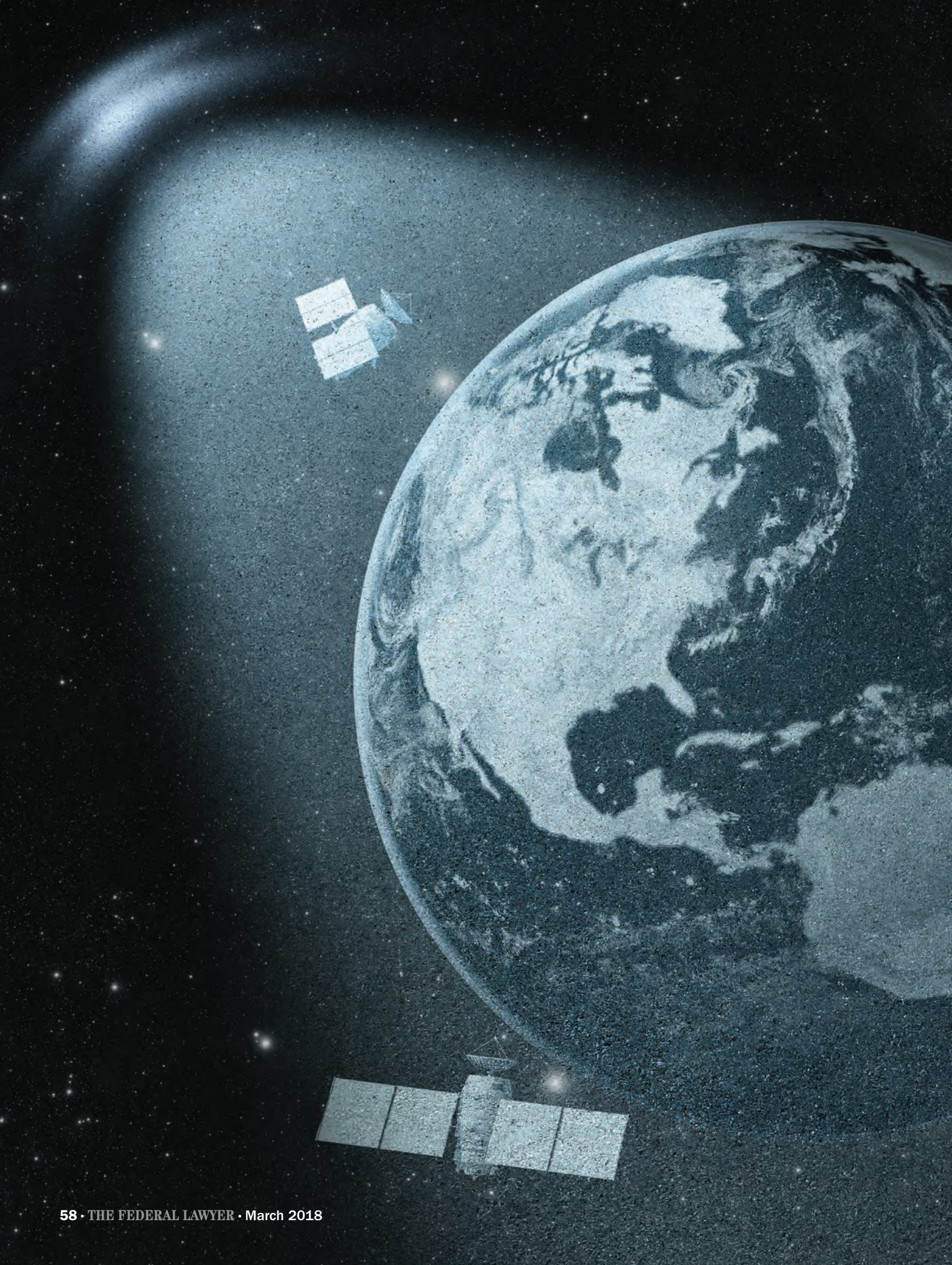

# ARBITRATION RULES FOR DISPUTES ARISING FROM OUTER SPACE ACTIVITY

SUSAN CONE KILGORE

Space law came into its own starting with the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty)[1] and continuing to the 2011 Optional Rules of the Arbitration of Disputes Relating to Outer Space Activities (Outer Space Rules).[2] That said, there is no all-encompassing compulsory dispute resolution procedure within international space law. However, some generally accepted principles and understandings of dispute resolution procedure have developed as space law has developed.

