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ADVANTAGES OF NON-LEGAL METHODS OF DISPUTE SETTLEMENTS IN INTERNATIONAL SPACE LAW

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ABSTRACT

The idealistic picture of space activities has spent the era that the most powerful states were the only space faring entities. Before concluding space treaties, they believed that any conflict between them can be solved through negotiation and diplomacy in a prejudicial phase. The space sector nowadays has changed substantially. It has expanded in number and type of actors involved and even in the volume and variety of activities. Space programs have been undergoing a rapid Shift from government oriented activities to commercial ventures, since direct participation of private sector has grown fast and space tourism which was a dream and fantasy once upon a time is becoming a reality. This paper by using descriptive method of research is about to analyze the space treaties for non-legal methods of peaceful settlement of disputes that may arise to safeguard international peace and security which is the ultimate goal of United Nation.

Keywords: International Space Law, consultation, negotiation, inquiry, mediation, conciliation, Claims Commission (CC)..

INTRODUCTION:

The law provides the rules and justification for dispute settlement. The evolution of international dispute settlement has following five phases:

a)There was the concept of just war which allowed the enforcement of rights and obligations between states through a legally accepted use of armed force; b) Realization of the importance of peaceful settlement of dispute between states and before adhoc bodies; c) The establishment of Permanent Court of Arbitration (PCA) by 1899 treaty, with the awareness of the urgency to establish a standing body; d) The establishment of the Permanent Court of International Justice (PCIJ), International Court of Justice (ICJ), regional bodies such as European Court of Justice (ECJ), The European Court of Human Rights (ECHR) and International Center for the Settlement of Investment Disputes (ICSID) after World War II and in early 1980s; e) The established of various human rights commissions and tribunals (Rosanne, 1991: 4).

These evolutions show clear inclinations away from the use of force and dispute settlement towards recourse to third party compulsory mandatory jurisdiction and binding decision making powers. Generally speaking, a dispute occurs when a party perceives itself to be injured; decide some other party is responsible; from a sense of entitlement to some kind of redress, and formulate a specific claim which is rejected by the other party. The method of dispute settlement to be chosen by parties depends upon following factors:

a) The extent of the interaction and interdependence of the actors involved; b) Whether the parties are in a continuing relationship with each other, their relative bargaining power and ability to exert influence on each other; c) Their geographical and political relationship with each other and third party; d) The similarities or differences in their political, cultural or economic ideology; e) The history of their relationships and the methods of dispute settlement used in the past between them; and, f) Their respective commitments to international law and principle of peaceful settlement of dispute (Surds & Shany, 1999:28).

The Charter of United Nations (UN) provides, in Art. 2(3) and (4), two parallel obligations, requiring all members to settle their international disputes by peaceful means in a manner that international peace and security and justice are not endangered; and to refrain from any treat or use of force in their international relations against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose(s) of the UN (Watts, 2001:21). Article 33 of the charter of UN requires that parties of any disputes which the continuance of it is likely to endanger the maintenance of international peace and security shall first of all seek a solution by "negotiation, equity, mediation, conclusion, arbitration, judicial settlement, resort to regional agencies or arrangement" (Watts, 2001:21).

In this paper we are about to analyze advantages and disadvantages of non-legal methods of peaceful settlement of conflicts arises in space activities, which are consultations, negotiations, inquiry and fact finding, mediation and good offices, conciliation and the claims commission (CC).

NON-LEGAL DISPUTE SETTLEMENT METHODS RECOMMENDED BY SPACE TREATIES:

CONSULTATIONS:

Consultations and prior notification is one of the most useful methods of dispute settlement and conflict avoidance techniques. This method requires a party that might adversely affect another party, to inform the other party of its intentions and to discuss the matter and avoid any disputes. Some advantages of this method are as follows:

a) Advocating a Pre-emptive and early resolution of a dispute by permitting parties to identify and attempt the settlement of potential problems at an early stage through taking action before parties' positions become rigid and polarized and their difference become more critical and intractable. This method especially is vital in space activities, as it can avoid escalation of the problem into an international conflict as well as political and economic chaos.

