The European Space Agency's experience with mechanisms for the settlement of disputes

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Introduction

The European Space Agency is a European organisation established pursuant to a Convention signed in Paris on 30 May 1975 by the representatives of 12 European Member States.[1] The Convention entered into force on 30 October 1980, on the date of France's ratification, and there are currently 15 Member States, Portugal having deposited the instrument confirming its adhesion to the Agency Convention, effective on 14 November 2000. The purpose of the Agency is to provide for and to promote, for exclusively peaceful purposes, cooperation among European States in space research and technology and their space applications.

Discussing dispute settlement mechanisms at ESA could be seen as something of a challenge, because the 25-year history of the Agency has been free of actual cases of dispute settlement. This may be attributable to the dissuasive effect of dispute settlement clauses calling for final and binding disposition of a dispute through arbitration; in other words, because calling into play arbitration clauses implies a significant investment of time and money, the parties to an agreement or a contract will be encouraged, and therefore will make all their best efforts, to settle their disagreement at an earlier opportunity. ESA practice is consistent with regard to concluding agreements or contracts in which dispute settlement clauses, and in particular provisions confirming the possibility of binding arbitration, are accepted by the parties. As we will see below, the space activities conducted by ESA provide numerous angles for examining the various aspects of dispute settlement.

In presenting an overview of ESA's experience with mechanisms for the settlement of disputes[2], the Convention's provisions for disputes should first be discussed, followed by the relevant provisions usually introduced in contracts concluded by ESA with industry or research centres for the purpose of carrying out Agency programmes and activities, followed by a similar analysis of ESA's inter-organisational agreements. Annex I to the Convention, pertaining to the organisation's privileges and immunities, clearly has a significant bearing on ESA's experience with regard to dispute settlement, and this will also be examined below.

Each year, ESA concludes numerous agreements with other international

[1] In the period between the opening to signature of the Convention and its entry into force, the European Space Research Organisation (ESRO) established in 1962 – acting under the name of ESA - continued to exist, the ESA Convention being applied *de facto* during that period.

[2] A fairly complete overview can be found in Bockstiegel K.-H. "Settlement of Disputes regarding Space Activities", in 21(1) *Journal of Space Law*, 1-10. See also Cocca A.A., "Law Relating to Settlement of Disputes on Space Activities", in *Space Law – Development and Scope*, ed. Praeger(Westport), 191-204, from page 195.

organisations and institutions and with governments, organisations and institutions of non-member States for the purpose of cooperating in the conduct of space activities. These agreements, which are generally authorised at Council by unanimous votes of all Member States pursuant to Article XIV.1 of the Convention, may take different forms and designation: fully-fledged agreements, arrangements, memorandums of understanding, exchange of letters (the latter being agreements in simplified form) or even reimbursable agreements, which could be viewed as procurement contracts. ESA also regularly concludes agreements with its Member States or their institutions for the execution of certain parts of its programmes, including the establishment of facilities. Examination of the provisions of these agreements pertaining to dispute settlement may provide a better understanding of the practice which has been established over the years.

Dispute settlement mechanisms may also be examined from the standpoint of what I would refer to as "dispute avoidance clauses and practices". Because the United States is ESA's main partner in space cooperation, NASA practice with regard to cross-waiver of liability, first implemented in the 1970s, has become the standard in the space world and has been widely adopted by ESA. A cross-waiver of liability is of course applicable within a partnership and does not affect the rights of third parties, individuals or States, in the event of their suffering damage from space activities. In this connection, ESA has formally accepted the rights and obligations outlined in the 1972 Liability Convention[3] for the space activities it conducts, and recent developments in ESA's Council have confirmed some movement towards acceptance by ESA and its Member States of the binding nature of arbitration, subject to reciprocity, that could be initiated pursuant to that Convention.

I. The ESA Convention

(a) Privileges and immunities

The need to include provisions in the ESA Convention concerning an arbitration tribunal for the settlement of disputes can be explained and justified by the existence of the privileges and immunities granted to ESA as an international organisation.[4] In this

[3] The Convention on International Liability for Damage Caused by Space Objects, of 29 March 1972, in United Nations Treaties and Principles on Outer Space (A/AC.105/572/Rev.2).

