations of itself with the disputing parties. A truly neutral stance is often not possible without favoring one side or the other. Third-party involvement has also frequently failed due to the lack of sufficient influence of the third party involved. Larger States with greater political weight may have more chances of success due to their resources and influence. However, they tend to pursue their own interests at the same time. Small States or international organizations are less prone to such inducements, but they also have less leverage in persuading disputing parties to reach a compromise. In recent years however, the good offices of the UN Secretary-General has been used to settle disputes very effectively.[117] Mediation and good offices appear to have the greatest chances of success in the settlement of smaller issues or local conflicts, in stalemate situations, or when the dispute has in fact already been decided and the consequences have to be implemented.

These disadvantages of mediation and good offices are especially significant in disputes arising from space activities. Factors that would be unfavorable for mediation in space disputes include:

1. Mediation presupposes that the intervening third party has some influence on the disputing parties. In disputes arising from space activities however, one or both of the disputants are generally either powerful, space-faring States, large multi-national corporations or complex intergovernmental organizations. These actors are very unlikely to submit to the influence of a third party mediator, even if a third party with sufficient influence could be found.

2. Mediation has no set procedure. This means theoretically that media-

[116]The WTO Dispute Settlement Understanding is discussed in detail *infra* in Chapter 4.
[117]see *infra* Chapter 4

tion could carry on indefinitely if parties' positions are entrenched and they refuse to compromise. This is extremely unfavorable particularly for disputes arising from space activities, as a delay in the settlement of the disputes could have tremendously deleterious effects. This is especially in consideration of the huge effect some activities in outer space, such as telecommunications, direct broadcasting and military applications, have on the maintenance of international peace and security on Earth.

3. Mediation also requires a third party that enjoys the confidence of the disputants. It may be difficult to find such a third party in disputes arising from space activities. This is because such activities are generally confidential and high security. To find a third party with one party's confidence is sufficiently difficult; to find a third party that enjoys both parties' confidence may well be impossible.

4. Mediation requires the consent and cooperation of the parties to be effective. This precludes the use of mediation in cases where the dispute arises because one of the parties refuse to cooperate with an existing obligation, or because one party has violated a rule of international space law.

5. Mediation additionally runs the risk of the mediator pursuing its own interests. In a high-stakes environment that constitutes space activities, it would be difficult to find a mediator that has the requisite influence but which rises above the temptation to pursue its own interests.

However, it is submitted that mediation and good offices can still play a very significant role in disputes arising from space activities. Significant advantages include:

1. Mediation is a flexible process. It allows loopbacks to negotiation, and encourages parties to reach a settlement that is acceptable to both. This allows parties to retain their autonomy and control of the process, which may increase the willingness of parties to participate in the process.

2. In some cases, the mediator may be allowed to suggest a solution. In space law, this is crucial as the mediator may be able to formulate a solution that is based on principles of international space law as well. This will ensure that disputes are settled on the basis of law, while taking into account the parties' perspectives and interests.

3. The good offices of the UN Secretary-General is particularly vital in disputes arising from space activities. Almost the entire treaty rgime for space activities has been elaborated in the framework of the United Na-

tions. In particular, the Register on which space objects are registered[118] is kept with the office of the UN Secretary-General. The Secretary-General may thus be a good choice for a mediator in disputes involving States and intergovernmental organizations. It is however questionable whether it is appropriate for the Secretary-General to intervene in disputes involving individuals and private entities, since these are not members of the United Nations. If however, the disputing parties agree to use the good offices of the UN Secretary-General, it is submitted that there should be no barrier to the Secretary-General's assistance in settling the dispute.

4. Mediation can be a confidential process. This is important in some activities in outer space that are either sensitive due to national security and interests, or because of technology markets that have a small window of opportunity.

2.2.5 Conciliation

In 1961, the *Institut de droit international* defined conciliation as:

> "A method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or an ad hoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the parties, with a view to settlement, such aid as they may have requested."[119]

Conciliation combines the distinctive characteristics of inquiry and mediation.[120] The conciliator is appointed by agreement between the parties. The conciliator then investigates the facts of the dispute and suggests the terms of a settlement. Conciliation is however more formal and less flexible than mediation. A mediator whose proposals are rejected may go on formulating new proposals, whereas a conciliator generally only issues one report. Typically however, the conciliator has separate confidential discussions with each of the parties, aiming to find a sphere of agreement between them before issuing the report. Parties have no obligation to accept the terms of settlement issued by the conciliator. Otherwise, conciliation often resembles arbitration, especially

[118] see Article 2,Convention on Registration of Objects Launched into Outer Space (1974), adopted on 12 November 1974, opened for signature on 14 January 1975, entered into force on 15 September 1976, (1976) 1023 UNTS 15, 28 UST 895, TIAS 8480, [hereinafter "Registration Convention"]

[119] Article 1, Regulation on the Procedure of International Conciliation, (1961) 49-II Ann. IDI 385

[120] see generally Cot, J.-P., *International Conciliation* (1972)

when the dispute involves points of law and is not be settled *ex aequo et bono*. Parties are generally required to use more moderate language to frame their arguments, as they would before an arbitrator.

Under the Conciliation Rules of the International Chamber of Commerce (ICC),[121] the distinction between "mediation" and "conciliation" makes no practical difference. This is because the Conciliation Rules leave it to the conciliator whether or not to make settlement proposals.[122]

The evolution of conciliation as a separate method of dispute settlement in international law began with the 1913 Bryan Treaties. These Treaties granted the established permanent commissions only the competence to make non-binding decisions. Today, the inclusion of clauses stipulating conciliation as a dispute settlement mechanism in multilateral treaties has become habitual.

There is a patent dissimilarity between good offices and mediation on the one hand and conciliation on the other. Reminiscent of good offices and mediation, conciliation also involve third parties, usually formal commissions, that provide non-binding reports on questions of law or fact.[123] When confined to fact-finding, the commission is usually called a "fact-finding commission", and takes the form of inquiry and fact-finding as a dispute settlement mechanism instead.

Conciliation as a methods of dispute settlement has gained recent popularity with prominent commissions investigating, for example, the violence accompanying East Timor's independence referendum,[124] NATO's bombing campaign in the former Yugoslavia,[125] and the spate of violence in the Middle East.[126] Israel and Egypt also turned to conciliation in the Taba dispute. The peace agreement called for a boundary commission to demarcate the boundary. When the attempt failed, the parties went to arbitration.[127] In 2000, Ethiopia and Eritrea initially considered conciliation of their boundary dispute, with the Commission's jurisdiction limited to "pertinent colonial treaties (1900, 1902 and 1908) and applicable international law". It did not have powers to make

[121] The International Chamber of Commerce deals with commercial disputes and not with inter-State disputes.

[122] Schwartz, E.A., "International Conciliation and the ICC", (1995) 10 ICSID Rev. 98 at 100

[123] Fox, H., "Conciliation in International Disputes", in Waldock, C.M.H., (ed,), *International Disputes: The Legal Aspects*, (1972)

[124] "UN Investigator Names Indonesia Army Officers in Violence Probe", Agence Francais-Press, (20 April 2001)

[125] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, available online at http://www.un.org/icty/pressreal/nato061300.htm, Last accessed: 04 January 2006

[126] Sharm El-Sheikh Fact-Finding Committee, Mitchell Panel Report, available online at http://usinfo.state.gov/regional/nea/mitchell.htm, (Last accessed: 04 January 2006).

[127] *Agreement to Arbitrate the Boundary Dispute Concerning the Taba Beachfront*, Egypt-Israel, (1987) 26 ILM 1

decisions *ex aequo et bono*.[128] Subsequently, the parties chose arbitration to settle the dispute. The Organization for Security and Cooperation in Europe (OSCE) has formed a permanent court of conciliation and arbitration,[129] and the WTO Dispute Settlement Understanding incorporates conciliation among the dispute settlement options open to members,[130] as does the UN Convention on the Law of the Sea.[131]

Third parties cannot take their own initiative in conciliation proceedings. Conciliators are appointed on the basis of their official functions or as individuals in their personal capacity. The common practice in establishing commissions is for disputing parties to nominate one or two of their own conciliators and agree on a certain number of impartial and independent conciliators in order to provide a neutral majority. Most commissions are composed of several members. This is the usual arrangement under bilateral or multilateral treaties. Occasionally parties may prefer a single conciliator, as in the case of the 1977 distribution of assets of the former East African Community.[132]

Often the conciliation procedure is kept flexible so as to deal with the precise nature of the dispute. Confidentiality of the proceedings has been a cornerstone to success in dealing with parties. The parties are generally given a specified time to consider the proposals of the conciliation commission. Once the parties accept the proposals, the commission prepare a procès-verbal that records the conciliation and the agreed terms of settlement. If the proposal is not accepted, the commission's work ends and the parties are under no further obligations. Findings of fact or law by the commission are not to be used by the parties in subsequent arbitral or judicial proceedings, unless they otherwise agree.

Conciliation has both advantages and disadvantages, as compared with other methods of international dispute settlement. Advantages include

1. Conciliation is more flexible than other binding third party dispute settlement mechanisms such as arbitration or adjudication. This leaves more latitude for the parties' wishes and for the initiatives of third parties. This factor is especially important for disputes relating to outer space as parties may have made huge investments and would wish to retain control of the dispute settlement process. Also, solution of the dispute might require creative initiatives on the side of the third party conciliator.

2. Conciliation allows compromises to be made more easily. This is because the procedures of conciliation allow the brokerage of package deals,

[128]Peace Agreement between Ethiopia and Eritrea, (12 December 2000), (2001) 40 ILM 260
[129]Principles for Dispute Settlement and Provisions for a CSCE Procedure for Peaceful Settlement of Disputes, text to be found at (1991) 30 ILM 382
[130]see *infra* Chapter 4.
[131]see *supra* note 29
[132]Merrills, J.M., *International Dispute Settlement*, see *supra* note 23 at 65

whereby parties give ground on their demands in return for a reciprocal compromise from the other party. This is pertinent to space disputes. Given the complexity of space activities, it is likely that disputes will contain a range of issues, some of which parties may be willing to concede ground for in return for other concessions.

3. Conciliation allows parties to avoid losing face and prestige by voluntarily accepting the proposal of the third party. As many space programs are rooted in national and State prestige, and because a huge amount of public spending goes into the space industry, parties to a dispute may be politically challenged to compromise. Private entities operating in outer space are also responsible to their shareholders and board of directors. If the settlement is however proposed by a third party conciliator, parties are able to accept the settlement and still avoid losing the confidence of their constituencies.

4. Conciliation allows parties to remain in control of the outcome. Parties may decide that the proposed solution is not acceptable, and they may move on to other methods of dispute settlement. This is useful in settling disputes relating to outer space as it allows parties to accept only a solution that is in their interests, and in the pursuit of efficiency, choose another form of dispute settlement if conciliation fails to settle the issue.

5. Conciliation does not create a legal precedent for the future. The third party does not have to give reasons and the proceedings can be conducted in secret. The whole matter thus tends to focus on the practical issues. This would be attractive to parties involved in space activities as there is no precedent created, and by accepting the solution in one case, they need not worry about being bound by the same principle in a separate factual matrix. The focus on practical, rather than legal, issues also takes the parties' interests into consideration above all else.

The disadvantages are also obvious:

1. Conciliation procedures are difficult to start without the opponent's consent and also require the goodwill of the opponent. Where the stakes in the dispute are high, such as in space activities, it is questionable whether these two requirements are present.

2. The contribution to the development of the law is also much more reduced than in the case of arbitration or adjudication. While this is an abstract systemic consideration, it is significant in the field of international space law. As it is a young field still in the throes of development, the settlement of disputes without reflecting the substantive law could be deleterious for the legal framework in general.

3. Conciliation suffers from a historical lack of usage. Generally, it appears that less than 20 cases have been heard in seventy years of the modern history of conciliation. Nearly all of them have involved legal questions, the majority of which were submitted under a prior general undertaking to conciliate. The relatively small number of cases reported may find some explanation in the confidentiality of the proceedings. The value still being attached to conciliation as can be seen from the 1990 UN Draft Rules on Conciliation of Disputes between States[133] and the 1992 CSCE Convention on Conciliation and Arbitration.[134] However, this also points to the fact that conciliation does not have a proven track record as a efficacious method of dispute settlement. This may not be acceptable to parties in disputes relating to space activities, as they are likely to look for a rapid and practicable means of dispute settlement. As such, they are likely to be more confident with a method that has been tried and tested, and proven successful.

4. An ironic phenomenon associated with conciliation is that it generally needs a subsequent binding third party dispute settlement mechanism in the event of its failure, for it to succeed. Eight of the twenty cases submitted to conciliation were settled on the basis of recommendations of the respective conciliation commissions. In all but one case, failing conciliation, compulsory arbitration had been provided for.[135] This seems to indicate that the existence of a default procedure leading to a legally binding decision in the next stage, if no result is achieved through conciliation, is conducive to a settlement. This however also leads to the conclusion that conciliation itself is a time-consuming means with no impetus on parties to settle the dispute. This may be off-putting to parties in space disputes that need a swift resolution of the dispute at hand.

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[133](1991) 30 ILM 231

[134]The 1992 CSCE Convention was created by the Conference (now Organization) on Security and Co-Operation in Europe (OSCE). The process was initiated at the Helsinki Conference in 1975. In Valletta in 1991, the Member States adopted the Principles for Dispute Settlement and Provisions for a CSCE Procedure for Peaceful Settlement of Disputes, text to be found at (1991) 30 ILM 382. These were modified at the 1992 Stockholm meeting. [For the applicable text, see (1993) 32 ILM 55] At the Stockholm meeting, the OSCE opened for signature a Convention on Conciliation and Arbitration within the OSCE and made provision for an OSCE Conciliation Commission to complement the Valletta Principles. The text of the Convention, the Conciliation Commission Provisions and those for Directed Conciliation can be found in Annexes 2, 3 and 4 to the OSCE Stockholm decision, see (1993) 32 ILM 557, 568 and 570 respectively.

[135]Merrills, J.M., *International Dispute Settlement*, see *supra* note 23 at 76

2.2.6 Arbitration

There is a mounting interest presently in binding means of dispute settlement. Binding settlement can be attained through arbitration and judicial settlement. Arbitration is the older mechanism and is less formal than judicial settlement. There has recently been a decline in inter-State arbitration compared with the immense escalation in international commercial arbitration in inter-State and mixed disputes. The success of international commercial arbitration is owing mostly to the fact that the problem of the enforcement of arbitral awards was resolved through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[136]

Arbitration involves the settlement of a dispute between parties through a legal decision of one or more arbitrators and an umpire.[137] The arbitration may involve one specific issue, or it may be concerned with claims and counter-claims. Arbitration may take the form of an *ad hoc* procedure for the settlement of a particular dispute. It may also be institutionalized for the settlement of a class of disputes, such as that of the International Centre for the Settlement of Investment Disputes (ICSID).[138]

Arbitration has a long history in international law.[139] It evolved its recognizable modern form from the 1794 Treaty of Amity, Commerce and Navigation ("Jay Treaty"). This established arbitral tribunals consisting of an equal number of members appointed by the two disputing States, with an umpire in the event of disagreement, to consider claims by nationals of the United Kingdom and the United States.[140] The Jay Treaty commissions decided many claims by awards based on legal principles.

The typically modern form of arbitration consists of a tribunal reaching a reasoned decision based on law through an essentially judicial process. It was first undertaken by the United States and the United Kingdom in the 1871 Washington Treaty.[141] That treaty established a tribunal to arbitrate the 1872 *Alabama* claims, which was proclaimed a great achievement. Subsequently, its success was followed in other disputes, such as the 1893 Behring Sea Fur Seal case and the 1897 British Guiana-Venezuela Boundary dispute.[142] The accomplishments of the *Alabama* claims also motivated the parties at the 1899 Hague Peace Conference. As a result, the 1899 Hague Convention established

[136]New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), 21 UST 2517, 330 UNTS 38

[137]see generally Chapal, P., *L'arbitrabilité des différrends internationaux (1967)*

[138]ICSID is discussed *infra* in Chapter 4.

[139]see generally Stuyt, A.M., *Survey of International Arbitration 1794 - 1989*, (3rd ed., 1990)

[140]Text at (1794) 1 BFSP 784

[141]Text at (1871) 61 BFSP 40

[142]see Schwarzenberger, G., *International Law as applied by International Courts and Tribunals*, Vol. IV, (1986) 1 - 94

the Permanent Court of Arbitration.

Arbitration is a shift away from the balance-of-power system of negotiated settlements towards a more principled system. It intended to bring the rule of law into international relations and to replace the use of force with legal settlement. However, arbitration is distinct from adjudication. Arbitration is similar to judicial settlement in that an arbitral award is in principle binding on the parties and that, unless the parties specify otherwise, it is based upon rules of international law. Arbitration differs from judicial settlement in several ways. The arbitration agreement, usually termed the *"compromis d'arbitrage"*, may allow dispute settlement based on extra-legal standards. The *compromis* may otherwise lay down the standards by which the tribunal is to decide the case.[143] Further, the tribunal consists of persons chosen by the parties. It is typically instituted to handle a particular dispute or class of disputes. Arbitration is usually confidential and the award may remain confidential if the parties so desire. One disadvantage is that the parties have to pay the arbitrators and meet other expenses of the arbitration, thus making it more expensive than judicial settlement.[144]

In 1949, the UN Secretary-General submitted a Survey of international law[145] to the International Law Commission (ILC). This indicated, *inter alia*, that one of the questions to be considered by the ILC was arbitral procedure. In response, the ILC produced a Draft Convention in 1953.[146] The UN General Assembly discussed it and then referred the draft back to the ILC, instructing it to report back, but not before 1958.[147] Due to the obvious lack of interest in the General Assembly, the ILC discarded the draft Convention, downgrading it to a set of optional Model Rules on Arbitral Procedure. This was adopted by the General Assembly in 1958.[148]

The Rules are not binding but could be adopted by disputing parties a dispute. They deal with, *inter alia*

1. the determination of the existence of a dispute;

2. the scope of the undertaking to arbitrate;

3. the *compromis*;

[143]For example, Article 6 of the 1871 Treaty of Washington, (1871) 61 BFSP 40, laid down the applicable law for the arbitral tribunal.

[144]For example, parties need not make these payments to the ICJ. The expenses of the ICJ are borne by the United Nations' budget.

[145] "Survey of International Law in Relation to the work of Codification of the Commission", (1949) UN Doc. A/CN/14/1 Rev. 1

[146]see the Report of the Commission to the General Assembly, Yearbook of the ILC, (1958)(ii) 80

[147]UN GA. Res. 989 (X), 14 December 1955

[148]UN GA. Res 1261 (XIII), 14 November 1958, see also Carlston, K.S., "Draft Convention on Arbitral Procedure of the ILC", (1954) 48 AJIL 296

4. the constitution of the tribunal[149] and its power, including the power to adjudge its own competence and interpret the *compromis*;

5. the law to be applied in the absence of an agreement between the parties[150] and its procedure;

6. a prohibition on a finding of *non liquet*;

7. the deliberations of the tribunal and

8. its award.

The award is binding and must be reasoned. It comprises the definitive settlement of the dispute. This may be modified, however, by the competence given to the arbitral tribunal to rectify, interpret, or review the award. Finally, it may be possible to refer the award to the ICJ for review. The ICJ also has the jurisdiction to invalidate the award for a serious procedural error or lack of jurisdiction in the tribunal.[151] If these Model Rules are adopted by the disputing parties, obstructive devices could not be used to frustrate the arbitral proceedings.

Arbitration appears to be the preferred method of the settlement of space disputes.[152] This is due to the fact that arbitration provides the parties with the greatest amount of control over the settlement process, while ensuring a definite binding resolution in the light of applicable legal principles. Thus, it is instructive to consider the Permanent Court of Arbitration (PCA) and its present functions. The advantages of arbitration were reaffirmed at the 1899 Hague Peace Conference.[153] By the 1899 Hague Convention, as amended by the 1907 Hague Convention,[154] the Permanent Court of Arbitration (PCA)

[149]This was deliberately included as a result of the 1950 decision of the ICJ in the *Peace Treaties* Advisory Opinion, (1950) ICJ Rep. 65 at 221. The ICJ there held that where parties obliged to arbitrate failed in their agreement to appoint their arbitrators, the UN Secretary-General could *not* appoint the third commissioner. As such, a refusal by one party to appoint its commissioner could prevent the arbitration from taking place. The ILC specifically wanted to prevent the frustration of the arbitral process due to the parties' refusal to cooperate in the selection of the third arbitrator. See Yearbook of the ILC, (1958)(ii) 80 at 83

[150]Article 10 lists the sources of law. These are the same as those listed in Article 38 of the Statute of the International Court of Justice.

[151]Articles 31 - 38

[152]see generally Böckstiegel, K.-H., (ed.), *Settlement of Space Law Disputes: The Present State of the Law and Perspectives of Further Development*, Proceedings of an International Colloquium organized by the Institute of Air and Space Law, University of Cologne, September 13 and 14, 1979, (1980)

[153]PCA, *Basic Documents: Conventions, Rules, Model Clauses and Guidelines* (1998) 3 ; 91 BFSP 970, (1901) UKTS 9. See also Scott, J.B., *The Hague Conventions and Declarations of 1899 and 1907* (1915)

[154]PCA, *Basic Documents: Conventions, Rules, Model Clauses and Guidelines*, *ibidem* at 17, (1971) UKTS 6

was created. It has often been said that it is neither permanent, nor a court, not does it, itself arbitrate.[155] The long experience of the PCA should be considered in preparing future procedures for dispute settlement.[156]

The PCA consists of an International Bureau that acts as a registry for the arbitration tribunals. These tribunals are established on an *ad hoc* basis by the parties to disputes to hear specific cases.[157] The composition of these arbitral tribunals is selected by disputing parties from a panel of persons nominated by the contracting States.[158] The arbitral procedure has two distinct phases: pleadings and oral discussions. The settlement is made by majority voting.

In the 1990s, the International Bureau elaborated a series of model rules for use in the settlement of disputes. It issued a succession of revised Optional Rules to promote greater utilization of its facilities.[159] This process had actually begun in 1962 when the PCA extended its jurisdiction to mixed State / non-State arbitrations.[160] The 1992 Optional Rules adapted the UNCITRAL Arbitration Rules, which were designed for commercial arbitration, to reflect the public international law character of disputes between States and to provide freedom for the parties to choose the composition and size of the arbitral tribunal.[161]

The PCA now offers arbitral possibilities for disputes in which only one party is a State;[162] in which one party is a State or an international organization, and the other is an international organization;[163] and in which one party is an international organization and the other a private party.[164] Two of these

[155]Varekamp, J., "Development in the Permanent Court of Arbitration", in Council of Advanced International Studies, *Desarrollo Progresivo del Derecho Internacional*,(1991) Buenos Aires Chapter 19

[156]Galloway, E., "The History and Development of Space Law: International Law and the United States Law", (1982) 7 AASL 195

[157]Article 43 and 45, 1907 Hague Convention, see *supra* note 82

[158]Article 44, 1907 Hague Convention, see *supra* note 82

[159]PCA, The Optional Rules include: Arbitrating Disputes between Two States (1992); Arbitrating Disputes between Two Parties of which only one is a State (1993); Arbitration involving International Organizations (1996); Arbitrations between International Organizations and Private Parties (1996); and Conciliation (1996). Texts of these documents can be found in PCA, *Basic Documents: Conventions, Rules, Model Clauses and Guidelines*, see *supra* note 153

[160]1962 PCA Rules of Arbitration and Conciliation for the Settlement of International Disputes Between Two Parties of which Only One is a State, (1963) 57 AJIL 500. This was replaced by the new rules in 1993.

[161]Rosenne, S., *Developments in the Law of Treaties 1945 - 1986*, (1989) at 275

[162]Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of which Only One is a State, effective July 6, 1993, in PCA *Basic Documents*, see *supra* note 153 at 69 [hereinafter "PCA Optional Protocol I"]

[163]Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States, effective July 1, 1996, in PCA *Basic Documents*, see *supra* note 153 at 97 [hereinafter "PCA Optional Protocol II"]

[164]Permanent Court of Arbitration Optional Rules for Arbitration Between International Organizations and Private Parties, effective July 1, 1996, in PCA *Basic Documents*, see *supra*

protocols include a waiver of sovereign immunity or immunity from jurisdiction by State and international organization parties.[165] All three protocols allow a choice of arbitrators outside the membership of the Court.[166]

Since the end of World War I, inter-State arbitrations have been less frequent than before. One of the reasons for this is the establishment of the Permanent Court of International Justice and its successor, the International Court of Justice, both of which are permanent institutions of judicial settlement. Some important disputes were however, still settled by *ad hoc* arbitration. These include the *Air Transport Agreement* arbitration (USA v. France) (1963),[167]; the 1968 *Rann of Kutch* arbitration (India v. Pakistan),[168] the 1978 *Beagle Channel* cases (Chile v. Argentina),[169] the 1978 *Channel Continental Shelf* arbitration (France v. United Kingdom),[170] the *Taba* arbitration (Egypt v. Israel),[171] and the *Rainbow Warrior* case (New Zealand v. France) (1990).[172] The most striking attribute of arbitration recently however, is the growth of mixed arbitrations. It was once the custom for States only to make claims on the international plane, even if it were on behalf of a company. It has become common however, for such cases to be presented by the company itself before an international arbitral tribunal. Examples of such cases include *Texaco v. Libya*,[173] *BP v. Libya*,[174] and *Saudi Arabia v. Aramco*.[175]

The scope for PCA arbitrations could still be expanded. The PCA concentrates on public (inter-State and State/international organization) and mixed public/private (State/international organization; State/private party; international organization/private party) arbitral activity.[176] The PCA itself has made recent plans to expand its role. An example is in the field of international environmental law. Arbitral clauses referring to the PCA have been included in a number of conventions pertaining to environmental protection, including

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note 153 at 125 [hereinafter "PCA Optional Protocol III"]

[165]Article 1(2), PCA Optional Rules I and Article 1(2) PCA Optional Rules III, *ibidem*

[166]Common Article 8(3) of all three PCA Optional Rules. See Gillis Wetter, J., "Pleas of Sovereign Immunity and Act of Sovereignty Before International Arbitral Tribunals", (1985) 2 Journal of International Arbitration 7 at 19. The PCA is also instrumental in promoting conciliation and mediation strategies, see PCA Optional Conciliation Rules, effective July 1, 1996 in PCA *Basic Documents*, see *supra* note 153 at 153

[167](1963) 38 ILR 182; this arbitral decision also laid the foundations for the rule of international law that a treaty may be amended by a subsequent custom, where this custom is recognized by the subsequent conduct of parties.

[168](1968) 7 ILM 633, 50 ILR 2

[169](1978) 17 ILM 634, 738 and (1985) 24 ILM 1

[170](1979) 54 ILR 6; 18 ILM 397

[171](1988) 80 ILR 224

[172](1990) 82 ILR 499

[173](1977) 53 ILR 389

[174](1973) 53 ILR 297

[175](1958) 27 ILR 117

[176]Chiasson, E.C., "The Sources of Law in International Arbitration", in Beresford, G.M. (ed.), *The Commercial Way to Justice*, (1997) 29 at 33

the 1973 Convention on International Trade and Endangered Species of Wild Fauna and Flora (CITES)[177] and the 1979 Convention on Migratory Species of Wild Animals!Migratory Species Convention.[178]

In purely private arbitrations, the PCA is limited to administrative support and assistance.[179] The PCA's characteristic interaction with private parties and in commercial disputes is as an agency to select arbitrators. Article 6(2) of the 1976 UNCITRAL Arbitration Rules permits either party to an arbitration to request the Secretary-General of the PCA to designate an "appointing Authority".[180] The PCA will regularly execute these functions in disputes among private parties. However the PCA remains crippled by its parochial attitude to trade legalism. In principle it is amenable to assisting private commercial parties. Still, its procedures are calculated to assume formal jurisdiction only when States or international organizations are parties to the dispute before it. Further, its decisions are only binding for parties to the Hague Conventions under international law. The PCA also suffers from a lack of any of the panoply of automaticity that characterizes the World Trade Organization Dispute Settlement system.[181] Thus, at the compliance stage, States have more flexibility in responding to an adverse settlement than if the judgments could be made binding and enforceable in their domestic systems.

Clearly, the PCA dispute settlement mechanism stops short of allowing private entities and multinational corporations to directly enforce trade rules against foreign or domestic governments, or against each other. Pressure for this sort of unconstrained access will intensify in the future. This will include an insistence that domestic law incorporate norms of international law or that judgments of supranational tribunals be made directly enforceable by private parties in a defendant's domestic judicial system.[182] The subsequent horizon for international dispute settlement therefore, is the establishment of private party procedure before international and supranational tribunals with compulsory jurisdiction under international law for States, international organizations and private entities.

The endorsement of arbitration suggests a mechanism for internationalizing disputes within the space industry. With the globalization of national and commercial space activity, the dispute settlement framework must cope with the systematic and incessant flow of goods, services, capital, ideas and people across borders. The technical and jurisprudential absurdity of pretending

[177] 1973 Convention on International Trade and Endangered Species of Wild Fauna and Flora (1973) 993 UNTS 243

[178] 1979 Convention on Migratory Species of Wild Animals (1980) 19 ILM 15

[179] For example, the PCA's cooperation agreements with ICSID and the UN Multilateral Investment Guarantee Agency is limited to site facilities.

[180] UNCITRAL Yearbook, Vol. I, (1968 - 1970)

[181] This is dealt with *infra* in Chapter 4.

[182] This is already the case with the NAFTA and ICSID systems.

to be able to straitjacket the international space industry within domestic legal systems will become unavoidably evident. The premise of space activities and global communications inexorably requires an international approach to operations, financing and marketing.

Arbitration has been mooted vigorously as the most suitable means of dispute settlement for disputes arising from outer space. The strengths of arbitration as such a means for space disputes are apparent:

1. Arbitration results in final, binding decisions. Although several other methods of dispute settlement can help parties reach a settlement, most of them rely on party *bona fides* and cooperation to be enforced. A final, enforceable decision is obtained only through arbitration or adjudication. Additionally, arbitral awards are not subject to appeal, and the grounds of challenges to the awards available are very limited. This means that arbitral awards are much more rapidly enforced, and the settlement of the dispute is definitively final. This is especially attractive to parties involved in space disputes, as it is likely that they need a swift and final settlement of the decision. Activities in space have a small window of opportunity, especially with regard to the windows for launch, atmospheric entry, descent and landing, and orbit insertion. Parties may be running on a very tight, precise schedule that does not allow for repeated appeals and second-guessing.

2. There is international recognition of arbitral awards. Over 134 States have signed the 1958 New York United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[183] The Convention provides for the enforcement of arbitral awards in all contracting States. This is extremely advantageous in the light of the international and transboundary nature of space activities. Often, a project undertaking in outer space involves many actors, both private and State entities, across many countries. The capability to enforce arbitral awards in all contracting States is thus an important one.

3. Arbitration is a neutral process. In arbitral proceedings, parties can put themselves on an equal basis in six essential factors:

   (a) Place of arbitration
   (b) Language used
   (c) Applicable procedural rules
   (d) Applicable substantive law
   (e) Nationality

[183] see *supra* note 136

(f) Legal representation

Arbitration may take place in any State, in any language and with arbitrators of any nationality. This flexibility allows parties to structure a neutral procedure without undue advantage to any party. Again, in the light of the international cooperation in projects in outer space, this is an important consideration.

4. Arbitration makes use of the specialized competence of arbitrators. Judicial settlement does not allow disputing parties to choose their own judges. In fact, most judges in judicial courts and tribunals are experts only in the legal field. On the contrary, arbitration offers the parties the unique prospect of choosing their own arbitrators, provided these are independent. This allows the parties to have the disputes settled by specialized experts in the relevant field. Undoubtedly, this is of special significance in the field of space activities, as so many factors in this field are extra-legal, and grounded in specialized fields of business, science and technology. Disputes arising from space activities in particular cannot rely solely on legal expertise for its satisfactory settlement.

5. Arbitration is known for its speed and economy. Arbitration is more rapid and less expensive than adjudication. The limited possibility for challenge against arbitral awards offers a clear advantage. It ensures that the parties will not be consequently embroiled in a protracted and expensive series of appeals. Additionally, arbitration allows proceedings to be set up as flexibly, swiftly and economically as possible. Arbitration fees are normally regressive and expressed in percents for the subject of a dispute. All these factors point to immense savings of time and money for the parties, a factor that is all the more important in space activities.

6. Arbitration preserves confidentiality. Arbitration hearings are not public, and only the parties themselves receive copies of the awards. This allows sensitive information, such as that relating to large contracts, novel high technology, and national interests, to be kept confidential. This is especially significant to actors in space activities.

The disadvantages of arbitration arise from these identical features.

1. Arbitration is adversarial. Therefore, it does nothing to solve the zero-sum gain problem or enhance inter-party relationships. Often it may worsen a conflict, much like adjudication. This may not be favorable in a field such as space activities, where the community engaged in the same field is relatively small, and the likelihood of a continuing or subsequent relationship cannot be discounted.

2. Arbitration generally does not permit appeal or the setting aside of an award. If one party loses, the likelihood of having the award set aside on appeal is exceedingly limited. This is the case even if the arbitrator's award appears to be completely wrong. This leads to a situation where an outrageous arbitration award is much more difficult to reverse than a court judgment. The finality of arbitral awards, while increasing its efficiency, can be rather daunting for parties, especially those involved in space activities. With so much at stake, both economic and scientific, the finality of an award, even if patently incorrect, can be discouraging.

3. Arbitration does not set any legal precedent. Arbitration awards are generally unreported, except in special cases of securities and labor arbitrations. Awards do not bind anyone other than the parties, and may be used in other proceedings only under the principles of *res judicata* and collateral estoppel. Awards also need not be reasoned. As such, it is arguable that arbitration does not provide the best means of dispute settlement for space law, for two reasons. First, it does nothing for the evolution of the legal framework of international space law. There is actually, a real anxiety that unpublished arbitral awards might serve to fragment international space law, particularly where two panels confidentially give awards that lead to patently opposite results for various parties.[184] Second, the climate of uncertainty caused by a lack of precedent is not conducive to business practices, especially in a novel field such as space activities.

2.2.7 Claims & Compensation Commissions

Two novel innovations in the field of international dispute settlement evolved recently. The first is the Iran-United States Claims Tribunal, established in the wake of the Iranian Islamic revolution in 1979. The second is the United Nations Compensation Commission, set up pursuant to a UN Security Council Resolution in the aftermath of Iraq's expulsion from Kuwait in the 1990 Gulf War. These two commissions are especially unique in their terms of reference, parties, composition and structure. This section deals with these new advances in claims and compensation commissions.

The first is the Iran-United State Claims Tribunal. It is an exceptional instance of mixed arbitrations between a State and private entities. The Iran-United States Claims Tribunal,[185] is probably the most notable body in the

[184]The settlement of disputes between two private disputing entities, for example private-private arbitration, is dealt with *infra* in Chapter 5.

[185]Avanessian, A., *The Iran-United States Claims Tribunal* (1991); Aldrich, G.H., *The Jurisprudence of the Iran-United States Claims Tribunal*, (1996)

development of international arbitration.[186] Its case load and the financial amounts involved are staggering. It also deals with a wide range of issues of public international law and international commercial law. The Tribunal was created by the 1981 Algiers Declarations[187] as part of a settlement of the Tehran hostages crisis mediated by Algeria. On 19 January 1981, Iran released the 52 hostages held at the American embassy in Tehran. In return, the United States transferred about USD$8 billion from frozen Iranian assets[188] to trust accounts held by Algeria at the Bank of England. The Tribunal was established to settle the numerous claims each of the two State parties and their nationals had against each other. These claims ranged from a few thousand dollars in some cases to the USD$12 billion in the *Foreign Military Sales* case brought by Iran against the United States.[189]

A special "Security Account" holding USD$1 billion was opened in Algeria's name to pay for awards rendered by the Tribunal against Iran. Iran was obliged to replenish the account once it fell below USD$500 million.[190] This is an unprecedented device in inter-State claims settlement procedures. Iran has repeatedly abided by this obligation.[191]

The Tribunal has the jurisdiction to give final and binding decisions in four areas:

1. Claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of the Agreement, and arise out of debts, contracts, expropriations or other measures affecting property rights;[192]

2. Official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services;[193]

3. Disputes on whether the United States has met its obligations in connection with the return of the property of the family of the former Shah of Iran;[194] and

[186] Lillich, R.B. (ed.), *The Iran-United States Claims Tribunal* (1984)
[187] Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration); (1981) 20 ILM 224
[188] Executive Order No. 12170 (14 November 1979), Federal Register 65729 (1979)
[189] *Foreign Military Sales* case, Case No. B1
[190] Para. 7 of the General Declaration
[191] *Islamic Republic of Iran v. United States of America*, DEC 12-A1-FT
[192] Claims Settlement Declaration, Article II(1), see *supra* note 187
[193] Claims Settlement Declaration, Article II(2), see *supra* note 187
[194] General Declaration para. 16

4. Other disputes concerning the interpretation or application of the Algiers Accords.[195]

Additionally, the Tribunal was given a broad discretion regarding the applicable substantive law. It has powers to decide in all cases

> "on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."[196]

The Tribunals' Constitution and procedural rules were modified from the 1976 UNCITRAL Arbitration Rules for conducting international commercial arbitration[197]. The Tribunal consists of nine Members, three Iranians, three Americans and three from third States. The President of the Tribunal is selected from the third party arbitrators. Most cases are decided by Chambers of 3 arbitrators. The Full Tribunal of all nine Members decides only on international law disputes between the parties and in some particularly important cases.

The Tribunal was created under exceptional circumstances, in view of the parties' diametrically opposite ideology, the preceding political and military conflict, and the dimensions of economic interests at stake. It has however, been able to successfully discharge its mandate, even under the cessation of diplomatic relations and the ongoing confrontation between Iran and the United States.[198] Its success is verified by the number of claims that have thus far been decided or settled. These cases run the entire gamut of international commercial transactions and foreign investment. Even without considering "small claims" of less than USD$ 250,000 terminated by an Award on Agreed Terms in 1990[199] under which Iran paid a lump sum of USD$ 105 million, the total sum awarded to parties by the Tribunal has exceeded USD$ 3 billion.[200]

The second example of these prominent recent innovations is the United Nations Compensation Commission.[201] After Iraq was ejected by military force from Kuwait following its 1990 invasion, the UN Security Council adopted Resolution 687 under Chapter VII of the UN Charter. This set out the basis for

[195] General Declaration para. 17

[196] Article V, Claims Settlement Declaration, see *supra* note 187

[197] (1976) 15 ILM 701

[198] Dekker, I.F. and Post, H.G., *The Gulf War of 1980 - 1988* (1992)

[199] Award on Agreed Terms, No. 483-CLTDs/86/B38/B76/B77-FT, (22 June 1990)

[200] Award No. 306-A15(I:G)-FT

[201] see generally Lillich, R.B., (ed.), *The United Nations Compensation Commission*, (1995); Affaki, B.G., "The United Nations Compensation Commission: A New Era in Dispute Settlement?", (1993) 10(3) Journal of International Arbitration 21; Bettauer, R., "The United Nations Compensation Commission - Developments Since October 1992", (1995) 89 AJIL 416

the settlement of claims against Iraq arising from its invasion.[202] In Resolution 687 the Security Council created a Fund to pay compensation for claims for

> "any direct loss, 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."[203]

The Fund and the claims machinery were instituted soon after in UN Security Council Resolution 692.[204] The UN Compensation Fund was established on a 30% levy on proceeds of UN-authorized Iraqi oil sales.[205] The UN Compensation Commission administered all claims against Iraq. The Commission was established as a subsidiary body of the Security Council. It is constituted by a body of commissioners. These sit in three-member panels, and are experts in fields such as law, accountancy, insurance, and environmental damage assessment.

The character of the Commission is remarkable. It is not a judicial tribunal before which parties appear. It is a political organ that executes a fact-finding mandate of investigating claims, verifying their validity, calculating payments and settling disputed claims. Only in respect of resolving disputed claims does the Commission act in a quasi-judicial manner.[206] One motive for the deviation from judicial settlement was the immense number of claims filed. An estimated 2.6 million claims from over 100 States were submitted.[207] The claims had a total value of USD$250 billion. This caseload could not have been handled without accelerating the claims process. This was achieved by forgoing the judicial hearing stage.

Under the Commission's Provisional Rules,[208] claims may be submitted by international organizations and governments on their own behalf, and by governments on behalf of their national corporations and residents. Companies that cannot convince their national governments to submit their claims may do so in their own name.[209] The Secretariat makes an initial appraisal of the claims to decide if all administrative matters have been dealt with, and then

[202] All texts pertaining to the United Nations Compensation Commission, the Iraqi invasion of Kuwait and its expulsion, can be found in Weller, M. (ed.), *Iraq and Kuwait: The Hostilities and their Aftermath*, (1993)

[203] It is beyond the scope of the present analysis to examine the questions arising from the quasi-judicial determinations the UN Security Council made on this occasion. See for example Lauterpacht, E., *Aspects of the Administration of International Justice*, (1991) at 37

[204] see *supra* note 202

[205] UN Doc. S/AC.26/1991/6 (23 October 1991)

[206] see UN Doc. S/22559, (2 May 1991)

[207] 10(4) International Arbitration Report, (April 1995) 12

[208] UN Doc. S/AC.26/1992/10, 26 June 1992

[209] Provisional Rules, Article 5, *ibidem*

transmits the claims to panels of commissioners. The normal procedure involves no hearings. The panel reaches their decision on the basis of the documents submitted to substantiate the claim.[210]

The UN Compensation Commission embodies a methodology analogous to lump sum settlements, when claims are presented to national claims commissions. There is no determination of liability. The essential verdict of Iraq's liability had been decided on by the Security Council before the Compensation Commission was established.[211] The work of the Commission represents a new step in the evolution of international dispute settlement. It establishes that there can be individualized compensation for damages resulting from a violation of international law. It also offers a viable alternative model to the concept of reparations that had followed previous wars.

These two bodies constitute an important study in the development of dispute settlement systems for space activities. The continued functioning of the Iran-United States Claims Tribunal under such sensitive circumstances is noteworthy in itself. This model of mixed arbitration brings up several interesting issues. It illustrates a dispute settlement mechanism that is able to deal with huge financial sums. It also provides an outstanding example of a mechanism that could work between two parties of polarized political, cultural and ideological positions. This could potentially be significant in space disputes, as these will likely also involve huge amounts of economic investment. Further, parties to potential space disputes are also likely to come from different political and cultural demographics. The Iran-United States Claims Tribunal shows that dispute settlement in these circumstances is not only possible, but has proven successful.

The UN Compensation Fund and Commission illustrates a mechanism that deals mainly with compensation issues after liability has been established. Although established with specific mandates on an *ad hoc* basis, it exemplifies how a huge caseload can be dealt with. This is especially when claims abound from various fields, such as international law, economics, environmental protection and insurance. This efficient, interdisciplinary approach is definitely of relevance to the field of space activities.

2.2.8 Judicial Settlement

If the above methods of settlement fail to resolve the dispute, some treaties provide for judicial settlement. This results in a third-party decision legally binding upon the parties. Adjudication is performed by a standing court. The judges are pre-selected, the procedure is fixed and the law that the court must apply is preset.

[210] Provisional Rules, Article 36, *ibidem*

[211] Schneider, M.E., "How fair and efficient is the United Nations Compensation Commission system? A model to emulate?", (1998) 15(1) Journal of International Arbitration 15

Among the few permanent international courts and tribunals,[212] the International Court of Justice (ICJ) is without doubt the most important.

The ICJ[213] is one of the six principal organs of the United Nations.[214] It is an independent court that is not incorporated into the hierarchical taxonomy of the other five organs. Its Statute is annexed to the UN Charter. All members of the UN are *ipso facto* parties to the Statute.[215] In certain situations, non-Member of the UN may appear before the Court, and may become Parties to the Statute.[216] This was the case of Switzerland in 1948, Liechtenstein in 1950 and San Marino in 1954.

Each UN Member State is obliged to comply with decisions of the Court in any case to which it is a party.[217] In some situations, decisions of the Court may be enforced through the Security Council.[218] The UN Security Council, the General Assembly, as well as other authorized international bodies, can request advisory opinions from the Court.[219]

Another notable feature of the ICJ is its comprehensive jurisdiction, which is not limited by geography or subject matter. The ICJ has universal jurisdiction in cases involving public international law, unlike some specialized tribunals dealing with certain categories of disputes or that limited by region. The Court's jurisdiction however, is limited in other ways. The most relevant limitations to this analysis are found in Article 34(1) of the ICJ Statute:

> "Only States may be parties in cases before the Court."[220]

and the fact that the Court may only be seized of cases with the parties' consent. The latter limitation is characteristic of international dispute settlement. The former restriction however, has an immediate impact on the choice of fo-

[212] see generally Gray, C., *Judicial Remedies in International Law* (1990); Guillaume, G., *Les Formations restreintes des jurisdictions internationals*, (1992); Janis, M.W. (ed.), *International Courts for the Twenty-First Century* (1992)

[213] For excellent discourses and analyses of the ICJ, see generally Fitzmaurice, G.C., *The Law and Practice of the International Court of Justice*, (1986); Jiménez de Aréchaga, E., "The Work and the Jurisprudence of the International Court of Justice 1947 - 1986", (1987) 58 BYIL 1; McWhinney, E., *Judicial Settlement of International Disputes: Jurisdiction, Justiciability and Judicial Law-Making in the Contemporary International Court*, (1991); Rosenne, S. and Gill, T.D., *The World Court: What it is and How it Works*, (5th ed. 1994); Lowe, V. and Fitzmaurice, M. (eds.), *Fifty Years of the International Court of Justice*, (1996)

[214] Article 92 of the Charter, see *supra* note 1 See generally Rosenne, S., *The Law and Practice of the International Court*, 1920 - 1996, Vols. I - IV, (1997) see also Vereschetin, V.S., "The International Court of Justice as a Potential Forum for the Resolution of Space Law Disputes", in Benkö, M. and Kröll, W., (eds.), *Luft- und Weltraumrecht im 21. Jarhundert / Air and Space Law in the 21st Century* (1995) 476

[215] Articles 92 and 93(1), UN Charter, see *supra* note 1

[216] Article 93(2), UN Charter, see *supra* note 1

[217] Article 94, UN Charter, see *supra* note 1

[218] Article 95, UN Charter, see *supra* note 1

[219] Article 96, UN Charter, see *supra* note 1

[220] Article 34(1), Statute of the International Court of Justice, see *supra* note 25

rum for dispute settlement, depending on the nature of the disputing parties. This limitation acquires particular consequence in the light of space law disputes.[221] While Article VI of the Outer Space Treaty[222] stipulates that States bear international responsibility for their space activities and those of their national private entities, increasingly space activities are being undertaken by international organizations and multi-national corporations. The lack of *locus standi* for these actors is thus particularly injurious to the use of the ICJ for the settlement of space disputes.

Moreover, the gradual evaporation of impermeable boundaries between public and private international law in the new climate of communal interdependence is another factor. These new circumstances that directly relate to non-State individuals and entities constitute a swiftly emergent component of the system of international law. The once-clear barrier between public international law and private law has become a zone of complex connections.[223]

The ICJ has two major functions: First, its contentious jurisdiction mandates it to settle disputes submitted to it by States in accordance with international law. Secondly, it renders advisory opinions on legal questions referred to it by international organs and agencies duly authorized to do so.

Only States have standing in contentious proceedings before the Court.[224] This limitation is antediluvian because many areas of international law today concern individuals, corporations and legal entities other than States.[225] Jurisdiction in contentious proceedings is dependent on the consent of States. The consent of a State to appear before the Court may take several forms. Article 36(1) of the ICJ Statute provides:

> "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."[226]

The word "parties" implies that all the disputing parties must consent to the referral of the dispute to the ICJ. The usual practice is that the dispute is referred to the Court by the parties jointly by concluding a special agreement. The Court however has held that a defendant State may accept the Court's jurisdiction after the institution of proceedings against it. This acceptance may either take the form of an express statement, or be implied by the defendant State defending the case on the merits without challenging the Court's

[221] See also Jennings, R.Y., "The Role of International Court of Justice", (1997) BYIL 1

[222] Article VI, Outer Space Treaty, see *supra* note 62, see also *supra* Chapter 1.

[223] see *supra* note 221

[224] Article 34, ICJ Statute, see *supra* note 25; see also Charney, J.I., "Compromissory Clauses and the Jurisdiction of the International Court of Justice", (1987) 81 AJIL 855

[225] Jennings, R., "The International Court of Justice after Fifty Years", (1995) 89 AJIL 493 at 504

[226] Article 36(1), Statute of the International Court of Justice, see *supra* note 25

jurisdiction.[227]

States can also agree in advance by treaty to confer jurisdiction on the Court.[228] There are several hundred treaties in force that include a jurisdictional clause stipulating that if parties disagree over the interpretation or application of that treaty, one of them may refer the dispute to the Court.

Further, Articles 36(2) and 36(3) provide

> "2. The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes
> . . .
> 3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time."[229]

This optional clause materialized as a compromise between the advocates and the opponents of compulsory jurisdiction.[230] States that accept the Court's jurisdiction under the optional clause do so on the basis of reciprocity. This principle of reciprocity,[231] means that a State cannot benefit from the optional clause without accepting its corresponding obligations. According to the *travaux préparatoires*, Article 36(3) permits reservations relating to reciprocity and to time.[232] Many States have made reservations permitting them to withdraw their acceptance without notice. Even where such a reservation has not been made, a State may withdraw its acceptance by giving reasonable notice.[233] If a State validly withdraws its acceptance, it negates the Court's jurisdiction in future cases against it. However, it does not deprive the Court of jurisdiction over cases that have already been started before it.[234] Many States have made reservations concerning disputes that fall "essentially" or "exclusively" within their domestic jurisdiction. This is to exclude from the Court's jurisdiction disputes that may affect their national interests.[235]

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[227] *Corfu Channel* case (Preliminary Objections), (1948) ICJ Rep. 15 at 27. See in comparison to the *Haya de la Torre* case (Judgment), (1951) ICJ Rep 71

[228] Article 36(1), Statute of the International Court of Justice, see *supra* note 25; see also Rosenne, S., "The Qatar/Bahrain Case - What is a Treaty? A Framework Agreement and the Seising of the Court", (1995) 8 LJIL 161

[229] Articles 36(2) and 36(3), Statute of the International Court of Justice, see *supra* note 25

[230] Szafarz, R., *The Compulsory Jurisdiction of the International Court of Justice*, (1993)

[231] Thirlway, H.W.A., "Reciprocity in the Jurisdiction of the International Court", (1984) 15 NYIL 97

[232] Alexandrov, S.A., *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice*, (1995)

[233] *Nicaragua case*, see *supra* note 28 at 420

[234] *Nottebohm case*, (1953) ICJ Rep. 111 at 122

[235] Dolzer, R., "Connally Reservation", (1992) 1 EPIL 755

Another common reservation permits the exclusion of "any given category or categories of disputes".[236] In the *Fisheries Jurisdiction Case*,[237] Canada contested the Court's jurisdiction with Spain based on the declarations made by the two parties under Article 36(2) pertinent to the corresponding States' acceptance of the Court's jurisdiction.[238]

The optional clause is an exiguous method for enhancing the competence and jurisdiction of the Court. Despite the principle of reciprocity, States may decide that there is political benefit in keeping out of a régime that permits their joining on their own time and terms. It is virtually impossible, however, to reform the system, given the complexities of amending the Statute of the Court.[239]

The Court can only hear cases involving States with their consent. The recent decision of the ICJ in the *East Timor* case,[240] took the requirement of consent very strictly, leading to a very disappointing judgment. East Timor was once a colony of Portugal. It was occupied by Indonesia in 1975 and annexed as its 27th Province in 1976. This occupation and annexation has repeatedly been condemned by the UN. The UN has continually reaffirmed the right of the people of East Timor to self-determination and called for Indonesia's withdrawal. In 1991, Portugal, as the administrating power of East Timor under Chapter XI of the UN Charter, filed an application against Australia. This was in relation to Australia's concluding an agreement in 1989 with Indonesia on the exploration and exploitation of the continental shelf between Australia and East Timor. Portugal argued that this agreement violated East Timor's rights to self-determination over its natural resources, as well as Portugal's rights as the administrating power with regard to its responsibilities towards the people of East Timor. Although the ICJ accepted Portugal's assertion that the right of peoples to self-determination was of an *erga omnes* character,[241] it dismissed the case. The reason given for the dismissal was that Indonesia, as a substantially affected party, had not consented to the Court's jurisdiction in that case. The ICJ held

> "That the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right

[236] see in particular the Declaration of Portugal, 19 December 1955, in Jennings, R. and Watts, A., (eds.), *Oppenheim's International Law* (9th ed., 1992) at 495

[237] see *supra* note 56

[238] ICJ Communiques, 95/9 (29 March 1995) and 95/12 (2 May 1995)

[239] Merrills, J.G., "The Optional Clause Revisited", (1993) 64 BYIL 197

[240] *East Timor* case, see *supra* note 36

[241] *East Timor* case, *ibidem*, paras. 29 and 37

> in question is a right *erga omnes.*"[242]

The Court noted that it is not *per se* barred from adjudicating a case if a judgment might affect the legal interests of a State that is not a party to the proceedings.[243] However, in this case it adjudged that

> "the effects of the judgments requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute the very subject matter of such a judgment made in the absence of that State's consent. Such a judgment would run directly counter to the 'well-established principle of international law embodied in the Court's Statute, namely that the Court can only exercise jurisdiction over a State with its consent'."[244]

This decision reflects the Court's dependence on the consent principle, and the extent to which it inhibits the Court's competence to act. The results of this are often unjust and unsatisfactory.[245]

Judgments of the ICJ are binding. Article 94 of the UN Charter authorizes the Security Council to "make recommendations or decide upon measures to be taken to give effect to the judgment". Such recourse to the powers of the UN Security Council however, has thus far not been used to enforce a judgment.[246] The only measures the Security Council may adopt in this respect are those under Chapter VI of the Charter. It may not use the stronger Chapter VII measures, which require an immediate threat to international peace and security as a precondition. A request by Nicaragua to the Security Council to enforce the Court's decision in the *Nicaragua case* was vetoed by the United States.[247] It must be noted that all of the Permanent Members of the Security Council are major space-faring States. The United States, Russia, and China are space-faring States in their own right, and the United Kingdom and France are large contributing members to the European Space Agency. The question arises as to whether these States might not also veto the enforcement of any ICJ ruling against them in disputes arising from their activities in outer space.

[242] *East Timor case*, *ibidem*, para. 29

[243] *Certain Phosphate Lands in Nauru* case (Nauru v. Australia), (1992) ICJ Rep. 261

[244] see in comparison *Certain Phosphate Lands in Nauru* case, *ibidem* at para. 34; c.f. *Monetary Gold Removed from Rome case* (1943), (1954) ICJ Rep. 32

[245] Chinkin, C.M., "The East Timor Case (Portugal v. Australia)", (1996) 45 ICLQ 712; Maffei, M.C., "The Case of Eat Timor before the International Court of Justice - Some Tentative Comments", (1993) 4 EJIL 223

[246] Tanzi, A., "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations", (1995) 6 EJIL 539

[247] S/PV 2718 (28 October 1986), UN Doc. S/18428

However, generally the problem of enforcement is not very serious. If a State consented to the Court's jurisdiction, it is generally prepared to enforce the Court's judgment. The real complexity lies in persuading a State to accept the Court's jurisdiction, or to carry out a prior commitment to do so made *in abstracto*.

Additional to its contentious jurisdiction, the ICJ also has the competence to give advisory opinions.[248] Article 96 of the UN Charter provides:

> "1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
> 2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."[249]

The advisory procedure of the ICJ is only open to international organizations. The mandate of specialized agencies to request advisory opinions is restricted by the scope of their activities as laid down in their constituent treaties. Requests must relate to an abstract legal question and not a particular dispute. In reality however, a specific situation usually underlies the abstract question put to the Court. Upon a request for an advisory opinion, the ICJ invites States and organizations to present written or oral statements. The rest of the procedure is mainly similar to contentious proceedings.

Advisory opinions are merely consultative. They are not binding on the requesting bodies. However, they carry significant political import. Some advisory opinions have significantly impacted upon the development of international law. *Inter alia*, the Court has given advisory opinions on the admission to UN membership,[250] the reparation for injuries suffered in the services of the UN,[251] the territory status of South West Africa (Namibia)[252] and Western Sahara,[253] judgments rendered by international administrative tribunals,[254] the expenses of certain UN operations,[255] and the legality of nuclear weapons.[256] Compared with the volume of cases in contentious proceedings however, the advisory jurisdiction of the ICJ has been little used.

[248] Ago, R., " 'Binding' Advisory Opinions of the International Court of Justice", (1991) 85 AJIL 439

[249] Article 96, UN Charter, see *supra* note 1. See also Higgins, R., "A Comment on the Current Health of Advisory Opinions", in Lowe, V. and Fitzmaurice, M. (eds.), *op cit.*, 567

[250] *Admission* Case, (1948) ICJ Rep. 57

[251] *Reparations* Case, (1949) ICJ Rep. 174

[252] *South West Africa* cases,see *supra* note 30

[253] *Western Sahara* Case, (1975) ICJ Rep. 12

[254] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, (1954) ICJ Rep. 47

[255] *Certain Expenses of the United Nations* Case, (1962) ICJ Rep. 151

[256] see *supra* note 39

A new development to increase the use of the Court came in the form of *ad hoc* chambers under Article 26(2) of the Statute.[257] Usually, the Court decides in its full composition of fifteen judges (or up to seventeen, if *ad hoc* judges are appointed by the parties). However, the use of chambers gives parties influence as to the number of judges to decide a case.[258] Parties also have influence over the composition of the chamber. This allows them to have more assurance in the proceedings and outcome instead of submitting to the full Court. The innovation has been criticized on the grounds that

1. the chamber procedure is not reconcilable with the judicial and independent nature of the Court,

2. the power of the *ad hoc* chambers are too extensive, and

3. it has moved the Court into the direction of arbitration instead of adjudication.

Nevertheless, *ad hoc* chambers have been preferred by the parties in some cases, notably the *Gulf of Maine* case,[259] the *Frontier Dispute* case,[260], and the *Land, Island and Maritime Frontier Dispute* case.[261] In its first Chambers case, the *Gulf of Maine* case, the ICJ was forthrightly informed by Canada and the United States that a chamber with the membership as stipulated by the parties was crucial to their consent of the Court's jurisdiction. Failing that, the parties would resort to an *ad hoc* tribunal. In fact, the legal instruments of establishment for this *ad hoc* tribunal had already been drafted. Some judges of the Court opined that this procedure was improper. However, it is submitted that the parties should have the right to state their inclinations. There is no reason why the Court should be prejudiced by the States' insistence on a certain composition. The ICJ could refuse to form the chamber, although whether that would have been conducive to its future is debatable.

In 1993, another innovation arose with the establishment of a chamber for environmental disputes. The creation of this Environmental Chamber was in response to the appeal made to States by the UN Conference on Environment and Development (1992) to settle their disputes *inter alia* through recourse to the ICJ. It is staffed by seven judges with a special interest and expertise in international environmental law. However, two important cases with an

[257] Schwebel, S.M., "*Ad hoc* Chambers of the International Court of Justice", (1987) 81 AJIL 831; Oda, S., "Further Thoughts on the Chambers Procedure of the International Court of Justice", (1988) 82 AJIL 556

[258] Article 17(2) of the Rules of Court

[259] (1984) ICJ Rep. 246

[260] (1986) ICJ Rep. 554

[261] see in particular Rosenne, S., *Intervention in the International Court of Justice*, (1993)

environmental focus went to the full Court.[262] In a Colloquium to celebrate the 50th anniversary of the Court, it was argued that the full Court may not be best suited to deal with the settlement of space law disputes. It was proposed that a special chamber might therefore be advisable, analogous to the Environmental Chamber. Some other participants however expressed serious doubt about the need to set up a standing chamber for this purpose.[263]

Whether the ICJ is a preferred means of settlement for disputes arising from space activities is questionable. There is only a small number of relevant international treaties and agreements whose dispute settlement clauses contain a reference to the ICJ as a potential forum. Among the few, reference may be made to the INMARSAT Convention,[264] the 1985 Convention for the Protection of the Ozone Layer[265] and the decision of the ITU 1994 Plenipotentiary Conference in Kyoto authorizing the ITU Council to request advisory opinions from the ICJ.[266] Conspicuously, none of the basic space law instruments provide for recourse to the ICJ. It is debatable as to whether a Special Chamber of the ICJ would be attractive to parties involved in disputes arising from space activities.

In terms of issues of jurisdiction *ratione personae*, practical activities in outer space involve tremendous economic, political and military interests of direct concern for many States. Disputes on various aspects of space law can no longer be left open, allowing each State to persist in its perspectives and actions. Quite often, these conflicting views are incompatible, both in theory and in practice, so that decisions are required to avoid interference between various space activities.[267] International responsibility for national activities in outer space, including activities carried on by non-governmental entities, is borne by the States concerned.[268] In this regard, the jurisdiction *ratione personae* of the ICJ is particularly useful in its extension to States. States are ultimately internationally responsible for their activities in outer space, as well as those of their individuals and private entities. This unique feature of international space law opens up another avenue for the possible involvement of

[262] *Certain Phosphate Lands in Nauru* (Nauru v. Australia) case, Preliminary Objections, (1992) ICJ Rep. 240; *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia) case, Order of 20 December 1994, (1994) ICJ Rep. 151 ; see generally Fitzmaurice, M., "Environmental Protection and the International Court of Justice", in Lowe, V. and Fitzmaurice, M. (eds.), *op cit.*, 293

[263] Article 26 - 29 of the Court's Statute provides for two kinds of chambers: standing and ad hoc. See generally Peck, C. and Lee, R.S. (eds.), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court*, (1997)

[264] UNTS Vol. 1143, No. 17948

[265] 1513 UNTS 16164

[266] Resolution 59, ITU, Final Acts of the Plenipotentiary Conference, Kyoto (1994)

[267] Böckstiegel, K.-H., "Settlement of Space Law Disputes", in Peck, C. and Lee, R.S. (eds.), see *supra* note 263, 447

[268] Article VI, Outer Space Treaty, see *supra* note 62

States in space law disputes. The *prima facie* ascription of State responsibility is fulfilled by the standing of the respective States before the Court.

In terms of jurisdiction *ratione materiae*, the volume and variety of agreements dealing with space activities is massive. From the legal perspective, they range from issues specific to space law *stricto sensu*, to questions related to commercial law, intellectual property rights, environmental law, taxation, insurance, labor law, torts and criminal law. A close interaction exists between international space law and other branches of the law, which was apparently already at the time of the adoption of the Outer Space Treaty.[269] In this context, the global jurisdiction of the Court in terms of public international law is particularly useful. Further, it is not unusual for the ICJ to resort to determinations on questions of municipal law in the process of adjudication.[270] In the language of the Court's jurisprudence, national law for the Court is a "fact".[271] As such, given its wide-ranging jurisdiction in terms of subject matter, the ICJ could well be a good avenue for the settlement of dispute relating to space activities.

Another question is whether the ICJ has the requisite specialized knowledge and expertise in the field of space law and technology required by disputes in this field. The Court has demonstrated that it is fully capable in dealing with cases involving difficult scientific issues. Two recent examples are those of the *Kasikili/Sedudu Island case*[272] and the *Gabcikovo-Nagymaros Project case*.[273] The latter case, in particular, concerned *inter alia* complicated environmental and hydrological issues. Many members of the ICJ have a particular interest in international space law. As such, the Court may be in a position to properly decide on matters relating to space disputes.

The caseload of the ICJ was light before the end of the Cold War. On average, it dealt with not more than three decisions a year.[274] It is often said that the political and social disapproval of the Court's judgment in the *South West Africa cases*[275] was responsible for the decrease in the Court's work. This situation might change if:

1. Individuals and private entities affected by international law had access to the Court; or

2. National courts could petition the ICJ for a preliminary ruling on questions of international law. An example of this is the case of European

[269] Article IX, Outer Space Treaty, see *supra* note 62

[270] see *Case concerning Elettronica Sicula S.p.A. (ELSI)*, (1989) ICJ Rep. 5

[271] *Case concerning certain German interests in Polish Upper Silesia* (Merits), (1926) 7 PCIJ Judgments 3

[272] see Counsel's argument, *Kasikili/Sedudu Island Case* (Botswana v. Namibia), (2 March 1999) CR 99/11 at 49

[273] see *supra* note 262

[274] Janis, M.W., *An Introduction to International Law*, (2nd ed., 1993) at 122

[275] see *supra* note 30

> Law under Article 177 of the European Community Treaty. This procedure of *renvoi prejudicial* allows national courts to make reference to the European Court before judgment. A national court which encounters a question involving the interpretation of Community law can stay proceedings and refer the question to the European Court. The ruling of the European Court is binding on the national court.[276]

For smaller developing States, another disadvantage of the Court is its costs. Although the ICJ does not demand any fees, the costs of legal counsel, experts, secretarial assistance, travel and translation are often vast. In 1989 a UN Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice was created by the Secretary-General.[277] This was used to provide financial help in the dispute between Burkina Faso and Mali. However, this Trust Fund is based on voluntary contributions. This is a great weakness, bearing in mind the reluctance of States to pay even their normal UN dues.[278] With the increasingly cheap access to outer space, smaller developing States may find themselves embroiled in disputes which they cannot afford to submit to the ICJ for adjudication.

Evaluating the usefulness of the ICJ is a matter of perception and intuitive deduction.[279] The Court is often derided due to a perceived lack of respect by States, especially in the non-appearance[280] of defendant States before the Court. Judges of the Court, however, rebuff such blanket assertions and are more sanguine as to the general effectiveness of the Court. [281] The recent increase in the number of cases however is encouraging.[282]

The ICJ was a milestone in international dispute settlement, with the establishment of a permanent court for binding third party dispute settlement.

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[276]Benvenisti, E., "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts", (1993) 4 EJIL 159

[277]UN Doc. A/44/PV.43; for terms of reference see Guidelines and Rules of the Trust Fund, (1989) 28 ILM 1590

[278]Bekker, P., "International Legal Aid in Practice: The ICJ Trust Fund", (1993) 87 AJIL 659

[279]See comparatively Damrosch, L.F. (ed.), *The International Court of Justice at a Crossroads*, (1987); Kelly, J.P., "The ICJ: Crisis and Reformation", (1987) 12 Yale JIL 342; McWhinney, E., *Judicial Settlement of International Disputes: Jurisdiction, Justiciability and Judicial Law-Making in the Contemporary International Court*, (1991); Condorelli, L., "La Cour internationale de justice: 50 ans et (pour l'heure) pas une ride", (1995) 6 EJIL 388

[280]Elkind, J.B., "The Duty to Appear before the International Court of Justice", (1988) 37 ICLQ 674

[281]see for example Singh, N., *The Role and Record of the International Court of Justice*, (1989); Shahabudeen, M., "The ICJ: The Integrity of an Idea", (1993) 19 CLB 738; Weeramantry, C.G., "The World Court: Its Conception, Constitution and Contribution", (1994) 20 Mont. LR 181; Guillaume, G., "The Future of International Judicial Institutions", (1995) 44 ICLQ 848

[282]Keith, H., "The Peace Palace Heats Up: The World Court in Business Again?", (1991) 85 AJIL 646

It motivated the foundation of new courts, such as the International Tribunal for the Law of the Sea, and the International Criminal Court. It may indeed be useful for disputes arising from space activities.

2.3 Conclusion

From the foregoing analysis, several conclusions can be drawn. Firstly, there are many established and tested means of international dispute settlement that have seen successes and setbacks over the last century. Secondly, although there has not been much experience of these means in the resolution of disputes arising from space activities, it is clear that each has its own advantages and disadvantages. Thirdly, some of these schemes of dispute settlement are more suited to certain types of disputes. This suitability or otherwise is dependant upon the particular factors and desired outcomes of the dispute at hand.

There has recently been a movement for the improvement of international dispute settlement. For example, the UN General Assembly proclaimed the UN Decade of International Law (1990 - 9) aiming to promote methods for the peaceful settlement of disputes between States, including resort to the ICJ.[283] Another focus of debate was initiated by the UN Secretary-General's 1992 Agenda for Peace. Aside from the concept of "preventive diplomacy", it recommended greater dependence by States on the ICJ for the peaceful adjudication of disputes.[284]

The reluctance of parties - States and non-States alike - to submit to binding third party dispute settlement however, is well documented. Besides straightforward reasons for the reluctance to accept the optional clause of the ICJ, there appears also to be a preference for smaller, cheaper and more expedient methods of dispute settlement. These offer parties a greater amount of autonomy and control. There is also a clear distrust of parties for binding third party dispute settlement such as arbitration and adjudication in general. This is not symptomatic of a wish to be able to violate law with impunity. However, the lack of an enforcement mechanism in the international legal framework is a chink in its armor. It is submitted that in fact, the actual mechanisms of inducing parties to abide by international law does not rest on arbitration or adjudication, but rather on the formulation on a workable, reasonable and efficacious method for dispute settlement.

It is instructive to examine the raison d'être for parties' inherent distrust of the international dispute settlement system. If parties are to be persuaded to resort to such dispute settlement mechanisms, their qualms must be addressed and overcome. One of the main reasons parties are reluctant to accept binding

[283] UN GA Res. 44/23, UN Doc. A/44/49 (1990)

[284] Agenda for Peace, text in (1992) 31 ILM 953. See generally Ramsharan, B.G., *The International Law and Practice of Early-Warning and Preventive Diplomacy*, (1991)

third party dispute settlement is because the outcome cannot be controlled and is thus fairly unpredictable. Generally, the fact that a dispute has arisen indicates that the relevant law or facts are uncertain and are thus open to interpretation.

Where the law is vague, an intervening third party is likely to be influenced by political and other considerations. This casts serious doubts on the third party's impartiality.[285] This component of uncertainty and randomness may be acceptable in minor cases. However, this is often not the situation when important political issues or huge economic investments are at stake. This in particular, is generally the case for disputes arising from space activities.

Further, especially with regard to adjudication, the court's decision is not limited to the facts of a particular case. It also sets a legal precedent for future cases. Although there is no doctrine of *stare decisis* in international law, some parties distrust adjudication due to a concern that such decisions might have too great an impact on the development of international law. When a dispute revolves around a point of law on which the parties sincerely hold opposing views, it will always appear to the losing party that the court has adversely changed the law. In public international law especially, States develop the law themselves through treaties and custom. They are resentful of contending sources, such as judicial precedents, preferring to retain control over the developmental process of the law. On the other hand, other States distrust international courts, shunning them due to a perceived conservativeness. In situations where a State has reason to hope that a customary rule is evolving, a judgment reaffirming an old rule may impede or thwart the change. This is especially in the field of international space law, which is still in the stages of development and evolves in parallel with the rapidly changing contexts of business, law, science and technology in which it operates.

A dispute that cannot be settled will result in a stalemate. Aside from the threat of the use of force or the flagrant violation of the law, a stalemate will lead in any case to a needless prolongation of tension and conflict. The absence of compulsory dispute settlement procedures sometimes enables parties to break the law with apparent license, precludes censure, engenders gross injustice, and entrenches cynicism about the effectiveness of international law.

There are means by which the distrust for international dispute settlement can be overcome. Firstly, attention should be focused on creating a dispute settlement mechanism that answers to the parties needs and addresses their fears. This mechanism should learn from the experiences of all other dispute settlement machineries, and attempt to find a best fit that would suit parties as well as the development of the law. Secondly, this dispute settlement

[285]Franck, T.M., "Fairness in International Law and Institutions" (1995) 324 et seq., and Weiss, E.B., "Judicial Independence and Impartiality: A Preliminary Inquiry", in Damrosch, L.F. (ed.), *The International Court of Justice at a Crossroads*, (1987) at 123

mechanism should reflect the realities of contemporary international society. This would include the recognition of the role of private entities, individuals, non-governmental organizations and intergovernmental organizations on the international plane. Third, this dispute settlement mechanism should be flexible and forward-looking. It should be able to adapt itself to the rapidly changing paradigm of international society, and adjust its workings to suit the evolving circumstances without compromising on principles of law and justice. Fourth, this dispute settlement mechanism should consider parties' interests and concerns, while formulating a certain, just and practicable legal framework.

This debate is hardly academic. The creation of a permanent authority to determine the basis of the corpus international and transnational space law is both urgent and necessary. The differing contentions of stakeholders in any area of the international space industry should be governed by law, which no stakeholder can unilaterally circumvent or avoid in the given case. The question is whether international space law will retain the plebeian model of generalized cooperation with benign dispute settlement provisions, and risk becoming obsolete in the face of the present and future demands of actors in the space field. The alternative is for international space law to graduate to permanent mechanisms that established detailed substantive rules and envision a stable framework for the supranational settlement of transnational public and private space disputes.

To successfully achieve this framework, international space law must first acknowledge the changing paradigm of activities in outer space and the urgent need for a sectorialized dispute settlement mechanism. It must also draw from the lessons learnt through the experiences of recent developments in comparable fields of international law. The next Part of this book deals with these issues.

Part Two: Evolution

Chapter 3

Need for a Sectorialized Space Law Dispute Settlement Mechanism

International space law is a strange beast. It straddles basic principles of international law and economics on the one hand, and cutting-edge technology and science on the other. This creates a fascinating crucible of interdisciplinary issues, and any dispute settlement mechanism in international space law must somehow be structured to address all these concerns.

The pioneers of international space law made several intrepid innovations in the infancy of this branch of international law. In legislating for a field of activity that was novel and unknown, they put their collective minds to creating a framework that was pre-emptively visionary. This foresight finds articulation in the founding principles of international space law.

It is submitted that international space law is in urgent need of a sectorialized dispute settlement mechanism. Presently, international space law faces three scenarios with regard to dispute settlement:

1. General reference to international law for dispute settlement;

2. Bilateral *ad hoc* establishments in the case of disputes arising; or

3. Stalemate, with no resolution of the dispute.

None of these circumstances is acceptable especially in a field such as international space law. This Chapter argues that international space law requires a special sectorialized dispute settlement mechanism that is permanent and compulsory. This is due to two over-arching factors in disputes relating to outer space. Firstly, activities in space take place in unique circumstances and form an exceptional paradigm. Second, due to this factor, a general dispute settlement mechanism is unsuitable for the settlement of disputes arising from space activities.