b) It may give the proposing party a better understanding about its proposal effect on other party which may lead to abandonment of that policy or vary it, so that to avoid or limit more harm. As in space activities any adverse action by one party may have huge implications on others due to the principle of reciprocity which must be avoided and necessary abandonment of any retaliatory counter-actions by other parties, as it can be detrimental to all parties.

c) Providing an opportunity for the affected party to take measures necessary to avoid or reduce the potential harm which is very important in space activities, as it might lead to enormous savings of costs incurred later to remedy damages.

d) It shows an attitude of good will, good faith and good neighborliness which are good confidence building, and establishing a climate favorable to dispute settlement and cooperation in space activities (Kirgis, 1983:20-25).

The drawbacks and limitations of consultation includes: "The main aim of consultation is about not harming the other party which this may not be the case in space activities as potentiality effecting national security or involving massive costs and economic gain; Consultation is effective if the other party willing to change its policy or action which in space activity this change cannot happen as they are generally entail technology development; Consultation may result in delay or publicity, diminishing the usefulness of a proposed policy or action which is contrary to space activity features of urgency or secrecy for its effectiveness which competition level is high".

The use of consultation procedure is provided for in article XI of the Outer Space Treaty (OST), which provides: "appropriate international consultations" in cases involving "potential harmful interference with activities of other state parties.[1] The states conducting space activities therefore, "shall undertake" consultation before proceeding with such activities, if that state believes its activities or those of its nationals might cause such interference. It seems the duty to consultation regarded as binding obligation due to the use of the word "shall" in this treaty. The main aim is to avoid further conflict and there is no detailed procedure for it which seems to be state oriented approach.

NEGOTIATION:

The aim of negotiation is achieving agreed solutions which are more than mere deliberation (consultation). This method of dispute settlement can be bilateral or multilateral and full power may be required for person(s) who is considered to represent the state or other subject of international law.[2] Negotiation is the method suitable for settlement of all international disputes and the ICJ affirmed it in the North Sea continental shelf cases.[3] It is the principal, standard and preferred method of settling international disputes. It is included in many contracts and international agreements as an obligation of prior consultations, a means of settlement, or as a preliminary to other methods even adjudication (Collier & Lowe, 1999:21).

Negotiation currently been noticed again as a type of alternative dispute resolution which must be proceeded in good faith and international law is also applicable on it despite its informal character. The reasons for preferring this method include:

a) It is a low risk method which parties retain maximum control over process and outcome of it, since they can walk away any time. It is suitable for space activities, as they are high risk activity and party autonomy to reach the most flexible solution is highly prized. b) The responsibility for settling of the dispute is on both parties for working out their dispute in a sensible, practical and acceptable solution. Since many issues in space activities are highly confidential, negotiation allows that a dispute to be settled solely by the parties. c) The result of negotiation is mostly accepted and has stable outcome, since parties are agreed freely. This method is suitable for space activities due to the relatively small community of actors involved in and it is important that any dispute settlement chosen can mountain good working and cooperative nature of those activities. d) Negotiation is in the favor of compromise and accommodation between parties, rather than a zero sum win or lose situation such as adjudication. This approach can preserve good long term cooperative relations, as most of space disputes involve many complex technical and Economics issues; negotiation is a better approach for resolving them. Since space disputes may not entail a zero sum gain situation. e) Negotiation is simpler and less costly method of dispute settlement and can be carried most easily due to its confidential manner. As it can develop cooperation-fostering and confidence-building attitudes; procedures and relations between parties; as well as being faster and cheaper is more suitable for costly space activities.

Some of limitations and disadvantages of negotiations for space dispute settlement are: a) cannot assure the settlement of disputes which parties have very opposite positions and not willing to compromise without intervention of third party. As space disputes relates to national security, economic and international relations, the prolonging of a dispute is undesirable. b) Negotiations are intrinsically political and subject to pressure of various interested groups which may complicate, delay or hinder this method. Since space activities have captured public interest, its actors will face several pressures that might prevent the early and compromised settlement of disputes (Grone, 1996:26-40). C)This method seems unfair and dependent upon parties bargaining

[1] Treaty on principles governing the activities of state in exploration and use of outer space including mean and celestial bodies (OST), 27 January 1967, 610 UNUS 205; (1967) 61 AJIL 64; hereinafter OST