[4] The European Court of Human Rights, in two separate decisions of 18 February 1999 issued in Strasbourg, in (a) the case of Waite and Kennedy v. Germany (Application no. 26083/94), and (b) the case of Beer and Regan v. Germany (Application no. 28934/95), contributed significantly to a better understanding of the effect of an international organisation's immunity from jurisdiction. In these cases, which came after exhaustion of remedies before the German courts by the plaintiffs, the latter, who had worked for a considerable time at the ESA establishment in Darmstadt (ESOC) under a contract between ESA and a foreign firm, claimed they had become ESA staff members in application of a German statute. The gist of the decision in the second case (which is similar to the first) is as follows: "58 For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention. 59 The ESA Convention ... expressly provides for various modes of settlement of private-law disputes, in staff matters as well as in other litigation. Since the applicants argued an employment relationship with ESA, they could and should have had recourse to the ESA Appeals Board". For the sake of completeness,

connection, Annex I to the ESA Convention provides that the Agency shall have legal personality, within the usual meaning of this expression; it includes the capacity to enter into contractual commitments, to acquire and dispose of movable and immovable property, and to be a party to legal proceedings. Article IV of this Annex confirms that the Agency shall have immunity from jurisdiction and execution, although a number of limited exceptions are also listed in the article. The Agency's property and assets are immune from any form of requisition, confiscation, expropriation and sequestration, and also from any form of administrative or provisional judicial constraint. Over and above the provisions for the protection of the Agency's property and assets, Annex I also deals with tax exemption for official activities, the import and export regime, disposal of funds, the entry, stay and departure of Agency staff, the status of Member States' representatives and of experts, together with the social security regime and fiscal regime of staff members.

The Agency's privileges and immunities are also subject to specific and more detailed provisions in the agreements concluded with a number of Member States to provide a framework for the activities of ESA's technical establishments, in Germany, the Netherlands, Italy and Spain for example. These agreements are generally referred to as "host agreements". In the United States, the Agency benefits from the provisions of the International Organisations Immunities Act, originally through a series of Executive Orders and since August 1998, after amendment of the Act, through applicable provisions of the Act itself[5]. Finally, ESA's activities in Russia, including those carried out by the ESA Moscow Office, are covered by privileges and immunities pursuant to an agreement concluded in 1995[6].

(b) Arbitration tribunal

The ESA Convention, in its Article XVII, specifies that any dispute between two or more Member States, or between any of them and the Agency, concerning the interpretation or application of the Convention or its Annexes

it is recalled that these cases, when submitted subsequently to the ESA Appeals Board, were dismissed because the Board considered that the applications did not fall within the notion of "staff members".

[5] The International Organisation Immunities Act is codified in Title 22, section 288 of the United States Code. A significant case (enquiry) in the United States, directly affecting ESA as a defendant, is the one referred to as "the TCI Affair", summarised in Krige J., Russo A. and Sebesta L., A History of the European Space Agency 1958-87, published by the ESA Publications Division, 2000, 481-490. On 25 May 1984, Transpace Carriers Inc (TCI) filed a petition - based on Section 301 of the Trade Act of 1974 - against eleven European governments and their space-related agencies, in particular ESA and CNES. It accused them of aiding and abetting the European firm Arianespace in illegally dumping its rocket launch services on the US market. The Presidential decision of 17 July 1985 rejected the TCI petition.

[6] See: Agreement between the European Space Agency and the Government of the Russian Federation on the establishment of the European Space Agency Permanent Mission, and its status, in the Russian Federation, ESA/LEG/82 signed on 10 April 1995.

which is not settled by or through the Council, shall, at the request of any party to the dispute, be submitted to arbitration. This also applies to the disputes referred to in Article XXVI of Annex I to the Convention, i.e. those disputes that could arise from damage caused by the Agency, or involving any other non-contractual responsibility of the Agency, or involving the Director General or a staff member of the Agency who can claim immunity from jurisdiction under the relevant provision of the Annex.

The above arbitration procedure shall be in accordance with the conditions outlined in Article XVII and with additional rules adopted by Council. As foreseen in the Convention, these additional rules, which are detailed and extensive, define further matters such as the procedure to be applied, the manner in which the arbitration tribunal is to be set up and the documentation to be provided, were adopted at Council's 66th meeting, in October 1984.

Article XVII of the Convention lays down the following:

(a) the arbitration tribunal shall consist of three members, one nominated by each party, and the third, who shall be the chairman, nominated by the first two arbitrators;

(b) other Member States or the Agency may intervene in the dispute if they have a substantial interest in the decision of the case;

(c) the tribunal shall determine its seat and establish its own rules of procedure;

(d) the award, which shall be made by a majority of the tribunal's members, shall be final and binding on the parties and not subject to appeal;

(e) the parties to the dispute shall comply with the award without delay.

