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Resolving space disputes differently

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The legal framework governing outer space has always seemed to be a domain of law reserved to the public authority¹, limiting the exploitation of space to governmental action, especially for military and telecommunication purposes.

In recent years, space has become increasingly commercialized and democratized, as recent technological developments have reduced the costs of going into space². We are now witnessing a privatization of space operations, with attempts to open up new fields such as space tourism, surveillance activities, and many others.

Although they do not formally concern space law, disputes can arise in this industry whose actors conclude a large number of contracts for the planning and manufacturing of satellite, their insurance and their exploitation. In addition to this multitude of contracts including various actors, there is also an active involvement of states in this industry which can be analyzed as a source of potential conflicts.

Such growth in commercial space activity requires an appropriate dispute resolution mechanism. The question that arises is the following: what is the most suitable forum for resolving disputes relating to the space sector?

Dispute resolution pertaining to incidents arising out of outer space activities is not a new idea³. Long before the rise of alternative dispute resolution, the use of diplomatic channels and international instruments or institutions was the most common way of thinking about the settlement of disputes in outer space.

Thus, on the one hand, we will study the dispute settlement mechanisms available under public international law (I), and on the other hand, the mechanisms adequate to the issue of commercialization of space activities, namely arbitration in all its forms (II).

I- MECHANISMS AVAILABLE UNDER PUBLIC INTERNATIONAL LAW

The Outer Space Treaty

The Outer Space Treaty of 1967 (OST) governs the activities of states in the exploration and use of outer space, including the Moon and other celestial bodies. However, this same treaty does not contain any provision relating to the resolution of space disputes.

¹ J. FROHLOFF, “Arbitration in space disputes”, in William W. PARK (ed), *Arbitration International*, Oxford University Press, 2019, Volume 35 Issue 3, pp. 309 – 329.

² M-J. ALARCON, *New Opportunities for Arbitration Lawyers: Climate Change, Outer Space and Human Rights*, Kluwer Arbitration Blog, July 3, 2021.

³ M. LISTNER, *A new paradigm for arbitrating disputes in outer space*, The space review, 2012.

On the one hand, Article 9 of the OST refers only to the issue of cooperation with the aim of anticipating or preventing conflicts rather than resolving them⁴: *“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 in the peaceful exploration and use of outer space, including the moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment.”*

On the other hand, with Article 3 of the Treaty⁵ referring to the United Nations Charter, it would be possible to envisage a resolution of space disputes by the mechanisms of settlement of international conflicts enumerated in the above mentioned Charter, such as the International Court of Justice (ICJ).

However, the possible recourse to the ICJ also poses some problems because the latter can be seized in contentious matters only by states, and can deal with a dispute if the states in question have accepted its jurisdiction. Private entities cannot therefore avail themselves of the jurisdiction of the ICJ.

But with an increased privatization of space activities and operations, space disputes concern more private entities between them, or even public and private entities. The ICJ cannot therefore constitute an adequate forum for such issues.

Hence the need for a more appropriate dispute settlement mechanism.

The Space Liability Convention

The 1972 Space Liability Convention is a widely ratified United Nations Space Treaty that addresses the issue of dispute resolution. According to its provisions, all states launching a space object are jointly and severally liable for any damage caused by that object⁶.

This Convention allows states to assert liability claims on their own behalf and on behalf of their companies or individuals⁷ by instituting a two-tier claims procedure: the first through diplomatic channels and the second through the establishment of a Claims Commission⁸.

⁴ N. JASENTULIYANA, “Conflict Resolution in Outer Space: new approaches – old techniques”. In DUPUY, R.-J. (ed.): *The Settlement of Disputes on the New Natural Resources*, Workshop, The Hague, 8-10 November 1982. The Hague, Boston, London: Martinus Nijhoff Publishers, 229-241 (p. 233).

⁵ “States Parties to the Treaty shall carry on activities in the exploration and use of outer space [...] 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”.

⁶ Article. V of the Liability Convention.

⁷ Article VIII.1 of the Space Liability Convention.

⁸ Article XIV of the Space Liability Convention.