The roles played by doctrine and general principles of international law are defining features of international space law. Among the bedrock of legal principles that found expression in the United Nations space law treaty framework are

1. The principle of non-appropriation of outer space;[1]

2. The prohibition of nuclear weapons and weapons of mass destruction in orbit around the Earth or in outer space;[2]

3. International liability of the launching State in the case of damage;[3] and

4. The principles of international cooperation and mutual assistance, and of due regard.[4]

Further, several original advances were made with regard to international law in the evolution of the international space law framework. This included the international responsibility of States for activities of both governmental and non-governmental entities,[5] the call to explore and use outer space for peaceful purposes,[6] as well as the principle that outer space shall be the province of all mankind.[7]

Principles of equity are vital rudiments of international space law. The "province of all mankind" principle in the Outer Space Treaty was based on the general supposition that it constitute a general principle that all States have a non-exclusive right to the exploration and use of outer space. Its constituent factors reflect basic principles of equity, accountability and fairness in the use of the resources of outer space. This should be seen in the light of the common benefit. The members of the international community have the right to decide the circumstances in which the use of space resources should take place. The "province of all mankind" principle implies that the freedom of the exploration and use of outer space is not unlimited. This is with especial emphasis on the prohibition against warfare in outer space. In particular, the "province of all mankind" principle integrates the notion of sustainable development.[8]

[1] Article II, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, (1967), adopted on 19 December 1966, opened for signature on 27 January 1967, entered into force on 10 October 1967. (1967) 610 UNTS 205, 18 UST 2410, TIAS 6347, [hereinafter "Outer Space Treaty]

[2] Article VI, Outer Space Treaty, see *supra* note 1

[3] Article VII, Outer Space Treaty, see *supra* note 1

[4] Articles IX and X, Outer Space Treaty, see *supra* note 1

[5] Article VI, Outer Space Treaty, see *supra* note 1

[6] Article I, Outer Space Treaty, see *supra* note 1

[7] *ibidem*

[8] Tan, D., "Towards a New Regime for the Protection of Outer Space as the 'Province of All Mankind"', (2000) 25 Yale Journal of International Law 10

The twin concepts of State responsibility and liability as defined under space law are novel.[9] They really contain their own respective definitions regarding the entities the activities of which a particular State might be held accountable. State responsibility is dealt with by Article VI of the Outer Space Treaty. Liability for damage is provided by Article VII of the Outer Space Treaty, as supported by provisions in the Liability Convention.[10] A State is thus motivated to exercise jurisdiction, authorization and supervision on entities for which it can be held responsible or liable under interntional space law.[11] Article VIII of the Outer Space Treaty plays a crucial role in the light of State responsibility. This touches upon the relationship between jurisdiction and international responsibility and liability. This provides the foundation for the regulation of private space activities by individual States for the purpose of international space law. Even without these treaty provisions, a State remains responsible under customary international law for all commissions and omissions within its territory. It has an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[12] In the *Trail Smelter Award* it was held that "no State has the right to use or permit the use of its territory in such a manner as to cause injury to the territory of another".[13] Hence, it is clear that States that allow space activities to occur on their territory have to ensure that such activities do not cause injury to other States.

This Chapter will first look at the unique paradigm of activities in outer space. This sets the context for the next section, which makes the case for a sectorialized dispute settlement mechanism for disputes arising from space activities. This Chapter will then turn to the special requirements that this sectorialized dispute settlement mechanism will have to fulfill.

3.1 The Unique Paradigm of Activities in Outer Space

The environment of outer space is at once majestically novel and deliciously exciting. From the infinite darkness of outer space, the Earth looks brilliantly incandescent, and yet so amazingly fragile. So it is also with the environment of space activities and the perspective of international law from that environment. The tight balance on international peace and security that is held in check by

[9] For an excellent overview of this topic, with especial focus on its applicability in the context of European space activities, see generally von der Dunk, F.G., *Private Enterprise and Public Interest in the European 'Spacescape'*, (1998)

[10] see also Horbach, N.L.J.T., *Liability Versus Responsibility Under International Law*, (1996) 20 - 34

[11] Cheng, B., "The Legal Regime of Airspace and Outer Space: The Boundary Problem. Functionalism versus Spatialism: The Major Premises", (1980) 5 AASL 340; Cheng, B., "The Commercial Development of Space: The Need for New Treaties", (1991) 19 JSL 37

[12] *Corfu Channel case*, (1949) ICJ Rep. 22

[13] *Trail Smelter Award*, U.S. v. Canada, (1935) 3 UN Reports of International Arbitral Awards 1965

international law is a delicate one. As international society evolves and matures with space activities and technology, varied and conflicting interests will inevitably arise. To fully appreciate and enhance the role of international space law, it is first necessary to understand the environment in which it operates and over which it governs. This is especially the case in terms of any dispute settlement and enforcement mechanism for international space law. This section deals with the unique characteristics of the environment of space activities. These include:

1. Military use of outer space and dual-use technology;
2. International cooperation;
3. Space science and technology;
4. Commercialization of outer space; and
5. Proliferation of actors involved in space activities.

3.1.1 Military Use of Outer Space & Dual-Use Technology

All States have the right to develop any sort of outer space technology. This includes launch capabilities, satellites, ground-based equipment and facilities, planetary probes, or orbiting telescopes, stations and other instruments. Practically however, this gives rise to issues of international law when such technology innovation treads the very thin line between civil and military applications.[14] This is especially in a situation of war between States. Such technology may be used in civil applications, and thus protected as civilian systems under the international law governing warfare. However, this protection is automatically lost upon the usage of these systems in any military or non-civilian operations. The problem at hand is that most space technology can be used for both military and civil applications, and the distinction between them is in many cases unclear. Such dual-use technology has, from the birth of space technology and exploration, raised questions relating to disarmament, weapons proliferation, technology transfer and immunity. The crux of the issue at hand is for international space law to keep the delicate balance of ensuring that advances in space technology are not unduly limited and allowing the transfer of

[14]Gasparini Alves, P., "The Transfer of Dual-Use Outer Space Technologies: Confrontation or Co-operation?", Doctoral thesis submitted to the Institut Universitaire de Hautes Études Internationales, Université de Genève, (2001), online at http://www.unige.ch/cyberdocuments/theses2001/GaspariniP/these_front.html and following, (Last accessed: 05 January 2006)

some technologies for civil use for the benefit of all mankind, whilst regulating the use of outer space for military purposes and armed force through the application of international law.[15]

Maintaining this fragile equilibrium is not easy. The character and potential of outer space applications and their related technology is such that the dichotomy is never a clear-cut one. This is so even if the international laws that govern the two régimes of warfare situations and those of peace or civil operations are completely separate.[16] As a result, States are often faced with the dilemma of regulating technology research and development and deciding what could be illegal or permissive.[17] The development of space technology bestrides both that which can be used for offensive purposes, and hence could be seen as a threat to international peace and security, and that which is genuinely civil, or used for deterrent and compliance monitoring schemes.[18] One clear example of such technology is launcher capability, which could contribute to the acquisition of ballistic missiles.[19]

Another serious factor is the fact that much military-grade space technology is available on the open market. For example, the development of military-grade, high resolution satellite technology is often considered the acquisition of military technology in support of a national militarization doctrine.[20] However, international market access to such satellite data (if not the satellite technology itself) is becoming increasingly widespread. New civil and security-related applications are emerging from this sort of data, such as disaster early-warning systems and land management systems. Joint manufacturing ventures are also increasing, as these are becoming more politically achievable and economically viable.[21] These are also used in the security framework of regional military alliances such as the North Atlantic Treaty Organization (NATO). The question of which aspects of space technology comprise a threat to international peace and security and hence is internationally illegal is becoming more relevant.[22]

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[15]Shah, A., "Militarization of Outer Space", (May 23, 2005), online at http://www.globalissues.org/Geopolitics/ArmsControl/Space.asp (Last accessed: 06 January 2006)

[16]It is beyond the scope of this thesis to discuss in detail the rules of international law governing warfare in outer space. For an overview, see Goh, G.M., "Keeping the Peace in Outer Space - A Proposed Legal Framework", (November 2004), 20(4) Space Policy 259

[17]Ramey, R., "Armed Conflict on the Final Frontier: The Law of War in Space", (2000) 48 AFLR 1

[18]Sadurska, R., "Threats of Force", (1988) 82 AJIL 239

[19]Hitchens, T., "Weapons in Space: Silver Bullets or Russian Roulette? The Policy Implications of U.S. Pursuit of Space-Based Weapons", (April 18, 2002), online at http://www.cdi.org/missile-defense/spaceweapons.cfm, (Last accessed: 10 January 2006)

[20]Petras, C.M., "Space Force Alpha : Military Use of the International Space Station and the Concept of 'Peaceful Purposes' ", (2002) 53 AFLR 135

[21]von Noorden, W.D., "INMARSAT Use by Armed Forces: A Question of Treaty Interpretation", (1995) 23(1) JSL 1

[22]Goh, G.M., "Tintallë: Kindling International Security with Space Law", (2003) 46 Proc.

Two issues arise in the context of this discussion on dispute settlement relating to space activities. First, it is important to note that a viable dispute settlement mechanism would provide a real alternative to the use of military force in the resolution of any disagreements that may arise. Secondly, it must be able to assess the complex political, technological, economic and military corollaries for which space technology might reasonably apply itself to. Therefore, it is submitted that any dispute settlement mechanism established for space activities need to be, and be regarded as, fair, workable and capable of performing such a function.

This is by no means an easy task. The dispute settlement mechanism might find itself in a quandary of complicated issues and conflicting yet reasonable justifications for space technology and application. The political and military appraisals as to whether a State's decision to develop or contract possibly military-related applications involves not only a consideration of the perceived level of threat to international peace and security, but also a consideration of the need to respond or adapt to potential technological innovations. Economic implications also arise, and these are likely to be the least known or studied. These economic considerations have both push and pull factors - States may wish to protect national space technology markets by securing a high level of domestic market control, or they may wish to promote increased competition in space technology development and manufacture. These market advantage strategies must also be dealt with by any dispute settlement mechanisms relating to space activities.[23]

Drawn into the quagmire are technology transfer issues, especially those of dual-use technology. Such dual-use expertise is wedged between *ad hoc* national control systems and the absence of an international agreement. With crucial nuclear, chemical and biological disarmament negotiations in progress, the reassessment of State and regional priorities related to international peace and security has great impact on global geopolitical concerns. This re-evaluation of priorities has led to an approach more amenable to international cooperation in developmental and environmental issues. This has several impacts in the field of space activities. First, space activities often involve nuclear, chemical and biological factors that potentially have a global environmental impact that ignores the artificial territorial boundaries of States. These range from nuclear power sources that orbit the Earth to the risk of spacecraft carrying chemical or biological weapons in orbit. Secondly, even in a contemporary environment of international cooperation in development, many States and non-State actors continue to be wary about the transfer of potentially dual-use technology for ostensibly development-related purposes. This is especially in relation to tech-

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[23]Mrazek, J., "Prohibition of the Use and Threat of Force: Self-Defence and Self-Help in International Law", (1989) 27 CYIL 81

nological development aid to States that have a history of warfare or violations of international legal obligations. There is a very real fear that the transfer of technology meant for development aid may end up in the hands of a rogue government that may use this technology for illegal or non-peaceful purposes. It is submitted that a dispute settlement mechanism would necessarily also have to consider such difficult factors. This is because disputes may arise due to the perception of one actor that another is allegedly using such transferred technology for purposes other than that which it is being transferred for. Alternatively, disputes may arise due to real or unreal fears as to the transnational impact of such space activities on the environment. These have to be addressed and resolved in a manner that protects international peace and security, while ensuring the most efficient possible means of development for the benefit of Humanity.

Aside from these practical considerations, any dispute settlement mechanism must have the capacity to constructively contribute both to the progressive evolution of international law and the maintenance of international peace and security. Essential to this is the ability to effectively regulate the transfer of dual-use space technology and of its delivery-vehicles. It has to be able to stimulate both creative discussions on such regulation as well as the political will to promote such initiatives. The dispute settlement mechanism must be able to tackle the apprehensions and advance the pursuit of international security, and promote international cooperation in the civil use of dual-use space applications. The difficulty is both historical and practical.

Historically, space systems have always been a significant component of international security and military initiatives. The military use of outer space has progressed from peacetime tactical deterrence operations to an extensive network-centric support application of the complete scope of military activities.[24] Such support has encompassed military operations other than offensive tactics. This includes international peacekeeping and peace enforcement operations, humanitarian assistance and disaster mitigation, crisis-related noncombatant evacuation, global treaty compliance and monitoring, as well as actions against terrorism, the international drug trade, and proliferation of weapons of mass destruction. These dual-use support applications also contribute to international confidence building and security arrangements, and pre-emptive conflict resolution.

Practically, many space applications employ dual-use technology for both civilian and military purposes. Reconnaissance satellites, for example, can be used for remote sensing for land and agriculture management. This difficulty is exacerbated with the commercialization of such civilian satellite systems with dual-purposes.[25] The question at issue is how any dispute resolution mecha-

[24]Fulghum, D., "Network-Centric Warfare", Aviation Week (November 2002) 28

[25]Goh, G.M., "Elendilmir: Satellites - Threats or the Threatened?", (2002) 45 Proc. Coll.

nism can balance sensitive issues of national interests and security with good business sense and efficacy. It may be necessary for any proposed dispute settlement mechanism to look past the win/lose process of traditional adjudication, or even binding arbitration, to be able to discharge this responsibility.

One big issue is the increasing reliance of the United States on commercial and military space support activities.[26] Aside from the revenues earned from commercial space activities, there is a growing camp in the United States arguing that military action in outer space is in the economic interests of the country. For example, the US SPACECOM argues that American possessions in space are vulnerable to attack and that to properly protect them the United States needs to dominate space militarily.[27] SPACECOM's Vision for 2020 makes the case for the protection of American space assets through superior space warfare capability. This Vision establishes two themes:

1. The military domination of outer space to protection American interests and investment; and

2. The integration of space warfare capabilities across the full spectrum of American military capacity.[28]

This global engagement strategy has been endorsed by many American politicians and civilian defense officials. As a direct result, Pentagon doctrine, organization and budgetary objectives have shifted in this direction. The 2001 Rumsfeld Commission report signaled a strong movement to project US dominance in outer space to counter presumed threats to US military and commercial interests there.[29] This was only one step short of the open advocacy for weapons in outer space. This perspective was further campaigned by the U.S. Quadrennial Defense Report issued later that year. In assessing US defense policy, it called for the strengthening of military space surveillance, communications and spacecraft capability to deny the use of space by other adversaries. This was to ensure that any possible American vulnerability in outer space was met by aggressive military development of space capabilities.[30] The use of such

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[26]Weiner, T., "Air Force Seeks Bush's Approval for Space Arms", (May 18, 2005), New York Times A1, online at http://query.nytimes.com/gst/abstract.html?res=F40F15F93D5D0C7B8DDDAC0894DD404482 (Last accessed: 05 January 2006)

[27]In October 2002, SPACECOM was incorporated into the US Strategic Command.

[28]The Pentagon's vision of outer space is contained in US SPACECOM's Vision for 2020 (February 1997); Long Range Plan: Implementing US SPACECOM Vision for 2020 (March 1998); and Oberg, J.E., Space Power Theory (Washington, DC: U.S. Government Printing Office, 1999). Online at the Federation of American Scientists website, http://www.fas.org/spp/military/docops/usspac/, (Last accessed: 06 January 2006)

[29]Final Report of the Commission to Assess United States National Security Space Organization and Management, (January 2001)

[30]Quadrennial Defense Review Report, (30 September 2001), online at http://www.defenselink.mil/pubs/qdr2001.pdf, (Last accessed: 06 January 2006)

capabilities however, might well be in violation of international legal principles governing the freedom of the use and exploration of outer space by any State.

SPACECOM was merged with the United States Strategic Command in October 2002. This new entity controls both US nuclear forces as well as space activities. This was to create a single entity responsible for early warning, missile defense, and long-range strikes.[31] The Pentagon requested USD$1.6 billion over FY 2003-2007 to develop space-based lasers and kinetic kill vehicles to intercept and destroy ballistic missiles.[32] This military initiative has also been complemented by non-military overtures. The US decision to withdraw from the Anti-Ballistic Missile (ABM) Treaty was more symbolic move away from inconvenient legal obstacles to US dominance in outer space than a response to technical needs of missile defense testing.[33]

The US vision of national dominance in outer space has been decried by the rest of the international community, most notably the People's Republic of China. China argues that this is irreconcilable with the established legal regime in space.[34] The international community has for over forty years repeatedly reaffirmed that space should be preserved for peaceful purposes, should be available to all, and should be weapon-free.[35] Thus, the international community will have to deal with two options: either an active arms race and a competition for national superiority in outer space; or a brave, detailed legal dispute settlement framework and enforcement régime that would prevent decisive dominance in outer space by any one State.

The first option is clearly a non-*sequitur*. Such an arms race in outer space would quench any semblance of the equal right of access to space and the freedom of the use and exploration of outer space. This would create instead

[31] "DoD Announces Merger of U.S. Space and Strategic Commands", Pentagon press release, 26 June 2002, online at http://www.defenselink.mil/news/jun2002/b06262002_bt331-02.html, (Last accessed: 06 January 2006)

[32] Steinbruner, J. and Lewis, J., "The Unsettled Legacy of the Cold War," Daedelus (Fall 2002)

[33] The ABM Treaty and Missile Defense Testing: Does the United States Need to Withdraw? Union of Concerned Scientists Working Paper, online at http://www.ucsusa.org/security/ABM analysis.pdf, (Last accessed: 10 January 2006)

[34] China Conference on Disarmament PAROS [Prevention of an Arms Race in Outer Space] Working Paper, (8 February 2000) 43 Disarmament Diplomacy; see also in particular Monterey Institute of International Studies, "China: Arms Control Proposals and Statements", Statements from March 28, 2002 to February 12, 2004, online at http://cns.miis.edu/research/space/china/arms.htm (Last accessed: 06 January 2006)

[35] Between 1959 and 2002, the UN General Assembly adopted forty resolutions on the *International Co-operation in the Peaceful Uses of Outer Space*. All forty resolutions are online at http://www.oosa.unvienna.org/SpaceLaw/gares/index.html, (Last accessed: 06 January 2006). In 1994 a new initiative by the General Assembly led to the adoption of the first resolution on the *Prevention of an Arms Race in Outer Space*, UN GA Res. A/RES/48/74 (1994). Between 1994 and 2001 a further either resolutions on this same topic was adopted without a single negative vote. These resolutions, and the voting history of the various States, are available online at the same webpage of the UN as cited in this footnote.

a *de facto* system based on a chronologically-prioritized deployment of space weapons. This tit-for-tat competition would generate great international instability and give rise to motivations for pre-emptive offensive attacks. The dispute settlement mechanism for space law should prevent such destabilizing conflicts over the use of outer space.

This function of the dispute settlement mechanism is further complicated by the large proportion of commercial and dual-use technology available on the international market today. More than 250 of the total 2816 active and inactive satellites in orbit as of February 2003 were operated by non-State entities such as intergovernmental organizations, non-governmental organizations or private enterprises.[36] In the 1991 Gulf War, more than 25% of U.S. military communications was provided over commercial satellite systems. This proportion escalated to over 85% in the 2003 war against Iraq.[37] This has extended to commercial satellite operators. Also, during the 1991 Gulf War, the U.S. government relied on commercial satellite communications services and remote sensing imagery from the French company SPOT Image. Both the Coalition and Iraqi forces also used channels on ARABSAT.[38] Later, imagery of the Gulf region from both SPOT Image and the U.S. Landsat satellites was prohibited from sale during the conflict. The United States relied on INTELSAT for communications among field commanders in Bosnia in 1996, and in 1999 for Kosovo.[39] The United States Air Force present relies on commercial systems for about 50% of its military satellite communications needs, a number it estimates will rise to about 85% by 2010. The United States Air Force is also now the largest customer for commercial satellite imagery in the world.[40] In October 2001, the U.S. National Imagery and Mapping Agency (NIMA) bought for USD$1.9 million per month the exclusive rights to all images acquired over Afghanistan by the IKONOS-2 satellite since the Afghanistan conflict began. This was to prevent the satellite company from selling its pictures to other buyers on the open market. IKONOS-2, the world's highest resolution commercial satellite, was built by a U.S. firm, Space Imaging, and launched in September 1999.[41] The company referred to its contract with the U.S. government as "a wonderful business transaction".[42]The United States has recently further de-

[36]Projection from Willson, D.L., "An Army View of Neutrality in Space: Legal Options for Space Negation", (2001) Air Force Law Review, 175 (2001) 4

[37]Preston, B., *Plowshares and Power: The Military Use of Civil Space*, (1994), at 132

[38]Cleminson, F.R., "Banning the Stationing of Weapons in Space Through Arms Control: A Major Step in the Promotion of Strategic Stability in the 21st Century", in Beier and Mataija, (eds.) *Arms Control and the Rule of Law in Space*, (1997) at 39

[39]Tannenwald, N., "Law Versus Power on the High Frontier: the Case for a Rule-Based Regime in Outer Space", (2003), Project on Advanced Methods of Cooperative Security, Center for International and Security Studies

[40]*ibidem*

[41]The Economist, (November 10, 2001), at 74

[42]"The Satellite Wars", (November 8, 2001), online at http://www.spacetoday.org, Last

cided to make commercial satellites the primary source of data for the Central Intelligence Agency (CIA) mapping program. This is so as to free up the government's own satellites for more specialized work.[43] The increasing reliance of the military on commercial and dual-use technology must be adequately addressed by any mechanism involved in resolving disputes arising from space activities. Further, any dispute settlement mechanism for space activities must present a viable alternative to the resolution of disagreements by forceful or illegal means.

3.1.2 International Cooperation

The science and technology relating to activities in outer space formed the basis for the evolution of international space law. New developments in this field have inevitably led to changes in the public international law, including the establishment of new international organizations to deal with these new issues. This is particularly due to immense amount of international cooperation in the field of activities in outer space.[44] Three aspects of such international cooperation are pertinent to any discussion of a proposed dispute settlement mechanism for space-related disputes. The first is that it is very likely that the establishment of a dispute settlement mechanism will become increasingly urgent as more actors become involved in space activities. This is because the probability of a dispute arising increases with greater numbers of actors involved in any field of activity. Secondly, any proposed dispute settlement mechanism must not only be accessible to as many actors as possible. It must also present a viable and highly regarded choice for actors to turn to in the event of a dispute arising. Thirdly, a transnational mechanism is required for the settlement of any disputes that may arise. This is necessary as it can reasonably be envisaged that disputes relating to space activities will transcend State borders and involve actors on different levels.

The function of the United Nations is particularly important in this regard. It comprised the most comprehensive framework for the establishment of legal norms for the entire community of States and other international organizations. The UN General Assembly was at first seized of the novel matters relating to outer space. However, the issues raised were too specialized for a gathering inherently too large and political to deal with such new problems and technology. This led to the establishment of the UN Committee on the Peaceful Uses of Outer Space (UN COPUOS). The objective of UN COPUOS was to prepare the groundwork for future basic multilateral conventions and to operate as a forum for negotiations and discussions relating to this new field

accessed: 06 January 2006

[43] Risen, J., "CIA Instructs Spy Agencies to Use More Commercial Satellite Photos", New York Times, (June 26, 2002), at A8

[44] van Bogaert, E.R.C., *Aspects of Space Law*, (1986), at 261 - 264

of international law. Other specialized international organizations involved in the exploration and use of outer space were also involved. The ITU and UNESCO initiated the involvement of intergovernmental organizations, followed by the participation of the FAO, ICAO, WHO, IAEA and WMO. These played a crucial role in the establishment of legal rules for the new applications of space activities. Some international and intergovernmental organizations were instituted specifically to undertake activities in outer space. These included, *inter alia*, INTERCOSMOS, INTELSAT, and ESA.[45]

Two other factors contributed to the international cooperation witnessed in space activities. First, governments of various States also realized the international cooperation was necessary for the full and efficient exploration and use of outer space. The huge economic and political investments involved required a concrete consideration of whether cooperation with other space-faring States would substantially increase productivity and efficiency. Secondly, the nature of space activities led inevitably to international cooperation. Spacecraft in Earth orbit theoretically need not respect either the artificial territorial boundaries drawn between States, or the sovereignty rights of subjacent States.

Any dispute settlement mechanism relating to space activities will be complicated by the multiplicity of factors involved in the international cooperation in space programs. Reaching a commonly acceptable settlement for disputes will be made arduous by the diversity of interests and considerations. Very often much will depend on the acceptance of a common *corpus* of international law and the reputation of the mechanism itself. The role of UN COPUOS may be important in this regard. The endorsement of the mechanism by the United Nations and of COPUOS in particular, together with organizations involved in space activities may forward a collective understanding and recognition of this dispute settlement mechanism.[46]

In particular, the phenomenon of regional cooperation in space activities is burgeoning. A clear example is that of the European Space Agency, which has contributed very much to coordination of space activities amongst its European State partners themselves, as well as with external agencies on important space projects. Another regional space coordination agency is consistently mooted for the States in the Asia-Pacific region.[47] Regional organizations tend to develop their own legal systems, especially with regard to dispute settlement mechanisms. These however should respect general international law and international space law in particular.[48] Regional organizations perform a noteworthy

[45] see generally Galloway, E., "Introduction to the Symposium on International Organizations and the Law of Outer Space", (1977) JSL 3

[46] Hosenball, J.N., "The United Nations Committee on the Peaceful Uses of Outer Space: Past Accomplishments and Future Challenges", (1979) JSL 95

[47] He, Q., "Organizing Space Cooperation in the Asia-Pacific Region", (1993) Space Policy 209

[48] *ibidem*

function in the present international community.[49] It is thus not surprising that for space activities they also have a certain significance. Regional organizations such as INTERSPUTNIK and ARABSAT have been influential in telecommunications and satellite operations.

The significance of these regional organizations is threefold. First, they have established their own mechanisms for dispute settlement, which are extremely informative for the study of the trends of dispute settlement in the field of space activities. Secondly, they highlight the importance of international cooperation in the exploration and use of outer space. Thirdly, they raise the issue of the need for a comprehensive, international framework for dispute settlement. This will ensure that the framework of international space law is not fragmented by the various mechanisms of dispute settlement adopted by these institutions, as well as regulate the relationships created by these organizations amongst their Members *inter se* and between these organizations and other external agencies.

As mentioned, the role of INTERCOSMOS and the European Space Agency is extremely instructive in this regard. The INTERCOSMOS agreement establishing this organization was signed in Moscow on 13 July 1976 by Bulgaria, Cuba, Czechoslovakia, the German Democratic Republic, Hungary, Mongolia, Poland and the Soviet Union. The agreement was a new legal basis for cooperation which had already existed for a decade.[50]

In response to the relatively backward amount of Western European research and development in the space field as opposed to that in the United States and the Soviet Union, the Paris Treaty of 14 June 1962 established the European Space Research Organization (ESRO). It was purposely created to contribute to scientific and technological research in outer space. Its activities were closely intertwined with those of the European Launcher Development Organization (ELDO). In 1972, some ten years after ESRO's founding, a European Space Conference agreed that the merger of ESRO and ELDO would be beneficial to European space activities. Preparatory work for the European Space Agency was then started.[51] A general agreement was reached in February 1975 and approved by the European Space Conference on 15 April 1975. A special diplomatic conference was held in Paris by which the Convention establishing the European Space Agency was approved and opened for signature on 30 May 1975.[52] As elaborated upon in Chapter 1 of this book, the ESA

[49] Vellas, P., *Régionalisme international et l'Organisation des Nations Unies*, (1948)

[50] Vereschetin, V.S., "Cooperation in the Exploration and Use of Outer Space for Peaceful Purposes (INTERCOSMOS)", in Jasentuliyana, N. and Lee, R.S.K. (eds.), *Manual on Space Law*, (1979) 415

[51] Chappez, J., "La cessation des activities de l'ELDO et la relance de l'Europe spatiale", (1973) AFDI 941

[52] Convention Establishing the European Space Agency, (1975) ILM 855. Text of the Convention is also available online at http://esamultimedia.esa.int/docs/SP1271En_final.pdf. As of July 2005, ESA consists of 16 Member States: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden,

Convention also contains procedures for dispute settlement.[53]

Another factor involved in international cooperation is the role of the developing States. As the economic benefits of space activities became more manifest, North-South dynamics also became clearer. Efforts by the Group of 77 non-aligned States to extend the "common heritage of mankind" principle is one example of this.[54] As access to outer space becomes cheaper and easier however, these non-space-faring States, which comprise the vast majority of the international community and the UN General Assembly, will have a voice that is increasingly important.

3.1.3 Space Science & Technology

The benefits to be gained by exploring and using outer space for scientific purposes were among the main early arguments advanced to justify space activity. It is submitted that advancement in the field of scientific research presents further factors that advance the arguments for the establishment of a sector-specific dispute settlement procedure for space activities. Firstly, the exploration and use of outer space for scientific purposes involves international and interdisciplinary cooperation. Such cooperation envisages actors of various States and professions working together to successfully launch, operate and manage space missions. It is reasonably foreseeable that with so many disparate actors such cooperation may potentially lead to disputes. A universal mechanism for dispute settlement may be the solution that provides a workable process for these actors to resolve any arising disputes. Secondly, a dispute settlement mechanism is generally one of the means by which law develops with ambient developments in the field. It is submitted that the institution of a dispute settlement mechanism will ensure that international space law evolves so as to remain relevant in the rapidly advancing fields of space sciences and technology. Thirdly, many scientific space missions generally involve small windows of opportunity for launch and operations. As such, any disputes relating to such scientific missions must be resolved as efficiently as possible so as not to jeopardize the success of the scientific mission. It is submitted that the establishment of a viable dispute settlement framework will allow the efficient resolution of disputes within the law and the general principles of justice and equity.

Switzerland and the United Kingdom. Luxembourg is expected to become a member of ESA in 2005, and Canada, Hungary and the Czech Republic participate in some projects under cooperation agreements. See generally Kalternecker, H., "The European Space Agency (ESA)", in Jasentuliyana, N. and Lee, R.S.K. (eds.), *Manual on Space Law*, see *supra* note 50 at 427. See also Bourély, M., "L'Agence spatiale européenne", (1976) AASL 186

[53] *ibidem*; also see Bourély, M., "The Legal Framework of European Cooperation in the Execution of Space Application Programmes", (1975) 28 Proc. Coll. Law of Outer Space 58

[54] Franck, T., *Fairness in International Law and Institutions* (1995) at 400

The Outer Space Treaty advances two principles about space science in particular:

1. There shall be freedom of scientific investigation in outer space, and to that end outer space shall be free for exploration and use and is not subject to national appropriation; and

2. There shall be freedom of access irrespective of States' degree of scientific development; and to that end international cooperation shall contribute to scientific development.[55]

Scientific research and the international scientific community are referred to in various provisions of the Outer Space Treaty and the Moon Agreement, but there is no specific treaty dealing with cooperative scientific agreements. There have been however, many international cooperative projects involving space science and technology. Aside from the massive undertaking that is the International Space Station, they include, *inter alia*,

1. Past international scientific missions:

   (a) COS-B (ESA, 1975)[56]
   (b) International Ultraviolet Explorer, IUE (ESA-NASA-UK, 1978)[57]
   (c) European X-Ray Observing Satellite, Exosat (ESA, 1983)[58]
   (d) AKEBONO / EXOS-D (Japan-Canada, 1989)[59]
   (e) Infrared Space Observatory, ISO (ESA, 1995)[60]

[55]Lafferranderie, G., "Space Science and Space Law", in Lafferranderie, G. and Crowther, D. (eds.), *Outlook on Space Law over the Next 30 Years*, (1997) 107

[56]This scientific mission was to study the sources of extra-terrestrial gamma radiation at energies above about 30 MeV. It lasted nearly 7 years. Swanenburg, B.N., et al, "COS B Observation of High Energy Gamma Radiation from 3C273", Nature 275, 298 (28 September 1978)

[57]This analyzed ultraviolet light from the stars and storm signals of cosmic upheavals. This mission lasted nearly 19 years until 1996. Wilson, R., "The International Ultraviolet Explorer", Mitteilungen Astron. Gesellschaft Vol. 47, 91 (1980)

[58]Its goal was to make observations in the X-ray band of many classes of objects, including active galactic nuclei, white dwarfs, stars, supernova remnants, clusters of galaxies, cataclysmic variables and X-ray binaries. This mission operated between May 1983 and April 1986. Warwick, R.S., Turner, M.J.L, Watson, M.G. and Willingale, R., "The Galactic Ridge Observed by Exosat", Nature 317, 218 - 221 (19 September 1985)

[59]This Japanese-Canadian cooperation studies auroral phenomena. Abe, T., B. A. Whalen, A. W. Yau, R. E. Horita, S. Watanabe, and E. Sagawa (1993), EXOS D (Akebono) Suprathermal Mass Spectrometer Observations of the Polar Wind, Journal of Geophysical Research, 98(A7), 11, 19111, 204

[60]This mission aimed to detect this kind of radiation invisible to the human eye and to optical telescopes. Kessler, M.F., et al, "The Infrared Space Observatory (ISO) Mission", Astronomy and Astrophysics 315, L27L31 (1996), available online at http://www.iso.vilspa.esa.es/outreach/bck_grnd/a_and_a/2300l27.pdf (Last accessed: 15 January 2006)

(f) MUSES-B (Japan-USA-ESA-Russia, 1996)[61]

(g) NOZOMI (Japan-USA-Canada-Sweden-Germany, 1998)[62]

2. Ongoing operative scientific missions:

(a) Ulysses (ESA-NASA, 1990)[63]

(b) Hubble Space Telescope (ESA-NASA, 1990)[64]

(c) GEOTAIL (Japan-NASA, 1992)[65]

(d) Solar Heliospheric Observatory, SOHO (ESA-NASA, 1995)[66]

(e) Cassini-Huygens (NASA-ESA-ASI, 1997)[67]

(f) MUSES-C (Japan-USA, 2001)[68]

(g) LUNAR-A (Japan-USA-France, 2002)[69]

[61]This is a Very-Long Baseline Interferometry (VLBI) to allow, among other things, high-resolution imaging of active galactic nuclei. Hirabayashi, H., et al, "Overview and Initial Results of the Very Long Baseline Interferometry Space Observatory Programme", Science Vol. 281. no. 5384, pp. 1825 - 1829, 18 September 1998

[62]This project planned to study Martian plasma. It has since been abandoned after efforts to insert it into the Martian atmosphere failed. Lammer, H., Stumpter, W. and Bauer, S.J., " Upper Limits for the Martian Exospheric Number Density during the Planet B/Nozomi Mission", Planetary and Space Science, Volume 48, Number (15 December 2000), pp. 1473-1478(6)

[63]The main scientific goal of Ulysses is to make measurements of the unexplored region of space above the Sun's poles. This project is funded until March 2008. Smith, E.J., Marsden, R.G. and Page, D.E., "Ulysses Above the Sun's South Pole: An Introduction", Science 68(5213), pp. 1005-7, (19 May 1995)

[64]This is a long-term space-based observatory. Current mission end estimate is 2010. Poliдan, R.S., "Hubble Space Telescope Overview", Paper presented at AIAA, 29th Aerospace Sciences Meeting, Reno, NV, (January 7-10, 1991) p.5

[65]This mission studies the structure and dynamics of the tail region of the magnetosphere with a comprehensive set of scientific instruments. Fairfield, D.H., et al, "Geotail Observations of Substorm Onset in the Inner Magnetotail", Journal of Geophysical Research, Vol. 103, No. A1, pp. 103118, (1998)

[66]SOHO is a space-based observatory, viewing and investigating the Sun from its deep core. This mission is slated to run until 2007. Domingo, V., Fleck, B. and Poland, A.I., "The SOHO Mission: an Overview", Solar Physics, v. 162, p. 1-37 (1995)

[67]This mission's mandate is to explore the Saturnian system. The Huygens probe landed successfully on Titan on 14 January 2005; the Cassini orbiter is expected to orbit Saturn for four years from 1 July 2004. Jaffe, L.D. and Herrell, L.M., "Cassini/Huygens: Science Instruments, Spacecraft and Mission", Journal of Spacecrafts and Rockets vol.34 no.4 pp. 509-521 (1997); see also Lebreton, J.-P., et al, "An Overview of the Descent and Landing of the Huygens Probe on Titan", Nature 438, 758-764 (8 December 2005)

[68]This is an asteroid sample return mission. Fujiwara, A., Mukai, T., Kawaguchi, J. and Uesugi, K.T., "Sample Return Mission to NEA : MUSES-C", Advances in Space Research, Volume 25, Issue 2, p. 231-238 (1999)

[69]LUNAR-A is a moon penetrator. This mission aims to study the lunar interior using seismometers and heat-flow probes installed in the penetrators. Mizutani, H., et al, "LUNAR-A mission : Goals and status", Advances in Space Research, Volume 31, Number 11, June 2003, pp. 2315-2321(7)

(h) International Gamma-Ray Astrophysics Laboratory, INTEGRAL (ESA-Russia-USA, 2002)[70]

(i) Double Star (China-ESA, 2003)[71]

(j) SOLAR-B (Japan-USA-UK, 2004)[72]

3. Planned scientific missions:

(a) Orbiting Carbon Observatory, OCO (NASA-Germany-France-New Zealand, 2007)[73]

(b) SAC-D /Aquarius (NASA-Argentina-Italy-France, 2008)[74]

(c) James Webb Space Telescope, JWST (ESA-NASA-Canada, 2011)[75]

(d) Bepi Colombo (Japan-ESA, 2012)[76]

[70]The task of INTEGRAL is to gather some of the most energetic radiation that comes from space. This mission will last till 2008. Winkler, C., et al, "The INTEGRAL mission", Astronomy and Astrophysics 411, L1-L6 (2003)

[71]This mission studies the effects of the Sun on the Earth's environment. The mission is slated to last 18 months, but its mission lifetime has been doubled and extended to December 2006. Liu, Z.X. and Escoubet, C.P., "The Double Star Mission", Geophysical Research Abstracts, Vol. 7, 04722, 2005; see also Liu, Z.X. and Cao, J.B., "A Brief Introduction and Recent Progress of the Geospace Double Star Program", Chinese Journal of Space Science 2004 Vol.24 No.z1 P.39-45 (in Chinese)

[72]SOLAR-B will be placed in a polar, sun-synchronous orbit about the earth to study the Sun's magnetic field, luminosity and generation of ultraviolet rays through quantitative measurements of the full vector magnetic field. This mission will continue through to 2008. Shimizu, T., et al, "Solar-B", Advances in Space Research, Volume 29, Number 12, June 2002, pp. 2009-2015(7)

[73]This is a NASA Earth System Science Pathfinder Project (ESSP) mission designed to make precise, time-dependent global measurements of atmospheric carbon dioxide (CO2) from an Earth orbiting satellite, to study the phenomenon of climate change. This mission is slated for launch in 2007 and will nominally last to 2009. Crisp, D., et al, "The Orbiting Carbon Observatory (OCO) Mission", Advances in Space Research 34 (2004) 700709

[74]SAC-D/Aquarius is a multi-sensor mission covering ocean, land, atmosphere and space environments. The primary science goal is to study the processes that couple changes in the water cycle and ocean circulation, and influence present and future climate, by measuring global sea surface salinity variations. This mission is slated to run between 2008 and 2011. See http://www.invap.net/news/novedades.php?id=26 and http://www.astroseti.org/vernew.php?codigo=164, both websites in Spanish, (Last accessed: 10 January 2006). See also Raul Colomb, F. et al, "The SAC-D/Aquarius Mission: Scientific Objectives", (2004) Gayana Concepción 68(2), also available online at http://www.scielo.cl/, (Last accessed: 10 January 2006)

[75]This is the successor to the Hubble Space Telescope, slated for launch in 2011. This mission is planned for a nominal 5 years, extendable to 10. H.S. Stockman, *James Webb Space Telescope: Visiting a Time When Galaxies Were Young*, AURA, 1997; see also Seery, B.D., "The James Webb Space Telescope (JWST): Hubbles Scientific and Technological Successor", available online at http://www.ngst.nasa.gov/project/text/JWST_HST_successor.pdf (Last accessed: 10 January 2006)

[76]This cooperation plans to explore the planet Mercury. It is slated for launch in April 2012, and will last a nominal 1 year in Mercurian orbit. See

(e) Laser Interferometer Space Antenna, LISA (ESA-NASA, 2014)[77]

(f) Darwin (possible ESA-NASA-Russia-Japan, 2015)[78]

This list is by no means exhaustive. It does however illustrate the extent of international cooperation involved in space science missions. It is important to note that issues relating to space science cannot be treated in isolation. These necessitate the harmonized efforts of intergovernmental organization such as UN COPUOS, and professional institutions such as COSPAR and the International Astronomical Union (IAU). The proposed framework of dispute settlement for disputes arising from space activities has to understand the scientific schedules and technological aspects and likewise scientists have to acquaint themselves with the rules and constraints of international space law. In particular, any dispute settlement mechanism must carry enough professional weight and credibility with all these disparate actors.

Issues to be tackled in the establishment of any dispute settlement mechanism include, *inter alia*

1. Access to and use of scientific data: Generally a Memorandum of Understanding (MoU) contains articles as to the access and use of scientific data. Access to data is in principle open to all scientists in the world subject to an initial period during which access is reserved for the Principal Investigators. Arrangements have always been left entirely in the hands of MoU drafters, there are no particular recommendations emanating from the scientific community that has been formulated. It is submitted that the proposed dispute settlement mechanism will need to find an acceptable framework for the coordinated and systematic protection of the access to and use of scientific data from these missions.

2. Environmental protection: Planetary protection in the form of protection against forward and backward protection will be important in the light of scientific mission that involve planetary probes, *in situ* analysis or sample

http://www.stp.isas.jaxa.jp/mercury/index-j.html, in Japanese, (Last accessed: 10 January 2006); and http://sci.esa.int/science-e/www/area/index.cfm?fareaid=30, (Last accessed: 10 January 2006); see also Anselmi, A. and Scoon, G.E.N., "BepiColombo, ESA's Mercury Cornerstone Mission", Planetary and Space Science, Volume 49, Issue 14-15, p. 1409-1420 (2001)

[77]LISA's mission is to detect and observe gravitational waves from massive black holes and galactic binaries. This mission consists of three spacecraft that act as an interferometer and is nominally slated for operation between 2014 and 2019. Danzmann K., et al, " LISA: Laser Interferometer Space Antenna for Gravitational Wave Measurements", Classical and Quantum Gravity, Volume 13, Number 11A, 1996, pp. A247-A250(1)

[78]Darwin will use a flotilla of three space telescopes to scan the nearby Universe, looking for signs of life on Earth-like planets. The launch of Darwin is planned for the 2015 timeframe. Léger, A., et al, "Could We Search for Primitive Life on Extrasolar Planets in the Near Future? The DARWIN Project", ICARUS 123, 249255 (1996)

return. It is submitted that any proposed dispute settlement mechanism must be capable of considering environmental protection issues both of the Earth and of outer space in general.[79]

3. Use of and liability resulting from damage caused by nuclear power sources: One example of public concern as to the use of nuclear power sources is the 1989 *Florida Coalition for Peace and Justice v. George Herbert Walker Bush*.[80] In this case, the Florida Coalition and the Christic Institute led the challenge against alleged potential environmental and health threats presented by nearly 22 kilograms of plutonium carried aboard the Jupiter-bound Galileo probe launched in 1989. Although the Coalition failed to prevent the launch of Galileo, it brought similar charges with regard to the Ulysses probe in its Amended Complaint, filed 29 January 1990.[81] The case is important because it indicates that any framework of dispute settlement relating to space disputes, as well as the space science community, should be prepared to address environmental concerns and ensure careful compliance with laws and regulations so that potential litigants will find nothing with which to take issue.[82]

Any dispute settlement mechanism should be instituted based on analyses of the guiding principles of international space law for perceived scientific projects and problems, as well as the requirements for solving such specific problems.[83] Any workable dispute settlement mechanism will need specialized scientific knowledge. The political, legal and social problems that will be created by space science and exploration require legal analysis from the dispute settlement mechanism to promote the benefit of all mankind.[84]

3.1.4 Commercialization of Outer Space

The easing of stringent government hegemony on space activities has led to national and multilateral commercial ventures in outer space. The entrepreneurial synergy and market insight of the private sector has inspired ingenuous enterprises and investment in space research and development. This in turn has

[79]Goh, G.M. and Kazeminejad, B., "Mars Through the Looking Glass: An Interdisciplinary Analysis of Forward and Backward Contamination", (2004) 20(3) Space Policy 217

[80]No. 89-2682 (filed 28 September 1989)

[81]Trinder, R.B., "Recent Developments in Litigation", (1991) 5(1) Journal of Law and Technology 47

[82]Galloway, E., "The Legal and Regulatory Framework for Solar Power Satellites", in Glaser, P. (ed.), *Solar Power Satellites* (1992) 145

[83]Galloway, E., "The Definition of Space Law", (1989) 32 Proc. Coll. Law of Outer Space 373

[84]Galloway, E., "The Community of Law and Science", in U.S. Congress, Senate, Special Committee on Space and Astronautics, Space Law: A Symposium, Committee Print, 85th Congress, 2nd Session, Washington, Government Printing Office, (31 December 1958) 415

given new momentum to the growth of space applications and commercial competitiveness. The establishment of partnerships across the spectrum of public and private sectors will best utilize the resources of both sectors. However, this again propounds the elementary question as to whether the procedural framework international space law is adequate to deal with private space activities. The issue is whether the procedural framework of international space law can balance valid private interests with its substantive principles of maintaining the use and exploration of outer space for benefit of all Humanity.[85]

International space law developed as a branch of public international law addressed primarily to States. As with so many other fields of law, the overwhelming commercialization of the space sector raises a few complex issues. The normative system of international space law and any dispute settlement system are generally held subject to the general principles of international law under Article III of the 1967 Outer Space Treaty.[86] The invocation of the UN Charter and the maintenance of international peace and security seemingly fails to make specific provision for private space activities that are subject to authorization and continuing supervision by a State.[87] These private and commercial space activities should conform to the same rights and obligations that public space activities are obliged to comply with under international law. This is so even if private enterprise is not directly bound by those rights and obligations.[88] Accordingly, the duty of authorization and continuous supervision to realize this depends on States.

Space technology has progressively developed into an imperative global economic concern. Space assets are an inherent element of modern economies. This is especially given the large amounts of investments and returns involved. The global space and satellite market surpassed USD$103 billion in Financial Year 2004, and is expected to exceed USD$158 billion in 2010.[89] Government backing for space activities is rising, commercial orders for satellites and launch services have recovered, and new entrepreneurial efforts related to radio, broadband and space tourism have led to a rebound of the international space industry. More than USD$18 billion is spent annually on the development of space systems.

In the United States alone, defense spending on space has grown from about USD$15 billion in 2000 to more than USD$22 billion in 2005. It is expected to reach USD$28 billion by 2010. The satellite industry itself grosses more than

[85] von der Dunk, F.G., "Sovereignty Versus Space - Public Law and Private Launch in the Asian Context", (2001) Singapore Journal of International & Comparative Law 22 - 47

[86] Article III, Outer Space Treaty, see *supra* note 1

[87] Article VI, Outer Space Treaty, see *supra* note 1

[88] Meredith, P.L. and Robinson, G.S., *Space Law: A Case Study for the Practitioner*, (1992) 58 and 67

[89] International Space Business Council, "2005 State of the Space Industry", (July 2005)

USD$90 billion annually.[90] In 2000, space technology industries generated US$125 billion in profits. By 2010, the cumulative US investment in space is expected to reach US$600 billion. This is approximately equal to the total US investment in Europe in 2001.[91]

The commercial launch service market between 1987 and 1996 amounted to 36 satellite launches on average each year. With a projected 1,697 satellites to be launched during the 1998 - 2007 period, the commercial launch vehicle industry is forecast to expand at more than 10% annually.[92] The nature of the demand is also changing. The geostationary orbit satellites are growing in mass, the time between their purchase and launch is reduced, and the launch of satellite constellations has become a flourishing commercial trend. The total market value for launch services over the 1997 - 2006 decade is valued at USD$33.4 billion, of which USD$21 billion will be used for launching geostationary orbit satellites. Nearly 70% of this total market value will be generated by commercial operators, the remainder coming from governmental agencies. In 1996, global commercial utilization, development, manufacture and operation of space hardware and infrastructure elements represented 53% of the space industry. For the first time, commercial revenues exceeded governmental expenditure.[93] This figure is projected to increase by another 10 - 15% between 1996 and 2006.

Further, it can be expected that with increasing commercialization, the number of States with space-faring capabilities will increase. The demands for commercial utilization of space technology and its applications and the national budgets of many States for space applications will likewise escalate. States are beginning to realize that national commercial participation in space activities and applications is necessary to secure strong economic growth. This has led to two trends. First, governmental authorities have started to operate their space programs on a commercial basis. They have started to provide market-oriented commercial services such as launch services and satellite communications. Governmental agencies are starting to operate as if they were commercial entities. Secondly, space applications involving less governmental responsibility have gradually been opened up to private actors. Examples of this are the commercialization of telecommunications, remote sensing, and ground-based satellite operation systems. This hybrid situation will continue to exist with governments playing a major role with the private sector in a supplementary one.[94]

[90] Satellite Industry Association, "2005 Annual Statistics Report", (2005)

[91] Krepon, M., "Lost in Space: The Misguided Drive Toward Antisatellite Weapons", (May / June 2001) *Foreign Affairs* Vol. 80 No. 3 at 7

[92] *ibidem*

[93] Huang, H., "Space Law and the Expanding Role of Private Enterprise, with Particular Attention for Launching Activities: Commentary", (2001) 5 Singapore Journal of International & Comparative Law 55 - 62

[94] Haller, L.L. and Sakazaki, M.S., "Commercial Space and United States National Secu-

Clearly, economic interests in outer space are essential in the present global economy. Any dispute resolution mechanism must consider issues arising such as international trade law, international economic law, as well as transnational concerns of domestic law and business practices. This issue is compounded in the light of the public obligations of all space organizations and business to use space for the common benefit of all Humanity. Issues of concern to any dispute settlement mechanism dealing with space activities include, *inter alia*

1. Market-savvy regulation of private space activities in balance with general public principles of international space law;

2. Issues of State responsibility and State liability for essentially private commercial space activities;

3. Fragmentation of the international space law framework due to possibly divergent regional and national systems of laws relating to space activities; and

4. *Locus standi* for private entities.

The international regulation of space activities run the gamut from international commercial launch services, the liability aspects of such services, intellectual property rights, insurance, product liability insurance, labor laws, international trade laws, environmental laws and torts. Aside from these varied branches of law, any dispute settlement mechanism must also have the capacity to balance this with the general legal principle that the use and exploration of outer space should be carried out for the benefit of all mankind. One of the central rationales of space commercialization should be to help developing countries to enlarge the base of their existing space applications. Private sector industries and researchers in the developed world should be looking for counterparts in the developing world.[95] The commercialization of space activities by non-State entities has transformed the character of international space law from a branch of public international law into a hybridized law combining diverse other legal regulations.[96] The dispute settlement mechanism must be able to effectively deal with this new hybridized form of the law.

International responsibility of a State in international space law is completely different from international contractual liability. The former is related to breaches of treaties obligations in general international law. The latter is concerned with civil liability arising from the breach of commercial contracts.

rity", (2000), Commission to Assess United States National Security Space Management and Organization, at 13

[95]Mehmud, S., Statement, in UN Office of Outer Space Affairs, The Age of Space Commercialization: Proceedings of a Preparatory UNISPACE-III Seminar held 29 January - 1 February 1998 in Alpbach, Austria, (UN, New York, 1999), 5 at 8

[96]Wassenbergh, H.A., *Principles of Outer Space Law in Hindsight*, (1991) at 22

State responsibility for outer space activities is regulated by general international law including treaty law and customary law. The consequences of State responsibility in cases of damage arising is reparation in the form of payment of compensation or restitution and any other form of satisfaction.[97] State responsibility in this narrow sense never involves contractual liability in commercial transactions. International contractual liability derived from the commercial operation of outer space by state agencies, international organizations and private enterprises come under the purview of private law.[98] However, commercialization of outer space activities cannot be conceived outside the framework of the *lex specialis spatial*. This is presided over by principles such as the Common Heritage of Mankind, equitable access to benefits, international cooperation and good faith. While Article VI of the Outer Space Treaty has been considered one of the strongest recognition of the commercial utilization of space within the general framework of international space law, when read with the other provisions of the Outer Space Treaty there is no doubt that such commercialization was conceived with utmost regard to these founding principles of space law.[99] Activities in outer space have been regulated not only by public international law, but also by domestic laws.[100] However, the main framework of international space law is still within the domain of public international law. Further, domestic legislation of States relating to space law must conform to the international obligations laid down in public international law. As such, it is important to focus on the role of various actors engaged in outer space activities under the perspective of space law as a special branch of public international law.[101] The dispute settlement mechanism would have to deal with the novel and difficult area of State responsibility and State liability in this context.

Another factor that would impact the working of any dispute settlement mechanism for space activities is the complete dearth of substantive provisions specifically dealing with private space activities. This means that a large margin of discretion remains for individual States to legislate on the national level.

[97]Brownlie, I., *Principles of Public International Law*, (5th ed., 1998) at 460

[98]The situation is further complicated by international non-contractual, third-party liability. This is provided for in the Liability Convention, see *supra* note 117. It is beyond the scope of this thesis to elucidate on the finer points of the various different branches of liability. An excellent overview of this topic may be found *inter alia* in Hurwitz, B., *State Liability for Outer Space Activities in Accordance with the 1972 Convention on International Liability for Damage Caused by Space Objects*, (1992)

[99]Cheng, B., "The Commercial Development of Space: The Need for New Treaties", (1991) 19(1) JSL 17

[100]see generally Benkö, M. and Schrogl, K.-U., *International Space Law in the Making*, (1994); Diederiks-Verschoor, I.H.Ph., *An Introduction to Space Law*, (2nd ed., 1997); Williams, S.M., *Derecho international contemporäneo: La utilizaciön del espacio ultraterrestre, (1990)*

[101]Malanczuk, P., "Space Law as a Branch of International Law", (1994) 25 Netherlands Yearbook of International Law 143

Such patchwork in domestic legislation may lead to a fragmentation of the framework of international space law, as well as cause uncertainty in the law. Such uncertainty is not conducive for commercial enterprise.[102]

This leads to the thorny issue of *locus standi* for private entities in space law. The basic framework of the space legal system was built on the basis of rights and obligations of States. Sovereign states and inter-governmental organizations have been the exclusive subjects of international space law. Individuals and private enterprises remain under the jurisdiction of their respective governments and national laws. They have no independent legal status in international space law, and their rights and interests are represented by their government at the international level. With burgeoning commercialization of space activities however, private enterprises have also become entities with rights and obligations under international law. This is so even if they have not been formally recognized as such.[103] The dispute settlement mechanism must be able to resolve this issue of standing for traditional non-recognized entities.

Space operations are unique in that they require enormous investment in very high-risk ventures. Thus, economic considerations are intrinsically critical in every commercialization process of space activities.[104] Therefore, national and regional space policies are heavily influenced by commercial considerations.[105] Whereas in the past national security and military motivations have stimulated national space policies and programs, the present and future development of the space sector will depend heavily on the potential of any return on investment.[106] As such, any dispute settlement mechanism for space activities has to be able to operate in this hybrid public-commercial environment so as to promote the further use and exploration of outer space.

3.1.5 Proliferation of Actors

Space law is no longer the sole prerogative of States. The proliferation of actors in space activities means that any dispute settlement mechanism has to provide

[102]Mosteshar, S., "International Liability for Damage: Proposed Solutions for the Era of Commercial Space Activity", in Benkö, M. and Kröll, W., (eds.), *Luft- und Weltraumrecht im 21. Jahrhundert / Air and Space Law in the 21st Century* (1998) 396

[103]see generally Cheng, C.-J. (ed.), *The Use of Air and Outer Space - Cooperation and Competition*, (1998)

[104]van Traa-Engelman, H.L., *Commercial Utilization of Outer Space: Law and Practice*, (2nd ed., 1993) at 17

[105]see generally Finch jr., E.R. and Moore, A.L., *Astrobusiness: A Guide to the Commerce and Law of Outer Space*, (1985), Rofrer K.A. and Smith, M., *Space Commercialization in China and Japan*, CRS Report for Congress 89-367 SPR, Congressional Research Service (9 June 1989)

[106]For example, in 1984 the U.S. NASAct of 1958 was amended with a provision that 'the general welfare of the United States requires that (NASA) seek and encourage to the maximum extent possible the fullest commercial use of space' (Paragraph 102(c): Adopted 16 July 1984 as part of P.L. 98-361)

for standing for these entities, as well as adapt existing dispute settlement methodologies to better deal with such a varied diversity of interested parties. Complementarity amongst these actors must be sought and the roles and remits of all players clearly identified.

The issue of different actors in international space law did not much concern the development of the law in the 1960s.[107] At the time, the focal point was on the role of States. The establishment of international organizations active in outer space and the commercialization of space activities,[108] among other factors, have irrevocably altered the situation.

The international legal system is still first and foremost State-oriented. However, it is questionable whether this paradigm still credibly reflects the status of international society today. International space law is not immune from the discussion of the proliferation of actors in international law.[109] The idea of the sovereign State appears to be in decline.[110] In international space law, the challenge arises primarily from the telecommunications revolution, the globalization and transnationality of cooperation in outer space.[111] Certainly, the modern State system that emerged from the 1648 Peace of Westphalia[112] has been increasingly confronted with competition from non-State actors on the international level.[113] There are now more than five hundred intergovernmental organizations engaged in a broad variety of public international functions. Further, there are also numerous non-governmental organizations active on the international plane.[114] Additionally, there are another 45,000 multinational

[107]Lachs, M., "The International Law of Outer Space", (1964) Receuil de Cours 113

[108]See generally van Traa-Engelman, H.L., *Commercial Utilization of Outer Space: Law and Practice*, see *supra* note 104; see also Hobe, S., *Die rechtlichen Rahmenbegingungen der wirtschaftlichen Nutzung des Weltraums*, (1995)

[109]Barberis, J.A., *Los sujetos des derecho internacional actual*, (1984); see also Menon, P.K., "The Subjects of Modern International Law", (1990) 3 Hague Yearbook of International Law 30. In the context of international space law, see Malanczuk, P., "Actors: States, International Organisations, Private Entities", in Lafferranderie, G. and Crowther, D. (eds.), *Outlook on Space Law over the Next 30 Years*, see *supra* note 55, 23

[110]see generally Dunn, J. (ed.), *Contemporary Crisis of the Nation-State?*, (1995); Schreuer, O., "The Waning of the Sovereign State: Towards a New Paradigm for International Law?", (1993) 4 EJIL 447

[111]see generally Schwab, K. (ed.), *Overcoming Indifference: Ten Key Challenges in Today's Changing World*, (1995)

[112]see de Zayas, A.-M., "1648 Peace of Westphalia", (1984) 7 Encyclopaedia of International Law 536

[113]see Report on the Conference on Changing Notions of Sovereignty and the Role of Private Actors in International Law, (1993) 9 American University Journal of International Law 1; see generally Sands, P., and Klein, P. (eds.), *Bowett's Law of International Institutions*, (5th ed., 2001); Seidl-Hohenveldern, I. and Loibl, G., *Das Recht der Internationalen Organisationen einschliesslich der supranationalen Gemeinschaften*, (5th ed., 1992)

[114]see Willetts, P. (ed.), *The Conscience of the World: the Influence of Non-Governmental Organizations in the UN System*, (1996); also Beigbeder, Y., *Le rôle international des organizations non gouvernementales*, (1992)

corporations operating within the global network.[115] Even the individual has come to the forefront on the international plane and is now considered an actor in its own right.[116]

Even more than in general international law, States are still the predominant actors in international space law. This is a clear consequence of the fact that States create space law in the form of treaty law and customary international law. It is also States that create the international organizations active in outer space. Under Article VI of the Outer Space Treaty, it is also States that are to authorize and continually supervise the activities of non-State entities involved in outer space under their jurisdiction. Article XIII of the Outer Space Treaty clearly makes activities of intergovernmental organizations subject to the provisions of the Treaty, and obliges Member States to regulate the activities of the intergovernmental organizations to which they may belong. All of the four subsequent treaties on outer space however, go a step further and allow for the possibility of accession by international organizations.[117] This opens the way for improving the legal position of international organizations under treaties in international space law.

Any future regime in space must take into account certain features of space as an issue area. First, creation of regimes for space activity has been conditioned from the start by the highly unequal distribution of overall and issue-specific power in the international system. Long dominated by the Soviet-American duopoly, today more than 30 countries possess significant space industries, including eight actors that provide launch services.[118] A larger group of nations, along with four intergovernmental organizations, possess significant space capabilities in narrow areas. They are however, generally dependent on other nations to achieve the benefits of outer space. Many in this group routinely build and operate objects launched for them by one of the launching States.[119] It is submitted that although these form but a small minority in a world of over 190 states, the spacefaring States' status as "specially affected States" has given them extra weight in the bargaining process.

[115]see Muchlinski, P.T., *Multinational Enterprises and the Law*, (1995)

[116]Mullerson, R.A., "Human Rights and the Individual as a Subject of International Law", (1990) 1 EJIL 33

[117]see for example Article XXII, Convention on Liability for Damage Caused by Objects Launched into Outer Space (1972), adopted on 29 November 1971, opened for signature on 29 March 1972, entered into force on 1 September 1972. (1971) 961 UNTS 187, 24 UST 2389, TIAS 7762, [hereinafter "Liability Convention"]

[118]The group that provides launch services includes Russia, the United States, collectively the member States of the European Space Agency (ESA), France (separately and individually apart from its involvement with ESA), China, India, Japan and Israel.

[119]This group that has its own technical capability and facilities includes Argentina, Australia, Brazil, Canada, Germany, Indonesia, South Africa, and the United Kingdom (apart from its involvement with ESA, the United Kingdom has no separate launch technical capability of its own). The intergovernmental organizations are INTELSAT, INMARSAT, COMSAT and ARABSAT.

Second, the dispute settlement mechanism for space activities must consider the interplay of North-South dynamics. After the initial motivation to avoid political-military conflicts in outer space had waned, the economic benefits of space activities brought this issue to the forefront again. The Group of 77 non-aligned States have contributed very much to the development of international space law, and are a force to be reckoned with.[120] This group of States are also increasingly making significant contributions to space activities. However, many States within this group are still considered non-space-faring States. While holding the majority in the UN General Assembly, these States are threatened by the dominance of the space-faring States. Disagreements may foreseeably arise over such fears and different viewpoints. Thus, while the cost of access to outer space has lessened considerably in recent years with the introduction of lower-cost space assets such as nano-satellites, this geopolitical concern is still a crucial point of concern.

Further, due to the lowered cost of access to outer space, many players in the space arena do not come on equal bargaining positions. Various actors, such as space-faring States, less developed States, educational institutions, international organizations, small and medium enterprises, and individuals are involved in space activities. The dispute resolution mechanism must consider these international and transnational issues, as well as the interdisciplinary nature of disputes arising, in settling any potential claims from these parties.

The commercialization of outer space has also led to the introduction of private entities to the sphere of international space law. Private entities however remain under the jurisdiction and control of their own State. Their State also remains internationally responsible for them under the Liability Convention. As such, domestic law will also be applicable.[121] The basis of their legal relations is consensual and determined by acceptance of the rules by their Governments and themselves.[122]

In addition to states, a large number of private firms operate in space or provide space services to governments. Just as the interests of industry have been one of the major factors conditioning the development of ocean law, so the interests of industry will strongly influence policy in space.[123]

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[120]Franck, T., *Fairness in International Law and Institutions*, see *supra* note 54 at 400

[121]Diederiks-Verschoor, I.H.Ph. and Gormley, W.P., "The Future Legal Status of Non-governmental Entities: Private Individuals and Companies as Subjects and Beneficiaries of International Space Law", (1977) JSL 145

[122]For an example of literature concerning such entities in the international legal order, see generally Jessup, P., *A Modern Law of Nations* (1986) at 17; Seyersted, F., "Applicable Law in Relations between Intergovernmental Organizations and Private Parties", (1967) Recueil des Cours 541

[123]de Saint-Lager, O., "L'organisation des activités spatiales francaises: une combinaison dynamique du secteur public et du secteur privé", (1981) AASL 475; see also Williams, S.M., "International Law and the Exploitation of Outer Space: A New Market for Private Enterprise?", (1983) International Relations 2482

With regard to this delicate problem concerning the legal status of natural and juridical persons under international space law, it is necessary to re-examine the existing mechanisms for dispute settlement involving space activities as a whole. The development of new, effective mechanisms might be an alternative way to fill the vacuum of the existing system in international law in general, and in international space law in particular. Arbitration Procedures in Section V of the 1998 Taipei Final Draft of the Revised Convention may provide one illustration of how to use the arbitration procedure in dealing with non-State disputes regarding the commercial operation of outer space. It is submitted however, that the procedures of arbitration may not be entirely suited to each and every dispute that may possibly arise.[124] What is clear however, is that whichever dispute settlement mechanism is chosen, it cannot ignore the proliferation of actors on the international space law scene.

3.2 The Urgent Need for a Sectorialized Dispute Settlement Mechanism

Conflicting attitudes in international space law in the early phases of space activities were by and large only abstract value-laden debates. They had little impact on any practical interests or tangible application of such legal rules on space activities. As the potential benefits of space activities become increasingly apparent however, such debates have left the realm of academia. Disputes on various aspects of international space law can no longer be left unsettled. Such a situation would enable actors to persist in their own standpoints and courses of action. It is clear that a contradictory theoretical opinion of international space law will lead to an irreconcilable practice in outer space. To deal efficaciously and practically with this embryonic situation, space law faces an urgent demand for a sector-specific dispute settlement mechanism.[125]

It has been shown that international law constitutes the foundation for the understanding of the conduct of international relations, including those in outer space. However, recourse to legal processes for international dispute settlement has always been optional and consent-based. International law is generally selected as the framework within which to settle international and transnational disputes only when it appears advantageous to do so.[126] This is the fundamental rationale for the urgent need to develop a workable dispute settlement framework for international space law. The lack of this mechanism will lead to disputing parties looking to extra-legal measures to settle their

[124]The reasons for this submission will be dealt with in detail later in this thesis. See generally Chapter 5, *infra*.

[125]See generally Böckstiegel, K.-H., (ed.), *Settlement of Space Law Disputes: The Present State of the Law and Perspectives of Further Development*, (1980)

[126]Collier, J. and Lowe, V., *The Settlement of Disputes in International Law: Institutes and Procedures*, (1999) at 3

conflicts. From a legal perspective, this result is particularly objectionable. First, the basic principles of international space law, such as the peaceful uses of outer space, may be disregarded if disputants turn to other extra-legal methods of dispute settlement. Secondly, and perhaps practically more urgent, this may lead to the use of force in outer space as a means of resolving conflicts.

Two other factors lend more weight to the call for the development of a sectorialized dispute settlement mechanism for space disputes. The first is that there is at present no international tribunal that has compulsory or universal jurisdiction. The second is that raising the subject of an international dispute at an organization such as the United Nations is purely discretionary.

The consensual nature of submission to formal legal processes underscores the optional nature of recourse to law. This has been the traditional approach to international dispute settlement. The requirement for consent to any particular procedure is an axiomatic principle. One means by which the international community has circumvented this requirement is through the increasing trend of the acceptance of a particular dispute settlement procedure as a precondition to membership of a particular community. An example is that of the European Community, membership of which also demands an obligation to have disputes adjudicated by the European Court of Justice. There is a clear repositioning of dispute settlement mechanisms. Where once they were generally optional supplements to substantive instruments, they are being repositioned as obligatory elements of specific international regimes. While this trend is still nascent, this shift in perspective and structure is clear.[127] The international community has yet to conclude any specific international conventions to regulate the settlement of space law disputes. It is submitted however that this is only a matter of time, together with the speed with which the evolution of thought in this regard can give rise to a workable dispute settlement framework for the unique environment of space activities.

The issue of jurisdiction of this mechanism is another intervening factor. With increasing commercialization of outer space activities, the parties potentially involved have proliferated beyond the traditional State exclusivity. Accessibility to the dispute settlement mechanism must be open to States, private enterprises, intergovernmental organizations, non-governmental organizations and individuals. It is foreseeable that disputes arising from space activities are likely to involve various permutations of this set of actors. Any proposed dispute settlement mechanism will be tasked with protecting the rights of actors in outer space and settling responsibility and liability of these actors under both public international space law and private international space law.[128]

[127]See generally Brus, M.T.A., *Third Party Dispute Settlement in an Interdependent World* (1995)

[128]Böckstiegel, K.-H., "Development of a System of Dispute Settlement Regarding Space Activities", (1992) 35 Proc. Coll. Law of Outer Space 27; Böckstiegel, K.-H., "The Settlement of Disputes Regarding Space Activities after 30 Years of the Outer Space Treaty" in

Notionally, dispute settlement for outer space activities is an ingredient of the traditional system of judicial and extra-judicial settlement of international disputes in public international law. As discussed in the preceding Chapter, negotiation, good offices, enquiry, mediation, conciliation, arbitration and judicial settlement are institutionalized forms of dispute settlement historically instituted by the international legal order. Any inter-State dispute relating to space activities may be covered by one of these mechanisms. Nonetheless, the increasing frequency of non-State actors in space activities, for example in the sector of satellite communications, launch services and remote sensing, has created an additional catch-22. These activities were not outfitted with effective dispute settlement mechanisms and still rely on diplomatic methods to solve any disputes.

As such, there is a clear and present need for a sectorialized dispute settlement mechanism.[129] It is essential to develop a new dispute settlement machinery that can handle scientific and technologically highly controversial cases between the various actors in the space industry.

States, as well as the international organizations that they form, are subjects of international law. Thus, they are obliged to settle their disputes in a peaceful manner as required by Article 2(3) of the UN Charter. The classical list in Article 33(1) of the UN Charter is possibly sufficient to settle disputes between sovereign States and inter-governmental organizations. However, they are unsuitable to manage commercial contract disputes in outer space activities between two contracting parties. The incompetence of the classical dispute settlement mechanisms is due to the specificity of the laws applicable to commercial activities when they are applied to space activities.[130]

The subject of devising a blueprint for effective dispute settlement mechanisms for increasingly commercialized space activities has been at the forefront of recent academic and practical discussion.[131] While it is acknowledged that arbitration has for a long time been the preferred method of dispute settlement in space law instruments, this has been restricted to bilateral and multilateral agreements outside the UN framework. In these cases, recourse to arbitration

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Lafferenderie, G. and Crowther, D., (eds.), *Outlook on Space Law over the Next 30 Years*, see *supra* note 55 237; Bourély, M.G., "Creating an International Space and Aviation Arbitration Court", (1993) 36 Proc. Coll. Law of Outer Space 144; Almond, H.H., "Disputes, Disagreements and Misunderstandings - Alternative Procedures for Settlement - Claims Process in Outer Space", (1993) 36 Proc. Coll. Law of Outer Space 125

[129] Havel, B.F., "International Instruments in Air, Space and Telecommunications Law: The Need for a Mandatory Supranational Dispute Settlement Mechanism", in *Arbitration in Air, Space and Telecommunications Law: Enforcing Regulatory Measures*, (2002) Permanent Court of Arbitration / Peace Palace Papers 11

[130] Böckstiegel, K.-H., "Neue weltraumrechtlichen Arbeiten der International Law Association (ILA)", (1998) ZLW 331

[131] Bostwick, P.D., "Going Private with the Judicial System: Making Creative Use of ADR Procedures to Resolve Commercial Space Disputes", (1995) 23 JSL 19 at 33

has remained either discretionary or as a means after all other forms of diplomatic efforts fail. Further, the major space law treaties still lack machinery for binding dispute settlement. There is consequently an urgent need for new efforts in developing a dispute settlement system for space activities.[132]

This thesis submits that there is an urgent need for a sectorialized dispute settlement mechanism that is permanent and compulsory. This section sets forth the case for such a dispute settlement mechanism, focusing on the following submissions:

1. There is an empirical need for a mechanism that is compulsory and permanent.

2. Such a dispute settlement mechanism is a vital step in the adaptation of international space law to the evolving matrix of present and future outer space activities.

3. The establishment of such a mechanism would allow the recognition of both private and public interests, which are crucial to the continued exploration and use of outer space.

4. There is an urgent need for a sectorialized dispute settlement mechanism to enforce the rule of law in outer space.

3.2.1 The Case for a Compulsory Permanent Mechanism

In particular, this thesis argues that all space disputes with an international or transnational character should be subject to mandatory settlement mechanisms before a permanent dispute settlement body. Stakeholders other than States and international organizations should be afforded full participation in international dispute settlement mechanisms.

While a general obligation to submit to *ad hoc* arbitration does provide some compulsion,[133] this thesis contemplates a much deeper level. It is submitted that it is necessary for a a neutral sectoralized supranational forum with mandatory jurisdiction in the context of international space law.[134] Otherwise, the lack of a convincingly impartial forum with compulsory jurisdiction in an international transaction makes the consequences of a dispute much more acerbic.[135]

[132]Böckstiegel, K.-H., "Arbitration of Disputes Regarding Space Activities", (1993) 36 Proc. Coll. Law of Outer Space 136 at 139

[133]See generally *supra* Chapter 1

[134]Havel, B.F., "International Instruments in Air, Space and Telecommunications Law: The Need for a Mandatory Supranational Dispute Settlement Mechanism", in International Bureau of the Permanent Court of Arbitration (ed.), *Arbitration in Air, Space and Telecommunications Law: Enforcing Regulatory Measures*, see *supra* note 129 11

[135]Park, W.W., "Symposium: International Commercial Arbitration, Illusion and Reality in International Forum Selection", (1995) 30 Texas ILJ 135 at 137

The reasons for a compulsory and permanent institution are four-fold:

1. A compulsory, permanent institution will ensure the certainty that disputes will be settled and the rule of law enforced within a flexible framework.

2. Given the high risks and unequal bargaining positions in space activities, disputing parties should not be allowed to opt out of peacefully settling their disputes.

3. A compulsory, permanent institution ensures the certainty of the law and prevents against the fragmentation of international space law.