II. Contracts

The above-mentioned Annex I to the ESA Convention, in its Article XXV, directs the Agency to provide for arbitration when concluding written contracts. It adds that the arbitration clause shall specify the law applicable and the country where the arbitrators sit and that the arbitration procedure shall be that of that country. Finally, it mentions that the enforcement of the arbitration award shall be governed by the rules in force in the State on whose territory the award is to be executed.

The general clauses and conditions for ESA contracts provide a standard clause for arbitration to be included in the Agency's contracts. This clause number 13 specifies that:

(a) a party may request that any dispute arising from the contract be submitted to arbitration;

(b) the arbitration tribunal shall have its seat in the country where the contractor has its legal seat or where the contract is to be executed;

(c) any dispute shall be finally settled in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in accordance with the

corresponding rules, unless agreed otherwise in the contract; in the latter case, the procedure of the arbitration tribunal shall be that of the country mentioned in the contract;

(d) the award shall be final and binding on the parties and no appeal shall lie against it; its enforcement shall be governed by the rules of procedures in force in the State in which it is to be executed.

(e) As mentioned before, there is no known case of arbitration related to ESA contracts. It could be added that ESA contracts with the industry of Member States generally indicate that the arbitration will take place in the capital of the State named in the contract. In the case of Russian industry, the practice has been to elect that arbitration take place in Stockholm, under Swedish law.

III Agreements

(a) Consultation and dispute settlement clauses in agreements concluded by ESA

In preparing this paper, I consulted the agreements concluded in the period 1998-2000 between ESA and other international organisations and institutions and with governments, organisations and institutions of non-member States for the purpose of cooperating in the conduct of space activities. I believe that the examination of the agreements concluded by ESA over a longer period would have led me to the same findings since ESA's practice has been consistent over the years. The list contains a first category of agreements, i.e. those concluded with States of Central and Eastern Europe to establish a general framework for cooperation[7]. These agreements contain provisions for consultation between the parties when a question of interpretation arises. As a second step, the establishment of an arbitration tribunal is envisaged for a final disposition of the dispute, with the usual approach whereby each of the parties names an arbitrator, with the third arbitrator being named by the first two arbitrators. The relevant provisions specify that in case of disagreement on the nomination of the third arbitrator, the President of the International Court of Justice (ICJ) may be asked to proceed with this nomination. A second category of agreements concluded during the above-mentioned period concerns the relations between ESA and technical organisations of Member States, which contain similar clauses. For this category, however, it is generally the Chairman of the International Chamber of Commerce, or in a certain number of cases either the President of the ICJ or the Secretary General of the Permanent Court of Arbitration, who may be asked to nominate the

[7] For an extensive analysis of these agreements, see Kopal V., "Cooperation Agreements with ESA, Central European Viewpoint" in *Legal Aspects of Cooperation between the ESA and Central and Eastern European Countries*, Proceedings of the International Colloquium, Charles University, Prague, 11-12 September 1997, Kluwer Law International, 31-41. See also Hoskova M., "Tendencies of dispute settlement in present eastern European space law" in *Proceedings of the 39th Colloquium of the Law of Outer Space*, International Institute of Space Law (IISL), 7-11 October 1996, Beijing, 75-84.

third arbitrator in case of disagreement on this matter between the parties.

(b) Impact of space station cooperation on ESA practice

The most important international partnership ever concluded for a technological and scientific project is that arising out of the 1998 Intergovernmental Agreement (IGA) concerning cooperation on the International Space Station, concluded between the United States, Russia, Japan, Canada and the European Partner encompassing 11 ESA Member States. Upon its entry into force, this IGA will replace the corresponding 1988 Agreement to which Russia was not a party.[8] ESA is the Cooperating Agency designated by the 11 ESA Member States to discharge the responsibilities of the European Partner, through a number of dedicated ESA optional programmes conducted consistent with the ESA Convention. The detailed obligations of ESA are set out in the ESA/NASA Memorandum of Understanding (MOU) concerning cooperation on the International Space Station, signed on 29 January 1998, one of four similarly-worded MOUs signed early-1998 between NASA and each of the other Cooperating Agencies of the Partner States.

Current practice with regard to the drafting of dispute settlement clauses for all types of arrangements concluded between ESA and its main space partner, NASA, in all fields of cooperation or other types of dealings between the two entities, derives primarily from the outcome of the mid-1980s negotiations on the Space Station project. Negotiation of the new IGA in 1994-1997 has not, except on one specific point[9], modified the approach to dispute settlement established in 1988, suggesting that the original Partners and Russia had decided that this approach reflected the most balanced solution that could be reached in any circumstances.