[2] Art.7 (2) of the Vienna convention on the law of treaties (1969)

[3] North Sea continental shelf cases, (1959), ICJ rep. 3, at.48

powers, instead of the legal or equitable merits of their respective position. d) Negotiations preclude the assistance of special experts which are essential to space disputes settlements which considering technical facts or scientific facts. e) In disputes arising from commercial space activities, private enterprises are not subjects of international law and its obligations, therefore they are not comfortable with direct intervention of government because diplomacy and negotiations are known a method for diplomatic protection of their nationals and allows the verification of state responsibility for its national's actions in outer space according to article VI of OST. Therefore, it is not simple to advocate negotiation for settlement of space disputes.

INQUIRY AND FACT FINDING:

According article 34 of UN charter, the main aim of this method is supplying information required for decision making at international level which is used widely in organs of UN and its specialized agencies (e.g. International Atomic Energy Agency (IAEA)) and other international bodies with global or regional character. The outcome is a non-binding and detailed report after conducting an impartial examination of dispute. This method is about formal intervention of third party in international disputes. Its place is after direct diplomatic negotiations between parties when intervention of third party (good offices) has been exhausted, and before conciliation and mediation. Most inquiry and fact finding bodies are adhoc, but it can be done through a permanent panel due to prior agreement which does not involve the application of rule law (Leurduk, 1967:45-55). This method is suitable for settlement of factual or technical disputes which facilitate a solution by conducting impartial and conscientious investigation.[4] Since it can reduces the tension and narrowing the area of disagreement between parties.

The term fact-finding and inquiry are synonymous and interchangeable, since in article 33(1) of the UN charter where different steps of peaceful settlement are listed, only the word of inquiry appears as a step between negotiations and mediations (Rosanne, 1991: 21). This method is utilized by the UN Secretary General in 1984 to investigate the use of chemical weapons in Iran-Iraq Gulf war.[5] The only problem of this method is that use of fact finding method is subject to the consent of the state whose territory is to be inspected (Gray, 1999: 152-7). In space disputes, states carrying out space activities may refuse to allow the initiation of fact-finding missions about its spacecraft or installations in space. Despite vital role of this method, as space activities involve high technological and scientific data, much of the evidence that are important and indispensable to space dispute settlement, needs expert interpretation which can be obtained by using the legal professionals. Therefore, this method is very suitable for space disputes and any recommendation of inquiry and fact finding bodies should be evaluated in the light of legal principles and the inquiry board should have at least one legal professional, so that the rule of law can be obtained in a newly developing field of international law such as space law. The settlement of space disputes based only on issues of fact finding, however, runs the risk of the legal framework governing space activities.

MEDIATION AND GOOD OFFICES:

Good offices is about the involvement of one or more states or an international organization in a dispute settlement procedure between states with aim of settling it, contributing to its settlement or the solution of specific problems which the states in question are unable or unwilling to solve it, or ease relations between them. Good office may be an initiative action or requested by one or both parties, with or without their consent at First, which must be obtained before such assistance can in fact be rendered (Bindschedler, 1995:601). This method expedient when the animosity between the parties is so great that direct negotiations are not successful and intervention of third party is appeasing the feeling of resentment.[6] Chapter VI (Arts. 33- 38) of the UN charter provides for the peaceful settlement of disputes likely to endanger international peace and security which is the primary responsibility of Security Council. The good office will normally be rendered by the Secretary General of UN or a special organ (Rosanne, 1991: 21-23).

The difference between good offices and mediation is that in mediation, the mediator takes active steps to settle the dispute. Article 33(1) of the UN Charter does not mention good offices, but the UN Secretary General has frequency undertaken good offices for intervention in dispute settlement. The pre-conditions of these methods of dispute settlement are the consent and cooperation of disputants, but the proposals of third party are not binding. The next point is that, its implementation depends on consent and good faith of parties. Mediation of

[4] Report of secretary general "on method of fact finding", 22of April 1966, UN Doc. A/6228, GAOR (XXI), annexes Vol. 2, Agenda item 87, PP.1-21
[5] UN SC Res, 496 (1981)
[6] Article 4 of 1899 Hague convention for the pacific settlement of disputes, UKTS 9(1901) cd.798