4. A compulsory, permanent institution will be allowed to build up its legitimacy and jurisprudence, which is essential for confidence building.

These four reasons will be dealt with consecutively.

A compulsory, permanent institution will allows for two certainties: that disputes are not left unresolved, and that space activities take place within a flexible yet legal framework. The permanence of dispute settlement institutions is a departure from the usual *ad hoc* approach taken by most space agreements. It is important to understand the reasons that such *ad hoc* approaches have become the dominant methodology to dispute settlement in space transnational and international instruments. International disputes have a polemic entirely missing in domestic disputes: there is an inherent complexity and distrust between parties as well as the dispute settlement body. These issues are augmented given the extraordinary details of international space law and the intricacies of space activities. It is submitted however that a permanent tribunal without the formality of strictly adjudicatory structures can still these anxieties by granting parties a certain amount of control over the dispute and its settlement process. This institution should be able to resolve the opposing aspirations of flexibility and certainty.[136] It is submitted that a compulsory mechanism will allow for certainty, and that its procedure should be adapted to allow for some flexibility. One example to follow would be that of the permanent arbitral process. In the arbitral procedure, parties have the choice of the arbitration venue, the size and composition of the arbitral panel, procedural rules and the substantive applicable law. In particular, this applicable law could be a coalescence of both *lex specialis* and general principles of international law.[137] In the interests of promoting certainty, a permanent compulsory tribunal could provide a series of published, reasoned awards. Examples of this include those contained in the Rules of the London Court of International

[136] Böckstiegel, K.-H., "Arbitration of Disputes Regarding Space Activities", (1994) 36 Proc. Coll. Law of Outer Space 137

[137] David, R., *Arbitration in International Trade*, (1985) 3

Arbitration and the International Chamber of Commerce. This would serve to improve confidence in the rigor and consistency of the dispute settlement procedure.[138] A compulsory, permanent and yet flexible dispute settlement mechanism will be able to handle the dual requirements of flexibility and certainty.[139]

Activities in outer space comprise two factors: firstly, these are high risk, high stakes activities; secondly, there is a general inequality of bargaining positions involved. Due to these two considerations, it is submitted that disputing parties should not be given an opt-out from peaceful settlement of their disputes. A compulsory, permanent dispute settlement mechanism will ensure this. In activities which involve high investment and risks, and which involve high stakes, a prolongation of any dispute is always deleterious. Certainty is necessary for such activities to prosper, in particular with so much risk already involved, parties prefer to minimize other external possibilities of hazards. A compulsory dispute settlement mechanism can work to reduce any further risk resulting from unresolved disputes. Further, space activities involve different actors of varying sizes and bargaining power. A compulsory dispute settlement mechanism is necessary to ensure that disputes are settled justly and fairly in accordance with the law. The situation in which disputes are settled by strong-arming should not become the norm in space activities. Additionally, with the multilateral derivation of space activities, this permanent, compulsory mechanism would have a valuable hermeneutical and expository result. This is not possible with *ad hoc* dispute settlement. Another consideration is that when parties such as States take unilateral perspectives and actions, the compromises behind a complicated multilateral treaty can unravel. States may invoke "national security" or "public policy" exceptions to circumvent treaty or contract obligations. A compulsory, permanent dispute settlement mechanism has the added advantage of being able to actualize to the spirit and letter of these agreements, while adapting the practicable obligations to the changed circumstances. Indeed, this dispute settlement mechanism can do all this within a normatively consistent and coherent framework.[140]

With the recent proliferation of international courts and tribunals, there is a very real fear that the concurrent jurisdictions of these tribunals will lead to the fragmentation of the law. It is submitted that a compulsory, permanent dispute settlement mechanism for space activities ensures the certainty of the

[138] Article 16.1, Rules of the London Court of International Arbitration (1985); Article 20(1), International Chamber of Commerce Rules of Arbitration (1988), ICC Publ. No. 447 (1988)

[139] Havel, B.F., "International Instruments in Air, Space and Telecommunications Law: The Need for a Mandatory Supranational Dispute Settlement Mechanism", in International Bureau of the Permanent Court of Arbitration (ed.), *Arbitration in Air, Space and Telecommunications Law: Enforcing Regulatory Measures*, see *supra* note 129 at 36

[140] Noyes, J.E., "The Functions of Compromissory Clauses in US Treaties", (1994) 34 Virginia JIL 821 at 864

law, and prevents the fragmentation of international space law. A compulsory, permanent mechanism has the opportunity to generate a sustainable *corpus* of awards, case law, and norm-creation. It is able to provide a compass of precedent, and allows the evolution of a body of law that adequately reflects the condition of space exploration and industry as the most intricate domain of human endeavor. International space law encompasses an intricate gossamer of public international law, private international law, and domestic legislation.[141] *Ad hoc* dispute settlement is insufficient for such a sophisticated system of law. A permanent, compulsory dispute settlement institution maximizes certainty and also allows the development of a pattern of normative coherence.

One of the biggest issues in international space law is confidence building. In a realm of activity that is at once so novel and so full of potential, it is unsurprising that mutual distrust accompanies much of the interaction between actors in the field. A compulsory, permanent institution allows for confidence building. It has the opportunity to strengthen perceptions of its legitimacy, and cultivate its jurisprudence in a manner that increases parties' confidence in the international legal system relating to space activities. Rules evolved within this framework then, would contribute to rule coherency and legitimacy. Rules advanced on an *ad hoc* basis serve only to increase distrust in the system. As such, a permanent, compulsory dispute settlement mechanism is necessary to ensure legitimacy and confidence in the international legal system.[142]

It is realistic and jurisprudentially appropriate to project for the establishment of a sectorialized dispute settlement mechanism for disputes arising from space activities.[143] There is a global trend moving in the direction of the establishment of sector-specific dispute settlement mechanisms in various areas of the law. In 1998 for example, the international community established a new international criminal court.[144] Further, although one of the central precepts of international dispute settlement has been consent, this requirement has been chipped away at by the various international instruments in which parties are obliged to submit to a specific compulsory and permanent mechanism of dispute settlement. The convincing and recursive preference for a compulsory,

[141] For a comparative look at international air law from this perspective, see generally Cheng, B., *The Law of International Air Transport* (1962); Cheng, C.-J., (ed.), *The Use of Airspace and Outer Space for all Mankind in the 21st Century*, see *supra* note 103

[142] Franck, T.M., "Legitimacy of the International System", (1988) 82 AJIL 705 at 752

[143] For support as to sector-specific international dispute settlement in other comparable areas of the law, see generally Jackson, J.H., *The World Trading System: Law and Policy of International Economic Relations*, 2nd ed., (1997) 112 - 127 (economic policy); Franck, T.M., *Fairness in International Law and Institutions*, see *supra* note 54 at 5 (general public international law); Eaton, P., "The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment", (1997) 15 Boston Univ. ILJ 261 (environmental law)

[144] Bassiouni, M.C. and Blakesley, C.L., "The Need for an International Criminal Court in the New International World Order", (1992) 25 Vandebilt Journal of Transnational Law 151

permanent dispute settlement mechanism signifies a macro change in actors' attitudes towards the loosening of the requirement of consent.

At present, there is no international or transnational instrument that provides for the compulsory submission of space disputes to a standing dispute settlement mechanism.[145] In mooting a permanent system of compulsory space dispute settlement, it is apparent that a flexible approach should be preferred to a rigid, hierarchical and formal system such as adjudication. It is indicative that there is no multilateral treaty providing for the recognition and enforcement of civil and commercial adjudicatory judgments.[146] In direct contrast, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[147] has widespread State support and provides a useful model for a recognition process for supranational arbitrations.[148] The Convention allows domestic enforcement of international commercial arbitration awards in contract and other transactional disputes. These considerations should be kept in mind in considering the structure of any compulsory, permanent dispute settlement mechanism for space disputes.

3.2.2 Adapting to the Evolving Landscape in Space Law

A sectorialized dispute settlement mechanism is a vital step in the adaptation of international space law to the evolving matrix of present and future outer space activities. It is submitted that a sector-specific dispute settlement mechanism is the only establishment that can reasonably handle disputes in a field such as space law and space activities.

The reasons for this are

1. A sectorialized dispute settlement mechanism is more adaptable and can better respond to changes in the field.

2. A sectorialized dispute settlement mechanism allows the further elaboration of space law as a separate and specialized field of international law.

3. A sectorialized dispute settlement mechanism enables the pre-emptive development of the law to deal with the rapidly evolving field of space activities.

[145] It might be instructive to note the recent revived effort to establish a multilateral enforcement treaty reflected in the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Adopted by the Special Commission of the Hague Conference on Private International Law, (October 30, 1999), available online at http://www.hcch.net/e/conventions/draft36e.html, (Last accessed: 10 January 2006)

[146] Lowenfeld, A.F., "Editorial Comment: Forum Shopping, Antisuit Injunctions, Negative Declarations and Related Tools of International Litigation", (1997) 91 AJIL 314 at 322

[147] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (June 10, 1958), 21 UST 2517, 330 UNTS 38, [hereinafter "New York Convention"]

[148] Articles 2(1) and 2(3), New York Convention, *ibidem*

4. A sectorialized dispute settlement mechanism can deal with the special requirements in space disputes, such as the highly technical issues and disparate parties involved.

Creating a specialized dispute settlement mechanism allows it to focus specifically on space law within the context of international law and international society. This enables it to be more adaptable to changes in the field, and respond in better time to such variations. This is especially important in a field such as space activities, where science and technology are rapidly advancing, and the economic and political potential is vast and undetermined.

Further, a sector-specific mechanism contributes to the development of space law as a discrete field of international law. Legal professionals sitting on it can be experts in the field, learning both from their scientific and their business counterparts. This is essential since space law is a relatively young field of international law, and needs to establish itself as a discrete entity that is nevertheless part of the whole. An analogy is the evolution of environmental law, which has advanced its own régime of rules, regulations and compliance obligations. Space law requires also its own set of recognizable rules, and a sectorialized dispute settlement mechanism is a step in the correct direction in this regard.

One of the greatest distinctions of international space law is its pre-emptive development of the law. Recognizing both the immense beneficial and deleterious potential of the use of outer space, space law has pioneered a new form of law-making - the pre-emptive strike. This focuses on early detection or abstract consideration of potential conflict areas and interests, and the *a priori* address of these issues. The creation of a legal framework to respond pre-emptively to the demanding scenario of space technology for the benefit of mankind has laid the basis for a new approach to international law.[149] The preventive force of such an approach to settle potential areas of disputes in advance must not be underestimated. A mechanism that is specialized in space disputes and space law can focus its energies on the continued *a priori* address of issues relating to outer space.

Practically, the most important feature of a sectorialized dispute settlement mechanism is its ability to deal with the special requirements of space disputes that other more generalized mechanisms cannot. For the practical applicability and acceptance of these more general mechanisms, political and technical compromises have to be made. This means that these mechanisms are generally unable to deal with the highly technical issues and the disparate parties that are always involved in space disputes. This difficulty would be solved

[149]see Jasentuliyana, N., "Conflict Resolution in Outer Space: New Approaches - Old Techniques", in *The Settlement of Disputes on the New Natural Resources*, (1983) Hague Academy of International Law Workshop, The Hague, November 1982, 229

by the establishment of a specialized dispute settlement mechanism for space activities.

Further, such a dispute settlement mechanism would be inevitable with any international or transnational body established to regulate any activities in outer space. The scenario that developed with the Law of the Sea framework and its dispute settlement procedures,[150] together with the regulatory power of the International Sea-Bed Authority, is particularly instructive. A similar situation may occur in space law in relation to the exploitation of natural resources in outer space and on the moon. The provisions of the Moon Agreement envisaged the establishment of an international regime to govern the exploitation of the natural resources of the moon when exploitation becomes feasible.[151] It is reasonably conceivable that specific dispute settlement mechanisms will be necessary within such a framework. While there are few ratifications of the Moon Agreement,[152] this argument also applies to other future international institutions that might be set up to regulate other areas of space activities. When actors establish an international institution whose competence and power might significantly affect their rights and interests, they will doubtless also subject such an organization to effective judicial review.[153] The reasons for a specialized dispute settlement mechanism, rather than submission to a general dispute settlement procedure at international law, applies *a fortiori* for such an organization. The creation of a sectorialized dispute settlement mechanism would not only be a given result but a condition *sine qua non*.

3.2.3 Recognition of Public and Private Interests

Law in the domain of space activities in increasingly put in a paradoxical position. On the one hand, international space law is founded in the principles of public international law. On the other, to remain relevant in today's space industry, it must consider the interests of private entities, which takes it into the realm of private international law. This tension between public and private international law is fast becoming evident also in other areas of the law.[154] With regard to space activities however, the balance is more easily upset. Outer space is designated as the province of all mankind. International cooperation,

[150] see *infra* Chapter 4

[151] Article XI(5), Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, (1979), UN Doc. A/34/664 (1979) [hereinafter "Moon Agreement"]

[152] As at 1 January 2006, only eleven States have ratified the Moon Agreement: Australia, Austria, Belgium, Chile, Kazakhstan, Mexico, Morocco, the Netherlands, Pakistan, the Philippines and Uruguay. Five States have signed the Agreement but not ratified it: France, Guatemala, India, Peru and Romania.

[153] Jaenicke, G., *Settlement of Space Law Disputes*, Proceedings of an International Colloquium, Munich, September 13 - 14, 1979, (1980) at 130

[154] see *infra* Chapter 4

non-appropriation and freedom of exploration and use are the main tenets of international space law. It is thus *prima facie* difficult to see how international space law can maintain these principles in the face of increasing commercialization. However, given the cost of access to outer space and its enormous economic potential, space law would become obsolete and impracticable if it did not also take into account the interests of private entities.

Additionally, commercial space activities undertaken by private entities often do not fall within the international dispute settlement procedures provided by the classical framework of international law. Issues of *locus standi* and jurisdiction abound, and much of the law applicable in these mechanisms do not consider domestic public and private concerns. Further, the proliferation of space activities and the commercialization of the space sector make the need for binding rules to settle disputes increasingly urgent. Aside from the interests of efficiency and certainty, it is important for any dispute settlement mechanism in space law to tread the fine line between public and private international law. This provides the international community and legal scholars an unprecedented opportunity to consider the possibility of establishing an appropriate dispute settlement method to handle space law disputes effectively, while taking into consideration the interests of all parties concerned.

The establishment of the International Centre for the Settlement of Investment Disputes (ICSID)[155] and the practice of arbitration as a result of the related Convention on the Settlement of Investment Disputes shows a rising positive stance of States to waive their traditional sovereignty regarding private entities. States and private entities are beginning to deal as equal parties in cases where financial interests are at stake. This example may be of specific relevance to space law disputes when commercial interests will continue to increase and pave the way for similar considerations.

3.2.4 The Enforcement of the Rule of Law in Outer Space

International law may be flawed and deficient in some aspects, but it is more often observed than violated. This is certainly the case as well with international space law. Further, it is submitted that a permanent, compulsory dispute settlement mechanism will make a substantial contribution to the development of the *corpus juris gentium*. As such it will improve international space law and enhance the role of dispute settlement in space activities.[156] In resolving disputes within the legal framework, the dispute settlement mechanism will interpret the law through its application. Each dispute settled is a step in the

[155] see *infra* Chapter 4

[156] Cocca, A.A., "Law Relating to Settlement of Disputes on Space Activities", in Jasentuliyana, N. (ed.), *Space Law: Development and Scope* (1992) 191

evolution of international space law.[157]

Probably the most important reason for the establishment of a sectorialized dispute settlement mechanism for space disputes that is permanent and compulsory is for the enforcement of the rule of law in outer space. This mechanism would provide a viable alternative to any extra-legal and illegal methods of redress or conflict resolution. This mechanism would perform three tasks in this regard:

1. Establish international space law as a special sector of international law through the declaration of the law;

2. Increase the political attractiveness of accepting international legal norms in space activities with a built-in system for reform and review; and

3. Maintain outer space for exclusively peaceful purposes by ensuring that conflicts are settled peacefully rather than through the use or threat of the use of force.

This section will deal with these three factors in sequence.

One of the most important reasons for establishing a permanent, compulsory dispute settlement mechanism is that it allows for the development of international space law as a specialized branch of international law. This dispute settlement mechanism will allow for the declaration of the law through its application. As more disputes arising from space activities are settled through legal means, this allows the *corpus* of international space law to be gradually built up. The declaration of the law is essential for its progressive evolution, in particular in young fields such as international space law. The formulation of the law in this regard allows for its growth and enforcement in practical matters.

The second factor is that a compulsory, permanent dispute settlement mechanism will increase the political appeal of accepting international legal rules governing space activities. The existence of a dispute settlement mechanism implies a solid framework within which the law can be reviewed and reformulated as necessary. This allows the law to progressively develop together with changes in social and technological innovations. With a built-in system for such review and changes, actors will likely be more disposed to accept international space law as the governing framework for space activities. This furthers the cause of the enforcement of the rule of law in outer space activities.

The most urgent and important reason for the adoption of a permanent, compulsory dispute settlement mechanism to ensure the enforcement of the rule of law is that it maintains outer space for exclusively peaceful purposes. Such

[157]Lachs, M., "Some Thoughts on the World of the International Court of Justice", in Council of Advanced International Studies, Desarrollo Progresivo del Derecho Internacional,(1991) Chapter 17

a dispute settlement mechanism ensures that disputes are settled peacefully within the legal framework, rather than through the use or threat of use of force. This is a crucial argument as to the reason for the establishment of such a mechanism.

The international legal order is essential to the maintenance of international peace and security. Explicitly or implicitly, international law establishes and enforces the general *jus cogens* principles that all disputes should be settled peacefully.[158] This crystallizes each actor's interest in the maintenance of international order, and international peace and security.

Dispute settlement within the international legal framework also more expressly establishes norms, procedures and institutions that facilitate conflict avoidance and dispute settlement. In the latter case especially, international law provides relevant regulations and legal norms that influence actors' perceptions of legitimacy. This guides their efforts in reaching settlement of any potential dispute. Further, to the extent that relevant legal obligations are clear, actors are less likely to pursue a course of action that might give rise to disputes. Should any such disputes nonetheless arise, parties will be able to settle them more straightforwardly based on clear relevant laws. Even if parties elect to settle disputes through non-legal, non-binding forms of dispute settlement, such as negotiation, they typically bargain in the shadow of the law. The rule of law in the international order also provides a framework by which actors can commit themselves to the principle of peaceful settlement of disputes. It also allows them to institute detailed dispute settlement methodologies. This allows the enforcement of the rule of law through the compromise on reaching a legal settlement.

The maintenance of international peace and security in outer space is at a particularly crucial juncture. The legal regime that governs military, commercial and scientific activities in outer space presently lacks coherence. It is increasingly insufficient to deal with the challenges raised by the disparate actors involved in space activities. Without a concentrated endeavor to establish a workable dispute settlement mechanism and a comprehensive legal order for outer space, there is a real possibility that the lacuna will be filled with military competition instead. This will doubtless have immense destabilizing consequences for international peace and security.

To avoid a military confrontation or an actual conflict in outer space, actors on the international plane must be subject to the rule of law. In this regard, the establishment of a dispute settlement mechanism would be in the interests of the global military, commercial, political and scientific constituencies. The dispute settlement mechanism will ensure that the future of space activities will be presided over by the long-term interests of law rather than the short-term interests of the balance of power. The predominant concern would be to manage

[158] This point is argued in detail *supra* in Chapter 2.

space activities while highlighting the crucial role of international space law in the preservation of outer space for exclusively peaceful purposes. The dispute settlement mechanism showcases the benefits of multilateral cooperation within a legal régime as the best path towards the protection of various interests in space. This ensures that no single power dominates the space industry, and threatens the freedom of access to space by other actors. The dispute settlement mechanism will ensure that any power-play will be restrained by recourse to legal rules. Any interests in outer space would then be pursued solely in the context of an evolved, expressed legal framework on the basis of mutual benefit and reciprocity.

The dearth of a proper dispute settlement mechanism in international space law could lead to two potentially disastrous scenarios. The first is military dominance by a space-faring power, and the second is a fragmented unilateral interpretation of the law by various parties.

The first scenario envisages the unilateral imposition of one party's perspectives through power politics and military dominance. This was the model of the initial two decades of space exploration, where the two superpowers of the United States and the former Soviet Union, the only space-faring States at the time, held sway over the development of international space law through their actions. Without a proper dispute settlement mechanism to articulate the framework of international space law, there is a clear and present danger of a powerful party taking advantage of the immensely unbalanced distribution of power and influence in the space field. This party could then enforce its own hegemonic order that promotes only its own interests and defends only its own actions. This will inevitably lead to a monopoly on the use and exploration of outer space, and the denial of access to space to other parties. It is clear that such a scenario will not take any heed of international treaties and international law. In fact, any existing restraint imposed by the law would likely be swept away as an undesirable restriction on that party's assertion of power and sovereignty in outer space.[159]

The second scenario envisages the continuation of the *status quo ante*, without the development of any mechanism for the settlement of disputes. The existing practice of laboring under disparate elucidations of ostensibly mutual but imprecisely specified principles is the norm. Parties pay lip-service to whatever current regulations there are, and see to modify the legal framework incrementally whenever possible. International space law would be shaped by unilateral interpretations of general principles and self-determining policies. Any norm-creation would proceed in an *ad hoc*, piecemeal fashion.

Neither one of the scenarios is sustainable for the further progressive evolution of international space law. They encompass two miasmas for the development of international law: the threat of the use of force, as well as the

[159]Dolman, E.C., *Astropolitik: Classical Geopolitics in the Space Age*, (2001), at 157

fragmentation of the international legal system. It is submitted that a more detailed normative system may provide the solution needed. An established dispute settlement mechanism would ensure that commercial, political, security and scientific interests in outer space are protected. This mechanism would accentuate pan-party cooperation, with widespread involvement by all stakeholders in decision-making and norm-creation regarding space activities.

The establishment of a sectorialized dispute settlement mechanism that is compulsory and permanent would enforce the rule of law also in other beneficial ways. It would reduce the resort to unjustified countermeasures on the part of allegedly injured parties. The establishment of such a dispute settlement mechanism would, by the fairest means possible, restrict the faculté of parties to resort to illegal countermeasures. Also, an effective dispute settlement mechanism would reduce friction between stakeholders, and bring about a more balanced and equitable allocation of benefits and settlement of disputes. This would work to prevent against any unjustified countermeasures and counter-reprisals and the intensification of unilateral measures that would serve only to ignite further friction between the parties. The result on the whole would be based on the rule of law and would thus likely be more just than those attained by resort to unilateral coercion. The upshot is that such a dispute settlement mechanism is that it reduces the need for actors to rely exclusively upon their own ability to resort to effective unilateral reaction, which in space activities is likely to prove costly and uncertain to produce the desired results. Parties would have the opportunity to better defend themselves before an effective dispute settlement mechanism rather than being coerced to accept the unilateral determinations of a potentially more powerful opponent. Considering the high degree of economic risk and technical interdependence of parties in space activities, this would be a great motivating factor for actors to accept the enforcement of the rule of law in outer space activities through the establishment of such a dispute settlement mechanism.[160]

Thus, a generally established dispute settlement mechanism in space law matters would not only benefit the international community by reducing tension between the various actors, but is also a requisite condition for augmenting the dependability and efficacy of this new field of international law. Improved confidence in the system of international regulation of space activities would moreover boost the readiness of actors to extend space law regulation to specific fields not yet included. There is now a substantial body of positive international space law comprising substantive law regarding the rights and obligations of actors in space activities. However, there needs to be a framework of procedural rules for the implementation and enforcement of these rules of substantive law in cases of dispute. This procedural framework for dispute settlement is still missing in international space law today.

[160]UN Doc. A/CN.4/453, Add. 3, (24 June 1993) especially paras. 95

This lacuna gives great reason for concern today as to the actual usefulness of space law. Presently, the practical application of space activities confronts the international legal framework with a great risk of potential disputes. These arise both in the application of international space law principles, as well as in the disparate fields of applied space activities. The commercialization of outer space, the potential benefits to be derived there from, and the proliferation of activities in outer space has increased the urgency for the establishment of a proper dispute settlement mechanism. This urgent need if ignored would lead only to the detriment of the efficacy, relevance and evolution of the framework of international space law.

3.3 Special Requirements for a Dispute Settlement Mechanism for Outer Space

Having stated the case for the urgent need for a sectorialized space law dispute settlement mechanism, this Chapter will turn now to the special requirements demanded of the dispute settlement mechanism for outer space. It is submitted that for any dispute settlement mechanism to be effective and workable in relation to disputes arising from space activities, it has to take into account several factors that may not be present in other more generalized forms of dispute settlement machinery. These factors include

1. The need for the declaration and creation of the law;
2. An overarching and universal jurisdiction to consider any and all factors potentially involved in the dispute;
3. The special requirements of *locus standi* necessary for the myriad actors involved in space activities;
4. A heightened requirement of flexibility to deal with rapidly evolving political, economic, technical and other contexts;
5. The capacity to include technical and economic competencies into the dispute settlement procedure;
6. The need for efficiency in the settlement of disputes and the possibility of requests for rapid provisional measures to be ordered and enforced; and
7. The assurance that any settlement achieved is practically applicable and enforceable.

This section will consider these factors in the context of ensuring that any dispute settlement mechanism for space disputes be of actual application to this complex field of human endeavor.

3.3.1 Declaration & Creation of Law

The current procedural legal régime in space is increasingly fragmented and inadequate to meet the challenges of the intensifying use of space. It consists of several key but very general principles expressed in five space treaties adopted since 1967 and a now defunct arms control treaty,[161] along with general international law and the practices of the space-faring States. The legal regime also includes various commercial agreements, such as rights to use the geostationary orbit and agreements establishing intergovernmental organizations.[162] However, due to the small handful of states historically able to operate in space, these principles have not really been tested and remain largely aspirational. The definition of "peaceful" is contested and unclear, environmental protections for outer space are weak, and there is no agreed operational definition of the concept of "province of all mankind" used in the Outer Space Treaty. This principle is not sufficiently widely accepted that it could be called a principle of customary law.[163]

The space-faring States have historically been concerned with optimizing the use and exploration of outer space while non-spacefaring States have been concerned with influencing rule-making to constrain the activities of those States and to protect their own future interests. For example, from the beginning, U.S. space programs have been primarily military, not civilian or scientific, in nature.[164] The current legal framework thus imposes certain prohibitions on military activity but also leaves significant lacunae.

It is submitted that a mechanism that can be relied upon to declare and assist in the evolution of the law is especially necessary in a novel branch of international law such as space law. This is particularly urgent for two important reasons. Firstly, the form of substantial international space law is still largely embryonic, and its principles aspirational. A dispute settlement mechanism that is able to articulate the existing law and give concrete applicability to such principles will most likely be welcome. Disputes that parties may have over abstract principles underlie the fact that these disputes will in the future become practical issues of conflict that would impede the exploration and use of outer space. It is thus never too early to set about establishing a dispute settlement mechanism that could, aside from settling practical conflicts, also deal with abstract disagreements based on matters of principles.

Secondly, the landscape of international space law is ever changing. In the

[161]For an excellent overview, see Diederiks-Verschoor, I.H.Ph., *An Introduction to Space Law*, see *supra* note 100

[162]For example, the Intergovernmental Agreement on the International Space Station, the International Telecommunications Union, and the World Meteorological Organization.

[163]Tan, D., "Towards a New Regime for the Protection of Outer Space as the 'Province of All Mankind",(2000) 25 Yale Journal of International Law 10

[164]Vlasic, I.A., "The Legal Aspects of Peaceful and Non-peaceful Uses of Outer Space", in Jasani, B., (ed.), *Peaceful and Non-Peaceful Uses of Outer Space* (1991)

light of the growth in the potential of various political, economic, scientific and technical benefits derivable from outer space, it is clear that interests and principles will evolve with a rapacity quite unknown to other fields of international law. The fourth frontier of human endeavor has proven that its rewards may very well outweigh the enormous risks and hazards it demands. As the potential benefits of outer space become clearer and more reachable, it is reasonably foreseeable that the law governing this field will evolve to reflect the seachange in attitudes, perceptions and interests of the parties involved. An established dispute settlement mechanism ensures the dynamic adaptation of the law to the emergent needs and interests of this extant and ebullient sector. It keeps the law from becoming obsolete in the face of ever-changing interests and evolving technology by declaring the status of the law at any given time. This dispute settlement mechanism must be pre-possessed of liberal, progressive creativity and an energetic élan that allows it to act and be regarded as a relevant instrument in the development both of international space law and space endeavor.

3.3.2 Jurisdiction

Jurisdiction refers to the powers exercised by the dispute settlement mechanism over persons, property or events. One of the unique requirements for any dispute settlement mechanism for space activities is that it requires an ecumenical and universal jurisdiction. This mechanism must be competent to consider any and all the factors that could potentially arise in a dispute concerning space activities.[165] In general terms, this means that it has to have a broad[166] scope of jurisdiction in three areas:

1. Subject matter and adjudicative jurisdiction: This dispute settlement mechanism must have the jurisdiction to consider disputes that will likely range over a wide diaspora of subjects. Disputes arising from space activities will likely involve factors of public international law, private international law, domestic law, and matters of equity. The dispute settlement mechanism must be competent with the jurisdiction to deal with the varied subject matter that may crop up in these cases. Further, it is necessary that this dispute settlement mechanism should have wide adjudicative jurisdiction to hear and settle disputes with little unreasonable restriction on the applicable law and type of dispute that can be brought before it. The mechanism should also have the competence to decide its own jurisdiction. In particular, it must be noted that this mechanism

[165]See Mann, F.A., "The Doctrine of Jurisdiction in International Law", (1964) Receuil des Cours 111

[166]see generally Bowett, D.W., "Jurisdiction: Changing Patterns of Authority over Activities and Resources", (1982) 53 British Yearbook of International Law 1

needs to have jurisdiction to hear disputes that might fall within a multilateral or international treaty framework, such as the 1967 Outer Space Treaty or the 1972 Liability Convention, other general treaties (such as environmental treaties) as well as private contracts between a private commercial entity and another. One possible manner to achieve this is by allowing parties to choose which areas of the law to include or exclude from the mechanism's authority in dealing with disputes that are submitted to it. Another possibility is to ensure that the mechanism is not established as a supplement to a particular treaty régime, but rather as a standalone institution that separately supports the existing legal framework.

2. Territorial jurisdiction: This is especially important, given that activities in outer space generally know no artificial State boundaries that have been imposed on Earth. As Huber noted in the *Palmas Island* case,

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. ... The development of international law [has] established this principle of the exclusive competence of the State in regard of its own territory in such a way as to make it the point of departure in settling most questions that concern international relations."[167]

Action on the territory of a State without its consent then, generally constitute violations of the international legal principles of territorial integrity and non-intervention.[168] Examples of this at international law include the kidnapping in the *Alvarez-Machain* case by US agents,[169] and the bombing of the *Rainbow Warrior* by French agents in New Zealand.[170] This principle has always been operative in international law, including international dispute settlement, meaning that no action can be taken without the consent of the State. It is significant that this dispute settlement mechanism be allowed to hear and settle cases with no restriction as to the territory in which the factual matrix constituting the events took place. Due to the transboundary nature of space activities

[167] *Island of Palmas* Case, (1928) II RIAA 829 at 838

[168] Oppermann, T., "Intervention", (1995) II Encyclopaedia of Public International Law 1436

[169] See the International Law AssociationInternational Law Association (ILA), *ILA Committee on Extraterritorial Jurisdiction: ILA Report* (1994) at 679

[170] *Rainbow Warrior* (New Zealand v. France) Case, (1987) ILR 74; see also United Nations Secretary-General: Ruling Pertaining to the Difference between France and New Zealand arising from the *Rainbow Warrior* Affair, (1987) 26 ILM 1346

and the immense amount of international and multilateral cooperation involved, it would be counter-productive to confine the jurisdiction of the dispute settlement mechanism behind the artificial walls of territoriality. This can already be seen in the context of the Liability Convention, which, although appearing to limit potential claims only to "launching States", then proceeds to define such "launching States" in a very broad manner. This wide definition, together with the liability then accrued for joint and several liability under the Convention, actually allows in practice for a wide range of possible parties from which claimant States can pursue a remedy.[171] It is submitted that the establishement of any dispute settlement mechanism should follow in the path of the Liability Convention, and be endowed with universal jurisdiction irrespective of territorial boundaries.

3. Enforcement jurisdiction: This refers to the powers of the dispute settlement mechanism of physical interference executively exercised. The includes the enforcement of any awards or settlement given, together with measures that can be undertaken to ensure that such awards or settlements are implemented in good faith. A dispute settlement mechanism without proper enforcement jurisdiction is ineffectual. Space activities involve high risks and stakes, and any effective dispute settlement mechanism must be able to be practically enforceable.

3.3.3 *Locus Standi* for Various Parties

International law has traditionally feared the individual. Standing for individuals and private entities in international law has been very restrictive. The slow evolution of standing for private entities can be traced in the international community's careful steps to allow these actors standing in their disputes with States and international organizations. Clearly however, these will only occur in settings where there has been a waiver of sovereign immunity by the international public actor, or where norms of *jus cogens* are involved.[172] The success of foreign investors and businesses in protecting themselves from expropriation or mistreatment by a host country has however, signified the emergence of the individual and private entities on the international plane.[173] Traditionally the investor would rely on its home State to protect its interests through diplomatic and other inter-States means. With the investors' interests in independent protection coming in line with host States' desire for more investment,

[171] see *supra* note 117

[172] The latter case applies in particular in the field of the international protection of human rights. This field is considered in the context of dispute settlement mechanisms *infra* in Chapter 4.

[173] Barton, J.H. and Carter, B.E., "Symposium: International Law and Institutions for a New Age", (1993) 81 Geo. LJ 535

all parties generally wish to settle disputes as rapidly and reasonably as possible. As such, a trend has emerged towards direct dispute settlement between the host State and the private entity by a dispute settlement mechanism applying international legal principles. The emergence of the private actor on the public international plane has exposed the artificiality of the traditional international law framework. The same issues will be posed by the increasing commercialization of space activities, and mixed public-private issues will increasingly transcend State boundaries. This new phase in global economic integration and interaction will require a dispute settlement mechanism that is able to give direct access to all involved actors on a supranational and domestic plane. This is necessary in the interests of increasing efficiency and reducing legal transaction costs of the global space industry.[174]

The dispute settlement mechanism for space activities must be viewed within the perspective of the totality of public international space law as well as international commercial and trade law. Public international law requires especial emphasis because, pursuant to Articles VI, VIII and XIII of the 1967 Outer Space Treaty, the 1972 Liability Convention and the Principles adopted by the UN General Assembly, States are held directly responsible for all space activities that are conducted within their respective territorial jurisdictions or with which they or their nationals are associated.

Dispute settlement for space activities require imaginative expansion of the *locus standi* to address the concerns of the actors involved. The proliferation of these actors and their interests means that this dispute settlement mechanism needs to allow standing of the following categories of interested parties:

1. States & their National Agencies;
2. Inter-Governmental Organizations;
3. Non-Governmental Organizations;[175]
4. Private Entities: Companies and Multi-National Corporations; and
5. Individuals.

The issue of standing becomes more volatile as the latter three categories comprise actors that are formally not subjects of international law. This gives rise to questions of the scope of the applicable law. The Warsaw aviation law system is one example of how complex and labyrinthine straddling systems of law can be. When parties enter into a commercial relationship, the presumption is that private law is *prima facie* applicable. This may be domestic or

[174]Oehmke, T., *International Arbitration* (1990) at 274

[175]This refers to organizations without a commercial character, and conducted on a transnational level without governmental interference.

international in nature, or a mix of both. However, due to the nature of space activities, in the vast majority of cases public international law will be relevant too.

Before public international law can apply however, the characterization of the parties is necessary. Generally speaking, unless all the parties have legal personality to act on the international plane, principles of public international law may be excluded. The reason is because the characterization of their personality determines their capacity to act under international law. Therefore, a party has to be a subject of international law before it may operate on the international level, namely it has to be either

1. a State,
2. an international organization, or
3. an entity that has been given this capacity by States in an international instrument.

Before an entity is recognized as a State, it must pass the test established for statehood. Although it is not possible to define exactly what a State is, it is generally accepted today that four main characteristics are necessary. They are found in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, listed as

1. Permanent population;
2. Defined territory;
3. A Government; and
4. Capacity to enter relations with one another.[176]

For an international organization to have this personality and capacity, it must be given these characteristics by its constituent instrument. This is best illustrated by the Advisory Opinion of the ICJ in the *Reparation for Injuries*[177] case. There the Court emphasized Article 104 of the UN Charter on the organization's legal capacity. Article 104 provides as follows:

> The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.[178]

[176] Brownlie, I., *Principles of Public International Law*, 5th ed., (1998) at 69

[177] *Reparation for Injuries* case, [1949] ICJ Rep. 174

[178] Article 104, Charter of the United Nations, (1945) 59 Stat. 1031, UNTS No. 993 [hereinafter "UN Charter"]

The Court held in this case that:

> ...fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality and not merely personality recognized by them alone, together with capacity to bring international claims.

With regard to individual and private entities such as commercial enterprise, it is now possible for them to act on the international level where the legal framework so conceived, and where contracting Parties so intended. The restrictive approach that only allows States to operate on the international level is slowly being eroded as a nod to the practicalities of contemporary international society. In the *Postal Services in Danzig* case,[179] the Permanent Court of International Justice held that there is nothing in international law that prevents an individual from acquiring rights under an international convention if the contracting Parties so intended. This position was reiterated by the Nuremberg Tribunal, which held that "Crimes against international law are committed by men, not by abstract entities...".[180] Today, the international conventions on human rights illustrate best the extent to which an individual may be given this capacity by international conventions. Therefore, States may provide the individual and other private parties with the capacity to act on the international level in a constituent instrument, in the same way they have given international organizations this capacity.

It is hence submitted that not only is it possible, but it is urgently necessary that any dispute settlement mechanism for space activities should grant standing to the above-listed categories of actors. The artificiality and ineffectiveness of the classical restrictions on actors on the international plane should not be imposed on international space law.

3.3.4 Flexibility

It is submitted that any workable dispute settlement mechanism for space activities must be sufficiently flexible to deal with the rapidly evolving political, economic, technical and scientific aspects of outer space. The sustained viability of any such mechanism will depend largely on the corresponding flexibility it can afford. This flexibility can manifest in three ways:

1. Flexibility as to its procedures;
2. Flexibility in its adaptability to the specific factual matrix of the present case; and

[179](1925) PCIJ Rep. Series B. No. 11
[180](1947) 41 AJIL 221

3. Flexibility in its willingness to maintain the principles of the law in balance with the permutating circumstances of space activities.

In respect of procedural flexibility, it is important that this dispute settlement mechanism does not adhere to a rigid, formalized procedure of settlement. While allowing for due process and the rules of natural justice, this mechanism should not require unnecessarily long-drawn-out processes that impede party autonomy and hence give rise to reluctance to submit to this mechanism. This mechanism should also ensure that it is flexible enough to adapt to the specific factual matrix of the present dispute. This means that it should be able to take under advice the consideration of technical, economic or scientific issues present, and incorporate these considerations together with the applicable legal principles in any given case. Parties need to have confidence in the impartial flexibility of this mechanism to consider submission of their disputes to its jurisdiction and purview.

More importantly, this mechanism must allow the maintenance of the founding principles of international space law in the light of the rapid iteration of the circumstances in which it operates. It has to maintain the delicate balance of preserving the values on which the system of international space law is based, while ensuring that it does not become obsolete and irrelevant in the evolving model of space endeavor and industry.

3.3.5 Technical & Economic Competencies

Disputes in space activities are likely to involve facts of a scientific and technical nature.[181] This is compounded in the light of the need for economic expertise due to the commercialization of space activities.

Managing a dispute settlement mechanism is an art. The best management of a dispute in a field such as space activities is to include as much expertise in the disparate factors as possible. This means that there is a need for legal, economic, political technical and scientific expertise. This allows for better case management, due process and a greater quality of outcome. The application of the law is done through a thorough understanding of the technical and scientific facts, as a result, there is a cost savings of money and time. This is particularly precious in cases where there is a small window of opportunity, as there will likely generally be in space activities. Of course, the appointment of any experts to the dispute settlement mechanism will very much depend on the scope and complexity of the matters submitted for settlement.

These requirements however should not overshadow the need for legal expertise. Any dispute, however technical, raises legal issues. Legal experts are

[181] See generally Böckstiegel, K.-H., "Streiterledigung bei der kommerziellen Nutzung des Welraums", in Böckstiegel, K.-H. et al (eds.), *Festschrift für Ottoarndt Glossner zum 70 Geburtstag*, (1994) 39

better equipped to deal with these issues than technicians. This consideration speaks strongly against having only technical experts on a dispute settlement mechanism, as in the current practice in many international and intergovernmental space organizations. It is submitted that any dispute settlement mechanism for space activities must combine both the technical and the legal aspects in its expertise to be practically effective.

3.3.6 Efficiency & Rapid Provisional Measures

The evolution of international space law has been an efficient one, following very closely on the heels of scientific and technical advances. Certainty of efficiency can come about only from the adoption of an operational, regulated mechanism for the settlement of disputes.

A potential problem in international dispute settlement is the need for the exhaustion of local remedies prior to the commencement of settlement on the international plane. Even the 1998 Taipei Draft Convention on the Settlement of Space Disputes requires this in Article 12.[182] Although this is a common principle of international law,[183] this approach will be counterproductive if applied *en bloc* to the mechanism for the settlement of space related disputes. It may be instructive to note that the 1972 Liability Convention does not require the exhaustion of local remedies before its Compensation Commission is resorted to.[184]

The establishment of a new institution for dispute settlement will undoubtedly face questions of a procedural nature, which will not have been provided for in advance. In this regard, it is submitted that the research and drafting of procedural rules *a priori* should also be supplemented by an ongoing review of the operations of the mechanism itself.

Further, this mechanism should allow for rapid provisional measures and an expedited hearing in case of disputes that are severely constrained by time. Aside from lowering the costs of dispute settlement with a speedier procedure, in space activities it will often be the case that the actual application of a settlement can only work within a limited timeframe. Hence efficiency is extremely important in this regard, and the dispute mechanism should not allow disputes to carrying on for a long time. The procedural rules of this mechanism should be geared towards as quick a resolution as possible without compromising the fairness and natural justice of the case. Accelerated processes would be suitable

[182] Final Draft of the Revised Convention on the Settlement of Disputes related to Space Activities, ILA, *Report of the 68th Conference, Taipei, Taiwan, Republic of China*, (1998) 249 - 267

[183] Broches, A., "Convention on the Settlement of Investment Disputes between States and National of Other States of 1965: Explanatory Notes and Survey of its Application", in *ICCA Yearbook for Commercial Arbitration*, (1993) 627

[184] Article XI, Liability Convention, see *supra* note 117

in this regard.

3.3.7 Practicality of Judgements and Awards

There is often a cynicism that legal experts and practitioners are unable to come up with a settlement of a dispute that is practically applicable, especially in technical fields such as space activities. The underlying fear is that jurists do not comprehend the technical considerations and scientific background in which space activities necessarily must operate. As such, there is a fear that any dispute submitted to the jurisdiction of international space law will result in a solution that is at once overly idealistic as it is impractical.

It is therefore submitted that a dispute settlement mechanism for activities in outer space must necessarily result in awards or judgments that should, aside from being rooted in principles of international and commercial law, as well as justice and fairness, also ensure that it is practically applicable. This entails taking into consideration the scientific and technical issues of the dispute, the economic risks at stake, the political implications and policies involved, as well as the limitation of the time available.

3.4 Conclusion

This Chapter has considered three crucial factors in the evolution of dispute settlement for space activities. It assessed the unique paradigm of space activities, which led to the case for an urgent need for the establishment of a sectorialized dispute settlement mechanism for space activities. It then turned to the specific requirements demanded of this dispute settlement mechanism for it to fulfil its role in effectively resolving disputes arising from space activities. It is submitted that not only is there a clear need for a sectorialized dispute settlement mechanism for space activities, but this need is a pressing and urgent one.

Before proposing a workable solution for the establishment of a dispute settlement mechanism for outer space, this thesis will turn first to consider the recent developments in dispute settlement in other comparable fields of international law. These provide a plethora of instructive examples, tested experience and comparative analyses that should prove useful in the formulation of a dispute settlement mechanism for disputes arising from activities in outer space. Taken against the backdrop of the considerations raised in this Chapter, this comparative analysis will provide the groundwork for this thesis proposal of a practical framework for the establishment of a dispute settlement mechanism for outer space.

Chapter 4

Recent Developments in Comparable Fields of International Law

International space law is not the only developing area of the law. The field of international dispute settlement has recently also been in the legal spotlight, with many novel innovations evolved to meet the changing needs of contemporary international society. Much of these changes are instructive as possible models for a comprehensive dispute settlement mechanism for space law. This Chapter provides brief summaries and a critical analysis of the recent developments in international dispute settlement in comparable fields of law. This Chapter studies the lessons learnt from these fields as a background before proposing a workable framework for dispute settlement in outer space in Part Three of this thesis.

There are five international institutional contexts where dispute settlement mechanisms have been implemented and modified from diverse rationales.

- The first is the utilization of mechanisms for both compliance control[1] and dispute settlement. This has specifically been used in fields termed "dynamic, sectoral legal systems".[2] In particular, a noteworthy example is the institutional régime for the regulation of the environment under international environmental law.

- The second comparable mechanism is the dispute settlement processes within international trade and financial institutions. These aim at enhancing institutional good governance and democratic participation within the international trade community under international trade and economic law.

[1] Handl, G., "Compliance Control Mechanisms and International Environmental Obligations", (1997) 5 Tulane JICL 29

[2] Gehring, T., "International Environmental Regimes: Dynamic Sectoral Legal Systems", (1990) 1 Yearbook of International Environmental Law 35

- The third mechanism is the middle-of-the-road approach taken in the protection of human rights at the regional level. These aim at lifting the veil of the State, while working within cultural and regional relativities so as to protect human rights at the grassroots level.
- The fourth focuses on the enforcement of the rule of law in the world's common spaces of great economic, scientific and environmental interest. This mechanism is derived from the developments under the law of the sea and the Antarctica regime.
- The last looks at the more direct alternative to the use of armed force, which is the practice of good office by the Secretary-General of the UN.[3]

These mechanisms are comparable in various aspects to the emergent and nascent issues that face international space law. Further, they exemplify the friction between institutional aims and the notion of treaty performance. This is especially where such performance involve obligations owed *erga omnes* and where *locus standi* to uphold those obligations is restrictively conjectured. Another interesting point is the further tension developing within the international legal system - that of the interaction between private negotiatory mechanisms, institutional outlooks and the rights and obligations of the international community at large to the standards of international law.

This Chapter will look at these comparable fields of international law and their dispute settlement mechanisms in turn, demonstrating the reason for which these fields in particular are instructive for international space law. It will critically analyze these developments and cull lessons learnt for the benefit of any dispute settlement mechanism specific for outer space disputes. This lays the lattice for the proposal of a workable dispute settlement mechanism for outer space as proposed in the next Chapter.

4.1 Institutional Treaty Compliance Régimes: International Environmental Law

The mechanisms for dispute settlement in the field of international environmental law are remarkable in four regards.

Firstly, they are exceptional in their promotion of treaty compliance without the framework of an overarching Convention such as the UN Convention on the Law of the Sea.

Secondly, the "soft" methods of enforcement employed by most of the environmental law mechanisms advocate the use of engagement rather than exclusion. This refers to enforcement of international legal obligations and norms by including any defaulting party in the process through dialogue and diplomacy,

[3]Supplement to an Agenda for Peace, (1 January 1995), UN Doc. A/50/60-5/1995/1

as opposed to excluding the defaulting party from community membership. This has been particular to the success attained in the achievement of the various environmental standards and obligations.

Thirdly, the transboundary character of the various environmental concerns necessitates much international cooperation. The transboundary and international dispute settlement mechanisms developed by this body of law has inevitably had to consider this aspect of environmental law. As such, they are evolved so as to best facilitate the peaceful settlement of disputes within such a transboundary context.

Lastly, these dispute settlement mechanisms also consider the involvement of the various multinational corporations and non-governmental organizations that are necessarily involved in any transboundary environmental dialogue. Thus, they are also specially evolved to involve a slate of varied and diverse parties. With these factors in mind, this section will consider the various dispute settlement mechanisms in the framework of international environmental law, providing also a brief critically analysis as to the successes and lessons derived from these mechanisms.

International environmental law has the distinction of being one of the youngest fields of international law, building on the UN Charter. However, not all multilateral environmental agreements have included dispute settlement mechanisms.[4] It was only in the 1970s that these agreements started to include a variety of dispute settlement mechanisms. For example, the 1973 Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES)[5] and the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals[6]include dispute settlement options under which State Parties are required to negotiate in the event of a dispute. Where negotiation fails to bring about a resolution, the Parties may by mutual consent submit the matter to arbitration, in particular to the PCA.

Further, the majority of international environmental conventions do not impose compulsory third party dispute settlement. Exceptions to this, however, include the 1954 International Convention for the Prevention of Pollution from Ships by Oil,[7] the 1978 Convention for the Prevention of Pollution by Ships,[8]

[4]Triggs, G., "Japanese Scientific Whaling: An Abuse of Right or Optimum Utilisation?", (2000) 5 Asia Pacific Journal of Environmental Law 33

[5]Convention on International Trade of Endangered Species of Wild Fauna and Flora (1973) 993 UNTS 243, Article XVIII

[6]Convention on the Conservation of Migratory Species of Wild Animals (1980) 19 ILM 15, Article XIII

[7]International Convention for the Prevention of Pollution from Ships by Oil (1954) 12 UST 2989, TIAS No. 4900, 327 UNTS 3. Article 13 provides for compulsory jurisdiction of the ICJ except where parties mutually consent to choose arbitration.

[8]Convention for the Prevention of Pollution by Ships (1973) 12 ILM 1319. Article 10 makes arbitration the compulsory methods of dispute settlement.

the 1986 IAEA Convention on Early Notification of a Nuclear Accident,[9] and the 1986 IAEA Convention on Assistance in Case of a Nuclear Accident or Radiological Emergency.[10] However, in most cases, States avoid such compulsory mechanisms through reservations or an opt-out formula.

Changes to this attitude were made by the 1980s and 1990s. By then, international environmental agreements started to include more far-reaching dispute settlement mechanisms. These made unequivocal mention to peaceful methods of dispute settlement such as negotiation and adjudication before the ICJ. Other mechanisms of dispute settlement were also included, such as conciliation, arbitration, and resort to expert specialist panels. Another procedure evolved in which States Parties were given also the chance to state their desired dispute settlement method in the case a dispute should arise. In some instances, States Parties were also provided with an opportunity to appoint their nominees to Lists of Experts to serve as arbitrators on arbitration panels. The choice offered to States Parties was expanded to include

1. Negotiation or other method of dispute settlement, with the option of acceptance of the ICJ's jurisdiction or that of a specially constituted arbitration panel;[11]

2. Negotiation or third party dispute settlement, acceptance of the ICJ's jurisdiction or that of a specialist arbitration panel, and alternatively conciliation;[12]

3. Negotiation or other means of dispute settlement, agreement to submit disputes to the ICJ or to arbitration, or to a conciliation commission upon the request of one of the parties, which shall consider a recommendatory award, to be considered by the parties in good faith.[13]

Another trend was to tag on novel dispute settlement mechanisms to long-standing Conventions without changes to the original agreements. This was achieved through the establishment of various Protocols.[14]

[9]IAEA Convention on Early Notification of a Nuclear Accident, IAEA INFCIRC/335, 25 ILM 1370 (1986). Article 11(2) provides for compulsory jurisdiction of the ICJ.

[10]IAEA Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 26 September 1986, IAEA INFCIRC/ 336, 25 ILM 1377 (1986)

[11]For example, Article XV and Appendix VII, 1991 Convention on Environmental Impact Assessment in a Transboundary Context (1991) 30 ILM 802; Article 20 and Annex VI, 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (1989) 28 ILM 657; Article 22 and Annex IV, 1992 Convention on the Protection and Use of Transboundary Watercourses (1992) 31 ILM 1312

[12]Article 27 and Annex II, 1992 Convention on Biological Diversity (1992) 31 ILM 818

[13]Article 14, 1992 United Nations Framework Convention on Climate Change (1992) 31 ILM 849

[14]For example Article 9, 1994 Oslo Protocol on Further Reduction of Sulpher Emissions (1994) 33 ILM 1542; 1991 Madrid Protocol on Environmental Protection to the Antarctic Treaty (1991) 30 ILM 1455

In particular, international environmental law has moved towards offering the option of compulsory third party dispute settlement within Convention frameworks. Three such Conventions are the 1985 Convention for the Protection of the Ozone Layer[15] and its 1987 Montreal Protocol on Substances that Deplete the Ozone Layer,[16] the 1992 Convention on Biological Diversity,[17] and the UN Framework Convention on Climate Change.[18]

The first of these Conventions, the Ozone Layer Convention and its Montreal Protocol exemplifies this very well. Article 8 of the Montreal Protocol sets out a non-compliance procedure that was thrashed out by a Working Group and adopted at the 1992 4th Meeting of the Parties to the Protocol.[19] These non-compliance procedures allow either a Party or the Secretariat of the Convention to raise concerns about another Party's non-compliance. This makes each State Party a trustee for the other Parties' conformity to obligations under the Convention.[20] As the economic, social and developmental costs of compliance with environmental standards increases, all Parties will have a motivation in ensuring that no one Party is gaining an unfair benefit through disregarding these international environmental standards. In a field that transcends boundaries, this is especially significant.[21] Concerns are raised with the Implementation Committee. The Committee considers all such submissions with the aim of "securing an amicable solution of the matter on the basis of respect for the provision of the Protocol".

The bureaucratic institution established by the Convention is integral to the regulatory régime of these non-compliance procedures. This has significant impact on the execution and performance of the legal obligations embodied in the Convention. The procedure rebuffs the paradigm of independent, neutral third party specialist panels. Instead, it gathers the constituent Parties into the institutional framework, involving the very actors responsible for the fulfillment of the substantive norms in working towards the final result. However, it is also dissimilar from non-institutional mediation or conciliation, in which parties alone are responsible for the outcome of the situation. Any solution reached within this framework must be amicable, and reached within the context and provisions of the Convention.

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[15] 1985 Vienna Convention on the Ozone Layer, (22 March 1985), 26 ILM 1529, [hereinafter "Ozone Layer Convention"]

[16] The Montreal Protocol on Substances that Deplete the Ozone Layer, (19 September 1987) 26 ILM 1550, hereinafter ["Montreal Protocol"]

[17] see *supra* note 12

[18] see *supra* note 13

[19] Report of the 4th Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UNEP/OZL.Pro.4/15, (25 November 1992), 3 YBIEL 819

[20] Koskenniemi, M., "Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol", (1992) 3 Yearbook of International Environmental Law 123

[21] Handl, G., "Compliance Control Mechanisms and International Environmental Obligations", see *supra* note 1 at 31

This non-compliance procedure is very similar to the long-established model of a conciliated amicable settlement between governments and petitioners under the European Convention of Human Rights.[22] The European Commission on Human Rights was substituted with a single-tiered judicial settlement process with Protocol 11 to the European Convention.[23] This however, does not indicate that settlement will not be attempted any longer. The first instance Chamber of the new Court is at the Parties' disposal for the purposes of a peaceful settlement. The blending of both negotiatory and adjudicatory authorities in a single institution causes some disquiet. It creates a conceptual short circuit in Eurocentric concepts of adjudication. However, this model is widespread and familiar in other systems of the law.[24]

Another interesting point about the Montreal Protocol is that the Party whose alleged non-compliance has been raised cannot contribute to the elaboration and recommendation process. It can only submit data, information and comments for consideration to the Implementation Committee. This exclusion takes away both from the free discretion of the resolution and the wider appreciation of the diplomatic process. As the aim is to ensure compliance, any solution espoused is inclined to be activist and facilitative rather than condemnatory. However, a failure to comply with the recommendations and obligations may lead to punitive reactions such as sanctions. The obscuring of the dichotomy between quasi-negotiatory and semi-adjudicatory utilities raises pertinent questions of institutional transparency, accountability and due process. However, an inclination for compliance procedures that avoid more coercive measures is more likely to encourage a non-complying Party State to comply with the proposed recommended outcome.

The non-compliance procedure embodied in the Montreal Protocol has been praised for its nurturing and dynamic reaction to a developing sectoral legal system, considering the prospects and understanding of the constituent participants in the régime, and balancing these with both technical and bureaucratic proficiency, as well as the needs of the international community. It has been noted that recourse to other dispute settlement processes that are more usual to general international law, but outside the institutional framework of the Montreal Protocol, could not achieve this.[25] Thus, recourse to the ICJ, *ad hoc* arbitration or conciliation, would not prove as effective as this non-compliance procedure. It is further submitted that the use of a binding dispute settlement mechanism such as judicial settlement or arbitration would be counter-

[22] Article 28(b), European Convention for the Protection of Fundamental Rights and Freedoms, (4 November 1950) ETS No. 5; see *infra* the discussion on human rights below in this Chapter.

[23] Protocol No. 11 to the European Convention for the Protection of Fundamental Rights and Freedoms, (May 11, 1994), 33 ILM 943

[24] Astor, H. and Chinkin, C., *Dispute Resolution in Australia*, (1993) at 145

[25] see *supra* note 1

productive to the progress of the regulatory régime. A formal judgment has the effect of crystallizing the law, which may not be beneficial in a rapidly-evolving area of international law. The régime procedures however, can consider within their scope such developments and contribute positively to the development of the law.[26] For example, in the *Gabcikovo-Nagymaros Project* case,[27] the ICJ itself held that the Parties should consider developing environmental legal norms in the performance of their treaty obligations. It highlighted the importance of third party involvement and the flexibility required on both sides.

There is however, a flipside to this argument. A treaty régime is a public prescription of negotiated international standards and obligations the fulfillment of which affects both Parties and non-Parties. This is especially so with regard to international environmental law agreements.[28] These obligations are owed *erga omnes*,[29] and not just to the particular complainant, or even just to other Party or non-Party States. A friendly solution achieved through compromise reached by an institutional framework might not satisfy outsider perceptions of the content of these legal obligations. A mediated solution generally presents a win / win agreement that represents components of both the disputants' interests. However, it may not provide for the interest of third parties or that of the international community at large.[30] A particularly pertinent example in the context of human rights is the agreement reached in the 1983 inter-State application against Turkey by Denmark, France, the Netherlands, Norway and Sweden against Turkey.[31] The applicant States claimed that Turkey had violated a number of prohibitions in the European Convention on Human Rights, including the prohibition against torture in Article 3. A mediated settlement was eventually achieved whereby Turkey undertook to comply with the Convention in future. The settlement did not refer to a number of alleged violations that the Commission had previously found admissible. This has been censured on the grounds that the final settlement did not respect basic human rights.[32]

Although the political quandary the Commission found itself in was evident, this criticism was brought about due to the inherent lack of transparency in the employment of private settlement processes within an institutional treaty régime. In the performance of treaty obligations, including those owed *erga omnes*, the ghost of the lack of accountability and transparency in private

[26] Goode, R., "Usage and its Reception in Transnational Commercial Law", (1997) 46 ICLQ 1

[27] *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, (1997) ICJ Rep. 57

[28] Chinkin, C., "Alternative Dispute Resolution under International Law", in O'Connell, M.E., (ed.), *International Dispute Settlement*, (2001) 506 at 508

[29] *Barcelona Traction, Light and Power Co. Ltd., 2nd Phase*, Judgment, (1970) ICJ Rep. 3 at 32

[30] Dryzek, J. and Hunter, S., "Environmental Mediation for International Problems", (1987) 31 International Studies Quarterly 87

[31] Report of 7 December 1985, 44 Decisions and Reports 31

[32] Robertson, A. and Merrills, J., *Human Rights in Europe*, (3rd ed., 1993) at 284

ordering is resurrected. This concern has also been compellingly articulated within the context of domestic dispute settlement.[33] The component of confidentiality cannot be under-valued in its importance in reaching an acceptable friendly settlement. However, it thwarts a candid appraisal of Parties' compliance with their legal obligations. This apprehension increases in the decentralized international legal system, where such solutions can form the basis of State practice constitute of customary international law.

This concern as to the applicability of such amicable settlement procedures may be likewise pertinent in all non-compliance procedures that need to balance State and political will with institutional credibility.[34] The objective of preserving treaty integrity may cause such non-compliance procedures to become ineffective and allow Parties to conceal non-compliant behavior, to the detriment of the collective interest.[35] This can lead to the fragmentation of the particular field of international law and its institutional structures. While such fragmentation may allow for the evolution of dedicated high-level expertise, it risks incoherence and illogic between areas of international law.

Aside from the non-compliance procedure, the most detailed dispute settlement procedures are also found in the Convention for the Protection of the Ozone Layer.[36] In particular, Article 11 provides that where negotiation or the use of good offices or mediation fail to resolve a dispute, Parties shall submit the dispute to conciliation. Where both Parties have declared an acceptance of the ICJ's jurisdiction, or submission of the dispute to arbitration, and where both Parties have chosen the same mechanism *a priori*, then the dispute will be submitted to this procedure. This applies to any Protocol to the Convention as well, unless otherwise provided. As such, this procedure is also applicable to its 1987 Montreal Protocol. The Montreal Protocol however, augments its dispute settlement mechanisms considerably. As mentioned above, it establishes procedures for non-compliance determination and for the treatment of non-compliant Parties.[37] This significantly provides a chance for the Parties to respond to non-compliant behavior without formally submitting the issue to formal judicial procedures or invoking a bilateral dispute so as to apply Article 11 of the Convention. The mechanism of dealing with non-compliant behavior places strong emphasis on assisting Parties to comply with the Protocol's standards through technology transfer and financial incentives, rather than on outright condemnation.

[33]Astor, H. and Chinkin, C., *Dispute Resolution in Australia*, see *supra* note 24 at 81

[34]Chinkin, C., "Alternative Dispute Resolution under International Law", see *supra* note 28 at 509

[35]For example *East Timor (Portugal v. Australia)*, Judgment, (1995) ICJ Rep. 90; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, (1985) ICJ Rep. 13. See further Chinkin, C., *Third Parties in International Law* (1993)

[36]see *supra* note 15; see also Birnie, P.W. and Boyle, A.E., *International Law and the Environment*, (1992), at 404 - 411

[37]Annex IV to the Montreal Protocol, see *supra* note 16

The Secretariat and the Implementation Committee assume an extremely important function in this compliance mechanism. Upon observation of non-compliant behavior of a Party, or when a Party declares that it is unable to comply with the Protocol, the Secretariat will collect all necessary information and facilitate an exchange of views with concerned Parties. It will then inform the 10-member Implementation Committee. The Committee then investigates and reports on the situation of non-compliance, undertaking fact-finding mission on the Party's territory if necessary. The Committee then reports its finds and makes recommendations to amicably resolve the situation and bring the defaulting Party back in line.

This Implementation Committee process is similar to a form of conciliation. However, the Parties concerned have only a small measure of control on institutional procedures such as the selection of conciliators and rules of procedure. The Committee's recommendations are non-binding. However, in political terms, the non-compliant Party may faced with the threat of bilateral or multilateral sanctions from other concerned States if it refuses to comply. It is submitted that this special compliance procedure ensures the most effective implementation of the Protocol's standards. What is remarkable is the selection of conciliation as the choice of dispute settlement, which encourages Party compliance through assistance rather than condemnation.

It should be noted that the Montreal Protocol non-compliance mechanisms co-exist with third party dispute settlement processes contained within Article 11 of the Ozone Layer Convention. The existence of such a dispute may encompass an assertion of breach, unsatisfactory performance or non-compliance by a Party to the Convention. Thus it may intersect with the points that can prompt the non-compliance procedures. Additionally, complaints of non-compliance with the Montreal Protocol may amount to claims of breach within Article 60 of the Vienna Convention on the Law of Treaties,[38] leading to the applicability of the options specified.[39] The dispute settlement mechanisms to be followed in the case of claims of breach of the Vienna Convention on the Law of Treaties are found in Article 33 of the UN Charter.[40] The same techniques, such as consultation, independent expert investigation, fact-finding, negotiation, mediation, third party expert appraisal and non-binding recommendations, are found in both the non-compliance and the dispute settlement mechanisms. Another factor to consider may be that the alleging Party's predilection may be for performance induction rather than compensation or redress. As such, the amicable outcome of conciliation may maintain friendly relations while providing inducements for performance.

[38] see Koskenniemi, M., "Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol", see *supra* note 20

[39] Article 60(2) Vienna Convention on the Law of Treaties, 23 March 1969, 1155 UNTS 331

[40] Article 65 - 66 of the Vienna Convention on the Law of Treaties, *ibid.*

While established dispute settlement mechanisms may not be best-suited for encouraging compliance,[41] the interaction of these traditional methods of dispute settlement with the novel non-compliance mechanism generates some legal predicaments. One of these is the issue of whether this co-existence, founded upon analogous non-adjudicatory mechanisms, promotes assimilation or fragmentation from the general body of international law. One obvious solution would be that if the dispute settlement process moves towards conciliation, that it should be led to the procedures of the Implementation Committee, hence merging the dispute settlement procedure with the non-compliance mechanism. If the chosen dispute settlement procedure of any one of the parties is arbitration or adjudication however, then the non-compliance mechanism should be excluded since their objectives and intentions differ from those of the Parties. In line with the UN Charter and the various judgments of the ICJ however, Parties themselves should always continue to their quest of a friendly settlement.

This debate is mirrored in the more extensive concerns of the International Law Commission (ILC) on the relationship between State responsibility and dispute settlement.[42] In its Draft Articles on State Responsibility, the ILC has expanded upon the concept of an "injured state" in the contexts of breach of a multilateral treaty,[43] and of an international crime,[44] so as to include collective and community interests. An injured State may resort, subject to applicable limits,[45] to countermeasures to induce conformity.[46] Since the draft definition of an international crime includes a "serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment",[47] such a claim might fall within the context of an environmental treaty with a non-compliance procedure. The extensive definition of an "injured" State increases the chance of such a breach being raised at the international level. However, this is likely to sour relations with other directly injured States that may be seeking reparation, or with those whose interest conflicts with that of the claimant State.

[41] Handl, G., "Compliance Control Mechanisms and International Environmental Obligations", see *supra* note 1 at 34

[42] International Law Commission, Draft Articles on State Responsibility, Draft Report of the ILC on the Work of its Forty-Eighth Session, (16 July 1996), UN Doc. A/CN.4/L.528/Add.2

[43] Articles 40(e), (f), Draft Articles on State Responsibility, in the Report of the International Law Commission in its Work of its Thirty-Seventh Session, reprinted in [1985] 2 YBILC 20

[44] Article 40(3) of the Draft Articles on State Responsibility, see *supra* note 42

[45] It is beyond the scope of this thesis to discuss the limits on States to resort to countermeasures. For an excellent overview of the topic, see Cassesse, A., "*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", (1999) 10 EJIL 23

[46] Article 47 of the Draft Articles on State Responsibility, see *supra* note 42

[47] Article 19(3)(d) of the Draft Articles on State Responsibility, see *supra* note 42

Further to the Ozone Layer régime, two important Conventions were adopted at the 1992 United Nations Conference on Environment and Development (UNCED). These were the Convention on Biological Diversity[48] and the UN Framework Convention on Climate Change.[49] The fulfillment of the obligations in these two Conventions in particular required tremendous international cooperation and coordination. They are concerned with the adjustment of economic development models to strike an equilibrium between economic progress and ecological protection so as to achieve an acceptable level of sustainable development. In their first steps in finding a bridge between economics and the environment, the dispute settlement mechanisms of these two Conventions take after the Ozone Layer Convention. The procedure in the Convention on Biological Diversity follows that in Article 11 of the Ozone Layer Convention. The UN Climate Change Convention pursues a more elaborate structure. While a dispute can be submitted to the ICJ or compulsory arbitration only with mutual Party consent, all disputes under this Convention are subject to compulsory conciliation. The non-compliance procedure of the Montreal Protocol mentioned above is a success case of the effectiveness of conciliation. Article 13 of the Climate Change Convention provides that Parties shall consider the establishment of a multilateral process for the settlement of questions regarding the Convention's implementation.[50] It is submitted that this procedure for compulsory conciliation is a step in the correct direction. The provision for the submission of any disputes to compulsory dispute settlement mechanisms in this Convention builds the framework for a structured development of international dispute settlement. At the same time, it ensures that the standards of the Convention are met. Further, it provides an impetus and an inspiration to move the attitude of the international community towards a more affirmative posture towards compulsory dispute settlement.

A point of regret is the lack of compulsory binding third party dispute settlement mechanisms in these Conventions. It is unfortunate that the UNCLOS dispute settlement system, or the Antarctic Mineral Activities Convention system,[51] does not find a place in these Conventions.[52] The reason is probably due to the comparatively novel field of law and the reservations contiguous to it. However, it is submitted that inter-State dispute settlement such as judicial settlement by the ICJ or inter-State arbitration may not necessarily be the

[48]see *supra* note 12; see Bilderbeek, S., (ed.), *Biodiversity in International Law: The Effectiveness of International Environmental Law* (1992)

[49]see *supra* note 13; see also Bodansky, D., "The United Nations Framework Convention on Climate Change", (1993) 18 Yale Journal of International Law 451

[50]UN Doc. A/AC.237/Misc.20 (1992) at 42

[51]These systems are dealt with in more detail *infra* in this Chapter.

[52]Kindt, J.W., "Dispute Settlement in International Environmental Issues: The Model Provided by the 1982 Convention on the Law of the Sea", (1989) 32 Vanderbilt Journal of Transnational Law 1097

most suitable method of dispute settlement.[53] Thus, it is submitted that conciliation serves as an important alternative, especially where the community of States Parties to the Convention plays a significant role in the conciliation procedure. This is institutionalized in the context of the Montreal Protocol, but disappointingly not yet so in the Biodiversity Convention and the Climate Change Convention.

Another interesting factor is the range of "soft" methods of international environmental dispute settlement. This refers to dispute settlement that may not necessarily come within the traditional legal framework. Rather, such methods depend upon other extra-legal mechanisms that exert influence or leverage upon a defaulting Party so as to resolve an existing dispute.[54] One evident means is through political negotiation. A successful example of this was the reaction of the European States to the 1986 Chernobyl nuclear power station accident. There was clearly no attempt to initiate any formal methods of dispute settlement. Rather, these States focused on the development of a new legal institution that would respond to any future nuclear accidents.[55] Another example is the response of Member States of the Association of South East Asian Nations (ASEAN) to the 1997 Indonesian forest fires and their work to achieve political arrangements to effectively handle the issue. This validates the faculty of affected States to labor cooperatively to resolve shared crises.[56]

Confidence in these "soft" methods of dispute settlement acknowledges the unpredictable character of environmental problems as well as their incumbent political sensitivities and technological challenges. These problems require novel, disparate tactics that are customized to the unique circumstances at hand. It is submitted that there should not only be one rigid procedure for the resolution and management of environmental issues, but rather a plethora of varied settlement mechanisms that utilize different techniques and operate on various levels.[57]

An assessment of international environmental dispute settlement mechanisms show that a host of techniques have been employed to achieve the aims of the international community and settle any questions and crises that may

[53]Gehring, R., "International Environmental Regimes: Dynamic Sectoral Legal Systems", see *supra* note 2; also Bilder, R.B., "The Settlement of Disputes in the Field of the International Law of the Environment", (1975) 144 Recueil des Cours 145

[54]Rothwell, D.R., "Editorial: Reassessing International Environmental Dispute Resolution", (2001) 6(3) Asia Pacific Journal of Environmental Law 201 at 209

[55]This resulted in the 1986 Convention on Early Notification of a Nuclear Accident (1986) 25 ILM 2570; and the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (1986) 25 ILM 1377

[56]Tay, S.S.C., "The South-east Asian Fires and Sustainable Development: What Should be Done?" (1998) 3 Asia Pacific Journal of Environmental Law 205

[57]Bilder, R.B., "The Settlement of Disputes in the Fields of the International Law of the Environment", see *supra* note 53 at 222; see also generally Romano, C.P.R., *The Peaceful Settlement of International Environmental Disputes*, (2000)

arise. International environmental law has measured up to the tenets of international dispute settlement as stipulated by the UN Charter. Further, it has evolved several inimitable methodologies applicable to the specific issues unique to the field of environmental law. The use of either institutionalized or *ad hoc* specialist arbitral tribunals has however been infrequent. Negotiation is most resorted to as a form of dispute settlement, which comes as no surprise, given its popularity in other areas of international law.

The core features of international environmental dispute settlement have evolved with those of contemporary international dispute settlement. However, there has been the distinctive step of the creation by the ICJ of a special Environmental Chamber. This is of emblematic significance - the Environmental Chamber is the only permanent ICJ Chamber. Its creation marks the significance which the Court ascribes to this young field of international law. Another imperative change is the escalating interface between treaty implementation, compliance and enforcement. In this regard the Montreal Protocol non-compliance procedure is an extremely interesting and useful model. It enables a specialist institutional framework for dispute settlement, which contains the capability to contain disputes while providing support to encourage and assist Parties to meet with their international legal obligations. The weight given to compliance and implementation is beneficial for international dispute settlement as a whole since it also boosts Party confidence and enhances dispute avoidance.[58] This development will inescapably also involve dispute settlement as States will be held accountable for their failure to comply with critical obligations under the respective Conventions. It is submitted that this shows in particular the vitality and significance given to international dispute settlement as the crux of international environmental law, and indeed any substantive field of international law.[59]

The pioneering compliance procedures, the developing "soft" methods of inducing compliance, and the response to the non-compliance with international environmental law obligations that have been institutionalized within the multilateral treaty regimes are especially notable for so young a field of international law.[60] These developments in the field of international dispute settlement are particularly encouraging and provide the groundwork for the evolution of the same in comparable fields of the law by way of analogy.

[58] Adede, A.O., "Management of Environmental Disputes: Avoidance versus Settlement", in Lang, W., (ed.), *Sustainable Development and International Law* (1995) 115

[59] Rothwell, D.R., "Editorial: Reassessing International Environmental Dispute Resolution", see *supra* note 54 at 214

[60] Handl, G., "Compliance Control Mechanisms and International Environmental Obligations", see *supra* note 1 at 32

4.2 Inspection Panels and Private Investment: International Trade and Financial Institutions

The occurrence of legal disputes in international commercial transactions is comparatively frequent. Commercial operation in outer space is no exception. As already pointed out earlier, international space law is a crucible of both public and private law. Sovereign acts in outer space will thus fall under the scope of general international law, including the dispute settlement mechanisms provided for by public international law. However, commercial activities in outer space would certainly be regulated by private law, including the mechanisms of private international law, international commercial law and international trade law.

