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# DISPUTES, DISAGREEMENTS AND MISUNDERSTANDINGS ALTERNATIVE PROCEDURES FOR SETTLEMENT. CLAIMS PROCESS IN OUTER SPACE

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## ABSTRACT

Disputes, disagreements and misunderstandings are widely perceived as obstacles to achieving common objectives through cooperative enterprise. But our experience shows that disputes regardless of the good intentions of the parties are inevitable and, worked out, strengthen enterprise. Much in state relations cannot be foreseen, and too often the circumstances upon which they relied for enterprise have materially changed. In this inquiry, it is argued that trends are critical elements in orienting ourselves in our attempts at uncovering the contemporary trends and future probabilities. The focus of the inquiry is upon trends that relate to dispute settlement procedures, applicable in outer space disputes, and especially to resolving disputes in a decision environment of cooperative enterprise. A study of trends indicates that disagreements are inherent in overall decision flow - even in the process of establishing facts and evidence, and the process of claim is in turn resolved by decision. [MCDOUGAL AND ASSOCIATES, 1960]

Inherent in the flow of decisions is the way in which we develop our tolerances about what others are doing, or about what patterns of conduct we expect from each other in the future. Law arises from this process of claim, and as academic scholars and practitioners alike, we are familiar with the development of law as formulated in the legislation and treaties, or informally in enforcement actions, and in the patterns that find themselves in the common law courts or in countless claims processes that have a juristic equivalence to these.

Seeking the authority linked to the state or the relevant political entity itself, the tribes, nations, Greek, Roman, and others of antiquity created tribunals that protected the power of the elites, and even operated in some situations to project it. This linkage to the power process continues today: Mr. Justice Holmes spoke of jurisdiction as power. The outlook at these earlier periods - and now - is that of competing states and peoples seeking an undefined control of scarce resources or of scarce values, including power itself.

Disputes thus arise in the process of power, and disputes are, au fond, problems of power and competition for power. Dispute settlement has evolved as part of this power process, part of the competitive elements that comprise it, and as part of the confrontational elements that have been retained in competition amongst them. A shift in these

attitudes can be detected with regard to activities in outer space: its environment and the formidable technologies involved predispose decision-makers toward cooperative enterprise, and through cooperative enterprise we can expect settlement by cooperative procedures.

## CONSULTATION AND CONSULTATIVE MECHANISMS.

A number of the recent multilateral agreements among states - and of the proposed codifications of commercial and trade law - have introduced a dispute mechanism that is informal, but effective, and that with growing practice has substantial promise in more effective dispute settlement, to wit, the introduction of consultation. Wherever consultation is used and effective, the fundamental principle of economy is served: the traditional dispute mechanisms generally impose costs, burdens and slow-downs on the fulfillment or continuation of a program. The economy principle, like the standard of reasonableness in balancing claims under law, is one of the fundamental principles that can build upon cooperation among the disputants even in situations in which they have assumed sharply adversarial or hostile positions.

Communications can be expanded to achieve a variety of purposes: they can range from simple, informal and continuinginterpretations of the guiding principles that the parties are employing for their endeavor, to monitoring the progress of their efforts, thereby avoiding the surprise of misperceptions or misunderstanding, to preventing or avoiding a breakdown or interruption of their endeavor by alerting the parties to the likelihood of more serious or deep-seated differences that might crop up.

Guidelines for the Design of Consultative Settlement Mechanisms. The following examples can be used to guide the design of alternative dispute mechanisms, based on consultation. In addition they can include fact-finding, independent panels of experts, panels or "courts" of inquiry, and so on offer us a look into the possibilities for more appropriate dispute settlement in activities in outer space. We can consider in an extended study:

- the simple consultation arrangement such as that undertaken between the United Kingdom and Argentina with respect to reporting to each other naval warship transit of seas in the areas around the Falkland/Malvina islands.

- the norms, principles and standards that have been adopted both in separate agreements and in the draft prepared by the International Law Commission relating to state responsibility, and reshaped or incorporated in undertakings among the parties.

