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## Star Wars: the Launch of Extranational Arbitration?

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“There is no strife, no prejudice, no national conflict in outer space as yet. Its hazards are hostile to us all.” John F. Kennedy, 1962.<sup>1</sup>

### 1. Introduction

The realm of outer space has traditionally, due to its very nature, constituted a vast and infinite domain in which very few players have been able to operate. In fact, until very recently, the only participants in this field have been states, or state entities. There is no doubt, however, that this balance has begun to shift. Mankind has taken further giant leaps since Neil Armstrong's first steps—in large part due to the ever-increasing number of privately-funded outer space endeavours. The Google Lunar XPrize, for example, is the first ever global competition to land a privately funded and unmanned spacecraft on the moon by 31 December 2017,<sup>2</sup> while the rather intriguing Mars One Project forecasts the start of a permanent colony on the red planet from 2026.<sup>3</sup> Virgin Galactic aims to create the world's first “commercial spaceline”<sup>4</sup> and both Planetary Resources and Deep Space Industries have dedicated themselves to the pursuit of asteroid-mining operations. Space X, the only private company ever to return a spacecraft from low-Earth orbit, now provides the International Space Station with cargo and commercially manufactures and launches advanced rockets for governments and other commercial satellite operators. Its unprecedented prices have revolutionised the satellite communication industry and have meant that putting communications satellites into orbit has become more accessible than ever. These and the many other current private sector outer space initiatives have made three things strikingly clear. First, the countdown to the commercial space age has begun. Governments have even acknowledged that the successful advancement of human activity in outer space depends no longer upon them but upon the assistance and progress that the private sector can make in this arena.<sup>5</sup> Second, though outside the scope of this article, the laws of outer space must be modernised to cope with this reality and to create substantive rights for private enterprises operating in outer space. Third, the launch of the commercial space age will inevitably give rise to an ever-growing number of increasingly complex and high-value disputes over the next century, and beyond.

The nature of such space disputes will be diverse—not just with respect to their subject matter, but also in relation to their source; there will be those arising out of contracts, those emanating from treaties or international conventions, as well as those rooted in pure public international law. Each may involve private enterprises, states, or a mixture of the two. This article touches upon all three, but it is important to recall this distinction from the outset. In all of these scenarios, given the inherently international nature of outer space activity, together with its highly sensitive scientific character, the neutral and confidential appeal of international arbitration makes it a fitting process to resolve the inevitable increase in disputes in this sector over the next 100 years. Indeed, many commercial arbitrations involving some kind of outer space pursuit have already taken place; satellite companies and telecommunications providers, for example, are appearing with increasing frequency as parties before arbitral institutions such as the ICC International Court of Arbitration (ICC) and the London Court of International Arbitration (LCIA). As discussed further below, several steps have been initiated to address and respond to this increase in commercial space disputes. It is therefore possible to affirm without much hesitation that part of the future of international arbitration lies firmly in this field, and arbitral bodies and institutions should ready themselves for this.

<sup>1</sup> John F Kennedy's “Moon Speech”, delivered at the Rice Stadium, Houston, Texas, 12 September 1962.

<sup>2</sup> For more information, see <http://lunar.xprize.org/> [Accessed 2 October 2016].

<sup>3</sup> For more information, see <http://www.mars-one.com/> [Accessed 2 October 2016].

<sup>4</sup> For more information, see <http://www.virgingalactic.com/who-we-are/> [Accessed 2 October 2016].

<sup>5</sup> Report of the President's Commission on Implementation of United States Space Exploration Policy, June 2004, available at [https://www.nasa.gov/pdf/60736main\\_M2M\\_report\\_small.pdf](https://www.nasa.gov/pdf/60736main_M2M_report_small.pdf) [Accessed 2 October 2016].

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However, there remains one very substantial lacuna in relation to such “extranational arbitration”, namely with regard to the recourse that private commercial actors in the industry have against their state counterparts, now that they are beginning to operate in the same intergalactic playing field. In this regard, as will be seen below, no effective solution currently exists. The 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) revolutionised international co-operation for global economic development by furnishing private individuals and enterprises with a direct and unprecedented recourse against states, for legal disputes arising out of an investment, by way of arbitration under the auspices of the International Centre for Settlement of Investment Disputes (ICSID’).<sup>6</sup> Prior to this, these parties had to rely either upon diplomatic channels, if they were in luck and their state of origin agreed to pursue the case on their behalf, or upon domestic courts. This is the situation in which private participants in the outer space business find themselves today—a status quo that lies at marked odds with the advances of the commercial space age. As discussed below, it is for this reason that the time has arguably come for the creation of an ICSOD; an International Centre for the Settlement of Outer-Space Disputes.