The designation of activities in outer space in those that are acts *jure imperii* or acts *jure gestionis* should depend upon the character of the transaction rather than its purpose.[61] Article 2(2) of the ILAInternational Law Association (ILA) Draft states that

> "In determining whether a contract or transaction is a 'commercial transaction' (...), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if, in the practice of the State which is a party to it, that purpose is relevant to determining the non-commercial character of the contract or transaction."[62]

This restrictive approach in defining commercial activities in outer space will allow the determination of which mechanism should be used for dispute settlement. If the activity is commercial in the sense of international law, then Parties may use either national courts or arbitral tribunals to resolve arising disputes. Alternatively, Parties may insert an arbitral clause in contracts, agreeing *a priori* to submit the case to an international commercial arbitration tribunal or other chambers of commerce in accordance with an international arbitration procedure.

This thesis now turns to look at the dispute settlement mechanisms of the international financial and trade institutions. Mechanisms here analyzed include the UNCITRAL Model Law, the General Agreement on Trade and Tariffs (GATT) and its resulting World Trade Organization (WTO), as well as the World Bank and its International Centre for the Settlement of Investment Disputes (ICSID). These international financial and trade institutions are particularly pertinent because the transactions and disputes dealt with invariably deal with huge sums of investments. Also, it deals with much multilateral cooperation, including foreign investment, as well as a varied slate of actors,

[61] The significance of this distinction was discussed *supra* in Chapter 2.

[62] International Law Commission, *Report of International Law Commission*, (1991) at 13

ranging from governmental entities to multinational corporations and other private parties. Further, it has evolved a unique body of dispute settlement mechanisms, including the specialized Dispute Settlement Body (DSB) of the WTO, and the World Bank's Inspection Panels. Lastly, international trade law is extraordinary in its promotion of the use of arbitration as a means of binding third party dispute settlement.

4.2.1 International Commercial Arbitration: UNCITRAL

Due to the burgeoning commercialization of national and transnational activities in outer space, international commercial arbitration offers many advantages over the traditional form of inter-State adjudication. Firstly, space activities require an intricate grasp of science, technology, law and other related disciplines. An arbitral tribunal may be constitute to provide the best mix of this expertise to resolve the dispute in question. Secondly, parties to an international contract concerning space activities can ensure that any dispute arising will be submitted to a panel of arbitrators of their choice, which allows them to better secure their own interests. Thirdly, an arbitral award is in principle final, whereas judicial settlement, especially domestic litigation, is subject to appeal and may take a long time to resolve. Fourthly, arbitration allows the guarantee of confidentiality, which is important for the high technology information invariably involved in space activities. Lastly, international arbitration awards are recognized and can be enforced by domestic courts.

This is the raison d'être of international commercial arbitration law. It is the most institutionalized form of extra-judicial dispute settlement of a quasi-judicial nature. This framework is instituted in all the basic instruments of international trade law.[63] Among these instruments, UNCITRAL played a pivotal part in the establishment of modern international arbitration law within the framework of international trade law, with its 1976 UNCITRAL Arbitration Rules and its 1985 UNCITRAL Model Law on International Commercial Arbitration. In particular, the 1985 Model Law has been enacted into the municipal legislation of a number of countries.[64]

There are three class of existing arbitration rules within the framework of international commercial law, namely, the UNCITRAL arbitration system, the ICC arbitration system and the national arbitration system. These three systems of arbitration law has certain common characteristics in both form and substance.

[63] "Steps to be taken for Promoting the Harmonisation and Unification of the Laws of International Commercial Arbitration: Report of the Secretary-General of the United Nations", (1966), UNCITRAL Yearbook, Vol. I, (1968 - 1970), at 260 - 284

[64] These countries include Australia, Bulgaria, Canada, Egypt, Finland, Mexico, Nigeria, Peru, the Russian Federation, Scotland, Singapore, Ukraine and others. Cheng, C.-J., *Basic Documents in International Trade Law*, (3rd ed.), (1999) at 1173

1. All arbitration rules follow the typical prototype in acknowledging party autonomy, with minimal restrictions. The UNCITRAL Model Law allows parties the freedom to refer to standard institutional or *ad hoc* rules. Parties can for all intents and purposes customize the arbitral procedures to their particular case and requirements. They are not hindered by particular local rules on procedure, including evidence.[65]

2. The parties determine the applicable law to the dispute. The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the disputes.[66] The Rules however, also provide for the event where the parties may not agree on this matter. Failing any designation by the parties, the arbitral tribunal shall apply the law as determined by the applicable conflict of law rules. The arbitral tribunal may also decide the dispute *ex aequo et bono* or as amiable compositor if the parties have expressly authorized it to do so.[67] In all instances, the arbitral tribunal must decide the case in accordance with the contract and consider the trade usages applicable to the transaction.[68]

3. The scope of jurisdiction of arbitral tribunals broadly defined to include all commercial contracts. The UNCITRAL Model Law grants the arbitral tribunal substantial powers. Failing an agreement by the parties, the arbitral tribunal also has wide procedural discretion. This guarantees the efficacy of the arbitral process and allows the proceedings to be conducted free from domestic law restrictions.

4. The principle of de-localization is generally assumed in international arbitral proceedings and awards. Parties are free to choose the location of arbitration. The UNCITRAL Model Law appreciates that the place of an international arbitration may be chosen often for reasons other than the applicable domestic law.[69]

5. Fairness and due process are provided for in arbitral proceedings. Parties must be treated equally, with each party given the full opportunity of presenting his case.[70] The parties may decide on the arbitral procedure

[65]Hermann, G., "The Role of the Courts under the UNCITRAL Model Law Script", in Lew, J.D.M. (ed.), *Contemporary Problems in International Arbitration*, (1986) at 166

[66]Article 33(1), 1976 UNCITRAL Arbitration Rules ; Article 28(1), 1985 UNCITRAL Model Law on International Commercial Arbitration

[67]Article 33(2), 1976 UNCITRAL Arbitration Rules; Article 28(2), 1985 UNCITRAL Model Law on International Commercial Arbitration

[68]Article 33(3), 1976 UNCITRAL Arbitration Rules; Article 28(3), 1985 UNCITRAL Model Law on International Commercial Arbitration

[69]Article 20, 1985 UNCITRAL Model Law on International Commercial Arbitration

[70]See Article 15(1), 1976 UNCITRAL Arbitration Rules; Article 18, 1985 UNCITRAL Model Law on International Commercial Arbitration

> to be followed in conducting the proceedings.[71] Failing such agreement between the parties, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.[72]

Undeniably, the refined UNCITRAL commercial arbitration rules are equipped to deal with all disputes arising from commercial contracts. The only interesting question is whether different dispute settlement mechanisms should be established depending on the legal status of the concerned actors, or depending on the acts performed by the different actors in international law.[73] However, it is submitted that the UNCITRAL Model Law does provide a well-established and well-tested framework for the settlement of commercial disputes by arbitration.

4.2.2 The General Agreement on Trade and Tariffs - GATT

In direct contrast to international commercial arbitration is the GATT dispute settlement mechanism. It aims to resolve a dispute through the conciliatory mechanism that evolved gradually with the practice within the GATT community.[74]

The down-to-earth nature of the GATT dispute settlement mechanism virtually guaranteed its success. The GATT dispute settlement mechanism developed in response to the urgent requirements of the contracting Parties, who had grown to be active partakers in a truly interdependent international trade régime. The nature of GATT and international trade law is based on the consciousness that unilateralism is not a firm foundation for an extended period of economic development. The experiences and lessons of the 1930s act as a caution against the disrupting and destabilizing consequences of unilateral trade measures and protectionist national economies. Historically, the aftermath of the Second World War made it unviable to establish an international trade organization that would provide a constitutional basis and an institutional framework for international trade law. Thus, the nascent international trade economy had to evolve from the provisional trade agreements as negotiated and laid down in GATT. This enabled the law to develop together with

[71] Article 15(1), 1976 UNCITRAL Arbitration Rules; Article 19, 1985 UNCITRAL Model Law on International Commercial Arbitration.

[72] Article 19(1) 1985 UNCITRAL Model Law on International Commercial Arbitration

[73] This again depends on whether such acts are acts *jure imperii* or acts *jure gestionis*. See *supra* Chapter 2 for a discussion on this topic.

[74] GATT Basic Instruments and Selected Documents, (1990) 26S/210; GATT, Analytical Index, Guide to GATT Law and Practice (6th ed., 1994); Hilf, M., "Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedure", in Petersmann, E.-U. and Hilf, M. (eds.), *The New Round of Multilateral Trade Negotiations: Legal and Economic Problems*, (1988) at 285; Pescatore, P., "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects", (1993) 27 Journal of World Trade 5

the realities of international trade, the needs of contracting Parties, and the confidence in the international trade economy. The development of the dispute settlement mechanism was one of the consequences of this measured evolution. It instituted an adaptable and pragmatic approach to the peaceful settlement of trade disputes, drawing on a conciliatory approach to coax States Parties to submit their disputes for settlement. A more severe and compulsory dispute settlement mechanism, it is submitted, would have only led to political impasse and disuse.

Certainly there are some downsides to the GATT dispute settlement system. With a non-compulsory dispute settlement mechanism, Parties could well ignore the dispute settlement procedures and utilize unilateral interpretations and means to reach their desired goals.[75] This led to much uncertainty and a definite rift between the power-oriented approach and the rule-oriented approach. The power-oriented approach focused on maintaining the integrity of the trade régime through pragmatically applicable solutions rather than a legalistic application of rules and regulations. The rule-oriented approach highlighted the legal nature of the international trade régime, especially arguing that the use of economic or diplomatic influence to resolve trade disputes was contrary to international law. In the sphere of dispute settlement, the divide between these two approaches is illustrated in the debate as to whether the dispute settlement mechanism should maintain its conciliatory nature, or move towards a binding form of dispute settlement such as adjudication.[76]

It is submitted that the adoption of the 1986 Punta del Este Declaration[77] and the 1989 Decision on Improvements to the GATT Dispute Settlement Rules and Procedures[78] moved dispute settlement in international trade law towards a more legalistic framework. This legalistic approach was verified in December 1993 when the Parties ended the Uruguay Round with an agreement on the establishment of a World Trade Organization in 1 July 1995, and the Understanding on Rules and Procedures Governing the Settlement of Disputes.[79]

4.2.3 The World Trade Organization - WTO

The WTO dispute settlement system symbolizes a historic victory for the rule-based perspective of the international trade legalists over the power-oriented

[75] Jackson, J.H., "Perspectives on the Jurisprudence of International Trade: Cost and Benefits of Legal Procedures in the United States", (1984) 82 Michigan Law Review 1571

[76] Montañà i Mora, M., "A GATT with Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes", (1993) 31 Columbia Journal of Transnational Law 103

[77] Punta del Este Ministerial Declaration on the Uruguay Round, 20 September 1986, GATT Basic Instruments and Selected Documents, (1987) 33S/19

[78] GATT Basic Instruments and Selected Documents, (1990), see *supra* note 74

[79] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, signed 15 April 1994, reprinted in (1994) 33 ILM 1

approach of the trade pragmatists.[80] The WTO dispute settlement system shows that a rule-based tribunal is able to move world trade towards a governance system, and that this system is politically sustainable. As global trade exponentially increases, enormous sums of investments and jobs now can rely on a rule-oriented governance system to both protect and further their interests.

It must be noted that there are three normative approaches to trade legalism. These are

1. the Régime Management Model,
2. the Efficient Market Model, and
3. the Trade Stakeholders Model.

The *Régime Management Model* argues that States are the primary actors in the international legal economy. They aim to achieve self-interested objectives such as national power, wealth, purchasing power, and political stability. Against this background, international trade dispute settlement mechanism support the international trade régime by allowing States to control and regulate contractual obligations arising from international and transnational trade treaties. In this model, States dominate the international judicial process, using centralized international tribunals for their own benefit. A clear example of the classical Regime Management Model is the ICAO dispute settlement mechanism. It is a contract between sovereign States aimed to allows benefits from international air navigation and safety cooperation without forfeiting State sovereignty and autonomy. Only States have standing before the ICAO dispute settlement structure. Unresolved disputes are referred to an international tribunal, which makes final, binding decisions.

The *Efficient Market Model* is based in pure free trade theory. It assumes that States interact with each other essentially under the strong duress of powerful private economic actors. This Model advocates direct access and standing for businesses to the dispute settlement mechanisms. States are allowed to transfer accountability for decisions to an extra-political, extra-State entity. International trade laws and institutions are thus used to evade protectionist groups. Examples of this Model include NAFTA, the New York Arbitral Awards Convention, and ICSID. These institutions grant businesses direct standing and domestic enforceability, thereby weakening State monopoly on power in the international legal economy. ICSID, in particular, allows private entities to sue States in a self-regulatory international arbitral process with a built-in appeal system. States agree to the domestic enforcement of arbitral decisions without the "public policy" review discretion as allowed under the New

[80]Shell, G.R., "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization". (1995) 44 Duke LJ 829

York Arbitral Awards Convention. ICSID provides a forum for private business creditors to obtain automatic awards against State debtors using debtors' national courts.

The *Trade Stakeholders Model* also allows a great role for private entities, but is inclined less towards pure trade interests, leaning instead towards an accommodation of a plethora of social interests. These interests include consumer, labor and environmental protection, under the banner of the advancement of a transnational society. The European Union is a good example of this Model, developing from a conventional trading alliance into a socially responsive union that allows private entities and States to assert a broad range of rights and regulations at both the domestic and regional level.

The WTO goes further than all these Models, applying more pressure on States than past manifestations of supranational adjudication. It allows for an appellate body, creating a reverse consensus rule that maintains arbitral or appellate decisions unless a consensus vote rejects them. This no-exit stratagem eliminates the opportunity of political duress in the dispute settlement system.[81]

It may be noted that under the 1907 Hague Convention for the Pacific Settlement of International Disputes, the PCA is declared to be "competent for all arbitration cases".[82] The PCA acts definitively and without appeal. The WTO procedure however, in a marked departure that will have resounding impact on the future of international dispute settlement, provides that Parties are bound to submit to the award. This is a step forward from Article 37 of the 1907 Hague Convention, in which parties only have "an engagement to submit in good faith" to the arbitral award. The WTO dispute settlement mechanism presents a foremost challenge to the present international arbitration systems, as it combines a quintessentially arbitral process with a supranational appellate process that does not depend on domestic law or good faith for its implementation. The WTO's greatest drawback however, is its legal incapacity to hear disputes brought by or against non-governmental organizations or private entities. As such, the PCA's generalized jurisdiction may be seen as an advantage. It is however submitted that sectoral expertise is critical, especially with the development of sectoralization under the General Agreement on Trade in Services, whereby a permanent form of sector-specific dispute settlement becomes increasingly desirable. The sectoralization paradigm should be seriously considered. This is especially important in arbitration, where expertise is just as imperative as neutrality and independence. Under Article 287 of UNCLOS for example, inter-State disputes may be referred not only to the ICJ, but also to a new International Tribunal for the Law of the Sea and two different arbitration

[81] *ibidem* at 898

[82] Article 42 Hague Convention for the Pacific Settlement of Disputes (1907) UNTS 6 (1971) Cmd. 4575

arrangements. The high flexibility provided for States to select a method of dispute settlement however includes arbitration as "the compulsory subsidiary method of dispute settlement". The drafters of the UNCLOS further clearly expected enforceability under the New York Arbitral Awards Convention.[83] It is thus submitted that the PCA may accommodate non-governmental and private entity interests not included under the WTO system. However the choice of the PCA as the preferred arbitral forum requires a consideration of a supranational appellate structure, as well as sectorialized expertise to provide adequate solutions for a dynamic field such as international trade law. It is submitted as well that the WTO's strengthened dispute settlement mechanism has bearing beyond the traditional trade arena, and in particular on States' ability to achieve sustainable development. This impact requires procedural mechanisms that will ensure the effectiveness of the dispute settlement mechanism through greater transparency and greater standing for wider participation.[84]

Further, it is submitted that the provisions of the WTO Dispute Settlement Understanding (DSU) may generate more positive outcomes for sustainable development. The DSU would certainly increase internal transparency through the use of alternative dispute settlement, an improved access to the dispute settlement mechanism, and greater implementation of remedies.

The DSU clearly establishes other means of dispute settlement apart from the adversarial Panel process. Article 5 allows for the methods of good offices, conciliation and mediation, although this has not been utilized to date. It has been argued that a midway could be found between adversarial and conciliatory dispute settlement approaches through the establishment of a comprehensive mediation system that operates in parallel with the Panel procedure. This would complement the tradition of consensus in the WTO and allow more effective non-State actor participation. It is submitted that alternative dispute settlement methods would be especially appropriate in disputes where it would be counter-productive to have a win-lose situation. An example is the *Shrimp / Turtle case*,[85] in which all the disputing parties had an interest in the conservation of the affected turtles. A mediatory procedure could have ensured that the US measure could better protect the turtles while averting economic damage to the complainants. An expansion of the use of such dispute settlement

[83]Sohn, L.B., "Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS IIII Point the Way?", (1983) 46 Law & Contemporary Problems 195

[84]Chaytor, B., "Reforming Dispute Settlement for Sustainable Development", Paper at the SUSTRA International Workshop: Architecture of the Global System of Governance on Trade and Sustainable Development, Berlin (9 - 10 December 2002)

[85]WTO Appellate Body Report on U.S. - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (October 12, 1998), available online at http://www.wto.org/english/tratop_e/dispu_e/distabase_e.htm (Last accessed: 10 January 2006) See also Howse, R., "The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate", (2002) 27 Columbia Journal of Environmental Law 471

procedures would render the Article 5 procedure operational and effective.

A greater access to the dispute settlement mechanism also enables smaller developing States to effectively defend their interests in the WTO. The *Sardines case*[86] between Peru and the European Union illustrates this effect. However, there is still a clear feeling from many poorer States that the dispute settlement system is out of reach. Aside from the financial and logistical constraints, other considerations include the fear of reprisals and loss of developmental aid should these States bring a claim against the larger trading nations. There is a present and evident need to ensure that developing States have greater and more effective tools to allow the proactive usage of the dispute settlement mechanism. A parallel consultative system may help, allowing more in-depth consultations between disputants and assisting towards a negotiated agreement. An independent third party with legal expertise could act as a facilitator, either as a precursor to the Article 5 dispute settlement procedures, or parallel to the pre-Panel consultation process. A further option is to use the European Court of Justice's model of a WTO Advocate General. This Advocate General would summarize the Parties' submissions and make recommendations as to where the Panel or WTO Dispute Settlement Body should focus, and how the legal issues could be resolved. The WTO Advocate General could also serve as a filter for the consideration by the Panel of the concerns of concerned third party or non-State actors. This concept will assist the poorer Member States of the WTO as well as allow non-governmental organizations to express their perspectives and points of law inexpensively. Further, the WTO Advocate General could secure impartial expert legal opinion for the use of the Panel or members of the dispute settlement body.

The implementation of dispute settlement awards will be, ultimately, influenced by the relative economic and political weight of the Parties to the dispute.[87] This is a nod to the fact that poorer or weaker WTO Member States may be unable to invoke trade sanctions to enforce rulings against more power Members. Such sanctions are thus not a practicable mechanism for the implementation of rulings, the achievement of reparation or the encouragement of compliance with WTO rulings. Conversely, such sanctions if applied by a particular developing Member State would most probably lead to economic damage on itself. However, the threat of sanctions when imposed by a powerful WTO Member State is likely to induce or force compliance. It is however submitted that there should be a balance between the implementation of legal and

[86]European Communities - Trade Description of Sardines, Report of the Appellate Body, WT/DS231/AB/R (decided September 26, 2002) (adopted October 23, 2002) See also Wold, C., Gaines, S. and Block, G., *Trade and the Environment: Law and Policy*, (2005)

[87]Petersmann, E.-U., "International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction", in Petersmann, E.-U., (ed.) *International Trade Law and the GATT/WTO Dispute Settlement System*, Volume 11, Studies in Transnational Economic Law, (1997) 3

economic enforcement procedures available to WTO Member States at differing phases of economic development and prowess. One suggested option is to allow for flexibility in reparation, compensation and the suspension of concessionary remedies to impose an obligation on a non-compliant Member State to allow market access on concessionary terms in a sector of the complainant's choice. It may also be worthwhile to allow the regular use of financial compensation as an alternative to the exercise of trade sanctions by a developing Member State. Damages or reparations could be quantified on the basis of a loss of profits due to the offending action, including the losses sustained by natural or juridical persons connected with the complainant Member State.[88] This would include retroactive compensation for damage sustained from the moment the measure was applied. This would make the dispute settlement mechanism appealing especially to those who depend on a single or a few important trading relationships. An added advantage is that such financial compensation would distribute the outlay of non-compliance across all components of the offending Member State instead of, with the use of carousel sanctions, the costs being borne by a few sectors unrelated to the dispute.

Aside from this, the DSU can also increase external transparency through the use of expert review groups and *amicus curiae* briefs.

Article 13.2 of the DSU provides that Panels may seek information from any relevant source and may consult experts to obtain their technical opinion on certain aspects of the dispute. Article 13 is the only provision relating to participation by individuals or potentially, non-governmental organizations, in the dispute settlement procedure. Expert review groups could be used by Panels to provide technical information and opinion in complex and technical cases. Where there are disputes concerning the interpretation of both environmental law and trade law and the consequent overlapping obligations arising from them, the Panels may be well assisted by Expert Review Groups comprising international law specialists in these fields.

A cause for regret is that individuals and non-governmental organizations do not have a right to be consulted or to participate in WTO dispute settlement proceedings. Recently however, some individuals and non-governmental organizations have submitted *amicus curiae* briefs to Panel and Appellate Body proceedings pursuant to Article 13.1. This development is not specific to the WTO. It has been the case in the European Court of Human Rights, where the position of the individual has gradually improved in the history of the Court's jurisprudence. From 1982 the applicant could act as a party in proceedings involving either the Commission or a State. Similarly, the Inter-American Court of Human Rights have gradually accepted *amicus curiae* briefs.[89] There has

[88]Mosoti, V., "The Award of Damages under WTO Law: An African Take on the Debate", (May 2002) Bridges, Year 6 No. 4, at 9

[89]Shelton, D., "The Participation of Non-Governmental Organisations in International

been, in fact, specific reference to these briefs in the Court's fifth Advisory Opinion.[90] The Court has also allowed the *amici* to participate in oral testimony, thus increasing public involvement and offering a greater chance for a fair hearing. The WTO Appellate Body held in its ruling in the *Shrimp/Turtle case*[91] that the submission of unsolicited information in the form of *amicus* briefs is not incompatible with the provisions of the DSU. However, the attempt by the Appellate Body during the *Asbestos* dispute[92] to delineate detailed procedures for the admission of *amicus* briefs was curtailed by the General Council. For the foreseeable future, the consideration of *amicus* briefs by the Panel and Appellate Body will continue to be discretionary. In the *Sardines case*,[93] submitted *amicus* briefs were considered by the Appellate Body.[94]

Dispute settlement is taking on an ever more momentous part in the operation of the international and multilateral trade economy. With more new multilateral environmental agreements coming into force, the overlapping obligations under the WTO system will probably cause additional complicated disputes between WTO Members. The WTO dispute settlement system therefore must be in a position to maintain the equilibrium between trade and other aspects of public policy. Concurrently, the prevalence of developing States in the WTO means that the dispute settlement's efficacy turns on guaranteeing that all its Members States have equal access to the dispute settlement system in as credible and equitable a manner as possible.

4.2.4 The World Bank Inspection Panels

The collective nature of the non-compliance institutional régimes have, however, not expanded participation in the dispute settlement processes to non-treaty Parties. One example of the blending of dispute settlement mechanisms with innovative procedures I the Inspection Panels established by the international financial institutions, the World Bank, the Inter-American Bank and the Asian Development Bank.[95] A critical analysis of these Inspection Panels

Judicial Proceedings", (1994) 88 AJIL 611; see *infra* the discussion in the next section.

[90]Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29, American Convention on Human Rights), (1985), 5 Inter-Am. Ct.H.R. (ser A), para. 60

[91]see *supra* note 85

[92]Panel Report, European CommunitiesMeasures Affecting Asbestos and Asbestos- Containing Products, WT/DS/135/R, 18 September 2000; see also Appellate Body Report, European CommunitiesMeasures Affecting Asbestos and Asbestos Containing Products, WT/DS135/AB/R, 12 March 2001

[93]see *supra* note 86

[94]see also the European Union's submission in TN/DS/W/1 Contribution of the EC to the Improvement of the WTO Dispute Settlement Understanding, (13 March 2002)

[95]The International Panel International Bank for Reconstruction and Development Report August 1, 1994 to July 31, 1996 (The World Bank); see also Shihata, I., *The World Inspection Panel*, (1994)

swings the focus of the discussion in two directions: Firstly, the complaint is against the institution itself and secondly, the process is initiated by non-State actors, that are by definition non-parties to the institutional regime.

The World Bank introduced the first of these Inspection Panels in 1993 following rife disapproval about certain development projects, most famously the Indian Sardar Sarovar Dam project.[96] The Inspection Panel was an innovative mechanism of enhancing conceptions of effectiveness, good governance, transparency and accountability within international institutions, especially where their activities directly intrude upon peoples, lives and living conditions. Creation of the Inspection Panels represents an admission that disputes arising out of development projects cannot be defined solely by the project State and the relevant lending Agency. Hence, requests for inspection of a World Bank-financed project can be made by the intended beneficiaries. This includes a community, organization or other group residing in the State in which the project is being implemented, or an adjacent State, if the group is adversely affected or likely to be adversely affected, by the project. Requests may also be made by representatives residing in the same State, or in exceptional cases outside the State, if the Board consents.

A granted request for inspection does not lead to an independent assessment of the project, nor to an appraisal of its conformity with international law. Instead, it results in an investigation of the relevant Bank's compliance with its own operational policies and practices. The focus is upon actual and potential damage, especially of a social or environmental kind, due to non-compliance with Bank policy, not from a violation of international law. The World Bank envisioned that recourse to the Panel would be limited to those "exceptional cases where the Bank's own high standards were not met".[97]

Unlike the position of the Implementation Committee with regard to the regime for the protection of the ozone layer, the Panel is not an integral part of the World Bank. However, its members of the standing Panel are chosen for their germane expertise. The Inspection Panel effectually acts as a conciliator between the requesters, the Bank Management and the Board. Its procedures resemble those for dispute settlement and their flexibility allows them to be tailored to the particular circumstances. Inspection can include impartial investigation, visiting the project site, broad consultations, appraisal of decision-making and preparing recommendations for remedial measures. Consultations can take place with relevant Bank staff, local people, intended project beneficiaries, grassroots and international non-governmental organizations and local and central governmental agencies. The Panel's findings are sent to the President and Executive Directors of the Bank who determine upon any response. Unlike

[96] Morse, B. and Berger T., *Report of the Independent Review, Sardar Sarovar*, (1992)

[97] Oxfam, *The World Bank Inspection Panel: Analysis and Recommendations for Review* (February 1996)

either non-compliance procedures or dispute settlement, the objective is not to reach an amicable solution between the requesters and the Bank. Instead, it is to reach a decision by the Board based on informed, impartial recommendations. The process is more akin to an institutional grievance-procedure requiring only conformity with Bank policies, and not any re-evaluation of the project.

What is remarkable is the conferral of standing to commence the process upon non-State actors. This is a step away from traditional State-oriented international dispute settlement, and broadens beneficiary participation. It admits that the traditional legal and procedural exclusion of non-State actors from international dispute settlement ignores the reality that international decision-making has a bearing upon peoples' lives, a position the ICJ for example, has not taken.[98] It also concedes the role of financial institutions as actors on the international plane.

However, there are limits to the latent empowerment accorded by the right to request inspection. Single individuals cannot request inspection, but must be part of a community or organization. Doubts have been raised as to the capability of local groups to access the procedures and the receptivity of the Bank to requests for inspection. Local people may be ignorant of their rights, and of the existence and powers of the Inspection Panels. Even with such knowledge, they may remain unable to access information about the relevant policies and the potential effects of the project, especially where the national government hinders the flow of information. One response is to facilitate requests from representatives, including non-local representatives, who may have greater resources. The World Bank's limitation of non-local representation is an *aide memoire* that non-State actors stay outside the project blueprint and management process. The Bank seeks to prevent well-funded western NGOs from taking up cases and politicizing what some borrower governments view as internal domestic issues. Even if such representation were more readily accorded there is need for some caution. Authentic articulation of local people's perspectives cannot be frivolously assumed. Assiduousness is necessary to ensure that such representation fully encompasses local opinion, including dissenting views. Procedural rights of the requesters once the process has commenced are poorly defined. Without, for example, the right to be heard or to have access to full documentation, the Inspection Panels may appear to offer more to affected communities than is actually the case.

[98] Chinkin, C., "Increasing the Use and Appeal of the Court", in Peck, C. and Lee, R. (eds.), *Increasing the Effectiveness of the International Court of Justice*, (1997) at 43

4.3 Grassroots Enforcement of State Obligations: Regional Human Rights Institutions

Human rights are doomed to remain idealistic concepts if not rendered a tangible actuality for the peoples they were intended to serve.[99] The enforcement of human rights has been an ongoing quandary in human rights law. The last half-century has witnessed the development of intricate human rights enforcement mechanisms to implement internationally recognized human rights.[100] These mechanisms include a diversity of regional, national and *ad hoc* institutions to complement the international United Nations human rights framework.

Three regional human rights adjudicatory institutions have recently emerged. The establishments of the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Human Rights are critical steps in the realization of human rights. In a world uniquely united by humanity and rights, and yet estranged by ideology, geography, economics and culture, these regional adjudicatory institutions provide analogous and yet contrasting experiences on the implementation of human rights. It is submitted that enforcing human rights at the regional level primes the State for interaction in an international human rights régime. Institutional procedures of these regional courts have a crucial role to play in enhancing the effectiveness of human rights enforcement.

The quintessence of human rights law is to secure State compliance with international law. Constitutional safeguards, effectual implementation, and judicial remedies are essential to turn human rights ideals into actuality.[101] States' compliance with international law may stem from various considerations. Some States observe international law because they have a vested interest in upholding the norms they made or consented to. Another motivation could be the presence of a system of "horizontal enforcement" where would-be defaulters are checked by the anticipated retaliation of other States. These considerations however are not as effective for human rights enforcement.[102]

States have not yet digested the reality that they are internationally obliged to respect their citizens' rights. Still less have States accepted that the treatment of their own citizens is an international concern. Further, horizontal enforcement operates less effectively for human rights. States are not ade-

[99] This section is an adapted summary of a longer discussion on the topic of regional enforcement of human rights from Goh, G.M., "Human Rights Adjudicatory Institutions - Some Procedural Issues", (2003), LL.M. Thesis, Faculty of Law, University College London, University of London, unpublished manuscript available on request to the author.

[100] Donnelly, J., *Universal Human Rights in Theory and Practice* (1989) at 205

[101] Petersmann, A.J., "Constitutionalism and International Adjudication" (1999), 31 Journal of International Law and Politics 101; see generally Wood, AW., *Kant's Ethical Thought* (1999)

[102] Henkin, L., "International Law: Politics, Values and Functions", in 216 Collected Courses of the Hague Academy of International Law 13 Volume IV (1989), 251

quately motivated to enforce human rights against another State. Many States are themselves exposed to charges of human rights violations. Thus, they are averse to responding to another State's violations.

A panoply of human rights régimes have emerged in response to these difficulties. Donnelly has classified these régimes into declaratory, promotional, implementation and enforcement régimes.[103] *Declaratory régimes* involve international norms, but not international decision-making. *Promotional régimes* involve international sharing of knowledge and efforts to promote the implementation of norms. *Implementation régimes* involve weak monitoring and co-ordination procedures. Enforcement régimes involve binding international decision-making and strong forms of monitoring of compliance with international human rights standards.[104] It is submitted that all these régimes can successfully be employed through the framework of regional human rights courts working in tandem with the national and international systems.

The regional institutions for the enforcement of human rights illustrate the importance of accessible procedures at the grassroots level for greater effectiveness of international law. The formal aspects of procedural law are the guarantors of freedom - "Les formalités de la Justice sont nécessaires à la liberté."[105] Procedure is crucial for increasing access to justice. Effective procedure ensures certain results.[106] It provides an accessible, fair and expeditious review of both parties' claims. This allows for a determination that indicates the basis of a finding and the steps required to remedy the violation. Most importantly, it ensures that the defaulting State acts upon the finding within a reasonable time.[107]

The court's efficiency depends on the extent to which its procedure is framed and followed. The procedure should be formulated to empower the litigants.[108] The courts' procedure must ensure that the disposition of cases is not delayed. It should ensure complete independence of the Bench. Most crucially, it must generate public confidence in the court as a regional instrument for redressing human rights violations. The rules must balance the competing interests that will inevitably arise between the applicants and the respondents. The courts' pronouncements gain their authority from the impartiality of their procedure in providing due process to the parties. Lord Woolf lists the requirements of procedural fairness as follows:[109]

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[103]Donnelly, J., *Universal Human Rights in Theory and Practice*, see *supra* note 100 at 206

[104]*ibidem* at 250 - 269

[105]Montesquieu, *L'Esprit des Lois*, LXXIX, (1970) Chapter 1

[106]van Caenegem, R.C., *Judges, Legislators and Professors*, (1987) at 162

[107]Byrnes, A., "An Effective Complaints Procedure in the Context of International Human Rights Law", in Bayefsky, AF., (ed.), *The UN Human Rights Treaty System in the 21st Century*, (2000) 139 at 143

[108]Kuloba, R., *Courts of Justice in Kenya*, (1997) at 103

[109]Lord Woolf, *Access to Justice (Interim Report)*, (June 1995) at 19

1. The system should deliver just results;
2. It should be fair by ensuring that litigants have an equal and adequate opportunity, regardless of their resources, to assert or defend their legal rights;
3. It should be comprehensible to its users;
4. It should be responsive to the needs of its users; and
5. It should promote certainty in the law.

A few human rights treaties establish regional enforcement systems to ensure that States Parties comply with their obligations. These systems usually consist of a judicial institution composed of experts and judges. The judicial institution is endowed with a range of functions, including the power to receive and consider individual petitions.[110] These judicial institutions provide a needed enforcement mechanism. They answer the UN's call for more binding instruments that recognise human rights and define them with greater precision.[111]

Chapter VIII of the UN Charter provides for regional arrangements in relation to international peace and security. However, it leaves aside the question of regional human rights co-operation. Nonetheless, three regional human rights courts have developed: the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Human Rights. Moreover, there is a quiescent Arab system and a proposed Asian system. However, the latter two systems have not produced judicial enforcement mechanisms within the framework of a human rights charter. This section will look first at the quiescent regional human rights institutions in the Arab and Asian States, and then turn to an overview of the established European, Inter-American and African Courts.

4.3.1 Gaps in the Regional Framework: the Arab, Asian and Southeast Asian States

The Council of the League of Arab States founded the Permanent Arab Commission on Human Rights in September 1968. It has been preoccupied primarily with the rights of Arabs living in Israeli-occupied territories.[112] Building on the Universal Islamic Declaration of Human Rights,[113] the League of Arab

[110]Pinto, M., *Temas de Derechos Humanos* (1997) at 119 - 153

[111]see generally Pinto, M., *La Denuncia ante la Comisin Interamericana de Derechos Humanos* (1993)

[112]See generally Steiner, H.J. and Alston, P., *International Human Rights in Context: Law, Politics, Morals* (2nd ed., 2000) at 780

[113]Universal Islamic Declaration of Human Rights (19 September 1981) 21 Dhul Qaidah 1401

States approved an Arab Charter on Human Rights in September 1994.[114] The Charter provides for periodic reports to the League's Human Rights Committee by States Parties. The Charter does not specify any other procedures for human rights enforcement. States of the Middle East are divided over the need to enforce human rights law through a regional judicial system.

Asian States have been ambivalent to human rights, thus precluding agreement on regional enforcement initiatives.[115] In 1993, anticipating the Vienna World Conference on Human Rights,[116] Asia-Pacific non-governmental organisations adopted an Asia-Pacific Declaration on Human Rights calling for the establishment of a regional human rights ré. In 1997 the Asian Human Rights Charter was adopted.[117] In deference to the region's diversity and vastness this urged instead the establishment of national human rights commissions. The Asian States' positions were indicated at a UN-sponsored workshop in 1996. The thirty participating States concluded a regional human rights mechanism in the Asian and Pacific region would be premature. They agreed however, to explore the possibilities for establishing such a regional mechanism.[118] The case for a Human Rights Charter for the Association of Southeast Asian Nations (ASEAN) and the establishment of an independent ASEAN enforcement mechanism has been mooted for some time.[119] The Working Group for an ASEAN Human Rights Mechanism (WG) was established following a string of workshops.[120] ASEAN Foreign Ministers acknowledged the work of the WG in their 1998 Joint Communiqu.[121] The WG is studying the viable routes ASEAN

[114]Arab Charter on Human Rights, September 15, 1994, reprinted in (1997) 18 Human Rights Law Journal 151

[115]Abidin I., "Human Rights: The Indonesian View", (1997), online at http://www.dfa.deplu.go.id/view/humanrights/paper/indonesianview.php3 (Last accessed 5 January 2006); Cerna C., "East Asian Approaches to Human Rights" (1995 - 96) 2 Buffalo Journal of International Law 201

[116]see the Statements made by Government officials and representatives from ASEAN at the 1993 Vienna World Conference on Human Rights, reproduced in Appendix III, Tang, J.T.H. (ed.), *Human Rights and International Relations in the Asia-Pacific Region* (1995), at 213 - 249

[117]See Asian Human Rights Charter Draft, online at http://is7pacific.net.hk/ ahrchk/ahrdraftpart2.html (Last accessed 12 January 2006); Bangkok NGO Declaration on Human Rights, reproduced in de Varennes, F. (ed.), *Asia-Pacific Human Rights Documents and Resources*, (1998) at 147

[118]Muntarbhorn, V., "Asia, Human Rights and the New Millennium: Time for a Regional Human Rights Charter?" (1998), 8 Transnational & Contemporary Problems 407 at 414

[119]see generally, Wilde, R.., "NGO Proposals for an Asia-Pacific Human Rights System", (1998) 1 Yale Human Rights & Development Law Journal 137, Thio, L., "Implementing Human Rights in ASEAN Countries: 'Promises to keep and miles to go before I sleep"', (1999) Yale Human Rights & Development Law Journal 1

[120]Weston B.H. et al., "Regional Human Rights Régimes: A Comparison and Appraisal", (1987) 20 Vanderbilt Journal of Transnational Law 585; Wilner, G.M., "Reflections on Regional Human Rights Law" (1995/96) 25 Ga. Journal of International & Comparative Law 407

[121]Donnelly, J., *Universal Human Rights in Theory and Practice*, see *supra* note 100 at 200

could take towards establishing such a commission.[122]

4.3.2 Established Regional Human Rights Institutions: the European, Inter-American and African Systems

The UN General Assembly pondered the dynamism of regional mechanisms as early as 1966.[123] In 1977, it adopted a resolution requesting "States in areas where regional arrangements in the field of human rights do not yet exist to consider agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights".[124] Four years later, the African Charter of Human and Peoples' Rights was adopted. However, the adoption of regional mechanisms started some thirty years before, with the births of the European and Inter-American systems.

On November 4, 1950, the Council of Europe agreed to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[125] The substantive provisions of the European Convention are founded on the blueprint of what is now the International Covenant on Civil and Political Rights. Together with its eleven additional Protocols, it represents the most highly evolved and successful regional enforcement mechanism to date.[126] This mechanism has developed a substantial corpus of case law, which the State parties generally have respected.[127] Some European States deem the Convention's provisions to be part of their domestic law. Other State Parties have acted to ensure their domestic laws conform to their obligations under the Convention.[128] Building upon these successes, a consolidation of the European régime occurred on November 1, 1998, when Protocol No. 11[129] entered into force. Two enforcement mechanisms created by the Convention, the European Commission of Human Rights and the ECHR were merged into a reconstituted court. This Court is empowered to hear individual and interstate petitions

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[122]Text of reservations is available at United Nations Treaty Series, Treaties in Force, online at http://www.un.org/Depts/Treaty/fin...newfiles/part_boo/iv_boo/iv_8.html (Last accessed: 10 January 2006)

[123]see generally Russett, B., *International Regions and the International System: A Study in Political Ecology* (1967)

[124]UN GA Res. 32/127 (1977)

[125]European Convention for the Protection of Human Rights and Fundamental Freedoms, (November 4, 1950), 213 UNTS 221 [hereinafter the "European Convention"]

[126]Bernhardt, R., "Reform of the Control Machinery under the European Convention on Human Rights: Protocol No. 11", (1995) 89 AJIL 145

[127]see generally Mowbray, A., *Cases and Materials on the European Convention of Human Rights* (2001)

[128]see generally, Leach, P., *Taking a Case to the European Court of Human Rights* (2001)

[129]Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, (May 11, 1994), 33 ILM 943 [hereinafter "Protocol 11"]

without the prior approval of the local government. The decisions of the court are final and binding on the State Parties.[130]

In 1948, the Ninth Pan-American Conference adopted the American Declaration on the Rights and Duties of Man.[131] This was parallel with its founding of the Organisation of American States (OAS). Unlike the Universal Declaration of the Human Rights adopted seven months later, the American Declaration set out both the duties and rights of individuals. In 1959, the Inter-American Commission on Human Rights was created and charged with investigating human rights activities in the region. Finally, in 1969, the Inter-American Specialised Conference on Human Rights adopted the Inter-American Convention on Human Rights.[132] This Convention entered into force in July 1978. It made the existing Inter-American Commission an organ of the Convention and established the Inter-American Court of Human Rights (IACHR). In November 1988, the OAS adopted the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.[133] Of the twenty-six Western Hemispheric States that have signed the Convention, only the United States has not ratified it. The United States is also not party to the Additional Protocol, which entered into force in November 1999.[134] The configuration of the Inter-American system is akin to that of its European counterpart.[135] However, there are three striking differences. Firstly, the American Convention recognises the connection between individual duties and individual rights. This mirrors the influence of the American Declaration. Secondly, the American Convention inverts the priorities of the European Convention before Protocol 11. It guaranteed individual petitions while making interstate complaints optional. Finally, the Inter-American Court has jurisdiction to interpret the human rights provisions of other treaties, including those of the OAS Charter.[136]

In 1981, the Organisation of African Unity (OAU) adopted the African

[130]Schemers, H., "The Eleventh Protocol to the European Convention on Human Rights", (1994) 19 European Law Review 367

[131]American Declaration on the Rights and Duties of Man, OAS Res XXX, (1948) reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/SerLV/II882

[132]American Convention on Human Rights, also known as the Pact of San José, Costa Rica, (18 July 1978), OATS No.36 at 1 [hereinafter the "American Convention"]

[133]Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, (7 November 1988), OAS/SerLV/II92

[134]see generally, Buergenthal, T., and Shelton, D., *Protecting Human Rights in the Americas: Cases and Materials* (1995)

[135]Cerna, C., "The Structure and Functioning of the Inter-American Court of Human Rights (1972 - 92)", (1992) 63 British Yearbook of International Law 135

[136]Weston, BH., "Human Rights", in *Encyclopaedia Britannica* (15th ed., 2002), online at http://www.britannica.com/be/article?eu=109242&tocid=0&query=human%20rights (Last accessed: 10 January 2006)

Charter on Human and Peoples' Rights.[137] It entered into force on 21 October 1986. The majority of the African States are parties. Like its Inter-American and pre-Protocol 11 European counterparts, the African Charter provides for a human rights Commission. There is no stricture on who may file a complaint with it. Differing with the European and Inter-American procedures however, States are urged to arrive at an amicable resolution without implicating the Commission. The African Court on Human and Peoples' Rights (ACHPR) was created by the Protocol to the African Charter.[138] The Protocol shall come into force 30 days after fifteen instruments of ratification have been deposited. As of September 12, 2002, six States have ratified the Protocol. They are Burkina Faso, Mali, Senegal, the Gambia, Uganda and South Africa.[139] Four characteristics of the African Charter are noteworthy.[140] Firstly, it provides for economic, social and cultural rights as well as civil and political rights. Here it parallels the Inter-American Convention and contrasts with the European Convention. Secondly, differing from the European and Inter-American Conventions, it recognises group rights. The right of self-determination is also elaborated as the right to existence, equality and non-domination. Thirdly, it espouses two third-generation rights: the right to economic, social and cultural development and the right to national and international peace and security. Finally, it is the only instrument to detail individual duties to the family, society, the State and the international African community.[141]

4.3.3 Significance of the Establishment of Regional Human Rights Institutions

Several lessons can be learnt from the establishment of the various regional human rights courts.

Firstly, States are more amenable to regional than international pressures for compliance. Causes of violations are close to home - a weak rule of law, socio-economic underdevelopment, and political instability. Thus, international influences are alien and remote. Regionally however, international solutions

[137]African Charter on Human and Peoples' Rights, (27 January 1981), OAU Doc.CAB/LEG/67/3 Rev 5, 21 ILM 58 (1982) [hereinafter the "African Charter"]

[138]Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, (9 June 1998), not yet in force, OAU/LEG/MIN/AFCHPR/PROT (III) [hereinafter "African Protocol"]

[139]See *List of Countries Which have Signed, Ratified, Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights*, AUCAB/LEG/66.5 (status of ratification as on Sept 12, 2002)

[140]Naldi, G.M. and Magliveras, K.D., "Reinforcing the African System of Human Rights; The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights", (1998) 16 Netherlands Quarterly on Human Rights 431

[141]Quashigah, E.K., "The African Court of Human Rights: Prospects, in Comparison with the European Court of Human Rights and the Inter-American Court of Human Rights", (1998) 10 African Society of International & Comparative Law 59

can be adjusted to local difficulties. Inter-State obligations can be limited to achievable dimensions and endorsed by manifest mutuality.[142] It is submitted that regionalism is especially apt for the fostering of inter-State co-operation.

Secondly, regional courts provide the "bite" to the "bark" of human rights commissions. The African example is particularly compelling. The African Charter did not create a strong judicial institution to supplement the African Commission's work.[143] As such, the Commission's effectiveness was gravely impaired in comparison to its European and Inter-American counterparts.[144] The African Commission's work was often delayed, slow, ineffectual and unenforced.[145] The Court established by the African Protocol has revived optimism in the African system.[146] This Court allows the development of jurisprudence from an African perspective, execution of appropriate remedies, publicity of human rights and compulsion of State compliance.

Thirdly, regional courts serve as an effective middle ground between "top-down" and "bottom-up" pressures for enforcement. Various UN human rights declarations call upon international organisations to promote State compliance.[147] Yet, such "top-down" reforms remain slow because many States choose not to limit their powers.[148] Human rights enforcement hardly develops "top-down" without "bottom-up" pressures by citizens and courageous judges advocating human rights vis-à-vis governmental abuses of power. The problem with these "bottom-up pressures" is that they often involve bloodshed and violence. It is submitted that regional courts provide a platform for the peaceful interaction of international "top-down reforms" whilst harnessing grassroots "bottom-up pressures".

Lastly, there are advantages in the complementarity of regional courts and the UN system.[149] Four considerations favour regional organisations. Firstly, geographic and cultural bonds exist among States of a particular region. Secondly, recommendations of a regional organisation generally meet with less resistance than those of a global body. Thirdly, human rights publicity will be

[142]Claude, I., *Swords into Ploughshares*, (4th ed., 1984) at 102

[143]Udombana, NJ., *The African Regional Human Rights Court: Modelling its Rules of Procedure* (2002) at 19

[144]Communications 54/91, *Malawi African Association and Ors. v. Mauritania* (1991) at para. 83

[145]Graefrath, B., "Reporting and Complaint Systems in Universal Human Rights Treaties", in Rosas, A. and Helgesten, J., (eds.), *Human Rights in a Changing East/West Perspective* (1990) 290 at 327

[146]Udombana, N.J., "Toward the African Court on Human and People's Rights: Better Late than Never", (2000) 3 Yale Human Rights & Development Law Journal 45 at 47

[147]E.g. the Report of the Intergovernmental Group of Experts on the Right to Development, UN Doc. E/CN.4/1998/29 (7 November 1997)

[148]E.g. The Special Report on Human Rights, *The Economist* (18 August 2001) at 20; Amnesty International, *United States of America, Rights for All* (1998) 123 - 135

[149]Vasak, K. and Alston, P., (eds.), *The International Dimension of Human Rights* (Vol. 2, 1982) at 451

more effective. Lastly, there is less possibility of compromised formulae that global bodies churn out due to political considerations.[150]

Naysayers however dispute that since human rights are global, they should be interpreted and enforced by global institutions. Secondly, regional bodies would at best duplicate the UN's work and at worst, develop contrary practices. Thirdly, preoccupation with regional arrangements might delay ratification of international Conventions.[151] However, it is submitted that regional organisations can exercise their advantages whilst avoiding such conflicts. The European system shows that the regional judicial enforcement of human rights can constitute an element in a policy of regional integration. So long as regional judicial protection is exacting, collaborative and operates in accordance with the UN Charter,[152] regional judicial systems are a crucial component of the international human rights enforcement mechanism.[153]

The establishment of the various regional human rights Courts is a milestone achievement for the enforcement and promotion of human rights. The evolution of the European, Inter-American and African Courts have evinced some teething problems. However, in the case of the first two Courts, teething problems have given way to a real bite in the enforcement of human rights in their respective regions. It remains to be seen if the African Court will also be as effective in securing human rights for the peoples of Africa.

It is important to remember however, is that the procedures of these institutions act as the gatekeepers to justice for victims of human rights violations. It is especially crucial that these three existing bodies should strive for a greater access to justice by improving their own systems through shared experiences, combined resources and collective inspiration.

It is true that the mere existence of a regional human rights judicial institution does not automatically ensure the protection and promotion of human rights. However, regional human rights institutions have immense potential for improving State governance and human rights protection. Their potency relies however, on an intricate myriad of political, economic and social considerations. Many of these considerations fall within the scope of the executives and legislatures of the respective States and regional organisations. It is the political will and good faith of States that will decide the effect of a regional human rights judicial institution in the protection and promotion of human rights. Only with the backing of serious governmental commitment to human

[150]Commission to Study the Organisation of Peace, *Twenty-Eighth Report: Regional Promotion and Protection of Human Rights*, (1980) at 15

[151]Taylor, R., *International Organisation in the Modern World: The Regional and Global Process*, (1993) at 25

[152]Simma, B., "Chapter VIII: Regional Arrangements", in Simma, B. et al, (eds.), *The Charter of the United Nations: A Commentary*, (1994) 679

[153]Weston, B., Lukes, R. and Hnatt, T., "Regional Human Rights Régimes: A Comparison and Appraisal", (1987) 20 Vanderbilt Journal of Transnational Law 585

rights enforcement can regional human rights judicial institutions turn idealistic concepts of human rights into a manifest reality.

4.4 The World's Common Spaces: The Antarctic System and the Law of the Sea

The mechanisms for dispute settlement in the law of the sea and Antarctica are notable for several reasons. The first is the amazing comprehension of all details to do with the law of the sea that is encompassed in the 1982 United Nations on the Law of the Sea (UNCLOS). After many years of political wrangling and legal drafting, as well as many abortive attempts, in 1982 a fully comprehensive framework Convention was achieved, including an intricate dispute settlement system. The detail that went into that document, in the light of the many economic, technical, political and legal considerations with regard to this field of activity, make the UNCLOS an amazing feat of achievement. Secondly, these two régimes deal with the world's common spaces. Thirdly, these territories are extremely rich in resources and potential. The use, exploration and exploitation of the potential, nascent and existing resources of the high seas, deep seabed and Antarctica is regulated by these two dispute settlement procedures. Lastly, especially with regard to Antarctica, this region also encompasses the legal ideal of the Common Heritage of Mankind, which has spawned other legal developments, especially with regard to international space law and the use and exploration of outer space and the celestial bodies.

4.4.1 The Antarctic Mineral Resource Convention

Although the dispute settlement system of the UNCLOS does not have a direct effect on the attitudes of States to compulsory third party dispute settlement, it certainly serves as a model for dispute settlement systems in later multilateral conventions. One of the first occasions this became apparent, was the Convention on the Regulation of Antarctic Mineral Resource Activities.[154] This Convention was concluded in 1988, after six years of negotiations, but as a result of developments subsequent to the successful end of the negotiations, the idea of opening the Antarctic continent for the exploration and exploitation of minerals has been abandoned in order to protect the Antarctic environment. A moratorium on these activities was agreed upon for the next fifty years in 1991. This is laid down in a Protocol to the 1959 Antarctic Treaty.[155] The

[154]Wolfrum, R., *The Convention on the Regulation of Antarctic Mineral Resources Activities: An Attempt to Break New Ground*, (1991); see also Jørgensen-Dahl, A. and Østreng W. (eds.), *The Antarctic Treaty System in World Politics* (1991)

[155]see Verhoeven, J., Sands, P. and Bruce, M. (eds.), *The Antarctic Environment and International Law* (1992)

1959 Antarctic Treaty[156] merely makes reference to dispute settlement consistent with the provisions of the UN Charter, including the formal use of the ICJ.[157]It is very unlikely that the Minerals Convention will ever enter into force.

Despite these recent developments, the Minerals Convention remains an interesting subject for study in the present context. Its most important feature in this respect is the establishment of a comprehensive internationalized resource management system. Although the mineral activities were to be undertaken by individual States or private enterprises, they would be subject to strict control by the Antarctic Consultative Parties, or institutions set up by them for this purpose. There are four objectives in the development of the Convention:[158]

1. To preserve the Antarctic Treaty System: The Antarctic is governed by a limited number of States, the Consultative Parties to the 1959 Antarctic Treaty. Only when certain requirements are fulfilled can a State become a member of this select group. When it became clear that the Antarctic area contained potentially valuable resources, third States started to challenge this system and tried to replace it with a universal system in the context of the UN. The Consultative Parties were thrown at the mercy of one another: unless they could succeed in developing a mineral activities regime that would convince most of the other States that mineral activities would by undertaken only with due respect for the interests of third States, the pressures on developing a UN system for the management of Antarctica would increase considerably.

2. The basic provision of the Antarctic Treaty, reserving the Antarctic area for peaceful purposes only, had to be preserved, despite the increased chances of conflict when the economic value of Antarctica became clear.

3. The area should be opened for mineral activities, but only if the chances of environmental harm are reduced to a minimum.

4. The decisions on the starting of mineral activities and the control on compliance with all regulation should not be left to individual States under whose responsibility private contractors would work, but should be reserved to the Consultative Parties.

[156]Antarctic Treaty 1959, opened for signature at Washington December 7, 1959. 97 UKTS Cmd. 1535, 402 UNTS 71 [hereinafter "Antarctic Treaty"]

[157]Article XI, Antarctic Treaty, *ibidem*. There was a real prospect of the use of these dispute settlement mechanisms following the *Antarctica* Cases (UK v. Argentina; UK v. Chile) [1956] ICJ Rep. 12 when the UK brought claims against Argentina and Chile to resolve territorial disputes in Antarctica. These were eventually struck off the list by the ICJ, and no similar claims have since arisen.

[158]For an excellent overview of this subject, see generally Watts, A., *International Law and the Antarctic Treaty System* (1992)

These objectives required a comprehensive Convention which would provide detailed rules and regulations. The Consultative Parties succeeded in drafting such a text after six years of negotiation. It met all of these objectives, although the reactions of third States could not be predicted. A close study of the history and text of the Convention, in particular its internationalized decision-making structure, will show that it could only offer a viable regime if it were to be accompanied by an elaborate set of dispute settlement procedures. On the one hand, the interplay between general legal principles concerning the Antarctic, universal interest in protecting its environment, and specific provisions for commercial exploration and exploitation, required that conflicts about interpretation and application of the Convention should not be left to the individual discretion of the parties. On the other hand, the internationalization of decision-making has given the institutional bodies considerable power. This could be counter-balanced by an elaborate system for dispute settlement.

The system of dispute settlement resembles the system in UNCLOS. First, parties have the right to make a declaration as to whether they accept the ICJ, or an arbitral tribunal as the preferred form. If no declaration is made, or parties to a dispute have made different declarations, the dispute will, eventually, be resolved by arbitration. In case a dispute arises, parties have the duty to enter into consultation about the preferred means of settlement. Only if this has not led to an agreement after 12 months, may a party refer the dispute to the ICJ or to the arbitral tribunal, as appropriate. In cases relating to the interpretation or application of the Convention relating to a measure pursuant to the Convention or a Management Scheme, only arbitration is the appropriate means. As in UNCLOS, the arbitral tribunal or the ICJ will not be competent with regard to discretionary powers exercised by an institution in accordance with the Convention. Moreover, in no case will it substitute its discretion for that of an institution.

One limitation to this compulsory system exists. The arbitral tribunals or the Court have no competence to decide or rule upon matters which deal with the legal position of a State in respect of asserting, supporting or denying territorial claims in the Antarctic Treaty area.[159] Furthermore, States may opt out of compulsory jurisdiction, where in the case of UNCLOS it is explicitly provided with regard to which categories of disputes an opting-out declaration may be made, in the Mineral Activities Convention it is exactly the other way around. The Convention provides for which categories of disputes no opting-out declaration can be made. Although only seven categories are mentioned, they cover the most important aspects of the Convention, such as the protection of the environment, response action and liability, inspection, and respect for other uses of Antarctica.

Besides these provisions for the settlement of disputes between States, addi-

[159] Article IV, 1959 Antarctic Treaty, see *supra* note 156

tional provisions have been made for third party settlement of disputes between an institution established by the Convention and a State or enterprise engaged in mineral activities. These rules would be elaborated by the Antarctic Mineral Resources Commission after the entry into force of the Convention. They would allow States and enterprises to initiate proceedings against the institution whose decision affect their exploration or exploitation of mineral resources.

Compared to the law of the sea dispute settlement system, the Mineral Activities Convention provides a less complicated system, which nevertheless has the same effect, namely to allow parties to a very broad category of disputes unilaterally to refer the issue to compulsory and binding means of settlement. State parties retain the freedom to choose by common consent any other method, including conciliation, but no compulsory conciliation is provided for when a dispute is excluded from the compulsory arbitration or litigation. Procedures for disputes related to actual exploration and exploitation have not yet been elaborated, but they would probably also resemble the corresponding provisions in the law of the sea, notably the inclusion of commercial arbitration.

The Convention will probably never enter into force, in the face of France and Australia's refusal to sign or ratify the treaty to give priority to the preservation of the Antarctic environment by prohibiting mineral activities completely. This led to negotiations focused on protecting the Antarctic environment, culminating in the 1991 Protocol on Environment Protection to the Antarctic Treaty.

The regime established by the Protocol is far less elaborate compared to the Mineral Activities Convention. Such an elaborate system was probably not necessary for the parties as their interests were much less directly affected by the Protocol than by the Mineral Activities Convention. No internationalized decision-making institutions are provided for in the Protocol. This totally different character is reflected also in the articles on dispute settlement. Although the Protocol also provides for compulsory binding dispute settlement in a manner similar to the Convention, its scope is considerably less. Only disputes concerning the interpretation and application of the prohibition of mineral activities, environmental impact assessment and response action can be referred unilaterally to the arbitral tribunal or the ICJ. If the parties have not succeeded in agreeing on another method of settlement within 12 months after consultations have started. An Annex provides for the rules concerning arbitration. The arbitral tribunal is composed from a list of arbitrators designated by the parties. The administrative functions are performed by the Secretary-General of the PCA. Unless the Parties decide otherwise, arbitration will be held in The Hague.

Two concluding remarks can be made in respect of compulsory dispute settlement in general. First, the comparison of the Mineral Activities Convention and the Protocol gives a first, rather direct, confirmation of the fact that the

willingness of States to accept compulsory third party procedures can be connected to the level of interdependence between the parties as reflected in a specific regime. Second, it would have been fairly unlikely that the Antarctic Consultative Parties would have accepted compulsory methods at all in the Protocol if it had not been preceded by the Mineral Activities Convention. The Convention has probably contributed to a process that may lower the threshold for accepting such methods within this group of States.[160] This can be seen as a confirmation of the occurrence of indirect effects to which was referred at the end of the discussion about the law of the sea dispute settlement system.

4.4.2 UNCLOS & the International Tribunal for the Law of the Sea

The 1982 United Nations Convention on the Law of the Sea (UNCLOS)[161] has been in force since 16 November 1994. It contains an elaborate system of dispute settlement. This system is extremely creative, because in most cases it will lead to a binding third party decision. This binding decision takes the form of arbitration in default, in the case that other mechanisms of dispute settlement fail.[162] The 1982 Convention and the Agreement for the Implementation of Part XI of the Convention adopted by the General Assembly on 28 July 1994 make the peaceful settlement of disputes an integrated part of the Convention.[163] This section chooses to focus on the dispute settlement provisions of the Convention rather than the deep seabed mining régime. This is because the UNCLOS dispute settlement provisions have found much more support among States, and is thus more likely to be implemented successfully in practice.

The 1982 UNCLOS and its dispute settlement provisions are a departure from the history of the earlier conventions to do with various aspects of the law of the sea. The main issue with the earlier conventions was that binding dispute settlement procedures that were provided for were not applied,[164] or they were established in a separate Protocol that did not find support among the members of the original Convention.[165] The 1982 UNCLOS however automatically

[160] Auburn, F.M., "Dispute Settlement under the Antarctic System", (1992) 30 Archiv des Völkerrechts 212 at 220

[161] United Nations Convention on the Law of the Sea, (opened for signature December 10, 1982), 21 ILM 1261

[162] Adede, A.O., *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary*, (1987); Oda, S., "Dispute Settlement Prospects in the Law of the Sea", (1995) 89 AJIL 806

[163] Eitel, T., "Comment", (1995) 55 ZaöRV 452

[164] This was the case of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 April 1958, 559 UNTS 285

[165] This occurred with the other three Law of the Sea Conventions, the Optional Protocol to the Convention on Diplomatic Relations (18 April 1961) 500 UNTS 241 and the Optional

makes each ratifying State a party to the dispute settlement provisions.

The mechanism for dispute settlement in UNCLOS is found in Part XV of the Convention. It is rather flexible. Article 280 provides that States have the right to select their preferred method of dispute settlement in a particular case. States may even select other methods than those provided for in Part XV. If this initial selection does not reach a resolution of the dispute, then the parties may return to the basic mechanisms provided for in Section 1 of Part XV.[166] Priority is given by Article 282 to binding dispute settlement mechanisms that the parties have agreed to in other instruments. This includes the case in which parties have accepted the optional clause of the ICJ.

Should the methods under Section 1 fail to settle the dispute, Section 2 is initiated. Section 2 provides for compulsory and binding dispute settlement procedures at the request of any party to the dispute. This applies in all cases excepting those types of disputes provided for under Section 3. Section 2 allows disputing parties four different choices of compulsory settlement procedures. Parties may choose their preferred method by way of a written declaration.[167] These four procedures are:[168]

1. the International Tribunal for the Law of the Sea in Hamburg;

2. the International Court of Justice;

3. an arbitral tribunal established in accordance with Annex VII to the Convention; or

4. a special arbitral tribunal for the settlement of disputes concerning fisheries, protection and preservation of the marine environment, marine scientific research, or navigation and pollution by vessels.[169]

The binding settlement procedures provided by UNCLOS is one of its greatest innovations. Section 2 in particular is entitled "Compulsory Procedures Entailing Binding Decisions". Article 296(1) provides

> "[a]ny decision rendered by a court or tribunal having jurisdiction under this section shall be final and complied with by all the parties to the dispute."[170]

Protocol to the Convention on Consular Relations (24 April 1963) 596 UNTS 487

[166] Article 281, UNCLOS, see *supra* note 161

[167] For an updated list of States' declaration of dispute settlement procedures see "Settlement of disputes mechanism: Choice of procedure by States Parties under article 287 of the Convention," http://www.un.org/Depts/los/los_sdm1.htm (Last accessed: 10 January 2006)

[168] Article 287, UNCLOS, see *supra* note 161

[169] Adede, A., "The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention", (1982) 11 Ocean Development and International Law 125

[170] Article 296(1), UNCLOS, see *supra* note 161

These decisions, however, have "no binding force except between the parties and in respect of that particular dispute."[171] This limits the binding nature of the decision to the parties concerned in the dispute at hand. It is identical to language found in Article 59 of the ICJ Statute.[172]

Where the procedures chosen by the parties themselves fail to settle the dispute, then any party that is party to UNCLOS may submit it to a court or tribunal having jurisdiction under Section 2.[173] The courts and tribunals listed in Section 2 have jurisdiction over any dispute concerning the interpretation of application of the UNCLOS or any international agreement related to its purposes.[174] Further, they are also competent in respect of other rules of international law so long as they are not contrary to the UNCLOS. Also, decisions can, at the parties' request, be taken *ex aequo et bono*. The only unfortunate issue is that there are no concrete provisions made for the enforcement of the decision.

The structure and function of the International Tribunal for the Law of the Sea (ITLOS) is established in Annex VI. The seat of the Tribunal is in Hamburg, Germany. ITLOS started its settlement duties with its first case, *The M/V Saiga* (Saint Vincent and the Grenadines v. Guinea).[175] *The M/V Saiga* is a maritime action brought by the flag State of the tanker Saiga, Saint Vincent and the Grenadines. It alleges that the vessel was improperly detained by Guinea, and asked for the prompt release of the vessel under Article 292 of UNCLOS. ITLOS ruled that the Saiga should be released upon the posting of an appropriate bond. Both parties also accepted the jurisdiction of ITLOS to decide on the merits of the case.[176]

Article 287(1)(b) provides for the jurisdiction of the ICJ, corresponding to the Article 36(1) clause in the ICJ Statute. Both parties to the dispute must have accepted the ICJ's jurisdiction for the dispute to be referred to the Court. Law of the sea disputes may also be submitted to the ICJ by Special Agreement, or under the optional declaration under Article 36(2) of the Court's Statute. One example of a law of the sea dispute submitted under the Article 36(2) optional clause is the *Fisheries Jurisdiction* case (Spain v. Canada).[177]

Where the same procedure was accepted by the disputing parties, it must

[171] Article 296(2), UNCLOS, see *supra* note 161

[172] Statute of the International Court of Justice (1945) 9 ILM 510, [hereinafter "ICJ Statute"]

[173] Article 286, UNCLOS see *supra* note 161

[174] Articles 288(1) and 288(2), UNCLOS, see *supra* note 161

[175] See http://www.un.org/Depts/los/judg_1.htm, (Last accessed: 10 January 2006)

[176] See Oxman, B.H., "International Decisions: Applicability of procedure for securing prompt release of vessels and crews under UN Convention on the Law of the Sea", (1998) 92 AJIL 298

[177] see Boyle, A.E., "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction", (1997) 46 ICLQ 37 at 50

be utilized unless they agree otherwise.[178] If a State party has not designated a preferred dispute settlement procedure by written declaration, then it is deemed to have accepted arbitration.[179] If dispute parties have designated different methods of settlement under Article 287, then the dispute may only be submitted to arbitration.[180] Arbitration is thus designated by the drafters of UNCLOS as the default procedure. This process allows party control over the choice of settlement method, but ensures that there will be a binding solution.

There is a difference between arbitration and the "special arbitration" that is provided for in Article 287(d). This lies in the technical nature of the disputes and the qualification of potential arbitrators. Categories of disputes that may be referred to "special arbitration" are provided for in Annex VIII:

1. fisheries,
2. protection and preservation of the marine environment,
3. marine scientific research, and
4. navigation, including pollution from vessels and by dumping.

The special arbitral tribunal is comprised of recognized experts in those particular fields.[181] Clearly, one of the main reasons for "special arbitration" is to ensure that issues concerning specific technical or scientific issues are submitted to arbitral panels with the requisite expertise. Such expertise would increase the efficiency of the decision-making process, while ensuring the most fair and informed decision.

Article 284 also provides for the option of non-binding conciliation as a method of dispute settlement. Non-binding conciliation is the only procedure mentioned in Section 1 of Part XV, that gives parties the freedom to choose their preferred method of dispute settlement. Conciliation is also an express option mentioned in Article 285 in relation to disputes involving deep seabed mining.

An interesting clause in the dispute settlement system is Article 298. This allows for "optional exceptions", which permits States Parties to exempt certain traditionally sensitive types of disputes from the rules on compulsory jurisdiction. These categories of disputes generally concern concerning territorial sovereignty, military activities, or fishing rights. It is submitted that this is an interesting and productive way of ensuring that a dispute settlement system receives the greatest possible support from Member States. It ensures that traditionally difficult and thorny issues do not detract from the functioning and acceptance of the main system of dispute settlement.

[178] Article 287(4), UNCLOS, see *supra* note 161
[179] Article 287(3), UNCLOS, see *supra* note 161
[180] Article 287(5), UNCLOS, see *supra* note 161
[181] Annex VIII, UNCLOS, see *supra* note 161

What is particularly interesting is that conciliation is provided for as a dispute settlement procedure in some cases of these "optional exceptions". An example of this is disputes relating to sea boundary delimitations. Providing for conciliation in these areas was a tool to ensure a general consensus on the acceptance of binding settlement procedures as an integral part of UNCLOS. Conciliation is also made obligatory for certain types of disputes that fall under the Article 298 "optional exceptions". Annex V sets out the conciliation procedure to be adopted. These provisions largely correspond to those in other recent multilateral conventions providing for conciliatory procedures.

Critics have argued that the UNCLOS system is unnecessarily complex. It is submitted however, that given the customary reluctance of States in general to accept any form of compulsory binding dispute settlement, the UNCLOS dispute settlement system represents a great achievement. While the myriad forms of settlement may pose some problems when in practical use, the UNCLOS system is a accomplishment that has not seen any predecessors in international law. For the first time, a system has been drafted whereby all States concerned in a comprehensive multilateral treaty have accepted a compulsory and binding dispute settlement régime. While far from being perfect, it is an important groundbreaking system that will provide lessons for compulsory and binding third party dispute settlement in other areas of international law such as international space law. Certainly, a lasting impact of the UNCLOS heritage is the increased awareness of the urgent need for compulsory and binding dispute settlement procedures in the framework of a comprehensive multilateral convention.[182]

Further, the comprehensive nature of UNCLOS, together with its wide acceptance by the majority of the world's States,[183] oversees all facets of the law of the sea. The substantive provisions of the UNCLOS are meant to be adequately protected by the flexible yet compulsory procedural provisions of its dispute settlement framework. Although the UNCLOS dispute settlement framework has yet to be well tested, especially in the important field of marine environmental protection, it is submitted that the UNCLOS provides a legally workable and politically acceptable framework for the peaceful settlement of disputes in an area of extreme international, economic and scientific interest.[184]

It is further submitted that the flexibility and highly consensual nature of

[182] Jaenicke, G., "Dispute Settlement under the Convention on the Law of the Sea", (1983) 43 ZaöRV 813

[183] United Nations Division for Ocean Affairs and the Law of the Sea, *Status of the United Nations Convention on the Law of the Sea of 10 December 1982 and of the Agreement relating to the implementation of Part XI of the Convention adopted by the General Assembly on 28 July 1994*, online at http://www.un.org/Depts/los/los94st.htm (Last accessed: 10 January 2006)

[184] Schiffman, H., "The Dispute Settlement Mechanism of UNCLOS: A Potentially Important Apparatus for Marine Wildlife Management, (1998) 1(2) Journal of International Wildlife Law & Policy 293

the Part XV procedures will ensure a high level of State compliance and resort to the provided dispute settlement mechanisms. It maintains the delicate balance between granting party control over the settlement procedure and ensuring that a binding solution is ultimately found. The ability of States to successfully obtain acceptable and fair solutions to maritime disputes will install confidence not only in the UNCLOS régime, but also in international and transnational dispute settlement systems in general. It is therefore submitted that the UNCLOS system, aside from providing valuable lessons for the establishment of any dispute settlement system for outer space disputes, also assists in the creation of a culture of greater acceptance and trust in a compulsory and binding third party dispute settlement system.[185]

4.5 Direct Alternatives to the Use of Force: Good Offices of the UN Secretary-General

The most utilized instance of an institutionalized direct alternative to the use of force in the resolution of international disputes is the function of the United Nations Secretary-General. This comprises two aspects: Good offices and the delegation of Chapter VII powers by the UN Security Council.

The good offices of the UN Secretary-General is an example of the institutional relationship between peaceful settlement of disputes and other actions for the maintenance of international peace and security. This is illustrated by the mediatory good offices function developed by the successive UN Secretaries-General. This role is not explicitly prescribed in the UN Charter.[186] However, its exercise is pursuant to both peacemaking through the peaceful settlement of disputes under Chapter VI as described in an Agenda for Peace,[187] and peacekeeping by the Security Council under its Chapter VII mandate. The concept and practice of peacemaking are also intrinsic in preventive diplomacy and post-conflict peace-building. Dispute settlement through the office of the UN Secretary-General may thus be carried out concurrently with other more coercive operations, directed at the maintenance of international peace and security.

Qualified publicists have argued that when the Secretary-General extends his good offices to disputing parties, he acts with the authority of the international community as a whole.[188] The role of the Secretary-General in dispute

[185]Noyes, J., "Compulsory Third-Party Adjudication and the 1982 United Nations Convention on the Law of the Sea", (1989) 4 Connecticut Journal of International Law 675

[186]Articles 98 and 99 of the Charter of the United Nations, (1945) 59 Stat. 1031, UNTS No. 993 [hereinafter "UN Charter"]

[187]An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peacekeeping: Report of the Secretary-General Pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992, (17 June 1992), UN Doc. A/47/277

[188]Franck, T., "The Secretary-General's Role in Conflict Resolution: Past, Present and

settlement is thus vital to functions of the United Nations in peacemaking and peacekeeping, and the maintenance of international peace and security in general.

