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1 Introduction

It is contended, that … “a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two States”.¹ This echoes the Permanent Court of International Justice (PCIJ) definition in the Mavrommatis Concessions Cases² that “a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.” Another definition of dispute, as … “a specific disagreement relating to a question of rights or interests in which the parties proceed by way of claims, counter-claims, denials and so on,”³ distinguishes same from conflict, which … “is used to signify a general state of hostility between the parties”.⁴ Yet another definition,⁵ considers a dispute as referring to “some disagreement, that is, lack of consensus or the presence of some objection by a party which is regarded as sufficiently significant or substantial to constitute an obstacle to arriving at a decision involving a claim or demand.” This proponent asserts, that … “a dispute may relate to any substantive or procedural question, including the proof of damage, problems of causation, the amount of compensation, the method of payment, and any other relevant matter.” Furthermore, we should distinguish between disputes and differences of view between governments on issues that may arise during the use and exploration of outer space.⁶

² Mavrommatis Palestine Concessions, Greece v United Kingdom, Objection to the jurisdiction of the court, Judgment No. 2, PCIJ Series A No. 2, ICJ 236 (PCIJ 1924), 30 August 1924. The ICJ, recognized in the South West Africa case, ICJ Rep. 1962, p. 319 at 328 that a mere conflict of interests, without more, does not constitute a dispute. See also Northern Cameroons, ICJ Reports 1963 pp. 15, 20, 27 and East Timor (Portugal v Australia), ICJ Reports 1995 pp. 90, 99–100.
⁴ Id.
⁶ E. Galloway, Which Method of Realization in Public International Law Can be Considered Most Desirable and Having the Greatest Chances of Realization, op. cit., at p. 159.
These distinctions must be made at the outset particularly as it relates to the nature of activities with which this chapter is concerned. Understanding the applicable legal order is pivotal to any consideration of dispute settlement or conflict resolution arising from outer space activities, for various reasons. Summarily, the international legal system establishing the general principle that international disputes be settled peacefully, also establishes norms, procedures and institutions required to facilitate the avoidance and resolution of international disputes, thereby providing techniques with which States can reach settlements. On the premise that international law including the Charter of the United Nations is applicable to activities in outer space, the main sources of procedures for settlement of disputes arising from outer space activities have traditionally been international principles and treaty provisions including the means set forth in the Charter of the United Nations and of international law in general. Such means or procedures available to States for the settlement of disputes arising from outer space activities, are comprised of: negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional arrangements or agencies or other peaceful means of the parties’ own choice. For outer space activities borne out of a race between superpowers for technological and ideological superiority, the techniques for avoiding, managing and resolving conflict between States, including prior notification and consultation requirements, duties to publish and exchange information and the conduct of impact assessments, are equally important as those techniques required for handling of conflicts and / or disputes that arise despite these preventive methods. Likewise, attention must be paid to composite dispute-settlement mechanisms designed to prevent, to the extent possible disputes from arising, to foster reaching agreed solutions and to put in place efficient dispute-settlement methods when disputes nevertheless arise. Such mechanisms include early warning, partnering, facilitated negotiation, conciliation and mediation, non-binding expert appraisal, mini-trial, senior executive appraisal, review of technical disputes by independent experts, dispute review boards, non-binding arbitration, and judicial proceedings.

The consensual or optional recourse to legal mechanisms by actors at all levels, applies equally in both international and domestic legal systems, albeit without precluding the potential for use of State machinery which may be brought to bear in certain circumstances against the traditional subjects of States. Because international tribunals do not exercise compulsory jurisdiction, any reference to judicial settlement can only be made by agreement of the disputing parties which may be in the form of a rule, decision, agreement, contract, convention, treaty, constituent instrument of an organization or agency, or relationship out of, or in relation to which, the dispute arises. This transpired when the question arose if the PCIJ, i.e., the predecessor of the International Court of Justice (ICJ), could deliver an advisory opinion in relation to obligations of the Soviet Union towards Finland regarding the Eastern

11 Id. pp. 176 to 187.
Carelia case, as the Soviet Union had not given its consent to have this issue resolved through the League of Nations or the Court.\(^{12}\) The Court held… “it is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement”. Furthermore, as it has been contended,\(^{13}\) States have proven adept at constructing bespoke systems of dispute resolution concerning particular forms of subject matter or which are operable within particular treaty regimes,\(^{14}\) or within particular regional contexts or within international organizations.

This said, **procedural mechanisms** for the settlement of disputes arising from outer space related activity in the form in which they arise should not be exclusively governed by public international law, but should also contain elements of private international law.\(^{15}\) As disputes and conflicts could and do arise from activities of *international persons*, encompassing States, international intergovernmental organizations as well as individuals, recognized in theory and practice as the third category of *international law subjects*. Disputes and conflicts also arise from activities conducted by *subjects of States*, that is, nationals, both “physical” and “juridical” persons. Consequently, this chapter addresses the nature, techniques and particularities associated with settling disputes or resolving conflicts arising from outer space activities between any combination of international persons, or subjects of States, operating within either international or domestic legal systems. **Section 2**, examines differences between international and domestic legal systems in the context of constituent instruments establishing relationships out of, or in relation to which, disputes arise. An attempt is also made to detail and categorize the nature of disputes and conflicts which could and have in fact arisen from various forms of outer space activity. **Section 3** examines techniques for settlement and resolution, in the course of which attention is paid to the Permanent Court of Arbitration 2011 *Optional Rules for Arbitration of Disputes Relating to Outer Space Activities*. **Section 4** highlights a number of particularities and concludes the chapter.