Algeria in the 1980 diplomatic hostage dispute between Iran and USA is an example of good offices that lead to the establishment of Iran-US claims tribunal in 1981 (Algiers accords, text, 1981, 20 ILM 233).
The advantages of this method of dispute settlement are to be seen in the breaking of a stalemate, the removal of psychological inhibitions and the introduction of new elements into negotiation. Larger states (super powers) with greater political weight have more chances of success due to their resources and influence provided that they don't involve in the conflict or which are not closely allied to one of parties and have truly neutral stance. This method has greater chance of success in following situations:
a) The settlement of smaller issues or local conflicts; b) in stalemate situations, or when the dispute has already been decided and the consequences have to be implemented; c) when the parties agreed on the substance and the extent of the mandate which must be clear and unambiguous; d) The task must be feasible and the mandate must be limited to a specific period of time; e) Willingness of the parties to reach a solution for the conflict, regardless of the public stances that may have been adopted (Buhring, 2006: 176-195).
This method plays a very significant role in space dispute settlement and its advantages include: a) It is a flexible process, which allowing loopbacks to negotiation and encouraging parties to reach an acceptable settlement, allowing parties to retain their autonomy and control of the settlement process which is essential for space activities; b) Mediator can suggest a solution based on the principles of international space law, while taking into account the parties perspective and interests; C) As the treaty regime of space activities has been elaborated by the UN, the good offices of the UN Secretary General are vital in space dispute settlement, since the registration of space objects[7] is kept by its office; d) It can be a confidential process which is important for space activities that are sensitive about national security and interests, which is due to the importance of technology market secrecy; e) Mediator, in addition to proposing compromises, can offer assistance in carrying out the compromise agreed upon, financial support and even guaranteeing the execution and continued observance of the solution arrived at.

CONCILIATION:

Conciliation can be either on permanent or an adhoc basis which means impartial examination of the dispute for finding a substantive solution by narrowing the gap between different point of view of parties and presenting an acceptable compromise that go beyond fact-finding and inquiry. The proposals offered in contrast to arbitral award are not binding and have recommendatory nature which must be accepted by parties. This method of dispute settlement primarily has utilized by the European nations. It can be voluntary or compulsory in nature and each party has this right unilaterally to appeal to a competent body and set its proceedings in motion. The third party proposal can be based on existing law or ex aequo et bono (Equity) principal. Conciliators are acting in their individual capacity and not as functionaries of their state or organization. In general, each party nominates one or two of its own nationals and the parties jointly select one, three or more of nationals of the states that are not involved in that conflict (Schwarts, 1995: 98-100).
Conciliation combines the distinctive characteristics of inquiry and mediation. It is more formal and less flexible than mediation, since mediator can formulate new proposals in case of rejection of the first one, where as a conciliator only issue one report. Conciliator usually has separate confidential discussion with each party to find a sphere of agreement between them. The success of this method dependent upon the independence and impartiality of the person(s) selected, so that objectivity and moderation can be guaranteed. Independent persons, therefore, bring a non-political element into the conflict and have more freedom of action than states and less likely to be suspected of misusing their mandates.[8]
Conciliation is suitable for non-judiciable disputes, but it can be used for judiciable ones, either alone or as a preliminary step before beginning of the arbitration proceedings, as a legal advisor of parties. It seems conciliation is inappropriate in the content of multilateral conventions, as their aim is to establish a uniform legal order.
The conciliation body can negotiate with parties separately or jointly, it is supposed to establish the facts, take notice of the claims of both parties and take all other relevant factors into account. At the conclusion, this dispute settlement method usually presents a recommendatory report of solution, which must be accepted or rejected by parties within a given period. Some of the advantages of conciliations include:

