

DISPUTES RESOLUTION OPTIONS IN THE LEGAL REGIMES REGULATING OUTER
SPACE ACTIVITIES

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ABSTRACT

There is no gainsaying to the fact that since the space race/age in 1957, outer space has been utilized for different beneficial purposes particularly in the areas of Communication (tele-education, tele-medicine), Earth observation surveillance, population monitoring, war advantages etc through launching of different satellites that has now assumed commercial interest in satellite communication sector, launching services and remote sensing. The commercial activities in outer space are very welcome idea, however, just like in any commercial activities, dispute is inevitable. It is then left for a viable dispute resolution mechanism to be put in place in an effort to resolve the peculiar nature of dispute that may arise in the utilisation of this unique environment. It is the intention of this paper to assess the dispute resolution options available to States, non-governmental organizations and private entities involved in any dispute arising from space activities.

1.0 INTRODUCTION

Outer Space often referred to as space has been defined as the *near* emptiness in which all objects in the universe move.¹ It is not entirely empty especially with the launching of artificial satellites into the regions of Space. Furthermore, this area contains some particles of air, space dust, occasional chunks of metallic or stony matter called meteoroids and various kind of radiation flow freely.² It is ‘the known and unknown area of the universe beyond airspace as the boundary between airspace and outer space is not fixed or precise.’³ It is also described as the

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¹ Oberg. J. “space exploration” World Book Online Reference center 2004 world book line [http: www.worldbookonline.com./web/Article? 1d=ar 522550. >accessed on 7 January 2015](http://www.worldbookonline.com./web/Article? 1d=ar 522550. >accessed on 7 January 2015)

² Ibid

³ See Blacks Law dictionary 1212 (9th ed. 2009)

environment beyond the sensible atmosphere of the Earth.⁴ According to Scott, defining exactly where airspace end and outer space begins has proven problematic and proposals have ranged from 80 Km to 100 Km.⁵

2.0 COMMERCIALISING SPACE TECHNOLOGY

Ever since the first unmanned artificial satellite launched, the outer space environment has received series of satellite launch (both manned and unmanned) and space stations. These satellites range from communication; in the area of receiving television signals, telecommunication,⁶ transmission of wireless radio, the use of GPS systems in automobile, listening to weather forecast derived from remote sensing satellite, earth surveillance, military and war advantages and natural resources like asteroids known to be rich in valuable elements such as neodymium, scandium, yttrium, iridium, platinum and palladium which are regarded as limited and rare resources on earth and which have informed different Governments⁷ to clamor for Property Rights⁸ and settlement in Outer Space.

Most commercial Satellites in operation today are majorly used for television program transmission or distribution, private voice, data and video networks and International telephony via the public switch.⁹ Satellite telecommunication refers to the use of Satellites for variety of communications, broadcasting, navigation and position location purposes. Launching and operating most telecommunication satellites involve a huge finance and abiding with series of

⁴ See Sec 20162, National Aeronautics and Space Act pub. L. No. 111-314 124 Stat. 3328 (Dec 18, 2010)

⁵ Scott J.S; The tragedy of the Common Heritage of Mankind. Stanford Environmental Law Journal Vol. 27:nnn 2008 pp 101-157.<http://ssrn.com/abstract=1407332>>accessed on 7 July 2014

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⁷ E.g the United States of America and Russia.

⁸ Rand S, 'Property Rights In Space' A journal of Technology and Society. (2012) www.TheNewAtlantis.com>accessed on 09 August 2014. See also Glenn R and Robert M, 'Outer space: problems of Law And Policy' (1997) Boulder; Westview Press Vol.3 xvi 349.

⁹ Pamela L.M and George S.Robinson; Space Law: A case study fo the practitioner (Implenting a Telecommunications Satellite Business Concept) Kluwer Law Innernational 1992 p.71-

International regulations.¹⁰ State parties at international level or even private parties and non-governmental organization prefer to enter into agreement for the allocation, allotment, transfer, lease, sale (whether Transponder Sales, percentage sales or sale-lease-back transactions), assignment or licenses¹¹ of radio frequencies from a satellite-owner-party and of course with consideration.