This article addresses the current standing of international arbitration in the present matrix of outer space dispute resolution processes, and looks at how this may evolve over the coming decades.

### 2. Traditional Legal Framework

Before analysing recent, and potentially future, developments in the use of arbitration for the resolution of space disputes, it is necessary first to understand the wider context of international space law. This is underpinned by the five United Nations treaties that were promulgated during the Cold War, in the midst of the tense political relations that, in large part, originally triggered the dawn of the space age (Space Treaties). The Space Treaties have, of course, been complemented by other international conventions, and by states’ own domestic laws on outer space, but these lie outside the scope of this article. In any case, it is the Space Treaties that remain the legal foundation stones of all human extraterrestrial activity. They are as follows:

- The 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty);
- The 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space;
- The 1972 Convention on International Liability for Damage Caused by Space Objects (Liability Convention);
- The 1976 Convention of Registration of Objects Launched Into Outer Space, 1976 (“Registration Convention”); and
- The 1984 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, though this remains largely ineffective given that it has not been ratified, to date, by the main space-faring nations (Moon Agreement).<sup>7</sup>

While the other Space Treaties build and expand upon certain elements of it, it is the Outer Space Treaty that remains, almost 50 years after its entry into force, the mothership of international space law. However, of all the Space Treaties, it is only the Liability Convention that makes any mention of a dispute resolution mechanism—and even then, the method it proposes is non-binding.

#### Outer Space Treaty

The Outer Space Treaty has now been ratified by 103 countries, with a further 25 countries having signed but not yet ratified it.<sup>8</sup> Its original purpose was to maintain peaceful relations between states in outer space and to protect its status as the “province of all mankind”, accessible to all countries notwithstanding the level of their economic development.<sup>9</sup> The Treaty also stresses that

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6 ICSID Convention Art 25. Note that recourse to ICSID depends upon the consent in writing of the two contracting state parties. Such consent is normally given in bilateral and multilateral investment treaties.

7 Matthew J. Kleiman, *The Little Book of Space Law* (Bolingbrook, Ill.: American Bar Association 2013), p.4.

8 As at 9 September 2015—see [http://www.unoosa.org/pdf/limited/c2/AC105\\_C2\\_2015\\_CRPo8E.pdf](http://www.unoosa.org/pdf/limited/c2/AC105_C2_2015_CRPo8E.pdf) [Accessed 2 October 2016].

9 Outer Space Treaty Art.I.

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the “exploration and use” of outer space must be undertaken in accordance with international law.<sup>10</sup> While such provisions were very apt for their time, it is difficult to imagine how the economic exploitation of outer space will be able to truly succeed from a legal standpoint until they are modernised.

With regard to states’ liability, Arts VI and VII, which were later expanded upon by the Liability Convention, hold that states shall bear international responsibility for the activities of their governmental and non-governmental entities in outer space, and prescribe that non-governmental entities operating in outer space must be authorised and continually supervised by their respective state.

“Launching States”<sup>11</sup> are made liable for any damage caused to another contracting state, or its “natural or juridical persons”, by an object which they have launched into outer space.<sup>12</sup> However, with regard to what would happen if any such liabilities were triggered, the Outer Space Treaty remains completely silent. Moreover, despite the Treaty’s assurances to “natural or juridical persons”, private entities would not themselves be able to bring an action against a liable government.<sup>13</sup>

### Liability Convention

The objective of the Liability Convention was to expand upon Arts VI and VII of the Outer Space Treaty and 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 the Convention of a full and equitable measure of compensation to victims of such damage”.<sup>14</sup>

The liability that this Convention addresses is that of “launching States”<sup>15</sup> towards foreign states and their nationals.<sup>16</sup> The damage which would incur such liability, however, is defined as “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 organisations”.<sup>17</sup> Instantly, therefore, the material scope of the Liability Convention is limited. It covers only damage to personal or physical “property” and does not encompass other harm or harmful acts such as expropriation or arbitrary discrimination. The extent of any liability depends upon where the relevant damage, caused by the space object of a launching state, has occurred; strict liability applies for any damage incurred on the Earth’s surface, or to aircraft,<sup>18</sup> whereas damage caused in outer space will only render a State liable if it “is due to its *fault* or the fault of persons for whom it is responsible”.<sup>19</sup> Upon what standard “fault” is or is not to be established is also inherently problematic. Yet even if these issues are resolved, the question as to how “a full and equitable measure of compensation”<sup>20</sup> would be calculated poses further difficulty and is a source of potential argument.