[7] Article 2, Convention on Registration of objects launched into outer space (1974), adapted on 12 November 1975, entered into force on 15 September 1976, (1967) 1023 UNTS [hereinafter registration convention]
[8] Alternative dispute resolution: mediation and conciliation, law Reform, (2010) LRC 98-2010, law reform commission, November 2010, PP. 40-45 available on: www.lawreforme.ie, last seen on: 20 June 2016

a) It is more flexible than other binding third party dispute settlement mechanism such as arbitration and adjudication, since there is more freedom for the parties' wishes and for the initiatives of third parties, which is important for space disputes, as parties may have made huge investments and would wish to retain control over dispute settlement procedure.
b) It allows compromise to be made more easily as its procedure allows the brokerage of package deals, so that parties give ground on their demands in return for a reciprocal compromise from the other party. This is pertinent to space dispute due to the complex nature of space activities.
c) It allows parties to avoid losing face and prestige by voluntary accepting the proposal of the third party. As many space programs are rooted in national and state prestige, and because a huge amount of public spending goes into the space industry, parties maybe politically challenged to compromise. As parties are responsible to their private shareholders and board of directors, third party proposal can be accepted without losing the confidence of their constituencies.
d) It allows parties to remain in control of the outcome by rejecting the proposed solution, and they may move on to other methods of dispute settlement. This is suitable for space disputes, as it allows parties to accept only solution that is in their interests or reject that.
e) It does not create a legal precedent for the future disputes. The third party does not have to give its reasons and the proceeding can be conducted in secrecy by focusing on the practical issues. This is suitable for space disputes as there is no precedent created, and by accepting the proposed solution in one case, the parties need not worry about consequence of it in future. Its priority is taking the parties interest into consideration above all else (Merrills, 1996: 76).

The disadvantages of this method of dispute settlement are: a) It is dependent upon the opponent's consent and good will; b) Its main contribution is to develop the rule of law that is less than arbitration or adjudication; c) It suffers from a historical lack of usage and its value being attached to it is due to 1990 UN draft rules on conciliation of disputes between state[9] and The 1992 CSCE convention on conciliation and arbitration[10]; d) It generally needs a subsequent binding third party dispute settlement in case of its failure, for it to be successful (from 20 cases which settled by conciliation, in one case conciliation failed and Compulsory arbitration had been provided for), this means that conciliation in itself is a time consuming method of dispute settlement.

THE CLAIMS COMMISSIONS (CC):

The liability convention (1972) is the other broadly accepted UN space treaty beside the OST which allows state parties to assert liability claims on their own behalf and on behalf of corporations or individuals under their jurisdiction (Article VIII (1)). This convention then stipulates that if the state of nationality has not presented a claim, the state in whose territory the damage was sustained or the state of damaged person permanent residency may present a claim respectively to a launching state (Article VIII (2-3). Any claim of compensation in respect of international organization liable for damage caused, shall be first presented to that organization (Article XXII (3(a)), in case of that organization has not paid the compensation within a period of six months, any sum agreed or determined to be due as compensation for such damage, may be paid by members of that organization which are state parties of this convention (Article XXII (3(b)).

The first way of dispute settlement provided in this convention is diplomatic negotiations and if a state party does not maintain diplomatic relation with launching state, it may request another state or the UN Secretary General to present its claim, provided the claimant state and launching state are both UN members (Article IX). The time limit for presentation of a claim for compensation to a launching state is one year after occurrence of the damage or the identification of launching state or one year after learning about the mentioned facts which reasonably be expected to be learned about through exercise of due diligence (Article X (1-2)). This claim shall not require the prior exhaustion of any local remedies available (Article XI (1)). The amount of compensation to be paid shall be determined in accordance with international law and the principles of justice and equity for having reparation which will restore the condition that would have existed if the damage had not occurred (Article XII).

If the diplomatic negotiations failed within one year from the date on which the claimant state notifies the launching state and it has submitted the documentation of claim, the parties concerned shall establish a claims commission (CC) at request of each party (Article XIV). The three-member commission will be convened in a way that each party will appoint one member and third member (chairman) will be chosen jointly by both parties. The time limit for appointment of each party member for the commission will be two months from the

