Space Activities in the Jurisprudence of International Dispute Settlement Institutions

Mahulena Hofmann[*]

Whereas the International Court of Justice has so far not yet been seized with any dispute concerning space activities, certain aspects of such activities have been faced by other international dispute settlement institutions of judicial or quasi-judicial character, particularly in cases relating to space communication. These cases involve different subjects of international law: States within the legal framework of WTO and ITU, respectively; private commercial entities in the majority of cases dealt with in commercial or investment arbitration procedures; parties in respect of a defined legal relationship as regards the Permanent Court of Arbitration Rules on Outer Space Disputes; or even individuals in proceedings before human rights institutions. This paper analyzes issues connected with the jurisdiction of such international institutions as regards disputes resulting from space activities. Reflecting the discussions held both during the 2nd Luxembourg International Workshop on Space Communication and the 2013 IISL Colloquium, it concludes by predicting that mediation, negotiation and arbitration, but also alternative dispute settlements mechanism will become the main mechanisms of dispute settlement in the area of space communication.

1 Introduction[1]

A dispute is usually understood as a disagreement on a point of law or fact, a conflict of legal views or interests between two persons;[2] the legal status of the parties does not prevent to include interstate, state- private entities, or

* SES Chair in Satellite Communications and Media Law, University of Luxembourg, Luxembourg, mahulena.hofmann@uni.lu

1 For details see *Mahulena Hofmann* (ed.), Dispute Settlement in the Area of Satellite Communication, Nomos 2015.

2 Mavrommatis Palestine Concessions, Greece v. United Kingdom, Objection to the jurisdiction of the court, Judgment No 2, PCIJ Series No 2, ICGJ 236 (PCIJ 1924), 30th August 1924.

private entities-only disagreements. Consequently, any negotiation process in which there is no agreement can turn into a "dispute" in a legal or real sense and require a mechanism leading to resolution.[3]

2 Dispute Settlement Mechanisms

The choice of dispute settlement mechanisms is determined by the legal character of those who are parties to the dispute - States, international intergovernmental organizations,[4] private entities or even individuals: The procedure of the International Court of Justice (ICJ) is open only for States which have accepted its jurisdiction;[5] the same can be said about the dispute settlement system of the International Telecommunication Union (ITU), the World Trade Organization (WTO) or the (until now not established) Claims Commission under the 1972 UN Liability Convention. The European Court of Justice and the European Court for Human Rights can deal only with very specific cases, determined by the material and procedural scope of their respective legal frameworks.

Of a different legal character are real or potential investment agreements concluded between States and space communication operators. Disputes arising from such agreements may take place under a variety of *ad hoc* or institutional arbitration rules frameworks; two international institutions – the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA) offering Optional Rules for Arbitration on Disputes Relating to Space Activities – are primarily connected with disputes where one of the Parties is a State or State entity.[6]

Because of a variety of cross-border business arrangements falling primarily under the scope of private law, the most common method of settlement of disputes in international economic relations is international arbitration: In cases of institutional arbitration, the parties can use the procedural rules of institution such as the International Chamber of Commerce in Paris (ICC),[7] the London Court of International Arbitration (LCIA), or Stockholm Chamber of Commerce Arbitration Institute (SCC).

---

3 *Gerry Oberst*, Dispute Resolution before the ITU – The Operators Experience, in M. Hofmann (ed.), supra note 1, p. 43 *et seq*.

4 Eg. Intersputnik or Arabsat.

5 *Alain Pellet*, Peaceful Settlement of International Disputes, MPEPIL 2013.

6 *Richard H. Kreindler, Rita Heinemann,* Commercial Arbitration, International, MPEPIL 2009, para 39.

7 See SES and Eutelsat Settle their Dispute and Conclude a Series of Agreements Concerning the 28.5 Degrees East Orbital Position, http://www.ses.com; accessed on 4 July 2014.