In order to place in orbit and operate satellite (even if it is just to receive frequency), the authorization of a National government is necessary. Few countries have established regulations and agency for licensing purpose.¹² Direct space Laws that have been put in place by the Government of China include the *Interim Measures on the Administration of Permit for Civil Space Launch Projects 2002*,¹³ *The Provisions and Procedures for the Registration of Space Objects*¹⁴ The China National Space Administration is the National agency responsible for coordinating the government's Space activities. Also the Space Affairs Act of 1993 regulates South Africa's National space activities. The Act establishes the South African Council for Space Affairs South with a mandate to implement, in the most efficient and economical manner possible, the space policy of the Republic and to take care of the interests, responsibilities and

¹⁰ See the International Telecommunication Convention 1982 entered into force in Jan. 1984, International telecommunications Satellite Organisation (INTELSAT) established as an interim organization in 1964 and in its current form in 1973, International Maritime Satellite Organisation (INMARSAT) 1979 and the European Telecommunications Satellite Organisation established in 1977 as an interim organization and in 1982 as a permanent entity in its present form.

¹¹ See *Application of GTE Corporation and Southern Pacific Company for consent to transfer control of Southern Pacific Communications Company and Southern Pacific Satellite Company*, 94 F.C.C 2d 235 1983, *Western Union Corporation and Hughes Communications Galaxy, Inc.*, 3 F.C.C Rcd 6792 1988, *Domestic fixed satellite transponder sales*, 90 F.C.C 2d 1238 1982

¹² National Space Research And Development Agency (NASRDA) was established in 1st August 2001. NASRDA is responsible for implementing the National Space Policy of Nigeria. The Agency is launched to promote space activities and research in Nigeria. The scope of the National space program of Nigeria includes, Study and Learning of Basic Space Sciences Research and education in areas of rocketry, satellites and space sciences, establishment of National Earth observation station for remote sensing and satellite meteorology data acquisition and the provision of reliable telecommunication services in Nigeria.

¹³ Decree of the Commission of Science, Technology, & Industry for National Defense of the People's Republic Of China No 12. Entered into force on the 21st December 2002. See also <http://www.fdi.gov.cn/pub/FDI-EN/Laws/default.htm>

¹⁴ Decree of the Commission of Science, Technology, & Industry for National Defense of the People's Republic Of China No 12. Entered into force on the 21st December 2002. See also <http://www.fdi.gov.cn/pub/FDI-EN/Laws/default.htm>

obligations of the republic regarding its space and space related activities in compliance with International conventions, treaties and agreements entered into or ratified by the Government of the republic.¹⁵

Another agency in charge of south African space activities is the South African National Space Agency established by the South African National Space agency Act of 2008 and detailed in its preamble is the purpose of the Act and the Agency which is to the promotion and use of space, cooperation in space related activities, fostering research in space science and the advancement of scientific engineering through development of human capital and support of industrial development. It also includes the promotion of the peaceful use of space, supporting industrial development, fostering research in space science.

In the United State for example, an interested space Satellite user is required to obtain a construction permit from the State's Federal communication Commission. For this commission, licenses are granted based on public interest. Hence an applicant must be found to be legally, financially and technically qualified.

Today several International organizations own and operate satellite systems for Specialized Telecommunication Service¹⁶ International Public Telecommunication Service, Domestic Public Telecommunication Service or International Fixed Satellite Service.¹⁷ For example, the International telecommunications Satellite Organisation (INTELSAT) with membership of over 120, launched its first Satellite in 1965 and now has more than a dozen. In recognizing the commercial nature of outer space establishes, according to the organization, what is referred to as "a Global Commercial Communications Satellite System" which will provide expanded

¹⁵ Section 4 Space Affairs Act 1993

¹⁶ See article III of the Agreement relating to International telecommunication Satellite Organisation (INTELSAT) 1971