## History of Space Law

The original intent of the Outer Space Treaty was to outline the legal principles and guidelines for future space activities.[3] States, who in the early days of space activity were the actors in space activities, preferred first negotiation and then diplomatic methods of dispute resolution, such as mediation, conciliation, and other nonbinding resolution methods. Implicit within the Outer Space Treaty is the state parties' acceptance of the regulations and procedures for international dispute resolution inherent in general international law. This inherent acceptance is found in Article III of the Outer Space Treaty:

> States parties to the treaty shall carry on activities in the exploration of outer space, including the moon and other celestial bodies in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding.[4]

The international law referenced is the United Nations' requirement for the prevention and settlement of disputes.[5] While this section is intended to address the development of the Outer Space Treaty, much of this discussion will revert to the interplay between the Outer Space Treaty and the U.N. Charter.

Within the Outer Space Treaty, "international cooperation and understanding" are operative terms. First, these terms refer to government actions. Second, these terms pre-suppose the avoidance of disputes—*not* what to do when a wrong has occurred or damage has been done. Further, the U.N. Charter contains the governmental dispute resolution provisions: One purpose of the U.N. is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes and situations which might lead to a breach of the peace."[6] Here we see some mention of resolution of disputes after they occur and specifically the mention of "adjustment" of disputes. Whether tort claims were envisioned in this charter is not clear. It can be argued that this section lays the foundation for some resolution of tort claims.

Next, Article 2(3) of the U.N. Charter provides that "all members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[7] This foundational article sets up Chapter VI of the charter,

which addresses peaceful dispute settlement. Chapter VI may have a wider audience than the state parties to the U.N. Charter since the language in this chapter changes from "members" to "party."[8]

While this article identifies specific optional methods for dispute resolution, neither the act of dispute resolution nor any method of dispute resolution is compulsory. The only mandatory requirement is that the parties "shall seek a solution."[9]

These articles within the U.N. Charter provide the foundation for the Outer Space Treaty and its provisions for state responsibility for space activities. Two Outer Space Treaty provisions are relevant. First, Article IV:

> States parties to the treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by nongovernmental entities, and for assuring [sic] that national activities are carried out in conformity with the provisions set forth in the present treaty. The activities of nongovernmental entities in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate state party to the treaty.[10]

This article, read with the understanding of the general doctrine of state responsibility for internationally wrongful acts or actions that violate obligations under international law, expands state responsibility for outer space activity when such outer space activity violates obligations under international law.[11] Article VI expands the general concept of state responsibility by its application to nongovernmental entities. If private space activity results in a violation of international law, the state incurs international responsibility.

Next, we turn to Article VII and its treatment of liability for damage:

> Each state party to the treaty that launches or procures the launching of an object into outer space, including the moon and other celestial bodies, and each state party from whose territory or facility an object is launched, is internationally liable for damage to another state party to the treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air or in outer space, including the moon and other celestial bodies.[12]

This liability provision, read in conjunction with the later Convention on International Liability for Damage Caused by Space Objects (Liability Convention),[13] indicates that states or international intergovernmental organizations are the only entities that may be liable as "launching states."

Absent from Articles VI and VIII (and from the later Liability Convention) is any provision for the mechanics of dispute resolutions.

Article IX offers a mechanism to prevent disputes—providing that a state shall proceed to consultations if the state has reason to believe that its planned activity or experiment would cause potential harm or interfere with the space activities of another state. Under this article, the original state will not pursue these activities or experiments before holding the consultations. Still, absent from Article IX is any specific instruction regarding the mechanics or procedures for such consultations.[14]

Returning to the Outer Space Treaty, while Article III suggests these dispute resolution procedures are applied to international space law by invoking the general principles of international law through the U.N. Charter, this suggestion is insufficient. Article III merely implies the use of certain forms of dispute resolution procedure. The invocation of the U.N. Charter and general principals of international law do not provide any binding obligation to submit disputes to any resolution mechanism. And the general principles of dispute resolution provided in the U.N. Charter do not envision state and private actors' participation. As private actors become increasingly more involved in space activity, these public law methods leave us wanting appropriate resolution methods. Space law needs a dispute resolution mechanism with the force of public international law that permits the participation by private actors or the combination of public and private actors.