- the creation of a General Fund, the dispersal of moneys or compensation from the Fund; analogous to those used in maritime situations involving hazardous pollution, nuclear wastes and oil spills, or like those used for investment disputes, and operating somewhat more formally to resolve those disputes primarily in the context of monetary disputes as in the International Centre for Settlement of Investment Disputes, initially formulated in a 1964

resolution of the Board of Governors of the World Bank.

- the dispute settlement mechanisms that go to the heart of the operative provisions of the GATT [General Agreement on Tariffs and Trade], and include consultation to prevent disputes from becoming intractable or leading to a cycle of reciprocating retorsions. The other international organizations concerned with international trade and commerce, and the International Monetary Fund, the International Civil Aeronautics Association, and others, have a variety of settlement mechanisms, invoking a variation of consultation. These are relevant to this study and will be examined for the purpose of this study in a longer paper.

- the adoption by the parties - especially parties other than states or other political entities - of standardized terms, provisions or conditions designed to lay down the entire "regime" for the program, policies or plans and the joint endeavor they have adopted for outer space.

These and other mechanisms building upon consultation and channelled communications - i.e., communications to a purpose, or communications toward achieving common and clarified goals or objectives - can be designed in a variety of forms, as the above examples indicate. But they will build upon the effective assimilation of the decision process and the effective design of that process. They will in short be premissed on the realization that perspectives at the time the dispute settlement process is <u>designed</u> may differ, with or without differing circumstances, at a later time when the dispute occurs.

<u>Observations.</u> Several observations can be made at this point:

- if the parties have committed themselves to a cooperative endeavor, they will most likely be attracted to cooperative measures to settle future disputes, and will most likely accept the principle of acting in good faith as the primary guiding principle of their joint efforts.

- the parties who have adopted cooperative enterprise and its objectives as their program will be most likely to share a common stake in the success of the enterprise, and this common stake will become the basis for strengthening cooperation and assuring more economical disposal of disputes of all kinds.

- the parties who design their enterprise with a deliberate expectation of achieving common objects and a common stake are most likely to adopt and enlarge upon a pattern of open, timely and adequate communmications that in turn will promote their success of their enterprise, and also the success of consultative-communications procedures for overcoming their misunderstandings, or more serious disputes.

- in all activities, relations, and endeavors among states or other parties there is at least a minimal cooperative effort, and this hard core element of cooperation is the appropriate basis to build or design future dispute settlement procedures.

GENERAL PRINCIPLES. The parties can formulate and seek to invoke general principles or norms to guide their behavior and to guide their resolution of disputes. The International Law Commission has adopted general principles on state responsibility for international wrongs or breach of international obligations. Principles such as these provide a certain precision - though also subject to interpretation or the harmonization of differing views about how they are to be applied. They can be reformulated as part of a mechanism that will reduce the problems raised by disputes and dispute settlement, or incorporated into the agreements or committments of the parties.

Fact-Finding. Fact finding procedures offer a further opportunity to introduce compatible devices: consultation and undertakings for reasonable fact-finding procedures either by the parties or third parties serves a number of purposes arrayed with disputes - including the introduction of a cooling-off device, or a device moderating extreme or unnecessary claims. Such procedures may be adopted ad hoc, or, as with the Geneva Protocols of 1977 introduced institutionally as a means to deal with problems raised under those law of war agreements. They may therefore extend from application to commercial or other undertakings even to the situations raised during hostilities.

Simple Consultation. Simple consultation procedures may be adopted as a first step, prior to more intensively controlled procedures, or as a step without detailed consultation. The U.K.-Argentine Agreement reached at the conclusion of the War in the Falklands/Marinas is an example.

The Fund. The Fund is a device that offers flexible, adaptive, means for dispute settlement; the funds for maritime incidents, damage from accidents of nuclear powered ships or from oil tankers provide examples. Through the fund, compensation can be made for damage from incidents such as that of COSMOS 954 that was created in Canada with the crash of a nuclear powered satellite. The Fund can also be used to channel state behavior: moneys are made available to support desired behavior, or denied when the funded state fails to fulfill the standards imposed. Payment can be made from the fund to conduct research or testing of damage limiting procedures. Research may look to the future or be connected with a specific incident - e.g., the oil spill might be the basis for testing new ways to limit damage.

