# Disputing with ESA*

*Ulrike M. Bohlmann***

A legal dispute entails a disagreement or an argument about a legal situation. Disputes may and do arise in all relationships where partners may have diverging or contrasting interests. They do have a disruptive potential that actors tend to try to contain in interdependent and long-term relationships, in which the partners know they may very well be led to cooperate again in the future.
In its almost forty years of existence, ESA has gathered its own experience with the anticipation, the prevention and ultimately also the settlement of disputes. This paper provides an overview of the different kinds of legal relationships that affect ESA or that ESA entertains and the different strategies that ESA has developed to deal with disputes that may arise therein. These relationships range from the

- cooperation among the Member States that have created ESA;
- cooperation with the Member States or their institutions;
- cooperation with other international organisations and with governments and institutions of non-member States;
- contractual and pre-contractual relations with industry; and
- employment relations with its staff.

For each of these different relationships, ESA has set-up via internal regulation or inter-party mechanisms tailored suitable solutions, which have evolved over the years to keep the disruptive potential of disputes under control and to allow the actors concerned to sort out legal arguments effectively, always in the perspective of legal security and keeping long-term cooperative relations workable and trustful. This paper reports on the mechanisms and procedures involved available to all those doing business with ESA.

## A. ESA's Status ...

The European Space Agency was created by its Member States as an independent international intergovernmental organisation in the classical sense.[1] The fact that the parents of the ESA Convention decided on the term "*Agency*" and

---

* The views expressed are purely personal and do not necessarily reflect the view of any entities with which the author may be affiliated.

** European Space Agency, Paris, France, Ulrike.Bohlmann@esa.int.

1 Convention for the Establishment of a European Space Agency, Paris, May 30, 1975, 14 I.L.M. p. 864 (1975).

not the more classical "*Organisation*" does not have an impact on that characteristic. This linguistic choice can be understood as only mirroring their aspiration to creating a modern and pragmatic environment for the joint European space effort. Interestingly enough, the official German version of the Convention for the establishment of a European Space Agency is entitled Übereinkommen zur Gründung einer Europäischen Weltraum-*organisation*,[2] and the official German abbreviation is still EWO.
As such an international intergovernmental organisation, ESA enjoys the classical immunity from jurisdiction and execution stipulated in Article XV of the Convention and further detailed in its Annex I, in particular Article IV of Annex I to the Convention. This immunity guarantees the Agency's independence, which is necessary in order to allow it to fully realize its objectives, as these also involve political and economic interests across the twenty Member States. This immunity is counterbalanced by a system of dispute prevention and dispute settlement mechanisms that foresees the tailored approach to each potential dispute that may arise in the various relations the Agency entertains on different levels.[3]

## B. … and Its Consequences

In this following section, we will take a closer look at these different measures and procedures, designed in the Convention and other fundamental texts and developed in the daily legal life of ESA.

### I. Disputes among or with Member States

The Convention establishes in Article XVII an ad-hoc-arbitration procedure in case of disputes 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. Although much of the ESA Convention has been modeled after the Convention for the Establishment of a European Space Research Organisation[4], ESRO, one of ESA's predecessors, the drafters of the ESA Convention decided not to do so concerning dispute settlement. Article XVI of the ESRO Convention stipulated that a dispute which was not settled by the good offices of the ESRO Council should be submitted to the International Court of Justice, unless the Member States concerned agreed on some other mode

2 Bundesgesetzblatt II 1976, pp. 1862.

3 In its advisory opinion of 29 April 1999, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Cumaraswamy), [1999] ICJ Rep. 62, the International Court of Justice emphasised the obligation of an international organisation (here: the UN) to provide for alternative modes of dispute settlement as a corollary of its right to immunity. Advisory opinion available at: <www.icj-cij.org/docket/files/100/7619.pdf>.