Is that mechanism arbitration? Arbitration may be advantageous or useful for the resolution of space-related disputes. The following six points partially explain why arbitration is favored to resolve space-related disputes.

1. **Availability.** The arbitration tribunal, as a forum, is available to all kinds of participants: from states to private natural persons. This feature makes arbitration a particularly good fit for the changing demographics of space actors. With the commercial development, manufacturing, and operation of space hardware and infrastructure activities; the global expansion of commercial communications companies; and the market demand for commercially provided satellite launch services, national and multinational companies are an ever-increasing percentage of space actors.
2. **Requirement of Consent.** Much as public international law is premised on consent, arbitration is premised on consent. Similarly, public international law is demonstrated by treaties among or between states. At their core, treaties are contracts or agreements. Arbitration of disputes is, at its core, voluntary and occurs by parties' contract or agreement.
3. **Narrow Application.** Public international law moves slowly, often because a public international regime must be considered in light of each state's national legal regime. A bilateral treaty is easier to negotiate than a multilateral treaty. States' consent to arbitration for a specific dispute does not require a line-by-line comparison to each nation's legal regime. While arbitration occurs by agreement, it is more like the easier-to-negotiate bilateral treaty than the multilateral treaty.
4. **Party Control.** Arbitration evolved out of trade organizations' need to resolve disputes among parties who intended to trade with each other or to work together. These parties wanted decision-makers with knowledge of their trade. General legal principles—and even general principles of public international law—are still general and may not be best-suited to resolution of highly specialized disputes. Decision-makers with general legal knowledge may also not be best-suited to resolve highly specialized and highly technical disputes. The specialized knowledge, training, and skills, (and, it is hoped, experience) of a specially chosen arbitrator or panel offers the expectation that the decision-makers are aware of the special evidentiary and legal considerations. For example, space activities involve highly specialized scientific experience beyond the usual knowledge of the average fact-finder.

5. **Confidentiality.** Space activities involve government secrets, military tactics, and highly specialized technology. These activities, and their actors, invoke a high preference for protection of their government, military, or trade secrets. Arbitration proceedings are often confidential—or may be made so—and evidence presented in arbitration proceedings is rarely a matter of public information and awards are rarely publicized. Parties to an arbitration can require this confidentiality at the time of referral or submission.
6. **Adaptability and Control.** Because arbitration is a recognized and well-used form of international dispute resolution, it has demonstrated its adaptability and its value to the parties to select their rules and procedures. For over 36 years the United Nations, through the United Nations Commission on International Trade Law (UNCITRAL),[15] has promulgated what are considered the most widely used procedural rules in international arbitration.[16] In 2010, UNCITRAL adopted the most current version of the rules, drawing upon the case law derived from the application of previous versions of UNCITRAL rules and upon academic commentary.[17]

Many space businesses have sites in a variety of states. Public and private actors enter into contracts relating to outer space activity and other activity that has effects in outer space. Under typical international dispute resolution procedures for contract actions, the parties would submit their dispute to international commercial (or private law) arbitration. However, public international law arbitration procedures may prove to be more practical to resolve these disputes because of the overarching public law principle of preserving outer space. Hence, the Permanent Court of Arbitration (PCA) introduced optional rules.

## The Optional Rules

The PCA is an intergovernmental organization with member states and is a permanent mechanism for arbitral tribunals to resolve disputes. The PCA allows states, state entities, intergovernmental organizations, and private parties to resolve their international legal disputes.

The PCA recognized a need for a specialized method for resolving disputes arising from outer space activities. The PCA was well positioned to realize this need and address it since the PCA facilitates the resolution of disputes, including the arbitration of disputes, among various combinations of states, intergovernmental organizations, nongovernmental organizations, and private parties.

In 2009, the PCA created an advisory group to consider and address the need for sectorialized arbitration rules targeted for resolution of space-related disputes. The advisory group considered five discussion papers and based their work on them.[18] The advisory group then settled on three topics of discussion and work: (1) the characteristics of current outer space activity (i.e., public, private, and the combination of public and private actors), (2) an evaluation of the effectiveness of arbitration as a dispute resolution mechanism for this field, and (3) a discussion and ultimate decision upon the rules of procedure for such arbitrations. The results of the advisory group's consideration on these topics follows.