The Liability Convention also falls short when it comes to dispute resolution mechanisms. While it does, unlike the other Space Treaties, provide for a dispute resolution forum, by way of a “Claims Commission”,<sup>21</sup> the process is very lengthy<sup>22</sup> and somewhat curious. For example, there are no provisions for appointment by default, meaning that should a party fail to nominate a commission member, the Claims Commission would be comprised of one member only. This leaves open the possibility for a dispute of considerable national and international importance to be decided by a single individual, simply because a deadline is missed. Moreover, none of the modern-day references to the required independence and impartiality of the adjudicators feature.

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10 Outer Space Treaty Art.I.

11 This phrase, which was later made a defined term in the Liability Convention, refers to either (i) a State “that launches or procures the launching of an object into outer space”, or (ii) a state “from whose territory or facility an object is launched”—see Outer Space Treaty Art.VII; Liability Convention Art.I(c).

12 Outer Space Treaty Art.VII.

13 Outer Space Treaty Art.VII.

14 Liability Convention, preamble.

15 See Outer Space Treaty Art.VII; Liability Convention Art.I(c).

16 Liability Convention, art VII. This affirms that the Convention’s provisions will not apply to damage caused by a launching State to either its own nationals or to foreign nationals that participate in the operation of the space object in question.

17 Liability Convention Art.I(a).

18 Liability Convention Art.II. The only exception to this rule is at Art.VI; namely, when the damage in question has been caused by the claimant state’s negligence or when it (or the natural or juridical persons that it represents) has acted with deliberate intent to cause the damage. However, an “exception to the exception” is also provided for: this exoneration will not kick in where the launching state has acted in breach of international law.

19 Liability Convention Art.III, emphasis added.

20 Liability Convention, preamble.

21 Liability Convention Arts XIV–XX.

22 A mandatory one-year period of diplomatic negotiations must precede the establishment of any Claims Commission (Liability Convention Arts IX–XIV). The Claims Commission itself may then take up to a further six months to be formed (Art.XV).

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In addition, no claim may be brought before a Claims Commission if it is also being pursued before the national courts of the launching state in question.<sup>23</sup> Most significantly, however, the process is not, in any event, binding, unless the parties otherwise agree<sup>24</sup> and, even if they were to concur, the enforceability of a Claims Commission decision has not been tested. Finally, the “natural and juridical persons” to whom the Convention refers<sup>25</sup> are again left without direct recourse to recover any damages they may suffer; only states may bring actions in the event of a dispute.<sup>26</sup>

### 3. Moves towards a Modernisation of the Dispute Resolution Framework Relating to Outer Space Disputes

Since the entry into force of the Space Treaties, the commercial and technological advances made in outer space have outpaced their legal counterparts. While this arguably applies to all areas of space law, which is likely to need modernising in its entirety to keep up with the way in which the commercial space age is developing,<sup>27</sup> it is certainly the case with regard to the available dispute resolution mechanisms to resolve conflicts arising in this area.

This has become increasingly recognised by legal and academic communities in recent years, and various international symposia have been held to address the issue. Even the United Nations, which houses the Office for Outer Space Affairs (UNOOSA) and the Committee on the Peaceful Uses of Outer Space (COPUOS), and which spearheads the global regulation of all human activity in outer space, organised a conference session upon the subject in 1996, as part of the fiftieth anniversary celebrations of the International Court of Justice (ICJ).<sup>28</sup> Here, it was proposed that a special chamber of the Court be established to hear disputes related to activities in outer space. The outlook for the future of arbitration in this field is therefore not quite as bleak as it may first appear. In fact, several recent initiatives to create new dispute resolution forums for conflicts arising in relation to outer space activities have recognised and embraced arbitration for its aptness to resolve such conflicts. In addition, many of the intergovernmental bodies operating in this sector have incorporated arbitration into their constitutions for some time, meaning that arbitration is, in fact, already mandatory in some areas of space law.

#### Industry-specific intergovernmental organisations and instruments

The intergovernmental bodies which regulate the plethora of outer space activities have commonly adopted arbitration as a dispute mechanism in their constitutional treaties. This is particularly significant given that many of these entities are encompassed within the definition of a “state” in several of the Space Treaties.<sup>29</sup> In fact, given that such entities are themselves not actually able to bring actions before the ICJ, arbitration is the only effective form of binding dispute resolution open to them, save for the national courts of their members.