4 Convention for the Establishment of a European Space Research Organisation, Paris, June 14, 1962, 6258 U.N.T.S. p. 35 (1965).

of settlement. The default rule was thus judicial adjudication rather than arbitration. Certainly, the approach of settling disputes via arbitration promises a more flexible and supple procedure tailored to the individual needs of the parties. The typically confidential procedure implies less a potential loss of face.[5] Additionally it may also have played a role that one Member State had shortly before experienced adverse findings against itself by the ICJ.

In this context, ESA serves as a good example of how the usual hesitation of sovereign states to submit themselves to binding dispute settlement mechanisms is to a certain degree extenuated when they join to form an international organization[6]. Contributing factors may be the limited number of states involved, and the generally high degree of homogeneity with regard to their political, economic and legal systems.

The general rule as stipulated in Article XVII of the Convention establishes that recourse may be had to arbitration if it has not been possible to settle the dispute amicably through Council. The fact that throughout the nearly forty years of existence of ESA, not one dispute has been submitted to arbitration is proof of the efficiency of the culture of intensive negotiation and inclusive cooperation that prevails in the ESA Council. Trade-offs always seem possible in the relations between partners who know that they will have to continue working well together. The perspective of arbitral proceedings as last resort may contribute to the Member States' willingness to resolve issues before they become disputes.

Article XVII of the Convention roughly defines the outlines of the arbitration procedure: The dispute needs to concern the interpretation or application of this Convention or its Annexes, or relate to a damage allegedly caused by the Agency, Article XXVI of Annex I to the Convention. Parties may only be one or more Member States or the Agency. Member States or the Agency, not being parties to the dispute, may intervene in the proceedings with the consent of the Arbitration Tribunal if it considers that they have a substantial interest in the decision of the case. The Arbitration Tribunal shall consist of three members. Each party to the dispute shall nominate one arbitrator; the first two arbitrators shall nominate the third arbitrator, who shall be the chairman of the Arbitration Tribunal. The award of the Arbitration Tribunal shall be made by a majority of its members, who may not abstain from voting. This award shall be final and binding on all parties to the dispute and no appeal shall lie against it. The parties shall comply with the award without delay. In the event of a dis-

5 As to the advantages of arbitration as a type of dispute settlement mechanism, see: Karl-Heinz Böckstiegel, Developing a System of Dispute Settlement Regarding Space Activities, in Washington 1992 Session of the International Institute of Space Law p. 27, at p. 31 (Washington, 1993); reprinted in ECSL Space Law and Policy Summer Course, Basic Material p. 187 (European Center for Space Law, 1994), see also: Alexis Mourre, Arbitration in Space Contracts, in: Arbitration International Vol. 21 (2005), pp. 37, at 52 sseq.

6 See Karl-Heinz Böckstiegel, Streiterledigung bei der Kommerziellen Nutzung des Weltraums, in Festschrift für Ottoarndt Glossner p. 39, at p. 44 (Heidelberg 1994).

pute as to its meaning or scope, the Arbitration Tribunal shall interpret it at the request of any party to the dispute.
In accordance with paragraph 2 of Article XVII of the Convention, additional rules on arbitration have been adopted by Council on 25 October 1984. These define what the submissions and counter-submissions need to contain, the time-limits etc. In case, the dispute is among two or more Member States, the Director General takes the role of a registrar before the constitution of the arbitral tribunal. In the event of the Agency itself being a petitioning party to a dispute with one or more Member States, the Director General's request for arbitration requires Council's prior approval, with a simple majority. The deliberations of the tribunal shall be held in private and shall be secret. The award shall be rendered in writing and substantiated.
However, pursuant to paragraph 2 of Article XVII of the Convention, the parties to a dispute are not bound by this procedure and may decide to follow a different kind of arbitration procedure, noting, however, that arbitration is the means for the settlement of disputes to which the parties are committed pursuant to paragraph 1 of Article XVII.