¹⁷ Defined as a radiocommunication service between earth stations at specified fixed points when one or more satellites are used; in some cases this service includes satellite to satellite links, which may also be effected in the inter-satellite service; for connection between one or more earth stations at specified fixed points and satellites used for a service other than the fixed satellite (eg, the mobile satellite service, broadcasting satellite service, etc) ITU Convention

telecommunications services to all areas of the world and which will contribute to world peace and understanding and with the belief that satellite telecommunications should be organized in such a way as to permit all mankind to have access to the global satellite system and those States members of the International Telecommunication Union so wishing to invest in the system with consequent participation in the design, development, construction, including the provision of equipment, establishment, operation, maintenance and ownership of the system¹⁸

The COMSAT¹⁹, under the United Nations contributes to the financing and management of the INTELSAT Space Stations. This entity is the supplier of the satellite services so that any private individual/organization/state is interested in the transmission of INTELSAT satellite services is required to enter into an agreement with COMSAT. Initially, this entity does not contract with end users directly but service providers like the AT&T, Western Union International, RCA Global communication etc. However, with the decision of the Federal Communication Commission²⁰ in *Spanish International Network*²¹ authorizing Spanish International Network to take end to end services directly from COMSAT for purposes of International television transmission, COMSAT now offer service directly to end users.

3.0 DISPUTE: A POSSIBLE OUTCOME AND THE WAY OUT

Dispute can simply be referred to as a disagreement, conflict or controversy. For the purpose of this work, dispute can be a conflict of claims or rights; an assertion of a right, claim or demand

¹⁸ Pamela L.M and George S.Robinson; Space Law: A case study for the practitioner (Implementing a Telecommunications Satellite Business Concept) P.281

¹⁹ Communications Satellite Corporation (COMSAT) established by the United States Communication Satellite Act of 1962

²⁰ A united State agency, formally known as the Federal radio commission established by the radio Act of 1927 responsible for policy and decision making as relating to COMSAT contracts

²¹ 70 F.C.C 2d 2127 (1978)

on one side, met by contrary claims or allegations on the other²² while dispute resolution is the various ways or processes of settling a dispute as provided by the Laws to be examined²³

Outer space dispute is not limited to disagreement between contracting parties in respect of conveyance of communication signal to and from outer space satellite (as would be discussed later). Dispute may also arise as a result of damage caused to an individual/State by a launching state as a result of a space activity out of negligence or inevitable damage or claim of ownership of all or part of outer space. This is despite the provisions of the legal regime of outer space that the environment is not subject to National appropriation of any kind.²⁴ According to Ram,²⁵ as the number of space players, users and missions increase, the competition for the orbital slot (regarded as limited resources) becomes severe. Hence harmful interference is being witnessed with the use of radio frequencies which is expanding day by day and giving rise to dispute.

It is pertinent to state that the legal regimes that would be dealt with (in this paper) in respect of outer space dispute resolution include the following

1. *The Convention on International Liability for Damage Caused by Space Objects 1972*
2. *Agreement Relating to International Telecommunication Satellite Organisation. (INTELSAT) 1971.*
3. *Convention of the International Telecommunication Union 2010*²⁶

²² See Blacks's Law Dictionary free online Legal Dictionary 2nd Ed. <http://www.thelawdictionary.org/dispute> >accessed 25/02/2015.

²³ See Dispute Resolution Processes. American Bar Association. http://www.americanbar.org/groups/dispute_resolution/resources/DisputesResolutionProcesses.htm >accessed 25/02/2015.

²⁴ See Article 2 of the "Outer Space Treaty", adopted by the General Assembly in its Resolution 2222 (Xxi), opened for signature on 27 January 1967, entered into force on 10 October 1967, www.oosa.unvienna.org/oosa/spacelaw/outerspace.html >accessed on 7 July 2014

²⁵ Ram S.J; Dispute resolution under the ITU Agreement.> http://www.iislweb.org/.../2004_Applicant.pdf >accessed 15 Feb. 2015

²⁶ See the constitution and convention of the International Telecommunication Union as amended by the 2010 by the 2010 Plenipotentiary Conference (published in Basic Texts)