The Fund's operation may enable parties to determine certain technological or other standards that will reduce or prevent accidents or incidents in the future: for example, double bottoms are now being required for oil tankers because tests indicate that they will reduce the possibility of oil spill damage. Introduced into outer space technologies, the Fund offers excellent opportunities for achieving the goals of states in their exploration and use of outer space.

Investment Dispute Mechanisms. The institutional mechanism of the World Bank is an example with its International Centre for Settlement of Investment Disputes. The Bank

and its executive branch are introduced, procedures for conciliation and arbitration are brought to bear, and the operating mechanism enables the Bank to protect its interests in its commitments. Even the problem of submitting to jurisdiction can be overcome, because parties that deal with the Bank must deal with its institutions to receive their funds.

Standardized Terms. Proposed in other contexts, such as international trade and commerce, standardized terms afford a general and reasonably uniform practice in a variety of subjects and endeavors. Standardized terms enable the parties to agree upon the application of international law - including the applicable law of outer space - and make this law effective and enforceable through access under the agreements to the municipal courts and their access to the executive arm. They also suggest the way through to a total or comprehensive design of decision ranging from the start-up of programs and enterprise, their implementation, the management of disputes and the completion.

The World Bank and the standardized terms it uses for its loans provide one example. The General Agreement on Tariffs and Trade offers another example of the possibilities here. The various uniform codes for monetary, trade and other purposes are widely known and have established a substantial, operational practice. The GATT furnishes a general, comprehensive umbrella to trade activities, a mechanism that discourages adversarial or hostile measures for working through trade controls and differences about such controls, and includes consultation as a procedure that the parties are to invoke.

Consultation: Design. Consultation can be designed to apply to a given enterprise or association or cluster of activities among states or other participants. The participants to the design of such programs or enterprise may at the outset assume or determine that they will rely upon pure consultation - or consultation without the adopting of other dispute solving mechanisms. Or they may include consultation with some of the traditional approaches, infusing a greater degree of consultation in the provision they have designed. Or consultation may be concurrent with other dispute processes, or a necessary precedent.

Additional combinations are self-evident: consultation may be combined with data reporting, responsibilities to warn or notify - e.g., in outer space, this might include warnings about impending risks or hazards, or dangerous situations, or harmful interference threatening a particular effort or action, and so on. It may be coupled with a responsibility to provide records and reports, to publicize these, and to including with further consultation monitoring procedures to follow the performance or action of joint participants. Some of these features were adopted in the latest nuclear weapons control agreements between Russia and the United States. Inspection - on the ground, from air space, and from outer space - afford further variations for monitoring; and ground monitoring might include technological devices that can operate without the intrusion of human beings.

The participants may find that they can avoid disputes by staging the performance of their agreements or undertakings. As with construction contracts or other activities that are either long term or require considerable disbursement of loaned funds, the staging of activities involving a joint enterprise enables all participants to assure themselves of the attainment of their common goals, the success in other words at each stage, and even the need to modify how they are to attain the goals, or the goals themselves.

All of these measures have a bearing on the strengthening of law itself: they lead to patterns of expectation that can coalesce so that the patterns are expected, but also expected to operate in a regime that has the added impact of authoritative decision [especially when made part of an agreement intended to operate under the rule of law], and gives the decision flow of law greater strength as well. The application of law has the useful advantage of providing controls, or supporting the controls of the participants, under community standards.

Dispute Mechanisms by Design. We can design the model provisions so that municipal systems - their law and enforcement capabilities can be invoked, thereby strengthening international law through increased effectiveness and enforceability. It is possible that wide spread adoption of globally established standard provisions - even provisions that have within reason the same general content - states that have not ratified or adhered to the outer space treaties or other applicable instruments of international law will be subject to that law - at least for the subject of the agreement. This may induce them ultimately to become parties to such agreements, including the outer space treaties in which a number of states have yet to adhere. This in turn will provide at least some momentum to states adhering to and finding a part of their common stake in a global order, in which they can participate, and in which they can share in the universal quest for human dignity.