A World Trade Organization (WTO)

The dispute settlement mechanism of the World Trade Organization is designed for inter-governmental trade disputes in accordance with the WTO Dispute Settlement Understanding (DSU). According to *Peter Malanczuk*,[8] the telecommunication sector is covered by the Telecommunication Annex to the General Agreement on Services (GATS). With the aim of liberalization of services, it allows the foreign companies to use the public networks and facilities of another WTO member to reach customers and provide telecommunication services;[9] WTO members are requested to cooperate with the ITU. In 1997, agreement was reached to liberalize the trade in basic telecommunication services. The only telecommunication case so far submitted to a panel on the basis of this Annex was a complaint by the US about Mexico's measures affecting telecommunication services.[10] Another area within the WTO framework is the purchase of satellite equipment under the Government Procurement Agreement (GPA); the only relevant case, i.e. European Union against Japan because of procurement of a purchase of a multi-functional satellite for Air Traffic Management[11] was concluded amicably. It has to be seen, however, that the WTO structure is less suitable for the needs of individual operators and companies as they lack standing under WTO rules. Additionally, the narrow material scope of the WTO offer should be enlarged due to the convergence of information and communication technologies.

B Permanent Court of Arbitration (PCA)

To offer a more flexible mechanism for settling disputes in the area of satellite communication, the Rules on Outer Space Disputes were adopted under the auspices of the Permanent Court of Arbitration in 2011. As explained by *Frans von der Dunk*,[12] these rules are based on the 2010 UNCITRAL Arbitration Rules with changes taking into account the specifics of outer space activities: The services of the PCA Secretary-General are available to States, international organizations and private entities; there is a high flexibility on determining the scope of "outer space activities". Also the legal basis for the dispute is irrelevant: the arbitral tribunal shall apply the law or rules designated by the parties as applicable to the substance of the

8 *Peter Malanczuk*, From Negotiations to Dispute Settlement: The Role of the World Trade Organization (WTO) in relation to Satellite Communications, in: M. Hofmann (ed.), supra note 1, p. 71 *et seq*.

9 The cable or broadcast distribution of radio or TV programming is excluded from its scope, Article 2 b of the Annex.

10 Dispute DS204.

11 Dispute DS73.

12 *Frans von der Dunk*, About the New PCA Rules and their Application to Satellite Communication Disputes, in M. Hofmann (ed.), supra note 1, p. 93 *et seq*.

dispute – national law, international law - or decide *ex aequo et bono* if so authorized by the Parties.
The members of the arbitral tribunal shall be appointed by the PCA Secretary General as appointing authority; the use of the Rules is facilitated by providing a list of legal experts who may be appointed by the Parties. The arbitrators are handed a large measure of discretion during the procedure. Interim measures can be imposed at the request of one of the parties; the award of the Tribunal is final and binding. Frans von der Dunk concludes that the PCA Rules on Outer Space Disputes represent the most comprehensive coverage of all aspects of satellite communication and – through the availability of legal experts aware of the specifics of outer space activities and their often complicated technological basis – they offer high potential in future disputes, especially for space operators.

C International Telecommunication Union (ITU)

The International Telecommunication Union has adopted a specific mechanism of preventing and settling disputes in the area of space communication, especially the management of frequency spectrum and registration of orbital positions on the geostationary orbit, is the core of one of the oldest international intergovernmental organizations. In the sense of the extensive definition of "disputes in space communication", the whole system of the ITU has been designed to prevent disagreements and remedy their consequences in the area of spectrum management. As underlined by *Francis Lyall*,[13] the most important element of this system is the principle of consensus: Its significant role can be observed – albeit with different intensity – in all three ITU Sectors: In the Radiocommunication Sector (ITU-R) consensus is useful if a workable international agreement is to be obtained; this can be seen in the development of successive generations of the Radio Regulations. The Standardization Sector (ITU-T), which develops and agrees upon standards for the operation of communication technologies, has to use this method since a standard does need to be widely applied if it is to be effective, and non-compliance with the standards means non-communication. The situation in the Development Sector (ITU-D) is different: Because it does not produce binding law but rather recommendations and accommodations, the attaining of consensus within its conferences may be facilitated as could be observed in respect of the results of the World Summit on the Information Society (WSIS) initiated by the ITU.
In general, consensus is an effective method in many areas of ITU activities. Nonetheless, given the constraints of the law of physics, wherever possible within the ITU, consensus should be sought as the premier method, which we can partake of the benefits of international telecommunications.

---

[13] *Francis Lyall*, The Role of Consensus in the ITU, in: M. Hofmann (ed.), supra note 1, p. 33 *et seq*.