3.1 **THE LIABILITY CONVENTION 1972**

This Convention has been said to be a demonstration of acceptance by the International community of International *responsibility* for activities in space,²⁷ as damage may on occasion be caused by space objects. The Convention is borne out of the consideration that though precautionary measures might have been taken by a launching State, damage may still be caused and as such there is need to elaborate effective International rules and procedures concerning liability for damage caused by space objects and to ensure in particular the prompt payment under the terms of this convention of a full and equitable measure of compensation to victims of such damage leading to the establishment of the rules and procedures to strengthen international co-operation in the field of the exploration and use of outer space for peaceful purposes.²⁸

The Liability Convention provides that launching State shall be absolutely liable to pay compensation for damage caused by its space objects on the surface of the earth or to aircraft and liable for damage due to its faults in space. This Convention also provides for procedure for the settlement of claims for damages.

Article 1²⁹ of the convention define damage to mean 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 while articles 2,3 and 4 provides for *absolute, fault and joint liability respectively* to pay damages depending on the extent of contribution to the damage caused.

A bargain on compensation claim can be done through diplomatic means at the first instance (and this does not require the exhaustion of any local remedy to which the claimant is entitles in

²⁷ E. Britton, "The corpus juris spatialis" <http://www.suit101.com>>accessed 12/02/2015

²⁸ See the Preamble

²⁹ Definition section

his State).³⁰If the claimant state does not maintain a diplomatic relationship with the Launching State then the claim can be brought through another State that maintains such a relationship or through the Secretary-General of the United Nations.³¹This method requires a claim to be brought within a year of its occurrence even when the extent of damage is not ascertained. A claimant is allowed to file a suit for compensation in a court of law or administrative tribunal in a launching state. Where a claimant has adopted this means he is precluded from presenting a claim under this Convention on the same issue.Compensation under this conventional shall be determined in accordance with International Law, principles of justice and equity and should be capable of returning the claimant to *status quo*³²

A Claims Commission is to be established by either Party where no settlement is reached by diplomatic means.³³This Commission is to be comprised of three members, two appointed by the parties each while the third member, chairman of the commission, is to be appointed by both parties jointly within two months³⁴and if after four months no agreement is reached, the parties can request the assistance of the Secretary-General for the appointment of the Chairman of the Commission. The decision and award of the commission shall be by Majority Vote. A one-man claims commission is to be adopted at the request of a party where the other party fails to appoint. The Commission is expected to give its decision or award (made public and a Certified copy given to the parties and the Secretary-General)not later than one year from the date of its establishment unless for an inevitable extension.³⁵

The Convention also make provision for compensation where the damage is as a result of an International Intergovernmental organization's launching activity where the organization has

³⁰ It should be noted here that an individual claim can only be brought through his State under this Convention.See Article XI

³¹ See Article IX

³² See Article XII

³³ See Article XIV

³⁴ See Article XV

³⁵ The expenses in regard to the Claims Commission shall be borne equally by the parties, unless otherwise decided by the Commission. See Article XX

declared its acceptance of the rights and obligations provided for in this Convention and if a majority of the States members of the organisation are State Parties to this Convention and to the Outer Space Treaty.³⁶ Where liability of the organization is ascertained, then member states shall be liable jointly and severally. Claim for compensation in respect of such damage shall be first presented to the organization failure of the organization to pay within a period of six then the Claimant State can invoke the liability of the members which are States Parties to this Convention for the payment of that sum.³⁷

3.2 INTELSAT AGREEMENT 1971

This Agreement envisages four categories of disputants namely; INTELSAT i.e the organisation itself comprising of member states, Party/Parties i.e State(s) for which the Agreement has entered into force or been provisionally applied, Signatory/Signatories i.e a Party or the telecommunications entity designated by a Party, which has signed the Operating Agreement and for which it has entered into force or been provisionally applied and a State that has ceased to be a party.

Hence disputes may arise between Parties with respect to each other, or between INTELSAT and one or more Parties or between one or more Parties and one or more Signatories or between a Party and a State that has ceased to be a Party or between INTELSAT and a State that has ceased to be a Party.