## DISPUTE SETTLEMENT - DRAFTING THE MODEL.

The Consultative Model. The numerous provisions currently adopted by states furnish us with the experience and possibilities for the design of a consultation process - involving communications and decisions - for the resolution of disputes, and to make that process operative as part of the overall decision flow among the parties. The purpose in seeking a more refined model is to make consultation the primary means for doing this, and for enlarging its range so that the parties will shift towards the prevention, avoidance, even the informal deterrence of situations or misunderstandings that may lead to disputes. The participants become familiar with the problem of disputes in the context of their activities and endeavors, so that consultation thus appraised is part of a larger, more general process of assessing the specific needs regarding consultation with regard to specific subjects that make up a joint endeavor or joint venture or enterprise.

The principles relating to the

design offered here include:

- adoption of a design that builds upon the principle of cooperation and the common objectives including the success in achieving the goals embraced in a common stake.

- the adoption of the decision process that is already in play between the participants and applying the relevant features of that process to the decisions needed to avert, or dispose of, disputes, misunderstandings, and so on.

- the adoption of general principles, norms and standards that will afford the participants guidelines or means to channel their communications and decisions both to achieve their common goals and to control their efforts preventing misunderstandings. [Mention has been made of the general principles of state responsibility, but numerous other examples can be found].

- the negotiation and adoption of the provisions relating to consultation that are most likely to ensure their being used and invoked by the participants, with close attention to be given to the negotiating process as a major element in developing an effective design for future disputes, and with further attention being given to monitoring the enterprise, activities and so on to determine whether additional consultation is required to modify or refine the goals initially adopted, or the means to achieve the goals, either adopted or in operation.

- the adoption of the traditional approaches to dispute settlement [e.g., court or adversary proceedings] as measures of last resort, or, alternatively, reshaping the traditional approaches to strengthen the consultation component, and designing them to ensure the application of the consultation component.

- the establishment of the procedures to be invoked when necessary with regard to amending, revising, suspending elements of the undertakings for a common enterprise so that the enterprise can continue without the need for substantial revision of the operating agreement. This may require consideration of creating the appropriate institutions among the participants to provide for interpretations, review of applications, and so on. [cf, Standing Consultative Commission of the strategic nuclear arms agreements of the United States and the former Soviet Union - established in Article XIII of the ABM Treaty].

To avoid prolixity in the provision to be adopted, the design may include (a) a general set of comments that the participants might adopt to reflect their expectations regarding the use of the consultation-communication process; (b) a further set of statements that lay down consultation as an operating element applicable to the entire enterprise activity as well as the disputes; and (c) a declaration of the procedures, institutions, and norms that may be invoked for the dispute process.

## The Model Clause.

The parties to this undertaking recognizing that disputes,

disagreements and misunderstandings [herein "differences"] will arise in the course of their activities [optional language: in the joint enterprise and program set forth in this agreement] have for this purpose adopted the following guidelines, standards and principles to resolve these differences:

Consultation

1. All differences relating to this agreement, its interpretation, implementation or other application of its provisions shall be the subject of consultation, or, if the parties so determine through the assistance of third parties to support consultation with a view to achieving their common understandings by means most likely to achieve the object and purpose of the agreement and of the common ends sought in the enterprise undertaken by the parties.

2. The parties undertake to consult concerning prior to taking other measures as to differences relating to this agreement, with a view to preventing, avoiding, averting or engaging in misperceptions or misunderstandings in the performance of this agreement.

Definitions.

The parties have agreed upon the following definitions:

- the term "consultation" includes negotiation, bargaining, and other acts of intercourse among the parties relating to the conduct of this agreement, or to monitoring the performance of the program or enterprise, or relating to the stages set for achieving their agreement; it includes, in context, the process involving claims of any kind, or counterclaims in response invoked for resolving disputes as well as for pursuing the goals of the agreement ["process of claim"].