According to *Srinivasan Venkatasubramania*n,[14] within the procedures of coordination and standard setting, the Member States are basing their activities on negotiating consensus which is reflected in the documents of the ITU Conferences. The private entities can participate in the activities of the three sectors and study groups that are responsible for developing recommendations. The reaching of consensus is a time consuming process which may be perceived by private entities as a delay in making the required changes to the binding Radio Regulations. Therefore, private entities have to convince their Administrations to propose changes to the valid instruments which are based on the principle of cooperation and consensus.

The most important legal instrument aimed at prevention of disputes in the area of frequency management are the ITU Radio Regulations: They provide for a three stage procedure to ensure that the non-planned satellite radiocommunication services operate without causing harmful interference to each other: On the basis of this mechanism, the ITU publishes annually more than 250 coordination requests received form 50 different administrations. In this large number of cases, disputes can arise due to the broadcasting satellite coverage, harmful interference and interpretation of the regulatory texts of the ITU. According to the Radio Regulations, the satellite operator reports any detected infringements of the ITU rules to its own administration, which contacts the administration having jurisdiction over the other operator. Only if the dispute is not resolved, the Radio Communication Bureau and later the Radio Regulations Board may be involved. So far, these disputes could be solved without recourse to the compulsory dispute resolution mechanism enshrined in Article 56 of the ITU Constitution and the Optional Protocol on the Compulsory Settlement of Disputes; the ultimate aim of the ITU procedures is not so much to bring about abstract justice but an unspectacular and smooth functioning of international communication.

According to *Gerry Oberst,*[15] this system, however, does not always correspond to the industry practice: In the area of Coordination Agreements, the ITU believes that no administration maintains priority as a result of being the first to start the request for coordination procedure (Article 9.6 Radio Regulations); the established practice respected by most national administrations, however, connects a clear negotiating priority with the administration with an earlier date of filing: In other words, filing priorities inevitably shape the position of administrations and operators engaged in a coordination negotiation.

Additionally, the position of the Radio Regulations Board that the "disagreements" in the sense of Article14 of the ITU Constitution are not

[14] *Srinivasan Venkatasubramanian*, ITU and its Dispute Settlement Mechanism, in: M. Hofmann (ed.), supra note 1, p. 23 *et seq*.

[15] *Gerry Oberst*, Dispute Resolution before the ITU – The Operator's Experience, in M. Hofmann (ed.), supra note 1, p. 43 *et seq*.

"disputes" because of the existence of specific provisions of the ITU Constitution dealing with dispute settlement (Article 56 ITU Constitution), does not correspond to the needs and practice of today's telecommunication: Article 14 expects that this Board approves Rules of Procedure for registration of frequency assignments; in case of continuing "disagreement" among the Administrations on the application of the Rules of Procedure, the matter shall be submitted to the next world radiocommunication conference (Article 14 ITU Constitution). Moreover, the Board is charged to deal with appeals against decisions made by the Radiocommunication Bureau regarding frequency assignments (Article 10 of the ITU Convention). This position of the Board that no disputes are involved leads to the situation where the operators and administrations that find themselves in a "disagreement" concerning ITU rules do not have any clear path to their resolution based on the rule of law.

Tanja Masson-Zwaan[16] stresses that Article 44 of the ITU Constitution requires that all stations are operated in such a manner as not to cause harmful interference to the radio services of other Member States or of recognized operating agencies. She underlined that this provision, together with the respective Articles of the Radio Regulations, are intended to deal with the "technical " harmful interference but were not drafted to prevent or combat the cases of interferences of intentional character. There are several paths how to prevent and avoid this phenomenon: Tanja Masson-Zwaan mentioned the necessity to strengthen monitoring capabilities able to control the compliance of the administrations with the ITU rules, e.g., through concluding Memoranda of Cooperation with structures such as the International Monitoring System (IMS). According to her, also the UN space treaties can offer a solution: As an example, she mentioned Article 9 of the 1967 UN Outer Space Treaty which contains a procedure of consultations in case of harmful interference with space activities of other States. The deficiency of the ITU regime might be balanced by adopting non-binding instruments such as Guidelines or Code of Conduct that address the safe, sustainable and secure use of outer space.