## II. Cooperation

Two categories of cooperation that the Agency undertakes, can be distinguished: its cooperation with technical organisations of the Member States, in particular national space agencies, but also other technical institutions, on the one hand, and on the other hand, the cooperation with other international organisations and institutions and with Governments, organisations and institutions of non-member States. All these cooperations are formalized by the appropriate kind of agreement, which also contains a clause concerning the settlement of potential disputes.
Over the years, ESA has concluded more than four-hundred agreements on cooperation with other organisations, States, or their institutions. They may take on different forms, ranging from the most formal kind of agreement signed by high representatives of States and requiring ratification by national parliaments, to agreements with space agencies of member States or non-member States, which according to their contents and the kind of commitment taken by the parties, can take on many different forms, such as Memoranda of Understanding, Letters of Agreement etc.
One essential feature that all these agreements share is a clause on dispute settlement. Furthermore, most contain also some provisions on the prevention of disputes, which may have contributed to the fact that also in this category of relationships there has so far never been the need to have recourse to the stipulated mechanism for the settlement of potential disputes.

### II.1. Cooperation with Member States' Institutions

Such cooperation with Member States' institutions is foreseen in different places in the ESA Convention: Pursuant to Article VI.1 of the ESA Convention, the Agency may enter into special arrangements for the execution of certain parts of its programmes by, or in cooperation with, national institutions of the

Member States, or for the management by the Agency itself of certain national facilities. According to Article IX the Agency may make its facilities available to a Member State that asks to use them for its own programmes. It may also make its assistance available to Member States that wish to engage in a project that is outside the Agency's activities and programmes but within its purpose.

### II.2. International Cooperation

Article XIV of the ESA Convention foresees the possibility for the Agency to cooperate with international organisations and institutions and with Governments, organisations and institutions of non-member States, and conclude agreements with them to this effect. Each cooperation requires unanimous approval by Council. There is a large variety of forms that such cooperation may take: non-member States or international organisations may participate in an Agency programme; they may contribute to one specific project or even only to one phase of a project, or – in the other extreme - they may be attributed the status of an associate member state. There are also cases of cooperation on a more political level, allowing the partners to get to know each other and each other's working methods as a first step before concrete practical activities are decided upon.

### II.3. Common Features

Although these different legal relationships require each an agreement that is appropriately adapted to the particularities of each case and although of course each agreement is the fruit of negotiation with a partner, there are still some general features, ESA will insist upon, when entering into an agreement. These concern also the prevention and the settlement of disputes.

#### *II.3.1. Cross-Waivers of Liability*

Cross-waiver of liability clauses are provisions by which parties commit themselves to refrain from presenting claims against another party to an agreement or contract in the event that other party causes damage. In other words, each party accepts to bear the costs for losses resulting from extra-contractual events. The cross-waiver clauses as first developed by NASA seem to have set the standard throughout the world of space activities.[7] The main reasons for their introduction into international agreements dealing with space activities stem from the fact that space activities are still regarded as a highly hazardous industry, for which insurance is sometimes simply unavailable or other times prohibitively expensive. They have therefore become an important element of high-risk space activities world-wide, even though the question may arise whether it is opportune to use these clauses in such a widespread and almost automatic manner throughout the whole space business. Given that quite a number of space-related activities is becoming more and more standard, the

7 See the Written Statement of Edward A. Frankle, NASA General Counsel, before the Subcommittee on Space and Aeronautics, Committee on Science, U.S. House of Representatives, 30 October 1997, available at: <www.prospace.org/issues/cats/971030_ed_frankle_xwaiver.htm>.

characteristic of "highly hazardous" may be questioned. A case-by-case assessment whether such a clause is required or not seems advisable. Its absence might contribute to an increased sense of accountability and responsibility on behalf of the parties due to an increased liability risk.
Cross-waivers come in different styles, depending on the subject of the agreement and the partners. They can range from three-line articles to those taking up three pages in an agreement. In general, willful misconduct and gross negligence are excluded from the cross-waiver, i.e. the parties remain liable for any damage that can be attributed to them and that is caused willfully or by gross negligence.[8] Other exclusions may, as the case may be, relate to the death or impairment of health or injury of persons. In order to be truly effective, most cross-waiver clauses also contain the commitment of the parties to flow-down that cross-waiver, i.e. to include in the agreements or contracts with their related entities a corresponding provision.
The wide-spread use of cross-waiver of liability clauses in ESA's agreements may have contributed to the absence – so far - of any disputes to be settled under any cooperation agreement ESA has concluded.