- the term "differences" includes disagreements, differences, issues, misunderstandings, misperceptions and differences or disputes of any kind or arising from any combination of these.

- the term "process of claim" refers to the communications between the parties in which they make or exchange claims, demands, or requests with each other, with a view to establishing their demands or positions, or with a view to reaching tolerances or harmonization where their claims differ.

- the term "consultation commission" or "consultative commission" refers to the commission, committee or institution established by the parties, whose power and competence is that delegated by the parties with the powers, competence and procedures to monsitor the performance of the work undertaken pursuant to their agreement, to review and assess the results, and to determine the success of the program in such stages as are appropriate while the program is pressing. The consultative commission may, as the parties determine, provide advisory competence, recommendations or counsel regarding their joint enterprise or their misunderstandings. It may similarly provide a fact-finding service or panel to provide facts or investigate or inquire into facts as requested by the parties.

- the term "joint enterprise," "joint venture," "joint endeavor," and others referring to joint programs, activities, or relations is used to refer to matters in which the parties have a common interest, seek common goals, and the success of a common stake.

- the term "participants" refers to those whose decisions or actions are the subject of differences involving this agreement.

- the term "parties' refers to the states or other entities, public or private, [optional: or individuals] that are involved in a dispute, or in other activities in which their actions or decisions are relevant.

Consultative Commission.

The consultative commission shall be established pursuant to the consent of the parties, and shall have such powers and competence as the parties shall determine; it may be established as a permanent, standing institution, or as an ad hoc institution for the purposes of a given inquiry or determination. The commission shall be empowered (a) to assist during consultation, including the adoption of the role as mediator or conciliator; (b) to provide advisory recommendations; (c) to assess or monitor the activities of the participants, determine whether they promote the enterprise, or impair its success, and provide recommendations to the participants to avert harmful interference with the progress of their enterprise; (d) to afford fact finding inquiries or investigations as directed by the parties and for such purposes as determined by the parties; (e) to provide good and friendly offices aimed at promoting a successful undertaking and to assist the participants in reaching the object and purpose of their agreement.

## CONCLUSION

Alternative mechanisms for dispute settlement include those that accommodate disputes as part of the decision flow or the claims process established among participants in all of their activities and enterprise. For example a monitoring commission can be established for this purpose, with the added powers or competence to evaluate the data that it receives in terms of the agreement that it monitors. Viewed in the larger perspective that presupposes disputes as innate in human activities and as a disruption of the decision process, such mechanisms would range deeply into the overall program or undertakings aimed at a successful, joint enterprise or in the more informal relations such as the activities of states.

The design and negotiation of the design of dispute settlement procedures that are assimilated into the decision process of the enterprise itself affords, in itself, a an element in the negotiating and planning processes that enable the parties to harmonize their policies, expose the differences in positions or claims, and work out disputes that may arise from misunderstandings that appear at the conception of their endeavors. They are then realistically establishing a program more likely to succeed, and one that can invoke the principle

of economy to reduce the costs and burdens of dispute settlement. They can achieve this in part because they would then be turning to factors that are similar to prevention or deterrence, but, in the context of space activities, deserves more approbatory terms.

Consultation can operate in combination with other features: as indicated in this paper they are likely to be coupled with the operating principles or standards, or expected to apply as in the nuclear free zone treaties, the Antarctica Treaty, and the outer space liability convention. Experience with the maritime conventions and the growing degree of regulatory control over maritime activities offers material of value in considering the controls to be achieved in outer space - and in considering the extent to which these controls can be designed, through carefully wrought measures for consultation, to reduce the costly impact of disputes.