## 2 Typology of disputes and conflict

In considering various instruments establishing relationships out of, or in relation to which disputes arise, there are differences between international and domestic legal systems. In the context of which it is necessary to note the difference between responsibility between States, and liability in private law of one citizen towards another.\(^{16}\) Concerning the international legal

\(^{12}\) *Status of Eastern Carelia (USSR v Finland)* Advisory Opinion (1923) PCIJ Series B no 5 p 27.


\(^{16}\) See generally: C. Eagleton, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* 3–25 (1928; reprint 1970). Cf. The fact that liability is... “a condition of being responsible for a possible or actual loss, penalty, evil, expense or burden”, and as... “the state of being bound or obliged in law or justice to do, pay, or make good something.” Bryan A. Garner, (ed.) *BLACK’S LAW DICTIONARY*, (2014) 10th ed. ISBN 978-0-314-61300-4.
system, the 1967 Outer Space Treaty provides\textsuperscript{17} for responsibility\textsuperscript{18} and consequent liability of States involved in space activities. Reference to the principle of State responsibility is in the dictum of the PCIJ in Factory at Chorzow\textsuperscript{19} (Jurisdiction). In respect of which, the court stated: “it is a principle of international law that the breach of an engagement involves an obligation to make reparation.” Presumably\textsuperscript{20} disputes could include: (a) Disputes occurring from civil space activities; (b) Disputes occurring from criminal acts; (c) A combination of (a) and (b) above; (d) Disputes resulting from the application and interpretation of principles mentioned in international conventions and treaties. Another attempt\textsuperscript{21} at categorizing dispute settlement and outer space activities, notes that legal problems can be about outer space, space to earth, and earth to space aspects. Although specifics are discussed in detail in the third section below, the subject matter or issues in related disputes, could concern torts, the environment, antitrust, taxation, intellectual property, insurance, and so on.\textsuperscript{22} To date, such subjects or issues associated

17 Note 8 supra, at Art. VI and Art. VII respectively.
21 I. H. P. Diederiks-Verschoor, The Settlements of Disputes in Space: New Developments (1998) J. Space L. vol., 26 no.1 at p. 44. See also K. Bockstiegel, The Settlement of Disputes Regarding Space Activities After 30 years of the Outer Space Treaty, in G. Lafferranderie and D. Crowther (eds) \textit{OUTLOOK ON SPACE LAW OVER THE NEXT 30 YEARS} (1997) at pp. 239 to 245 proposing the categorization, as: Disputes between States; Disputes within or Involving International Organizations; and Disputes Involving Commercial Private Enterprises.
with disputes and claims made by States, tend mainly towards international liability, protection from harmful interference, access to orbital resources and allocation of radio frequencies. The principal dispute settlement provisions deriving from international space law and the related multilateral regime can be found in United Nations legal instruments establishing principles on general and specific aspects, including: UNGA Resolution 1962 (XVIII), 1967 Outer Space Treaty, 1972 Liability Convention; 1982 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Agreement); UNGA Resolution 37/92; UNGA Resolution 41/65 and UNGA Resolution 47/68. Given the predominance of telecommunications in outer space activities, reference to constituent instruments of the International Telecommunication Union (ITU) should be made.

In addition to the aforementioned multilateral instruments, reference can be made to bespoke systems of dispute resolution concerning outer space activities operable within regional contexts, international intergovernmental organizations and thousands of bilateral treaties. Assessing the aforementioned international regime, reveals pertinent considerations amongst which summarily include, most notably, the fact that Article IX and Article XIII of the Outer Space Treaty provide for consultations to be undertaken between States party to the Treaty, or by States Parties to the Treaty either with the appropriate international organization or with one or more States members of a relevant international organization, which are Parties to the Treaty. Likewise, in accordance with the Liability Convention’s Article VIII paragraphs (1) (2) and (3), States have locus to pursue claims, whilst private entities may do so through a State, after having possibly exercised the option of pursuing local remedies. Second, in the absence of an agreement by the States parties to make the decision or award of a claims