The primary UN organ charged with the maintenance of international peace and security is the UN Security Council. However, the Security Council may delegate its Chapter VII powers to other UN principal organs.[189] In practice, the Security Council has mostly delegated such powers to the UN Secretary-General.[190] There are three main reasons why the Security Council may decide to delegate its Chapter VII powers to the Secretary-General.[191]

The first reason is where the UN Security Council considers that a particular situation threatening international peace and security is too politically sensitive for the direct use by the Council of its Chapter VII powers. In such cases, the Council has tended to delegate the responsibility to use these powers to the Secretary-General. Secondly, the institutional attributes of the Secretary-General's office may be more suitable in certain circumstances to exercise Chapter VII powers than the Security Council itself. Thirdly, the office of the Secretary-General is generally perceived to be impartial and less political than the Security Council. Therefore, the Council may delegate the performance of some of its Chapter VII actions to the Secretary-General to preserve the legitimacy and authority of collective enforcement measures.[192]

In this factual matrix there are institutional and procedural quandaries. The meshing of peacemaking procedures with those of peacekeeping situates dispute settlement mechanisms within the international public order. In order to be effective, the exercise of the Secretary-General's good offices must be perceived both by parties and the international community as a whole to be fair. Good offices and mediation assumes the intervention of a neutral and impartial third party facilitator. This may pose problems for the Secretary-General in situations where it is clear that the Secretary-General is working under the Security Council's orders, ultimatums or directions.[193] Such direction from the

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Pure Conjecture", (1995) 6 EJIL 360

[189]Rosenne, S., *Developments in the Law of Treaties*, (1994) at 237

[190]An excellent analysis of the UN Security Council's delegation of power to the Secretary-General can be found in Sarooshi, D., *The United Nations and the development of Collective Security: the Delegation by the UN Security Council*, (1999)). See also Kelsen, H., *The Law of the United Nations*, (1951) at 1951

[191]For an excellent overview of these reasons, see Franck, T., "Finding a Voice: How the Secretary-General Makes Himself Heard in the Councils of the United Nations", in Makarczyck, J., (ed.), *Essays in Honour of Judge Manfred Lachs*, (1984) 481; also Avakov, V., "The Secretary-General in the Afghanistan Conflict, the Iran-Iraq War and the Gulf Crisis", in Rivlin, B. and Gordenker, L., (eds.), *The Challenging Role of the UN Secretary-General*, (1993) 152 at 164 - 165

[192]Szasz, P., "The Role of the UN Secretary-General: Some Legal Aspects", (1991) New York University Journal of International Law and Politics 161

[193]See for example the situations surrounding UN Security Council Resolutions 660 (2 August 1990) and 661 (6 August 1990)

Security Council leaves the Secretary-General with little room for discretion. Further, it undermines the impartiality of the office of the Secretary-General. It is submitted however that the use of the Secretary-General's good offices may attain a mutually acceptable mediated settlement of the dispute. This may in turn be more in line with the objectives of the international community and the UN than collective enforcement measures undertaken by the Security Council.

A significant issue arises when the disputing parties are not members of the United Nations, or do not have *locus standi* on the international plane. Here a crucial question arises as to whether the office of the UN Secretary-General may be used. This is a contentious issue to which at present there is no definite answer. With particular reference to international space law, this issue may restrict the functions of the UN Secretary-General to disputes where the parties are Member States of the UN. This is an artificial dichotomy that may not serve the best interests of the international community. However, it is submitted that in terms of the maintenance of international peace and security in outer space, the good offices of the UN Secretary-General does provide a viable optional mechanism. This is especially so in cases of space disputes involving the military use of outer space, or an escalation of hostilities between States in outer space.

4.6 Conclusion

In this Chapter a number of developments in procedures for international dispute settlement have been described and evaluated. These provide an insight into the course that international and transnational dispute settlement may take in the years to come. The main characteristics of this trend are the need to incorporate compulsory dispute settlement procedures into the applicable legal régime, and creativity in designing procedures that consider both the needs and concerns of the actors concerned.

The examples given in the Chapter provide a sufficient background for a formulation of a workable dispute settlement régime for rapidly evolving fields of business, science and technology such as space activities. The time has come to acknowledge that the partial relinquishment of State sovereignty is necessary for the purpose of realizing individual and communal goals.

In recent years, the international community has evolved a plethora of dispute settlement tools. These tools have been constantly customized and adapted to meet the requirements of evolving objectives. Objectives that must be met include those of inducing compliance with treaty regimes and enhancing institutional transparency. These tools have become increasingly sophisticated, diversified and efficient. Their creation and planned use have underscored the problems of the traditional institutional structures of international law. Inex-

orably this has led to the birth of a novel international and transnational institutional law. Non-compliance procedures, institutional monitoring, dispute settlement procedures and peacekeeping measures may work simultaneously and complementarily.

The vitality of the international legal system will depend on the design of innovative dispute settlement processes. It is important to involve all concerned parties, States or otherwise, in the dialogue to ensure that the objectives of the international community can practically be realized. As with the case of the Hague Peace Conferences, focus must be placed upon harnessing the political will of States to use these dispute settlement procedures within a legal framework to resolve their differences. Further, it is important to give non-State actors a voice in the proceedings, as clearly more non-State actors will find an important role on the international and transnational plane. The evolution of dispute settlement processes should not be mere exercises in elaborate theoretical modelling.[194] With this in mind, the next Part of this thesis will propose a dispute settlement framework for the resolution of disputes arising from space activities.

[194]Chinkin, C., "Alternative Dispute Resolution under International Law", see *supra* note 28

Part Three: Evocation

Chapter 5

Proposal: The Multi-Door Courthouse for Outer Space

Two main issues have been discussed in detail in the first two Parts of this thesis. These are the evolution of mechanisms of international dispute settlement and the development of dispute settlement in international space law. The preceding Chapters drew the conclusion that the existing settlement structures available are inadequate for the present and future requirements of possible disputes relating to outer space activities. A case for a sectorialized space law dispute settlement mechanism was made. This was followed by an appraisal of the current ambient developments in comparable fields of international law. These comparable developments could serve as a model for a viable dispute settlement framework for disputes relating to outer space activities. This review demonstrated a clear movement away from formalistic procedures for procedure's sake. In contemporary topical fields of international and transnational law, there is an unambiguous shift towards more result-driven, resolution-oriented and resource-efficient approaches to dispute settlement.

The international and transnational legal systems play an important role in the growth of the law. Two propositions are evident in this regard. The first is that any shifts in the development of the law are ultimately caused by the actors in the system themselves. Secondly, a coherent legal system is an embryonic organism nurtured though coordination and compromise amongst the actors in that system. The settlement of disputes amongst these actors thus results in rules that form the backbone on which international and transnational legal norms are framed.

Dispute settlement mechanisms thus constitute the device through which new rules of law are formed, mainly through the interpretation and revision of old rules. These mechanisms also need to ensure that any new rule of law is created such that its substance does not fragment the existing legal framework by diverging from its basic principles. Instead, it should advance the existing system in a manner that is compatible with relevant pressures and needs of

contemporary society. Additionally, it has to ensure that the law develops coherently, both as a corpus as well as with existing fundamental principles, such as *jus cogens* norms. The dispute settlement mechanism also serves as a reminder to actors in the international and transnational plane that fundamental legal principles cannot be disregarded or derogated from.[1]

Law is conceived to be observed. In many cases it falls to the dispute settlement mechanism established to actualize the tangible observation of the law.[2] Unless the dispute settlement mechanism ensures the observance of the law in a majority of cases, it will lose the fundamental reason for its existence. Actors should be required by their settled compromised will to abide by the mechanism they created to manage their disputes. To make this practically executable, any dispute settlement mechanism proposed must be credible and practicable, not just in theory, but also in structure, implementation and authority.

This approach to dispute settlement especially required for disputes relating to activities in outer space. This is especially urgent if the law is to remain relevant in the rapidly evolving, high-risk arena of outer space activities. To date, there has not been any provision for a sector-specific dispute settlement mechanism of universal jurisdiction. The risk of fragmentation is prevalent, given that provision for dispute settlement mechanisms in the universal framework of the UN space treaties has not been well developed, as compared to those in bilateral or multilateral agreements on specific activities in outer space.

The legal community has always shown outstanding forethought in dealing with international space law issues. It has generally diagnosed latent problems and preemptively drafted legal provisions to deal with them. This process should be continued, given its success in dealing with issues relating to outer space to date. This is especially since a precise jurisdictional boundary cannot be drawn around the disparate subject matter with which disputes relating to outer space activities might be concerned. It is submitted however, that further to this a sector-specific dispute settlement mechanism is necessary to progressively develop international space law in a meaningful manner. It is further submitted that there is no one established mechanism of dispute settlement that is most suited to all disputes relating to outer space. A selection should be made out of the various mechanisms according to its specific germaneness to particular disputes.

Bearing this consideration in mind, Chapter 5 takes a bold, progressive approach in dealing with the issue of dispute settlement relating to activities in outer space. While grounded in the principles of international dispute settlement and international space law, this Chapter moots a dispute settlement system that can handle the extant and prospective vicissitudes of outer space

[1] Shen, J., "International Law & International Relations: Beyond Instrumentalism and Normativism", (1997) 111 [1] International Legal Theory 12 at 18

[2] Henkin, L., Schachter, O., Smit, H. and Pugh, R.C., *International Law: Cases and Materials*, (3rd ed., 1993) 1

activities. Chapter 5 proposes what it will show is a workable, viable dispute settlement mechanism as the next step in the evolutionary ladder both for international dispute settlement and space law: the Multi-Door Courthouse for Outer Space.

In looking to a workable future for any area of the law, it is always helpful to return to first principles. Presently, one of the most common forms of dispute settlement is adjudication. Adjudication began as a proxy for prior efficient though deplorable methods of dispute settlement. It standardized the dispute settlement process by proffering peaceful means as a substitute to physical warfare. Adjudication is a major step forward in the legal system, although it is normally more time-consuming than violent behavior in attaining a resolution. However, it is far from the ideal, and may not always be the best possible choice for the disputants or for the public interest. Some space-related agreements have instead preferred the use of arbitration. In such cases, whether or not the final arbitral decision is binding or only recommendatory is generally contingent on the extent to which the dispute is about a scientific or technical matter. Actors are traditionally wary about referring issues with political, economic or policy implications to binding arbitration. In establishing any workable dispute settlement mechanism for space-related disputes however, issues such as these must be addressed. This area of the law in particular will benefit from having interdisciplinary "specialized generalists" who can think across the jurisdictional bailiwick of specific disciplines.[3] Such transboundary, interdisciplinary methods may be found in other mechanisms of dispute settlement in contemporary employment. These are often categorized under the cluster of "alternative dispute resolution" or ADR.

This Chapter will give a short overview of ADR techniques and discuss the so-called "Dispute Resolution Movement". It will also give a brief description of the hybrid processes and gradated scale of dispute settlement, including the development known as the Multi-Door Courthouse (MDC). It will then moot the case of the use of the MDC for disputes relating to space activities, showing the reasons why the MDC system provides a viable dispute settlement mechanism for outer space disputes. An adapted MDC system is then proposed and elaborated as a workable settlement framework for disputes relating to activities in outer space.

[3]Galloway, E., "Which Method of Realization in Public International Law Can Be Considered Most Desirable and Having the Greatest Chances of Realization?", in Böckstiegel, K.-H., (ed.), *Settlement of Space Law Disputes: The Present State of the Law and Perspectives of Future Development*, (1980) 160

5.1 The Dispute Resolution Movement and the Birth of the Multi-Door Courthouse System

Before the use of terms such as "dispute settlement", "dispute resolution" or "alternative dispute resolution", methods other than adjudication were already used for settling disputes.[4] Negotiation has historically been the most preferred mechanism for resolving disputes, even after the adjudication process had begun.[5] Arbitration has found usage globally for centuries. The legal use of arbitration found its way into many common law jurisdictions for more than eighty years. The neutral intervention by respected community members in mediatory processes was a popular means of dispute settlement in early societies, and a usual process within immigrant groups in early colonial New England.[6] Professional mediators became involved in collective bargaining disputes early in the twentieth century, resort to them becoming more mainstream in the 1940s.[7] Further, some seventy years ago, some judicial courts had begun the use of mediation (calling it "conciliation") in minor criminal or family disputes.[8]

Alternative Dispute Resolution, or "ADR", began as a study of alternatives. Three waves of the ADR movement were identified in the Florence Access-to-Justice Project,[9] which were supplemented with the final two by the Dispute Resolution Directory of the Alberta Law Reform Institute:[10]

1. Infusion of Legal Aid;
2. Representation of Diffuse Interests;
3. Emergence of the "Access-to-Justice" Approach;
4. Experimentation and Evaluation; and

[4]The term "dispute settlement" is often used in the context of such processes on the international and transnational levels. In the literature concerning these processes on the domestic level, the term "dispute resolution" - and hence "alternative dispute resolution" - is more generally favored. This Chapter uses both "settlement" and "resolution" interchangeably to denote the process of resolving the conflict. It however, uses "settlement" when discussing the international and transnational contexts, and "resolution" when discussing the domestic context. This is merely an attempt to be consistent with other literature on the topic, and carries no other distinction between the terms.

[5]Kritzer, H., "Adjudication to Settlement: Shading in the Gray", (1986) 70 Judicature 161

[6]Merry, S. and Milner, N., *Popular Justice, Social Transformation and the Ideology of Community: Perspectives on Community Mediation*, (1993)

[7]Aaron, B., et al, (eds.), *The Railway Labor Act at Fifty*, (1977)

[8]Galanter, M., "The Emergence of the Judge as a Mediator in Civil Cases", (1986) 69 Judicature 257

[9]Cappelletti, M. and Garth, B., "General Report", Vol. I Book 1, in *Access to Justice* (1979) at 22

[10]Alberta Law Reform Institute, *Dispute Resolution: A Directory of Methods, Projects and Resources*, Research Paper No. 19, (July 1990) at 7

5. Advancement of Dispute Resolution Theory.

The first wave of the movement began approximately in 1965. It consisted of the introduction of legal aid schemes into adjudication to assist poor or indigent persons. The term "alternative dispute resolution" arose from prevalent discontent with the United States justice system in the 1970s.[11] Early ADR advocates reiterated calls to circumvent the undue cost and delay of adjudication. They aimed to increase access to justice through the transformative benefits of empowering disputing parties in the resolution of their disputes.[12]

The second phase of the dispute resolution movement was the onset of representation of disparate interests. This saw the infusion of attempts to better provide for the protection of communal interests. This entailed the legal representation of interests in which no single individual has sufficient interest to warrant the pursuit of a claim, but in which a category of plaintiffs have a genuine concern. ADR looked beyond the adversarial structure of adjudication and the dominant impression of the lawyer as a "knight in shining armor whose courtroom lance strikes down all obstacles."[13] Significantly, informal methods of dispute settlement became the initial focal point of dispute resolution movement. This was especially with respect to negotiation, mediation and other consensual decision-making procedures. This resulted from an international process of learning from dispute settlement processes in other societies and cultures,[14] as well as from experience in areas such as labor management, international relations, and religion.

The third wave was the manifestation of the full-fledged "access to justice" approach. This involved the entire range of institutions, devices, personnel and procedures used in dispute management in modern societies. It initiated a broad range of reform, including changes in procedural rules, the structure of the court system, the employment of para-professionals, and the use of the full range of private and informal dispute settlement processes. There was acknowledgement that procedural techniques are a means towards the end of social functions. Further, it was recognized that procedural regulations have a definite impact on how substantive law operates and is enforced. The basic aim in the third phase was to clearly depict the substantive impact of the failings of the adjudicatory system. The idea was to widen the focus of dispute settlement by using interdisciplinary insights from the field of politics, psychology, economics and sociology.

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[11] see generally Brown, H.J. and Marriott, A.L., *ADR Principles and Practice*, (1993)

[12] Levin, A.L. and Wheeler, R., (eds.), *The Pound Conference: Perspectives on Justice in the Future*, (1979)

[13] Burger, W., "Isn't There a Better Way?", (1982) 68 American Bar Association Journal 274 at 275

[14] Felstiner, W.F., Abel, R.L. and Sarat, A., "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming", (1980) 16 Law & Society Review 631

The motto of the third phase was that ADR not only was a requisite answer to the flaws of the current justice system, but also a better form of dispute settlement. As was to be expected, the dispute resolution movement and ADR was greeted with much criticism and hostility.[15] Certainly there was critiques from the legal procession and the judiciary, that felt that their time-honored adjudicatory and economic structures were being assaulted by those from outside the legal profession.[16] Specific criticism often was levelled at mediation, at that time an alien and unknown procedure.[17]

One of those critical commentaries was that ADR would cause the justice system to decrease in quality. This criticism charged that the function of the justice system was not only to achieve the objectives of private parties nor to secure the peace, but more importantly to interpret, explain and actualize normative principles oft he law.[18] Naysayers began to challenge the ADR movement from every conceivable viewpoint. Challenges included whether there was truly a "litigation crisis",[19] whether ADR processes would ultimately adversely affect outcomes,[20] and whether there were actual cost savings.[21]

While its momentum and purpose was not stopped by these critiques, the ADR movement was certainly changed by them. This change essentially initiated the fourth phase of the ADR movement, one characterized by experimentation and evaluation. As more legal professionals started assuming positions of leadership within the ADR movement, the anti-court statements were, in truly mediatory fashion, reframed. Legal professionals who supported the ADR movement contributed to it by adding statutory provisions to protect the fairness of ADR outcomes, framing guidelines for the exclusion of certain categories of cases unsuitable for ADR, and mandating a required ongoing review of ADR programs as a prerequisite to future funding. An example of this attempt is contained in the 1989 Canadian Bar Association (CBA) Task Force Report on Alternative Dispute Resolution. The report urges professionals working with disputes to see their basic function as problem-solving. Rather than dividing ADR procedures from traditional adjudicatory procedures, the problem-solver's task was to evaluate the whole continuum of dispute settlement techniques, skills and resources before selecting the most appropriate

[15]Menkel-Meadow, C., "Dispute Resolution: The Periphery Becomes the Core", (1986) 69 Judicature 300

[16]Prie, A., "The Lawyer as Mediator: Professional Responsibility Problems or Profession Problems?", (1985) 63 Canadian Bar Review 378

[17]Riskin, L.L., "Mediation and Lawyers", (1982) 43 Ohio State Law Journal 29

[18]Fiss, O.., "Against Settlement", (1984) 93 Yale Law Journal 1073

[19]Daniels, S., "Ladders and Bushes: The Problem of Caseloads and Studying Court Activities Over Time", (1984) American Bar Foundation Res. Journal 751

[20]Greatbatch, D. and Dingwall, R., "Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators", (1989) 23 Law & Society Review 613

[21]Esser, J., "Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Know What We Know", (1989) 66 Denver University Law Review 499

mechanism to use. Rather than being placed in a adversarial stance with adjudication, ADR became an expression of the legal profession's continuing commitment to fair, effective and accessible dispute settlement. As the CBA Report states, "alternative dispute resolution will not be viewed as superior or inferior to, or indeed even separate from, court adjudication."[22]

The same attitude was taken by North American legal professionals. There problem-solving was considered the paramount function of the legal profession.[23] The 1992 MacCrate Report on verified the central function of problem-solving to the legal profession's role in society.[24] This meant that ADR was one of the many methods through which the legal professional could assist their clients and communities. Helping disputing parties choose the most suitable dispute settlement mechanism was designated one of the essential functions of the lawyer.[25]

Responding to this change in attitude, the 1995 Canadian Forum on Dispute Resolution stated that ADR "should be considered an umbrella term which encompasses litigation, focusing on the appropriate method for resolving any given dispute".[26] The 1995 Report of the CBA Task Force on Systems of Civil Justice,[27] confirmed the new problem-solving orientation for the legal profession. It defined ADR as "a range of processes for resolving disputes"[28] excluding only a trial or hearing. The report in particular called for dispute settlement mechanisms to be promoted not as integral constituents of the civil justice system rather than alternatives to it.[29] The idea is that hybridizing and revitalizing the judicial system with the various techniques, used complementarily to the judicial system would lead to important and necessary reforms in the justice system.[30]

A core stimulus for the progress of dispute settlement commonly cited the "empowerment of the party".[31] Traditional adversarial procedures generally

[22]Canadian Bar Association Task Force on Alternative Dispute Resolution, *Alternative Dispute Resolution: A Canadian Perspective*, (1989) at 4

[23]Riskin, L.L. and Westbrook, J.E., *Dispute Resolution and Lawyers*, (1987) at 52

[24]American Bar Association Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development - An Educational Continuum. Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, (1992)

[25]Edelman, L.B. and Suchman, M.C., "When the 'Haves' Hold Court: Speculations on the Organizational Internalization of Law", (1999) 33 Law & Society Review 941

[26]Canadian Department of Justice, *Charting the Course: Report of the Canadian Forum on Dispute Resolution*, (1995) at 12

[27]Canadian Bar Association Task Force on Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (1996)

[28]*ibidem* at 26

[29]*ibidem* at 18

[30]Pirie, A.J., "Dispute Resolution in Canada: Present State, Future Direction", Consultation Paper for the Law Reform Commission of Canada, (April 1987) at 18

[31]For an analogy of "empowerment of the party" in the case of the individual, see generally Murray, Rau & Sherman; *The Processes of Dispute Resolution* (1989) at 249; Acland, D.,*A Sudden Outbreak of Common Sense* (1990) at 27 and Lovenheim, H.,*Mediate, Don't Litigate*

leave dispute settlement in the hands of third party intervenors such as the judicial system and the legal profession. The movement to empower parties aimed to endow them with greater responsibility for the settlement of their own disputes.

The end of the 1990s saw the shift in focus from experimentation to the institutionalization of ADR. This institutionalization marked the beginning of the fifth stage of the dispute resolution movement that present seeks to improve dispute resolution theory. Institutionalizing ADR mechanisms and providing opportunities and funding for further research and implementation ensure the aptitude to discover novel insights to dispute resolution theory. Further, it allows a greater understanding on the relationship between disputing, dispute settlement and important social problems. For example, the 1998 United States Alternative Dispute Resolution Act directed every federal district court to establish its own ADR program by local rule. It also required litigants in each case to consider the use of ADR at an appropriate stage in the adjudicator process. Sophisticated business clients are also beginning to insist upon a greater use of ADR. In response, many national judicial systems are increasingly demanding that parties involve themselves in various pre-adjudication procedures. ADR is evolving into a system of techniques that will allow the legal profession to better handle the increasing number and complexity of disputes today and in the future.

The historical evolution of ADR means more than the plain inference that it now includes adjudicatory processes.[32] The history of ADR also sheds light on its sometimes opposing validations, including

- To lower court caseloads and expenses
- To reduce the parties' expense and time
- To provide speedy settlement of disruptive disputes
- To improve public satisfaction with the justice system
- To encourage resolutions that are suited to the parties' needs
- To increase voluntary compliance with resolutions
- To restore the influence of community values and the cohesiveness of the community
- To provide accessible forums to disputing parties and

(1989) at 14

[32]Stitt, A.J. and Jackman, R., (eds.), *Alternative Dispute Resolution Practice Manual*, (1996)

- To teach the public to try more effective processes than violence or litigation for dispute settlement.[33]

Other more abstract references view ADR as seeking to reorient the practice of law towards a higher quality problem-solving approach.[34] This envisages the achievement of justice by emphasizing the parties' needs and interests rather than their legal rights, allowing the integration of justice and peace into the fabric of social reality.[35] Still others compartmentalize various expressions of ADR intent into two general goals: Efficiency versus qualitative justice.[36] Or, in space-related terminology, the division of "cheaper, better, faster" into the dichotomy of "cheaper-faster" versus "better".

It is evident that both goals are important and that different circumstances see them prioritized differently in the hierarchy of disputing parties' interests. Certainly, there will also arise situations in which ADR's efficiency goals will not be compatible with its qualitative-justice goals. For example, speedier resolutions of disputes may involve removing traditional procedural safeguards. ADR must address the legitimate concern that market goals may dominate dispute settlement, leading to qualitative-justice goals being entirely eclipsed by economic efficiency. Today, ADR processes are widely used in many States in the world, including Australia, Canada, Germany, Hong Kong (People's Republic of China), Netherlands, New Zealand, Singapore, South Africa, Switzerland, the United Kingdom and the United States of America.

5.1.1 Primary Methods, Hybrid Processes and the Gradated Scale of Dispute Settlement

There are many variations on the types of dispute resolution described below. One of the values of the process is precisely that it may be tailored in each case to suit the parties' specific requirements.

The primary methods[37] of dispute resolution are adjudication, arbitration, mediation, conciliation and negotiation. There are many other permutations and combinations of these processes, resulting in myriad mechanisms clustered under "hybrid processes" of dispute resolution. Aside from adjudication, most

[33]Goldberg, S.B., Sander, F.E.A. and Rogers, N.H., *Dispute Resolution, Negotiation, Mediation, and Other Processes*, (1999) at 8

[34]Galanter, M., "Compared to What? Assessing the Quality of Dispute Processing", (1989) 66 Denver University Law Review xi at xii

[35]see generally Sandole, J.D. and van der Merwe, H., (eds.), *Conflict Resolution Theory and Practice: Integration and Application*, (1993)

[36]Menkel-Meadow, C., "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or the Law of ADR", (1991) 19 Florida State University Law Review 1 at 6

[37]Also known as "primary methods", see for example Goldberg, S.B., Sander, F.E.A. and Rogers, N.H., *Dispute Resolution: Negotiation, Mediation and Other Processes*, (3rd ed., 1999) at 3 - 6

methods share the same essential features. The process is intended to encourage representatives of the parties to recognize the weaknesses of their own case and the strengths of their opponents' case, together with the wider social and commercial implications of the dispute. The success of any individual dispute resolution process will largely depend upon the opportunities available in bringing parties together to find areas of agreement.

This section will give a brief overview of the five principal methods,[38] followed by a short description of the more popular hybrid processes of dispute resolution. It then elaborates upon the continuum of characteristics of these dispute resolution processes, forming what is termed the "gradated scale of dispute settlement".

Dispute resolution in individual cases can be approached in a number of ways. One approach is to see a continuum running from consensual resolution at one end to formal binding third party adjudication at the other. The concept of consensual resolution embraces negotiation, conciliation and mediation. Negotiation is the most common form of dispute resolution. It is sometimes considered the superior option, in terms of economy, efficiency, party control and flexibility. The negotiation model embraces inducements for reasonable settlement, such as best offer negotiation.

In the case private negotiations are unsuccessful in resolving the dispute, third party intervention is generally considered the next step. Third party intervention in a dispute can vary greatly on a continuum. Minimal intervention is found in the mediatory model, where a mediator acts as a facilitator to help disputants settle their dispute between themselves. Maximum intervention is represented by the adjudicatory model, where an adjudicator acts as a decision-maker who imposes an externally-decided resolution on disputing parties.

The mediatory model gives more power to the parties in the settlement process. Here the parties define the issue, come to understand each other's position and come to terms with the problem. This model assists in repairing the parties' relationship, and improves the methods by which to deal with any future problems. On the other hand, the adjudicatory model embraces adversarial, inquisitorial and arbitral dispute resolution. The adversarial model is evident in adjudication, where the parties handle the investigation and presentation of their respective cases. The inquisitorial model involves more judicial management of the dispute. Here the decision-maker investigates, defines the issues and assesses the defenses. In arbitration proceedings are less formalized. The parties may participate in the choice of the decision-maker or mediated discussion before the arbitrator makes a decision.

Many other bases for distinction exist. Another basis of distinction is to

[38] A short analysis of dispute settlement procedures stipulated for and used in the international arena was given above in Chapter 2. This section gives a brief overview of the procedures as defined in the Dispute Resolution Movement, as well as those used to constitute the hybrid processes that have evolved.

consider the interrelationship of the various methods - the Choice, Linear and Integrated Models.[39] The Choice Model allows parties to select the model by which they wish their dispute to be resolved. The Linear Model sets up a hierarchical relationship between the dispute settlement methods. As one moves from negotiation to adjudication, the settlement of conflicts becomes more dependent on third party participation. There is a progression from process to process. The Integrated Model involves the creative application of existing processes and new hybrids. This recognizes that conflicts are multi-dimensional and that the issues may involve substantive, procedural and technical features.[40] Dispute settlement would be based on the fullest possible integration between the issues and processes. This would involve a combination of these three models. In considering the various factors affecting the choice of dispute settlement methods, a gradated scale of the methods can be formulated.[41]

For the sake of making a gradated comparison,the following is a brief description of the primary methods of dispute resolution from the most adversarial model: adjudication, arbitration, mediation, conciliation and negotiation.[42]

Adjudication

Adjudication in the traditional court system is an involuntary, binding adjudicative procedure. Adjudication involves third party intervention in its most extreme form. It is a very formal, costly and lengthy procedure. However, adjudication may still be the most appropriate method of dispute settlement in some circumstances. Additionally, it has some important advantages over other procedures.

Adjudication may be the most appropriate method in disputes where an issue of public interest is involved. Adjudication of these issues allows principles to be affirmed and developed in the legal system. These include constitutional issues and questions that require answers of precedential legal value. This illustrates the basic difference between adjudication and other mechanisms of dispute resolution. Adjudication generally is never concerned only with a particular dispute. It also contributes to the evolution of precedents for the future. This different focus may lead to rather dissimilar results than with mechanisms

[39] Pirie A.J., "Dispute Resolution in Canada: Present State, Future Direction", see *supra* note 30 at 11

[40] *ibidem*

[41] Shore, M.A., Solleveld, T. and Molzan, D., *Dispute Resolution: A Directory of Methods, Projects and Resources*, (July 1990), Alberta Law Reform Institute, Research Paper No. 19

[42] Further detail on these and the hybrid methods of dispute resolution can be found in, *inter alia*, Gallagher, P., *Guide to Dispute Settlement*, (2002); D'Ambrumenil, P.L., *What is Dispute Resolution?*, (1998); Coltri, L.S., *Conflict Diagnosis and Alternative Dispute Resolution and Mediation*, (2004); Alberstein, M., *Pragmatism and Law: From Philosophy to Dispute Resolution*, (2002); and Nagel, S.S. and Mills, M.K., *Systematic Analysis in Dispute Resolution*, (1991)

that have no precedential value, and so are only concerned with resolving the particular dispute between the particular parties. Cases involving complex issues of law may also be better suited to adjudication than other procedures. The formal rules of evidence that apply to adjudication, while costly, are directed towards settlement of the issue in the fairest way possible. Expedited proceedings are only feasible if parties and counsel trust each other to some extent. When this trust is absent, then adjudication might be the only fair way to settle the dispute. Finally, the threat of adjudication alone can also promote settlement. Arguably, the greatest effect of adjudication is on the majority of cases that are settled through other dispute resolution means, rather than on the few that are are ultimately brought to adjudication.[43]

Arbitration

There are many varied forms of arbitration, including private arbitration, court-annexed arbitration and voluntary, court-connected arbitration.[44] Disputes are generally submitted to arbitration by agreement of the parties. This agreement may be arrived at before or after the event of the dispute.[45] Arbitration is therefore more common in the framework of ongoing, contractual relationships. The parties have a fair amount of control over the process. They decide the identity and number of arbitrators, the procedure to be followed, the grounds on which the decision is to be based, and the extent to which the decision may be challenged. Arbitral awards are always be subject to judicial review on the basis of an arbitrator's misconduct, infringement of natural justice, or if fraud was involved. Additionally, if there is an error on the face of the award, or if new evidence has been discovered, the award may generally also be challenged. There are frameworks in place that provide for the enforcement of arbitral awards as well as court-based supervision of the actual arbitral process.[46]

There may be various variations in the arbitral procedure. There may be a single arbitrator or a panel. The objective standards on which the arbitral award is to be based include the contract between the parties, trade customs, the applicable law, or some combination of these factors. Often the arbitrator is an expert in the field in which the dispute arose. Arbitrators can be under a "high-low" contract, meaning that the limits of recovery and loss are bounded by the parties' agreement. This converts a win/lose situation into a partial win or partial lose situation. "Final offer arbitration" occurs when both dis-

[43]Goldberg, S.B., Green, E.D. and Sander, F.E.A., *Dispute Resolution*, (1985) at 150

[44]Merrills, J., *International Dispute Settlement*, (3rd ed., 1998), in particular see Chapters 5, 6 and 7

[45]Gray, C. and Kingsbury, L., "Developments in Dispute Settlement: Inter-State Arbitration since 1945", (1992) 63 British Yearbook of International Law 97

[46]see, for a comparison with other dispute settlement mechanisms, Bilder, R.B., "An Overview of International Dispute Settlement", (1986) 1 Journal of International Dispute Resolution 1

putants separately submit their best offer to the arbitrator, who then picks the one closest to the arbitrator's own determination. This encourages reasonable settlement offers by both parties.

Arbitration may allow a dispute to remain private. This allows the the publicity inevitably associated with adjudication to be avoided. The public interest is also served as the parties bear all costs themselves. Arbitration is more flexible than adjudication. The parties have control over their own dispute, the procedures followed and the applicable principles. This increases the parties' satisfaction with the process and the outcome. Arbitration is also faster, and consequently less expensive, than adjudication. There is formally no precedent value in the decision reached, so concern for future cases will not impact on the decision at hand. As the procedure can be designed to be less formal and intimidating than those relating to adjudication, the aggressive confrontational ambience is decreased. This is especially important in maintaining ongoing business relationships. If experts are used as arbitrators, results may be more in line, or at least perceived to be so, with the parties' expectations.[47]

Arbitration however, may not always be faster, less expensive, and less formal.[48] It may be more expensive and time-consuming than adjudication, if the arbitration agreement, choice or conduct of arbitrators, procedure or award are challenged. Further, there may be concerns regarding the arbitrators' ability and qualifications, and whether they should be subject to professional standards. Generally, arbitral decisions are not reviewable for errors of fact or law. This may lead to unfair results.[49]

Conciliation

Procedurally conciliation is similar to mediation. In practice the difference between a mediator and a conciliator is more perceived than actual. Strictly speaking, a conciliator participates in the proceedings and then expresses his or her own view on the merit of the respective cases. The conciliator does not meet with the parties in private session, nor does s/he therefore engage in shuttle diplomacy. The net result is that conciliation is more similar to round table settlement negotiations than mediation.

Mediation

Mediation involves representatives from each party sitting down with the mediator to attempt to reach a settlement. It is often the case that the mediator

[47] Damrosch, L.F., "Retaliation or Arbitration - or Both? The 1978 United States-France Aviation Dispute", (1980) 74 AJIL 785

[48] Kooijmans, P.H., "International Arbitration in Historical Perspective: Past and Present", in Soons, A.H.A. (ed.), *International Arbitration: Past and Prospects* (1990) 23

[49] Brownlie, I., "The Peaceful Settlement of International Disputes in Practice", (1995) 7 Pace International Law Review 257

will be an expert in the particular field of the dispute. The role of the mediator is that to speak separately to each of the parties to assist them in defining their differences and help them to work towards an acceptable solution. A mediator will not disclose confidential information imparted by one party to the other. Mediation proceeds in an extremely informal setting. Each party must be represented by a person with authority to settle the dispute, as well as a lawyer if they so wish. The mediator will generally begin the session by explaining the process to be used. Each party is then given the opportunity to describe the dispute and their respective positions in their own words. Reference can be made to what witnesses are likely to say, although the witnesses themselves will not be present. The aim of the session is to allow the parties to make a presentation that will allow both sides to fully comprehend the various perspectives of the dispute so that they may properly analyze their respective weaknesses. The mediator will then privately discuss the possibility of settlements with each party in turn to help them reach agreement. Whether or not the mediator will attempt a joint meeting to bring the parties to agreement will depend largely on the parties' intents. The essential function of the mediator is to engage in shuttle diplomacy between the parties. Concurrently, the mediator should not express a personal opinion or assessment of the merits of each side's case. Generally speaking the mediator will meet with each party in turn to assist them to examine their case and will, if so authorized, carry offers from one side to the other. This continues until a common position is attained and a settlement of the dispute is achieved.

The success of any mediation turns on the skill of the mediator. As such, it is extremely important that mediators are properly trained. Certainly in the early stages of the settlement process it may appear that the parties' positions are too far apart for a settlement to be achieved. However, by meeting with each party privately, these positions are hopefully drawn closer. If the mediation does not succeed ultimately in settling the dispute, it does at least keep the channels of communication open.

Negotiation

Negotiation is the method by which most disputes are resolved. It involves informal discussions between the two disputing parties without any third party intervention. Negotiation aim for a compromise between both positions that is acceptable to both parties. This method of dispute resolution is so obvious that it may come as a surprise that it is a discrete mechanism in itself. However, disputing parties may not consider any means of peaceful resolution, or may not have open channels of communications between them at all. Hence, the fact that negotiation functions as a separate dispute settlement mechanism may be less obvious that it should be.

Hybrid Processes

Elements of the primary processes of dispute settlement have been combined in a number of ways in a rich variety of "hybrid" dispute settlement processes. For example, an adjudication-like presentation of arguments is combined with negotiation in the mini-trial; and mediation is often combined with arbitration in med-arb.[50] Other hybrid processes include the mini-trial, the ombudsperson, med-arb, early neutral evaluation, and the summary jury trial. Some characteristics of these processes are summarized in Tables 5.1 and 5.2.[51]

Early Neutral Evaluation

Early neutral evaluation is an assessment of the case early in the settlement process by an experienced neutral third party. This assessment is based on brief presentations by both sides. If the case does not settle, the assessment is kept confidential. The evaluator may then assist the parties in simplifying the case for more efficient handling at adjudication. Sometimes the evaluator may also assist the parties in managing discovery.

Mini-Trial

A mini-trial is a hearing before a forum consisting of decision-makers from each side and a neutral third party. The decision-makers from each side are generally given the authority to settle the dispute. The mini-trial may take place even if adjudicatory proceedings have been initiated. It normally starts after the discovery and inspection of documents, so that there is an agreed *Compromis*. Each party is represented by one lawyer. This lawyer will be entitled to make a speech lasting generally not more than two hours, together with a right of rebuttal of not more than thirty minutes. After the lawyers' presentations, each of the decision-makers separately retire with their own advisors to discuss the merits of the case put by their opponent. The decision-makers then meet to discuss the possibility of reaching a settlement. The neutral may be called upon to render an opinion at any time by either of the two sides, or not at all as the case may be.

In many ways a mini-trial is similar to round table settlement conferences familiar within the building and construction industry. However, the slightly more formal proceedings, commitment of time and degree of preparation often benefits the settlement process. The lawyer is given the opportunity to present to the opposing decision-maker his client's point of view. However, the method is not without its disadvantages. As mini-trials involve partial

[50] "Med-arb" refers to a hybrid version of a dispute settlement mechanism that marries characteristics of mediation and arbitration. An elaboration of this is found further in this subsection.

[51] Mackie, K.J., *A Handbook of Dispute Resolution: ADR In Action* (1991)

discovery and considerable legal preparation, they are relatively expensive and time-consuming.

A mini-trial clearly has a greater chance of success if a neutral is appointed. The participating decision-makers may call on the neutral to assist in legal points at issue, or due to their natural distrust of the strengths of the opponent's case. This is especially where substantial sums, risks or interests are involved. The selection of the neutral is therefore an important element that should be given weight. The neutral is a key figure who must bring to the forum negotiating skills, as well as professional and legal expertise.

The mini-trial generally dispenses with legal rules of procedure. Essentially, it is a settlement procedure aimed at converting a legal dispute into a business problem that can be negotiated. This has a number of advantages:

- a lengthy hearing is eliminated;
- each party's case can be professionally presented but without any formal rules of procedure or evidence; and
- the parties, who ultimately decide whether and on what terms the disputes should be settled, have the opportunity to be guided by a neutral third party with some expertise in the field.

Ombudsperson

Ombudspersons perform a mixture of investigative and mediatory functions. The aim of resort to an ombudsperson is to resolve the dispute outside the judicial system. An ombudsperson is generally independent and performs a form of investigative mediation. Usually this role is played between the public and the government, or where there is a public interest involvement in the context of an imbalance of power. The advantage of resort to an ombudsperson are that it allows for dispute settlement without the onus and expense being entirely on the injured party. This increases access to justice. However, an ombudsperson may not be effective unless the more powerful party involved has an interest in considering the ombudperson's findings and attempts at mediation. Another disadvantage may be that making it so easy for a complainant to have a dispute brought forward may open the floodgates to trivial complaints or those without merit being lodged.

Med-arb

Mediation-Arbitration, or "med-arb", is a process by which the same person serves both as mediator and arbitrator. If the initial mediation does not result in a settlement, the mediator switches roles to act as an arbitrator and imposes a decision. Med-arb may involve tripartite arbitration. This is a procedure in

which one arbitrator appointed by each party serves on a panel of three with a neutral arbitrator. This neutral can act as an advisory arbitrator in proposing a non-binding arbitration. This prevents problems or role confusion. If this fails, arbitration follows using a different person as arbitrator to avoid compromising the adjudicatory role of the arbitrator.

Perceived advantages include less posturing by parties in the mediation process when the mediator also has the power of decision-maker. Parties are more likely to attempt serious and reasonable negotiations. Further, a better agreement may be reached in med-arb than if it would be imposed with arbitration alone. Perceived limitations however, include the fact that if the same person acts as both mediator and arbitrator, and mediation fails, the adjudicatory role of the arbitrator may be compromised. Information learned while acting as mediator may affect, or appear to affect, the validity of the decision made.

Summary Jury Trial

The summary jury trial is an adaptation of the mini-trial. It is used in cases where the parties want direct information about likely jury or bench reaction. The summary jury trial takes place in court with a judge presiding and an advisory jury. The advisory jurors are encouraged to treat their task as seriously as would an actual jury.

Lawyers for each party make summary presentations. These presentations are generally based on material that has been the subject of discovery and would thus be admissible at trial. The jurors deliberate, return a verdict, and then answer the attorney's questions about the verdict and their reaction to particular evidence and arguments. Following the return of the verdict and the questioning of the jury, the parties engage in settlement discussions. If no settlement results, the jury's verdict is not admissible at trial.

Summary jury trials undoubtedly settle some cases that would otherwise go to trial. However, the success with which they do so is unknown. The process is costly in terms of court time, and hence it is normally reserved for cases that are expected to take a long time if they proceed to adjudication. The summary jury trial is particularly useful for novel cases in which the verdict is difficult to predict, and that difficulty is deterring settlement.

Distinguishing Between the Methods

Distinguishing among the processes is more complicated than this simple description, due to variations in application. Criteria employed in distinguishing between the various mechanisms include the amount of party control over the

Characteristics	Adjudication	Arbitration	Conciliation	Mediation	Negotiation
Voluntary / Involuntary	Involuntary	Voluntary	Voluntary	Voluntary	Voluntary
Binding / Non-binding	Binding: Subject to appeal	Binding: Subject to review on limited grounds	If agreement, enforceable as contract	If agreement, enforceable as contract; sometimes agreement embodied in court decree	If agreement, enforceable as contract
Third Party	Imposed, third party neutral decision-maker, generally with no specialized expertise in dispute subject	Party-selected decision-maker, often with specialized subject expertise	Party-selected outside facilitator	Party-selected outside facilitator	No third party factor
Degree of formality	Formalized and highly structured by predetermined, rigid rules	Procedurally less formal; procedural rules and substantive law may be set by parties	Usually informal, unstructured	Usually informal, unstructured	Usually informal, unstructured
Nature of Proceeding	Opportunity to present proofs and arguments	Opportunity for each party to present proofs and arguments	Unbounded presentation of evidence, arguments and interests	Unbounded presentation of evidence, arguments and interests	Unbounded presentation of evidence, arguments and interests
Outcome	Principled decisions, supported by reasoned opinion	Sometimes principled decision supported by reasoned argument; sometimes compromise without opinion	Mutually acceptable agreement sought, with facilitator giving own views on the merits of the case	Mutually acceptable agreement sought	Mutually acceptable agreement sought
Private / Public Character	Public	Private, unless judicial review sought	Private	Private	Private

Table 5.1: Primary Dispute Settlement Processes

Characteristics	Early Neutral Evaluation / Fact-finding (Combination of negotiation and facilitative mediation)	Mini-Trial (Combination of mediation and arbitration)	Ombudsman / Med-Arb (Directive mediation: Combination of negotiation and mediation)	Summary Jury Trial (Combination of mediation and adjudication)
Voluntary / Involuntary	Voluntary or Involuntary	Voluntary	Voluntary	Voluntary or Involuntary
Binding / Non-binding	Non-binding but results may be admissible	Non-binding; if agreement, enforceable as contract	Non-binding	Non-binding; if agreement, enforceable as contract
Third Party	Third party neutral with specialized subject matter expertise; may be selected by the parties or the court	Party-selected neutral advisor, sometimes with specialized subject expertise	Third party selected by institution	Mock jury impanelled by court
Degree of formality	Informal	Less formal than adjudication: Procedural rules may be set by parties	Informal	Procedural rules fixed; less formal than adjudication
Nature of Proceeding	Investigatory	Opportunity to present proofs and arguments	Investigatory	Opportunity to present proofs and arguments
Outcome	Report or testimony	Mutually acceptable agreement sought	Report	Advisory verdict to facilitate settlement
Private / Public Character	Private, unless disclosed in court	Usually private	Private	Usually public

Table 5.2: Hybrid Dispute Settlement Processes

outcome, party first-hand participation in the process,[52] and whether the aim of the mechanism is to reconcile the disputants' underlying interests, determine who is right, or determine who is more powerful.[53] Generally, reconciling interests is less costly than determining who is right, which is in turn less costly than determining who is more powerful.[54]

Gradated Scale of Dispute Settlement Processes

Some authors describe five major categories of dispute processing,[55] stressing the presence or absence of a third party and the role of planning and prevention:

- Adjudicative processes: including court and administrative proceedings, arbitration and private tribunals;
- Consensual processes: including ombudsperson, fact-finding, negotiation, mediation and conciliation;
- Mixed processes: including mediation-arbitration (med-arb), mini-trial, summary jury trial and unstructured settlement negotiations;
- Litigation management and adjudication planning: including lawyer planning for adjudication, case reviews, discovery control and risk analysis; and
- Prevention: including strategies to plan transactions, conflict avoidance, partnering principles as well as consensus and confidence building.

The latter two categories can expand thinking about the methods of dispute processing. Litigation management and adjudication planning illustrates that what the course of adjudication is very much dependent on a number of decisions. ADR techniques can be considered and resorted to even as a dispute proceeds to adjudication. There may be several simultaneous tracks on which the dispute is moving along. Budget decisions may become turning points under this category. Relationship-building processes, both before and after the settlement of a dispute are components of an ADR inquiry. Such relationship-building and preventive processes include the practice of writing ADR clauses into contracts. Rather than waiting for disputes to arise, dispute prevention acts as a prescribed preventative medicine.

[52]Lind, E.A. et al, "In the Eye of the Beholder: Tort Litigants' Evaluations of their Experiences in the Civil Justice System", (1990) 24 Law & Society Review 953

[53]see generally Ury, W., Brett, J. and Goldberg S., *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, (1988)

[54]*ibidem* at 15

[55]see for example, Riskin, L.L, and Westbrook, J.E., *Dispute Resolution and Lawyers*, see *supra* note 23 at 2 - 6

Dispute resolution can be approached in many ways. One way is to see a continuum running from consensual resolution at one end to formal binding third party adjudication at the other.[56] ADR's magnitude is illustrated by the location of the various methods of dispute processing on a dispute resolution continuum as illustrated in Figure 5.1.[57]

Three observations can be made about the continuum manner of organizing the various mechanisms of dispute settlement. First, the mechanisms that can be employed to settle disputes are not limited. Not all the possible techniques of dispute settlement have been invented. The continuum consists of some well-known and comfortable locations. However, innovative mechanisms can always be evolved to solve old problems and emerging conflicts. Interest in dispute settlement systems design will add new mechanisms and methods to this continuum of settlement processes. Second, the potential significance of any particular mechanism on the continuum should not be ignored. ADR evolved out of a concern that too much emphasis was being placed on adjudication to the detriment of more widely used procedures such as negotiation. Though sexy processes such as mediation and negotiation capture the public imagination, the importance of understanding the entire continuum of settlement mechanisms cannot be neglected. Third, the continuum suggests that the various methods of dispute settlement can be located on the continuum, according various criteria. Such criteria include the identity and authority of the decision-maker and the degree to which the settlement of the dispute may be coercive or win-lose. It is important to realize that these characteristics can be important factors in deciding which methods to use in a particular case.[58]

There may be various means of differentiating mechanisms of dispute settlement. However, several common themes are evident. First, the range of settlement procedures buttresses the conclusion that adjudication is not the norm in dispute settlement. Only a small percentage of disputes actually proceed to adjudication. Additionally, lawyers and the parties themselves regularly settle disputes without ever initiating the adjudicatory process. Methods of dispute settlement often characterized as "alternative" are practically, in fact, the norm.

Second, a clear understanding of the functions and processes of the various dispute settlement mechanisms will be helpful when in making choices about which mechanism to use. Other factors may come into play in the selection of the most suitable mechanism, such as costs, availability and time. A working understanding of how each dispute settlement mechanism operates is essential

[56]Cappelletti, M., and Garth B., "General Report", Vol. I Bk. 1, in *Access to Justice*, see *supra* note 9

[57]Moore, C.W., *The Mediation Process: Practical Strategies for Resolving Conflict*, (2nd ed., 1996) at 7

[58]Brown, H.J. and Marriott, A.L., *ADR Principles and Practice*, see *supra* note 11 at 84

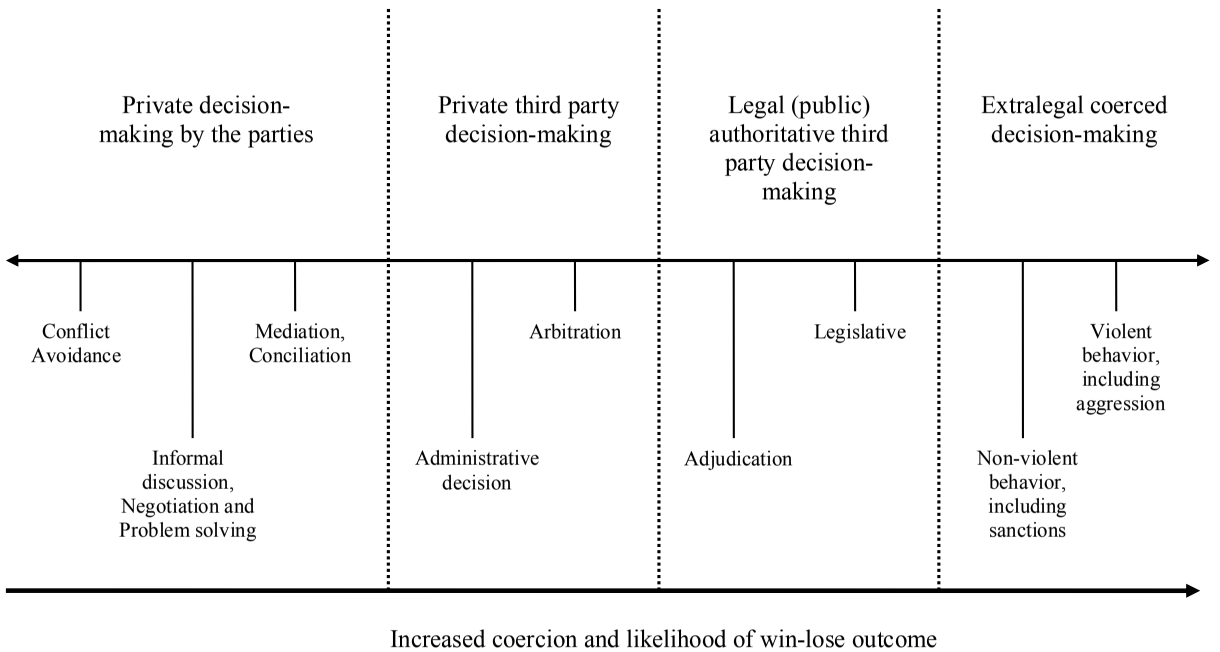

Figure 5.1: Continuum of Dispute Resolution: Maximum Party Participation to Maximum Coerced Settlement

to any informed decision as to which to employ.[59]

Third, a working comprehension of the skills used in the various dispute settlement mechanisms will be a prerequisite to participating effectively in these processes. Some skills will be generic to all the processes. However, many skills will be unique to particular processes within a particular factual matrix. A mediator will not use the decision-making skills required of an arbitrator. Conversely, an arbitrator is unlikely to need the same rapport-building skills of a mediator.

Sander authored one of the most significant developments of this concept of the gradated continuum.[60] Certain criteria were considered to be important for determining the effectiveness of a dispute resolution system, namely: "cost, speed, accuracy, credibility, and workability".[61] Although the context of this paper was based in the domestic judicial system, there is no reason why these criteria should not apply equally to international law. In particular, the nature of space activities require that any proposed dispute settlement mechanism should also consider these criteria.

Sander identified two questions as important:

1. What are the significant characteristics of various alternative dispute resolution mechanisms?

2. How can these characteristics be utilized so that, given the variety of disputes that presently arise, we can begin to develop some rational criteria for allocating various types of disputes to different dispute resolution processes?[62]

In comparing systems, Sander regarded the factor of decreasing external involvement in the process as critical. He outlined a spectrum of processes on a decreasing scale of external involvement. At the maximum end of the involvement scale was placed adjudication, then arbitration. Half-way between adjudication and mediation he placed the ombudsman and fact-finding enquiry. Mediation came next, followed by negotiation. At the minimum involvement end was "avoidance", an approach described as "clearly undesirable".

Professor Sander pointed out that while these different systems were distinct in theory, in practice there was often considerable interplay and overlapping. He recommended a flexible and diverse panoply of dispute resolution processes. The parties would be first channelled through a screening expert who would then direct them to the sequence of processes most appropriate to their needs.

[59] *ibidem* at 85

[60] Sander, F.E.A., *Paper: National Conference on the Causes of Popular Dissatisfaction with Administration of Justice*, (1976) 70 Federal Rules Decisions 79

[61] *ibidem* at 113

[62] *ibidem*

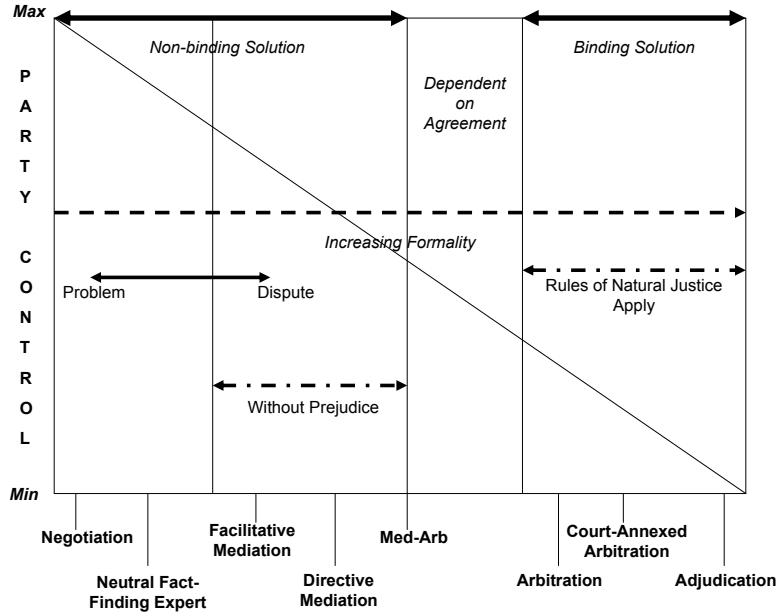

Figure 5.2: Gradated Scale of Methods of Dispute Settlement

Figure 5.2[63] shows the gradated relationship between the various dispute settlement methods. In terms of certain variable criteria such as party control, formal structure and binding solutions, Negotiation and Litigation are on opposite ends. Med-Arb lies in the middle of the spectrum. Between Negotiation and Med-Arb are the Neutral Fact-finding Expert and both forms of Mediation. Between Med-Arb and Litigation lies Arbitration in its various forms.

With this scale, dispute settlement methods can be recommended to parties whose particular dispute places them on different parts of the scale. This scale spectrum can be gradated by quantum. A "quantum" is used here to denote the smallest amount of tangible difference that can be discerned between the various mechanisms so as to be able to qualitatively differentiate them. This means that it is possible to arrange the various methods of dispute settlement on a scale based on the increasing level of party control, efficiency, legal applicability and formality. Each of these mechanisms would discretely occupy a place on this continuum, based on the discernment of the smallest quantity of methodical difference between them. Every interval between each mechanism would be considered one quantum.

[63] Adapted from the Academy of Experts, in Newman, P., *Alternative Dispute Resolution* (1999)

The dispute settlement method best suited to both parties' requirements can be recommended based on that quantum. For example, if one party would prefer negotiation while the other would prefer litigation, the dispute resolution method recommended could be med-arb. Of course, in the selection of the recommended choice, other factors should also be considered. Among these are whether the specific dispute settlement method is suitable for the type of dispute and the time factor involved. However, with this gradated scale, the choice of dispute settlement would be most suited to the parties' needs. This in turn would allow for more efficient resolution of disputes and greater satisfaction on the part of both parties.

This gradated scale theory has been tested in the incarnation of the multi-door courthouse. The multi-door courthouse has been tested domestically in parts of the United States, such as New Jersey, Houston and Philadelphia, and most notably in the District of Columbia.[64] It has been implemented in Alberta, Ottawa and various other states in Canada.[65] Recently, it was mooted as an improvement for the legal system in Singapore.[66] Before exploring the potential advantages and successes of the multi-door courthouse, the next section will first look at the beginnings of this revolutionary concept of dispute resolution.

5.1.2 The Beginnings of the Multi-Door Courthouse

Former chief justice of the United States Supreme Court, W. Burger, asked the legal profession to consider their traditional role as "healers of human conflict" and use more fully the negotiation and arbitration processes. This followed initiatives in the United States investigating alternatives to adjudication. Of particular note was the 1976 Pound Conference. There, Professor Frank Sander saw, in the future, not simply a courthouse but a dispute settlement center or a multi-door courthouse where disputants would be screened and channelled to a variety of dispute settlement mechanisms such as mediation, arbitration, fact-finding, malpractice screening panel, superior court, or an ombudsman.[67] Sander envisaged one large courthouse with multiple dispute resolution "doors" where each case would be diagnosed and referred to an appropriate process "door". These included conciliation , mediation, arbitration, and social services. The concept envisaged by Sander was eventually tested in various United States courts in the 1980's.

In 1984 the American Bar Association began to develop experimental multi-

[64] d'Ambrumenil, P.L., *What is Dispute Resolution?* (1998); Henderson, S., *The Dispute Resolution Manual: A Practical Handbook for Lawyers and Other Advisers*, Version 1.0 (1993)

[65] see *supra* note 41

[66] Lim, L.Y. and Liew, T.L., *Court Mediation in Singapore* (1997) at 31

[67] Sander, F.E.A., "Varieties of Dispute Processing", see *supra* note 60

door centers in Tulsa, Oklahoma; Houston, Texas; and the District of Columbia. The five criteria initially developed by Sander[68] were used in each of the experimental models. The criteria were

1. The nature of the dispute - repetitive and routinized disputes may be suitable for more formal adjudicatory processes.
2. Relationship between disputants - where ongoing relationships are concerned the preferred processes may be mediation or negotiation.
3. Amount in dispute - the expense of the process should be proportional to the amount at stake.
4. Cost of resolution - if all other factors are equal, cost should be kept as low as possible.
5. Speed of resolution - the quickest method of dispute resolution should be preferred.

Each multi-door courthouse initiated an intake and referral procedure. In the District of Columbia, the process involved a case classification form that was analyzed by the court. The form provided for the weighting of responses to questions about the nature of the case, the goals of the disputants and outcome factors. In Tulsa, much of the budget was invested in a public relations campaign, with little integration of the program into the formal adjudicatory court system.[69] In Houston, the program was largely conducted by neighborhood Justice Centers involving intake points that were located in various community centers sites.

Other models of the multi-door concept can be found throughout the United States. Examples include the Philadelphia Municipal Court Dispute Resolution Program and the Burlington County (New Jersey) Superior Court Comprehensive Justice System. Currently however, most disputing parties still find their way to the adjudicatory court system. This may be because the other forms of settlement are operated by a medley of local government agencies, neighborhood organizations, and trade associations. Thus, disputing parties must be knowledgeable about community resources in order to locate the right forum for a particular dispute.

No program model was ever developed beyond that originally mooted by Sander. Hence, there has never been a generally accepted notion of what such a program model should comprise in terms of intake points, referral procedures and other organizational and programmatic aspects.[70] At the same time this

[68]Sander, F., "Varieties of Dispute Processing", see *supra* note 60

[69]Standing Committee on Dispute Resolution American Bar Association, *The Multi Door Experience* (1988)

[70]McGillis, D., *Major Issues involved in the Development and Operation of Multi Door Courthouse Centres*, (1994)

lack of a defined view allows any model that is adopted to be flexible enough serve the specific needs of the particular justice system.[71]

It is submitted that any new dispute settlement mechanism must be realistic. It must not only develop legally satisfactory rules and regulations, but also find frameworks that will be accepted in practice by all potential parties. In order to take into account political feasibility and practical relevance, some major criteria will have to be designed for the development of any new system of dispute settlement.

It is further submitted that the multi-door courthouse recognizes that particular disputes and disputants may be best suited to particular dispute resolution methods. As options proliferate, choosing the correct option becomes a problem in itself. The multi-door courthouse, in which disputes will be analyzed and diverted to the appropriate dispute resolution method, may serve as an answer to this problem.[72] In this approach, a disputant would be channelled by intake screening to the correct "door" in the courthouse. The courthouse would make all dispute resolution services available under one roof, including the initial step of intake screening described. In appropriate situations, the disputing parties may be referred to external dispute settlement processes, but in general the multi-door courthouse should be a one-stop center for dispute settlement. As such, it should also ensure that it independently can provide the procedures necessary for the dispute to be resolved. The aims of the multi-door courthouse would be to inform the parties of the available alternatives, to assist them in choosing the appropriate mechanism for their particular dispute, and to provide them with access to the selected mechanism. It also allows any public interest in the dispute to be considered, and provides loop-back or back-up dispute resolution mechanisms in case of an unsuccessful first attempt.

The success of the multi-door courthouse would depend largely on the skill and accuracy of the intake screening. Hence, there are concerns as to the training required for, and the standards applied to, personnel that work in this initial stage. There is also a very valid concern that the multi-door courthouse would lead to a new bureaucracy that will send disputant from one method to another without any genuine attempts to address their particular problem. Further, if compliance with the intake screening's referral were purely voluntary, it would be questionable whether any efficiency gains would be realized. However, if compliance were purely involuntary, then policy concerns regarding fairness, access to justice and civil rights arise. Finally, as access to justice is increased, so is the potential that the multi-door courthouse would be flooded with time-consuming disputes of little merit or value.

It is however mooted that the multi-door courthouse should result in effi-

[71] Reuben, R., "The Lawyer Turns Peacemaker", (1996) American Bar Association Journal 71

[72] Sander, F.E.A., "Varieties of Dispute Processing", see *supra* note 60

ciency savings in terms of time and money. This would occur as disputes are diverted quickly to the most suitable method of resolution, rather than going to an inappropriate and consequently ineffective method. Access to, and legitimization of, new methods of dispute settlement would likely increase through the use of the multi-door courthouse system. Additionally, a better understanding of the unique advantages and disadvantages of specific mechanisms of dispute resolution should result.

The multi-door courthouse has been used in many domestic common law jurisdictions, as mentioned above. Multi-door courthouse systems have generally been restricted to a particular territorial jurisdiction, and to domestic usage. It is submitted however, that the multi-door courthouse system provides the sectorialized dispute settlement mechanism that is optimal for resolving disputes relating to outer space. It is submitted that the multi-door courthouse allows for the fulfillment of criteria necessary for the viable working of a dispute settlement framework for activities relating to outer space.

The next section of this Chapter will propose an adapted multi-door courthouse system for the resolution of disputes relating to activities in outer space. It will describe the proposed multi-door courthouse system in detail. It will then proceed to show the reasons as to why the multi-door courthouse system is the most workable and viable dispute settlement mechanism for disputes relating to outer space.

5.2 Proposal - The Multi-Door Courthouse System: A Viable Dispute Settlement Mechanism for Outer Space Disputes

International law derives its legitimacy from the purposes that it exists to serve. Its legitimacy thus depends on the extent that it is effective in doing so. In the absence of an international legislature, inferences from the purposes of international law such justice and the common good, constitute a much more direct source of law than they would in most domestic legal systems. Customary law, formed by the opinions and practices of States, provides good evidence of law by illustrating either

1. What States or other actors *have* agreed to, or

2. What all international legal actors *should* agree to, because it is widely recognized to be just.

This is comparable to the perception of *lex non scripta* as the embodiment epithet of reason, as applied to the vicissitudes of human society, and evolved through years of legal practice.

There is currently what has been termed an "obsessive concentration"[73] upon the processes of international dispute settlement that might is akin to the enthusiasm of the ADR movement in Anglo-Saxon domestic legal systems.[74] This is evident from the number of forums, for example in renewed UN emphasis on particular peacemaking devices,[75] and the proliferation of dispute settlement clauses in treaties. A balanced solution that makes some form of dispute settlement procedure compulsory, while allowing parties the maximum control over the specifics of its form, has been adopted in some sectoral regulatory régimes.[76] Such treaties generally contain Annexes that eases the operating procedure of the selected process. These Annexes provide procedural details as the method of selection of third parties, appropriate time limits, applicable procedures, preferred outcomes and third party powers.[77] Similarly, additional institutional mechanisms for dispute settlement have been introduced regionally, especially within Europe.[78] These have generally taken the form of Protocols to established treaty or convention régimes.[79]

In the field of international dispute settlement, an interdisciplinary study of conflict resolution very early surveyed both the processes available in international law and case studies of actual endeavors at conflict prevention.[80] What is particularly interesting is that the Anglo-Saxon domestic ADR movement has long combined both a procedural approach with an effectiveness approach to dispute settlement.

These comparative evaluations of ADR and international dispute settlement can be accounted for by the fact that international dispute settlement existed long before the modern pedagogy of socio-psychology and its links with dispute resolution. The modern ADR movement was born of developments in social psychology in the 1960s in how to influence the outcome of dispute settlement. At that point, the study of international dispute settlement was an established subfield of international law.

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[73]Koskenniemi, M., "International Law in a Post-Realist Era", (1995) 16 American Yearbook of International Law 1

[74]see Chinkin, C., "The Peaceful Settlement of Disputes: New Grounds for Optimism?", in MacDonald, R.St.J., (ed.), *Essays in Honour of Wang Tieya*, (1994) at 165

[75]An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peacekeeping: Report of the Secretary-General Pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992, (17 June 1992), UN Doc. A/47/277

[76]see *supra* Chapter 4; also see Chinkin, C., "Dispute Resolution and the Law of the Sea: Regional Problems and Prospects" in Crawford, J. and Rothwell, D., *The Law of the Sea in the Asian Pacific Region* (1995) at 237

[77]UN Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, (1985) 24 ILM 1302

[78]Convention on Conciliation and Arbitration within the Conference on Security and Cooperation in Europe, (1993) 32 ILM 557

[79]see *supra* Chapter 4 for a discussion of this topic.

[80]Donelan, M.D. and Grieve, M.J., *International Disputes: The Political Aspects*, (1971)

There is clearly a cross-fertilization between the domestic and international arenas. Nevertheless, many qualified publicists have exhorted caution in drawing comparisons between the two.[81] In domestic legal systems, the aim has always been to establish alternatives to the high costs and long delays of adjudication. In international law however, the objective was to promote third party settlement, in the absence of compulsory adjudication.[82] The motivations of international space law however, seems to fall in between. As a unique branch of the law that involves both public and private interests, it needs to walk the fine line between meeting the objectives of private parties with regards to costs and scheduling, while protecting public interests in the formulation of a coherent, practicable legal framework that actualizes the basic principles of international space law.

Internationally, diplomatic settlement processes were promoted as alternatives to recourse to armed force rather than as alternatives to adjudication. The latter was not introduced until the creation of the Permanent Court of International Justice as part of the post-World War I settlement.[83] In the *Great Belt* case the ICJ held that international adjudication is still an alternative to direct and friendly settlement between States.[84] This is contrary to the understanding in domestic legal systems. As a result, domestic discussion about the function and efficacy of ADR procedures carry less meaning in the international context where all third party procedures are peaceful alternatives to armed conflict. The consensual basis of international procedures indicates that they do not operate in the "shadow of the law" as is the case domestically,[85] although the *Nauru*,[86] *Great Belt*[87] and *Qatar v. Bahrain*[88] cases might suggest a change in this respect. Conversely, international adjudication draws more from negotiatory methods of settlement than does domestic adjudication.[89]

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[81] Chinkin, C., "Alternative Dispute Resolution under International Law", in O'Connell, M.E., (ed.), *International Dispute Settlement*, (2001) at 504

[82] Article 36, Statute of the International Court of Justice (1945) 9 ILM 510, [hereinafter "ICJ Statute"]

[83] Article 14, Covenant of the League of Nations, (28 June 1919) 11 Martens (3rd) 323

[84] *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, (29 July 1991) (1991) ICJ Rep. 12

[85] Mnookin, R. and Kornhauser, L., "Bargaining in the Shadow of the Law: The Case of Divorce", (1979) 88 Yale Law Journal 950

[86] *Certain Phosphate Lands in Nauru, (Nauru v. Australia)*, Preliminary Objections, Judgment, (1992) ICJ Rep. 240

[87] Magid, P., "The Post-Adjudicative Phase", in Peck, C. and Lee, R. (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997) 325

[88] Lauterpacht, E., " 'Partial Judgments and the Inherent Jurisdiction of the International Court of Justice", in Lowe, V. and Fitzmaurice, M., (eds.), *Fifty Years of the International Court of Justice* (1996), at 465

[89] Franck, T.M., *Fairness in International Law and Institutions*, (1995)

Therefore, ADR procedures are certainly not new to international law.[90] Such "diplomatic processes" have been formally part of the framework of international dispute settlement since the 1899 and 1907 Hague Treaties[91] and informally for much longer.[92] An optimism that States Parties would cooperate to seek peaceful means of dispute settlement motivated the 1899 and 1907 Hague Conferences. This optimism found solid expression in the provision for third party processes of arbitration, good offices, mediation, inquiry and conciliation. These processes were institutionalized in multilateral and bilateral treaties, including those that established the Permanent Conciliation Commissions,[93] the PCA,[94] the fact-finding Commission of Inquiry and Mixed Arbitral Tribunals.[95] Despite such optimism and the myriad of procedures established, their actual use was never extensive. Nevertheless, these processes were reiterated in Article 33 of the UN Charter[96] as a necessary corollary to the Charter's prohibition on the use of force in international relations.[97]

Steady reiteration has been found through the revision of the 1949 General Act,[98] further General Assembly Resolutions,[99] and regional arrangements.[100] Nevertheless, these processes remained under-utilized in the years of the Cold War. Any recourse taken generally was on an *ad hoc* basis. The integral flexibility of negotiatory processes were utilized to shape dispute settlement methods and outcomes to fit the factual matrix and political background of the particular dispute.

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[90]Malanczuk, P., *Akehurst's Modern Introduction to International Law*, (7th ed., 1997) at 273 - 281

[91]International Convention for the Pacific Settlement of Disputes, The Hague, 29 July 1899, 32 Stat 1779; International Convention for the Pacific Settlement of Disputes, The Hague, 18 October 1907, 36 Stat. 2199

[92]Merrills, J., *International Dispute Settlement*, see *supra* note 44

[93]Merrills, J., *International Dispute Settlement*, *ibidem*

[94]Articles 20 - 29, 1899 International Convention for the Pacific Settlement of Disputes, see *supra* note 91

[95]Articles 296 - 297, 304 - 305, Treaty of Versailles, 28 June 1919, 11 Martens (3rd) 323

[96]See further United Nations, *Handbook on Peaceful Settlement of Disputes between States*, (1992)

[97]Articles 2(3) and 2(4), Charter of the United Nations, (1945) 59 Stat. 1031, UNTS No. 993 [hereinafter "UN Charter"]

[98]General Act for the Pacific Settlement of International Disputes, 26 September 1928, Geneva, 93 LNTS 343; revised on 28 April 1949

[99]E.g. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res. 2625, 24 October 1970; Manila Declaration on the Peaceful Settlement of International Disputes, GA Res. 37/10, 1982; Declaration on the Prevention and Removal of Disputes and Situations which may Threaten International Peace and Security and on the Role of the United Nations in this Field, GA Res. 43/51, 1988

[100]E.g. the American Treaty on Pacific Settlement (1948) 30 UNTS 55; the European Convention for the Peaceful Settlement of Disputes, (1957) 320 UNTS 243; and the Protocol of the Commission of Mediation and Arbitration of the Organization of African Unity (1964), 3 ILM 1116

Clearly, different categories of disputes call for different approaches to and methods of settlement. Certainly, in some situations it may be better to deal with problems as they arise, on a *ad hoc* basis. In other circumstances it may be more logical to develop highly structured arrangements in advance for use when disputes actually arise. Effective dispute settlement involves an assessment of what method or combination of methods may be most suitable in resolving the particular dispute and how and when they can best be employed.[101]

The myriad of dispute settlement techniques are of course not mutually exclusive with strictly drawn borders. Some of them generally are prescribed either *seriatim* (although in no fixed order) or to complement one another. The recent 1982 UNCLOS, for example, uses a variety of mechanisms to deal with the various categories of disputes that may arise. This attitude clearly illustrates how these mechanisms can be used to their best advantages in an innovative and imaginative way.[102] Schachter writes:

> "Flexibility and adaptability to the particular circumstances are the essential characteristics of these various procedures. There is little to be gained by seeking to give them precise legal limits or procedural rules as a general matter."[103]

This section builds upon these principles to propose an adapted multi-door courthouse system for the resolution of space-related disputes. In recognizing that dispute settlement techniques overlap and can be used inter-changeably, it answers Schachter's exhortation in affording the greatest flexibility and adaptability possible. The aim of this proposal is for the satisfactory, reasoned settlement of disputes within the most efficient framework possible. This proposal also recognizes that it cuts across two novel and important fields of law: international dispute settlement and international space law.

