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

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Citation

Goh, G. M. (2007, April 19). *Dispute settlement in international space law : a multi-door courthouse for outer space*. Retrieved from <https://hdl.handle.net/1887/11860>

Version: Corrected Publisher's Version

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Note: To cite this publication please use the final published version (if applicable).

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 Relativity³ 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-

¹Einstein, 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)

²Einstein, 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)

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

⁴Einstein, 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)

⁵For 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)

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

⁷UN 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 Hammar skj ld'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)

⁸For excellent accounts of the life and work of Dag Hammar skj ld, see Fr hlich, M., *Dag Hammar skj ld und Die Vereinten Nationen: Die Politische Ethik Des Uno-Generalsekretars*, (2002); Miller, R.I., *Dag Hammar skj ld and Crisis Diplomacy*, (1961)

⁹Gorove, 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 settlement¹² 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

¹⁰Such “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.

¹¹The 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.

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

¹³International 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 initiatives²¹ 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

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

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

¹⁶The 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

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

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

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

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

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

²²see 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

²³See 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

²⁶McGoldrick, 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)

²⁷Augenblick, M. and Ridgway, D.A., “Dispute Resolution in International Financial Institutions”, (1993) 10 *Journal of International Arbitration* 73

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

²⁹see 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 Layer³² 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 11³⁴ 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

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

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

³²16 September 1987, (1987) 26 ILM 154

³³For 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

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

³⁵European 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-

³⁶see 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

³⁷It 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)]

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

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

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

⁴¹Shore, 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

⁴²d'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)

⁴³The 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.

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

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

⁴⁵Sander, 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

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

⁴⁸Cheng, 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-

⁴⁹Report 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*

⁵³Convention 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

⁵⁴Note 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:

⁵⁵The 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.

⁵⁶Resolution 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."