One of the most difficult issues during the original negotiations on the Space Station project in 1985-88 was undoubtedly dispute settlement. A number of Partner States, on the one hand, contended that an international project of this magnitude could only be envisaged on the solid grounds provided by binding arbitration as a mechanism for dispute settlement. On the other hand, the United States

[8] It may be important to recall that ESA and NASA cooperated extensively on the Spacelab project in the 1970's, on the basis of an agreement dating from 1973 which could be considered on many aspects, including a number of legal ones, as a trend-setter for Space Station Cooperation. To illustrate the magnitude of the project, it is recalled that development of the International Space Station has been valued at 60 billion US dollars, of which approximately 3.5 billion US dollars represents the European contribution; it is also expected that an equal amount will be spent by the Partners on the operation and utilisation of the Station during the 10-15 years of its exploitation. See by the author "Legal Environment for Exploitation of the International Space Station (ISS), in *International Space Station: the Next Space Marketplace*, Kluwer Academic Publishers, 2000, 141-153.

[9] In the 1988 MOU, NASA had precedence in case of a disagreement with another partner in a cooperation body and could ask for immediate implementation of the contested decision, i.e. absence of consensus, pending settlement at higher level(s). In the 1998 MOU, as a result of Russia's arrival in the partnership, it is provided that a partner may decide not to implement its part of a contested decision pending settlement.

insisted that, because of the sheer magnitude of the project and the sums involved, it was in the interests of the parties to settle their disagreements at the lowest possible organisational level, i.e. even before reaching the stage of formal consultations and State-level dispute settlement, and that therefore binding arbitration was not needed.

The approach to dispute settlement in Space Station cooperation is somewhat complex. First, it has to be borne in mind that day-to-day cooperation is conducted primarily through a number of technical cooperation bodies, organised in a hierarchical structure, each coordinating the partners' responsibilities for aspects of the project. The MOU provides that these bodies conduct their activities on the basis of consensus. In other words, an issue shall not be considered resolved until consensus has been reached among the interested agencies. If a disagreement persists between two or more partners on a particular issue, then a two-level consultation process may be pursued consistent with the relevant MOU provisions, normally ending with a decision of the highest authorities of the Cooperating Agencies. At this stage, an unresolved issue could still be submitted for consultation between representatives of the Partner States concerned in accordance with the IGA. Finally, Article 23.4 of the IGA provides: "if an issue not resolved through consultations still needs to be resolved, the concerned Partners may submit that issue to an agreed form of dispute resolution such as conciliation, mediation, or arbitration". This language of compromise indicates that: (a) there is actually the possibility for the Partner States to submit their disagreement to a form of dispute resolution, and (b) this possibility can only be exercised subject to a new agreement of the interested parties, on a case by case basis, as to the form it should take.

The approach to dispute settlement in almost all of the agreements, whatever their type and subject, concluded between ESA and NASA in recent years, borrows from the Space Station approach described above. The first step in resolving a difference of interpretation on a particular issue takes the form of discussion in the management structure established for the project, i.e. between the engineers interacting daily for the purpose of conducting the activities. The second step involves possible consultations, at the appropriate level, by agency officials and, further, a decision by the highest authorities of the Agencies. The third and final step requires that a new specific agreement between the two agencies be concluded for proceeding subsequently with a formal settlement of dispute through conciliation, mediation, or arbitration.

IV. Dispute avoidance clauses and practices

A number of measures can be adopted to limit the need for dispute settlement procedures to be called into play. ESA has taken such measures by introducing cross-waiver of liability clauses in the majority of its agreements, not only with organisations of non-member states but also with organisations of Member States. Also, by recognising for its own activities the obligations that could be generated by application of the 1972 Liability Convention, ESA pursued its objective of introducing more certainty into the legal environment in which space activities take place.