The Agreement Relating to the International Telecommunications Satellite Organisation (ITSO Agreement), upon which the ITSO is founded, stipulates that all disputes arising out of the ITSO Agreement, either between its 149 contracting states<sup>30</sup> or between those states and the ITSO, must be resolved by arbitration.<sup>31</sup> Such arbitration is to be conducted in accordance with Annex A of the ITSO Agreement, which sets out various procedural rules. The European Telecommunications Satellite Organisation (EUTELSAT) also stipulates mandatory arbitration for its 49 member states,<sup>32</sup> to resolve disputes arising from the interpretation or application of the EUTELSAT Convention, as amended,<sup>33</sup> should negotiations fail to succeed within one year. Again, procedural specificities are

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23 Liability Convention Art.XI.2.

24 Liability Convention Art.XIX.2.

25 Liability Convention Art.I(a).

26 Liability Convention Art.VIII.1.

27 As stated in the introduction, this subject is outside the scope of this article, but is the focus of another article currently being prepared by the author.

28 I.H.Ph. Diederiks-Verschoor, “The Settlements of Disputes in Space: New Developments” (1998) 26 J Space L 41, 43–45.

29 Registration Treaty Art.VII.1; Liability Convention Art.XXII.1; Moon Treaty Art.16.

30 As at December 2014. For a full list of members, see [http://www.itso.int/index.php?option=com\\_content&view=article&id=486&Itemid=28&lang=en](http://www.itso.int/index.php?option=com_content&view=article&id=486&Itemid=28&lang=en) [Accessed 2 October 2016].

31 ITSO Agreement Art.XVI(a).

32 For a full list of members, see <http://www.eutelsatigo.int/en/about/member-states/> [Accessed 2 October 2016].

33 EUTELSAT Amended Convention, 28 November 2002 Art.XV. The original Convention Establishing the European Telecommunications Satellite Organization of 1 September 1985 contained similar arbitration provisions at Art.XX.

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provided in an Annex B. Similarly, the European Organisation for the Exploitation of Meteorological Satellites (EUMESAT) dictates that arbitration be employed by its 30 member states<sup>34</sup> to resolve disputes concerning the interpretation or application of the EUMESAT Convention.<sup>35</sup> The International Mobile Satellite Organisation (IMSO) Convention, to which 101 state parties have acceded,<sup>36</sup> does not go as far as the above bodies—it contains an optional arbitration provision, together with an annex containing specific procedural rules, should a dispute arise which cannot be resolved via negotiation within one year.<sup>37</sup> The European Space Agency (ESA) Convention<sup>38</sup> also provides for optional arbitration in the event of a dispute,<sup>39</sup> as does the Constitution of the International Telecommunications Union (ITU),<sup>40</sup> though the latter has additionally made available an Optional Protocol whereby states may elect to resolve all disputes by compulsory arbitration should they not wish it to remain an optional recourse.<sup>41</sup> Bilateral and multilateral agreements between states have also seen the incorporation of arbitration clauses—the most notable example being the International Space Station Intergovernmental Agreement, signed on 29 January 1998 by the 15 governments involved in the Space Station project.<sup>42</sup>

While disputes that trigger the above arbitration provisions will inevitably be very different from both commercial contractual arbitration and private versus state cases, it is nevertheless encouraging to see that arbitration provisions are already prevalent in the space industry. It is also important to recall the hundreds of commercial contracts between industry operators which contain arbitration clauses, some of which have already been triggered. As the commercial space age rockets, such clauses will increasingly be invoked.

### Arbitral institutions

Two arbitral institutions, discussed below, have already made concerted efforts to respond to the needs of the commercial space age and the types of disputes which it will generate—one arguably more successfully than the other. To date, though, it seems that no participants have made use of these developments, nor have any other arbitral establishments followed their lead. This may well change over the next decades as the number of commercial space disputes increases.

### International Court of Air and Space Arbitration (ICASA)

This organisation, which was created in 1994 by the Société Française de Droit Aérien et Spatial and is based in Paris, is currently the only arbitration institution in the world that is designed specifically to administer arbitrations relating to disputes arising from space-related activities.<sup>43</sup>

However, to date, its existence has remained almost secretive—indeed, its arbitration rules even specify that proceedings administered thereunder are subject to “absolute secrecy”.<sup>44</sup> The institution has no website, its arbitration rules are not readily available and, it appears, the body has never in fact been utilised since its creation. This forms a harsh contrast—and, in fact, an acute incompatibility—with the Space Treaties, which oblige states and intergovernmental organisations to remain fully transparent with regard to all outer space activities and to keep “the Secretary-General of the United Nations as well as the public

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34 For a full list of members, see

<http://www.eumetsat.int/website/home/AboutUs/WhoWeAre/MemberStates/index.html> [Accessed 2 October 2016].