23 For a comparable categorization, of international environmental disputes, which could also be applied to outer space, cf R. B. Bilder, The Settlement of Disputes in the Field of the International Law of the Environment (1975) RECUEIL DES COURS at pp. 155 to 156.
24 Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space. (Dispute Resolution provisions in Principle 6).
26 Supra, note 14. (Dispute Resolution provisions in Art. IX, Art. XI, Art. XIV, et seq.).
29 Principles Relating to Remote Sensing of the Earth from Outer Space (Dispute Resolution provisions in Principle XV).
30 Principles Relevant to the Use of Nuclear Power Sources in Outer Space (Dispute Resolution provisions in Principle 10).
32 For a survey of instruments including regional agreements, see, K. Bocksteigel (ed.), supra note 5 at pp. 206 to 411; INTERNATIONAL AGREEMENTS AND OTHER AVAILABLE LEGAL DOCUMENTS RELEVANT TO SPACE-RELATED ACTIVITIES (1999), prepared as a reference document for member States by the United Nations Office for Outer Space Affairs; PCA Doc. 31641, Survey of Space Law Instruments (2010).
33 Id. For constituent instruments concerning intergovernmental organizations. Post-privatization of several intergovernmental satellite organizations, like INTELSAT, INMARSAT and EUTELSAT, their amended constituent instruments ensure inter alia that, in the event of disputes, parties could resort to arbitration (infra section 3).
Commission binding in accordance with the Liability Convention’s Article XIX (2), the Liability Convention would not ultimately settle a dispute and provide effective recovery to the claimant party if the Launching State\textsuperscript{34} is legally not obliged to abide by the Claim Commission’s decision.

Whilst private litigants are as a rule subject to compulsory adjudication of their disputes by courts, or could resort to other means by exercising the voluntary choice of a more flexible, time efficient and cost effective procedure, States are not generally subject to compulsory jurisdiction and would consider all forms of binding dispute settlement a restriction on their freedom.\textsuperscript{35} A realistic discussion of dispute settlement and conflict resolution must take account of what has been considered\textsuperscript{36} the notorious resistance of sovereign States to any form of international adjudication. This is probably an appropriate juncture to highlight the perception\textsuperscript{37} that, despite the aforementioned instruments, the international legal system is inadequate at providing suitable institutions, means or procedures for settlement of disputes arising from outer space activities. Whilst this remains debatable, it can also be argued\textsuperscript{38} that relatively, dispute settlement would play a greater role for private enterprises than for States and their institutions because private enterprises do not have recourse to diplomatic and political means. Private enterprises would rather calculate and balance their exposure to costs and evaluate risks associated with fulfillment of contractual obligations. In this regard, as far as contracts are concerned, issues which have arisen, aside a handful of exceptional instances, tend towards \textit{torts}, as well as, \textit{breach} or \textit{performance} obligations mainly in relation to the manufacture, launch and operation of satellites.

The trend\textsuperscript{39} is notable, commencing in the early 1980s, towards private sector participation and competition in infrastructure sectors, driven by general as well as country-specific factors. This time line coincides with the start of industry participation in traditional government owned and operated space projects through public-private partnerships (PPPs). It is contended that issues which most frequently give rise to disputes during the life of a project agreement concern possible breaches of the agreement during the construction phase, the operation of the infrastructure facility or in connection with the expiry or termination of the project agreement.\textsuperscript{40} One should add that this fairly simplistic description of PPPs, risks underestimating the inherently complex nature of PPPs, because privately financed infrastructure

\begin{itemize}
  \item \textsuperscript{34} The party liable to pay compensation for damage under the Liability Convention’s Art. II, is regarded as the “launching State” defined to mean: (i) a State which launches or procures the launching of a space object; (ii) a State from whose territory or facility a space object is launched. Further provision is made under Art. IV, Art. V and Art. VI of the Liability Convention for joint liability when two or more States launch a space object in a collaborative effort.
  \item \textsuperscript{36} A. Broches, Experiences from the Practice of an Arbitral Tribunal, in K. Bocksteigel (ed.) Supra Note 5 at p. 28.
  \item \textsuperscript{38} K. Bockstiegel in G. Lafferranderie, and D. Crowther (eds) supra note 21, at pp. 237–249.
  \item \textsuperscript{39} See: UNCITRAL Legislative Guide, supra, note 10 at p. 1.
  \item \textsuperscript{40} Id. at p. 175.
\end{itemize}
projects typically require the establishment of a network of interrelated contracts and other legal relationships involving various parties. Such projects must take account of the diversity of relations, which may call for different dispute-settlement methods depending on the type of dispute and the parties involved. This said, the main disputes may be divided into three broad categories, namely: (a) Disputes arising under agreements between the concessionaire and the contracting authority and other governmental agencies; (b) disputes arising under contracts and agreements entered into by the project promoters or the concessionaire with related parties for the implementation of the project; (c) disputes between the concessionaire and other parties.

3 Techniques

3.1 Negotiation and consultation

Negotiation and consultation feature in dispute resolution provisions establishing procedures for settlement of disputes arising from outer space activities. See, procedures to be based on consultations and negotiations pursuant to the Moon Agreement (Article 15), the UNGA Resolution 47/68 (Principle 10) which makes provision for negotiation and application of the United Nations Charter, whilst provisions under UNGA Resolution 37/92 (Annex E) and UNGA 41/65 (Principle XV) invoke established procedures in accordance with the Charter of the United Nations. Consultation also features in UNGA Resolution 1962 (XVIII) (Principle 6) and the Outer Space Treaty (Articles III, IX and XIII), in as much as it is rightly contended that consultation in this regard is geared towards preventing disputes (discussed below), avoiding harmful interference and protecting the environment. Noting also that negotiation can produce a settlement in accordance with legal criteria or in accordance with both legal and political criteria. For instance, regarding international responsibility and potential liability, whilst the 1978 claims against the Soviet Union by Canada, as a consequence of damage caused by the Soviet Cosmos 954 nuclear-powered satellite were made pursuant