The dispute resolution mechanism provided for parties under the INTELSAT Agreement, herein referred to as “Agreement” is Arbitration. This is to be adopted where there is no provision on settlement of disputes in an agreement between the disputants or such provision on settlement of disputes has been exhausted and settlement is not reached.³⁸ The procedure for the conduct of the

³⁶ 1967

³⁷ See Article XXII

³⁸ See Article XVII Of The Agreement Relating To The International Telecommunications Satellite Organisation 1971. See also Article 20 of the Operating Agreement Relating To The International Telecommunications Satellite Organisation 1971.

arbitration is as contained under Annex C to the Agreement.³⁹ Just like the liability convention, The INTELSAT Agreement provides for a three member arbitral tribunal duly constituted in accordance with the provisions of Annex C to the agreement. The deliberation of the Tribunal is to be held in secret and its decision shall be presented in writing and supported by a written opinion. Its rulings and decisions must be supported by at least two members. A member dissenting from the decision is to submit a separate written opinion. The tribunal shall forward its decision to the executive organ, which shall distribute it to all Parties and Signatories involved in the disputes.

Article 8 provides that if one of the parties fails to present its case, the other side has the opportunity to request that the tribunal enter a decision in its favour. But the tribunal, before acting upon such request must satisfy itself of its competence and that the case is well-founded in fact and in law.

While the decisions reached by the Claims Commission under the Liability convention must be founded and in accordance with International Law, principles of justice and equity, the decision of the tribunal shall be based on the Agreement (INTELSAT Agreement), the Operating Agreement and generally, accepted principles of law.

3.3 INTERNATIONAL TELECOMMUNICATION CONVENTION 2010(As revised)

The International Telecommunication Union regulates the use of radiofrequencies and geostationary orbital positions internationally. All States are free to choose and assign particular radio frequencies and orbital positions to their respective satellites, though they are obliged to avoid causing harmful interference to the radio frequencies that have been registered earlier with the ITU.⁷ This rule, also called the practice of “first-come, first-served”, implies that a State that registers its satellite system using particular orbital position and certain radio frequencies is protected against harmful interference from the late-comers.

³⁹ Ibid. See Annex C generally

Arbitration, an alternative dispute resolution process, also finds its way into the mind of this Union through the Convention of the International Telecommunication Union 2010. That is, of course, with the combined reading of Article 56 of the *Constitution of the ITU* and the *Optional Protocol On The Compulsory Settlement Of Disputes Relating To The Constitution And Convention Of The ITU And To The Administrative Regulations*. Article 56 of the Constitution of the ITU which provides for settlement of dispute among member State, states Member States are at liberty to settle their disputes on questions relating to the interpretation or application of the Constitution, of the Convention or of the Administrative Regulations (including Radio Regulations governing space communications) 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. 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 arbitration procedure as specified in Article 41 of the Convention of the ITU.

Article 41 of the ITU Convention provides for Arbitration as a dispute settlement option and its procedure. Just like other provisions mentioned earlier, this process is initiated by one of the disputants by service of a notice of submission of dispute to arbitration on the other party. The disputants are at liberty to choose is to be entrusted to individuals, administration or government. Failure to reach an agreement on this within a month of the service of notice, then the government is to be entrusted with the arbitration process.

The disputant may also agree to a one member arbitral tribunal or each can make nomination for the Secretary-General to appoint an arbitrator from, a member arbitral tribunal would be constituted where the parties to the disputes are more than two. The decision of this single arbitrator shall have a final and binding effect and where the decision is of a three-member arbitral tribunal, the decision reached by majority vote shall be final and binding.

Member States of the ITU agree to an *Optional Protocol on the Compulsory Settlement of Disputes Relating to ITU* applicable among Member States parties. This Protocol essentially makes the arbitration procedure, as defined in Article 41 of the Convention, compulsory for settlement of disputes among the States Parties to the Protocol, the number of which is 64 States as at 2010.