D European Court of Justice of the European Union

The European Court of Justice of the European Union[17] is a body which ensures that, in the interpretation and application of the Treaties, the law is observed (Article 19 TEU). According to *Mark Cole*[18] it can use several significant competencies that may be relevant for the area of electronic

16 *Tanja Masson-Zwaan*, Orbit and Frequencies: The Legal Context, in M. Hofmann (ed.), supra note 1, p. 59 *et seq*.

17 The ECJ shall include the Court of Justice, the General Court and specialized courts (Article 19 TEU).

18 ECJ and Space Communication, contribution of Mark Cole at the 2nd Workshop on Space Communication, Luxembourg.

communication, including space communication: The annulment procedure according to Article 263 TFEU has been applied in the older Case C-271, *Spain v Commission* in which Spain, Belgium and Italy brought an action for annulment of "Directive on Competition in in the Markets for Telecommunication Services."[19] Another example are the Case T-350/09 (2012) *ICO Satellite v Commission* and Case T-441/08 (2010) *ICO Satellite v European Parliament and Council* in which ICO Satellite Ltd. brought an action for annulment of the Decision No 626/2008/EC of the European Parliament and of the Council on the Selection and Authorization of Systems Providing Mobile Satellite Services. The Case C-59/98 (1999) *Commission v Luxembourg* is an example of the use of the infringement procedure[20] which dealt with the insufficient transposition of the Directive 94/46/EC with regard to satellite communications by Luxembourg.

The preliminary ruling procedure (Article 263 TFEU) was applied in the case C-244, 245/10 (2011) *Mesopotamia Broadcasting and RojTV* referred from the Bundesverwaltungsgericht (Germany) on behalf of the interpretation of Article 22a of the Council Directive 89/522/EEC which requires the Member States to ensure that broadcast do not contain any incitement to hatred on grounds of race, sex, religion or nationality. Mention has to be made also of the joined cases C-403 and 429/08 (2011) *Football Association Premier League Ltd and Karen Murphy* which dealt with the exclusive marketing of matches of the Premier League and use of foreign decoder devices for pub screening. *Mark Cole* concluded by stating that the number of cases dealing with space communication can increase because of Article 189 TFEU vesting the European Union with specific competencies in the exploration and exploitation of outer space, specifically in the area of navigation services.

E European Court of Human Rights

The European Court of Human Rights has been established for judging alleged violations of human rights stated in the European Convention for the Protection of Human Rights by those who claim to be victim of such violations of rights by one of its Contracting Parties – a State. The heavy workload of the Court makes the procedures lengthy, the compensation awarded is in the majority of cases low and the hearings and documents deposited by the Registrar principally open to public. All these limitations might lead to the fact that space operators take much less recourse to the Court than to arbitration bodies.

Despite of these limitations, there are several cases where the procedure on the basis of the Convection lead to satisfactory results for the applicants in the area of satellite broadcasting. The most important substantive basis of these cases is Article 10 of the Convention guaranteeing the right to

[19] C-271, 281, 289/90 (1992).
[20] Today Article 258-260 TFEU.

expression. A central judgment is the 1990 *Autronic v Switzerland* case[21] which dealt with the proportionality of a ban to receive and impart signal from telecommunication not direct broadcasting satellite. Other cases tackled the licensing procedure (*Tele 1 Privatfernsehgesellschaft*)[22] or the right to install a satellite dish in order to receive foreign TV broadcasting (*Mustafa*).[23] It can be concluded that the cases dealing with space communication are closely connected with the framework of the ITU; she added that the path to Strasbourg can be recommended in cases of rejections of licensing of broadcasting by the State organs, and in the denial of the right to install receiving stations in the States Parties to the Convention.

F Dispute Settlement Mechanism of the European Space Agency (ESA)

The collaborative spirit of the ESA Convention leads to the fact that the ESA is a dispute-averse organization with a strong conciliatory structure in the dealings among its Member States as well as in the relationship between the Agency and the industry. *Ioanna Thoma*[24] underlines that ESA activities encompass a wide range of dealings both in the sphere of public international law as well as private law. The arbitration procedure, enshrined in the ESA Convention, provides accordingly for two distinct types of arbitration: Article XVII concerns the arbitration procedure in case of disputes between two or more Member States, or between any of them and ESA, concerning the interpretation or application of the ESA Convention or its annexes, as well as disputes arising out of damage caused by ESA. Article XXV provides for the arbitral resolution of disputes arising out of written contracts other than those concluded in accordance with the Staff Regulations and introduces proceedings similar to those held in international commercial arbitration.