41 Id. at p. 173.
42 Ibid. Public projects, including those of a space-related nature, could be governed by either administrative law or contract law as supplemented by special provisions developed for government contracts for the provision of public services.
43 Id. at p. 174. Contracts would usually include at least: (i) contracts between parties holding equity in the project company (ii) loan and related agreements (iii) contracts between the project company and contractors; (iv) contracts between the project company and the parties who operate and maintain the project facility; and (v) contracts between the concessionaire and private companies for the supply of goods and services needed for the operation and maintenance of the facility.
44 Ibid. This could include customers of downstream space services such as airlines, airports, marine vessels, etc., or even individual users. Parties to these disputes may not necessarily be bound by any prior legal relationship of a contractual or similar nature. Cf. P. P. C. Haanappel, supra note 15, at p. 12, on the definition of private law and of private space law.
46 I. Brownlie, supra note 1, at p. 270.
to the 1972 Liability Convention and general international law, this landmark dispute involving consultations, resulted in a negotiated settlement.\textsuperscript{48}

Other instances to which reference can be made include, international reaction to the United States of America’s (USA) 1963 Project West Ford\textsuperscript{49} experiment; and reaction by a group of countries\textsuperscript{50} concerning information furnished to the United Nations Secretary-General by Russia\textsuperscript{51} on the de-orbiting and subsequent disintegration of the Mir Space Station over the Pacific Ocean on 23 March 2001. Likewise, despite detailed procedures available to Member States of the World Trade Organization\textsuperscript{(WTO)}, in the matter concerning “Japan and Procurement of a Navigation Satellite” for air traffic management, the European Communities (EC), complaint of 26 March 1997, regarding a procurement tender by Japan’s Ministry of Transport (MoT), contended that tender specifications were not neutral but referred explicitly to specifications of the USA. Implying that, European bidders could effectively not participate in the tender which was presumed inconsistent with Annex I of Appendix I of Japan’s commitments under the Government Procurement Agreement (GPA), in addition to violating Articles VI(3) and XII(2) of the GPA. This complaint which was resolved by consultations,\textsuperscript{53} resulted in a mutually agreed solution, reduced into agreement on 19 February 1998. In this regard, the settlement reached between the European Commission and the MoT saw the establishment of cooperation between the European Tripartite Group (consisting of the European Commission, the European Space Agency and EUROCONTROL) on the one hand and the MoT on the other in the field of interoperability between the MTSAT Satellite-based Augmentation System (MSAS) and European Geostationary Navigation Overlay Service (EGNOS). This cooperation was stated as aimed at jointly contributing to implementation of a global seamless navigation service for aeronautical end-users through interoperability among MSAS, EGNOS and other equivalent systems.\textsuperscript{54} Furthermore, whilst multilateral instruments governing space radiocommunications offer various techniques,\textsuperscript{55} several disputes concerning


\textsuperscript{49} For the facts, see K. Bockstiegel, Case Law on Space Activities, in N. Jasentuliyana (ed.) SPACE LAW – DEVELOPMENT AND SCOPE (1992) Prager, at pp. 207 citing, UN Doc. A/AC.105/13 and UN Doc. A/AC.105/15, reprinted in SPACE LAW, BASIC LEGAL DOCUMENTS op. cit. note 48 at section A.IX.1.

\textsuperscript{50} Ministers of Foreign Affairs of the Rio Group expressed concern that “…the common heritage has become an area where dangerous materials are being dumped…”. See statement reprinted in SPACE LAW, BASIC LEGAL DOCUMENTS supra note 48 at section A.IX.3.2.


access to orbital resources and frequency allocations have been resolved mainly by negotiations and consultations. Similar techniques have also been applied regarding alleged deliberate harmful interference to radiocommunications. See for instance, the dispute between France and Iran regarding alleged deliberate harmful interference affecting transmissions on EUTELSAT satellites at 7° East and 13° East. Thus in practice, space radiocommunications related disputes between States continue to be resolved in line with procedures for avoiding harmful interference detailed in Art. 15 of the Radio Regulations along with recommendations of the ITU Radio Regulations Board. In all, these interrelated methods for dispute settlement, that is, consultation and negotiation, are widely acknowledged as the first, and in practice constitute the principal technique by which States in particular, have traditionally addressed their differences, given their frequent use with all other methods combined.

### 3.2 Dispute avoidance

The notion that significant changes have occurred in the structure and content of the space endeavor, reflected in the emergence of new technologies and increasing number of actors at all levels pre-supposes increased activity with a heightened risk of disputes. This said, a tendency towards dispute avoidance in the space sector alongside reluctance to employ adversarial dispute-settlement mechanisms must be noted, given the practices, by either international persons, or subjects of States, that contribute towards eliminating potential conflicts. Evidence of State practice under international instruments applicable to outer space activities, similar to many other areas of international law, indicate a wide adoption of consultation provisions towards dispute avoidance or prevention. It is contended that the long duration of privately financed infrastructure projects makes it important to devise mechanisms to prevent, as much as possible, disputes from arising so as to preserve the business relationship between the parties. Related procedures typically provide for a sequential series of steps starting with an early warning of issues that may develop into a dispute unless the parties take action to prevent them. In most cases, adversarial dispute-settlement mechanisms are only used when the disputes cannot be settled through the use of conciliatory methods. This desire to prevent, as much as possible, disputes from arising so as to preserve the business relationship between the parties is prevalent in the space sector. For instance, under its Space Act authority, the US

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56 See 1990s controversy concerning Tongasat’s ITU application for 16 orbital slots and subsequent lease/auction of 6 orbital slots Tonga secured, absent any specific plan to launch satellites. Cf. frequency co-ordination issues arising from the Zohreh-1 and Zohreh-2 satellites, proposed by Iran, to be deployed at 34° East and 26° East.