International dispute settlement is one of the fastest-growing, most dynamic fields in international law at the beginning of the twenty-first century. This reflects the international law tradition of peace through law, which continues in the era of globalization as the prime hope and motivation of all in the field. This tradition could not find a better mirror than the fundamental principles of space law. Aside from the aspiration to prevent any form of conflict in outer space, the fundamental legal principles of space law protect outer space from appropriation and aggressive uses. Further, it provides for basic processes of peace-building mechanisms such as consultations, reciprocity and international

[101] Bilder, R.B., "An Overview of International Dispute Settlement", see *supra* note 46

[102] Adede, A., "The Basic Structure of the Dispute Settlement Part of the Law of the Sea Convention", (1982) 11 Ocean Development and International Law 125; Sohn, L.B., "Settlement of Disputes Arising Out of the Law of the Sea Convention", (1975) 12 San Diego Law Review 495. The UNCLOS and its dispute settlement provisions were discussed *supra* in Chapter 4.

[103] Schachter, O., *International Law in Theory and Practice*, (1991) at 205

cooperation.[104]

The crux of this thesis is a proposal that the multi-door courthouse system is the most viable dispute settlement mechanism for disputes relating to activities in outer space. This raises fundamental questions as to the basic function of a dispute settlement mechanism in this remarkably multi-disciplinary and rapidly evolving sector. Concerns as to the specific requirements of this technical, high-risk arena are also raised. The next section will outline the structure of the proposed multi-door courthouse. This following section will make the case that the multi-door courthouse system best fulfils the dispute settlement void in space law, and provides the best chance for a workable permanent framework for the resolution of disputes relating to outer space.

5.2.1 The Proposed Structure of the Multi-Door Courthouse System for Outer Space Disputes

Figure 5.3 shows proposed structure of the Multi-Door Courthouse for disputes relating to activities in outer space.

This structure describes a proposed method for the sifting of disputes to move towards the most satisfactory resolution within the most efficient framework possible. With the establishment of a sectorialized multi-door courthouse for outer space, it envisages a maximum seven-step process in the form of a yes / no dichotomy decision-making process. The process is initiated, as always, with a dispute arising between two or more parties.

Stage (A): Submission of the Dispute

Stage (A) requires the parties to submit the dispute to the multi-door courthouse for outer space. This submission can be consensual if the parties all agree to enlist the multi-door courthouse in the resolution of the dispute. In this case, the parties also submit their preferred choice of dispute settlement mechanism to the multi-door courthouse. Parties may choose any of the available dispute settlement mechanisms, ranging from requests for negotiation between the concerned parties to binding third party adjudication. This choice of dispute settlement mechanism can be taken in accordance with a prior agreement between the parties or, failing this agreement, unilaterally by each party. This submission may be made directly by the parties involved, or with the assistance of legal counsel. In the absence of all parties' consent to submit the dispute to the multi-door courthouse, one party can unilaterally do so. In this case

[104] Böckstiegel, K.-H., "Settlement of Disputes Regarding Space Activities", (1993) 21 JSL 1

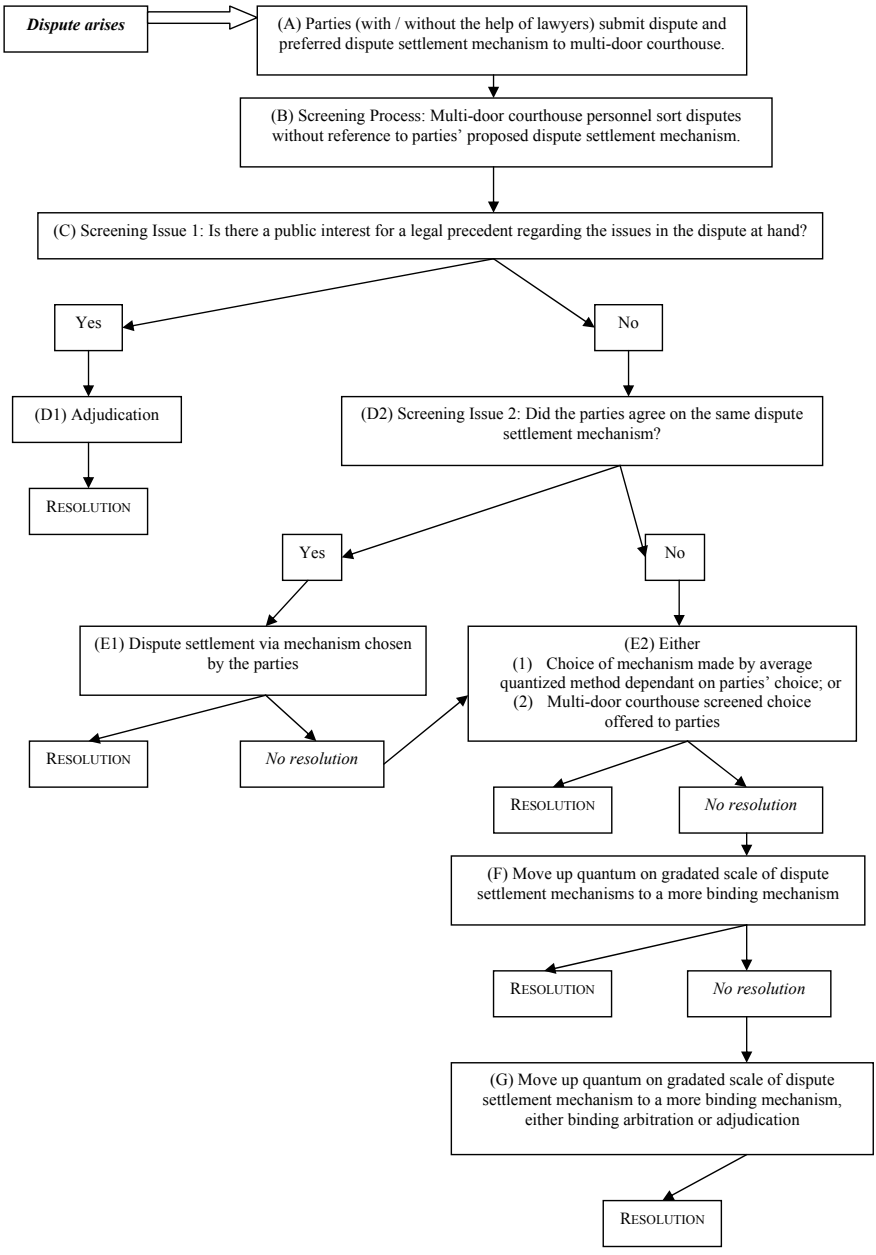

Figure 5.3: Proposed Structure of the Multi-Door Courthouse for Disputes Relating to Activities in Outer Space

the multi-door courthouse will act as a neutral third party intervener, and approach the non-consenting party with the offer of the multi-door courthouse as a forum for the settlement of the dispute. The submission of the dispute is made with

1. a signed contractual agreement between all parties to send the dispute for resolution through the multi-door courthouse process;
2. a statement from each party as to their perspective of the facts of the dispute;
3. if possible, a *Compromis* of agreed facts;
4. a statement from each party as to their preferred mechanism of dispute settlement.

It is proposed that a simple, standard formula will be made available for parties' use in the submission of their disputes to the multi-door courthouse.

Stage (B): Screening Process

Once the dispute has been submitted to the multi-door courthouse with the consent of all parties, the dispute is put through Stage (B). Stage (B) is the screening process of the multi-door courthouse. This is arguably the most important stage of the multi-door courthouse process. In this stage neutral experts of the multi-door courthouse sort the disputes based on content, parties' relative bargaining positions, the legal and factual matrices of the dispute, and the urgency of settlement.

Stage (B) is the crux that determines the success or failure of the multi-door courthouse. It is thus extremely important that the personnel of the multi-door courthouse that participate in the screening process are independent, have professional, legal and moral authority, and are perceived to be fair. In order to achieve this, the expert personnel of the multi-door courthouse dealing with Stages (B) through (E) must be multi-disciplinary experts in the field of outer space activities, and should act as neutral third party evaluators. It is thus proposed that a list of experts in the various sub-fields of space activities be maintained at the multi-door courthouse, in addition to permanent experts quartered at the multi-door courthouse. This list should consist of both legal and non-legal experts, including scientists, engineers, project managers, economists and legal counsel. The experts maintained on this list will act as *ad hoc* experts in cases where the permanent staff of the multi-door courthouse find that further expertise is required in the screening process of the submitted disputes. Further, the independence, actual and perceived fairness, and authority of the screening process will depend on the administration of the multi-door courthouse. It is submitted that in this case it is important to ensure sufficient

funding for the multi-door courthouse, together with proper training and established standards for such personnel. These issues relating to the administration of the multi-door courthouse will be dealt with below in section 5.3.5.

A related issue is deciding who should assess cases for ADR suitability. From the United States experience, four different approaches can be identified.

1. Parties may assess their own cases for ADR suitability. This approach is most common where ADR is voluntary. This ties in with the proposal in Stage (A) where parties are responsible for their own initial dispute settlement mechanism proposal.

2. Multi-door courthouse staff may assess cases based on interviews, questionnaires or pleadings.

3. Judges may be responsible for ADR assessment especially where ADR processes are mandatory, or case management processes provide for certain cases to be streamed into ADR. This is also considered in this proposal with the possibility of loop-backs in the system and ongoing review of the suitability of the dispute settlement mechanism proposed.

4. Professional hired consultants screen cases for ADR suitability. This proposal uses instead qualified experts, both permanently quartered at the Multi-door courthouse, and *ad hoc*, to screen such cases.[105]

The success of the multi-door courthouse would depend largely then on the initial screening process. There are concerns regarding the training and standards required for this screening. There is a real concern that the multi-door courthouse would lead to a new bureaucracy that will send disputants from one method to another without genuine attempts to address their problems.

The operation of the multi-door model depends on referral criteria, that is criteria on which a court, other forum or the parties to a dispute can select the appropriate dispute resolution process. [106] The referral criteria initially proposed by Sander were

1. the nature of the dispute - whether the dispute is more suitable for the mediatory or adjudicatory model of dispute settlement.

2. relationship between the parties - for example, where there is an ongoing relationship mediation or negotiation may be most suitable.

3. amount in dispute - the expense of the process should be proportional to the amount at stake.

[105]Plapinger, E., and Shaw, M., *Court ADR Elements of Program Design* (1994) at 21

[106]Ray, L. and Clarke, A., "The multi door courthouse idea: building the courthouse of the future ... today", (1985) 1(17) Ohio State Journal on Dispute Resolution 7

4. cost of resolution - if all other factors are equal, cost should be kept as low as possible.

5. speed of resolution - the quickest method of dispute resolution should be preferred.[107]

Courts experimenting with the multi-door approach have developed different intake and referral processes. For example, one court uses a case classification form completed by the parties and analyzed by the court. The form provides for the weighting of responses to questions about the nature of the case, the goals of the parties and outcome factors.[108]

There has been some discussion of approaches to the referral of disputes to particular processes.[109] In Australia, one focus has been on establishing criteria for excluding cases from ADR. Suggested exclusion criteria have included

1. where there is a history of violence or fear of violence between parties - in this case also where there is a threat of aggression;

2. where "a party is unwilling to honor basic mediation guidelines";

3. where "one of the parties is so seriously deficient in information that any ensuing agreement would not be based on informed consent";

4. where the parties are not *bona fide* and the entire process of alternative dispute resolution is used as a "fishing expedition" for information that is later used in adjudicatory processes; and

5. where the parties may reach an illegal agreement as a result of the ADR process, or disadvantage an unsuspecting third party.[110]

The Australian New South Wales Supreme Court's ADR Steering Committee has recommended the development of positive criteria for referral to ADR processes and has proposed a range of factors favoring referral to mediation, non-binding evaluation and arbitration.[111] Formal referral criteria have not been developed by the Federal Court. However, the Court is committed to developing systems to identify at an early stage those cases that may be suitable

[107]Sander, F.E.A., "Varieties of dispute processing", see *supra* note 60

[108]Superior Court of the District of Columbia Alternative Dispute Resolution Case Classification Form 1996

[109]Bush, R.B., "Dispute resolution alternatives and the goals of civil justice; jurisdictional principles for process choice", (1984) 4 Wisconsin Law Review 895

[110]Clarke, G. and Davies, I., "Mediation - when is it not an appropriate dispute resolution process", (1992) 3(2) Alternative Dispute Resolution Journal 78

[111]ADR Steering Committee, ADR Strategies & Proposals for the Future (1995)

for referral to ADR.[112] The Court has noted that mediation is of particular benefit in some types of proceedings, for example in taxation and apportionment of costs.

In this proposal, Stage (B) deals with two screening issues:

1. Stage (C) - Whether there is a public interest for a legal precedent regarding the issues involved in the dispute at hand; and

2. Stage (D) - Whether the parties agreed on the same dispute settlement mechanism.

Stages (C) and (D1): Whether There is a Public Interest for a Legal Precedent

Stage (C) consists substantially of the first screening issue under the screening process. It essentially answers the question: Is there a public interest for a legal precedent regarding any of the issues involved in the dispute at hand? This is extremely important for several reasons. Firstly, international space law is an embryonic branch of international law, and the development of the law is extremely important public interest. If there is one or more issues in the dispute that involve issues of *lex ferenda*, then the multi-door courthouse has a public duty to ensure that a legal precedent is created through a proper legal procedure. This will ensure the continued advancement of the law. Secondly, it is important that disputing parties will not use the multi-door courthouse system or any other dispute settlement mechanism to create trade custom or State practice that diverges or is contrary to the established principles of space law. This prevents the fragmentation of the legal framework governing space activities, and ensures that the framework of international space law remains relevant and coherent. Perhaps more importantly, because space law protects fundamental principles of space activities such as non-appropriation, international cooperation and the benefit of all Mankind, the multi-door courthouse has an important role to play in the enforcement of the rights and obligations of space-faring and non-space-faring entities.

The question regarding whether there is a public interest for a legal precedent must be answered considering input from both legal and non-legal experts. It is important that there is a multi-disciplinary and transnational dialogue regarding this issue. The answer to this question must be arrived at by neutral experts with technical, professional, legal and moral authority.

If there is a public interest in a legal precedent, then the direct recommendation of the multi-door courthouse experts must be for the choice of adjudication as a dispute settlement mechanism. This is so even if the parties have

[112]Black, M., "The courts, tribunals and ADR", (1996) 7 Australian Dispute Resolution Journal 138 at 144

unanimously chosen another method of dispute settlement. Two points are important in this regard:

1. The issue(s) that requires a legal precedent may be severed from the rest of the issues at hand in the dispute and be adjudicated separately. This allows the necessary legal precedent to be sought without prejudice to the other issues (if so severable) and allows at least the resolution of those other issues in the quickest time possible without a negative impact on the development of the law.

2. Experts at the various stages of the dispute settlement process may refer any issues that they consider require the establishment of a legal precedent back to adjudication at any stage of the dispute settlement process.

This is important as it strives to ensure an important balance between the parties' interests and the public interest rooted in the legal system relating to space activities.

Once there has been a recommendation to adjudicate the dispute at hand, then the forum of adjudication becomes an issue. The forum depends entirely on the type of parties involved in the dispute. If the parties are solely State Parties, the recommendation could be to the International Court of Justice. If the dispute were between private entities and their domestic authorities, a recommendation could be made to adjudicate in a domestic court of law. If however, the dispute is between two or more parties which do not together have *locus standi* before any existing adjudicatory entity, then it is submitted that the multi-door courthouse should also have the facilities and personnel, as well as the procedural rules, to adjudicate. The reason for this is that the field of space activities in particular will likely see more and more of such disputes where the parties involved do not have equal standing before the established judicial mechanisms. Further, if there are procedures, facilities and expertise available at the multi-door courthouse, then it will truly become an all-encompassing dispute settlement mechanism equipped with the technical and legal expertise to resolve any sort of disputes that may arise between parties involved in the exploration and use of outer space.

If there is a decision to submit the dispute to adjudication, then clearly at the end of the adjudication, the dispute will be resolved. If only certain issues are submitted to adjudication, then those issues will be resolved, while the rest of the issues involved in the dispute are put through the rest of the multi-door courthouse process.

If there is no public interest for a legal precedent relating to the issues in the dispute, then the screening process moves on to Stage (D2).

Stages (D2) and (E1): Whether the Parties Agreed on the Same Dispute Settlement Mechanism

In Stage (D2), the question as to whether the parties agreed on the same dispute settlement mechanism is considered. This is important as, aside from the public interest, this proposal prioritizes the parties' will and control over the dispute settlement process. It is also submitted that processes that have found favor with all parties are most likely to succeed in resolving the dispute to the greatest satisfaction of the parties. This in turn ensures a greater rate of compliance with the resolution. This is an easy question to answer, as the parties have themselves submitted their preferred choice of dispute settlement mechanism to the multi-door courthouse in the initial submission of the dispute in Stage (A).

In the experience of ADR trials in various domestic jurisdictions such as Canada and Australia, some Courts allow for mandatory mediation process referral to operate (that is referral to an ADR process without the consent of disputants) whilst in others mediation must be voluntarily entered into. The following is a brief overview of this dichotomy:

1. *Mandatory mediation, evaluation and conciliation referral recommendations*: A variety of recommendatory bodies have addressed the question of whether mandatory referral to ADR processes should operate. The response has varied. To some, mediation is defined by a voluntary entry into the process.[113] To others, mandatory entry into the process is not seen to have an adverse impact upon process.[114] Some models for referral are based on judicial or quasi judicial persuasion[115] or attendance at a mandatory ADR or mediation orientation session. There are numerous legislative examples of mandatory or potentially mandatory referral programs.[116]

2. *Where mandatory recommendations have not been made*: In response to concerns about the possible adverse impact that mandatory referral practices may have upon the process[117] and the participants, some courts, policy makers and others have declined to endorse mandatory referral to external or internal ADR processes. The concern also relates to funding or cost issues. That is, if referral to a process is mandatory then the

[113]New South Wales Law Society 1993 Guidelines

[114]Law Council of Australia, "Mediation Plan endorsed", (1995) 30(5) Australian Lawyer 15

[115]Black, M.E., "The Courts Tribunals and ADR: Assisted Dispute Resolution in the Federal Court of Australia", (1996) 7(2) Australian Dispute Resolution Journal 138

[116]For example Family Law Act 1975 (Cth); O 10 r 1(2)(i) Federal Court Rules (Cth); Land and Environment Court Act 1979 (NSW); Conciliation Act 1929 (SA); Rules of the Supreme Court 1971 (WA) Order 29.2, note that all of the above legislations are Australian.

[117]Ingleby, R., "Compulsion is not the answer", (1992) 27(4) Australian Law News 17

question of who should pay for the cost of the process arises. Where mandatory referral takes place it could be regarded as unduly onerous to require the disputants to pay for an additional dispute resolution process, particularly after court filing fees may have already been paid. The debate about the liability of the public system for the costs of private disputes is also related to this issue. Where non mandatory programs operate there may be a "persuasive" form of referral. An example of this could occur where a judge forcefully recommends that parties to a dispute mediate despite the absence of legislative sanction.[118]

3. *Referral criteria and multi-door courthouse dispute resolution*: The basis on which decisions are made to refer cases to ADR processes is a central issue for the development of court related ADR programs. In Australia, judges or registrars refer cases to ADR either on the application of parties or by mandatory referral. Often particular types of proceedings are actively streamed into an ADR process.[119]

If the parties have agreed on the same dispute resolution mechanism, then the dispute will be put through that procedure in Stage (E1). This could result in the resolution of the dispute. If the parties' choice of dispute settlement mechanism does not result in a resolution of the dispute, then the dispute will be looped back to Stage (E2).

Stage (E2): Choice of Dispute Settlement Mechanism

Stage (E2) involves the choice and recommendation of the dispute settlement mechanism for the resolution of the submitted dispute. The choice can be made in one of two ways:

1. The average quantized method dependant on the parties' initial submitted choice on the gradated scale of dispute resolution;[120] or

2. The multi-door courthouse screened choice by the experts.

The following is a suggested procedure for the framework for Stage (E2).

1. *Putting the Dispute in Context*: To suggest an appropriate dispute resolution method for the various parties, the legal system has to understand

[118]Legislative examples of non mandatory programs (that may involve persuasive referral) are Courts Legislation and Mediation Amendment Act 1994 (NSW); Administrative Appeals Tribunal Amendment Act 1993 (Cth); Federal Court - O10 r 1(2)(g) Federal Court Rules (Cth); Compensation Court Act 1984 (NSW) s38D(1), note that all legislation referred to in this footnote is Australian.

[119]See for example the Australian Farm Debt Mediation Act 1994 (NSW)

[120]This means that the method that falls exactly in the intermediate degree between the parties' difference choices would prevail.

the dispute in context. An adviser needs to identify the party dynamics and components of the conflict. S/he then integrates and interprets this information. For an effective choice of dispute resolution method, crucial party characteristics must be analyzed and processed. Suitable dispute resolution methods can then be suggested to resolve the conflict between the parties. Such information can be gathered from the parties by either structured or non-structured interviews. These interviews are designed to collect information about the disputes and its issues. Exploratory data collection from such interviews is important in identifying the parties' perceptions of the dispute.

2. *Dispute Analysis*: The adviser has to integrate the information about the people, relationships, dynamics and substantive issues generated by the interviews with the parties. This data must then be cross-referenced and verified. Any conflicting information provided by the various parties should be clarified by asking the appropriate questions. Once the information is integrated and verified the adviser will have to carry out the most difficult part of the dispute analysis: the interpretation of the information. It may be useful for the adviser to create a conceptual map of the dispute and to develop a set of hypotheses about the dispute. The adviser can then determine the realistic causes of the dispute. S/he can then determine what category of dispute appears to the primary or critical cause of the problem. Was the cause one of data, values, interests, relationships or structure? Dispute analysis can be complex and will be different for each case. However, it is a crucial step if the adviser is to provide sound advice to the client on which dispute resolution method would be most suitable.

3. *Choosing an Appropriate Dispute Settlement Process*: Once the adviser has undertaken the dispute analysis then s/he will be in a position to recommend to the parties the possible options that are available to resolve the matter. It is important at this stage to consider whether, given all the circumstances of the dispute and the attitudes of the parties, a particular method is indeed the appropriate process to resolve the matter. If the decision is taken to proceed with a particular process, it is imperative that the adviser constantly reviews the dispute to see if circumstances have changed. This could be for example the introduction of new evidence or if the method is proving to be counter-effective. This review should take place over the course of the entire dispute resolution process, from the time the initial decision is made to the time the dispute is resolved. If there are essential changes in the circumstances it may be appropriate for the adviser to reconsider the dispute resolution method to be used.

4. *Suggesting the Choice*: In suggesting the choice the adviser should first

explain the process selected and the underlying reasons for the choice. The adviser should emphasize that the choice suggested is merely a recommendation and is not binding on the parties. If one or both of the parties reject the choice recommended, they should state their reasons. The dispute can then be re-channelled for another analysis. To prevent an infinite loop of review, the parties should agree to be bound by the second recommendation.

It is submitted that this choice of dispute settlement mechanism should result in the resolution of the dispute at hand. As this was the choice that was made either by the multi-door courthouse experts or based on the compromised preference of the parties involved, it has the highest chance of resolving the dispute to the parties' satisfaction.

In the cases where this choice of mechanism does not result in a resolution of the dispute, however, the process moves to Stage (F).

Stages (F) and (G): Moving Up the Quantum on the Gradated Scale of Dispute Settlement Mechanism Towards a Binding Resolution

In the case the initial choice of dispute settlement mechanism in Stage (E) does not result in a resolution of the dispute, then the choice of mechanism will move up the gradated scale towards a more binding mechanism in Stage (F). Stage (G) provides a last loop-back for the disputes to be resolved through a binding mechanism assuming that the initial recommendation was much further down the gradated scale of dispute settlement mechanisms. A resolution to the dispute will be found in either Stage (F), or at the latest stage, Stage (G). Three propositions are important in this regard:

1. Parties are more likely to seriously attempt to resolve the dispute given the knowledge that a binding method of dispute settlement, imposed by a third party, will be initiated if other methods fail.

2. This ensures that at the end of the multi-door courthouse procedure, there will certainly be a resolution of the dispute, to prevent infinite loop-backs in the system, or parties purposefully relaying the resolution of the dispute for any reason.

3. A binding third party dispute settlement mechanism is generally less attractive to some parties, especially States Parties and large organizations such as multinational corporations and intergovernmental organizations. It is submitted that this procedure balances the interests of these actors, thus ensuring that the multi-door courthouse process will not be eschewed in the event of a dispute; while leaving the possibility of a binding third party process available if parties do not put sufficient effort into the resolution of the dispute.

In all cases, the Multi-door Courthouse will have the facilities and expertise in place and at the parties' disposal for the resolution of their disputes.

This is in essence, the structure of the proposed adapted Multi-door Courthouse System for the settlement of disputer relating to activities in outer space. Several propositions are evident with regard to this proposal:

- Definite Resolution: This multi-door courthouse system ensures that there will be a resolution of the dispute within seven steps or less. It is submitted that there will in actual fact be little use of Stages (F) and (G), as the choice of dispute settlement mechanism made by experts based on the parties' preferences are most likely to find success. These last two stages are built into the process however, to ensure a definite resolution of the dispute at hand in the few cases that a resolution cannot be reached at an earlier stage.

- Protection of Public Interest: There is an in-built device that protects the public interest in the resolution of disputes at Stage (C). This prioritizes the protection of the fundamental character of space law.

- Maximum Party Participation and Control: The multi-door courthouse process allows for maximum possible party participation in and control over the dispute settlement process. The parties' preferred choice of dispute settlement mechanism is considered, and the process allows for loop-backs in case the initial choice of mechanism fails to resolve the dispute.

- Increased Chances of Compliance / Enforcement: With greater party participation in and control over the dispute settlement process, it is submitted that there are increased chances of compliance with the resolution ultimately reached, as it will be arrived at with maximum possible party input, and thus, with greatest party satisfaction.

It is thus submitted that this proposal is the most viable permanent dispute settlement mechanism for the resolution of disputes relating to activities in outer space. The next section will show why the Multi-door Courthouse System for Outer Space Disputes is the most viable permanent dispute settlement mechanism for such disputes.

5.2.2 The Case for the Use of the Multi-Door Courthouse System for Outer Space Disputes

The following is a summary of the case for the multi-door courthouse system as the most viable permanent dispute settlement mechanism for disputes relating to outer space:

1. The Multi-door Courthouse system allows for the progressive evolution of the law relating to activities in outer space.

   (a) The Multi-door Courthouse system protects the special character of space law as a unique hybrid of public and private laws both at the international and domestic level.

   (b) It ensures the continued and relevant advancement of space law with ambient developments in its operational field.

   (c) It prevents the fragmentation of the field of space law and ensures a coherent, relevant legal framework for space activities.

2. The Multi-door Courthouse system is suited to the rapidly evolving and multi-faceted factual matrix of activities in outer space.

   (a) The Multi-door Courthouse system provides the technical, economic and scientific competence necessary in the multi-disciplinary environment of space activities.

   (b) It ensures the possibility of *locus standi* for the disparate parties that may become involved in disputes concerning activities in outer space.

   (c) It allows the prospect of "suiting the forum to the fuss" and tailoring the dispute settlement process to the distinctive characteristics of the particular dispute.

3. The Multi-door Courthouse system allows for greater efficiency and party satisfaction in the resolution of disputes, which in turn ensures a greater compliance and enforcement rate of settlements rendered.

   (a) The Multi-door Courthouse system grants greater party access and involvement with the dispute settlement process, thus increasing the likelihood of party satisfaction with the process and its outcome.

   (b) It ensures a guaranteed resolution of the dispute through the most non-coercive means possible whilst safeguarding any public interest issues involved.

   (c) It provides one of the best means to keep the peace in outer space.

This section will elaborate on these arguments in turn.

Submission One: Progressive Evolution of Space Law

The single most important fact is that the world today suffers from the dichotomy that has come to exist between the fast-growing socio-economic reality that entrepreneurs as individuals engage in activities on a global bases and the equally stark reality that the competence to regulate these activities are still compartmentalized by nation States, within the system based on the Westphalian legal order.

It is simply that tribunals have been thought of and produced from time to time for local or other reasons, but the result as a whole is a mess. The adjudicating machinery on the international plane consists of a number of tribunals, some instituted on a bilateral basis, others on a multilateral basis, but with nothing to hold them together in a coherent system. They all make decisions which can influence the development of international law. If that influence can amount to law-making in the case of all of them, the absence of hierarchical authority to impose order is a prescription for conflicting precepts. This leads to the fragmentation of the international legal system. It is submitted that the multi-door courthouse system provides a permanent dispute settlement mechanism that is the only workable solution against fragmentation.

It has been suggested because the ICJ is the principal judicial organ of the UN, it could possibly provide the head of some sort of hierarchy, a court of last appeal, review or cassation. However, there are difficulties, the least of which is that under Article 34(1) of the ICJ Statute, only States may be parties before the Court. The other difficult with the ICJ's attempt to control these other tribunals would be there, according to Article 34(1), it does not have contentious jurisdiction over any of the international organizations that exist in the international sphere.

The Multi-door Courthouse, it is submitted will provide a viable, permanent framework that will allow the coherent development of space law, whilst providing standing to the disparate actors in this broad field. It is in fact submitted that the multi-door courthouse system protects the special character of space law, allowing its continued and coherent advancement together with ambient developments in the field. It is acknowledged that the multi-door courthouse system has tall criteria to fill in order to fulfill this role. Professor Böckstiegel has identified such criteria by posing the following sixteen questions, which the present thesis answers in favor of the multi-door courthouse system in italics below:[121]

1. Should a universal formula for all actors be sought, and are there common denominators with regard to factual, political, economic or legal circum-

[121] Böckstiegel, K.H., "Developing a System of Dispute Settlement Regard Space Activities", (1993) 35 Proc. Coll. Law of Outer Space 27. All the submitted answers, given here in the text in italics, are the opinion and arguments of the present author and do not arise from the proceedings of the colloquium mentioned above.

stances?
Yes. A universal formula that encompasses all actors should be established. This establishment should be able to find common denominators with regard to various circumstances. In this aspect, the multi-door courthouse system provides a framework that is accessible to the myriad of actors involved in the field of space activities. Further, it seeks to find a compromised common denominator in relation to all the circumstances and aspects of the dispute by providing quantized, compromised choices of dispute settlement mechanism. In the event that it is difficult to find such common denominators, it is submitted that the multi-door courthouse system is flexible enough to take into account as many common factors as possible.

2. What is the character and political importance of the interest involved for the actors?
The framework of space law operates in a high-risk, rapidly evolving field with both high capital investments and potential high returns. Aside from that, it is also a developing corpus of law that requires shaping from the ambient developments in the field. These factors lead to the logical conclusion that the interest involved for all actors, as well as the international community at large, is a weighty one. It is thus submitted that the multi-door courthouse provides a framework that takes these interests into account, by providing the technical and legal expertise in the most flexible manner possible for the resolution of these disputes.

3. What pressures or motivations do the actors face in coming to a solution?
The pressures and motivations that all actors face in coming to a solution of any dispute relating to activities in outer space can be summarized in one word: Costs. This involves not just financial costs in terms of opportunity and restitution costs, but also costs in terms of political, moral, ethical and technical losses. It is submitted that in this particular field of activities, such costs are very high, and thus provides a huge motivation on actors to come to a solution of the dispute at hand. The multi-door courthouse capitalizes on these motivations to provide the most efficient and fair mechanism of dispute settlement for the parties concerned.

4. How wide is the gap between legal equality and factual inequality in the respective area of space activities between the actors concerned?
The gap between the actors concerned is very wide. There are disparate parties with disparate resources and interests, all competing for opportunities available in the field of space activities. It is submitted that this leads to very disparate bargaining positions, both legally and factually, for the actors concerned. The multi-door courthouse, it is submitted, provides

a bulwark against the unconscionable abuse of this wide gap between the concerned actors, thus leading to a fairer solution of the dispute.

5. Are the types of disputes predominantly political or legal?
   Both political and legal issues will dominate in equal measure in disputes relating to activities in outer space. Thus, the multi-door courthouse system takes this consideration into account by providing for the possibility not merely of legal redress and resolution, but also of more mediatory and negotiatory mechanisms.

6. Is an international organization available for the respective area that might host the administration of the dispute settlement?
   At the present moment, the most logical international organization available is the United Nations Office of Outer Space Affairs. It is however submitted that a separate, independent body should be set up to administer the multi-door courthouse system. This would create a discrete administrative body that would provide the facilities, expertise and procedures for the multi-door courthouse system. This is to allow for a greater independence of the multi-door courthouse system, both in actual fact and in perception. This multi-door courthouse for outer space would then either farm out suitable disputes to existing structures such as the ICJ, the PCA or the ICSID, or resolve the disputes through its own facilities and resident or ad hoc experts.

7. Does the dispute involve the rights, interests or obligations of any third party actor?
   More often than not, due to the universal character of outer space and the activities therein, disputes concerning activities in outer space concern the rights, interests and obligations of many third party actors. Further, these third party actors are generally in a more disadvantaged position than some of the parties to the actual disputes, which are likely to be corporations or agencies with the resources to engage in space activities. It is thus submitted that it is of utmost importance that the dispute settlement framework takes the interests of these third party actors into account and protects them, in accordance with the fundamental principles of international space law. The multi-door courthouse system, it is submitted, provides the best protection for the interests of these third party actors.

8. Does the dispute concern well codified areas of space law, or those still in an early stage of development?
   It is submitted that there are still no well-codified areas of space law - in fact that should well be the case, given the rapidly evolving nature of the field that this branch of the law operates in. Hence it is submitted that the

multi-door courthouse system is a necessary structure to ensure the coherent and relevant development of the law, either through the interpretation of existing principles, or the evolution of new laws. This is embodied in Stage (C) of the multi-door courthouse process, which directly channels all issues requiring a legal precedent for the public good to adjudication.

9. Can a non-binding settlement procedure reasonably be expected to be followed by the parties?
   It is submitted that the non-binding settlement procedure provided by the multi-door courthouse can reasonably be expected to be complied with by the parties. This is because the multi-door courthouse system allows for maximum possible party involvement and control in the dispute settlement process, hence increasing the likelihood of party satisfaction with the resolution outcome. Parties are then more likely to comply with the resolution of the dispute if they are satisfied with it.

10. Does the nature of the dispute require a fast and final decision or settlement?
    In general a faster settlement of a dispute is always preferred. It must be emphasized however, that efficiency should not be attained at the price of fairness or legal principles. It is submitted that the multi-door courthouse system provides this security of a fine balance between efficiency of dispute settlement and the fairness of the ultimate solution through the expert screening process in Stages (B) - (D) that ensure that the best method of dispute settlement will be recommended to the disputing parties concerned.

11. Does the dispute concern questions of space law to which many actors have already expressed a definite view?
    This question of course depends on the particular dispute at hand. It is also reflected in Stage (C) of the multi-door courthouse system, which channels disputes with no clear legal holding towards adjudication to allow for the development of the law; and all others where the law is relatively clear to other methods of dispute settlement.

12. Will it require special technical or other expertise to adequately deal with the disputes in procedure and substance?
    Certainly disputes relating to activities in outer space will require sectorialized technical, legal and other professional expertise to be adequately dealt with. This is due to the highly technical, specialized character of space activities. It is submitted that the multi-door courthouse provides such expertise with its roster of permanent experts (both legal and non-legal) quartered at the multi-door courthouse administration, as well as its list of ad hoc experts that can be called upon if necessary.

13. Would a flexible or a well codified set of procedural rules work better for the types of disputes concerned?
It is submitted that it is impossible to decide whether a flexible or a well-codified set of procedural rules would work better for disputes relating to space activities. Much would depend entirely on the particular dispute at hand. As such, the multi-door courthouse system provides the greatest chance of success - providing for flexibility in the mediatory model when required, and the well-codified set of procedures in the adjudicatory model when needed, as well as the possibility of a hybrid in cases where this is necessary.

14. Are difficulties as to the applicable substantive law expected?
Perhaps difficulties to the applicable substantive law are to be expected - and this is where the screening process, Stages (B) - (E), are so important in the workings of the multi-door courthouse system. The multi-door courthouse screening process allows parties to have the best possible method, taking into account such difficulties.

15. What categories of parties to the dispute are expected to be involved?
A myriad of parties to the dispute are expected to be involved: Individuals, small and medium-sized companies, multinational corporations, non-governmental organizations, intergovernmental organizations, and States Parties. A workable dispute settlement mechanism has to allow equal standing for all parties - which is precisely what the multi-door courthouse system offers.

16. Have the parties concerned already expressed a preference for a specific method of dispute settlement?
In general, actors in the space field have generally professed a preference for arbitration, but this is dependent again on the bilateral or multi-lateral agreement entered into prior to the dispute. The concept of consultations is repeatedly reiterated in the UN space law treaty system. The multi-door courthouse system however, provides for all these and further forms of dispute settlement. It also takes parties' preferences into account in Stage (A) of the procedure, where parties submit their preferred choice of dispute settlement mechanism at the same time as the submission of the dispute.

It is therefore submitted that the multi-door courthouse system provides the most viable form of dispute settlement for dispute relating to outer space by allowing for a flexible framework for the progressive evolution of the law.

Submission Two: Rapidly Evolving and Multi-Faceted Factual Matrix of Activities in Outer Space

Further, it is submitted that the multi-door courthouse system is uniquely suited to the rapidly evolving and multi-faceted matrix of space activities. It does so by proving the necessary expertise, *locus standi* for the disparate parties, as well as a distinctively customized form of dispute settlement that suits the settlement method to the particular dispute at hand.

An essential feature of the proposed system is that, failing an agreed settlement at any stage, it would offer all the advantages of a third-party process. Firstly, it would lead in any case to a binding settlement of the dispute. This result would obviously be assured either by both parties' acceptance of terms of settlement recommended by the conciliation commission in its report, or, failing such agreement, by the award of an arbitral tribunal. Furthermore, the presence of a third-party body would permit both the binding suspension of the unilateral measures undertaken or the binding indication of interim measures of protection.

A second important feature of the proposed system is the broad scope of the third-party's competence. Although the méchanisme déclencheur would be the dispute arising, the scope of the conciliation, respectively arbitration procedure - and of any involvement of the ICJ - could not be circumscribed to a merely partial verification of the legal issues of the dispute.[122] This would not exhaust the conditions of legality of the unilateral reaction to be verified by the third party body. Indeed, those conditions also include the existence of a wrongful act, the attribution of the act to the target State, and the absence of circumstances excluding wrongfulness.[123]

The multi-door courthouse is a multifaceted dispute resolution center. It recognizes that particular disputes and disputants may be best suited to particular dispute resolution methods. As options proliferate, choosing the correct option becomes a problem in itself. The multi-door courthouse, in which these considerations are analyzed and diverted to the appropriate dispute resolution methods, has been an answer to this problem.[124] In this approach, disputants are channelled by intake screening to the correct "door" in the courthouse. The courthouse would make all dispute resolution services available under one roof, including the initial intake screening. The aims of the multi-door courthouse are to inform the parties of the available alternatives, and to assist them in choosing the appropriate mechanism for their particular dispute.[125]

[122]see the analogy to Counter-measures in UN Doc. A/CN.4/453

[123]UN Docs. A/CN.4/453/Add. 1 and A/CN.4/453/Add. 1/Corr. 3

[124]Sander, F.E.A., "Varieties of Dispute Processing", see *supra* note 60; Cappelletti, M. and Garth B., "General Report", see *supra* note 9 at 515; American Bar Association, *Report on Alternate Dispute Resolution Projects* (1987)

[125]Brown, H.J. and Marriott, A.L., *ADR Principles and Practice*, see *supra* note 11 at 44 - 47

The import of alternative dispute resolution techniques and the multi-door courthouse allows a diversity of flexible dispute settlement processes. A procedure suitable for the needs of the particular parties' dispute can be chosen. These range from comparatively informal processes to sophisticated procedures. As such, the multi-door courthouse system is uniquely suited to the rapidly evolving and multi-faceted matrix of activities in outer space.

Submission Three: Greater Efficiency and Party Satisfaction Leading to Greater Compliance Rate

One of the most important features of the multi-door courthouse system is that it allows for greater efficiency and party satisfaction in the resolution of the dispute at hand, thereby ensuring a greater compliance and enforcement rate of the settlements rendered. Through the provision for the maximum amount of party involvement in the dispute settlement process and the guaranteed resolution of the dispute in the most non-coercive form possible, it allows for the greatest party satisfaction with the rendered outcome of the dispute. This in turn makes parties more likely to comply with the settlement, thus allowing the peaceful settlement of disputes relating to activities in outer space.

One of the overarching purposes of ADR in a field such as outer space is the involvement of social control in the dispute settlement process.[126] ADR allows for the expansion of State control but disguises its coercion by relying on the buzzwords of inclusiveness, consensus and community.[127] It casts a broader social net than that of the traditional justice systems. In actual fact, ADR's quality attributes are not merely masks for party power, but are expressions of the changing styles of social control.[128]

The peculiar attribute of the dispute resolution revolution is the notion that parties choose dispute resolution methods based purely on economic or social motivations rather than personal premises. The focus has always been on the problem - its costs, delays and issues. This detracts from the most important subject in the disputes - the parties themselves. Disputes can be effectively resolved by interpreting all the essential players into the dispute resolution process. A truly efficient system contains sufficient options of inherent flexibility. This allows the parties to resolve disputes in a manner that best suits their needs. A properly executed dispute resolution process depolarizes parties and focuses on the common goal of resolution. By understanding the parties' psyches, the dispute resolution method can attack the problem. The

[126]Deutsch, M., *The Resolution of Conflict: Constructive and Destructive Processes*, (1973)

[127]Nader, L., "Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology", (1993) 9 Ohio State Journal on Dispute Resolution 1

[128]Harrington, C.B. and Merry, S.E., "Ideological Production: The Making of Community Mediation", (1988) 22 Law & Society Review 709 at 713

parties are also geared towards attacking the problem instead of each other. Ultimately the parties look for resolution of the dispute and satisfaction of their needs, not simply advocacy of their positions and theories.[129]

The fact that the proposed system could extend theoretically over the seven steps from Stage (A) through (G) and the negotiatory, mediatory and adjudicatory models would not justify any fears that the settlement process becomes too long. It is obvious that although in principle seven steps are provided for, they would presumably not all be necessary in every case. The dispute could well be settled during or following conciliation in one step. Arbitration would come into play only in case of failure of conciliation; and the procedure before the ICJ, in its turn, would only come into play in case the arbitral proceedings failed, or the arbitral award was contested for alleged *excès de pouvoir*, or violation of fundamental rules of arbitral procedure. It follows that the envisaged process might actually lead to an earlier settlement than the seven steps provided for.

The multi-door courthouse could result in efficiency savings in terms of time, money, effort and frustration. Parties can be channelled to the correct method of resolution rather than a merry-go-round of inappropriate and consequently, ineffective, method. Access to and legitimization of new methods of dispute resolution would likely increase through the use of the multi-door courthouse. A better understanding of the peculiar characteristics of the specific types of dispute resolution methods should result.[130]

A further important feature of the proposed system is that, while ensuring a third party settlement in any case by circumventing (thanks to the compulsory nature of the procedures) any possibility of evasion by either side, it does not dramatically hinder the parties' choices with regard to other possible means of settlement. This is notoriously a prerogative that parties, especially States, are reluctant to renounce.

It should thus be clear what role the proposed dispute settlement system would perform within the legal framework. The availability of the system should have a sobering effect on an injured actor's decision to resort to unilateral reaction. However, it would not be a system *dispositif de freinage de l'action unilatérale* that is found in other more onerous frameworks of dispute settlement. Within the framework of the multi-door courthouse system proposed, the actions of the disputing parties would not be suspended, except by an order of a third-party body after the initiation of a settlement procedure. Parties would hopefully be induced to exercise a higher degree of circumspection in weighing the various issues involved in the dispute at hand.

[129] Silverman, D., "Alternative Dispute Resolution as an Effective Tool to Resolve Business and Account Receivable Disputes", online at http://www.firstmediation.com/library/acctrecp.htm (Last accessed: 10 January 2006)

[130] Goldberg, Sander and Rogers, *Dispute Resolution: Negotiation, Mediation and Other Processes*, see *supra* note 37

These are, in essence, the arguments for the use of the multi-door courthouse system for the resolution of disputes relating to activities in outer space. There are, of course, limitations of the multi-door courthouse system. The multi-door courthouse produces one quick reaction: It is difficult enough to manage a single-door courthouse. Broadening the scope of judicial activity to include identifying and treating the causes of disputes takes the judicial system well beyond its present bounds. Under present paradigms it may have neither the wisdom nor the will to take on the broader task. Setting the model as a combination of advising and adjudicating presents some clear conflicts that set judicial activism against judicial restraint. Those difficulties are huge if the black-robed judge remains the only focal point of the model, but that structure could change. If the courts aim to take full advantage of community-based resources as solutions, then there quickly arises an issue of arbitrariness in the referral process. As the legal history of domestic juvenile courts attests, informality can lead directly to claims concerning due process and reasonable doubt, and the intended flexibility becomes lost. It is submitted that these difficulties can be overcome with time. As the multi-door courthouse system develops the structure and technology to broaden their view, they will more easily narrow the portion of problems headed for traditional adjudication.

5.3 Detailed Issues of the Multi-Door Courthouse System

There are certainly some issues relating to the Multi-Door Courthouse System that will have to be dealt with in the establishment of this system as the dispute settlement framework for activities in outer space. These issues include:

1. Classification of disputes in the screening process;
2. Available means of choice for the recommended dispute settlement procedure;
3. Enforcement of the ultimate resolution of the dispute;
4. Value-added conflict avoidance procedures and dispute systems design;
5. Administration of the Multi-Door Courthouse system; and
6. Ongoing review of the Multi-Door Courthouse system.

This section will look in detail at these issues, and offer some prospects to deal with these issues in the establishment of the Multi-Door Courthouse System for Outer Space.

5.3.1 Classification of Disputes

The classification of disputes takes place in Stage (B) of the multi-door courthouse process. Making choices about using a particular dispute settlement procedure involves the fundamental question of the possibility of matching particular disputes settlement mechanisms with particular categories of disputes. The complicated factual matrices and uncertainty involved in many disputes points to the fact that a rigid approach to matching certain disputes to certain mechanisms would defeat the purpose of the entire exercise. Certainly however, there is a clear need for a suggested taxonomy to aid in the the process of classification of disputes and their subsequent matching to particular mechanisms.[131] For example, Sander and Goldberg proposed the following five criteria:

1. *Party Relationship*: This is a situation where there is an ongoing relationship. Here it may be important that the parties work out their own solutions to ensure that any agreement is acceptable and long-lasting. This is in the interest of preserving the relationship. Accordingly, negotiation or mediation would be preferable.

2. *Nature of the Dispute*: Some disputes involve issues that require a "test" case and a definitive precedent to be set by a court. Here the adjudicatory model of settlement would likely be preferable. On the other hand, polycentric problems with no clear guidelines or implications may be best settled by the parties themselves rather than by an externally imposed intervention.

3. *Stakes*: Disputes involving small financial or other costs may be more suitable for pared-down processes. Disputes where large costs or risks are in issue should be adjudicated with the full panoply of due process protection. However, some small cases may involve complicated issues, a big case may be simple. The novelty or complexities of the issues at stake may be a better indicator of which settlement process is more suitable, rather than the costs involved.

4. *Speed and Cost*: Dispute settlement should be efficient and cost-effective. However in cases where delay or costs may have dire consequences, faster and cheaper procedures may be preferable to full court adjudication.

5. *Parties' Bargaining Positions*: Where parties do not deal at arm's length, or where differences in bargaining positions are very evident, an adjudi-

[131] Sander, E.A. and Goldberg, S., "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure", (1994) 10 Negotiation Journal 49

> catory process may eliminate or reduce the inequalities in power. This would of course then be more fair and thus more preferable.[132]

Shore, Solleveld and Molzan have also postulated the various factors that may affect the choice of dispute resolution method.[133] They include:

(a) the strength of the interpersonal dimension of the dispute,

(b) the nature of the dispute,

(c) the amount at stake,

(d) the speed of resolution,

(e) the cost involved,

(f) the relative power of the disputants,

(g) the relative knowledge of the disputants, and

(h) the relative financial resources of the disputants, the incentives for use of methods.

This list of criteria, as well as others provided by qualified publicists, all list similar issues to consider in the selection of the most suitable method of dispute settlement. It is submitted that there are basically three overarching issues to consider:

1. Party objectives;
2. Impediments to settlement and ways of overcoming them; and
3. Weighing the advantages and disadvantages of the various dispute settlement mechanisms.

These three issues will be discussed in turn.

Party Objectives

The first issue at hand is to ascertain the objectives of the various parties to the disputes. This determination is crucial to the choice of dispute settlement mechanism that would be appropriate in the case at hand. If parties aim for either public vindication or a binding precedent, then only adjudication will suffice. Some measure of third party vindication may be achieved through the mini-trial, the summary jury trial, and early neutral evaluation, since in each

[132] see *supra* note 11 at 86

[133] Shore, M.A., Solleveld, T. and Molzan, D., *Dispute Resolution: A Directory of Methods, Projects and Resources*, see *supra* note 41

of these processes a neutral third party decides the case based on the parties' contentions. These mechanisms are however, brief and non-binding. As such, they may not satisfy the party's desire for vindication.

Certainly, party objectives will change with time as circumstances evolve and interests consequently wax or wane. Some parties may have initiated the dispute settlement process bent on public vindication, but priorities may shift if they are confident that their present and future interests will be taken care of. These are some thoughts to consider in assigning a dispute settlement procedure to any one dispute to meet party objectives. As proposed by qualified publicists, the value of various procedures in meeting specific client objectives is set forth in Table 5.3.[134]

The numerical scores are totalled depending on what the party's objectives are, showing which dispute settlement mechanism would be most suitable. Of course, this does not automatically lead to the conclusion that this would be the parties' preferred procedure. Any analysis of each process must be more specific and determinate. Such analysis must necessary prioritize the parties' objectives so that the choice of which process would be most suitable would be based on the top mean score for that objective.

Three issues are of extreme importance in this regard. Firstly, this numerical analysis is founded on the most typical manner in which the corresponding dispute settlement procedure is carried out. Certainly, once this changes, the measure to which each would fulfil particular party objectives would also change. Therefore, Table 5.3 is intended only as a general guide. This is subject to change if the specific mechanism should differ from the general norms on which the table is based.

Secondly, it must be remembered that these mechanisms are artificially discussed in isolation. As mentioned earlier in this Chapter, it is often possible to blend different procedures to develop a hybrid process. Indeed, Table 5.3 is useful as a manual in creating a process that attempts to achieve the parties' objectives, while considering the public interest factor of the dispute at issue.

Thirdly, there might be some contention that other dispute settlement procedures should not be employed altogether in the case where one party would almost definitely win if the dispute were submitted for adjudication. However, it is submitted that the use of one of the investigatory processes may persuade the likely losing party to concede. This may diminish the costs of adjudication for both parties. A settled outcome has a higher probability of compliance than an imposed adjudicated order. Alternatively, a settlement might achieve an outcome that has greater non-financial outcomes. This is likely to maintain and improve the parties' relationship. It is only in the case where a judicial precedent is required for the best interest of the public that adjudication may certainly be the most suitable procedure. As such, the likelihood of a victory

[134] Adapted from *supra* note 64 at 326

Party Objectives	Mediation	Mini-Trial	Summary Jury Trial	Early Neutral Evaluation	Arbitration	Adjudication
Minimize Costs	3	2	2	3	1	0
Speed of Resolution	3	2	2	3	1	0
Privacy of Process	3	3	2	2	3	0
Maintenance of Parties' Relationship	3	2	2	1	1	0
Vindication	0	1	1	1	2	3
Neutral Opinion	0	3	3	3	3	3
Precedent	0	0	0	0	2	3
Maximizing Recovery	0	1	1	1	2	3

Table 5.3: Extent to Which Dispute Settlement Procedures Satisfy Client Objectives
0 = Unlikely to satisfy objective
1 = Satisfies objective somewhat
2 = Satisfies objective substantially
3 = Satisfies objective very substantially

through adjudication is not reason enough for shunning other procedures.

Impediments to Settlement and Ways of Overcoming Them

In certain situations, a settlement is not in either party's interest. Examples of this case include circumstances in which

1. a binding precedent is necessary;
2. parties is in a non-relational situation;
3. there is only an issue of damages payable;
4. where one party wants to illustrate the costs of asserting claims against it to other potential litigants;
5. there is no pre-judgment interest; and
6. the cost of contesting the claim is less than the interest earned on the money.

In these situations, settlement will not be in the parties' interests.

Nevertheless, typically a satisfactory settlement is in the parties' interest. Often it is the incapacity to reach this settlement that motivates parties to turn to legal assistance to begin with. Thus, in selecting a particular dispute settlement procedure, it would do well not only to contemplate parties' objectives, but also the reasons for which they have been unable to settle their dispute. This has a higher likelihood of ultimately selecting a procedure that would overcome any impediments to settlement. It is important to remember however, that although it may initially appear as if parties are seeking a satisfactory settlement, an assessment of the impediments to settlement may reveal that they may in fact want an outcome that settlement will not provide. For example, parties may aim for public vindication, or for a binding precedent on a matter.

The impediments to settlement, along with the likelihood that various ADR processes will overcome them, are set out in Table 5.4.[135]

Impediments considered in the context of outer space activities include:

1. *Different perspective of facts*: This arises where parties have a different view of the factual matrix surrounding the dispute. The question to answer then is which party's version is the decision-maker most likely to believe or agree with. The further the parties are on their perspectives of the factual matrix, the more unlikely it is that settlement will be reached. Oftentimes, a skilled mediator can persuade the parties to put aside their

[135]see *supra* note 64 at 329

Impediment	Mediation	Mini-Trial	Summary Jury Trial	Early Neutral Evaluation	Arbitration	Adjudication
Different View of Facts	2	2	2	2	3	3
Different View of Law	2	3	3	3	3	3
Important Principle	1	0	0	0	1	1
Constituent Pressure	3	2	2	2	1	0
Linkage to Other Disputes	2	1	1	1	0	0
Multiple Parties	2	1	1	1	1	0
Jackpot Syndrome	0	1	1	1	2	3

Table 5.4: Likelihood that Dispute Settlement Procedure Will Overcome Impediments to Settlement
0 = Unlikely to overcome impediment
1 = Sometimes useful in overcoming impediment
2 = Often useful in overcoming impediment
3 = Most likely to be useful in overcoming impediment

factual dispute so as to achieve a mutually acceptable resolution of the dispute. However, if the factual matrix is intrinsic to the cause and resolution of the dispute, then it is arguable that the adjudicatory form of dispute settlement is better suited to resolve the particular dispute. Aside from adjudication and arbitration, investigatory processes such as a summary jury trial, neutral evaluation or mini-trial, while not binding, may also be useful in providing a neutral assessment of the facts at hand.

2. *Different perspective of the applicable law*: Parties may find agreement on the factual matrix but disagree on their legal effects. This may be described as a disagreement on the legal matrix surround the dispute. Frequently, mediation can often persuade the parties to reach a settlement without determining which position is correct. In the case of a failure to resolve through mediation, a non-binding evaluation of the likely outcome by an experienced neutral third party may assist in bringing about a settlement. An early neutral evaluation, a mini-trial, or summary jury trial would be useful in this regard.

3. *Important principle*: Where each of the disputing parties attaches importance to a basic principle that must be compromised in order to reach a resolution, then settlement is likely to be difficult. Here it is unlikely that evaluative or investigatory procedures will help in reaching a settlement. The process of mediation however, may find an innovative manner of either harmonizing or circumventing such conflicting principles. This may be achieved through seeking a compromise that achieves the parties' varying objectives.

4. *Constituent pressure*: Constituency pressures may hinder settlement in two ways: Firstly, various elements within a represented institution may have different interests in the dispute. Secondly, the disputing party may have political reasons for achieving a specific result. Mediation might work for the former case by proposing a compromised solution that meets the conflicting concerns. Mediation may indeed solve the latter issue by having the mediator serve as a scapegoat. This allows the disputing party to rest the blame for any outcome or impacts of the resolution on the mediator. Other non-binding procedures may serve a similar function. For example, a third party neutral's assessment may demonstrate that a particular position is unlikely to prevail and thus the accepted settlement is the best possible outcome.

5. *Impact on other disputes*: Resolving one dispute may have an impact on other disputes involving one or both parties. If this is the case, then this may cause dialogue to reach a *cul-de-sac*. Mediatory techniques may

assist in factoring this issue. This may also be achieved by other non-binding procedures such as the mini-trial, summary jury trial and neutral evaluation. This is especially if the neutral in these processes plays both a mediatory as well as an evaluative role.

6. *Multiple Parties*: When there are multiple parties with conflicting and divergent interests, the problems are similar to those raised by constituent pressures. Mediation will sometimes succeed in finding a balance of interests that satisfies all.

7. *Jackpot Syndrome*: An enormous barrier to settlement often exists in those cases where both parties is confident of obtaining in court a financial recovery far exceeding its damages.[136] The vast disparity in the evaluation of outcomes may make settlement close to impossible.

Clearly, mediation is often be the preferred procedure for overcoming the impediments to settlement. It comprises the maximum possibility of overcoming all impediments to settlement. Additionally, mediation may assist in obtaining a settlement while circumventing the necessity of resolving disputed questions of fact or law. Therefore, presumptive mediation, or mediation as the default procedure in the absence of compelling reasons to the contrary may be one way of approaching dispute settlement.

Presumptive mediation would require the mediator to first try to resolve the dispute using traditional techniques. This allows the illumination of the parties' objectives and of any impediments to settlement. If this does not resolve the dispute, the mediator could make an informed recommendation for a different procedure. For example, if the parties were so far apart in their views of the facts or law that settlement would be impossible, a recommended referral to an evaluative procedure may move the parties closer to a common view. Once that has been achieved, mediation could be re-initiated.

An advantage of this approach is that the mediator's recommendation might be more readily accepted by both parties, as it may be perceived to be more impartial than recommendations made by either party's lawyers. It is submitted that presumptive mediation appears to be promising, especially where the parties cannot agree on a particular dispute settlement procedure.

That said, the presumption in favor of mediation would be bested in circumstances where party objectives could not be satisfied, or where mediation is clearly unable to overcome a major impediment to settlement. A common example of this scenario is one where either party has a strong interest in receiving a neutral opinion, obtaining a verdict of precedential value, or being

[136]Brett, J.M., Barsness Z.I. and Goldberg, S.B., "The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers", (1996) 12 Negotiation Journal 259

publicly vindicated. In such cases, the party may be reluctant to undergo any procedure that does not allow the achievement of that objective.

Weighing the Advantages and Disadvantages of the Various Dispute Settlement Mechanisms

Choosing the most appropriate dispute resolution method may be seen as a process of weighing the advantages and disadvantages of different techniques. Table 5.5 illustrates some of the common advantages and disadvantages of the various dispute settlement mechanisms.

Parties will evaluate the various advantages and disadvantages of the dispute settlement techniques available in selecting the most suitable process. They will take into consideration whether specific processes might achieved their desired outcomes. Public and private institutions will meticulously assess these advantages and disadvantages before promoting particular methods of dispute resolution. In many situations however, this approach may be incomplete and misleading. Practically the quest for the right fit between a particular dispute and a dispute settlement techniques is more indeterminate.

The fact that a dispute is not static, but rather changes with time may also add fuel to the argument that a dispute could be matched to a particular settlement mechanism. Disputes are transformed in the process of the settlement. This suggests that more open-ended methods in the evaluation and selection of dispute settlement mechanisms may be necessary.

Incongruities and volatility in the dispute settlement mechanisms themselves also imperil the idea of matching specific disputes can to a particular procedure. For example, different processes are called mediation, but they generally have varying degrees of adherence to ideal mediation. Mediation may be facilitative, evaluative, transformative, bureaucratic, open or closed, activist or accountable, less professionalized or pragmatic. As such, choosing mediation will depend on the different contexts, methods and means in which mediation is practiced. The same can be said of negotiation. The participants, approach and interests may markedly change the process of negotiation itself. Even formal processes such as adjudication may not always render fully predictable results. A thorough comprehension that the myriad of dispute settlement techniques are objects and vessels of transformation brings a more sophisticated perspective to the choice of which method would apply.

The foregoing critique considers the issue from the perspective of the parties' preferences. Aside from this consideration, the suitability of each process should be examined also from a public policy perspective and the viewpoint of the public interest. This is necessary as it would ensure a more realistic and pragmatic assessment of the manner in which the choice of the procedure is made.

Dispute Settlement Procedure	Advantages	Disadvantages
Adjudication	• Public norms applied • Precedent generated • Deterrence factor • Uniformity • Independence • Binding decision allowing closure • Enforceability • Already institutionalized • Publicly funded	• Expensive • Requires lawyers and relinquishes party control to them • Lacks special substantive expertise • Involves delays • Time-consuming • Issues redefined or narrowed • Limited range of remedies • No compromise • Complicated procedures • Polarizes parties • Disruptive
Arbitration	• Privacy • Parties control forum • Enforceability • Expedience • Expertise • Tailors remedy to situation • Choice of applicable norm	• No public norms • No formally legally binding precedent • No uniformity • Becoming encumbered by increasing legalization

Dispute Settlement Procedure	Advantages	Disadvantages
Med-Arb / Conciliation / Mediation / Negotiation	• Privacy • Parties control process • Reflects concerns and priorities of disputants • Preserves continuing relations • Flexible • Finds integrative solutions • Addresses underlying problem • Process educates disputants • High rate of compliance	• Lacks ability to compel participation • Not binding • Weak closure • No power to induce settlements • No due process safeguards • Reflects imbalance in skills (especially in negotiation) • Lacks enforceability • Outcome need not be principled
Ombudsperson	• Not disruptive to ongoing relations • Flexible • Self-starting • Easy access	• Lacks enforceability • No party control
Early Neutral Evaluation / Mini-Trial	• Privacy • Responsive to concerns of disputants • Enforceability	• No independent due process safeguards • Not based on public norms • May reflect imbalance within organization

Table 5.5: Advantages and Disadvantages Associated with Dispute Settlement Mechanisms

In summary, these are the variables and issues at the heart of the classification of disputes, and the corresponding methods of the selection of dispute settlement mechanism. Many factors come into play in this classification. The classification of disputes is one of the most critical points of the multi-door courthouse system. As such, it must be as foolproof as possible. It is submitted that a Working Group of experts in the field should be constituted to cull the most relevant of these criteria for the classification of disputes relating to space activities. This classification of disputes then leads to the next process, which involves the means of choosing the specific dispute settlement mechanism for the particular dispute at hand.

5.3.2 Means of Choice

Any discussion of the factors constituting the means of choice of the dispute settlement mechanism undertaken must necessarily first consider the institution that makes that decision, and that is to conduct the dispute settlement process. The issue is whether the dispute settlement process should be conducted by court-employed evaluators and neutrals with legal training, by private community-based professionals, or by a combination of both. There are differing views on whether court-employed professionals would be suitable. However, it is submitted that some advantages of this may include the following:

1. Court-based or -employed dispute settlement procedures and professionals more clearly authenticates non-adjudicatory settlement methods as a sanctioned alternative to adjudication. This perceived promotion may serve a significant educational role.

2. Non-adjudicatory dispute settlement measures may be more immediately available or accessible at various phases of adjudication.

3. A higher degree of quality control may be maintained over dispute settlement personnel if non-adjudicatory processes were rooted in the established court system. Further, settled agreements may receive greater credibility, and thus added enforceability rates.

4. If neutrals in non-adjudicatory processes are trained officers of the court, their independence in the dispute settlement process is more guaranteed.[137]

There have been statements of concern that the court's administration of justice may be affected by the intrusion of external neutrals with their own

[137]Naughton, T., "Court related alternative dispute resolution in New South Wales", (1995) 12 Environmental and Planning Law Journal 373

commercial interests.[138] Perspicacity about the suitability of court-conducted non-adjudicatory dispute settlement mechanisms differ depending on whether the conduct of the process. One opinion is that making judges available to conduct mediation may decrease public confidence in the integrity and impartiality of the court. This may be especially the case where such dispute settlement procedures depend on shuttle diplomacy or private discussions in the absence of one or other party.[139] The Australian Federal Court has responded to this concern by having its registrars, and not its judges conduct non-adjudicatory dispute settlement.[140]

In fact, the issue of whether mediatory models of dispute settlement should be court-related has raised many eyebrows. One contention is that there might be subtle pressure from overworked or disinterested members of the judiciary to pressure parties into mediatory dispute settlement procedures. There are five counterarguments to this. Firstly, any court-related mediation can only be carried out with full party consent. Secondly, the existence of court-related mediation has an important educational role to remind the parties that different mediatory rather than adjudicatory forms of dispute settlement are available to them. Third, even after adjudicatory proceedings have been initiated, parties are free to attempt a mediatory solution to their dispute, upon clearly delineated boundaries. Fourth, court-related mediation obliges the court to maintain a degree of quality control over the personnel and procedure of the mediation. Lastly, a mediated agreement can be made a consent judgment with an added element of enforceability.[141]

The advantages of housing mediatory models together with adjudicatory models of dispute settlement have also been remarked upon. One of the supporting statements of this is that officers of the court are perceived to be more independent that external third party neutrals, which is vital for the mediatory process.[142] That opinion is argued against by Sir Laurence Street who has noted that

> "A court that makes available a judge or a registrar to conduct a true mediation is forsaking a fundamental concept upon which

[138]Brennan, G., "'Key issues in judicial administration", (1997) 6(3)Journal of Judicial Administration 138

[139]Street, L., "The courts and mediation - a warning", (1991) 2 Australian Dispute Resolution Journal 203

[140]Black, M.E., "The courts, tribunals and ADR", (1996) 7 Australian Dispute Resolution Journal 138

[141]Naughton, T.F.M., "Court Related Alternative Dispute Resolution in New South Wales", (1995) 12 Environmental and Planning Law Journal 373 at 381; see also Keogh, J.H., "Dispute Resolution Systems in the New South Wales Land and Environment Court", (1996) 7(3) Australian Dispute Resolution Journal 169

[142]Ingleby, R., "Alternative Dispute Resolution and the Courts", (1991) Paper at the 27th Australian Legal Convention, Adelaide

> public confidence in the integrity and impartiality of the court system is founded. Private access to a representative of the court by one party, in which the dispute is discussed and views expressed in the absence of the other party, is a repudiation of basic principles of fairness and absence of hidden influence that the community rightly expects and demands that the courts observe."[143]

Several issues arise in this editorial. Court-related mediation may be more cost-effective for the disputing parties. However, should it constitute a component of the court's functions? What exactly is the role of the court - to provide a variety of dispute settlement processes or to provide only adjudicatory ones? This debate about the function of the court system and its relationship to more mediatory forms of dispute settlement has yet to be resolved.[144] It is submitted that only time and experience will tell what the outcome of this debate will be.

Where members of the judicial bench conduct mediatory dispute settlement procedures, other issues may arise. Disputing parties may perceive the involvement of judges in a very different way, and the independence and neutrality of the bench may have an impact on the settlement process. Some tribunals have sought to bring balance to these issues by using a combination model which allows specific matters to be referred to a non-adjudicatory process.[145]
Other tribunals opt to leave the choice to the parties. Where court-related mediation is instituted, another issue that arises is that the procedures of dispute settlement used and the training and qualifications of the third party neutrals may vary. This is the same issue that arises with the use of external third party involvement.[146]

As such, a significant factor is to consider the means of choice by which the appropriate dispute settlement mechanism should be selected. The following

[143]Street, L., "Editorial: The Courts and Mediation - A Warning", (1991) 2 Australian Dispute Resolution Journal 203

[144]See for example, examples of models or recommendations: Australian Federal Court (Mediation by Registrars and external mediators where Appropriate); Australian Family Law Act - (Conciliation by court counsellors and Registrars)

[145]Particular Australian legislative examples are as follows:

1. Supreme Court Practice Direction No 4 (Qld) - Commercial List para 6 (b). A judge in charge of the list may conduct a mediation conference
2. Conciliation Act 1929 (SA) - s 3 the court may conciliate in chambers with or without solicitors being present.
3. District Court Act 1991 (SA) - Judges and masters may attempt to achieve a negotiated outcome. See also District Court Rules 1992 Amendment No 3 (SA) and Supreme Court Rules 1987 (SA) - r 56A.05
4. Rules of the Supreme Court 1971 (WA) - Order 29.2. The Court may direct mediation by Registrars or to external persons appointed by the Court.

[146]Black, M.E.J., "The Courts Tribunals and ADR", (1996) 7 Australian Dispute Resolution Journal 138 at 144

factors may assist in the selection of a choice of dispute settlement mechanism.

Factors in Favor of Adjudicatory Models of Dispute Settlement

1. *Where there is no genuine interest in settlement*: Non-adjudicatory dispute settlement will likely be ineffective if the parties have already taken adversarial positions, or where the case is being brought for tactical reasons. It is also unlikely to be effective where delay is beneficial to one of the parties, or where there is a large discrepancy in the parties' bargaining positions.

2. *Where there is a necessity to create a binding and public precedent*: Non-adjudicatory dispute settlement is inappropriate where it is necessary to create a binding and public precedent. This may be the case in which an important albeit unclear principle of law is involved, or where the dispute involves the interpretation of a commonly used standard contractual clause. Certainly, it is possible to separate these legal issues from the rest of the dispute, and revert to non-adjudicatory dispute settlement for an eventual settlement. Adjudication used together with neutral expert opinion might be appropriate in such cases.

3. *Where there are dangers to a breakdown in non-adjudicatory processes*: Most non-adjudicatory settlement procedural rules allow for rules that admissions or concessions made by a party cannot be used in any subsequent proceedings. Nevertheless, there may be a residual concern about revealing one's hand in the case the non-adjudicatory process breaks down.

4. *Where a binding settlement is imperative*: The main disadvantage of non-adjudicatory dispute settlement is that its procedures are not binding on the parties. This gives parties an excellent opportunity to waste time, particularly if one party is faced with economic difficulties. This is a valid concern. However, a counter to this concern is the fact that since the preparation for the non-adjudicatory method will have to be completed in any case in adjudicatory mechanisms. As such, the costs and short period of time spent in non-adjudicatory processes generally will have a small effect on the overall cost of the resolution of the dispute.

5. *Where there is a need for proper discovery and expert evidence*: There may be a need for proper discovery and expert evidence to fairly settle the dispute. In non-adjudicatory proceedings there is certainly a risk that proper discovery or disclosure of expert's reports may be left out. This risk may be minimized by an agreement between the parties to disclose important documents and other evidence that would significantly affect the position of either party. Parties may also be required to present a

statement of the evidence so that their opponent is not taken by surprise. Witness statements could be prepared early on and exchanged without prejudice. This is, in any case, work that would have to be done for a substantive adjudicatory hearing. The only disadvantage is that statements at such an early stage would effectively reveal the nature of the evidence to be relied upon, and may prejudice a party's tactical strategies.

6. *Where an enforceable award cannot otherwise be made*: Non-adjudicatory dispute settlement procedures are non-binding by nature. Thus, the result is that the third party neutral cannot make an award. The only role of the third party is to attempt to bring the parties to a compromised agreement. Even if an enforceable agreement is reached, problems may still arise in the international environment. This is because a non-adjudicatory dispute settlement agreement is not recognized by the New York Convention as an award for the purposes of international enforcement.

7. *Where the qualification of the third party neutral is in question*: The qualification, experience and skill of the third party may come into question. There are few trained mediators in the space-related fields, and steps should be taken to remedy this shortcoming.

8. *Where the third party neutral may be a compellable witness in later adjudicatory hearings*: This is the quintessential problem as to whether or not a third party involved is a compellable witness. A further question is whether the third party's privilege attaches also to records or documents disclosed during the course of the proceedings. This is a delicate balance to maintain. It would be absurd to enter the non-adjudicatory dispute settlement process attempting to reach settlement while simultaneously having to worry about the third party being used as a potentially hostile witness in later adjudicatory hearings.

9. *Where there is bias on the face of the non-adjudicatory process*: This arises in the situation where the third party may not in fact make a proper examination of the matters in dispute, or where there is bias on the face of the conduct of the proceedings. Such perception may cause the non-adjudicatory proceeding, and its outcome, to lose any legitimacy.

10. *Where the third party neutral may over- or under-represent parties' positions*: The third party neutral is tasked with bringing the parties to a compromised settlement. In so doing this may undermine one or both of the parties' confidence with regard to their relevant positions. These doubts may be exaggerated particularly if the parties are not legally represented, or if the parties are not dealing at arm's length.

11. *Where drafting the settlement raises difficulties*: A settlement may be reached at the non-adjudicatory proceedings. However, oftentimes drafting the settlement itself raises difficulties, particularly if the formal document is left to the parties to draw up with their respective lawyers.[147]

Factors Favoring Arbitration

Among the adjudicatory processes, in certain circumstances arbitration may still be favored over adjudication as a binding dispute settlement mechanism. Factors that may favor arbitration as the choice method include:

1. Where either party wishes to refer the matter specifically to arbitration.
2. Where it is an appropriate time in the dispute settlement process for referral.
3. Where an insurance company is liable in full or part for any damage caused or costs incurred.
4. Where speed of resolution is important.
5. Where receiving a binding opinion is relevant.
6. Where parties wish to avoid negotiations with the other side.
7. Where a matter involves the quantification of a dispute.

Factors in Favor of Non-Adjudicatory Models of Dispute Settlement

For all the volumes of critical analysis about the theory of dispute resolution, there is still comparatively little public information about the impact or problems with non-adjudicatory dispute settlement processes. Nevertheless, it is submitted that there are certain general observations about the advantages of the process as a whole. These include:

1. *Where there is a need for flexibility*: Non-adjudicatory models of dispute settlement offer great flexibility of procedure. Parties may choose that most appropriate method of dispute resolution and the procedure to be utilized. Additionally, parties are free to adopt an unlimited range of solutions. Hence, they are not simply restricted to a cash award in terms of reparatory damages. This enhances the likelihood of reaching a mutually acceptable compromise.

[147] see *supra* note 43

2. *Where proceedings need to be more clearly focused*: The involvement in the non-adjudicatory process of a neutral third party expert or panel allows the procedure to be better focused. This is especially so in situations where technical issues are involved. Non-adjudicatory procedures also allow parties to focus on the facts and not be diverted by procedural issues. The process encourages the parties to focus on the real problem themselves, rather than transferring the initiative to their lawyers.