Concerning the agreements with other public bodies, there is a common trend to include arbitration and escalation clauses. In the practice, ESA has never been involved in arbitral proceedings with any of its institutional partners – the intention of parties to avoid disputes clearly prevails. With regard to the disputes arising out of contracts concluded with private partners, the principal choice of arbitral set of rules is primarily those of the International Chamber of Commerce and occasionally the London Court of International Arbitration Rules; again, no arbitration proceedings have been initiated yet that led to the issue of an arbitral award under a contract. The only one case that resulted in a ruling against ESA before state (US) courts was based on a fundamental misunderstanding of the scope of its functional immunity; the

21 Judgment of 22 May 1990, Autronic.
22 Judgment of 21 September 2001.
23 Judgement of 16 December 2008.
24 *Ioanna Thoma*, Dispute Settlement in Space: the Perspective of the European Space Agency, in M. Hofmann (ed.), supra note 1, p. 127 *et seq*.

application of a restrictive immunity to acts allegedly committed *jure gestionis* does not correspond to the existing case law.

G Alternative Methods of Dispute Settlement

The use of alternative methods of dispute settlement is increasing in the area of telecommunication. According to *Burkhard Hess*,[25] the New Zealand had introduced the Telecommunication Dispute Resolution (TDR), which provides dispute resolution services under the Multi-Unit-Complexes (MUC) Dispute Resolution Code[26] for consumers facing problems with their telecommunication providers. TDR is operated by *FairWay* Resolution Ltd., a Crown Owned Company, which is independent of all the telecommunication companies; the procedure is confidential.[27] Following this model, the European Union adopted Directive 23/11/ on Alternative Dispute Resolution (ADR) for Consumer Disputes[28] (Directive on Consumer ADR) accompanied by Regulation No 524/2013 on Online Dispute Resolution (ODR) for Consumer Disputes. These instruments[29] shall apply to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the Union and a consumer resident in the Union through the intervention of an ADR entity which may be set either by public authority, by industry or in cooperation between the public sector, industry and consumer organizations; the duties of confidentiality laid down in the legislation of Member States have to be respected (Article 13 of the Directive). The ODR platform established by the Commission should be a single point of entry for those seeking the out-of-court-resolution of disputes covered by the Resolution and enable the secure interchange of data with ADR entities. In order to achieve its consistent application throughout the Union, its provisions have to be transposed to the national legislation of EU Member States until July 2015.

3 Conclusion

The analysis of various dispute settlement mechanisms demonstrated that not all existing mechanisms are equally capable to serve its purpose. It appeared that the parties of a dispute very often prefer searching for a consensus and

---

25 *Burkhard Hess*, Theory and Practice of Dispute Settlement in International Economic Relations, Introductory Lecture to the 2nd Workshop on Space Communication, Luxembourg.

26 New Zealand Telecommunications Forum: Multi-Unit Complex Dispute Resolution Code, approved by the Minister for Communications and Information Technology pursuant to Telecommunications Act 2001, October 2013.

27 www.tdr.org.nz, last visit on July 3, 2014.

28 L 165/63, 21 May 2013.

29 L 165/1, 21 May 2013.

an arbitration procedure in case of disagreement prior to international adjudication. This phenomenon is a consequence of the right of the Parties to the dispute to decide about the persons of the arbitrators, the possibility to apply the equity method rather to rely on formal legal principles, the right to keep the negotiation confidential, as well as the relative speediness of the procedure. The cases where formalized international courts are involved in this area have been relatively rare: The ECJ has been approached several times, mostly by national courts raising preliminary questions, the European Court on Human Rights dealt with alleged violations of Article 10 ECHR but mostly in the 1990ies. This situation places space communication disputes[30] in general close to the area of investment disputes: high costs of investment, its international character, the necessity to maintain acceptable working relations with the opposing Party of the dispute after its conclusion, difficult technical background of the case, little trust in court procedures, low indemnification and the fear of non-implementation of court decisions are the decisive factors of these similarities. As a consequence, it can be predicted that mediation, negotiation and arbitration, but also alternative dispute settlements mechanism will become the main mechanisms of dispute settlement in the area of space communication.

[30] In case that they are not investment disputes themselves, mh.