*II.3.2. Dispute-Settlement Mechanisms*
Another general feature ESA will insist upon before entering into any agreement is a clause concerning the settlement of disputes. Just as there is a whole panoply of different kinds of agreements, there is a corresponding amount of dispute settlement clauses that go with them. Any dispute settlement clause needs to be adapted to the content of the agreement and to its parties. It needs to be acceptable to all parties and, therefore, negotiated. This has given rise to a whole set of clauses which continues to grow richer over the years. These range from very short, such as

> "The Parties shall consult when events occur or matters arise that may occasion a question of interpretation or implementation of the terms of this MoU. Any dispute ensuing from the fact that such consultations were not conclusive may, at the request of either Party, be submitted to arbitration according to the Rules of Arbitration of the International Chamber of Commerce. The arbitral tribunal shall sit in Paris, France, and the language of the arbitration shall be English."

to multi-layered clauses, such as:

> "Any dispute in the interpretation or implementation of the terms of this Agreement that cannot be solved within the Steering Committee, shall be first referred to the legal representatives of the Parties concerned for conciliation.

8 As to the practical assessment of gross negligence in the context of space activities, see: Alexis Mourre, Arbitration in Space Contracts, in: Arbitration International Vol. 21 (2005), pp. 37, 42 sseq.

If conciliation is not reached within four months from the date on which the request for conciliation was received by the respondent, the dispute shall finally be settled by an Arbitration Tribunal, which shall consist of three arbitrators. Petitioner or respondent may be one or more of the Parties to this Agreement.
Within a period of thirty days, starting from the date of failure of the conciliation procedure, the petitioner and the respondent shall each nominate one arbitrator. Should any of the parties to the dispute fail to nominate an arbitrator within this period, the other party to the dispute may also nominate the second arbitrator.
Within thirty days of the appointment of the second arbitrator, the first two arbitrators shall agree on a third person to serve as chairperson of the tribunal. If they fail to reach an agreement, the third arbitrator shall be appointed, at the request of one of the parties to the dispute, by the Secretary General of the Permanent Court of Arbitration.
The Arbitration Tribunal shall determine its seat and establish its own rules of procedure.
The award of the Arbitration Tribunal shall be made by a majority of its members, who may not abstain from voting. This award shall be final and binding on all parties and no appeal shall lie against it. The parties shall comply with the award without delay. In the event a dispute as to its meaning or scope should arise, the Arbitration Tribunal shall interpret it at the request of any party."

in the case of a multi-lateral agreement.
They can already provide a certain level of detail, such as:

"Disputes concerning the interpretation or application of this Agreement shall in principle be settled by mutual consultations between the Parties. If an issue not resolved through consultations within six (6) months and still needs to be resolved, that issue shall be submitted, at the request of either Party, to an arbitration tribunal composed of one nominee of each Party and a Chairman appointed by agreement between the Parties or, failing agreement, by Secretary General of the Permanent Court of Arbitration at the Hague. The Chairman shall not be a national of the State of [...] or of one of ESA's Member States.

Implementing arrangements as referred to in Article of this Agreement may contain their own dispute-settlement provisions, which shall include the procedures and modalities for arbitration, based on the provisions of this Article.

The arbitral panel shall decide the dispute in accordance with the provisions of this Agreement. Unless the Parties agree otherwise, the arbitration tribunal shall act in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States, as in effect on the date of this agreement. The award shall be in writing, and contain the facts, law and reasons on which it was based. Unless otherwise agreed by the Parties, the award shall be rendered to the Parties within six months from the establishment of the tribunal. The tribunal's award shall be final and binding upon both Parties."