3. *Where speed of resolution is paramount*: Disputes can be resolved by certain types of non-adjudicatory dispute settlement procedures in a matter of days or weeks. Adjudicatory processes such as adjudication or arbitration generally take months or years. Efficient and quick resolution of disputes allow for cost savings, better time management, and limits any associated disruption or adverse publicity connected to the dispute.

4. *Where costs must be kept to a minimum*: Non-adjudicatory dispute settlement is a quicker and simpler method of dispute resolution. Thus, it is usually much cheaper than direct resort to adjudication. It has been shown that some US companies reduce up to 35% of their legal costs in using non-adjudicatory dispute settlement.[148] Further, even if non-adjudicatory dispute settlement proves unsuccessful, the parties will have gone some way towards preparing themselves for any subsequent proceedings.

5. *Where an on-going business relationship must be maintained*: Non-adjudicatory dispute settlement is an effective means of resolving dispute between parties who prefer to maintain an ongoing business relationship. The parties initiate the procedure in a spirit of compromise instead of adopting adversarial positions. The emphasis is on business and economic objectives rather than legal disagreements. Both parties are given the chance to air their views. Ideally, it is not a zero-sum win / lose situation, but one in which both parties would have partially won.

6. *Where confidentiality of proceedings is necessary*: Unlike adjudication, non-adjudicatory dispute settlement proceedings are carried out in private. This avoids the possibility of adverse publicity. It can also minimize the risk of disclosing business information and trade secrets to competitors.

Factors Favoring Mediation

All too often the effects of adjudication and arbitration are:

[148] Center for Public Resources, *Resolutions*, Issue No. 5, (1992)

- polarized positions;
- a drain on the party's managerial time;
- a loss of party control on the dispute settlement process;
- damaged commercial relationships;
- expensive and long drawn-out proceedings;
- a pyrrhic victory for the successful party with recovered monies only a fraction of actual costs; and
- a judgment that is impossible to enforce.

Further, some disputes are comprised of factors that favor mediation as the more suitable choice of dispute settlement mechanism:

1. Where the matter is complex or likely to be lengthy.
2. Where the matter involves more than one plaintiff or defendant
3. Where there are cross claims.
4. Where the parties have a continuing relationship.
5. Where either party could be characterized as a frequent litigator or there is evidence that the subject matter is related to a large number of other matters.
6. Where the possible outcome of the matter may be flexible and where differing contractual or other arrangements can be canvassed. Poor compliance rates in similar types of matters could be considered in respect of this factor.
7. Where the parties have a desire to keep a matter private or confidential.
8. Where a party is a litigant in person.
9. Where it is an appropriate time for referral.
10. Where the dispute has a number of facets that may be litigated separately at some time.
11. Where the dispute has facets that may be the subject of proceedings other jurisdictions.

Factors Favoring Non-Binding or Early Neutral Evaluation

The following are factors involved in disputes that might favor non-binding or early neutral evaluation:

1. Where the matter involves technical or legal issues.
2. Where liability is not an issue.
3. Where an expert opinion has previously been sought.
4. Where parties have a desire to keep a mater private or confidential.

5.3.3 Resolution of Dispute and Enforcement through Supervision

Upon resolution of the dispute, the ultimate outcome should be complied with by the parties concerned. As mentioned earlier, the multi-door courthouse system allows for the maximum possible party involvement in the dispute settlement process. This allows it to also maximize the possibility of party satisfaction with the final outcome of the resolution. This should increase the likelihood of compliance with the agreed resolution of the dispute.

In cases where such compliance is not forthcoming from one or more parties however, enforcement mechanisms are required. In this regard, three devices are important:

1. Verification; consisting of
   (a) Treaty compliance regimes;
   (b) Inspection panels and party reports;
2. Supervision; consisting of
   (a) Good offices of the UN Secretary-General;
   (b) Compensation Commissions; and in the last resort
   (c) Referral of the dispute via the UN Secretary-General to the UN Security Council.
3. Procedural Issues in Settlement Enforcement.

These three devices will be discussed in turn.

Verification

A compliance régime limits the opportunities for the violation of rules instead of making violation less attractive.[149] It involves the establishment of moni-

[149]Mitchell, R., "Regime Design Matters: International Oil Pollution and Treaty Compliance", (1994) 48 International Organization 425

toring and enforcement regulations aimed to prevent violations. As discussed earlier in Chapter 4, this includes treaty compliance régimes such as those in international environmental law. It also includes inspection panels for verification such as those found in international economic and trade law. In the field of international space law, compliance régimes may be built into technical capabilities or procedures so as to make monitoring transparent. In effect, compliance with the regime is coerced.

It is submitted that compliance régimes work better than deterrence régimes. Deterrence régimes attempt to restrict the occurrence of violations through imposed penalties or sanctions. While the mechanism of deterrence is also important, violations are often harder to detect. A compliance approach will be more useful in space law since violations, especially with dual-use technology, will be very difficult to detect. As such, it is submitted that incentives to comply with regulations and legal standards would likely achieve more.

An operative compliance régime for space law must be constructed around normative legal standards and processes of transparency. Transparency measures are an extremely important mechanism of reassurance and verification when in the context of cooperative obligations.[150] Transparency measures serve to demonstrate peaceful intent, *bona fides*, and continuing compliance with the law. Such compliance measures would involve an organized and systematic exchange of relevant information on space activities. This would include fora to provide generally available information as well as other measures for the exchange of more sensitive information under specific agreed conditions for access and use.

One method by which to achieve this would be the establishment of on-sites pre-launch verification schemes. This would be founded on the UN Registration Convention. The drafters or the Registration Convention intended it to be a transparency mechanism. However, it is presently not a very onerous or demanding treaty framework. It is submitted that the Registration Convention could be expanded upon to provide details about the spacecraft's nature and function, as well as about its transparency of use, such as tracking space objects, monitoring telemetry, and observation. Parameters such as radiation hardening, weight, power sources, mission objectives, nature of telemetry, contamination issues, satellite services, and international participation could be used as additional elements to categorize uses. The burden of proof would be on the verification scheme for suspected illegal use. However, lack of data, reluctance to be transparent or inadequate compliance may be an indicator to the international community of suspicious use. For the Registration Convention to perform a true verification role, the information reported about the various missions would have to reflect data about the manner in which each characteristic related to legally acceptable activities in outer space.

[150]Gallagher, N., *The Politics of Verification* (1999)

Other possible verification mechanisms could include prior notification of launches with expected orbital parameters to the UN Secretary-General, the establishment of minimum separation distances between spacecraft, international and transnational reciprocal inspection procedures, and consultative mechanisms in case of ambiguous activities or accidents in space.

Supervision

Supervision at the level of international law has had a checkered history.[151] Some branches of the law boast sophisticated, effective mechanisms that are widely perceived as legitimate and fair. These vary from reporting systems to the powers of the UN Security Council to determine and act upon a breach of international peace and security. Supervision is an ongoing process that ensures compliance with the law or with the settlement of a specific dispute.

Supervision comprises mechanisms that increase the motivation of actors to comply with their international legal obligations.[152] This is a very broad concept. It is an integral component of the structure of the international legal system. Supervision of compliance with various international legal standards are usually formulated within independent, though related, régimes.[153] Supervisory mechanisms are of great significance in the framework and workability of the international legal community.

There are three distinguishable supervisory models. These are, broadly speaking:

1. *The Reporting System*:

   Actors that are party to an international convention, or members of an international organization, generally accept the corresponding obligation for regular reports of their behavior in particular fields of international law. One of the oldest examples of this can be found in the International Labor Organization,[154] as well as various human rights conventions[155]

[151] Chowdhury, T.M.C., *Legal Framework of International Supervision*, (1986)

[152] van Asbeck, F.M., "Quelques aspects du contrôle international non-judiciaire de l'application par les gouvernements de conventions internationales", (1959) 6 Netherlands International Law Review 27

[153] see generally Blokker, N., and Muller, S., (eds.), *Towards More Effective Supervision by International Organizations: Essays in Honour of Henri G. Schermers* (1994); also Sohn, L.B., "Implementation and Supervision by the United Nations", in Meron, T. (ed.), *Human Rights in International Law: Legal and Policy Issues* (1984) 369

[154] Article 22, Constitution of the International Labor Organization, as amended October 9, 1946, 62 Stat. 3485, 15 UNTS 36

[155] Article 16 of the 1969 International Covenant on Economic, Social and Cultural Rights, UN G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 UNTS 3, entered into force January 3, 1976, and Article 40 of the International Covenant on Civil and Political Rights, UN G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force March 23, 1976.

and environmental law instruments.[156] These reports are generally provided by the parties themselves. However, in an updated version of the reporting system, non-State actors have been given standing to file reports concerning A State's implementation of its international obligations.[157] These reports form the basis for the discussion in the assembly of State Parties to the particular Convention or organization.

2. *Independent Supervisory Mechanisms*:

Independent supervisory mechanisms take many forms. These include special rapporteurs,[158] scientific or technical expert commissions,[159] or a monitoring network providing scientifically comparable technical data.[160] These institutions regularly report to the assembly of parties or to the public in general. The source of information is provided by an expert, usually selected by participating States or the international organization. These experts may not necessarily be independent or apolitical. However, they provide a relatively objective source of information. This can result in the initiation of a non-compliance procedure,[161] the imposition of sanctions or a suspension of rights of the defaulting member. The effectiveness of these results has been questioned.

The issue at hand is that any result due to the reporting system is too dependent on the relative power of the participant State actor. As such, reports may be overly political or biased. This concern can be addressed by ensuring the independence of the external supervisory expert. The competence of any expert or supervisory body involved should be enlarged to allow for an independent assessment and verification of the information provided. Further, the report should effect a decision or recommendation by the organization in question so as to induce parties to improve their

[156] Article 11 of the 1973 Convention for the Prevention of Pollution by Ships (1973) 12 ILM 1319, Article 26 of the 1992 Convention on Biological Diversity (1992) 31 ILM 818, Article 12 of the 1992 United Nations Framework Convention on Climate Change (1992) 31 ILM 849

[157] see for example Annex IV of the Montreal Protocol on Substances that Deplete the Ozone Layer, (19 September 1987) 26 ILM 1550

[158] Meron, T., *Human Rights in Internal Strife: Their International Protection*, (1987); rapporteurs have been appointed for investigations of human rights abuses in South Africa, Burma and Chile.

[159] Grossman, C., "Supervision Within the International Atomic Energy Agency", in van Dijk, P. (ed.), *Supervisory Mechanisms in International Economic Organizations in the Perspective of a Restructuring of an International Economic Order*, (1984) 489, the IAEA carries the supervisory function of the Non-Proliferation Treaty.

[160] Gosovic, B., *The Quest for World Environmental Cooperation: The Case of the UN Global Environmental Monitoring System* (1992); see Article 9 of the 1979 Convention on Long-Range Transboundary Air Pollution, 13 November 1979, TIAS 10541, (1979) 18 ILM 1442

[161] for example Articles 26 - 32 of the International Labor Organization Constitution; Article 12(c) of the IAEA Statute.

behavior so as to be more compliant with their international obligations. This will allow the supervisory institution to focus on the actualization of the spirit and objective of the Convention or régime in question.

3. *Binding Supervisory Procedures: the role of the UN Security Council*

The UN Security Council has a unique role as a supervisory body entrusted with decision-making powers. It is very different when compared to other supervisory institutions at the international level. It functions in a framework in which there is no basic confusion or disagreement as to the legal standards, principles and rules that it supervisors. The prohibition on the threat or use of force is an accepted obligation for all States Parties to the United Nations. Thus, the UN Security Council is not tasked with the function of legitimizing the principles it supervisors. However, it must be noted that this is not the case where its actions extend these principles. Examples of this include humanitarian intervention such the case of Somalia, Rwanda, Haiti and North Iraq.[162] In these cases the actions and decisions of the Security Council are important in ensuring that these new elements are a legitimate concern for the international community.

Another issue that invariably arises in any discussion about the UN Security Council is the small size of the Council and the veto power of the five Permanent Members. This makes supervisory actions of the Security Council vulnerable to questions about the legitimacy of its decisions.[163] An improvement to supervisory mechanisms in this regard may be to find a method of cooperation between the Security Council and the General Assembly as provided under Article 12(2) of the UN Charter. This has been mooted as a Chapter VII Consultation Committee.[164] The Security Council should be charged to notify this Committee upon any decision to exercise its Chapter VII powers.

Judicial review by the ICJ provides another check against capriciousness on the part of the Security Council.[165] Such judicial review is only be

[162]UN Security Council Resolution 794 (3 December 1992), see also those concerning Bosnia-Herzegovina (UN Security Council Resolution 871 (4 October 1993); humanitarian assistance to the Kurds in North Iraq (UN Security Council Resolution 688, (4 April 1991); Rwanda (UN Security Council Resolution 918, (17 May 1994) and Haiti (UN Security Council Resolution 940, (31 July 1994)

[163]Franck, T.M., "The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?", (1992) 86 AJIL 519; Stein, T., "Das Attentat von Lockerbie vor dem Sicherheitsrat der Vereinten Nationen und dem Internationalen Gerichtshof", (1993) 31 Archiv des Völkerrechts 206

[164]Reisman, W.M., "The Constitutional Crises in the United Nations", (1993) 87 AJIL 83

[165]See the *Certain Expenses* Case (1962) ICJ Rep. 151 (Advisory Opinion); the *Namibia* case (1971) ICJ Rep. 142 (Advisory Opinion) and the *Lockerbie* Case (1992) ICJ Rep. 3

concerned with a possible violation of international law. However, it increases the perception of legitimacy of the actions of the Security Council as representative of the interest of the international community.

The next issues that arises concerns the significance of supervision as to the legitimacy of international law and the international legal system. That effective supervision is necessary is evident. The quandary is the means by which an assessment of each of these models can be made in this context.

Supervision should be intelligent and specific. It must be directed and proportionate.[166] Not all régime rules subject to supervision are legally binding. However, they are essential to the achievement of the purposes of the organization. Additionally, they add to the normative value of the legal standards and rules concerned. An approach to international social conduct based on the rule of law is in the interest of all participants in the international community. The rule of law and its institutions are necessary, because they ensure that the development of the law is based on the common interests of the international community. Specifically in the field of space law, there is a pressing need for dispute settlement mechanisms that are built on the rule of law. International supervision mechanisms accompanying these mechanisms must ensure a fair and reasonable interpretation and application of the law by all parties.

Procedural Issues in Settlement Enforcement

Settlement enforcement procedures also take much of the brunt of criticism against the system of international law. Such critiques encompass the complaint that courts and tribunals do not have compulsory jurisdiction, and there is no system to ensure enforcement of any particular standard or rule of international law. As such, there is a general perception that international law is left to the self-interested interpretation of States of their rights and obligations. Thus, it is often argued that international law cannot constitute a genuine legal system.

The movement for the establishment of enforcement procedures for settlements derived from third party dispute settlement procedures must develop from within the legal system. It should not be an external idea imposed on the system. The international community should seriously institute an effort to elaborate detailed regulations are to the enforcement of such settlements. This prevents unilateral interpretation by parties of the settlement and its obligations therefrom. Within specific régimes there is a genuine need for a minimum procedure for such enforcement. The viability of any dispute settlement mechanism requires such procedures as a minimum condition. This allows the rule

[166] van Dijk, P., "A Topical Comparative Analysis in the Perspective of Changing Structures of the International Economic Order", in van Dijk, P. (ed.), *Supervisory Mechanisms in International Economic Organizations in the Perspective of a Restructuring of an International Economic Order*, (1984) 720

of law to gain ascendency over the rule of power. This is crucial for the acceptance of the particular dispute settlement mechanism by the international community.

In an international community characterized by a high level of interdependence and integration, a question was raised as to whether binding adjudicatory methods of dispute settlement gain priority over other dispute settlement mechanisms.[167] Two preconditions were identified for a community in which disputes are resolved peacefully. Firstly, the basic values and political ideologies of its members should not be so far apart as to be irreconcilable. Secondly, a minimum degree of mutual responsiveness should exist. This means that members of the community must recognize each other's interests and needs, and their own dependence on others. This is close to the Dworkin ideal of the international community. It was concluded though there these two conditions would likely not be fulfilled in the near future. However, in an ideal integrated international community, mediatory techniques would likely be preferred over adjudicatory techniques.

Since then, much has evolved in the global arena. Traditional ideological boundaries have been eroded, and interdependence is evident on a transnational scale. The prospects of binding enforcement procedures for dispute settlement mechanisms are now better than ever before. It is unlikely though that a global acceptance of such enforcement procedures will be actualized. Diverging opinions on the mechanisms and priorities that should apply in the international community present challenges to the realization of globally-accepted enforcement procedures. However, it is submitted that this is the challenge that the international space law community can rise to. In a rapidly evolving field with decreasing ideological schism and a real need of transnational cooperation, it would be impossible to reconcile elaborate, conflicting legal regulations to pragmatic concerns without such enforcement procedures in the case of a settlement of a dispute. All parties involved in space activities will rely upon the balance created by the certainty and legal basis of enforcement procedures for dispute settlement.

A step-wise approach in this regard is important. However, it should not result in a circumstance of fragmentation, where disputes are enforced on an *ad hoc* basis. The danger is imminent where there are no established rules for enforcement procedures, and enforcement is based on the rule of power. Continuity of decisions, settlements and enforcement procedures is of crucial significance in the development of the legal framework pertaining to space activities.[168]

[167] Neuhold, H., *Internationale Konflikte - verbotene und erlaubte Mittel ihrer Austragung: Versuche einer transdisziplinären Betrachtung der Grundsätze des Gewalt und Interventionsverbots sowie der friedlichen Streitbeilegung im Lichte der UN Prinzipiendeklaration 1970 und der modernen Sozialwissenschaften*, (1977) at 548

[168] Brus, M.M.T.A., *Third Party Dispute Settlement in an Interdependent World: Devel-*

These are the issues relating to the the means of choice of the suitable dispute settlement mechanism.

5.3.4 Conflict Avoidance and Dispute Systems Design

A competent dispute settlement mechanism also provides for confidence building and conflict avoidance processes. Dispute settlement, confidence building and conflict avoidance can best be achieved through a comprehensive dispute systems design. This involves the dispute settlement mechanism, the proposed multi-door courthouse in this case, ensuring that the system designed for dispute settlement allows for the most efficient and fair resolution of the disputes.

The six basic principles of dispute systems design are:

1. Prevention
2. Put the focus on interests
3. Build in "loop-backs" to negotiation
4. Provide low-cost rights and power backups
5. Arrange procedures in a low-to-high cost sequence
6. Provide the necessary motivation, skills, resources and environment.[169]

These principles will be dealt with in turn.

Prevention

When one party is considering a course of action that would likely affect another, that party should notify and consult with the other before embarking on that course of action. Notification entails an advance announcement of the intended action. Consultation is more onerous in that it requires offering a chance to discuss the intended action before it takes place. Notification and consultation act to prevent disputes that may arise through misunderstanding or misconception. This allows the Pavlov reaction that often is the result of unilateral decisions to be circumvented. Additionally, notification and consultation allow the discussion of disagreements that might be easier to resolve before the intended action is taken.

Responsible and sophisticated parties learn from such experience not only to prevent disputes, but also to reduce the occurrences of similar disputes in future. Thus, intelligent dispute systems design include processes for dispute prevention, post-settlement analysis and party feedback.

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oping a Theoretical Framework, (1995) in particular Chapter 6 at 154 - 195

[169] see *supra* note 11 at 308 - 314

Put the focus on interests

This is a basic element of dispute systems design. Effective and viable dispute settlement mechanisms fully utilize procedures that allow disputing parties to come to a compromised, interest-based resolution.

The encouragement of such interest-based compromises is embodied in the increasing instances of contractual clauses that explicitly provide for negotiation as the initial step in the settlement of a dispute. These contractual clauses generally designate the participants, timeframe and impacts of the negotiation. They also indicate what should happen in the case the negotiation fails. Many generally provide for a multi-stepped, prioritized process that channels unresolved disputes to higher-level negotiators until a resolution is arrived at.

Build in "loop-backs" to negotiation

Interest-based negotiations may not be effective or successful in the case where the parties have polar opinions as to the power balance or interests involved. In such cases, it is likely that the parties are unable to settle on a range of acceptable solutions within which to negotiate a settlement. Simultaneously, resort to a power struggle would have high financial and relational costs. As such, efficient dispute systems design will include procedures that will independently assess the likelihood of each party's chances at success before the actual engagement in such a power struggle. These procedures aim to motivate parties to seriously engage in negotiation. Further, they also motivate parties to return to negotiation even if the initial attempt has failed. These are called "loop-back" procedures.

A number os such "loop-back" procedures provide the requisite information as to the rights of the parties, their relative positions and respective possibilities of success. These include the mini-trial and the summary jury trial. For example, the mini-trial allows information of the probable outcome of adjudication to be provided by a mock jury. The essential component is that these procedures provide the parties with independent and dependable information, thereby diminishing the uncertainty about the outcome of an adjudicatory contest. Hence, they motivate a return to interest-based negotiation.

Yet another method for "loop-backs" to negotiation is called the cooling off period. This is a specified time during which the disputing parties agree to avoid a rights- or power-based competition. Some contractual clauses, for example, provide that parties may not commence adjudication for a fixed time in the case the contractually mandated processes fail to resolve a dispute. The idea is that this cooling off period allows parties to redouble their efforts an a negotiated, interest-based settlement.

Such "loop-back" procedures require a facility that would provide more than simple information as to the average outcome of any rights- or power-based

struggle. The parties' inclination to accept interest-based negotiation depends heavily on whether they consider that their circumstances will be taken into account. As such, information provided by the "loop-back" procedures should be accompanied by some mediatory model of dispute settlement that focuses on the parties' respective interests.

Provide low-cost rights and power backups

Some parties approach the initial dispute settlement with positions and interests so contrary that settlement is not possible. However, resort to adjudication may have dire financial and relational costs. An effective dispute systems design as such will include procedures for final and binding settlement of dispute through low-cost alternatives to adjudication. These processes include arbitration in its various incarnations and med-arb.

One time-efficient method of dispute settlement is the institution of a dispute review board.[170] This dispute review board is usually constituted of neutral industry experts which are agreed upon by the disputing parties. This board meets regularly with the parties to pre-empt any possible disputes that may arise. Should disputes arise nonetheless, the board will promptly evaluate these disputes, and produce written recommendations based on the relevant applicable law and the factual matrix of the particular dispute. These recommendations are meant to carry weight for all parties, but are not binding. They may, however, constitute admissible evidence in subsequent process of dispute settlement.

Arrange procedures in a low-to-high cost sequence

Another principle is to arrange the dispute settlement procedures into a sequence from the most cost-efficient to the most expensive procedure. This sequence should be based on the earlier four principles. The following is a sequence that provides guidelines on designing this prioritized list.

1. Prevention Procedures
    - Notification
    - Consultation
    - Post-Dispute Analysis and Feedback
2. Interest-Based Procedures
    - Negotiation

[170]Sander F.E.A. and Thorne, C.M., "Dispute Resolution in the Construction Industry: The Role of Dispute Review Boards", (1995) 19 Construction Law Reports, 194

- Mediation

3. Loop-Back Procedures

   - Advisory Arbitration
   - Mini-Trial
   - Summary Jury Trial
   - Cooling-Off Period

4. Low-Cost Back-Up Procedures

   - Conventional Arbitration
   - Expedited Arbitration
   - Med-Arb
   - Final Offer Arbitration

Such a sequence must necessarily begin with interest-based negotiation, followed thereafter by interest-based mediation. A mini-trial may be useful for significant disputes where parties have extreme opposite views. A cooling-off period might be required for all arising disputes. One of the low-cost rights-based procedures might be the ultimate step, except in cases where a legally binding precedent is required, or in the interest of the community at large.

The state of Florida in the United States of America recently directed its eleven regional planning councils to develop such a sequential system for planning local governmental and community disputes. The system agreed upon consists of four optional steps to be taken prior to initiating adjudication:

1. Situational assessment by the regional planning council or another neutral;

2. Settlement meetings;

3. Mediation; and

4. Advisory decision-making.

The system is designed to be used like a ladder. It is envisaged that situational assessments and settlement meetings would likely resolve the bulk of arising disputes. These steps are however not compulsory, and may be used in any sequence appropriate for the particular dispute at hand.

Provide disputants with the necessary motivation, skills and resources

The final principle ties across the other five. Appropriate procedures are of extreme importance, but are insufficient if the parties lack the necessary motivation, skills and resources to use them effectively.

Intelligent dispute systems design have to encourage the use of interest-based procedures to parties who are more familiar with the rights-based adjudicatory model of dispute settlement. Here resistance from disputing parties might make this task more difficult. Such resistance might come from parties who are of the opinion that rights-based procedures are better, from sectors whose functions and roles are threatened by the use of interest-based procedures, and those who believe that rights-based procedures will result in a victory for themselves. These sources of resistance have to be countered to ensure the effective use of interest-based procedures.

Dispute system design can use a myriad of arguments to work against such opposition. The high costs of rights-based procedures such as legal fees, potential recurrence of disputes and relational damage is one such argument. Another argument is aimed at those who feel threatened by such interest-based procedures. This sector can be shown how they can actively play a functional role in interest-based procedures. For example, the mini-trial is popular with the legal profession because lawyers are given the chance to use their trial and advocacy skills. However, sometimes a new procedure might diminish the role of some sectors who were important in prior procedures, with no corresponding role that would make up for the loss. In such cases, advocates of the new interest-based procedures must ensure that such opposition does not undermine the attractiveness of the new procedures to disputing parties.

The objective of conflict avoidance has also marked various space treaties. Several principles illustrate this:

- that the Moon and other celestial bodies will be used exclusively for peaceful purposes;
- that the placing of nuclear weapons and weapons of mass destruction in outer space is prohibited;
- that the environmental balance of celestial bodies shall not be disrupted and that harmful effects to the earth's environment shall be avoided; and
- that States are liable for reparation of damage caused by space objects.

Further provision is made for the assistance to and return of astronauts and space vehicles; registration of and jurisdiction over spacecraft; international responsibility for national space activities; and the freedom to carry out scientific investigations in space.

The exploration and use of outer space is an endeavor that necessitates cooperation, often on an international and transnational level. Thus, actors tended to facilitate such cooperation through advance conflict avoidance procedures. One obvious example is planning the use of some limited resources in outer space, such as the radio spectrum. All space communications depend on the radio spectrum, and it is essential that the use of the radio spectrum is planned in an equitable manner. Actors therefore necessarily had to negotiate equitable allotments through the International Telecommunications Union. This is a conflict avoidance procedure, actualized through a series of international agreements concluded within the framework of the ITU World Administrative Radio Conferences for space communications (WARC-ST).

The ITU framework for space communications provides elaborate regulations on the allotment of limited resources such as the radio spectrum and the geostationary orbit. It also frames a detailed, novel and compulsory system of coordination between various States for the purposes of avoiding harmful interferences. It also provides for mechanisms for dispute settlement in the case any disagreements arise.

It can be seen that the attitude in sharing space resources has been to provide an elaborate conflict avoidance scheme *a priori*. Such regulations diminish or eliminate potential sources of conflict. Additionally, they promote the establishment of multilateral agreements for the equitable sharing of these outer space resources with a view to international cooperation, reciprocal consultation and conflict avoidance. The process has invariably considered conflict avoidance procedures in parallel with mechanisms for dispute settlement.

5.3.5 Administration of the Multi-Door Courthouse

The administration of the multi-door courthouse will be crucial in maintaining the independence, accessibility, efficiency and quality of the work of the multi-door courthouse system. Issues to consider in the administration of the multi-door courthouse include:

1. Funding;
2. Training of Personnel; and
3. Standards Applicable to Personnel.

These issues will be considered in turn.

Funding

Funding and cost factors are important in ensuring independence and quality in the procedures of the multi-door courthouse. Where a referral to non-adjudicatory dispute settlement is mandatory, the institution may be obliged

to make these procedures available and affordable to disputing parties. This will have certainly impact upon funding for the multi-door courthouse. User charges may create an additional cost barrier to access to justice. The relative cost of providing internal or external processes is also significant.

The sources and basis of funding for the multi-door courthouse system varies. The multi-door courthouse, including processes using external neutrals, can be fully or partly funded by external sources such as the United Nations or be provided on a "user pays" basis. It is submitted that the multi-door courthouse should be funded firstly through an intergovernmental organization such as the United Nations, and that it should make use of a "user pays" formula. This will ensure that costs are kept low to ensure continued accessibility, while guaranteeing the independence of the multi-door courthouse. It is also important to note that many of the experts that will be used by the Multi-Door Courthouse for Outer Space will be from an *ad hoc* list, and called upon only when necessary. This serves to bring costs down, and allows more efficient expenditure of available funds for possible legal aid requirements of disadvantaged parties.

Training and Accreditation

Training and accreditation of neutrals involved in the dispute settlement process has been the subject of a number of recent reports and recommendations.[171] Many domestic national organizations provide training and accreditation in non-adjudicatory settlement processes. However, there is no single institution that can ensure the competence of neutrals involved in the process.

This is also the case for current multi-door courthouse and ADR programs in domestic jurisdictions. This raises issues as to the minimum international or transnational standard of training and accreditation required for these neutrals. Consequently, the quality and actual efficiency of non-adjudicatory processes may be in question. This issue is compounded in the light of the selection of personnel for the multi-door courthouse's screening and dispute classification procedure. This is especially since the dispute classification process is the stage upon which the concept of the Multi-Door Courthouse for Outer Space turns.

In this regard, lessons may be drawn from the experience of the Australian implementation of the multi-door courthouse system. National standards for accreditation have not been introduced in Australia. However, institutions

[171] Attorney-General's Law Reform Advisory Council (Vic) Standards for Court-connected Mediation in Victoria 1994; New South Wales Law Reform Commission Report 67; Training and Accreditation of Mediators Sydney 1991; Law Society of New South Wales Guidelines for Mediators and Evaluators 1996; The Law Council of Australia Standing Committee on Alternative Dispute Resolution 1993; The Victoria Law Foundation, Standards for Court Connected Mediation in Australia 1994; Access to Justice Advisory Committee Access to Justice - an action plan AGPS Canberra 1994; Attorney-General's Department The Justice Statement Canberra 1995

such as Lawyers Engaged in Dispute Resolution and the Australian Commercial Dispute Centre have developed their own accreditation schemes. The Australian National Alternative Dispute Resolution Advisory Council (NADRAC) periodically reviews accreditation, training and practice requirements for mediators.[172]

The Australian NADRAC also focuses on broader issues concerning the education of personnel involved in other dispute resolution processes. Recently, the training of those involved in ADR processes have received considerable consideration by courts, tribunals and peak industry groups. National Australian criteria for accreditation have, however, not yet been finalized. The main focus of discussion has related to accreditation criteria for mediators.[173]
Reports that have specifically dealt with training and accreditation issues include

1. Attorney-General's Law Reform Advisory Council (Vic) Standards for Court-connected Mediation in Victoria 1994

2. New South Wales Law Reform Commission Report 67 Training and Accreditation of Mediators 1991 (NSWLRC 67)

At present, there are some training and education institutions in Australia that provide training in mediation and other ADR processes. These training programs take place in workshops that are conducted as part of broader undergraduate and postgraduate University programs in fulfilment of a law or social science degree.

Further, the Australian government has recently considered legislation in this aspect. Legislation concerning the training and accreditation of mediators includes the 1996 Family Law Regulations. Those Regulations require a family

[172]Access to Justice Advisory Committee Access to Justice - An Action Plan AGPS Canberra 1994, 295, para 11.59

[173]Specific recommendations that relate to the training of ADR neutrals include

1. Law Society of New South Wales Guidelines - Specialist accreditation criteria, attendance at an "approved" course - Mediators and Evaluators (1996).

2. New South Wales Law Reform Commission (1991) Training and Accreditation of Mediators - Recommendation that the Government not regulate to make training mandatory.

3. New South Wales Supreme Court ADR Committee (1995) - That attendance at least a 28 hour course conducted by an approved organisation be required for listed mediators.

4. Family Law Council recommendation (1993) was that as soon as is practicable, the appropriate qualification for a mediator be a diploma or like course in mediation with appropriate practical training. This is consistent with the recommendations of the Joint Select Committee on certain Family Law Issues (1995).

5. Civil Justice Review, Ontario (1995) - That accreditation criteria be developed with the assistance of the Canada Law Society and other professional bodies.

and child internal mediator to be approved by the Chief Judge of the Family Court. A community or private mediator is required to have

1. a degree in law or social science or have undertaken a course or study in mediation completed a course of training of at least five days in family mediation; and
2. engaged in not less than ten hours of supervised mediation in the twelve months following completion of that training; or, provided mediation for at least 150 hours since June 1991 and enrolled in a tertiary course or be employed with a recognized organization.

All mediators must have continued with at least twelve hours in family mediation training per year.

Standards Applicable to Personnel

In terms of standards applicable to personnel of the multi-door courthouse, the Australian NADRAC has produced useful documentation. Uniform practice standards and guidelines have been worked out with input from a range of Australian expert and industrial institutions. Some recommendations have included

1. *The Family Law Council* (1993): Minimum standards and guidelines should be developed.
2. *The Joint Select Committee on certain Family Law Issues* (1995): Uniform standards should be developed. However, there was no comment as to the development of applicable national standards.
3. *The Law Council of Australia Standing Committee on Alternative Dispute Resolution* (1993): "Harmonious if not uniform" court rules on mediation should be adopted.
4. *The Victoria Law Foundation, Standards for Court Connected Mediation in Australia* (1994): Accessible standards should be developed.
5. *The New South Wales Law Reform Commission* (1991): Clear guidelines in the training and accreditation of mediators should be adopted so as to ensure the integrity of the ADR process. Case management should not be the only or primary reason for program implementation.
6. *The Access to Justice Advisory Committee* (1994): Client satisfaction, longitudinal studies of the results of mediated agreements, and outcomes be considered in evaluating ADR programs. Standards should include independence and impartiality, accessibility, efficiency and effectiveness, openness and accountability.

7. *The Justice Statement* (1995) - The Australian national government should set minimum standards for customer dispute schemes after consultation with industry and consumer groups.

Outside of Australia there has also been comment. In 1995, the Canadian Civil Justice Review remarked that standards for mediators should be developed in conjunction with the national Law Society of Canada.

Thus, there are at present no uniform Australian standards that have been developed. However, in 1994, the Access to Justice Advisory Committee stated that standards should cover independence, impartiality, accessibility, efficiency, effectiveness, openness and accountability. Issues relating to the standards of mediators have also received considerable attention in the United States.[174] In 1992, the Society of Professionals in Dispute Resolution (SPIDR) formed a joint committee with the American Arbitration Association and the American Bar Association to discuss the issue of standards and accreditation. Standards relating to the mediator's duties to the court, parties, the public, as well as procedural standards for ADR processes were developed.[175]

Those standards provide for basic principles in the following areas

1. *Self-determination*: A mediator shall recognize that mediation is based on the principle of self-determination by parties.

2. *Impartiality*: A mediator shall conduct the mediation in an impartial manner.

3. *Conflicts of Interest*: A mediator shall disclose all actual and potential conflicts of interest reasonably known to the mediator.

4. *Competence*: a mediator shall mediate only when the mediator has the necessary qualifications and experience to satisfy the reasonable expectations of the parties.

5. *Confidentiality*: a mediator shall maintain the reasonable expectations of the parties with regard to confidentiality.

Standards relating to the quality of process, advertising and solicitation, fees and obligations to the mediation process have also been developed.[176]

It is submitted that the Multi-Door Courthouse System for Outer Space can learn very much from the experiences of the national programs such as those in Australia and Canada. Essentially there has been much debate and

[174]For example the National Standards for Court Connected mediation Programs were developed in 1992 as a joint project of the Center for Dispute Settlement in Washington, DC, the Institute of Judicial Administration (New York) and the State Justice Institute

[175]Feerick, J.D., "Standards of Conduct for Mediators", (1996) 79(6) Judicature 314

[176]Chinkin, C and Dewdney, M., "Settlement Week in New South Wales; An Evaluation", (1992) 2 Australian Dispute Resolution Journal 93

dialogue as to the improvement of the procedures of the multi-door courthouse in these domestic jurisdictions that would be equally applicable to the Multi-Door Courthouse for Outer Space. Further, once established the Multi-Door Courthouse for Outer Space should also ensure that its experts work on training, accreditation and standards applicable for all its personnel. Together with independent funding, it is submitted that the Multi-Door Courthouse for Outer Space would provide a viable dispute settlement framework that is accessible, independent and legally embedded.

5.3.6 Ongoing Review of the Multi-Door Courthouse System

The legal profession may find it difficult to resist the temptation of passing on the messy work of assessing the social impact of the multi-door courthouse system to social scientists. However, it is submitted that the legal professional involved in the disputes systems design are instrumental to the proposed system's success. They can assist in the management of the assessment, and re-design improvements to the original design with an eye on the legal details. In fact, the overall viability of the proposed multi-door courthouse system will depend on ensuring a proper, efficient and affordable approach to assessment. Additionally, it must be remembered that assessment procedures will have an impact on the success of the Multi-Door Courthouse for Outer Space. The use of legal professionals and experts may create a political problem for a the legal implementation of the Multi-Door Courthouse for Outer Space. As such, the legal profession must be sensitive to the assessment of the program and its viability.

The assessment by the legal community will illustrate whether the Multi-Door Courthouse will meet its objectives. Further, it will identify what should be adapted so as to improve its performance quality. Of course, cost-effectiveness and efficiency may be more amenable to evaluation than fairness and quality standards. Nevertheless, these issues will present recurring problems as to the standards of measurement and the interpretation of their policy impacts and future implications. The question that arises is what exactly "cost" involves. An easy criterion to measure will of course be case processing speed. However, this may blur the lines of a small mediatory program as opposed to a larger adjudicatory case.

The assessment of quality, fairness and impacts of mediatory models will be even more difficult to achieve. Several issues arise in this regard. The first is the method by which the translation of "quality" into a clearer and more objective standard. Perceptions of due process and a fair settlement has been regularly used as a measure of system performance. However, it is submitted that the assessments by participants of perceived fairness is insufficient for those

that are uninformed as to the alternatives to a particular method of dispute settlement. Other criteria of fairness have included analysis of result-driven outcomes by expert panels, comparative analyses of the well-being of parties, and the enforcement and compliance rates of settlements.[177]

Certainly, evaluation methods affects the cost-effectiveness and other values of the dispute settlement review process. Further, an independent, ongoing evaluation will carry more credibility with the international and transnational community. This allows a further assessment of the methodology of evaluation. As such, an evaluation contract with an independent research institution will make the ongoing review of the multi-door courthouse more credible. Concurrently however, such external independent review provides proper interpretation of the provided data it produces. This allows for an external, independent recommendation for improvements to the system, which makes the evaluation effective, credible, and thus more useful.

The indicators that could be employed in evaluating the multi-door courthouse system have been summarized as follows

1. User rates
2. Settlement and Compromise rates
3. Compliance
4. Time Savings
5. Cost savings
6. Reduction in court backlogs
7. Community development
8. Removal of the sources of the problem.[178]

Researchers within Australia have used these indicators in assessing domestic ADR programs. Mediator models have been most minutely examined in Australia. The Supreme Court of New South Wales has used a telephone survey to elicit information from the legal professionals involved in the court's early neutral evaluation program. This evaluation has regularly been conducted together with the New South Wales Bar Association.

A fundamental question in any ongoing review of the Multi-Door Courthouse for Outer Space is the standard against which its procedures is to be

[177]Cole, S.R., McEwen, C.A. and Rogers, N.H., *Mediation: Law, Policy, Practice*, (2nd ed., 2001) at sec. 6:15

[178]Ingleby, R., "Why Not Toss a Coin? Issues of Quality and Efficiency in Alternative Dispute Resolution", (1991) Papers presented at the Ninth Annual AIJA Conference 1991 AIJA, Victoria

compared. The most typical standards are similar programs and schemes, as well as comparative analysis with more traditional adjudicatory systems of dispute settlement. Cost, efficiency and perception comparisons are made with these benchmarks.[179] One disadvantage of this approach is the underlying failure to consider the many cases that initiate adjudication, but thereafter settle through mediatory means out of court. Thus, a suggestion is that it may be preferable to define a set of desirable attributes and use those standards for comparison.[180] A number of Australian reports may be relevant in further establishing a methodology.[181]

The difficulties in establishing a methodology for the ongoing review and improvement of the multi-door courthouse system has also been remarked upon the in United States of America.[182] Nevertheless, studies have been undertaken by the National Center for State Courts with funding from the State Justice Institute. The aim of these studies is to develop, test, produce and disseminate methodologically sound self-evaluation for multi-door courthouse programs.

It has often been commented upon that there is clearly no conclusive evidence as to the benefits or otherwise of the multi-door courthouse system.

[179]Tyler, T.R., "The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities", (1989) 66 Denver University Law Review 3

[180]Caspi, S., "Mediation in the Supreme Court - Problems with the Spring Offensive Report", (1994) Australian Dispute Resolution Journal 4 at 20

[181]Reports that may have relevance (in terms of establishing a methodology) include

1. Justice Research Centre Researching Alternative Dispute Resolution Unpublished Paper August 1992
2. Justice Research Centre An Implementation Evaluation of Differential Case Management: A Report on the DCM Program in the Common Law Division of the Supreme Court of New South Wales 1995 (Authors: T Matruglio & J Baker)
3. Justice Research Centre Plaintiffs and the Process of Litigation: An Analysis of the Perceptions of Plaintiffs Following their Experience of Litigation 1994 (Author: T Matruglio)
4. Justice Research Centre Who Settles and Why? A Study of the Factors Associated with the Stage of Case Disposition 1994 (Author: J Baker)
5. Justice Research Centre So Who Does Use the Courts? 1993 (Author: T Matruglio)
6. Justice Research Centre The Cost of Civil Litigation: Current Charging Practices New South Wales and Victoria 1993 (Authors: D Worthington & J Baker)
7. Justice Research Centre The Pace of Litigation in New South Wales: Lessons From the Tail 1991 (Author: D Worthington)
8. Justice Research Centre The Role of Conciliation 1990 (Authors: T Beed et al)
9. Justice Research Centre Lawyers in Civil Litigation 1990 (Authors: T Beed & I McEwin)

[182]See generally Keilitz, S., (ed.), *National Symposium on Court Connected Dispute Resolution Research - a Report on current Research Findings - Implications for Courts and Research Needs*, (1994) USA State Justice Institute

Further, it has been noted that it is difficult to say whether the procedures of the multi-door courthouse system will be tonic or toxic for the justice system in general. It is submitted that this is fundamentally because the multi-door courthouse works differently, and has very different benefits for different categories of disputes. However, there have been studies in different jurisdictions and contexts that have suggested significant benefits in the adoption of the multi-door courthouse system. Thus, it is clear that an ongoing review of the system will ensure that the system of the Multi-Door Courthouse for Outer Space remains relevant, efficient and up to the expectations of the parties it serves.

5.4 Conclusion

Warren Burger, a former Chief Justice of the United States of America, once said:

> "The obligation of our profession is. . .to serve as healers of human conflict. To fulfill our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with the minimum of stress on the participants. This is what justice is all about."[183]

The function of the international legal system is to settle social issues and maintain the peace. It cannot do this by means of substantive law alone. Procedural laws are necessary to interpret, actualize and enforce substantive regulations. Further, procedural rules are necessary to deal with issues where the law is unclear. Procedural law is necessary and particularly important in the international legal system than in the domestic legal systems. The reason for this is that international law has no functioning legislative or executive branch that is capable of developing substantive rules to fill such lacunae in the law. Thus, gaps are much more likely to exist in international law, particularly in novel fields such as international space law. The rapidly evolving field of space activities especially will require such procedures. The traditional procedures of negotiation, good offices, mediation, inquiry, conciliation, arbitration and judicial settlement have been instituted to meet the dispute settlement needs of international society. These procedures are back in vogue in the present climate of international cooperation and globalization.

Certainly, the issue remains as to whether the traditional dispute settlement mechanisms can keep up with the present and future needs of a field such as international space law. It is questionable as to whether they will prove

[183]Cited in Coulson, R., *Professional Mediation of Civil Disputes*, (1984) at 6

adequate to deal with future questions of law and fact. It is thus submitted that innovative modification in the form of the Multi-Door Courthouse for Outer Space will ensure the continued viability of the peaceful settlement of disputes to preserve the peace in outer space. In a field and an age where maintaining the peace is a delicate and pressing concern, the evolution of the international and transnational system of law must realistically consider creative approaches to the settlement of disputes.

Binding and compulsory dispute settlement procedures are becoming increasingly important. This provides the foundation for the increasingly legitimacy of the rule of law in space activities. The traditional objection against compulsory third party dispute settlement - interference in State sovereignty - loses its credibility in an era of transnationalization, globalization and international cooperation. It must however, also be remembered that the mediatory model of dispute settlement has been extremely successful. It is submitted that the proposed Multi-Door Courthouse for Outer Space combines the best of the mediatory and adjudicatory models of dispute settlement. Together with specialized classification of disputes, the implementation of the proposed Multi-Door Courthouse for Outer Space promises to increase the quality and efficiency of the peaceful settlement of disputes arising from space activities.

Another issue is that it is particularly important to establish a connection between enforcement mechanisms and the dispute settlement mechanisms within a sector-specific régime. Effective enforcement will ensure that the rules of the particular legal régime are clarified and actualized. This increases the legitimacy, relevance and viability of the sector-specific legal régime, which in turn promises greater practical applicability.

Law-making, dispute settlement and enforcement mechanisms are very closely intertwined. An integrative approach towards a comprehensive sectorialized régime encompasses all three aspects is more productive than instituting separate techniques and fields. The legitimacy of the legal framework relating to space activities depends on the weakest link of this chain. The international and transnational legal system will continue its evolution from a complicated web of bilateral connections into an organized and coherent system of community-oriented, interest-based and rights-founded system. A workable, creative dispute settlement such as the Multi-Door Courthouse for Outer Space will ensure the safeguarding of community interests, technical and economic considerations, and the rule of law in outer space. This is a much better guarantee for the maintenance of international peace and security in outer space than reliance on sovereignty and the balance of power.

Chapter 6

Development of the Law: Implementing the Multi-Door Courthouse for Outer Space

Recently, there has been renewed interest in the issue of implementation in international law.[1] Implementation of international procedural law varies due to the many national constitutional, legal, policy and social factors, Ultimately, whether the substantive law is implemented is reflective of the efficiency and effectiveness with which Convention and legal régimes achieve their respective objectives.[2] An inter-connected issue in this regard is whether the implementation of procedural regulations at international law will induce compliance. This is especially the case in international space law. There has been genuine efforts to implement international space law obligations into domestic legal and policy frameworks.[3] However, the necessity of independent, transnational assessment and procedures of the performance of these international obligations is still prevalent. The importance of adherence to the rule of law is especially urgent in a field such as international space law. With the crucible of high technology, national interest, international peace and security, costly business risks and scientific interest, the rule of law is the stable, objective governance system that cannot be circumvented or ignored. Thus, the implementation of dispute settlement procedures, together with verification and supervisory mechanisms, is particularly significant.

The level of actor *bona fides* will never be sufficient to completely do away with the need for a viable dispute settlement mechanism for space activities. Due to the clean slate of dispute settlement mechanisms in international space

[1] see generally Shelton, D., (ed.), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System* (2000)

[2] See for example, in international environmental law, Bodansky, D. and Brunée, J., "The Role of National Courts in the Field of International Environmental Law", (1998) 7 Review of European Community and International Environmental Law 11

[3] See the various national space legislations of space-faring States, online on the UN Office of Outer Space Affairs website, at http://www.oosa.unvienna.org, (Last accessed: 10 January 2006)

law, there is a real chance to ensure a creative approach to conformity with the principles of the UN Charter and the corresponding UN treaty régime for outer space. Comparative analogy can be found in international environmental law dispute settlement mechanisms. The importance of a *lex specialis* dispute settlement régime was reaffirmed both in the Rio Declaration and in Agenda 21.[4] The majority of international environmental treaties provide for dispute settlement procedures. However, not all of these mechanisms are compulsory, and it may be difficult for an injured party to initiate dispute settlement procedures against another party.[5] Clearly, enforcement ultimately is in the parties' interest. There are reciprocal and mutual benefits for parties who respect the rule of law. As outer space does not respect the artificiality of State and political borders, actors in this field must take coordinated action in implementation substantive and procedural space law.

Dispute settlement processes have been instituted and promoted since the beginning of the twentieth century, well before the launch of Sputnik I. The Hague Peace Conferences drew on an optimistic idealism that States Parties would realize the importance of international cooperation in the maintenance of international peace and security. This idealism found expression in the provision of procedures such as arbitration, good offices and mediation, inquiry and conciliation in the ensuing Conventions.[6] This optimism was reiterated again at the end of World War I. States Parties to the Covenant of the League of Nations reaffirmed their commitment to peaceful settlement of dispute before recourse to war.[7] International adjudication was institutionalized through the creation of the Permanent Court of International Justice on 16 December 1920.[8] This was strengthened by the treaties establishing Mixed Arbitral Tribunals to determine claims arising out of the War.[9]

In the interwar years these processes gained wide acceptance, if not broad usage. The UN Charter was the phoenix of the ashes of World War II. The UN Charter prohibition on the use of force in international relations required

[4]Principle 26, Rio Declaration on Environment and Development hereinafter ["Rio Declaration"] 31 ILM 874; Ch 29.10, Agenda 21, 1992 Report of the UNCED, I (1992) UN Doc. A/CONF.151/26/Rev

[5]See for example New Zealand's unsuccessful attempt in 1995 to bring France before the ICJ in relation to France's nuclear weapons tests at Mururoa Atoll; Giraud, C., "French Nuclear Testing in the Pacific and the 1995 International Court of Justice Decision". (1996) 1 Asia Pacific Journal of Environmental Law 125

[6]International Convention for the Pacific Settlement of Disputes, The Hague (29 July 1899) 32 Stat 1779; International Convention for the Pacific Settlement of Disputes, The Hague (18 October 1907), 36 Stat 2199

[7]Articles 12 - 15 , Covenant of the League of Nations, (28 June 1919) 11 Martens (3rd) 323

[8]Article 14, Covenant of the League of Nations, *ibidem*

[9]Articles 296 - 297, and 304 - 305 Treaty of Versailles, (28 June 1919) 11 Martens (3rd) 323

a corresponding commitment to the peaceful settlement of disputes.[10] The same processes of peaceful dispute settlement found expression again in the UN Charter.[11]

The major step forward in the UN Charter was in the framework of collective enforcement action under Chapter VII. This must be seen together with the powers granted to the General Assembly and the Security Council under Chapter VI. Article 33 of the UN Charter mandated the obligation to settle disputes peacefully, in particular those "the continuance of which is likely to endanger the maintenance of international peace and security". Article 39 grants broad powers to the Security Council to take action where there is the existence of a "threat to the peace, breach of the peace or act of aggression". An unsettled dispute would probably come within the purview of Article 39, leading to Security Council action, which may be to establish a third party dispute settlement mechanism. Subsequent reaffirmation of the obligation of the peaceful settlement of disputes,[12] and more efforts to promote recourse to third party processes,[13] have attempted without much success to implement compulsory and binding dispute settlement procedures.[14]

Traditional resistance to compulsory, binding or third party dispute settlement procedures however, may have diminished. Since the advent of the 1980s, initiatives have been promoted by the organs of the UN[15] across the entire spectrum of modern international law-making. Such initiatives have taken place through multilateral and bilateral Conventions, the jurisprudence of the various courts and tribunals,[16] and through special interest institutions such as those relating to international trade and international environmental law. Innovation in combining existing processes and making them more accessible and responsive to the needs of disputing parties have made these initiatives more successful than their predecessors..[17] Further institutionalization of dispute management within the framework of global and regional organizations

[10]Article 2(4) read with Article 2(3), Charter of the United Nations, (1945) 59 Stat. 1031, UNTS No. 993 [hereinafter "UN Charter"]

[11]Article 33, UN Charter, *ibidem*

[12]For example, the UN GA Declaration on the Principles of Friendly Relations between States, GA Resolution 2625 (24 October 1970); the Manila Declaration on the Peaceful Settlement of International Disputes, GA Resolution 37/10 (1982)

[13]For example, the General Act for the Pacific Settlement of International Disputes, Geneva (26 September 1928), 93 LNTS 343. An inquiry and conciliation panel established by the General Assembly has never been used. See further Sohn, L., "Peaceful Settlement of International Disputes and International Security", (1987) Negotiation Journal 155

[14]Chinkin, C., "The Peaceful Settlement of Disputes: New Grounds for Optimism?", in Macdonald, R.St.J. (ed.), *Essays in Honour of Wang Tieya*, (1993) 165

[15]UN GA Resolution 44/23; see further *United Nations Handbook on the Peaceful Settlement of Disputes between States*, UN Doc. A/AC.182/L.68

[16]Highet, K., "The Peace Palace Heats Up: The World Court in Business Again?", (1991) 85 AJIL 646

[17]Lauterpacht, E., *Aspects of the Administration of International Justice*, (1991)

have aided in the push towards a more open and liberal attitude to peaceful dispute settlement on the international and transnational level.[18]

Certainly, these evolutionary steps are being taken together with input from other sources. One such source is from domestic jurisdictions where alternative forms of dispute resolution (ADR) gained much popularity. Creative and expert adaptation of the ADR processes from domestic jurisdictions have caused a domino effect, flowing through to the international and transnational legal régime in various sector-specific fields of the law. However, the motivation in domestic fora has generally been to seek alternatives to adjudication. The impetus in international and transnational arenas instead focus on the promotion of third party decision-making and the maintenance of peace and security in the absence of compulsory jurisdiction. The emphasis in international arenas has been on pushing the critical mass of political will towards accepted recourse to these methods in the light of a lack of mandatory program of dispute settlement.

Effective dispute settlement mechanisms at the international and transnational level must exhibit several characteristics. They must be accessible, economic, non-coercive, fair and coherent. Ultimately, effectiveness is not dependent on the frequency of resort to the dispute settlement mechanisms in question, but rather by the outcome of each in specific cases. A successful outcome must accommodate all paramount interests of the disputing parties, and be acceptable not just to the parties, but to the integrity of the international legal system in general.[19] Further, it should ensure the protection of third party interests, and uphold international community values.[20] Where State practice forms a component of the development of customary international law, it is essential that the dispute settlement mechanism should ensure consistency and continuity in procedure and outcome.[21]

Conflict prevention, preventive diplomacy and dispute systems management form constituent parts of dispute settlement. Potential dispute may be preempted by early consultation and open channels of communication between actors. Effective communication throughout any course of action is likely to prevent the eruption of a dispute that threatens not just the relationship between the parties, but the smooth operation of the international and transnational community. Sector-specific legal régimes that require continuous inter-party communication will institutionalize means through which reciprocal discussions can take place. This will include arrangements for consultative meetings and

[18]Koskenniemi, M., "The Future of Statehood". (1991) 32 Harvard International Law Journal 397 at 402

[19]Menkel-Meadow, C., "Towards Another View of Legal Negotiation: The Structure of Problem Solving", (1983) 31 UCLA Law Review 754

[20]Chinkin, C. and Sadurska, R., "An Anatomy of International Dispute Resolution", (1991) 7 Ohio State Journal of Dispute Resolution 39

[21]Abel, R., *The Politics of Informal Justice*, (1982)

the verification and supervision of obligation performance.

Some recent multilateral convention régimes have included detailed procedures for the compulsory settlement of disputes. These generally require Parties have have compulsory recourse to some dispute settlement process. Catch-all provisions are also included in the event of a failure of a settlement of the dispute in the first instance. A very good example of such a scheme is found in the dispute settlement articles of the 1982 UNCLOS. These provide a workable a model for future multilateral treaties for the allocation, use and regulation of limited resources.[22] In the negotiations leading up to the adoption of the UNCLOS, parties agreed that provision for the compulsory settlement of disputes was a necessary precondition for the effective working of such a complex, sector-specific treaty régime. Some States Parties argued for an integral role for dispute settlement procedures, with no reservations permitted.[23] Similar arguments had been made in the context of the 1969 Vienna Convention on the Law of Treaties. Ultimately in that case, the final compromised reached was the institution of Articles 65 and 66, together with the optional conciliation procedure contained in the Annex to the Convention.[24] The issue at hand in the negotiation of UNCLOS was however, to devise a dispute settlement framework that could be imposed as an obligation on States Parties to genuinely attempt to resolve their disputes. Concurrently however, it needed to be flexible so as to be viable for the various categories of disputes that could arise under the law of the sea.

Another method by which dispute settlement is provided for in some multilateral treaties is the drafting of Optional Protocols.[25] This scheme was particularly attractive when it was politically impossible for various reasons for parties to agree on a specific dispute settlement mechanism in the lead up to the actual Convention. Parties were then to be free to agree *a priori* to their preferred process of dispute settlement. Where such agreement proves impossible or incompatible, Convention obligations were meant to be imposed. This highlights the difficulty in keeping channels of communications open between parties. Often, parties are reluctant to make the first proposal for non-adjudicatory models of dispute settlement as they are concerned that this would somehow diminish their perceived strength of position. This reluctance can be overcome by prior agreement on the process to be undertaken in the

[22]Sohn, L., "Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way", (1983) 46 Law and Contemporary Problems 195

[23]This is in contrast to the fact that reservations to the compulsory jurisdiction of the ICJ or other tribunal are generally permissible, as held in the *Reservations to the Convention on Genocide* Case, (1951) ICJ Rep. 15.

[24]Sinclair, I., *The Vienna Convention on the Law of Treaties*, (2nd ed., 1984); see also Sinclair, I., "The Vienna Conference on the Law of Treaties", (1970) 19 ICLQ 47

[25]For example, Optional Protocol to the Convention on Diplomatic Relations (18 April 1961) 500 UNTS 241; Optional Protocol to the Convention on Consular Relations (24 April 1963) 596 UNTS 487

case of a dispute arising. This does of course require commitment by parties to a selection in advance. This gives rise to a tension between agreeing on a process that may subsequently be unsuitable for the particular matrix of the dispute,[26] or making the prior commitment too vague to be of any real value. One method to circumvent this issue would be to provide for compulsory initial consultations as to the dispute settlement preferred. This in itself could provide the first step towards the peaceful settlement of the dispute.

The effectiveness of these methods of implementation have not been seriously tested. They have however, impacted upon the drafting history of other sector-specific convention régimes and increased the acceptability of such compulsory dispute settlement mechanisms.[27] The fundamental principle that actors should at first instance be persuaded to try peaceful and non-coercive dispute settlement has gained wider desirability. This is especially so in cases where the disputing parties maintain control over the process and outcome of the dispute. Where it has become clear that particular non-adjudicatory models of dispute settlement are not effective, parties may involve a third party neutral to break the impasse and resolve the disagreement. Only in cases where this too has failed is there compulsory imposition of a binding adjudicatory process of decision-making.[28]

6.1 How To Get There: The Development of Dispute Settlement in International Space Law

The increased acceptance of compulsory dispute settlement procedures in contemporary multilateral legal régimes is a definite reflection of fundamental structural shifts in international society. This is particularly with regard to the growing certainty of globalization and interdependence. This necessitates the transnational legal regulation of complicated issues common to international space law.[29]

The various actors in outer space have disparate, and sometimes competing,

[26]See the arguments of the United States in the *Military and Paramilitary Activities in and against Nicaragua* case (Nicaragua v. U.S.) Jurisdiction and Admissibility (1984) ICJ Rep. 392

[27]For example, Article 11, 1985 Vienna Convention for the Protection of the Ozone Layer (1987) 26 ILM 1529; Articles 18 - 20, 1991 Madrid Protocol on Environmental Protection to the Antarctic Treaty (1991) 30 ILM 1455; Article 15, Espoo Convention on Environmental Impact Assessment in a Transboundary Context, (1991) 30 ILM 800; Article 27, Rio de Janeiro United Nations Conference on Environment and Development: Convention on Biological Diversity (1992) 31 ILM 818; Article 14, New York Framework Convention on Climate Change (1992) 31 ILM 849; Article 22, Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992) 31 ILM 1312

[28]Astor, H. and Chinkin, C., *Dispute Resolution in Australia*, (1992) at 72 and 285

[29]Brus, M.M.T.A., *Third Party Dispute Settlement in an Interdependent World: Developing a Theoretical Framework*, (1995) at 14 - 41

interests. These impacts upon the operational norms and procedural rules that actors are likely to agree on in any negotiations for a more comprehensive legal régime for space activities. A thorough understanding of these actors and their various interests will be a prerequisite to the development of space law so as to establish a workable dispute settlement mechanism.

Anticipatory Regulation

International space law has historically been based on anticipatory regulation. This involves the evolution of regulations that governs issues that will arise in the future. The inclination of the international space law community has been to frame space law in advance of actual emergence of either science and technology or actor practice in the particular field. This has often been lauded as the reason for the success in space law-making. One huge advantage is that actors, in particular States, are more amenable to negotiation and compromises on issues when those issues in question have yet to acquire practical significance in their respective particular national interests.

This has had major effects on the evolution of space law in general. In the initial phases of the development of space law, States and their representatives were not so much aware of the vast political, military, scientific and economic potential of space activities. It has been contended that the 1967 Outer Space Treaty would probably have not received the many ratifications it did if that had not been the case.[30] In each sector-specific area of the law, initial stages of negotiations have generally been characterized with concerns about the common interest from an abstract point of view. This is markedly different than those negotiations conducted in later stages in the shadow of individual national interests. Thus, it has been contended that anticipatory regulations would have the greatest success in handling economic, technological and scientific issues associated with space activities.[31] In the international space law community in particular there is widespread support in the belief that anticipatory regulation is a prerequisite for successful space law-making.[32]

Positive contribution in the negotiation of the legal framework governing activities in outer space does not require practical experience in space exploration, research and utilization. From a political-legal point of view, anticipatory regulation provides actors, including States, with an opportunity for an augmented function in space law-making. Further, anticipatory regulation prevents a power struggle by space-faring States to establish customary international law based on a pattern of the their behavior that may be unfavorable for the development of space law. Thus, the major supporters of anticipatory

[30]see remarks by O'Brien, J.E., in Proceedings of the 80th Annual Meeting of the American Society of International Law (1986) at 381

[31]Slouka, R., in Onuf, N. (ed.), *Law Making in the Global Community*, (1982) 131 at 150

[32]Zwaan, T.L. (ed.), *Space Law: Views of the Future* (1988) 33 - 37

regulation has been the developing or non-space-faring States. These believe that anticipatory regulation allows them to ensure that they have a greater influence on the protection of their interests in the law-making process.[33] It is submitted though that it will be dangerous to rely on anticipatory regulation too heavily in circumstances that necessitate detailed and elaborate regulation of highly technical or complex economic issues. Anticipatory regulation generally takes place without substantial knowledge, if any, of the content of those activities being regulated. Therefore, negotiations must be conducted based on certain assumptions about future developments, trends and interests.

There is a tension between the advantages evident in anticipatory regulation, and the dangers in over-detailed premature regulation. This is particular so in the negotiations leading to the 1979 Moon Agreement. There is a real risk that legal normative standards lacking practical applicability will be adopted. This will lead to a non-acceptance of the obligations by actors, and have a retrogressive effect on the development of the law.[34]

Proliferation of Negotiating Forums

Space activities comprise many diverse and interdisciplinary issues. The effect of this is the different negotiating fora within which space law issues may arise. From a legal perspective, the proliferation of negotiating fora requires increased coherence and coordination among the international space law community. This will ensure uniformity and consistence at the national, international and transnational levels.[35]

Coordination at the international and transnational levels ensures that conflicting rules on issues relating to space activities will not be adopted at different parallel fora. Thus, a lack of coordination will threaten the coherence of the space law framework. This would create serious legal and practical problems for the interpretation and enforcement of the rule of law in activities in outer space. Serious thought should therefore be given to addressing the issue of the proliferation of negotiation fora. One method to ensure the elaboration of a coherent space law framework would be that as followed by the UNCLOS system - a comprehensive sector-specific legislation on space law encompassing a dispute settlement and enforcement régime.

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[33]Emphasizing that the legal framework formulated with regard to outer space have always been anticipatory, the representative of Chile in the UNCOPUOS stated: "There could be no doubt that only by a process of anticipation was it possible to draft rules of international law." UN Doc. A/AC.105/C.2/SR.501 (1988) at 10; see also UN Doc. A/AC.106/PV.332 (1989) at 43 (Statement of Malaysia on behalf of the Group of 77)

[34]UN Doc. A/AC.105/C.2 SR.226-245 (1975) at 8

[35]Danielsson, S., *Space Activities and Implications: Where from and Where to at the Threshold of the 80's*, (1981) 117

Fragmentation of the Legal Régime

The coherence of the legal framework governing space activities may also be threatened by conflicting provisions within the same negotiating forum. Certainly, fragmentation of the legal framework relating to space activities is avoided to a certain extent because the fundamental principles of space law are often reiterated in new treaties. This enables the establishment of a legal system where basic principles of law are adopted and reiterated, thereby gaining broad community support.

Lacunae in space law are inevitable. This is especially so where the law-making process continues to take a step-wise approach to regulating various areas of space activities one at a time. It is submitted that the establishment of a *corpus* of space law will require the codification of space law in a comprehensive Convention régime governing all space activities, and encompassing a workable dispute settlement procedure.

Technically, the idea of negotiating such a comprehensive Convention régime for space activities looks very desirable. Nevertheless, there are reasons that any initiatives to crystallize the law in a conventional régime at this phase would be premature. Space law is a novel field of international law. Additionally, rapid evolving technology will create possibilities and problems that are impossible to completely foresee at this point in time. The timely, traditional and incremental approach of codification of the law through agreed area-specific frameworks is essential for any coherent development of space law.

Moreover, it is increasingly difficult to achieve consensus in space negotiating fora. Consensus on new principles for space law is likely to be achieved only in extremely well-delineated fields of space activities that clearly involve a common interest. The stark reality is that proposals for a comprehensive UNCLOS-style treaty governing space activities is likely to face serious political opposition. Experience garnered from the law of the sea negotiations illustrates that such comprehensive frameworks generally favor States Parties that lobby extensively for a whole range of issues, even when they are not directly affected by them. This may not yield positive results in the field of space law, and may cause reluctance to even bring the discussion of a comprehensive space treaty régime to the table.

6.2 A Protocol for the Multi-Door Courthouse for Outer Space

It is submitted that a Protocol for the Multi-Door Courthouse for Outer Space would be the best possible means of establishing this framework for dispute settlement. This is because such a mechanism allows for disparate parties to participate in the process, while ensuring that the basic Treaty framework

relating to space activities will not be altered. A Protocol is also more likely to garner political support and political will for signature, rather than a overhaul or revision of the major UN space treaties. The text of the proposed Protocol for the Multi-Door Courthouse for Outer Space is given in Appendix A.[36]

The substance of an Optional Protocol may of course be mired in political negotiations as to the timing, location and initiating procedures of the process. Further, much disagreement may occur with regard to any procedures proposed by the Optional Protocol with regard to third party dispute settlement procedures. Reference to established courts such as the International Court of Justice necessarily includes its procedural rules. However, this cannot be assumed for other third party processes. One method by which States Parties may avoid this disagreement as to procedure is to detail all such procedural regulation in an annex to the Optional Protocol. Alternatively, negotiating parties may stipulate that these procedural rules will be elaborated upon by a named institution, or to have recourse to model rule that can be adopted by parties to a particular dispute.

6.3 Suggested Model Clauses

The UN Rules for the Conciliation of Disputes between States requested by the General Assembly is one good example of model clauses that can be adopted by parties to a particular dispute.[37] In the case of the UN Rules for Conciliation, States Parties may agree in advance to the use of the Rules in the event a dispute arises, or on an *ad hoc* basis. The Rules encompass, *inter alia*, the initiation of conciliation proceedings, conciliation of multiparty disputes and all details of the process.[38] The aim of the rules is to promote conciliation as a dispute settlement process among States Parties. This allows parties to focus on resolving the substantive dispute without having to solve any disagreements on procedure. Nonetheless, the inherent flexibility in the Rules may well be their Achilles' heel. Parties are allowed to determine the establishment and composition of the conciliation commission, and whether at all to use the Rules, or demand an adapted version.

The same case happens with regard to the process of fact-finding. Here the UN General Assembly has attempted as well to create Model Rules for disputing parties. The concept of fact-finding is to have an impartial and independent investigation of the factual matrix of the dispute and provide an objective as-

[36]This proposed Protocol is adapted from work done by the International Law Association, Final Draft of the Revised Convention on the Settlement of Disputes related to Space Activities, ILA, *Report of the 68th Conference, Taipei, Taiwan, Republic of China*, (1998) 249 - 267

[37]UN GA Doc. A/46/383 (28 August 1991)

[38]Explanatory Commentary, Annex II, UN Rules for the Conciliation of Disputes Between States, *ibidem*

sessment that parties may then use as a basis for a negotiated settlement. This works on the foundation that a clarification of the factual matrix of a dispute will enable a constructive approach to the mediatory model of dispute settlement. Under the UN Rules, the commission has wide investigatory powers.[39] A clear distinction is made between factual disputes and legal disputes. Where a dispute involves disagreements that are based only on facts then the presentation of a report of the commission's findings to the parties will conclude its work.[40] In many cases however, a dispute is one of mixed law and fact. For example, the International Fact-Finding Commission under Protocol I to the Geneva Red Cross Conventions,[41] has competence to enquire into any facts alleged to be a grave breach or other serious violation of the Conventions or of Protocol I.[42] It is arguable as to whether all legal characterization of the facts found or alleged can always be distinguished.[43]

The need to establish a clear knowledge of all relevant facts has also been addressed by the UN General Assembly in the context of the maintenance of international peace and security. The Resolution and Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security provides that where satisfactory knowledge of the facts cannot be obtained, the organs of the UN with responsibility for peace and security should themselves consider having recourse to a fact-finding mission.[44] Consequently, States Parties should cooperate with fact-finding missions and attempt to the best of their ability to admit them to their territory.[45]

International law must deserve adherence. Without a recognized supranational authority to legislate and impose regulations, this is difficult to achieve. The international legal system cannot rely on established power structures to enforce obligations to settle disputes. International law must thus earn its own legitimacy through arguments of being right, or being useful. The normative standards of international law can be asserted by force or arms or by force of argument. In the peaceful settlement of disputes without resort to force however, international law must demonstrate that it deserves to be adhered to.

[39]Articles 23(3) and (4), UN Rules for the Conciliation of Disputes Between States, see *supra* note 37

[40]Article 28(3), UN Rules for the Conciliation of Disputes Between States, see *supra* note 37

[41]Article 90, Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), (1977)

[42]Article 90(2)(c))(i), Protocol I, *ibidem*

[43]Keith, K., "International Dispute Resolution - the *Rainbow Warrior* Case and the International Fact-Finding Commission", (1992) Proceedings of the International Law Weekend (Canberra) 125

[44]UN GA Res. 46/59 (9 December 1991) The organs mentioned are the Security Council, the General Assembly and the Secretary-General.

[45]Fact-finding missions have been established under UN SC Res. 687 (3 April 1991) for investigating compliance in Iraq and UN SC Res. 780 (6 October 1992) for reports on breaches of humanitarian law in the former Yugoslavia.

Custom generates laws. Law should be adhered to when custom provides the required normative standards of justice, or where it serves the purpose of justice. Where there are several possibilities available in the generation or interpretation of the law, custom may provide the most probable and correct solution. Custom also serves the identify the substantive portion of the law. It illustrates the most just and fair answer based on the principles and interests of the international and transnational community. *Opinio juris* offers evidence of what might be the binding law, if that opinion is widely shared.

Thus, international law-making is essentially an illustration of democracy. Actors on the international plane are in generally only bound by rules of international law if they so consent. Thus requires all actors, especially States Actors, to participate in the formation of a rule of international law. In principle, all those affected by the rule of international law may have a say in its evolution and interpretation in the light of their own interests. The structure of decision-making and inclusion is open to all recognized parties of the process, but this assumes that the ultimate outcome will be based on the relative bargaining power of the parties. Equality is reflected thus in the process of law-making by custom rather than its outcome. It is here that Model Rules are of especial significance. Its negotiation and potential widespread use can develop the law as to the procedure of dispute settlement.

One interesting example is in international environmental law. In the negotiations of the preparatory phase of the UN Conference on Environment and Development (UNCED), the UN General Assembly established a Preparatory Commission. This Commission was tasked with the preparation of texts to be adopted at the actual conference.[46] The establishment of such a Preparatory Commission is a common procedure. The Commission's ultimately prepared the text of the Rio Declaration and Agenda 21. It operated mainly in formal and informal deliberations in working groups and sub-working groups. The negotiations on the two Conventions took place in separate fora. These were the International Negotiating Committee for a Framework Convention on Climate Change and an Intergovernmental Negotiation Committee for a Convention on Biological Diversity.[47]

The issue of sustainable development is a relatively novel one in international law. As such there were no established rules of law that existed to provide a foundation for the work of the Preparatory Commission. This was in direct contrast to the law of the sea, which included outcomes from its previous work into the final comprehensive UNCLOS document. The UNCED model provided less guarantee that the rules would work due to a certain lack of legitimacy. However, the preparatory process was short and to the point. It

[46]UN Doc. A/RES/44/228 (22 December 1989)

[47]Spector, B.I., Sjöstedt, G. and Zartman, I.W. (eds.), *Negotiation International Regimes: Lessons Learned from the United Nations Conference on Environment and Development (UNCED)* (1994)

employed the use of technical experts and despite some shortcomings, the result is impressive. The UNCED model laid the foundations for the development of international and transnational environmental law. It is submitted that this direct, technical method of law-making may be one way through which model clauses for dispute settlement relating to space activities may be negotiated.

Examples of possible model dispute settlement clauses for inclusion in agreements and contracts relating to space activities are appended to this thesis in Appendix B.[48]

6.4 Grounds for Optimism

The quintessential issue remains as to whether these initiatives will be actualized, and whether the proposed Multi-Door Courthouse for Outer Space will remain an unfulfilled ideal. Some structural problems remain that prevent absolute optimism. The international legal order continues to maintain the dominance of States. This makes the provision of *locus standi* to other actors difficult. Further, it is difficult to general procedural rules of customary international law where the strict requirements of consent to any dispute settlement mechanism acts against the argument of any *opinion juris*. States Actors persist in excluding vital national interests from compulsory and binding dispute settlement. The provision for dispute settlement procedures is far from being routine is multilateral treaty régimes.