59 Para. 9, Declaration on the Fiftieth Anniversary of Human Space Flight and the Fiftieth Anniversary of the Committee on the Peaceful Uses of Outer Space in *General Assembly Official Records* *Sixty-sixth Session Supplement No. 20 (A/66/20)* Appendix.

60 For instance, see consultation provisions of the WTO dispute resolution mechanism, in Art. 4, Understanding on Rules and Procedures Governing the Settlement of Disputes, supra note 52.

61 Infra section 3.1.

62 UNCITRAL Guide, Supra, note 10 at p. 175.

63 Manufacture, launch and in-orbit delivery of a commercial satellite could take anywhere between two to five years at the minimum.
National Aeronautics and Space Administration (NASA) whilst incorporating dispute prevention provisions, has entered into a significant number of agreements with diverse groups of people and organizations, both in the private and public sector, in order to meet wide-ranging NASA mission and program requirements and objectives. The Agreement Partner can be a U.S. or foreign person or entity, an educational institution, a Federal, state, or local governmental unit, a foreign government, or an international organization. Likewise, it is notable the European Space Agency’s (ESA) practice which is largely based on the ESA Convention, and tailored clauses, favors arbitral tribunals (discussed below) for final disposition of disputes involving ESA. Nonetheless, the agency also promotes multi-layered consultation processes, or a conciliation procedure for resolving disputes between ESA and a contractor, before referring same to arbitration or any another dispute-settlement mechanism.

Outer space activities were born out of a race between superpowers for technological and ideological superiority, in which preventive diplomacy played a critical role in avoiding local struggles from becoming superpower conflicts. In this supposed period of détente, one easily underestimates the value of dispute avoidance, in as much as testing conventional weapons and/or missiles remains lawful in outer space, just as it is lawful on the high seas and in the superjacent airspace. For instance, recent events, intentional and accidental, have resulted in massive debris fallout, giving impetus to proposals for debris removal procedures. In this regard, we will recall, the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS) and its subcommittees have traditionally worked by consensus and for which it is contended that space law disputes requiring legal disposition should not be confused with the process of consensus decision making in UNCOPUOS. Furthermore, ...” Consensus as a method of work cannot always be successful with issues involving extremely sharp and

64 The agency has concluded nearly 1,800 such instruments with domestic and international entities. See National Aeronautics and Space Administration, Office of Inspector General, Report No. IG-14-020, NASA’s Use of Space Act Agreements, June 5, 2014.

65 See NASA Policy Directive 1050.1I, NAI 1050-1A NASA Advisory Implementing Instruction, Space Act Agreements Guide.


68 A term supposed to have been first used in 1960 by UN Secretary-General Dag Hammarskjold, with similar approach in 1990 by Boutros-Ghali, another UN Secretary-General. See: J. Nolan-Haley, H. Abramson, P.K. Chew, INTERNATIONAL CONFLICT RESOLUTION: CONSENSUAL ADR PROCESSES (2005) Thomson/West, at p. 279, citing D.A. Hamburg, NO MORE KILLING FIELDS: PREVENTING DEADLY CONFLICT (2002) at p. 117. See definition of Preventive Diplomacy as “action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur” in Boutros Boutros-Ghali, AN AGENDA FOR PEACE (1995) 2nd ed.


70 Ibid. at p. 128.

seemingly irreconcilable matters, but these often arise from different philosophical concepts of government and are more apt to be political rather than solely legal, and are therefore not justiciable, nor can they be ‘settled’ by voting”. This author is of the view that the UNCOPUOS consensus procedure and outcome may well constitute the results of dispute or conflict settlement procedures by negotiation or consultation. Given that a related question has been considered and judgment rendered in the affirmative by the ICJ in the South West Africa cases (Preliminary Objections) diplomacy by conference or parliamentary. Thus, diplomacy has come to be recognized in the past four or five decades as one of the established modes of international negotiation.