As in this example, in some cases, specific Rules of an arbitration institution are directly referred to, e.g. the Rules of Arbitration of the International Chamber of Commerce, the Permanent Court of Arbitration's (PCA) optional Rules for Arbitration involving International Organizations and States. The fact that the recent PCA's Optional Rules for Arbitration of Disputes Relating to Outer Space Activities, adopted on 6 December 2011[9], do not yet figure among the specific Rules directly referred to in ESA's international cooperation agreements can be attributed to the lack of international experience with these Rules so far. Other clauses, mostly in less formal kinds of agreements, leave a number of issues open, including even the mechanism of dispute settlement that still needs to be agreed upon should a dispute arise:

> "The Parties shall consult with each other promptly when events occur or matters arise, which may occasion a question of interpretation or implementation of the terms of this MOU. Any dispute in the interpretation or implementation of the terms of this MOU shall be first referred to the [Project Manager level]. If necessary, the dispute shall then be referred to the [Director level]. Any dispute, which cannot be resolved at this level, shall be referred to the [Director General level]. Failing agreement at that level, the Parties may agree to refer the dispute to arbitration, conciliation or mediation."

The richness of diversity in dispute settlement clauses contained in agreements ESA concluded over the last years can be attributed to the understanding that the reality of international cooperation in space activities is as diverse. Each actor has its own internal or domestic constraints and each cooperation is different. Therefore, also the individually applicable dispute settlement mechanism is subject to definition by negotiation between the parties.

### III. Contractual and Pre-Contractual Relations with Industry

Roughly 85 % of the Agency's budget[10] is spent on contracts with industry. In the year 2011 ESA has issued 604 Invitations to Tender and initiated 4582 contract actions, of which 1494 concerned new contracts, 51 riders, 353 work orders and 2684 contract change notices.

Pursuant to Article XXV of Annex I to the ESA Convention, when concluding written contracts, other than those concluded in accordance with the Staff Regulations, the Agency shall provide for arbitration. Article XXV further specifies that the arbitration clause or the special arbitration agreement concluded to this end shall specify the law applicable and the obligation to provide for arbitration in the country where the arbitrators sit, that the arbitration procedure shall be that of that country and that the enforcement of the arbitration award

9 See Judge Fausto Pocar, An Introduction to the PCA's Optional Rules for Arbitration of Disputes Relating to Outer Space Activities, in: Journal of Space Law 2012 [Vol. 38], pp 171.

10 The Agency's 2013 budget amounts to a total of 4.28 billion €.

shall be governed by the rules in force in the State on whose territory the award is to be executed.

This obligation is implemented via ESA's General Clauses and Conditions, GCC[11]. Clause 35 of the Agency's GCC introduces, however, as a mandatory step before recourse to arbitration, a conciliation procedure for solution of disputes between ESA and the Contractor. Either party may refer a dispute arising out of the contract to a Dispute Adjudication Board, DAB, composed of two senior representatives from each Party (one technical expert and the other representing the area of procurement) and as a fifth member the Agency's Industrial Ombudsman. The DAB shall issue its decision within two months from the submission of the notification of the dispute. In case either Party is dissatisfied with the DAB's decision, such Party may give a corresponding notice. Such a notice of dissatisfaction is a procedural requirement for the instigation of arbitral proceedings. Clause 35.2 of the GCC then provides that the contract shall specify the country and location within that country where the Arbitration Tribunal shall sit; normally 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. Arbitration proceedings shall be conducted in English unless otherwise agreed between the Parties. If no other arbitration is foreseen in the Contract, any dispute arising out of the Contract shall be finally settled in accordance with the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in conformity with those rules. Conduct of such proceedings shall be in accordance with the ICC rules in force at the time arbitration is requested by either of the Parties. The award shall be final, conclusive and binding on the Parties; no appeal shall lie against it. The enforcement of the award shall be governed by the rules of procedure in force in the state/country in which it is to be executed.

Again, also under this procedure, there has so far never been a dispute that went to arbitration, despite the enormous numbers of contracts concluded each year. A contributing factor to this successful dispute avoidance may once again, reside in the consistent application of cross-waiver clauses also in ESA's procurement contracts. These are foreseen in Clause 18 of the GCC.[12]

With the procurement reform, the Agency introduced a novelty in its procurement regulations[13]: in its part VI, the procurement regulations provide for a

---

11 ESA/REG/002, rev. 1, 7 February 2013, available at: <http://emits.esa.int/emits-doc/e_support/GCE/ESA_REG_002_GCC_rev_1.pdf>.