Consultation among states concerned with the proliferation of chemical weapons was introduced in the recent Chemical Weapons Convention [CWC]. The provisions of that Convention are similar to many of those proposed here, except that they do not suggest, as the proposal here suggests, that the parties monitor the joint efforts on a continuing basis with a view to minimizing the possibility of disputes being raised. The present approach thus taken would assimilate the continuing process of consultation and communication into any process subsequently adopted for dispute settlement. But the CWC would strengthen the operating bureaucracy by creating three organizations: the Conference of the States Parties, as principal organ, to establish fundamental policy and assure compliance; the Executive Council with a rotating membership to assure implementation or execution of the Convention; and, the Technical Secretariat to follow through with implementation and verification.

The proposal in the Chemical Weapons Convention that the Executive Council of that Convention be informed of actions taken to courts or other tribunals, to the Council introducing good offices, and to the intention of having the Executive Council authorized by the General Assembly of the United Nations to request advisory opinions from the International Court of Justice. If the parties to the Chemical Weapons Convention were to apply Article XIV , their experience with its application would be useful to the development of content under the provision proposed here.

It is likely that consultation is promoted because of the economic and social consequences likely to arise with future incidents that involve hazardous materials. The trans-frontier elements raise complex issues not readily resolved in courts. The possibilitility of using reporting procedures such as those found in the environmental impact assessments or of applying complex standards such as specifications for ship construction, the assignment of new shipping lanes, the regulation of shipping crew competence and readiness, and the responsibility of the coast guard all with regard to maritime activities have their counterparts in outer space, where regulation would replace simple contracts and simple norm application. The experience of institutions in other

arenas can be invoked: the International Atomic Energy Agency, the Intergovernmen- tal Maritime Organization, and numerous others offer such experience.

In the context of outer space, space debris may, potentially, lead to more severe, longer lasting, and wider-spread injury on space and the immediate atmosphere than oil spills - a terrestrial counterpart in the maritime incidents This is clearly a problem that involves the necessity of prevention as well as a comprehensive, substantial process of dispute settlement over the details of liability, responsibility and the restoration of values. But dispute settlement procedures should when designed be considered in the perspective of preventive and control objectives. By assessing and looking to the foreseeable problems of the future, disputes and the uncertainties of new, untried, or partially tried technologies in the dispute context, the enterprise itself can be more competently designed during the formulation stage. But the lessons learned in comparative treatment of this kind, are lessons relating to the decision process itself, so that the applications to differing activities or relations may turn out to be appropriate without hindrance. The terrestrial disasters and aftermath thus become relevant to a fair allocation of responsibility and liability.

In short, where disputes are perceived as part of the overall decision problem among two or more participants, this recognition and the negotiation of appropriate dispute settlement through consultation can enhance the entire program and increase the chances for its success. [JANET MCDONNELL, VALDEZ OIL SPILL, 1992].

Key to disentangling much of this complex interchange of communications is to ensure that the communications themselves take center stage. To this end, the design of procedures based upon effective use of consultation is of utmost importance. To ensure that disputes are amicably and quickly resolved, the negotiation and implementation of procedures designed for disputes are, in themselves, part of the process of implementing and strengthening the potentials of consultation.

This is not the conclusion of this inquiry. A future inquiry seeking an effective design model on a larger scale than the example suggested here should consider where consultation has been used, the undertakings and provisions that it relied upon, how effective it was in the decision processes of the parties, and where it may have been deficient and in need of refinement.

[This paper is exclusively the result of the author's inquiry and the conclusions are not to be attributed to Georgetown University.

SOURCES. McDougal and Reisman, INTERNATIONAL LAW IN CONTEMPORARY SOCIETY, 1980, McDougal and Feliciano, LAW AND MINIMUM WORLD ORDER, 1961; McDougal, Lasswell, and Vlasic, LAW AND PUBLIC ORDER IN SPACE, 1963; Janet McDonnell, THE U.S. ARMY CORPS OF ENGINEERS RESPONSE TO THE EXXON VALDEZ OIL SPILL, Ft. Belvoir, 1992; ALABAMA CLAIMS ARBITRATION: BALCH, 1900; USGOVT., THE ARGUMENTS AT GENEVA, 1873; Mysyrowicz, ARBITRAGE DE L'ALABAMA, GENEVE, 1872