3.3 Conciliation

In 1978, claims were made against the Soviet Union by Canada, as a consequence of damage caused by the Soviet Cosmos 954 nuclear-powered satellite. The claims were brought pursuant to a process akin to conciliation provided under the 1972 Liability Convention. That Convention, reveals a number of pertinent issues which include the fact that only States have the locus to pursue claims, whilst non-governmental entities may only do so through a State, after having possibly exercised the option of pursuing local remedies, as stipulated under the 1972 Liability Convention’s Article VIII. Second, in the absence of an agreement by the State parties to make the decision or award of a Claims Commission binding, effective recovery by the claimant party is not an absolute guarantee, if the Launching State (i.e., a State which launches or procures the launching of a space object, or a State from whose territory or facility a space object is launched) has not agreed to abide by the Claim Commission’s decision. Third, anticipated disputes are limited to those involving damage arising from loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of persons, natural or juridical, or property of international intergovernmental organizations. Fourth, while the liability regime for damage caused on earth is no doubt an exception to the general reluctance of States towards rules imposing strict liability, other aspects of liability and responsibility for injurious consequences of outer space activities would depend on the establishment of fault. In respect of which, neither is fault defined, nor are there binding guidelines for standards of care or provisions for imputing negligent conduct to others or for the attribution of vicarious liability. Fifth, in determining compensation, the applicable law shall

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72 Id.
75 For discussions, see note 47 supra.
76 Defined as … the process of settling a dispute by referring it to a commission of persons whose task it is to elucidate the facts and usually after hearing the parties and endeavoring to bring them to an agreement to make a report containing proposals for a settlement, which is not binding”. I. Brownlie, supra note 1 at p. 272, citing H. Lauterpacht, OPPENHEIM’S INTERNATIONAL LAW (1952) vol. II, 7th edn, at p. 12.
77 See note 34 supra.
78 See Liability Convention’s Article XIX (2).
79 Id.
be international law and the principles of “equity” and “justice”, in order to provide such reparation as will restore the person, State or international organization to the condition which would have existed if damage had not occurred. This derives from provisions of the Liability Convention’s Article XII, which could give rise to debate as there is no agreed body of international law providing adequate guides or grounds for determining compensation. Whilst “justice” is considered a term without precise meaning, noting that “equity” is defined in common law and some continental legal systems, its use in measuring compensation in other legal systems is uncertain. There are also unsettled questions concerning the exact scope of what could be construed as “damage” (be it “direct”, “indirect” or “delayed”) as defined under the Liability Convention.

### 3.4 Arbitration and adjudication

The object of international arbitration is described as the settlement of disputes between States by judges chosen by the parties themselves and on the basis of respect for law. Accordingly, one of the basic characteristics of arbitration is that it is a procedure which results in binding decisions upon the parties to the dispute. The power to render binding arbitration is thus similar to the method of judicial settlement by international courts whose judgments are not only binding but also, as in the case of the International Court of Justice, final and without appeal. As a consequence, arbitration and judicial settlement (also known as adjudication discussed below) are both usually referred to as compulsory means of dispute settlement. It is contended, that arbitration set up by States to decide a case or a series of cases between them, must be distinguished from another type which deals with disputes in which individuals or corporations are involved as parties, known as private (as opposed to public) international arbitration, or international commercial arbitration. It is perhaps for this reason it has also been contended that it is necessary to distinguish between international arbitration and international disputes, given that the former is governed by conventional or customary international law in respect of both procedure and effect to be given to the outcome of the arbitral process, whilst the latter concerns disputes between and among States (including State agencies) and public international organizations as well as disputes between States and non-State entities. It is argued that whilst public international law is concerned primarily with States, its application is not necessarily exclusive given that international law is a dynamic (not static) decision-making process, in which there is a variety of participants. This is because … “increasingly ‘international law’ may be specified as the substantive law of a contract, particularly where that contract is with a State or State agency. The reference may be to ‘international law’ on its own; or it may be used in conjunction with a national system of law”. Thus it may be, though perhaps it would be unusual, that the parties could validly agree that a part, or the whole, of

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82 A. Broches, supra Note 5 at p. 27.

their legal relations should be decided by the arbitral tribunal on the basis of a foreign system of law, or perhaps on the basis of principles of international law; for example in a contract to which a sovereign State was a party. Suffice it to say that arbitration has become the principal method of resolving disputes between States, individuals, and corporations in almost every aspect of international trade, commerce, and investment.

Activities associated with peaceful uses of outer space are no exception in this regard especially when private individuals and / or corporations have sought binding settlement to the resolution of their disputes. For instance, attempts at resolving an on-going dispute between Antrix (the marketing arm of India’s International Space Research Organization (ISRO) and Devas Corporation (a private company) concerning the long-term lease of two ISRO satellites operating in the S-band, are being pursued through arbitration panels. These include a panel constituted under the International Chamber of Commerce (ICC) followed by another panel constituted under the PCA in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. The 2003 case involving Loral vs Acatel Space submitted to arbitration and another between Eutelst vs Alcatel Space submitted to the ICC for arbitration also provide good examples. Others include the EchoStar insurance claim submitted to the American Arbitration Association (AAA); the ICC arbitration between New Skies and Astrium; the ICC arbitration initiated against the Boeing Company by insurers in respect of the Thuraya D1 communications satellite, and a similar claim against the Boeing Company by Telesat Canada and its insurers in respect of the Anik F1 satellite. Reference can also be made to the 2009 award by an arbitration panel ordering Sea Launch Co. To pay Hughes Network Systems in a dispute over termination of a launch contract and prelaunch payments. The 2011 AAA award to Avanti Communications in its arbitration against SpaceX relating to Avanti’s decision to scrap a planned launch of its Hylas 2 satellite aboard a SpaceX rocket in favor of a launch aboard the Araine 5 vehicle, and more recently, Lockheed Martin Space Systems won an arbitration dispute with SES over contracted performance specifications in respect of anomalies with the A2100 communications satellite.