12 For more details, see: Gunilla Stjernevi/ Eleni Katsampani, Space Contracting within the Framework of the European Space Agency, in: Lesley Jane Smith/ Ingo Baumann, Contracting for Space – Contract Practices in the European Space Sector, 2011, pp. 169.

13 ESA/REG/001, rev. 3, available at: <http://emits.esa.int/emits-doc/e_support/GCE/GCOT%20ANNEX%20IV%20to%20ESA%20REG%20001-%20rev%203%20final%20dg.pdf>. The Procurement Regulations were adopted by the ESA Council during its 222nd meeting held on 08 June 2011 and entered into force on 18 July 2011.

review procedure which allows economic operators, which have demonstrated direct interest in an Agency procurement, a right to have the procedure of the tendering process verified. In view of the Agency's legal status and privileges and immunities, the review procedure established under the new Procurement Regulations seeks to ensure full respect for the right to an effective remedy and fair hearing, in line with international legal standards[14]:

Any economic operator demonstrating a direct interest in an Agency's procurement, who claims a potential loss due to an alleged procedural breach of the Procurement Regulations by the Agency may seek review. The scope of the acts subject to such review is clearly defined in Article 49 of the Procurement Regulations and concerns, exclusively procedural issues. The principle of a review procedure in the frame of the Agency's procurement process recalls a universally recognised practice of public procurement both at national and international level, i.e. to provide tenderers with an adequate opportunity and effective procedure for review. It implements the transparency principle and enhances confidence in the fairness of the procurement system with respect to the actors of the procurement process, i.e. tenderers and Member States. The balancing act consisted in safeguarding the rights of tenderers while also preserving the integrity of the procurement process, by avoiding uncertainties and ambiguities. By the introduction of tight time limits and clear definitions, e.g. for "legitimate interests", the disruption of the procurement procedure remains limited. By restricting the review to procedural aspects only, the undisputed technical authority of the Agency was recognized.

Claims are to be submitted to the head of the Agency's procurement department and unless resolved by mutual agreement, the claim may be submitted to ESA's industrial ombudsman. The industrial ombudsman and his/ her alternate are nominated by Council. They are independent in the performance of their functions and shall not seek or accept instructions from anyone. They are neither staff members of the Agency nor members of delegations of Member States, Associate Member States or Cooperating States. They are eminent persons with particular experience and competence in matters pertaining to European Space Industry and procurement. Within ten calendar days after the submission of the claim and after having consulted with the claimant and the Head of the Procurement Department, the industrial ombudsman issues a written recommendation, upon which the Head of the Procurement Department is to decide, again within ten calendar days. The decision by the Head of the Procurement Department may be challenged by the claimant who may submit

14 Cf. in particular the UN Commission on International Trade Law (UNCITRAL)'s Model Law on Public Procurement, Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17), annex I, available at: <www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/ML_Public_Procurement_A_66_17_E.pdf>; See also the corresponding UNCITRAL guide to enactment: <www.uncitral.org/pdf.english/texts/procurem/ml-procurement-2011/pre-guide-2012.pdf> and the WTO's Agreement on Government Procurement, available at <www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm>.

his claim to the Procurement Review Board established pursuant to Article 54 of the Procurement Regulations. The Procurement Review Board consists of six members external to the Agency with proven legal and practical experience in the field of public procurement. They are nominated by the ESA Council. As the ombudsman, they are neither members of delegations of Member States, Associate Member States or Cooperating States. The decision of the Board is final and binding on the parties.

Although such review does not automatically have a suspensive effect on the entry into force of the related contract, interim measures may be proposed provided that the claim contains a declaration the contents of which, if proven, demonstrate that the claimant will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will succeed and the granting of the suspension would not cause disproportionate harm to the Agency. The procurement review board may grant financial compensation to a claimant for a loss due to a procedural breach by the Agency. Such compensation is in all cases limited to the cost for tender preparation and the costs incurred for protest, up to a certain threshold.