However, the dispute settlement system established by the Liability Convention has significant drawbacks:

- First, this system is limited to disputes on liability for damage as confined by the Convention⁹. Its scope of application is therefore very limited.
- Second, decisions rendered by the Claims Commission are only recommendatory in nature, unless the parties have agreed otherwise in advance¹⁰.
- Third, non-state parties can only assert their rights through cooperation between the signatory states. This can be detrimental to their interests, as governments may not always have an interest in acting on their behalf, according to the article XXII, for political reasons for example¹¹.
- Finally, it should be noted that the Convention has been used infrequently. The only claim made under the Liability Convention was by Canada in a case known as *Cosmos 954*.

The International Telecommunication Union

The International Telecommunication Union (ITU) is the United Nations specialized agency for information and communication technologies. The purpose of this agency is to organize telecommunication operations and services throughout the world by coordinating the international management of the radio-frequency spectrum and satellite orbits.

The ITU dispute resolution system is provided for in the Constitution and the Convention. Article 56-1 of the constitution states that *Member States may settle their disputes on questions relating to the interpretation or application of this Constitution, of the Convention or of the Administrative Regulations by negotiation, through diplomatic channels, or according to procedures established by bilateral or multilateral treaties concluded between them for the settlement of international disputes, or by any other method mutually agreed upon.*

Paragraph 2 of the same article adds that *if none of these methods of settlement is adopted, any Member State party to a dispute may have recourse to arbitration in accordance with the procedure defined in the Convention.*

However, it should be noted that the dispute settlement mechanism under the Constitution, as well as the arbitration procedure under Chapter 6 of the International Telecommunication Union Convention, are limited to member states.

⁹ F. G. VON DER DUNK, *Dispute resolution mechanisms for space? A few legal considerations*, University of Nebraska, Space – Cyber and Telecommunications Law Program Faculty Publications, 2001, <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1037&context=spacelaw>

¹⁰ Article XIX.2 of the Space Liability Convention.

¹¹ S. GOROVE, *Developments in Space Law: issues and policies*, Utrecht Studies in Air and Space Law, Vol. 10. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1991, p. 232.

Furthermore, even if the arbitral award is final and binding on the parties to the dispute, there is no effective enforcement mechanism in the above provisions¹².

II- MECHANISMS APPROPRIATE TO THE COMMERCIALIZATION OF SPACE ACTIVITIES

The above-mentioned mechanisms of public international law clearly reveal their limits and their inadequacy for the resolution of space disputes involving nowadays more private operators of international trade. Arbitration is therefore an attractive forum for the resolution of such disputes.

Commercial Arbitration

Most of the contracts concluded between several actors involved in a commercial space activity generally contain arbitration clauses allowing in case of dispute to start an arbitration procedure. Indeed, the economic, political and strategic stakes of such activities impose to the private operators to avoid the state courts in favor of a private justice tailored to their needs. Add to that the fact that such an industry is based on a succession of contracts of different categories¹³. The risk of disputes is therefore high.

It should be noted that many disputes arising from the execution of contracts relating to space activities are not different from disputes arising in other sectors of commercial activity.

Such disputes arising from the unilateral termination of contracts for example can easily be resolved by arbitral tribunals ruling under the auspices of classical commercial arbitration rules such as the London Court of International Arbitration (LCIA), the American Arbitration Association (AAA), and the International Chamber of Commerce (ICC)...etc.

But some disputes remain specific to the space industry and present particular financial stakes as well as technical difficulties which are specific to the sector. In this respect, specialization of the arbitrators seems important. Choosing an arbitrator who is familiar with the technical aspects of the dispute and who has sufficient knowledge of the very specific industrial context of the space industry is of particular importance.

¹² L. VIIKARI, *Towards More Effective Settlement of Disputes in the Space Sector*, <https://www.ulapland.fi/loader.aspx?id=a023c493-9028-46dd-a0bd-d7dc738d6b5d>

¹³ A. MOURRE, "Arbitration in Space Contracts", in William W. PARK (ed), *Arbitration International*, Oxford University Press, 2004, Volume 20 Issue 4, pp. 37 – 57.

The parties will thus have the choice:

- To choose a classical arbitration institution that could present a panel of arbitrators with technical skills in space activities;
- To choose a specialized arbitration institution such as the Permanent Court of Arbitration (PCA), which offers Optional Rules for arbitrating disputes relating to space activities, or the International Court of Aviation and Space Arbitration.

Such specialized institutions guarantee a technical qualification of the arbitrators and experts¹⁴ but remain rarely coveted for their inability to offer an administrative management of the proceedings comparable to that offered by classical arbitration institutions.