Regarding arbitration as a preferred technique, on 6 December 2011, the Administrative Council of the PCA comprised of 115 member States adopted Optional Rules for the Arbitration of Disputes Relating to Outer Space Activities (Optional Rules). The text of these Optional Rules, were developed by the PCA’s International Bureau in conjunction with an Advisory Group of leading experts in air and space law, relying on the 2010 UNCITRAL Arbitration Rules, as well as multiple sets of PCA procedural rules. Arbitration agreements
related to settlements discussed above between non-governmental entities, generally provide for arbitration under the UNCITRAL Rules or procedural rules of private arbitration institutions such as the ICC, AAA or London Court of International Arbitration (LCIA). However, these institutional Rules are not necessarily adapted or specific to space related disputes for which States, intergovernmental organizations, non-governmental organizations, corporations and private parties can have recourse, if and when they agree to use them.

In this regard, the following benefits of the Optional Rules should be highlighted. As the title implies, the Rules are optional and flexible, since they only become applicable where parties have agreed that disputes between them in respect of a defined legal relationship, contractual or not, or deriving from various types of legal instruments, shall be referred to arbitration, subject to such modification as the parties may agree. The Optional Rules emphasize autonomy because they remain open to States, international organizations and private entities. More so the characterization of a dispute relating to outer space is not necessary for jurisdiction, if parties have agreed to settle a specific dispute under the said Optional Rules. We will recall, Space technology, being often of a dual-use nature, ensures the influence or role of States (including State agencies) in related activities. State involvement is taken into account by the Optional Rules, which construe consent to arbitration as constituting a waiver of immunity to jurisdiction as would stem from sovereign immunity of States and any immunity to jurisdiction possessed by intergovernmental organizations. Given the confidential and strategic nature of outer space activities, the Optional Rules permit a tribunal, at the request of a party or on its own motion, to appoint a confidentiality adviser as an expert in order to report to it, on the basis of the confidential information on specific issues designated by the arbitral tribunal, without disclosing the confidential information either to the party from whom the confidential information does not originate or to the arbitral tribunal. There is a much welcomed freedom for parties to choose an arbitral tribunal of one, three or five persons from a standing panel of arbitrators, with possibilities for added support from another panel of scientific and technical experts, both maintained by the PCA Secretary-General, without prejudice to the rights of parties to appoint or choose persons outside the lists. The Rules offer services of the Secretary-General and the International Bureau of the PCA provides the distinct benefit of support from an institution with a longstanding tradition of providing registry services and administrative support to international arbitrations involving various combinations of States, State entities, international organizations and private parties. Regarding applicable law, the arbitral tribunal is required to apply the law or rules of law designated by the parties as applicable to the substance of the dispute, failing which the arbitral tribunal shall apply the national or international law and rules of law it determines to be appropriate. This distinction allows parties to designate as applicable to their case, rules of one legal system (i.e., ‘law’) or those of more than one legal system, including rules of law which have been elaborated on the international level (i.e., ‘rules of law’) whilst giving the arbitrators, if necessary, the broadest possible scope in determining the applicable law; leading to internationally recognized and enforceable, final and binding awards.

Closely related to arbitration is the possibility of adjudication, for which early compilations

96 Cf, the decision of the Supreme Court of India, in Antrix Corp. Ltd vs. Devas Multimedia 2013 (2) ARBLR 226 (SC) on issues concerning the invocation of proceedings and appointment of an arbitrator based on the agreement between the parties which had provided a choice between UNCITRAL or ICC procedures.
and studies\textsuperscript{97} categorized disputes before national courts on a thematic basis, such as \textit{torts}, \textit{the environment}, \textit{antitrust}, \textit{taxation}, \textit{intellectual property}, \textit{insurance}, and so on. This could be justified, given the paucity of recorded disputes arising from mainly government led and owned space related activities at the time. At present, with the diversification of space activity involving multiple players (State, intergovernmental organizations and non-governmental entities) operating in what has become a vibrant industry underpinned by private international law, public international law and domestic legislation across dozens of countries, dispute-settlement tendencies now require a much broader categorization. More so, it does not generally appear as if activities associated with peaceful uses of outer space are particularly exceptional when private individuals and / or corporations have sought binding settlement to resolution of their disputes. For which, contractual agreements involving private parties that relate to outer space activity alongside contractual agreements involving manufacturers and other contributors to users\textsuperscript{98} could be distinguished according to the: (a) \textit{type of deliverable} (i.e., satellites, launcher, equipment, parts, or services) and (b) \textit{type of contract} (i.e., research and development, testing, manufacturing, sale/ supply, services, or licenses/ intellectual property rights). In concluding, a number of particularities are worth highlighting and to which this chapter now turns.