35 Convention for the Establishment of a European Organisation for the Exploitation of Meteorological Satellites, as amended, 19 November 2000 Art.15.

36 For a full list of members, see <http://imso.org/public/MemberStates> [Accessed 2 October 2016].

37 IMSO Convention Amended as Adopted by the Twentieth Session of the IMSO Assembly Provisionally Applied from 6 October 2008 Art 17 and “Annex”.

38 Convention for the Establishment of a European Space Research Organisation, 30 October 1980.

39 ESA Convention Art.XVII.1.

40 Constitution of the International Telecommunications Union (ITU), as adopted at the ITU Plenipotentiary Conference in March 2015 Art.56.2.

41 Optional Protocol on the Compulsory Settlement of Disputes Relating to the Constitution of the International Telecommunication Union, to the Convention of the International Telecommunication Union and to the Administrative Regulations, as adopted at the ITU Plenipotentiary Conference in March 2015. See also ITU Constitution Art.56.3.

42 Space Station Agreement Between the United States of America and Other Governments, 29 January 1998 Art.23.4.

43 The ICASA By-Laws and its Rules of Arbitration (ICASA Rules) were published in (1995) 2 *Revue française de droit aérien et spatial* 29–54. For further information, see also Michael Bourély, “La création d’une cour internationale d’arbitrage aérien et spatial” (1994) 43 *ZLW* 401.

44 ICASA Rules Art.3.

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and the international scientific community” regularly informed in relation thereto.<sup>45</sup> In addition, while the ICASA Rules do provide for benefits such as the availability of an “emergency arbitrator procedure”<sup>46</sup> and the maintenance of lists of recommended arbitrators<sup>47</sup> and experts,<sup>48</sup> they are already in serious need of revision in order to face up to the complexities of modern-day disputes.

### Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (Outer Space Rules) of the Permanent Court of Arbitration (PCA)

This set of industry-specific arbitration rules was adopted on 6 December 2011 by the PCA<sup>49</sup> and is based in large part on the UNCITRAL Arbitration Rules 2010,<sup>50</sup> with several adaptations to take into account the specificities of outer space activity. The Rules aim to rectify some of the shortcomings of other dispute resolution mechanisms with regard to space disputes, including the lack of recourse for private parties against states and the limitations of the Liability Convention.<sup>51</sup>

The PCA advisory group which produced the Outer Space Rules specifically recognised that each of the traditional advantages of arbitration posed a specific benefit to space disputes, in particular its final and binding nature:

“This can be of great importance given that space activities often operate on precise and fixed schedules, especially as regards the time windows for landing, atmospheric re-entry, descent and landing, and orbit insertion. In these situations, only swiftly-obtained decisions are of any value.”<sup>52</sup>

The way in which the Outer Space Rules have been tailored to meet the needs of the space industry is extremely encouraging. Unusually, the Rules apply when two or more parties agree to apply them to any disputes arising between them “in respect of a defined legal relationship”, whether or not contractual.<sup>53</sup> Moreover, Art.1.1 affirms that “the characterisation of a dispute as relating to outer space is not necessary for jurisdiction where parties have agreed to settle a dispute under these Rules”. This therefore immediately does away with the potentially troublesome ambiguity of what may or may not constitute a dispute which relates to outer space, and makes the question of jurisdiction dependent purely upon the will of the parties. The Rules also specifically acknowledge that their adoption automatically constitutes a waiver of any sovereign or other immunity that may otherwise be applicable—thereby counteracting any immunity that not only states but also the many intergovernmental organisations that operate in space may have from jurisdiction. The requirements for the Notice for Arbitration are also space specific—claimants are required to identify “any rule, decision, agreement, contract, convention, treaty, constituent instrument of an organisation or agency, or relationship” which has given rise to the dispute.<sup>54</sup> This broad language reflects the abundant sources of law which may give rise to disputes in this sector. The Secretary General of the PCA is obliged by the Rules to maintain optional lists of arbitrators<sup>55</sup> and experts<sup>56</sup> in this field, so as to assist the parties when appointing the tribunal, and to aid both the parties and the tribunal when appointing any experts. Moreover, given the stakes that may be involved in space-related disputes, the Rules provide for a one-, three- or five-member tribunal should the parties so agree. Other benefits also exist, such as a “non-technical document” which the tribunal can request from the parties to assist it in understanding “scientific, technical or other specialised

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45 Outer Space Treaty Art.XI.