(a) cross-waiver of liability

Briefly, cross-waiver of liability clauses are provisions confirming the parties' commitment to refrain from presenting claims against another party to an agreement or contract in the event that the other party causes damage. In other words, each party agrees to bear the cost of losses resulting from unforeseen events. These waivers have become an indispensable element of high-risk space and aeronautical activities world-wide; beyond merely saving money on insurance premiums, cross-waivers encourage space activity by reducing uncertainty. With the largest class of potential claims eliminated, i.e. the one related to damage to goods caused by the interactions of two partners in the framework of a particular activity, and thus clearly excluding losses generated by the failure of a party to abide by its contractual obligations, each party may proceed unburdened by the concern that other involved parties may bring claims against it.[10]

Cross-waiver of liability clauses may be simple and all-embracing or, on the contrary, fairly complex, particularly if they provide for a number of exceptions, in particular those confirming that injury, impairment of health or death caused to a person are excluded from application of the cross-waiver. They occasionally provide for the obligation on a party to waive claims against the other party and its related entities throughout the chain of its contractors and subcontractors. Such clauses have been adopted in the majority of the ESA agreements described in this paper.

(b) 1972 Liability Convention

The ESA Member States are parties to the 1967 Outer Space Treaty[11] and the 1972 Liability Convention. One of those Member States, France, has jurisdiction over the Guyana Space Centre in Kourou. Delegations of the Members States of ELDO and ESRO, ESA's two "predecessor" organisations, succeeded in having a clause inserted in some of the space treaties, including in Article XXII of the 1972 Liability Convention, enabling an international organisation conducting space activities to accept the rights and obligations set out in the said Treaty, thus allowing the Treaty to be applied to some extent to that organisation. ESRO presented its declaration of acceptance of the rights and obligations set out in the 1972 Liability Convention on 23 September 1976, concluding that "the reference made in this Convention to "States" applies to it with effect from the date of the present Declaration". This resulted in the ESA Council adopting, on 13 December 1977, a Resolution

[10] See the written statement by E.A. Frankel, NASA General Counsel, before the Subcommittee on Space and Aeronautics Committee on Science of the US House of Representatives, 30 October 1997, accessible on the Internet at www.prospace.org/issues/cats/971030_ed_frankle_xwaiver.htm.

[11] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, of 27 January 1967, in United Nations Treaties and Principles on Outer Space, (A/AC.105/572/Rev.2).

on the Agency's legal liability, setting out in detail the practical conditions according to which ESA Member States would respond to a claim for damage caused by space activities conducted by the Organisation.[12] Finally, in a Resolution dated 21 June 2000,[13] the ESA Member States:

(a) recommended to Member States not having done so to recognise, subject to reciprocity, the binding effect of the decision of the Claims Commission provided for in the Liability Convention;

(b) invited the ESA Director General to build on its declaration of 23 September 1976 to recognise, subject to reciprocity, the binding effect of the decision of the Claims Commission provided for in the Liability Convention, provided that two-thirds of Member States had taken similar steps.

Conclusion

This paper reveals two trends in ESA's practice with regard to the settlement of disputes. The first is based on the ESA Convention, which clearly favours the constitution of an arbitration tribunal for final disposition of a dispute between ESA and another entity under public international law, or between ESA and a contractor. The second trend is that which tends to develop in large-scale cooperation projects with international partners, where the possibility of referring a dispute to arbitration or another dispute settlement mechanism is subject to conclusion of a new specifc agreement, once the multi-layered consultation process has been exhausted.

It is difficult to foresee how these trends will evolve. However, although ESA will continue, for the foreseeable future, to carry out its activities in the manner envisaged by the Convention, i.e. on the basis of financial contributions from its Member States for its mandatory and optional programmes, a number of upcoming developments may have an impact on ESA practice, including practice relating to dispute settlement. First, ESA is bound to adopt a "closer to market" approach to its activities, for example by encouraging increased competition in Europe's space industry and entering into partnership with industry for specific projects. In this connection, a particular challenge ahead is the plan to commercialise approximately 30% of Europe's share of International Space Station utilisation. Another challenge is the *"rapprochement"* between ESA and the European Union, which was mapped out in a resolution adopted at ministerial level by each of the two organisations on 16 November 2000. This could result in ESA carrying out the European Union's projects when these require a space segment. These are significant challenges for the next decade which are likely to have an impact on many aspects of ESA activities and possibly on its dispute settlement mechanisms.

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[12] See Bourély M., "Space Law and the European Space Agency", in *Space Law - Development and Scope*, Ed. Praeger (Westford), pp 82-96. The text of the declaration of acceptance and Resolution on the Agency's legal liability are reproduced, in French, in Lafferranderie, G., "Responsabilité juridique internationale et activités de lancement d'objets spatiaux au CSG", in issue 80 of the *ESA Bulletin* (November 1994), pp 59-68.

[13] The Resolution's title is: "Additional Declaration concerning Claims Commission awards under the United Nations Convention on International Liability for Damage Caused by Space Objects".