Dispute Resolution: Commercial In-orbit Space Activities

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Conference Question

Is there a need for a dedicated international settlement mechanism for dispute resolution arising from space commercialization?
Answer: NO

• There would be no work for such an organization.

• There has yet to be an incident in space with enough economic damage to warrant a law suit.

• And the probability of near-term incidents is still very low!
Economics: A Key Consideration

• *If there is an accident, will there be a formal legal dispute?*
  – Loss or damage to space assets/hardware
    • Low value—most are not insured
  – Loss of terrestrial revenues
    • Depends—resilience, back-up, insurance
  – Space environmental damage
    • Very difficult to value in monetary terms

• *If no economic damage, no formal dispute likely*
Historical Odds

- Loss of satellite on launch ≈ 6%
- Loss of satellite 1\textsuperscript{st} year in orbit ≈ 6%
- Loss of satellite after 1\textsuperscript{st} year ≈ 2%
- Loss of satellite from direct collision ≈ 0%
- Kessler effect -- it hasn’t occurred yet
  – If it occurs, where are the risks highest?
Current Regulations Focus on Access to Space (Launches)

- Access to space and return from space
  - Absolute (strict) liability for any “space object” that causes terrestrial damage
  - Insurance/indemnification for 3rd party liability
- No recommendations for changes
  - Current national systems for financial responsibility are working
Access to Space vs. In-Orbit Commercial Activity

• Do we need a different financial responsibility regime for in-orbit commercial activities?
  – Yes; risks, liability, and potential damage are different

• And, following that, do we need a better international dispute resolution system for private activities in space?
  – Yes, but use existing international commercial mechanisms
Future Commercial Issues will Focus on In-Orbit Activities

- Transporting people and cargo through space
- Active debris mitigation
- Satellite servicing
- Diverting Near Earth Objects
- Resource extraction and processing

- All currently face similar unresolved regulatory and legal issues
- These are activities that will change space law
Examples of What Will Change

- Definitions/interpretations of treaty terms
- Systems for transparency to avoid misunderstandings, especially w/r/t “weaponization” and “peaceful purposes”
- Rules for clarifying the ownership of resources and underlying obligations of stewardship
  - Recognize that sovereignty, property rights, and liability are very different things.
- Methods for resolving disputes
Situations of Particular Concern

(legal lacuna where regulatory standards and enforceable dispute resolution are yet to be defined)

• A commercial space asset, and
  – Accident or incident occurs in outer space
  – Incident is well defined and is not a political conflict
  – International dispute—2 or more parties with different launching states involved
  – There are no clear contractual agreements between the parties
  – Significant economic damage occurs, and
  – The accident or incident involves a finding of fault
Developing a Dispute Resolution System Without New Treaties

• Long recognized that a new or amended space treaty at the U.N. level would be impractical and difficult to implement in the near-term

• Soft law, non-binding, and “optional” solutions will not be sufficient for reducing risks and stimulating investment for private firms
For Space Activities Today: International Settlement Mechanisms

• Diplomatic negotiations:
  – Political issues including conflicts between nations
  – Incidents involving only government assets
  – Commercial space assets with dual-use, dual-funding, or hosted payload governmental purposes

• International Court of Justice
  – Mainly for incidents between governments

• Private actions:
  – Arbitration
  – National courts
Dispute Resolution Possibilities

- **Existing Int’l. Organizations With Dispute Provisions**
  - ICJ—including special chamber option
  - ICAO
  - ITU
  - WTO
  - UNCLOS
    - Arbitration required
    - Sea Bed Authority and Tribunal
  - French Air & Space Law Society (Int’l. Aviation & Space Court)
  - + Others

- **No formal tribunal—Case-based adjudication**
  - Conciliation, Fact-finding, Mediation
  - 1958 NY Convention on Binding and Enforceable Arbitration
  - Other arbitration options
    - Various sponsoring organizations with formal arbitration system.
International Models

(Better than nothing, but all with serious deficiencies)

• Treaty based systems—States have taken reservations and/or made system non-binding

• Non-binding; no enforcement mechanisms
  – (Liability Convention, ITU, ICJ special chamber model)
  – Optional systems are essentially useless for private/commercial cases
    For example: ICJ environmental panel never used

• UN/International Tribunals limited to State Representation
  – (ICJ, PCA, Liability Convention)
Binding International Arbitration Can Be Enforceable

• 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (ratified by 188 nations)
  – To apply this to commercial space may require an amendment of the Convention

• Commercial practice—arbitral systems
  – Domain name disputes
  – Maritime salvage
  – Wall Street securities industry arbitration (FINRA)
  – Sports arbitration (Court based in Switzerland)
  – Commodities markets (London Metals Exchange and National Futures Association, for example)
Advantages of Binding Arbitration

• Relatively fast process (compared to formal courts)
• Relatively less expensive (but complex litigation will still be costly)
• Judges selected by agreement among the parties
• Use of “list” of neutral experienced professionals for the very special technical issues of outer space
• No need for a new special tribunal or system
Issues to be Considered

• Selection of judges (special experts, how many on panel, etc.)
• Handling of classified or proprietary information
  – 2011 PCA Optional Rules for Outer Space Activities
    • Based on UNCITRAL arbitration proceedings
    • Art. 17, §6, §7, §8 address confidential information
  – IBA Rules of Evidence
    • Rules need to be agreed upon by parties to arbitration
    • Art. 3 and Art.9 are specific to proprietary, confidential, and classified information and are stronger than PCA Optional rules, above.
• Transparency and publication of judgment
  – Important because decisions can set legal precedents, but
  – Precedents might also conflict with existing treaties
Addressing the Issue
Before the Big Accident Occurs

• If we wait there will be no agreement possible since parties have too much to lose
• Commercial world has workable systems
• Governments could also agree to be bound by decisions
• National Laws are the key and
  – Before-the-fact binding agreements should be part of the licensing process
• International treaties can wait, but they would be very helpful in providing uniform guidelines.

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Recommendations for Space-faring Nations

• Nations, acting in parallel, should use national laws to specifically address adopting binding arbitration, particularly in licensing private space operations
• Agree on which arbitral process to be used for space disputes and on the specific choice of rules
• Don’t wait for a major space incident to happen
• Adopt the IADC Guidelines, continue to develop “codes of conduct,” and encourage transparency and confidence-building measures (TCBMs) to minimize future accidents; all before-the-fact actions, but
Summary

• An after-the-fact dispute resolution system that is enforceable is also an incentive for national and corporate responsible behavior.

• This leads to a more stable and predictable space environment for both business and government.