46 Outer Space Treaty Arts 27–36.

47 Outer Space Treaty Art.4.

48 Outer Space Treaty Art.5.

49 Optional Rules for Arbitration of Disputes Relating to Outer Space Activities, 6 December 2011, [http://www.pca-cpa.org/Outer%20Space%20Rules4fd4.pdf?fil\\_id=1774](http://www.pca-cpa.org/Outer%20Space%20Rules4fd4.pdf?fil_id=1774) [Accessed 2 October 2016].

50 Judge Fausto Pocar, “An Introduction to the PCA’s Optional Rules for Arbitration of Disputes Relating to Outer Space Activities” (2012) 38 J Space L 171. In relation to the reliance of the Outer Space Rules upon the UNCITRAL Rules, Judge Pocar states that “whenever a departure from their provisions was not called for by some unique aspect of space-related disputes—we tapped into a wealth of precedent, thus enhancing the degree of predictability in the interpretation and application of the Outer Space Rules”, 180.

51 Pocar, “An Introduction to the PCA’s Optional Rules for Arbitration of Disputes Relating to Outer Space Activities” (2012) 38 J Space L 171, 175–176.

52 Pocar, “An Introduction to the PCA’s Optional Rules for Arbitration of Disputes Relating to Outer Space Activities” (2012) 38 J Space L 171, 178.

53 Outer Space Rules Art.1.1.

54 Outer Space Rules Art.3.3(d).

55 Outer Space Rules Art.10.4.

56 Outer Space Rules Art.29.7.

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information”;<sup>57</sup> and a “confidentiality advisor”, who can assist a tribunal in determining whether certain documents, which may be so technically complex as to have any real meaning for the layperson, should be treated as confidential.<sup>58</sup>

Other arbitral institutions should be encouraged to ensure that their arbitration rules also hold up to the demands of space-related disputes over the next decades, so as to guarantee that the rise in disputes in this industry is adequately catered for. However, no matter how much these bodies may do to benefit the resolution of commercial disputes, when it comes to actions against states, the fundamental lack of recourse for private enterprises remains. This simply cannot persist if the exploitation of outer space by commercial enterprises is to continue.

### 4. Efforts made to date to address the lack of recourse for private entities with “space claims” against states

The International Law Association has made the most progressive—and only concerted—attempt to resolve the existing pitfall of the resolution of private versus state outer space disputes: namely its adoption, at the 68th ILA Conference in 1998, of the Final Draft of the Revised Convention on the Settlement of Disputes Related to Outer Space Activities (Draft Convention).<sup>59</sup>

The Draft Convention’s terms are applicable to private companies and individuals of contracting states, as well as to states themselves. It provides contracting parties with the option to choose one, or more, of three possible binding dispute resolution mechanisms, either upon ratification of the Draft Convention or at a later date: an International Tribunal for Space Law, the establishment of which is foreseen by the Convention, the ICJ, or an arbitral tribunal.<sup>60</sup> If a dispute arises between parties who have not chosen the same mechanism, and unless they both otherwise agree on a particular method, the default applicable procedure will be arbitration, whether or not this was their preferred method.<sup>61</sup> If a contracting party is subject to a dispute yet has not elected a procedure, or if its selection has for whatever reason expired, it will be deemed to have accepted arbitration.<sup>62</sup> In addition, given that the Draft Convention recognises that only states may be parties before the ICJ, the only options for private parties in the event of a dispute will be either the International Tribunal for Space Law (which will not be established until the Convention is in force and 21 parties agree to its formation<sup>63</sup>) or arbitration, depending upon which their state of origin has selected. Acknowledging the complex characteristics of outer-space disputes, the Draft Convention stipulates that any court or tribunal will also have jurisdiction to rule upon interpretive issues arising from other international agreements<sup>64</sup> and provides for the appointment of two scientific or technical experts to sit, but not vote, with the court or tribunal, if the latter so desire.<sup>65</sup> Provisional measures may also be awarded, if the parties’ rights are endangered or “to prevent serious harm to the space environment”;<sup>66</sup> and any arbitral tribunal will be made up of five members.