The first – and so far only – case was brought to the Procurement Review Board in July 2012. The Board examined the alleged irregularities as advanced by a claimant that had not been awarded a procurement contract and came to the conclusion that the entirety of the procurement procedure was in full compliance with all applicable rules and regulations. The Board therefore considered the claims put forward unfounded and rejected them in their entirety.

## IV. Employment Relations with Staff

According to Article XXVII of Annex I to the Convention, the Agency shall make suitable provision for the satisfactory settlement of disputes arising between the Agency and the Director General, staff members or experts in respect of their conditions of service. The reason for such obligation lies, again, in the Agency's immunity.[15] This obligation to provide for a dispute settlement mechanism has been complied with by the establishment of the Agency's Appeals Board pursuant to Chapter VIII, Regulations 33 to 41, of the ESA Staff Regulations.

According to Regulation 33 the Appeals Board, independent of the Agency, is competent to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member, a former staff member or persons entitled under him. It shall rescind any decision against which there

15 As to the historical background of the right to an availability of a legal remedy – as a guarantee of respect for the law as a general principle of law in the sense of Article 38 of the Statute of the International Court, see: August Reinisch, Ulf Andreas Weber: In the shadow of Waite and Kennedy – the jurisdictional immunity of international organisations, the individual's right of access to the courts and alternative means of dispute settlement, in: International Organizations Law Review 2004, pages 59–110, available at <http://zsu-schmelz.univie.ac.at/fileadmin/user_upload/int_beziehungen/Personal/Publikationen_Reinisch/waite_kennedy_iolr_2004.pdf>.

has been an appeal if the decision is contrary to the Staff Regulations; Rules or Instructions or to the claimant's terms of appointment or vested rights; and if the claimant's personal interests are affected. The Appeals Board may also order the Agency to repair any damage suffered by the claimant as a result of such a decision. It is also competent in the case where a staff member wishes to sue another staff member and such action has been prevented by the Director General's refusal to waive the immunity of the latter.

Since its inception, the Appeals Board has rendered decisions in 91 cases covering a very large span of aspects related to the service conditions of the Agency's officials, ranging from questions of social security to the rights of the staff association and many others. As other comparable institutions, it has been conceived on the example of the Administrative Tribunal of the International Labour Organisation, ILOAT[16], the jurisprudence of which is often used as inspiration in the pleadings before the Board.

The Appeals Board consists of six members of different nationalities. Eminent persons with particular competence in labour legislation and in staff relations, preferably from the international field, they are appointed by Council. Member States may propose candidates, as well as the Director General, who takes also into account corresponding proposals by the staff association.

The members of the Appeals Board are neither member of the staff of the Agency nor of a delegation of a Member State. They are independent and shall not seek or accept instructions from anyone whatsoever.

The Appeals Board is supported by a Registrar and a Deputy Registrar, both staff members of the Agency, who are in the discharge of their duties subject to the Authority of the Appeals Board only.

Access to the Appeals Board in general necessitates the accomplishment of a preliminary procedural step consisting of the reference of the matter to an Advisory Board. The Advisory Board comprises six members appointed from among the staff of the Agency. Half the members are appointed by the Director General, and the other half by the Staff Association. The Advisory Board procedure amounts therefore to a kind of review of a decision of the Director General by the peers of the staff member. The Advisory Board is expected to come to a unanimous opinion. It is completely independent in its deliberations and its work remains confidential. Although the Director General is not formally

16 The ILOAT is the successor of the Administrative Tribunal of the League of Nations and was transferred as such in 1946 to the International Labour Organisation, which became a specialized agency of the United Nations. The jurisdiction of the ILOAT has been recognized by 59 international organisations, comprising 12 specialised agencies of the UN system, thereby providing more than 46,000 officials with access to the tribunal. It has by now dealt with more than 3200 cases, see: <www.ilo.org/dyn/triblex/triblexmain.showList?p_lang=en&p_session_id=115>. For more information on the ILOAT, its history and jurisprudence, see: Catherine Comtet-Simpson, The ILO Administrative Tribunal, available at: <www.ilo.org/public/english/tribunal/download/articleccenglish.pdf>.