\section*{4 Particularities and conclusions}

The preceding appraisal of mechanisms and procedures for settlement of disputes, reveals nine particular characteristics\textsuperscript{99} in the conduct of outer space activities which require very high investments associated with very high risks. \textit{First}, private enterprises do not have direct access to mechanisms for resolution of disputes in the current, and mainly public, international legal framework governing outer space activities.\textsuperscript{100} \textit{Second}, decisions arising from mechanisms for the resolution of disputes in the current public international legal framework governing outer space activities are generally non-binding.\textsuperscript{101} \textit{Third}, the sovereign immunity of States could influence the initiation and conduct of proceedings by a tribunal constituted to arbitrate over disputes pertaining to outer space activities, including the enforcement of any awards.\textsuperscript{102} For instance, in the matter of \textit{Republic of Serbia v Imagesat International NV}\textsuperscript{103} a United Kingdom (U.K.) High Court dismissed an application by Serbia to challenge an earlier arbitral award for

\textsuperscript{97} See I. H. P. Diederiks-Verschoor; supra note 21; S. Gorove, supra note 22; and K. Bockstiegel, supra note 49. See also L. S. Kaplan, “Recent Developments in Space Law Litigation” in in Saïd Mosteshr (ed.) \textit{RESEARCH AND INVENTION IN OUTER SPACE: LIABILITY AND INTELLECTUAL PROPERTY RIGHTS} (1995), Martinus Nijhoff, at pp. 113 et seq.


\textsuperscript{100} See section 3.3. supra.

\textsuperscript{101} Id.

\textsuperscript{102} Cf. provisions for exclusion and waiver of sovereign immunity from jurisdiction in Art. I (3) of the Optional Rules.

\textsuperscript{103} [2009] EWHC 2853 (Comm), [2010] 1 Lloyd’s Rep 324. See in particular paragraphs 119, 120, 126 and 135 respectively.
lack of substantive jurisdiction under Section 67 of the 1996 U.K. Arbitration Act, on the ground that Serbia had conferred substantive jurisdiction on the arbitrator by virtue of Terms of Reference. The arbitration arose from a contract between Israeli satellite operator, ImageSat and the State Union of Serbia and Montenegro (the State Union). Shortly after the arbitration was commenced, the State Union split and Serbia responded to the request for arbitration. The arbitrator decided, as a preliminary issue, that Serbia was the continuation of the State Union, rather than a successor State, and was a proper party to the contract and the arbitration. Serbia argued that the arbitrator did not have jurisdiction to determine this issue. The court dismissed the Section 67 challenge, on the ground that Serbia had conferred substantive jurisdiction on the arbitrator, by virtue of the Terms of Reference, to deal with the question whether it was a continuator or successor State. Beatson J (i.e., the presiding Judge) also held that, in the context of this case, that issue was justiciable and arbitrable (emphasis mine). However, it is important to highlight the fact that the Judge expressed doubt (obiter) about whether such issues would have been justiciable in court proceedings. Imagesat was successful, but the Judge’s obiter remarks as to whether the question of Serbia’s status was justiciable in a non-arbitration context bring into sharp focus the complexities which may arise when private parties enter into commercial contracts or partnerships with States. Fourth, the confidential and strategic nature of outer space activities could give rise to challenges associated with adducing evidence before a tribunal constituted to arbitrate over disputes arising from outer space activities. Fifth, given the relevance of mandatory laws designed to protect the public interest, particularly in disputes between private entities and the State, an arbitration tribunal addressing a dispute over outer space activities could be faced with possible limitations on the arbitrators’ and contractual parties’ freedom to choose applicable laws. Sixth, there is an established trade (space sector) practice of liability cross-waivers which is summarily defined as a set of promises made by the parties to an agreement in which each of the parties’ pledges not to sue the other for damages caused by the other, except in specific circumstances. This has given rise to complex legal issues ranging from matters concerning the establishment of conduct bordering on negligence to consequential damages and establishment of loss, in order to obviate any exclusion of liability provisions between the parties. Seventh, the potential for debate on the scope of what constitutes outer space activities could pose significant challenges for ascertaining the jurisdiction of a tribunal established to address a related matter. Eighth, the technical nature of outer space activities justifies the need for appropriate legal and scientific expertise in support of related arbitration proceedings. Ninth, because pre-dominant actors (i.e., States)

104 It is reported that… “the decision led to a 28 million euro ($38.4 million) arbitration settlement from the government of Serbia and an agreement by Israel Aerospace Industries Ltd of Israel, to buy $81 million worth of ImageSat bonds held by Pegasus Capital Advisors LP, a New York-based private equity investment firm.” See Barbara Opall-Rome, Israel’s ImageSat Sheds Some Legal Baggage, Space News, Friday, 28 January 2011.

105 Cf. provisions for exclusion and waiver of sovereign immunity from jurisdiction in Art. 1(3) of the Optional Rules.


107 Cf. provisions of the Optional Rules at Article I (1) which provides, inter alia “…‘The characterization of the dispute as relating to outer space is not necessary for jurisdiction where parties have agreed to settle a specific dispute under these Rules.”

108 For a summary of space related disputes resolved by litigation and / or arbitration, along with technical issues arising, see S. Kaplan, supra note 97; and A. Mourre, Arbitration in Space Contracts, (2005) vol 21, issue 1 Arbitration International at pp. 37–58.
involved in outer space related activities have consistently demonstrated a reluctance to engage in adversarial forms of dispute resolution, rules of procedure designed to govern the activities of an arbitration panel must be attractive so as to encourage their adoption and use by States.