3.4 THE OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES 2011

The Permanent Court of Arbitration in 2011 adopted the *Optional Rules for Arbitration Of Disputes Relating To Outer Space Activities*.⁴⁰ The Optional Rules are purely based on the 2010 United Nations Commission on International Trade Law Rules (UNCITRAL) (as revised in 2010) with some changes. According to the drafters the reason for putting in place the optional rules include the intention to⁴¹

1. Reflect the particular characteristics of disputes having an outer space component involving the use of outer space by States, international organizations and private entities.
2. Reflect the public international law element that pertains to disputes that may involve States and the use of outer space, and international practice appropriate to such dispute.
3. Indicate the role of the Secretary-General and the International Bureau of the Permanent Court of Arbitration (PCA) at The Hague.
4. Provide freedom for the parties to choose to have an arbitral tribunal of one, three or five persons;
5. Provide for establishment of a specialized list of arbitrators mentioned in article 10 and a list of scientific and technical experts mentioned in article 29 of these Rules; and

⁴⁰ Permanent Court of Arbitration, *Optional Rules for Arbitration of Disputes Relating to Outer Space Activities*, introduction (Dec. 6, 2011) [hereinafter *Optional Rules*], available at http://www.pca-cpa.org/showfile.asp?fil_id=1774 accessed on 05 January 2015

⁴¹ Judge F. P, *An Introduction To The PCA's Optional Rules For Arbitration Of Disputes Relating To Outer Space Activities*. *Journal of Space Law* Vol 38 2012 p.171-185

6. Provide suggestions for establishing procedures aimed at ensuring confidentiality.

Expectedly, agreement is very key in initiating an arbitration proceeding and this is reflected in the provisions of the Optional rule.⁴² It provides that

“Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Outer Space Activities, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree. 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 Rules⁴³

As mentioned earlier, the provisions of the Optional Rules is quite similar with that of the UNCITRAL Rules 2010⁴⁴. The Rules provide for arbitration procedure from its initiation, to the giving of the award which is final and binding and the enforcement of such award.⁴⁵ Where arbitrations deal with technical questions, provision is made in article 27 for the submission to the arbitral tribunal of a document agreed to by the parties, summarizing and providing background to any scientific or technical issues that the parties may wish to raise in their memorials or at oral hearing.

Agreement by a party to arbitration under the Optional Rules constitutes a waiver of any right of immunity from jurisdiction, in respect of the dispute in question, to which such party might

⁴² See Article 1

⁴³ Ibid

⁴⁴ Giugi C, The Optional Rules For Arbitration Of Disputes Relating To Outer Space Activities: A Comparison To The Uncitral Rules. <http://www.lacba.org/files/main%20folder/sections/.../files/Carminati.pdf>>accessed 05 Feb. 2015

⁴⁵ See Article 2-43

otherwise be entitled. A waiver of immunity relating to the execution of an arbitral award must be explicitly expressed.⁴⁶

CONCLUSION

Save for the Liability Convention and the ITU Convention that provides for diplomatic negotiation at first instance in resolving a dispute, conclusively, arbitration is the most favoured dispute resolution option from the assessed Legal regimes on Outer Space in respect of dispute settlement. Hence, it is *assertable* that even on the international level arbitration is gaining ground as a means of dispute settlement rather than the regular litigation.

However, none of the provisions of these regimes consider ownership claim in its definition of dispute. Is it then safe to say that dispute arising from claim of ownership of Outer Space or any part thereof is not *arbitrable*. Court cases in respect of dispute on ownership claim are on the increase in different jurisdiction nowadays especially since there is no provision on a means in resolving such dispute in any International Law. So disputants (mostly individuals) enter into any Court in its jurisdiction and file their claim to which at the end of the day they are not satisfied and still go ahead with such claims.

It is hereby recommended that-

- a) A different legal regime be put in place or an amendment to the existing one be done to cater for a means of resolving dispute relating to ownership of outer Space
- b) Arbitration, an option in resolving dispute, is considered in resolving such ownership dispute.
- c) It would be more effective if there is a single legal regime on dispute resolution put in place solely in respect of settlement of dispute in outer space whatever the nature of such a dispute may be. This is to avoid multiplicity of Laws on dispute resolution. This would enable all International organization to make inference to this Law in their agreement in respect of dispute resolution.

⁴⁶

See Article 1