[9] (1991) 30 ILM 231, Valletta Principles
[10] The 1992 CSCE convention was created by the Conference on Security and Cooperation in Europe (CSCE) which was initiated at the Helsinki conference in 1975. It modifies 1991 draft in Stockholm meeting, (1993) 32 ILM 557,558 and 570

request for its establishment. If no agreement reached of the choice of chairman within four months from such a request, it will be appointed by the UN Secretary General due to request of each party within a further two months' period (Article XV). In case of that one party does not appoint its member within the stipulated period; the chairman by request of the other party shall constitute a single member commission (Article XVI (1-2)). The commission shall determine following matters: "a) its own procedure; b) place(s) where shall sit; c) all other administrative matters (Article XVI (3-4)); d) deciding about merits of claim and amount payable (Article XV)); e) it can also make final and binding decision, if so agreed (Article XIX (1)), and by majority according to (Article XVI (5)), otherwise shall render a final recommendatory award which its execution depends upon good faith of parties which contains the reasons of its decision or award (Article XIX (2)); f) If there are two or more claimant states or launching states, the members of the CC will be appointed jointly and no increase of membership allowed (Article XVII).

The technique of the commission has been described as conciliation which is non-binding dispute settlement method involving formal third party intervention. It has been described as a combination of inquiry (i.e. the ascertainment of facts) and meditation (i.e. the endeavor or bringing the parties to an agreement) (Romano, 2000: 60-64).

Where such an agreement about binding nature of this commission award has been made prior to the commencement of the procedure, the commission could be considered as an adhoc tribunal (Bockstigel, 1993: 27-35) and also can be referred to as a semi arbitration court (Supancana & Bagus, 1998: 187).

The modern space activities nowadays have become commercial and highly competitive. So that joint space ventures are more prevailing than an exception. Due to several liabilities established by article V of the liability convention, it seems unfeasible for a launching state to declare it acceptance of the binding nature of this commission award, when it is not accepted in mutual and reciprocal sense (Kerrest, 2002: 462-469). Enforcement of recommendatory CC awards depends upon the party's good faith and that it must be rendered promptly and made public.

The weakness of this convention is about protecting private parties damaged which must rely on the cooperation of state to assert claims. This can be detrimental to them; as political consideration may prevent states from acting on their behalf. Even if claims are presented, diplomatic negotiations may proceed forever and the CC can be formed if one of parties so request. Finally, the non-compulsory nature of the CC awards, combined with the wide range discretion of commission in deciding the amount of compensation, may do little in practice to alleviate the damage suffered by private sectors. This dispute settlement procedure of the liability convention involves significant uncertainties such as: a) not all disputes will ever be introduced to the commission; b) once this commission initiated, they can last for a very long time; d) the decisions rendered by the CC may be far from satisfactory due wide range of its discretion; e) the commission's awards are recommendatory in nature and most likely are not even enforceable.

CONCLUSION:

For a dispute to arise, a party must "perceive itself to be injured; decide some other party is responsible; entitle itself to some kind of redress; and formulate a specific claim which is rejected by other party. choosing a non-legal method for space dispute settlement depends upon these factors: " a) the extent of the parties interaction and interdependency; b) the parties relationship, their relative bargaining power and ability to exert power on each other; c) the partier geographical and political relationships with each other and third parties; d) their political, cultural or economic ideology similarities or differences, the history of their relationship and the method of dispute settlement used in the past; e) their respective commitments to international law and the principle of the peaceful settlement of dispute; f) motivation of third party for intervening and its beneficial or deleterious effect(s) on the settlement process; g) the consequence(s) of the method chosen and its overall effect on the parties and on the general framework of the law.

In recent years there is some reluctances for accepting the optional clause of the ICJ; so that, there is preferences for smaller, cheaper and more expedient methods of dispute settlement especially non-legal methods in space disputes. Because nowadays party's tendency is toward choosing methods of dispute settlement which is more harmonize with their autonomy and control. There is also a clear distrust for binding third party dispute settlement such us arbitration and adjudication in the ICJ and other international tribunals, due to lack of an impartial enforcement mechanism in the international legal framework. Furthermore, the actual mechanism of inducing parties to abide by international law does not rest on arbitration or adjudication, but rather on workable, reasonable and efficacious methods which can be obtained better in non-legal peaceful dispute settlement methods. These methods are therefore more suitable for space disputes which emphasis on

"flexibility, confidentiality, better understanding, maximum control, recommendatory solution and interest of both parties.

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