However, there are a few notable drawbacks to the Draft Convention. First, it states that “in the event of a dispute as to whether a court or tribunal has jurisdiction the matter shall be settled by decision of that Court or tribunal.”<sup>67</sup> On the face of it, this is all very well, and recognisant of the well-accepted principle of *competence-competence*. However, the very premise of the *competence-competence* principle is that any jurisdictional decision taken by the tribunal will, ultimately, be subject to review by a court or alternative appellate body, if challenged. This is where the Draft Convention falters, as it does not make provision for a seat of arbitration (which would provide recourse to the courts of that jurisdiction in the event of a jurisdictional challenge), nor does it provide for an ad hoc committee system similar to that offered by ICSID. Rather, the Draft Convention stipulates that any challenges to an arbitral award, jurisdictional or

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57 Outer Space Rules Art.27.4.

58 Outer Space Rules Art.17.8.

59 A copy of the Draft Convention can be found in A.H.A. Soons and Michael Byers (eds), “The International Law Association Report of the 68th Conference Held at Taipei, Taiwan, Republic of China, 24–30 May 1998” (London: ILA, 1998) 249–272.

60 Draft Convention Art.6.1.

61 Draft Convention Art.6.4. If two parties have agreed to the same procedure, however, then any dispute may only be submitted to that procedure, unless the parties otherwise agree.

62 Draft Convention Art.6.2.

63 Draft Convention Art.37.1.

64 Draft Convention Art.7.2.

65 Draft Convention Art.8.

66 Draft Convention Art.9.1.

67 Draft Convention Art.7.3.

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otherwise, must be heard and decided by the same arbitral tribunal which made the award,<sup>68</sup> and that such challenges can only be referred to another court or tribunal with the “agreement of all parties to the dispute”.<sup>69</sup> The issues of conflict that would arise in such situations are therefore likely to make the Convention unworkable until stronger interpretation, revision and annulment provisions are incorporated within it.

Other areas may also need to be ironed out before the Draft Convention, in its present form, can be adopted. For example, the instrument applies to “all activities in outer space and all activities with effects in outer space, if such activities are carried out by states and international organisations ... by nationals thereof or from the territory of a Contracting Party.”<sup>70</sup> The interpretation of such a broad and open scope seems to lend itself to jurisdictional challenges by wieldy respondents when disputes are finally brought under it—though, when presenting the Draft Convention for approval, the ILA’s Space Law Committee stated that, with regard to this material scope, “it is considered premature to engage in definitions and/or descriptions”.<sup>71</sup> However, given that the seemingly simple term “investment” in the ICSID Convention Art.25 has generated a flood of case law, commentary and articles as to what the term means, it seems inevitable that the ILA’s more complex wording will only follow the same course. Moreover, the option for contracting parties, in the Draft Convention Art.1.2, to then exclude, or limit its applicability to “space activities of a certain kind” is likely to only serve to increase any already existing ambiguity. A placeholder has been left in the Draft Convention for a “Definitions” section at Art.2, which is designed to be completed insofar as considered “necessary or useful”<sup>72</sup> at a later stage, when states and international organisations negotiate the final text. It is likely to be not only “necessary” and “useful” but, rather, imperative that this section is completed satisfactorily, to ensure the efficient application of the Draft Convention once ratified. Other interpretive issues include the obligation to conduct non-binding settlement procedures “expeditiously”<sup>73</sup> before having recourse to binding methods, which again seems to give unruly respondents room to wriggle out of confrontation on the basis of what may or may not constitute the term “expeditious”.<sup>74</sup>

In addition, no thresholds are set out regarding the independence or impartiality of any arbitrators, and the requirement for the exhaustion of local remedies “where this is required by international law”<sup>75</sup> means that private entities may face long delays before they can actually bring any claims under the Draft Convention, thereby somewhat defeating its purpose. Furthermore, while the tribunal’s ability to determine its own procedure<sup>76</sup> facilitates flexibility, it does little for procedural certainty. The main shortcoming of the Draft Convention is, however, perhaps the most obvious; namely, the fact that no states have yet signed up to it.

## 5. The Future: To Boldly Venture to Establish a Truly Functional Framework for the Resolution of Outer Space Disputes Between Private Entities and States

In light of the above, the time has arguably come for the establishment of an International Convention on the Settlement of Outer-Space Disputes (ICSOD Convention), which would create a dedicated International Centre for the Settlement of Outer Space Disputes (ICSOD Centre) before which private companies and individuals could bring claims directly against states, who have unlawfully interfered with their outer space activities, via binding arbitration. This would address the void which currently overshadows the myriad of other commercial advances being made in outer space today. Such an instrument could largely mirror its older sibling, ICSID, while tailoring itself to the specificities of outer space disputes by drawing from the proposals that the ILA and other bodies have already made to date, with respect to the modernisation of the outer space dispute resolution framework.