International law and its Statist orientation also creates problems for participation in the implementation of dispute settlement procedures. Many potential participants in the form of non-State entities continue to be denied standing. Preliminary disputes arise due to the issue of representation. However, where the interests of non-State entities are not represented by the State, the effectiveness and longevity of any proper outcome of the implementation process is jeopardized from the start. A wider section of participants is necessary in international law-making. The interests and contributions of non-State entities, especially in space activities, must be acknowledge through inclusion in implementation processes and their outcomes.

Dispute settlement mechanisms are however, clearly more acceptable in comprehensive regulatory régimes such as UNCLOS where the substantive law is complex and technical. The convention framework strives for an equitable balance between competing claims, which then promotes the inclusion and implementation of a dispute settlement mechanism. Any potential disputes arising from the interpretation and application of such technical treaty régimes are foreseeable. Certain requirements may reasonably be anticipated. These

[48]These are adapted directly from the Model Rules as drafted by the Permanent Court of Arbitration, PCA, *Basic Documents: Conventions, Rules, Model Clauses and Guidelines* (1998) 3 ; 91 BFSP 970, (1901) UKTS 9

include the almost-certain need for independent technical expertise and a certainty in outcome. However, procedural regulations in such treaties, especially those relating to dispute settlement, may delay the overall acceptance of the treaty text. Such political decisions on institutionalizing decision-making may well cause problems in the adoption of the particular régime in question.[49]

Effective dispute settlement mechanisms implicate actors in considerable budgetary and economic concerns. The costs of peace-building, dispute settlement, conflict avoidance and peace enforcement have been illustrated by the UN Secretary-General.[50] The peaceful settlement of disputes is an expensive process. The institutionalization and maintenance of regular consultative and conflict avoidance procedures require a continuous commitment of ongoing multilateral and transnational support. Dispute settlement procedures and their attendant supervisory and enforcement mechanisms imply considerable economic and political costs for actors, especially States.[51] Where there has been an eruption of a dispute the costs of settlement procedures appear to be rather prohibitive. Institutional mechanisms such as the proposed Multi-Door Courthouse for Outer Space involve costs of personnel, operations, expertise maintenance and so on. These mechanisms have clear long-term benefits. However, they are generally not highly prioritized by many actors in the international legal order. The UN Secretary-General has proposed concrete actions to be taken in this context. Whether these actions will actually be undertaken remain to be seen.[52]

Mechanisms for the peaceful settlement of disputes is important within the larger context of the maintenance of international peace and security. Dispute systems management is not given the priority it deserves for its role in ensuring the structural framework for international peace and security. Strategies for promoting a changed attitude to the institutionalization of peaceful dispute settlement is necessary and pressing. Normative standards of international law must be developed to provide a more representative participation in these process and a greater commitment to the benefit of all Humanity.

6.5 Promoting the Accession of Parties

Four alternative models for the promotion of the accession of parties to the proposed Multi-Door Courthouse for Outer Space are provided by

1. the UNCLOS approach to the law of the sea,
2. the framework-protocol approach of several recent environmental treaties,

[49]Koskenniemi, M., "The Future of Statehood", (1991) 32 Harvard International Law Journal 397 at 403

[50]Agenda for Peace, text in (1992) 31 ILM 953,

[51]Cassese, A., *International Law in a Divided World*, (1986) at 208

[52]An Agenda for Peace, see *supra* note 50 at paras. 69 - 74

3. the Ottawa process approach of the land mines campaign, and

4. the work of the International Law Commission.

Each has its advantages and disadvantages and will be considered in turn.

The UNCLOS model is a comprehensive effort resulting in an elaborate, massive regulatory structure that in effect is a grundnorm "constitution" for outer space.[53] This envisages a very detailed convention with minute operational rules relating to substantive and procedural laws, including those involved in decision-making and dispute settlement.

The UNCLOS approach would require an extended period of difficult, delicate negotiations. Political will and political commitment must be invested in the process to ensure its success. Dominant players in the space arena must undertake a leadership role in the negotiations. While some actors may be interested in this, dominant space-faring States and other non-State entities have shown no such commitment at this stage.

The framework-protocol approach is by contrast a more step-wise process. Good examples of this can be found in the negotiations leading to the Ozone Layer Treaty and the Kyoto Accord on global warming. This approach generally institutionalizes a framework for party cooperation in monitoring and implementation procedures. These procedures include consultation, data exchange and reciprocal facilitation of technical research. The respective Protocols then provide for more detailed regulation. This allows a treaty régime with general legal principles to be adopted, followed by a cooperative Protocol framework with more detail. This framework-protocol approach relies heavily on common interests and benefits. Buzzwords in this approach are transparency, capacity-building and compliance. The focus is on positive motivation to comply, rather than sanctions for breach.

The strength in the framework-protocol approach is that it ensures the continuation of progressive negotiation and cooperation even when the outcome remains unclear. For space activities however, the weakness of this approach is the rather slow progress of negotiations in the drafting of the detailed Protocol. Where actors cannot find a compromise on these detailed operational issues, the process may stall at the framework level. As the legal order for outer space already contains treaties with broad legal and aspirational principles, it is questionable if this approach is not too risky or inappropriate for space law.

[53]Some high qualified publicists have mooted that the UNCLOS model, with appropriate adaptations, should be extended to outer space. It has been argued that the basic foundations for a management régime for activities in outer space, as well as the peaceful settlement of disputes arising therefrom and the basic principle of the common benefit of all Humanity, is in place in the UNCLOS system. See Payoyo, P.B., (ed.), *Ocean Governance: Sustainable Development of the Seas* (1994), and Borgese, E.M., *Some Preliminary Thoughts on the Establishment of a World Space Organization*, (1988)

The third approach is the Ottawa process based on the land mines campaign. This was initiated by pressures originating in civil society and conscientious States. Its impressive outcome was a comprehensive global ban on land mines. The advantage of this process is that it took the absolute power of law-making out of the exclusive domain of States. It mobilized coalitions of non-governmental organizations, industries and interests groups that worked with States actors. This could well be a viable model for space activities, especially with regard to the maintenance of international peace and security in outer space. However, resistance might be found with most rich defense companies with a vested interest in the weaponization of outer space. These may mount powerful lobbies in the United States to avoid the process of institutionalizing peaceful methods of dispute settlement. Historically, the United States have attempted to avoid situations that might lead to future Ottawa-type processes outside regular UN negotiating fora. It would likely oppose such a process for outer space. Additionally, States may be uncomfortable with non-governmental organization participation in the regulation of space activities, a field close to national interests and security. While there is no obstacle to such a process being initiated by interested entities, the outcome would be ineffectual if the major space-faring entities and States refuse to cooperate in the process.

The last approach is the referral of the process to the International Law Commission (ILC). The ILC aims to achieve is the codification and progressive development of international law. Since 1947, part of the task of preparing law-making treaties has been delegated to the ILC by the UN General Assembly.[54] It worked well initially.[55] However, it then seemed to evolve into a rather academic forum for abstract theorizing than a practical institution that could actually contribute to the formation of applicable international law.[56]

The virtue of the ILC is that States have no direct influence on its law-making process. The only exception is the discussion of the ILC's annual report by the Legal Committee of the General Assembly. Before a draft convention is accepted by way of a UN General Assembly resolution, the ILC has taken it through a reasoned balancing of interests. This means that States have less room for political maneuvering, and are only engaged in the law-making process in its last phase. The work of the ILC in codifying customary international law commands an adequate amount of legitimacy. This may not be the case where it has to develop new principles and procedures of law. In areas requiring

[54]Sinclair, I., *The International Law Commission* (1987); Ramcharan, B., *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (1977)

[55]*Inter alia*, it formulated the 1969 Vienna Convention on the Law of Treaties, the 1961 Convention on Diplomatic Relations, the 1963 Convention on Consular Relations, and the 1958 Conventions on the Law of the Sea. It has also worked on the drafting of the rules of State responsibility.

[56]Ago, R., "Some New Thoughts on the Codification of International Law", in Bello, E.G. and Ajibola, B.A. (eds.), *Essays in Honour of Judge Taslim Olawale Elias* (1992) 43

the elucidation of new law, convincing outcomes can only be achieved if the drafting and negotiation process allows actors, particularly States, to contribute and safeguard their respective interests.[57] Thus, the draft document may be passed in the UN General Assembly if it garners a sufficient number of votes. It will then become legally binding, although it will not evolve into objective international law. This may have dire consequences on the legitimacy of the adopted document.

It is beyond the scope of this thesis to discuss possible reforms of the ILC.[58] Generally it could be suggested that the ILC should submit its suggestions to fora allowing political negotiation at an earlier stage. This is more in line with the work of the Preparatory Commission of the UNCED. This will allow the inclusion of more political compromises. However, by allowing actors, especially States, to contribute to the drafting process, this streamlines the ILC's work, eases the negotiations in the General Assembly, and provides a greater basis for legitimacy for the proposed draft document. The best recent example of this is the work on the Statute for an International Criminal Tribunal between 1992 and 1994. The UN General Assembly limited itself to drafting the Statute. Negotiations regarding the use and establishment of the International Criminal Tribunal was left to the political organs of the UN. Discussions of the Statute also ignored the connection between the draft code on international crimes and the establishment of the international criminal court. This issue had caused the ILC's work on this subject to stall for a long time. This is significant for space law since many substantive issues of space law will involve issues political and national interest. This in itself should not, however, paralyze work for the establishment of a dispute settlement mechanism for space activities. In particular, the institution of the Multi-Door Courthouse for Outer Space need not be hopelessly intertwined in political bickering as to substantive issues such as the deweaponization of outer space.

A summary of this overview of methods to promote party accession reveals two important elements. Firstly, it is necessary to include a minimum adequate degree of political negotiation in the process. While this might lead to less satisfactory legal results, political compromises will give a higher level of legitimacy to the process and resulting agreement. The extent to which political compromises are acceptable in the establishment of a dispute settlement system depends on whether such procedures are sufficiently well-developed to offset

[57]Schachter, O., "Dispute Settlement and Countermeasures in the International Law Commission", (1994) 88 AJIL 471; but see Briggs, H.W., "Reflections on the Codification of International Law by the International Law Commission and by Other Agencies", (1969) 126 Recueil des Cours 241

[58]On this topic, see *inter alia* El Baradei, M., Franck, T. and Trachtenberg, R., *The International Law Commission: The Need for a New Direction*, (1981); also Graefrath, B., "The International Law Commission Tomorrow: Improving its Organization and Methods of Work", (1991) 85 AJIL 595

any disadvantage that may occur. It is submitted that the Multi-Door Courthouse for Outer Space does provide a sufficiently evolved system to weather such political negotiations.

Secondly, time is of the essence. Sufficient time must be given for political bargaining. This will allow the proposed document to gain widespread support through a higher perceived level of legitimacy. While a longer process may be frustrating, it allows the outcome to have a greater contribution to the *corpus* of international law. The process in itself need not necessarily be time-consuming, as was evident from the examples of the Ozone Layer Convention. It is perfectly plausible that satisfactory outcomes may be achieved in a relatively short period of time.

In the context of space law, a basic set of fundamental legal principles are already in existence. This includes treating outer space as a commons, preserving it for peaceful purposes, maintaining freedom of access and use, and promoting responsibility and cooperation in its use for the benefit of all.[59] Significant components of the law are however, still absent. There are no clear definitions of these principles, nor are there any detailed regulations for ensuring their enforcement. Traditional analogies to the law of the sea and the Antarctica régime will no longer be sufficient. These need to give way to a new independent evolution of space law that encompasses comprehensive security and equitable access. An evolved articulation of the legal régime applicable to outer space must involve a more effective, collective dispute settlement process, together with verification, supervision and compliance mechanisms. The specific political process for negotiating this comprehensive framework for outer space can draw from the lessons of the four mentioned above.

6.6 Conclusion

The peaceful settlement of disputes arising from contemporary and future activities in outer space must protect the basic principles of space law such as equitable access and military restraint while promoting the exploration and use of outer space for the benefit of all Humanity. The challenge thrown to the international and transnational community is to build and implement a workable dispute settlement mechanism that would allow the actualization of this delicate equilibrium. One way or another, a new régime for outer space will emerge. The current framework will be transformed into a more elaborate, detailed operating régime based on the rule of law, or into one that is founded on the basis of power play and military dominance.

A viable dispute settlement mechanism for outer space cannot be properly established without the agreement of the major space-faring entities. On the

[59]Steinhardt, R.G., "Outer Space", in Joyner, C., (ed.), *The United Nations and International Law* (1997) at 340

other hand, it is clear that the interests of other entities, whether active in space activities or otherwise, will have to be taken into account. In the multipolar global situation today, there is good grounds for optimism that the legal process will not be dominated by one or two major powers.

International peace and security in outer space will be more effectively achieved through the implementation of a rule-based dispute settlement régime such as the Multi-Door Courthouse for Outer Space than through unilateral military contention. The best way to protect political, economic, scientific and security interests in outer space will be through the stability and certainly of the rule of law. The international community should take the lead in promoting the transition to a régime of mutual restraint and common benefit in outer space.

Chapter 7

Conclusion: Shaping the Future of International Dispute Settlement

The new global scenario facing space activities demands effective means of maintaining the peace. Securing stability, predictability and equality is necessary for the equitable use and exploration of outer space for the benefit of Humanity. The formulation of solutions to current global challenges promotes the role of law in the maintenance of transnational and international peace and security. Substantive law presents the appropriate riposte only through the creative and effective use of procedural legal devices.

Stability and security in outer space must be based on more than brute military, political or economic power. Currently, the most apposite foundation is the normative standard of law. Law provides the groundwork for such stability only if it attains the critical procedural capacity that is regarded as viable, just and legitimate. The applicable legal régime must comprise adequate procedures for settling any disagreements that may arise. Participating actors in the particular field must accept the authority of the law and the mandate endowed upon its dispute settlement institutions.

Without sufficient and viable procedures, the integrity of the legal system cannot be maintained. The pluriformity of disparate participants in activities in outer space underlies the plethora of potentially conflicting interests. Such conflicts are no longer confined to the proverbial academic ivory tower, as the vast political, economic, technical and scientific resources of outer space become more accessible. In order to inspire conviction in the peaceful and equitable use of outer space resources, it is imperative that the procedural legal framework is able to enunciate the delicate equilibrium between normative legal principles and the interests of participating actors.

In order to establish adequate and meaningful dispute settlement procedures, law-making and enforcement processes are of great importance. Law-making must be legitimate and acceptable to the parties concerned. Further, it has to occur in a timely and efficient fashion. This allows the evolution of

the law to pace ambient developments in the related field, a consideration of particular significance in the rapidly evolving field of space activities. Enforcement mechanisms render legal principles and settlements tangible. Adequate supervisory, verification and non-compliance mechanisms must be put in place to ensure that the practical applicability of dispute settlement is not lost due to actors' potential frippery and malapropism.

Of particular interest is the standing and role of non-State actors in the international community and the outer space arena. In the context of the protection of communal interests and basic legal principles in outer space, these non-State actors are an important basic element. Aside from the increasingly active and interventionist role of non-State actors in outer space, this group of actors illustrate that a truly transnational system of dispute settlement and decision-making must be developed for the legal framework to remain relevant.

The evolution of international space law has drawn many lessons from recent developments in comparable fields of the law, most notably from the Antarctic régime. Any proposed dispute settlement mechanism would do well to borrow positive developments from successful experiences in transnational, international and domestic dispute settlement procedures. Without re-inventing the wheel, dispute settlement in space law must elaborate a critical analysis and comprehensive framework for the enunciation of legal norms in space activities.

The development of dispute settlement procedures in space law occurs in a time of great change and evolution. Beyond the rapid development of space commerce and activity, the international and transnational community is evolving at a remarkable velocity. A workable, legitimate dispute settlement mechanism will be of great importance in clarifying and developing legal standards applicable to this novel field.

Additionally, the establishment of a dispute settlement procedure advances the possibility of the peaceful resolution of disputes without resort to the use of force. When viewed from the perspective of the vast potential of outer space as a theater for destabilizing military purposes, the reasons for the establishment of such a dispute settlement mechanism become ever more self-evident.

The establishment of a workable sector-specific dispute settlement mechanism for outer space not only builds on recent successful examples in international environmental law and the law of the sea. It also provides an opportunity for space law to contribute to the progressive advancement of the law in general, and dispute settlement in particular.

With its lack of an established dispute settlement mechanism, space law provides the opportunity for legal creativity and courage to work on a clean slate. The task at hand is to fashion a viable device for dispute settlement that represents a definite progression in the evolutionary ladder of international dispute settlement. One small step for space law could well be a giant leap for international law.

The use of legal mechanisms for the peaceful settlement of disputes is also reflective of the ascendency of the rule of law in international and transnational relations. Within the realities of the current global matrix, a common effort taken with equal doses of idealism and pragmatism can realize a more secure world built on the principles of peace and cooperation.

In Humanity's exploration of the infinite vastness of outer space lies the hope for a better future.

"Men who have worked together to reach the stars are not likely to descend together into the depths of war and desolation."

– Lyndon B. Johnson

Appendices

Appendix A

Proposed Protocol for the Multi-Door Courthouse for Outer Space to the 1967 Outer Space Treaty

The Contracting Parties to this present Protocol

Reaffirming the aims and principles of the Charter of the United Nations, the principles of international law and the prohibition on the use or threat of use of force,

Remembering that Humanity has always looked to the sky for inspiration and peace,

Recognizing the common interest of all Humanity in furthering the exploration and use of outer space for peaceful purposes,

Recognizing that the pursuit of peace based upon justice is vital for the preservation of human society and civilization,

Reiterating that outer space should be the province of all humankind, to be utilized in the interests of international peace and security, in accordance with the Charter of the United Nations, and as proclaimed in the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies,

Resolved therefore to settle by peaceful means any disputes which may arise between them with regard to outer space,

Have agreed as follows:

Section I. Applicability of the Protocol

Article 1 - Scope of Disputes Settled under this Protocol

1. This Protocol applies to all activities in outer space and all activities with effects in outer space. These two categories of activities are hereinafter designated "space activities".

2. Any Contracting Party, on depositing its instrument of ratification, may declare
(a) That it excludes from the applicability of the Protocol space activities of a specific kind described in such declaration.
(b) That it limits the applicability of this Protocol to certain space activities or to specific areas of space law as may be dealt with in specific bilateral or multilateral treaties described in such declaration.
(c) That it will not be bound by certain sections or articles of this convention described in such declaration.

3. A Contracting Party may only benefit from this Protocol in so far as it is itself bound.

4. A Contracting Party which is bound by only part of this Protocol, or which has made reservations, may at any time, by a simple declaration, either extend the scope of its obligations or abandon all or part of its reservations.

5. The Protocol shall not apply to disputes which the Parties have agreed to submit to another procedure of peaceful settlement, if that agreement provides for a procedure entailing binding decisions.

Article 2 - Definitions

This Article will be completed, insofar as considered necessary or useful, at a later stage when states or international organizations negotiate the final text of this Protocol.

Section II. Settlement Procedures

Article 3 - Obligation to Exchange Views

1. When a dispute arises between Contracting Parties concerning a matter described in Art. 1, paragraph 1, the parties to the dispute shall proceed

expeditiously to an exchange of views regarding its settlement by negotiations of other peaceful means.

2. The parties shall also proceed expeditiously to an exchange of views when a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

Article 4 - Submission of the Dispute to the Multi-Door Courthouse for Outer Space

Any dispute concerning a matter described in Article 1, paragraph 1shall, where no settlement has been reached by recourse to Article 3, be submitted at the request of any party to the Multi-Door Courthouse for Outer Space.

Article 5 - Choice of Procedure

1. When signing, ratifying or acceding to this Protocol or at any time thereafter, a Party shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of the Protocol:
(a) The International Tribunal for Space Law, if and when such a Tribunal has been established in accordance with Section IV,
(b) the International Court of Justice,
(c) an arbitral tribunal constituted in accordance with Section V.

2. A Contracting Party, which is party to a dispute not covered by a declaration in force, shall be deemed to have accepted the classification of its dispute by the Multi-Door Courthouse for Outer Space, and to have accepted to undertake the recommended procedure therefrom.

3. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.

4. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to the Multi-Door Courthouse for Outer Space, unless the parties otherwise agree.

5. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.

6. A new declaration, a notice of revocation, or the expiry of a declaration

does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree.

7. Declarations and notices referred to in this Article shall be deposited Secretary-General of the United Nations who shall transmit copies thereof to the Contracting Parties.

Article 6 - Operation of the Multi-Door Courthouse for Outer Space

The institution and operation of the Multi-Door Courthouse for Outer Space will be as detailed in Annex I of this Protocol.[1]

Article 7 - Jurisdiction

1. The Multi-Door Courthouse for Outer Space referred to in Article 5 shall have jurisdiction over any dispute concerning a matter described in Article 1, paragraph 1, which is submitted to it in accordance with this Protocol.

2. The Multi-Door Courthouse for Outer Space referred to in Article 5 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Protocol, which is submitted to it in accordance with this agreement.

3. In the event of a dispute as to whether the Multi-Door Courthouse for Outer Space, or a court or tribunal recommended by it, has jurisdiction, the matter shall be settled by decision of that court or tribunal.

Article 8 - Experts

In any dispute involving scientific or technical matters, the Multi-Door Courthouse for Outer Space may, at the request of a party or *proprio motu*, select in consultation with the parties no fewer that two scientific or technical experts to sit with the court or tribunal but without the right to vote.

Article 9 - Provisional Measures

1. If a dispute has been duly submitted to the Multi-Door Courthouse for Outer Space, it may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the

[1] see *infra* note 2

parties to the dispute or to prevent serious harm to the space environment, pending the final decision.

2. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist.

3. Provisional measures may be prescribed, modified or revoked under this Article only at the request of a party to the disputes and after the parties have been given an opportunity to be heard.

4. The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other Contracting Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures.

5. Pending the constitution of a tribunal to which a dispute is being submitted, any court or tribunal agreed upon by the parties or, failing such agreement, within two weeks from the date of the request for provisional measures, the International Tribunal for Space Law may prescribe, modify or revoke provisional measures in accordance with this Article. This may be done in the case the International Tribunal for Space Law considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. As long as the International Tribunal for Space Law has not been established, the International Court of Justice may carry out this function. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm these provisional measures prescribed under this article.

Article 10 - Access

1. All the dispute settlement procedures specified in this Protocol shall be open to Contracting Parties.

2. The dispute settlement procedures specified in this Protocol shall be open to entities other than States and international intergovernmental organizations, unless the matter is submitted to the International Court of Justice in accordance with Article 5.

Article 11 - Applicable Law

1. The Multi-Door Courthouse for Outer Space and any dispute settlement body it recommends shall apply this Protocol and other rules of international law not incompatible with this Protocol as well as any other rules of law that the parties to a dispute have agreed to be applicable or which the court or

tribunal finds o be applicable based on the nature of the dispute.

2. Paragraph 1 does not prejudice the Multi-Door Courthouse for Outer Space and any dispute settlement body it recommends to decide a case *ex aequo et bono*, if the parties so agree.

Article 12 - Exhaustion of Local Remedies

Submission of a dispute concerning a matter described in Article 1, paragraph 1 to the procedures provided for under this Protocol shall not require the prior exhaustion of any local remedies which may be available to a claimant State or to natural or juridical persons it represents.

Article 13 - Individual Applications

The Multi-Door Courthouse for Outer Space may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the Parties to this Protocol and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. The Parties to this Protocol undertake not to hinder in any way the effective exercise of this right.

Article 14 - Finality and Binding Force of Decisions

1. Any decision rendered by the final recommended procedure of the Multi-Door Courthouse for Outer Space under this Protocol shall be final and shall be complied with by all the parties to the dispute.

2. Any such decision shall have no binding force except between the parties and in respect to that particular dispute.

[. . .][2]

[2]It is beyond the scope of the present thesis to elaborate upon the details of the operation of the Multi-Door Courthouse for Outer Space, or the detailed provisions relating to each model of dispute settlement that may be recommended. It is envisaged that should the Multi-Door Courthouse for Outer Space be adopted in the future, additional provisions or annexes detailing these issues will be appended.

Section VII. Final Provisions

Article 69 - Signature

1. This Protocol shall be open for signature by:
(a) States, including partly self-governing states which have internal and external competence in the matter
(b) Any other entity as approved by the Secretary-General of the United Nations.

2. A declaration of the acceptance of the rights and obligations of this Protocol may be made by:
(a) International intergovernmental organizations which conduct space activities if the organization declares its acceptance of the rights and obligations provided for in this Protocol and if a majority of the States members of the organization are States Parties to this Protocol and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.
(b) Industrial entities, including corporations, multi-national corporations, financial institutions and other which are involved in commercial activities as described in Art. 1, paragraph 1, if the entity declares its acceptance of the rights and obligations provided for in this Protocol and if it is registered in a State member party to this Protocol and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.
(c) Any other entity as approved by the Secretary-General of the United Nations.

3. In accordance with paragraph 1 of this Article, this Protocol shall be open for signature and ratification by all States at the United Nations Office of Outer Space Affairs. Any State that does not sign this Protocol before its entry into force in accordance with paragraph 4 of this article may accede to and ratify it at any time.

4. This Protocol shall be subject to ratification by signatory States. Instruments of ratification and accession shall be deposited with the United Nations Office of Outer Space Affairs.

5. Non-State entities as specified in paragraph 2 of this article may enter a declaration of their acceptance of the rights and obligations of this Protocol.

Such declarations shall be deposited with the United Nations Office of Outer Space Affairs.

6. This Protocol shall enter into force among the States that have deposited instruments of ratification on the deposit of the fifth such instrument with the United Nations Office of Outer Space Affairs.

7. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Convention, it shall enter into force on the date of deposit of their instruments of ratification or accession.

8. The United Nations Office of Outer Space Affairs shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification of and accession to this Protocol, the date of its entry into force and other notices.

Article 70 - Accession

This Protocol shall remain open for accession by States and the other entities referred to in Article 69, paragraph 1. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 71 - Entry into Force

1. This Protocol shall enter into force 90 days after the date of deposit of the 30th instrument of ratification or accession.

Article 72 - Amendments and Review

1. Any Contracting Party to this Protocol may propose amendments to the Protocol. Amendments shall enter into force for each Party to the Protocol accepting the amendments upon their acceptance by two-thirds of the Parties to the Protocol and thereafter for each remaining Party to the Protocol on the date of acceptance by it.

2. Two years after the entry into force of this Protocol, and at intervals of two years thereafter, a Conference of Contracting Parties to the Protocol shall be convened by the United Nations Office of Outer Space Affairs. The Conference shall review the operation of the Protocol, and shall in particular examine the effectiveness of the Multi-Door Courthouse for Outer Space in

maintaining international peace and security in outer space.

Article 73 - Authenticity

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the United Nations Office of Outer Space Affairs, Vienna, Austria, which shall send certified copies thereof to all signatory and acceding States.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Protocol, opened for signature at Vienna, Austria, on the – day of –, two thousand and –.

Appendix B

Proposed Model Clauses for the Submission of Disputes to the Multi-Door Courthouse for Outer Space

FOR USE IN CONNECTION WITH INITIATING THE SUBMISSION OF THE DISPUTE TO THE MULTI-DOOR COURTHOUSE FOR OUTER SPACE

Future Disputes

If any dispute arises between the parties as to the interpretation, application or performance of the [treaty] [agreement] [contract], including its existence, validity or termination, either party may invite the other to submit the dispute to the Multi-Door Courthouse for Outer Space as in effect in the date hereof.

Parties may wish to add:

In any such submission of the dispute to the Multi-Door Courthouse for Outer Space:

1. The number of experts involved in the classification of the dispute shall be . . . [insert 'one', 'two', or 'three'].

2. The language(s) to be used in the recommended dispute settlement procedure shall be . . . [insert choice of one or more languages].

3. The parties agree that . . . [insert 'the expert(s)' or 'the third party neutral'] shall be appointed by the Secretary-General of the Multi-Door Courthouse for Outer Space.

Existing Disputes

The parties agree to submit the following dispute to the procedures of the Multi-Door Courthouse for Outer Space as in effect on the date hereof: . . . [insert brief description of dispute].

Parties may wish to consider adding paragraphs 2(a)-2(c) of the Model Clause for settling future disputes as set forth above.

Appendix C

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Samenvatting: Abstract in Dutch

Het bestaan van het internationale recht, met zijn rechten, plichten en regels, is zinloos zonder een doeltreffend nalevingsmechanisme als afdoende en adequate remedie. In het kielzog van de recente proliferatie van internationale gerechtshoven en tribunalen is de nadruk bij rechtshandhaving verschoven naar pogingen te garanderen dat bindende beslissingen in internationaal recht doelmatig en afdwingbaar zijn. Deze recente benadrukking van internationale geschillenbeslechting is vooral van belang voor het van internationale ruimterecht, dat geen sector-specifiek geschillenbeslechtingssysteem heeft.

Het internationale ruimterecht is bijzonder relevant in de ontwikkeling van internationale geschillenbeslechting, omdat het onderwerpen beziet vanuit een internationaal en interdisciplinair perspectief. Deze onderwerpen betreffen gebieden zoals internationaal publiekrecht, beleid van regionale en internationale organisaties, juridische geschillenbeslechting, 'global governance', fiscaal ondernemerschap, zakelijke doeltreffendheid, wetenschappenlijke doorbraken en technologische vooruitgang. Het juridische kader van ruimtevaartactiviteiten gaat boven de gebruikelijke nadruk van internationaal recht op staten. Het groeiende belang van commercialisering, gepaard met de betrokkenheid van non-gouvernementele en internationale organisaties in ruimteactiviteiten, maakt een heroverweging van de status van particuliere deelnemers op internationaal gebied noodzakelijk.

Ten tijde van het schrijven van deze dissertatie waren alleen geschillen met betrekking tot ruimtevaartactiviteiten op nationaal niveau onderworpen aan juridische geschillenbeslechtingsprocessen.[1] De meeste andere geschillen werden in het algemeen opgelost door middel van niet-juridische procedures. Het lijkt er niet op dat het gebrek aan een sectorsgewijs systeem van juridische geschillenbeslechting negatieve invloed heeft gehad op de ontwikkeling van ruimtevaartactiviteiten of van ruimterecht. Maar de ontwikkeling van een kader voor geschillenbeslechting binnen het ruimterecht wordt wel steeds meer noodzakelijk. Ruimtevaartactiviteiten worden steeds duurder en gecompliceerder, steeds meer verschillende soorten deelnemers zijn erbij betrokken en hebben invloed op steeds grotere delen van de samenleving. Een sectorsgewijs kader voor

[1] Gorove, S., *Cases on Space Law: Texts, Comments and References*, (1996)

geschillenbeslechting zal een coherente ontwikkeling van het recht, in overeenstemming met ontwikkelingen in de praktijk, waarborgen. Het zal tevens een bevredigende en doelmatige oplossing van geschillen bevorderen die anders hindernissen zouden kunnen creëren voor het gebruik van de ruimte ten goede van de mensheid.

Het ontbreken van een geschillenbeslechtingsregime in het internationale ruimterecht schept een ongekende kans voor het internationale recht met betrekking tot geschillenbeslechting. In combinatie met de grensoverschrijdende aard van het internationale ruimterecht creëert de totale afwezigheid van een geschillenbeslechtingsregime de mogelijkheid een gespecialiseerd en discreet geschillenbeslechtingssysteem te ontwikkelen. Het geeft de mogelijkheid voor een vergelijkend onderzoek naar de diverse bestaande geschillenbeslechtingsinstanties, om de meest geschikte methode van juridische besluitvorming en handhaving te kunnen bepalen. Het interdisciplinaire karakter van ruimtevaartactiviteiten maakt ook samenwerking met andere disciplines noodzakelijk, zoals natuurkunde, economie, handel, diplomatiek, informatietechnologie en techniek. Dit creëert een unieke gelegenheid voor juridische analyse en onderzoek, opdat een werkbaar geschillenbeslechtingssysteem kan worden geformuleerd ten gunste van de verdere ontwikkeling van het internationaal publiekrecht.

Internationale Geschillenbeslechting

Procedures voor internationale geschillenbeslechting door een derde partij zijn niets nieuws. Arbitrage, "goede diensten", mediatie, onderzoek en conciliatie vonden reeds in de Haagse Vredesconferenties uitdrukking.[2] Internationale berechting werd geïnstitutionaliseerd met de oprichting van het Permanente Hof voor Internationale Justitie.[3] Staten hebben sindsdien de verplichting om geschillen vreedzaam op te lossen bevestigd.[4] De Algemene Vergadering van de VN heeft ook getracht toegang tot procedures voor geschillenbeslechting door een derde partij te vergemakkelijken.[5] Maar tot in de jaren tachtig werden deze geschillenbeslechtingsprocedures slechts zelden toegepast.

De mate van controle van partijen over het proces bepaalt het karakter van de verschillende soorten geschillenbeslechtingsprocessen.[6] Onderhandeling

[2]International Convention for the Pacific Settlement of Disputes, Den Haag, 29 Juli 1899, 32 Stat 1779; International Convention for the Pacific Settlement of Disputes, Den Haag, 18 Oktober 1907, 3 Martens (3rd) 360, 36 State 2199.

[3]Statute of the Permanent Court of International Justice, (16 December 1920)

[4]Bijvoorbeeld, General Assembly Declaration on the Principles of Friendly Relations between States, GA Res. 2625 (24 Oktober 1970)

[5]Zie General Act for Pacific Settlement of International Disputes, (26 September 1928) 93 LNTS 343, zie Sohn, L., "Peaceful Settlement of International Disputes and International Security", (1987) Negotiation Journal 155

[6]Dit wordt verder toegelicht infra in Hoofdstuk 2.

vindt gewoonlijk uitsluitend plaats tussen de partijen bij het geschil; de partijen behouden controle over het proces, de inhoud ervan en het resultaat. De rol die gespeeld wordt door de derde partij varieert bij de andere processen. Bij onderzoek en het zogenaamde 'fact-finding' vervult de derde partij een onderzoekende rol.[7] De derde partij helpt de partijen bij het voeren van de onderhandelingen, zonder daarbij een mening te geven over de juiste uitkomst in mediatie-achtige processen.[8] Conciliatie lijkt op mediatie, behalve dat de derde partij een niet-bindend advies geeft over de uitkomst van de conciliatie.[9] Bij arbitrage en berechting mag de derde partij een bindende beslissing geven. Deze processen zijn flexibel. Een derde partij mag, met overeenstemming van de partijen, deze processen op een aantal manieren wijzigen.

Recentelijk is de ambivalentie van staten ten opzichte van procedures voor geschillenbeslechting door een derde partij wat verminderd. Door de VN gepropageerde initiatieven[10] zijn overal binnen het internationale recht aan de orde gekomen.[11] In plaats van het creëren van nieuwe processen werden bestaande procedures gecombineerd, om hen beter toegankelijk te maken en meer in overeenstemming te brengen met de behoeften van de partijen.[12] De nadruk binnen het ontwikkelende kader van internationale en regionale organisaties kwam te liggen op het oplossen van geschillen.[13]

Eén van de grootste ontwikkelingen van de laatste eeuw op het gebied van het internationale recht is de proliferatie van internationale hoven, tribunalen en andere geschillenbeslechtingsinstanties. De meest recente toevoeging geschiedde in 1998, met de oprichting van het Internationale Strafhof.[14] In combinatie met een reeks mensenrechtencomités, -commissies en -hoven werd dit Hof opgericht om claims van staten en individuen te horen over vermeende schendingen van mensenrechten.[15] Andere mechanismen werden opgericht om buitenlandse investeerders in staat te stellen arbitrage claims in te dienen tegen onteigening door de staat. Nog weer anderen werden ingesteld speciaal voor

[7] Plunkett, E., "UN Fact-Finding as a Means of Settling Disputes", (1969) 9 VJIL 154

[8] Touval, S. en Zartman, I., *International Mediation in Theory and Practice*, (1985)

[9] Zie in het algemeen Cot, J., *International Conciliation*, (1972)

[10] UN Doc. A/AC.182/L/68 (12 November 1990)

[11] Zie Chinkin, C., "The Peaceful Settlement of Disputes: New Grounds for Optimism?", in Macdonald J.,(ed.), *Essays in Honour of Wang Tieya*, (1993) 165 at 166; Highet, K., "The Peace Palace Heats Up: The World Court in Business Again?" (1991) 85 AJIL 646

[12] Zie in het algemeen Lauterpacht, E., *Aspects of the Administration of International Justice* (1991)

[13] An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping - Report of the Secretary-General pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992, (17 Juni 1992) A/47/277

[14] (1998) 37 ILM 999

[15] McGoldrick, D., *The Human Rights Committee: its Role in the Development of the International Covenant on Civil and Political Rights*, (1991); Merrills, J.G., *The Development of International Law by the European Court of Human Rights*, (1993)

geschillen over milieu-, maritieme, economische en handelsgeschillen.[16] Deze duidelijke toename in het aantal internationale geschillenbeslechtingsinstanties gaat gecombineerd met een groeiende bereidheid ervan gebruik te maken.[17] Deze vrij recente ontwikkeling is een frappant fenomeen. Er lijkt een basis te zijn voor een internationale rechterlijke macht met steeds bredere en verdergaande bevoegdheden.

De ontwikkeling van internationale geschillenbeslechting lijkt te hebben plaatsgevonden in vijf historische fasen. In de eerste fase ontstond het concept van een "gerechtvaardigde" oorlog. Dit concept maakte het mogelijk rechten en plichten van staten af te dwingen door middel van een juridisch acceptabel gebruik van gewapend geweld. De tweede fase begon met de erkenning van het belang van vreedzame beslechting van geschillen. Internationale geschillen werden berecht tussen staten en door *ad hoc* instanties die speciaal werden opgericht om een specifiek geschil te beslechten. De oprichting van het Permanente Hof van Arbitrage in 1899 luidde de start in van de derde fase, met de erkenning van de noodzaak een permanente instantie in te stellen. De vierde fase vond plaats in het kielzog van de Tweede Wereldoorlog en duurde tot in de vroege jaren tachtig. In deze fase werd het Internationaal Gerechtshof (ICJ) opgericht, alsmede regionale instanties zoals het Hof van Justitie van de EU, het Europese Hof voor de Rechten van de Mens (EHRM) en de geschillencommissie van de Wereldbank (ICSID). De vijfde fase werd ingeluid door vijf bepalende gebeurtenissen: de oprichting van verschillende mensenrechtencommissies en tribunalen, het 'Memorandum van overeenstemming inzake de regels en procedures betreffende de beslechting van geschillen' van de Wereldhandelsorganisatie (WTO); het Verdrag van de VN inzake het Recht van de Zee (UNCLOS) dat het Internationale Tribunaal inzake het Recht van de Zee (ITLOS) instelde; de nalevingsmechanismen die werden opgezet in het kader van het internationale milieuregime; en de ontwikkeling van het verlenen van "goede diensten" door de VN Secretaris-Generaal als alternatief voor het gebruik van geweld.[18]

De eerste vier fasen in de ontwikkeling van internationale geschillenbeslechting brengen drie ontwikkelingen aan het daglicht. Ten eerste is er een duidelijke afkeer van het gebruik van geweld als methode van geschillenbeslechting. Ten tweede is er ook een duidelijke trend tot afwijzing van de *ad hoc* constructies die domineerden tot 1907.[19] Ten derde is er een voelbare neiging naar het toevlucht zoeken tot geschillenbeslechtingsmechanismen door een derde partij. Hoewel ze

[16] Augenblick, M. en Ridgway, D.A., "Dispute Resolution in International Financial Institutions", (1993) 10 Journal of International Arbitration 73

[17] Lauterpacht, E., *Aspects of the Administration of International Justice* (1991) op 9

[18] Zie Sands, P., Mackenzie, R. en Shany, Y. (eds.), *Manual on International Courts and Tribunals*, (1999) op xxviii. De auteur (Sands) identificeert vier ontwikkelingsfasen vanuit de optiek van vreedzame geschillenbeslechting.

[19] Bowett, O., *Law of International Institutions*, (4e ed., 1982)

slechts een beperkte jurisdictie hadden, waren deze mechanismen toch nuttig voor internationale geschillenbeslechting op regionaal en globaal niveau. Het uitgebreide netwerk legde een groeiende bereidheid van staten aan de dag om de rol van geschillenbeslechting door een derde partij in internationale politieke betrekkingen te erkennen.

De vijfde fase ontstond in het begin van de tachtiger jaren, met de oprichting van verschillende nieuwe internationale geschillenbeslechtingsinstanties. Deze hebben een aantal karakteristieken die doen vermoeden dat internationale geschillenbeslechting een nieuwe fase is ingegaan.

Ten eerste duiden recente gebeurtenissen op een trend naar het oprichten van geschillenbeslechtingsmechanismen onder specifieke verdragsregimes met verplichte jurisdictie en bindende beslissingsbevoegdheden. Voorbeelden zijn de mechanismen ingesteld onder het UNCLOS van 1982, het WTO Memorandum van overeenstemming inzake de regels en procedures betreffende de beslechting van geschillen van 1994, de niet-nalevingsmechanismen opgericht onder het ozon regime[20], de inspectiepanels opgericht door de Wereldbank, en het Internationale Strafhof. Ten tweede is het onderwerp van naleving van juridische verplichtingen binnen specifieke verdragsregimes steeds vaker gekoppeld aan geschillenbeslechtingsprocedures. Niet-naleving van milieu-verplichtingen wordt steeds nauwkeuriger gecontroleerd, en dit heeft geleid tot nieuwe noncontentieuze, niet-gerechtelijke nalevingsregimesmechanismen gebruiken. Het niet-nalevingsmechanisme van het 'Montreal Protocol on Substances that Deplete the Ozone Layer' uit 1987[21] heeft de toon gezet voor verdere toepassing in het kader van andere milieuovereenkomsten.[22] Een derde factor is dat staten niet langer de enige spelers zijn op het internationale vlak. Steeds meer internationale hoven, tribunalen en andere geschillenbeslechtingsinstanties zijn toegankelijk voor individuen, bedrijven, non-gouvernementele organisaties, intergouvernementele organisaties en andere instanties. Een bijzonder succesvol voorbeeld is de oprichting van het Europese Hof voor de Rechten van de Mens en de adoptie van Protocol 11[23] door de Europese Conventie voor de Rechten van de Mens.[24] Deze ontwikkeling is niet zonder problemen. De traditionele visie op internationaal recht was dat alleen staten *locus standi* hebben op internationaal niveau, en derhalve bij internationale geschillenbeslechting. Maar nu

[20]Zie in het algemeen Szell, P., "The Development of Multilateral Mechanisms for Monitoring Compliance", in Lang, W. (ed.), *Sustainable Development and International Law*, (1995).

[21]16 September 1987, (1987) 26 ILM 154

[22]Bijvoorbeeld de UN Framework Convention on Climate Change (1992) 31 ILM 822; en het Protocol to the 1979 Convention on Long-range Transboundary Air Pollution on Further Reduction of Sulphur Emissions (1994) 33 ILM 1540.

[23]Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, (11 Mei 1994), 33 LLM 943.

[24]European Convention for the Protection of Human Rights and Fundamental Freedoms, (4 November 1950), 213 UNTS 221

vele geschillenbeslechtingstribunalen open staan voor particuliere deelnemers, is het beeld van de staat als enige speler op het internationale vlak langzaam aan het vervagen.

De proliferatie van internationale hoven en tribunalen roept een aantal vragen op.[25] Het oprichten van deze nieuwe mechanismen geschiedde niet binnen een vast gestructureerd kader van internationale geschillenbeslechting. Vragen betreffen de verhouding tussen deze instanties, het onderwerp *litis pendens*, en de afdwingbaarheid en interpretatie van internationale beslissingen op nationaal niveau.[26]

Doeltreffende mechanismen voor internationale geschillenbeslechting moeten economisch zijn, niet-dwingend, beschikbaar voor alle partijen bij het geschil, en eerlijk. Ze moeten toegankelijk zijn voor een ieder. Internationale geschillenbeslechting moet een evenwicht vinden tussen drie tegenstrijdige belangen. Ten eerste moet het resultaat aanvaardbaar zijn voor alle partijen en hun belangen dienen.[27] Ten tweede mag het de belangen van derden niet schaden en moet internationale geschillenbeslechting het internationaal recht en de waarden van de samenleving respecteren.[28] In de derde plaats moeten proces en resultaat coherent zijn en zodoende een progressieve en productieve ontwikkeling van het internationale recht waarborgen.[29]

Voorstel: het 'Multi-Door Courthouse' Systeem

Alternatieve geschillenbeslechting (ADR) heeft in vele nationale rechtssystemen aan populariteit gewonnen.[30] Het 'multi-door courthouse' concept (*vertaald: 'gerechtsgebouw met meerdere deuren', echter in deze samenvatting wordt de engelse term gebruikt*) is daaruit voortgekomen. Het multi-door courthouse is beproefd op nationaal vlak in het Verenigd Koninkrijk en in delen van de Verenigde Staten, zoals New Jersey, Houston en Philadelphia, en met name in

[25] Zie in het algemeen Janis, M.W. (ed.), *International Courts for the Twenty-First Century*, (1992); Merrills, J.G., *International Dispute Settlement*, (3rd ed., 1998); Guillaume, G., "The Future of International Judicial Institutions", (1995) 44 ICLQ 848.

[26] In dit opzicht is het verhelderend om de benadering van de US Supreme Court in *Breard v. Greene* (1998) [118 S Ct 1352, 140 L Ed. 2d 529] te vergelijken met die van de Privy Council of the House of Lords in *Hilaire en Thomas* [Privy Council Appeal No. 60 of 1998, *Thomas and Hilaire*, (27 January 1998)].

[27] Menkel-Meadow, C., "Towards Another View of Legal Negotiation: The Structure of Problem-Solving", (1983) 31 UCLA Law Review 754.

[28] Chinkin, C. en Sadurska, R., "An Anatomy of International Dispute Resolution", (1991) 7 Ohio State Journal of Dispute Resolution 39.

[29] Zie in het algemeen Abel, R., *The Politics of Informal Justice* (1982).

[30] Shore, M.A., Solleveld, T. en Molzan, D., *Dispute Resolution: A Directory of Methods, Projects and Resources*, (Juli 1990) Alberta Law Reform institute, Research Paper No. 19.

het District of Columbia.[31] Het concept is verder geïmplementeerd in Australië, Canada, Nieuw Zeeland, Singapore en andere delen van de Commonwealth.[32] Er is echter weinig overeenkomst tussen ADR op het nationale vlak en op internationaal niveau. In nationale jurisdicties is het doel te zoeken naar informele alternatieven voor berechting. Deze alternatieven variëren van onderhandeling tussen de partijen zonder interventie van een derde partij tot bindende arbitrage. In het internationale recht daarentegen ligt de nadruk meer op het ontwikkelen van politieke wil en andere mechanismen om het gebruik van permanente en verplichte geschillenbeslechtingsmethoden te stimuleren.[33] Desalniettemin zijn bepaalde ervaringen gedaan op nationaal vlak ook toepasselijk op het internationale en transnationale vlak van geschillenbeslechting.

Een aangepaste versie van het multi-door courthouse is wellicht de meest aangewezen stap in de verdere ontwikkeling van geschillenbeslechting in het internationale ruimterecht. Het multi-door courthouse is een geschillenbeslechtingscentrum met vele facetten. Het erkent dat bepaalde gevallen, overtredingen en partijen profijt kunnen hebben bij bepaalde geschillenbeslechtingsmethoden. Met de voortgaande uitbreiding van opties voor geschillenbeslechtingsmechanismen wordt het kiezen van de juiste optie een probleem op zich. De oplossing voor dit probleem is het multi-door courthouse, waarbinnen deze overwegingen worden geanalyseerd en wordt doorverwezen naar de meest geschikte geschillenbeslechtingsmethode.[34] In deze benadering worden de partijen door middel van vooronderzoek verwezen naar de juiste 'deur' in het courthouse. Het courthouse maakt alle geschillenbeslechtingsdiensten beschikbaar onder één dak, inclusief het vooronderzoek. Het doel van het multi-door courthouse is de partijen te informeren over de beschikbare alternatieven, hen te assisteren bij het kiezen van het meest geschikte mechanisme voor hun specifieke geschil, en hen te voorzien van het mechanisme om hun geschil op te lossen. Het aanvaarden van de verwijzing van de onderzoeksverantwoordelijke kan vrijwillig of verplicht zijn.[35]

Figuur C.1 geeft de voorgestelde structuur weer van het Multi-Door Courthouse voor geschillen met betrekking tot ruimtevaartactiviteiten. Deze structuur beschrijft de voorgestelde methode voor het schiften van geschillen om de meest bevredigende oplossing te bereiken binnen een zo doeltreffend mogelijk kader. De oprichting van een sectorsgewijs multi-door courthouse voor ruimtevaartactiviteiten voorziet in een proces van maximaal zeven stappen in

[31] d'Ambrumenil, P.L., *What is Dispute Resolution?*, (1998); Henderson, S., *The Dispute Resolution Manual: A Practical Handbook for Lawyers and Other Advisers*, Versie 1.0 (1993).

[32] Lim L.Y. en Liew T.L., *Court Mediation in Singapore*, (1997) op 31 en 33.

[33] Mnookin R. en Kornhauser, L., "Bargaining in the Shadow of the Law: the Case of Divorce", (1979) 88 Yale LJ 950.

[34] Sander, F.E.A., "Varieties of Dispute Processing", (1979) 70 FRD 111; Cappelletti, M. en Garth B., "General Report", Vol. I Bk. 1, in Access to Justice (Italy, 1979) op 515; American Bar Association, *Report on Alternate Dispute Resolution Projects* (1987).

[35] *ibidem* op 44 - 47.

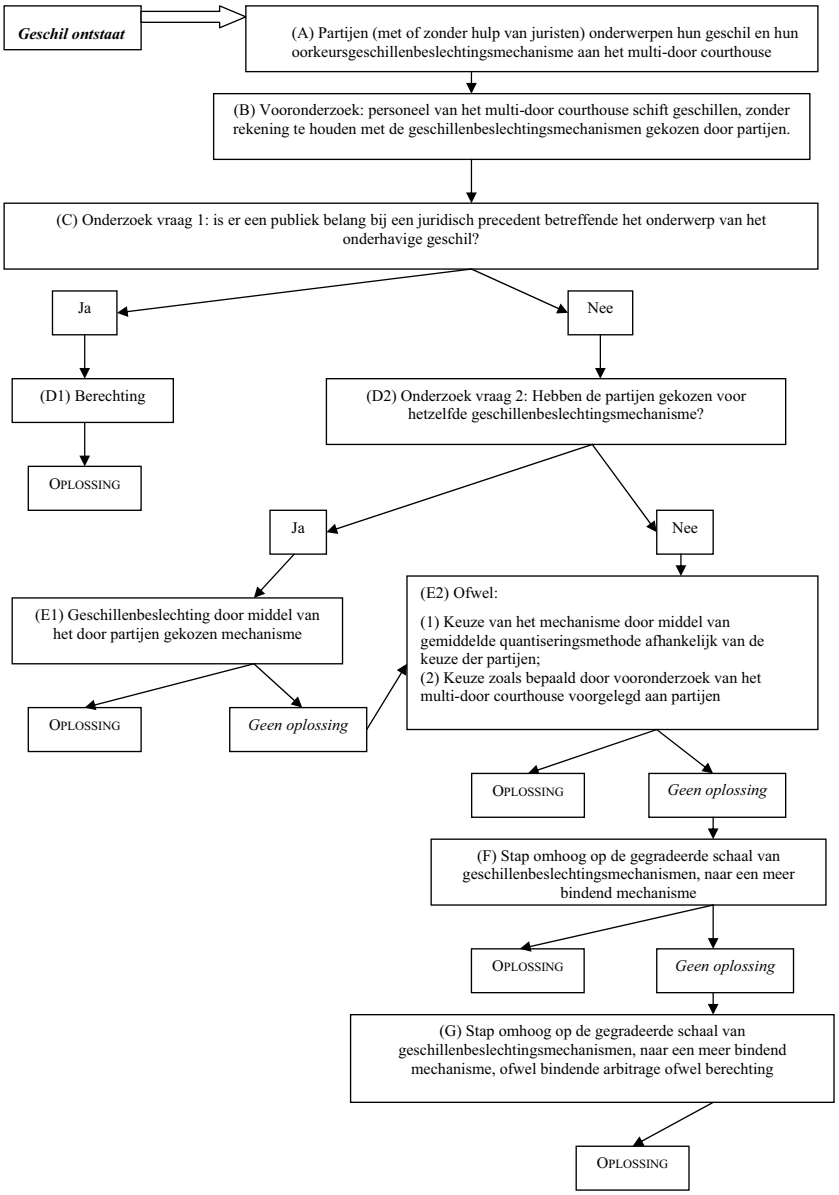

Figure C.1: De Voorgestelde Structuur Weer van het Multi-Door Courthouse voor Geschillen met Betrekking tot Ruimtevaartactiviteiten

de vorm van een besluitvormingsproces op basis van een ja/nee tweedeling. Zoals altijd wordt het proces opgestart door het ontstaan van een geschil tussen twee of meer partijen. Het vooronderzoek naar claims moet worden uitgevoerd door een juridisch gekwalificeerde adviseur, gespecialiseerd op het gebied van internationale geschillenbeslechting, ruimtevaartstudies en internationaal ruimterecht. Factoren die van bepalende invloed zullen zijn bij het aanbevelen van het meest geschikte geschillenbeslechtingsmechanisme zijn onder andere:

1. De belangen, perspectieven en relatieve standpunten van de partijen;

2. De aard en gevolgen van de vermeende overtreding of het gerezen geschil;

3. De geschiktheid, prijs, geloofwaardigheid en werkbaarheid van de voorgestelde methode, en

4. Het belang van het geschil voor de ontwikkeling van internationaal en nationaal ruimterecht.

Het succes van het multi-door courthouse zal in grote mate afhangen van zo'n proces van vooronderzoek. De kans bestaat dat het multi-door courthouse leidt tot een nieuwe bureaucratie die partijen van de ene naar de andere methode zal sturen, zonder werkelijk te trachten hun problemen op te lossen. Het voorgestelde aangepaste systeem zal deze kans verkleinen door een eerlijke analyse van partijen, feiten, juridische vragen en andere overwegingen geldig in het specifieke geval.[36] De Hoofdstukken 1 tot en met 4 zullen aantonen dat de huidige methoden van geschillenbeslechting niet voldoen. Hoofdstuk 5 zal daarna aantonen dat de ontwikkeling van het multi-door courthouse voor geschillen met betrekking tot ruimtevaartactiviteiten een coherent kader zal scheppen voor geschillenbeslechting en de verdere ontwikkeling van het ruimterecht.

Het multi-door courthouse zal leiden tot grotere doelmatigheid, door besparingen in tijd, kosten, inspanning en frustratie. De partijen kunnen worden doorverwezen naar de juiste methode van beslechting, in plaats van dat ze rond blijven dwalen in de molen van ongeschikte methoden die resulteren in inefficiënte en niet-afdwingbare besluiten. Door het gebruik van het multi-door courthouse zal waarschijnlijk de toegang tot en rechtvaardiging van nieuwe methoden van geschillenbeslechting toenemen. Dit zal leiden tot een beter begrip van de typische karakteristieken van de specifieke soorten van geschillenbeslechting. Daarom is dit het meest geschikte model voor de nieuwe grensoverschrijdende en interdisciplinaire vraagstukken die zullen opkomen in geschillen met betrekking tot ruimtevaartactiviteiten.

[36] Lim, L.Y., "ADR - A Case for Singapore", (1994) 6 Singapore Academy of Law Journal 103.

Er is veel twijfel geuit over de doeltreffendheid van de handhaving van internationaal recht.[37] Net als andere takken van internationaal recht heeft het internationale ruimte-recht geen permanente specifieke middelen om naleving te garanderen. Naleving van juridische verplichtingen kan natuurlijk worden afgedwongen door de Veiligheidsraad van de Verenigde Naties onder het mandaat van Hoofdstukken VI en VII. Maar toevlucht tot de VN Veiligheidsraad kan alleen plaatsvinden wanneer de Raad een bedreiging van de internationale vrede en veiligheid vaststelt onder Artikel 39 van het VN Handvest. Dit is de juiste manier om naleving van bepaalde internationale verplichtingen betreffende het gebruik van de ruimte veilig te stellen. Maar vele geschillen, die op andere wijze toch negatieve invloed zouden kunnen hebben op het gebruik van de ruimte ten goede van de mensheid, zouden door de mazen van het net glippen doordat de Veiligheidsraad niet kan vaststellen dat hun voortduren een bedreiging van de internationale vrede en veiligheid betekent.

Naast het oplossen van het nalevingsprobleem moet het geschillenbeslechtingssysteem voor ruimtevaartactiviteiten ook onderwerpen als internationale aansprakelijkheid en vergoeding kunnen behandelen. Elke inbreuk op een verplichting van internationaal recht, op welk onderwerp die verplichting ook betrekking moge hebben, brengt internationale aansprakelijkheid met zich mee.[38] Zoals het Permanente Hof van Internationale Justititie stelde in de 'Chorzw Factory case' uit 1928, '*"it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation"*.[39] Het Hof zei verder dat *"reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"*.[40] De intentie om restitutio in integrum te bewerkstelligen kan vruchteloos worden doordat het herstellen van de status quo ante niet te realiseren is. Wanneer restitutio in integrum onmogelijk is, wordt de plicht tot herstel een plicht tot het betalen van een financiële compensatie, *"corresponding to the value which a restitution in kind would bear"*.[41] Indien noodzakelijk moet de compensatie ook *"damages for loss sustained"* omvatten boven de *restitutio in integrum* of geldelijke compensatie.

Onder het Aansprakelijkheidsverdrag zijn staten die schade veroorzaken aan ruimteobjecten van een andere staat ook aansprakelijk voor het betalen van compensatie voor dergelijke schade.[42] Het voorgestelde aangepaste multi-door

[37] Cheng, B., "The Contribution of Air and Space Law to the Development of International Law", (1986) 39 CLP 181.

[38] Report of the International Law Commission, 28th Session, [1976], ILC YB 1 op 96.

[39] *Case concerning the Factory at Chrzow (Claim for Indemnity)* (Merits) (A/17 1928) 1 WCR 646 op 664.

[40] *ibidem* op 677 - 8.

[41] *ibidem*

[42] Convention on Liability for Damage Caused by Objects Launched into Outer Space (1972), adopted on 29 November 1971, opened for signature on 29 March 1972, entered into

courthouse zou de taak moeten krijgen om verantwoordelijkheid en aansprakelijkheid vast te stellen voor elke daad die plaats vindt in de ruimte en schade veroorzaakt, om geschillen met betrekking tot ruimtevaartactiviteiten op te lossen, en om de hoogte van de compensatie of de vorm van noodzakelijke schadevergoeding vast te stellen. Hierdoor kan een duidelijke en onafhankelijke afweging plaatsvinden van de geleden schade en bijbehorende vergoeding, en kan de naleving van de normen van internationaal recht in de ruimte worden gewaarborgd. Dit voorstel gaat een stap verder dan de Compensatie Commissie die onder het Aansprakelijkheidsverdrag ingesteld kan worden.

Het multi-door courthouse moet ook toegankelijk zijn voor particuliere deelnemers, alsmede intergouvernementele organisaties, non-gouvernementele organisaties, privaatrechtelijke personen en individuen. Dit is in overeenstemming met de huidige en toekomstige werkelijkheid dat ruimtevaartactiviteiten het uitsluitende domein van staten ontgroeid zijn.

Structuur van het 'Multi-Door Courthouse' Systeem

De structuur van het voorgestelde multi-door courthouse is betrekkelijk eenvoudig. Het volgende is een samenvatting van het voorgestelde geschillenbeslechtingskader.[43] Partijen kunnen toegang tot het systeem verkrijgen door middel van:

1. Het deponeren van toetredingsinstrumenten bij het multi-door courthouse systeem;

2. Het opnemen van clausules in bilaterale of multilaterale overeenkomsten waarbij in geval van een geschil toevlucht tot het systeem wordt overeengekomen; of

3. Het op een *ad hoc* basis onderwerpen van een geschil aan het systeem wanneer het geschil ontstaat.

Ten tijde van toetreding danwel het onderwerpen van geschillen geven beide partijen onafhankelijk van elkaar aan wat hun voorkeursmethode voor geschillenbeslechting is. Bij onderwerping van een geschil moeten beide partijen een vertrouwelijk compromis indienen samen met ieders voorlopige standpunten betreffende het geschil. Daarbij moeten zij ook een vertrouwelijke verklaring indienen betreffende enigerlei politieke, economische, technische of andere belangen die zij van belang achten vanuit hun perspectief op het geschil. Deze documenten worden voorgelegd aan een interdisciplinair panel met een oneven aantal van drie of vijf experts voor een vooronderzoek.

force on 1 September 1972. (1971) 961 UNTS 187, 24 UST 2389, TIAS 7762.

[43] De gedetailleerde structuur van het voogestelde multi-door courthouse voor de ruimte is te vinden in Hoofdstuk 5, infra.

Op basis van deze documenten en hun beoordeling van het geschil in zijn geheel zal het panel experts een geschillenbeslechtingsmethode uit een graduele schaal aanbevelen. Indien de partijen ten tijde van het onderwerpen niet voor dezelfde geschillenbeslechtingsmethode hadden gekozen, wordt het geschil onderworpen aan deze aanbevolen geschillenbeslechtingsmethode. Dit gebeurt met dien verstande dat indien deze methode er niet binnen bepaalde tijd in slaagt het geschil op bevredigende wijze te beslechten, het geschil dan opnieuw wordt onderworpen aan de volgende keuze van geschillenbeslechting van het panel. Deze volgende keuze zal hoger op de schaal liggen, in de richting van bindende geschillenbeslechting door een derde partij. De ervaring in het internationale recht heeft geleerd dat de mogelijkheid een geschil te onderwerpen aan bindende geschillenbeslechting door een derde partij een belangrijke rol speelt bij het stimuleren van de partijen om hun geschil spoedig te beslechten. Wanneer ook deze tweede aanbevolen methode faalt, wordt het geschil verplicht onderworpen aan bindende beslechting door een derde partij, zoals arbitrage. Uiteraard moet het vooronderzoek ook rekening houden met factoren als de invloed van de beslissing op derde partijen en de ontwikkeling van het internationale recht. Wanneer de uitslag van het geschil belangrijke gevolgen zou kunnen hebben voor deze aspecten, zal meteen een publieke, bindende methode worden aanbevolen.

De partijen moeten te goeder trouw op zich nemen dat zij de beslechting van het geschil zullen erkennen. Het multi-door courthouse omvat ook een driedelige benadering voor rechtshandhaving, alsmede procedures voor interim maatregelen indien nodig. In het kort komen de zes handhavingsmechanismen op het volgende neer:

1. Verificatie, bestaande uit
    - Verdragsnalevingsregimes;
    - Inspectiepanels en partij-verslagen;
2. Supervisie, bestaande uit
    - "Goede diensten" verleend door de VN Secretaris-Generaal;
    - Compensatie Commissies; en in de laatste plaats
    - Doorverwijzing van het geschil naar de VN Veiligheidsraad door de VN Secretaris-Generaal;
3. Procedurele aspecten van besluithandhaving.

Het systeem voorziet ook in faciliteiten voor vertrouwenwekkende maatregelen zoals mechanismen voor het vermijden van conflicten, en een systematische en doorlopende beoordeling van het eigen functioneren.

Implementatie & Rechtsontwikkeling

Er is reden tot optimisme is over de implementatie van een geschillenbeslechtingsmechanisme in het internationale ruimterecht, zoals door middel van het multi-door courthouse. Politieke wil, economische ratio, internationale samenwerking en geopolitieke verschuivingen lijken er allen op te wijzen dat zowel publieke als particuliere deelnemers gemotiveerd zullen zijn tot een dergelijk regime toe te treden.

De Algemene Vergadering van de VN heeft gesteld dat *"the United Nations should provide a focal point for international co-operation in the peaceful exploration and use of outer space."*[44] Het is van essentieel belang dat de Verenigde Naties een rol speelt als katalysator voor de implementatie van geschillenbeslechtingsmethoden voor ruimtevaartactiviteiten. Vanuit deze optiek stelt dit proefschrift voor een Protocol voor het Multi-Door Courthouse voor de ruimte aan het Ruimteverdrag van 1967 toe te voegen. Dit Protocol put uit delen van het Aansprakelijkheidsverdrag, de ILC 'Final Draft Convention on Settlement of Space Law Disputes' uit 1998, UNCLOS, het Memorandum van overeenstemming inzake de regels en procedures betreffende de beslechting van geschillen van de WTO en andere internationale geschillenbeslechtingsinstrumenten en -instanties. De tekst van het voorgestelde Protocol is te vinden in Appendix A. Als bijlage aan het voorgestelde Protocol zijn in Appendix B de voorgestelde 'Model Clauses' voor opname in overeenkomsten betreffende de ruimtevaart opgenomen.

Overzicht van het Analytische Kader

Dit boek geeft een kritische juridische analyse van institutionele geschillenbeslechtingsmethoden in het ruimterecht die beschikbaar zijn op internationaal en transnationaal niveau. Het boek baseert deze analyse zowel op het recht betreffende de vreedzame beslechting van geschillen als op de ontwikkeling van institutionele processen voor het oplossen van geschillen en het verzekeren van naleving van verdragsverplichtingen en internationale juridische normen.

Dit boek stelt het volgende:

1. De bestaande geschillenbeslechtingsmethoden in het internationale ruimterecht zijn niet in overeenstemming met de realiteit van huidige en toekomstige ruimtevaartactiviteiten;
2. Er is dringende behoefte aan een permanent, verplicht en sectorsgewijs geschillenbeslechtingsmechanisme in het ruimterecht;
3. Dit mechanisme moet verder bouwen op de ervaring met de ontwikkeling van geschillenbeslechting in internationaal recht;

[44] Resolutie 1721B-XVI.

4. Het aangepaste concept van het multi-door courthouse system vervult als beste de unieke vereisten van een geschillenbeslechtingsmechanisme voor ruimtevaartactiviteiten;

5. Het aanvaarden van het voorgestelde multi-door courthouse systeem zal één van de belangrijkste bijdragen van het ruimterecht zijn aan de progressieve ontwikkeling van het internationaal recht.

De analyse is onderverdeeld is drie delen: Exploratie, Evolutie en Evocatie.

In **Deel I: Exploratie**, worden de bestaande geschillenbeslechtingsmethoden in het internationale ruimterecht toegelicht en gewaardeerd (Hoofdstuk 1). Het onderzoek wordt dan verbreed naar een beschouwing van de mechanismen voor de vreedzame beslechting van geschillen onder algemeen internationaal recht, en de toepassing van deze mechanismen op ruimterecht in het bijzonder (Hoofdstuk 2).

Deel II: Evolutie, behandelt de chronologisch parallelle ontwikkelingen in ruimtevaartactiviteiten en internationale geschillenbeslechting. Het beschouwt het veranderende paradigma van ruimtevaartactiviteiten en de noodzaak voor een permanent, verplicht en sectorsgewijs geschillenbeslechtingsmechanisme (Hoofdstuk 3). Vervolgens geeft het een vergelijkende analyse van recente ontwikkelingen op het gebied van geschillenbeslechting in vergelijkbare onderdelen van internationaal recht (Hoofdstuk 4).

Deel III: Evocatie, introduceert het concept van het aangepaste multi-door courthouse systeem als het meest geschikte mechanisme voor de beslechting van ruimte-gerelateerde geschillen. Vervolgens wordt een korte beschouwing gegeven over de typologie van geschillenbeslechting, waarna het gebruik van het aangepaste multi-door courthouse systeem wordt gepropageerd. Daarna wordt de structuur van het aangepaste multi-door courthouse systeem toegelicht (Hoofdstuk 5). Suggesties worden gemaakt voor de ontwikkeling van het recht om het multi-door courthouse systeem te implementeren (Hoofdstuk 6).
Tenslotte concludeert het boek dat het implementeren van het voorgestelde multi-door courthouse systeem één van de belangrijkste bijdragen van het ruimterecht zal zijn aan de verdere ontwikkeling van het internationale recht (Hoofdstuk 7).

Conclusie

Het nieuwe globale scenario waarbinnen ruimtevaartactiviteiten plaatsvinden vereist doeltreffende maatregelen voor het waarborgen van de vrede. Het veiligstellen van stabiliteit, voorspelbaarheid en gelijkheid is noodzakelijk voor rechtvaardig gebruik en exploratie van de ruimte ten goede van de mensheid. Recht speelt een belangrijke rol bij het formuleren van oplossingen voor de huidige globale uitdagingen die de transnationale en internationale vrede en veiligheid

kunnen bedreigen. Substantieel recht biedt het juiste antwoord, met hulp van een creatief en doeltreffend gebruik van procedurele juridische maatregelen.

Stabiliteit en veiligheid in de ruimte moeten gebaseerd zijn op meer dan brute militaire, politieke of economische macht. Momenteel is de meest passende basis de normatieve rechtsnorm. Recht kan alleen dan een basis voor stabiliteit zijn wanneer het een procedurele kracht heeft dat wordt beschouwd als haalbaar, rechtvaardig en legitiem. Het toepasselijke juridische regime moet afdoende procedures bevatten voor het slechten van enigerlei geschil dat kan ontstaan. De deelnemers aan een bepaalde activiteit moeten de autoriteit van het recht en het mandaat dat is toegekend aan zijn geschillenbeslechtingsinstanties aanvaarden.

Zonder afdoende en haalbare procedures kan de integriteit van het juridische systeem niet worden gewaarborgd. De grote verscheidenheid aan deelnemers bij ruimtevaartactiviteiten ligt ten grondslag aan de veelvoud van mogelijk conflicterende belangen. Dergelijke conflicten zullen niet langer beperkt blijven tot de spreekwoordelijke ivoren toren naarmate de enorme politieke, economische, technische en wetenschappelijke hulpbronnen van de ruimte meer toegankelijk zullen worden. Het is van het grootste belang dat het procedurele juridische kader het gevoelige evenwicht tussen normatief juridische beginselen en de belangen van de deelnemers kan vinden, zodat vreedzaam en rechtvaardig gebruik van de hulpbronnen van de ruimte gewaarborgd kan worden.

Rechtscheppende en rechtsnalevingsprocessen zijn van groot belang voor het opstellen van afdoende en zinvolle geschillenbeslechtingsprocedures. Rechtsvorming moet legitiem zijn, en aanvaardbaar voor alle betrokken partijen. Voorts moet het op een tijdige en efficinte manier plaatsvinden. Zodoende kan de ontwikkeling van het recht pas houden met omringende ontwikkelingen op het betrokken gebied, en dit is van bijzonder belang voor het zich snel ontwikkelende gebied van ruimtevaartactiviteiten. Nalevingsmechanismen maken juridische beginselen en besluiten tastbaar. Toereikende mechanismen voor toezicht, verificatie en niet-naleving moeten worden opgesteld, zodat de practische toepassing van geschillenbeslechting niet verloren gaat vanwege mogelijke frivoliteiten of versprekingen der deelnemers.

Van bijzonder belang is de status en rol van particuliere deelnemers in de internationale gemeenschap en op ruimtevaartgebied. Deze deelnemers vormen een bijzonder element in het kader van de bescherming van gemeenschappelijke belangen en juridische grondbeginselen in de ruimte. Afgezien van de steeds actievere inmenging door particuliere deelnemers in de ruimte, toont deze groep tevens dat een werkelijk transnationaal systeem van geschillenbeslechting en besluitvorming ontwikkeld moet worden opdat het juridische kader zijn relevantie behoudt.

De evolutie van het internationale ruimterecht heeft veel geleerd van recente ontwikkelingen in vergelijkbare rechtsgebieden, met name het regime van

Antarctica. Het zou goed zijn als ieder voorgesteld geschillenbeslechtingsmechanisme verder zou bouwen op de positieve ontwikkelingen van succesvolle ervaringen in transnationale, internationale en nationale geschillenbeslechtingsprocedures. Geschillenbeslechting in het ruimterecht moet, zonder het wiel opnieuw uit te willen vinden, een kritische analyse uitvoeren en een alomvattend kader opstellen voor het formuleren van juridische normen voor ruimtevaartactiviteiten.

De ontwikkeling van geschillenbeslechtingsprocedures in het ruimterecht vindt plaats in een tijd van grote veranderingen en ontwikkelingen. Niet alleen ruimtecommercie en -activiteiten, maar ook de internationale en transnationale gemeenschap ontwikkelen zich snel. Een werkbaar, legitiem geschillenbeslechtingsmechanisme zal van groot belang zijn voor het verduidelijken en ontwikkelen van juridische normen die toepasselijk zijn op dit nieuwe gebied.

Bovendien zal het opzetten van een geschillenbeslechtingsprocedure de mogelijkheid van vreedzame beslechting van geschillen zonder gebruik van geweld bevorderen. De redenen voor het opzetten van een geschillenbeslechtingsmechanisme worden nog duidelijker bezien vanuit het perspectief van het enorme potentieel van de ruimte als strijdtoneel voor destabiliserende militaire doeleinden.

Het opzetten van een werkbaar sectorsgewijs geschillenbeslechtingsmechanisme voor de ruimte zal niet alleen voortbouwen op recente succesvolle voorbeelden in het internationale milieu- en zeerecht. Het zal ook de gelegenheid scheppen voor het ruimterecht om een bijdrage te leveren aan de progressieve voortgang van het recht in zijn algemeenheid, en geschillenbeslechting in het bijzonder.

Door de afwezigheid van een vaststaand geschillenbeslechtingsmechanisme schept het ruimterecht de ruimte voor juridische creativiteit en moed om met een schone lei te beginnen. De taak die voor ons ligt is het creren van een werkbare methode van geschillenbeslechting die een definitieve vooruitgang op de evolutionaire ladder van internationale geschillenbeslechting zal betekenen. Een kleine stap voor het ruimterecht zou wel eens een enorme sprong voor het internationale recht kunnen betekenen.

Het gebruik van juridische mechanismen voor het vreedzaam beslechten van
geschillen weerspiegelt ook de suprematie van het recht in internationale en transnationale betrekkingen. Binnen de huidige globale matrix kan een gemeenschappelijke inspanning met gelijkmatige porties idealisme en pragmatisme een veilige wereld gebaseerd op beginselen van vrede en samenwerking waarmaken.

De hoop op een betere toekomst ligt in de exploratie van de oneindige uitgestrektheid van de ruimte door de Mensheid.

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