bound by the opinion given by the Advisory Board, it is extremely rare, that he does not follow it.
The parties in cases before the Appeals Board are entitled to a hearing. They may be assisted by a counsel.
The Appeals Board's decisions are final and binding on both parties and no appeal is possible. However, the Board may be asked by the parties to interpret a decision, should difficulties arise as to the meaning or scope of that decision, or it may be asked by the parties to review a decision if a fact of decisive importance comes to the knowledge after a decision has been pronounced.
ESA and its Appeals Board have been at the heart of a case before the European Court of Human Rights[17]:
The applicants, employed by foreign companies, were placed at the disposal of ESA to perform services at the European Space Operations Centre in Darmstadt, Germany. When their contracts were not renewed they instituted proceedings before the municipal Labour Court against ESA, arguing that, pursuant to the German Provision of Temporary Staff Act, they had acquired the status of employees of the ESA. In these proceedings, ESA relied on its immunity from jurisdiction. Pursuant to Section 20 II of the German Courts Act, the Labour Court, therefore, declared the actions inadmissible. This decision that ESA's immunity from jurisdiction was an impediment to court proceedings was confirmed by the Labour Appeals Court and the Federal Labour Court. The Federal Constitutional Court declined to accept an appeal. The applicants contended that they had not had a fair hearing by a tribunal on the question of whether a contractual relationship existed between them and ESA and, consequently alleged that there had been a violation of Article 6 § European Convention on Human Rights.
The Court considered that, taking into account in particular the alternative means of legal process available to the applicants, it could not be said that the limitation on their access to the German courts with regard to ESA impaired the essence of their "right to a court" or was disproportionate for the purposes of Article 6 § 1 of the Convention. Article 6 § 1 required a judicial body, but not necessarily a national court.
For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the European Convention for Human Rights is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention. The possibility of legal recourse to administrative tribunals or similar institutions for staff members of an international organisation may embody such alternative remedies.
The Court considered that the detailed system of legal protection provided under the ESA Convention concerning disputes brought by staff and under Annex I in respect of other disputes satisfied the standards set in the Conven-

17 Case of Waite and Kennedy v. Germany, Application no. 26083/94, judgement Strasbourg 18 February 1999, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58912>.

tion. The remedies available to the applicants were in particular an appeal to the ESA Appeals Board if they wished to assert contractual rights or a membership of the ESA staff. The Court underlined that the ESA Appeals Board is "independent of the Agency" and has jurisdiction "to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member".
The Court concluded that, bearing in mind the legitimate aim of immunities of international organisations, namely the protection of international organisations against interference by individual governments, the test of proportionality cannot be applied in such a way as to compel an international organisation to submit itself to national litigation in relation to employment conditions prescribed under national labour law. To read Article 6 § 1 of the Convention and its guarantee of access to court as necessarily requiring the application of national legislation in such matters would, in the Court's view, thwart the proper functioning of international organisations and run counter to the current trend towards extending and strengthening international cooperation.

## C. Outlook

International organisations do not just thrive in a sort of diplomatic vacuum induced by their immunity from jurisdiction. In fact, the legal personality they are endowed with by virtue of the decisions taken by their founding Member States allows them to enter into legal relationships on many different levels and where there is a legal relationship there is also a potential for a legal dispute. As a corollary of the organisation's right to immunity, it has the duty to provide for adequate alternative modes of dispute settlement.
As the short overview above has demonstrated, ESA has taken the corresponding actions by establishing the different Appeals and Review Boards or by providing for the possibility of arbitration or other forms of dispute settlement in its cooperation agreements or contracts, always in compliance with the international requirements applicable to the respective situation.
The fact, that so few cases have actually materialised so far, can be considered a success for ESA's dispute-prevention strategies. These are all the more important in an environment where the number of actors is limited and the potential for future cooperation should not be risked light-headedly.