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68 Draft Convention Art.35.1.

69 Draft Convention Art.35.2.

70 Draft Convention Art.1.1.

71 Maureen Williams, “ILA Taipei Conference (1998) Space Law Committee Report” in Soons and Byers (eds) “The International Law Association Report of the 68th Conference Held at Taipei, Taiwan, Republic of China, 24–30 May 1998” (1998) 245.

72 Draft Convention Art.2.

73 Draft Convention Art.3.

74 Williams, “ILA Taipei Conference (1998) Space Law Committee Report” in Soons and Byers (eds) “The International Law Association Report of the 68th Conference Held at Taipei, Taiwan, Republic of China, 24–30 May 1998” (1998) 246. The ILA Space Law Committee did set out by proposing a period of three months but, given the difficulties in ascertaining when such period should commence, agreed to instead utilise the term “expeditious”.

75 Draft Convention Art.12.

76 Draft Convention Art.28.



## Star Wars: the Launch of Extranational Arbitration?

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Access to such an ICSOD Centre could, like ICSID, be ensured through the general ratification of the ICSOD Convention and the subsequent agreement to submit to its jurisdiction, either in relevant bilateral or multilateral agreements between states or on an ad hoc basis. Its scope should be wide enough to enable private entities to bring claims against not only states but intergovernmental organisations, as well as against their respective member states on a joint and several basis, thereby mirroring the Space Treaties. Its jurisdiction would be mandatory and its decision-making powers binding. Its procedural arbitration rules would be clear and fair. It would also prevent the fragmentation of space law by providing a single and unique forum for private entities to bring their space claims against states, thereby avoiding the unsystematic application of international and domestic law by a varied assortment of judicial bodies. For practitioners, a coherent body of case law would evolve. The ICSOD Convention should also consider the very public nature of its subject matter, and contemplate a mechanism whereby interested third parties could participate in proceedings. In order to ensure an effective, credible and enforceable regime, the ICSOD Convention and its Centre should, again like ICSID, and contrary to the ILA's proposal, constitute a self-contained regime of annulment, recognition and enforcement. This, in turn, would serve to provide private corporations with a degree of assurance and legal certainty in the event that they needed to bring an action against a state, thereby encouraging the continued pursuit of commercial space activity.

The drafting of such an ICSOD Convention will clearly require an astronomic amount of time and effort from anyone bold enough to embrace the challenge, not least with respect to the difficulty of defining the extent of its extraterritorial scope. However, the magnitude of such a feat does not render it any less necessary.

### 6. Conclusion

Private operations in outer space are no longer a matter of science fiction. As the commercial space age continues to rapidly evolve, international arbitration is likely to play an increasing role in the resolution of disputes relating to outer space activities—whether between private enterprises, states or a mixture of the two. At a contractual level, the world's principal arbitration institutions are already fairly well equipped to deal with such disputes, though they must continue to ensure that they adequately meet the technical and specific needs of this industry, and procedural rules must be fine-tuned and updated accordingly.

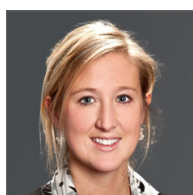
However, action must be taken, and soon, to fill the very black hole that exists in relation to non-contractual disputes between private enterprises and states. Public international law must inevitably evolve over the next few decades in order to ensure that it effectively governs the economic exploitation of outer space. If and when it does, investors in this arena will be granted significantly more substantive rights than those afforded by the Space Treaties of the Cold War era. Effective and efficient recourse must therefore be provided to such private entities to bring actions to defend those rights against states, whether via an ICSOD Convention or otherwise.

We, as public international law and international dispute resolution lawyers, have an unprecedented opportunity to address these issues now, before the explosion of commercial space activity that this century is likely to witness. As J.F. Kennedy stated in his famous “Moon Speech” of 1962, “The exploration of space will go ahead, whether we join it or not, and it is one of the greatest adventures of all time.”<sup>77</sup> As to whether the international arbitration community will rise to the challenge and join this adventure over the course of the next hundred years; watch this space.

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<sup>77</sup> John F Kennedy's “Moon Speech” (n 1).

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