In addition to being the best forum for dealing with the technical aspects of such disputes, commercial arbitration has also two advantages¹⁵:

On the one hand, the confidentiality of the arbitral proceedings is ensured by institutional rules or legal provisions, as it can be reinforced by contractual stipulations.

On the other hand, in addition to the guarantees of impartiality and independence of the arbitrators, the arbitral awards can be enforced in 156 signatory states of the 1958 New York Convention. This advantage granted by the Convention offers private operators of international trade significant legal security.

Investment Arbitration

An investment arbitration in the space industry is triggered when a state is involved in one way or another in a space activity:

This involvement can be direct. In this case, the investment arbitration is based on a contract between a foreign private party (called investor) and a state (called host state).

The same involvement can be indirect. In this case, no contractual link exists between the host state and the foreign company investing in a space activity. The latter is in this case linked to another private party.

In both cases, there must be an investment:

When states enter into contracts with foreign private companies, recognizing this investment should not be a problem because these types of contracts clearly define the terms of the

¹⁴ M-J. ALARCON, *op.cit.*

¹⁵ A. MOURRE, *op.cit.*

investment project in the host country's territory. The jurisdiction of arbitral tribunals that are constituted when a dispute arises will be based on a probable arbitration clause inserted in such contracts.

But when there is no link between the foreign company and the host state, establishing the investment is possible by resorting to the provisions of bilateral or multilateral investment treaties. In other words, there must be an investment covered by the applicable treaty in order to ground the jurisdiction of investor-state arbitration tribunals.

It is this determination of the notion of investment that may be problematic in the case of space industry disputes. According to the *Salini* test¹⁶, an investment requires an economic contribution, a risk, a certain duration and even a contribution to the development of the host state.

Space operations are likely to be eligible under this test because they are generally long-term, high-value projects, involving a high level of risk.

But the existence of an investment cannot be based solely on the criteria of the *Salini* test. It is essential to turn to the provisions of the treaties. However, these provisions can be confusing, especially when it comes to outer space activities. Indeed, no multilateral or bilateral investment treaty expressly mentions such activities in the scope of protected foreign investments.

The importance of raising the question of investment lies in the fact that it is the basis for the competence of arbitral tribunals, because quite simply, the absence of investment makes the initiation of such arbitration impossible.

In *Devas v. India*¹⁷, the Indian state raised the absence of investment by *Devas* on the basis of the *India-Mauritius* BIT which protects "assets invested and licensed in accordance with the laws and regulations of the host country". The country argued that since *Devas* had not applied for a license, all the activities carried out by the latter did not constitute an investment under the BIT¹⁸. The competence of the arbitral tribunal was therefore unfounded according to the Indian state.

¹⁶ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* [I], ICSID Case No. ARB/00/4.

¹⁷ *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited., and Telcom Devas Mauritius Limited v. The Republic of India*, PCA Case No. 2013-09.

¹⁸ G. ISSAC, *PCA tribunal holds India liable for unlawful expropriation and FET breach under India–Mauritius BIPA*, IISD, October 17, 2018, <https://www.iisd.org/itm/en/2018/10/17/pca-tribunal-holds-india-liable-for-unlawful-expropriation-and-fet-breach-under-india-mauritius-bipa-gladwin-issac/>

The stakes of investment arbitration in space are high and the issues to be raised are numerous. But it remains that such a forum for resolving such disputes may be appropriate, even if the cases are still relatively few¹⁹.

CONCLUSION

As space commerce becomes more and more global and countries more and more connected, this expansion in the scale of commercial relations requires an equally innovative legal system to keep pace, offering guarantees and certainty to support and protect the actors of this sector.

The transition from a classic public international law dispute settlement mechanism to a more flexible, efficient and accessible mechanism was a necessity.

This accessibility results in a possibility of recourse to arbitration in an easier way. The recourse to the commercial arbitration is done via a contractualization of the settlement of the spatial disputes by means of the arbitration agreement. The recourse to investment arbitration can be done in the same way, as it can be based on provisions present in the investment treaties.

This kind of democratization of dispute resolution mechanisms does not avoid us from questioning a certain number of issues. However, arbitration seems to be an appropriate forum that can set up guiding principles for the "space" and contribute to the development of this industry.

¹⁹ Three cases known so far.