1. **What Are the Characteristics of Current Outer Space Activity?** As previously discussed in this article—the increase in space activity; the increase in space activity for commercial purposes, such as satellite-based communication services and commercial launching services; and the increase in the number and type of participants, from exclusively governmental actors to juridical persons in the form of corporations and to natural persons—has redefined a major characteristic of space activity and the law applicable to such activity. The advisory group considered this evolving characteristic and the fact that space activity involves a high level of international cooperation among states and private entities. The advisory group further determined that an effective space activity dispute resolution mechanism needed to be accessible to public and private actors or to the public and private parties to such a dispute.
2. **Is Arbitration Effective as a Dispute Resolution Mechanism for Space Activity?** The advisory group reasoned that arbitration is a method of dispute resolution that is available to all "kinds" of space activity actors. Specifically, since the PCA facilitates the resolution of disputes among various combinations of parties—including states, intergovernmental organizations, nongovernmental organizations, and private parties—the advisory group found a fit in this regard.
3. **What Rules of Procedure Should Apply to Arbitration of Disputes Arising Out of Space Activities?** The final factor, whether optional arbitration rules would be a legitimate and likely successful dispute resolution mechanism, could be considered a review of the development and history of public international law. As public international law is a voluntary recognition and acceptance of the legal authority between states, arbitration is a voluntary recognition and acceptance of the legal authority of a specific dispute resolution provider. A dispute arrives before an arbitration tribunal by either referral or submission. "Referral" to arbitration describes the process by which parties to a contract provide within the contract for resolution of disputes by arbitration. In other words, a referral to arbitration is done before a dispute arises. "Submission" to arbitration describes the process by which parties to a dispute (and not necessarily a contractual dispute) agree, after the dispute has arisen, to submit to arbitration to resolve the dispute. In both referral and submission to arbitration, the parties have recognized and accepted, or chosen, the dispute resolution mechanism and often have chosen an agreed-upon entity to resolve their dispute.

### Discussion of the Rules of Procedure

As discussed in the preceding section, the research, thought, and consideration of the public international law aspects and applicability to space activities; the reluctance of any state to cede legal authority in this realm; the growing number of private actors in space activities; and the corresponding growing number of private international laws applicable to these activities all demonstrate the necessity for some formalized dispute resolution procedure.

### Authority and Jurisdiction

The Optional Rules state that the secretary general of the PCA has the authority to "govern" PCA arbitrations.[19] Jurisdiction is established by Article 1, paragraph 1:

> Where parties have agreed that disputes between them … whether contractual or not, shall be referred to arbitration under [these rules]…. The characterization of the dispute as relat-

ing to outer space is *not* necessary for jurisdiction where parties have agreed to settle a specific dispute under these rules.[20]

This is a broad statement of jurisdiction—as it should be—for a voluntary resolution process. The advisory group considered a subject matter jurisdiction test, but because the advisory group wanted to serve the greater intent to use arbitration as a dispute resolution mechanism, they did not included any test or limitation.[21] The rules allow the parties to determine whether to *apply* the rules, whether to *modify* the rules, and *do not* require the dispute to be characterized as relating to outer space.

Jurisdiction is further expanded in Article 3, paragraph 1:

> The party or parties initiating recourse to arbitration … shall communicate to … the International Bureau a notice of arbitration.

And Article 3, paragraph 3(d):

> The notice of arbitration shall include … identification of any rule, decision, agreement, contract, convention, treaty, constituent instrument of an organization or agency, or relationship out of, or in relation to which, the dispute arises.[22]

This language is more expansive than the UNCITRAL rules.[23] The Optional Rules, by these provisions, recognize and account for the various constituents—from states to private actors—and the various sources of law that affect space activities.[24]

Jurisdiction is a ticklish business when it comes to states. Treaties engender reservations. The beauty of optional rules is that they are focused and dispute-specific. While I do not predict whether we will see the Optional Rules included in treaties, their focus permits use in specific situations, as covered in Article 1, paragraph 2:

> Agreement by a party to arbitration under the rules constitutes a waiver of any right of immunity from jurisdiction, in respect of the dispute in question, to which such party might otherwise be explicitly entitled.[25]

The principle of waiver of immunity is explicit within the rule. The second sentence, however, gives me pause: "A waiver of immunity relating to the execution of an arbitral award must be explicitly expressed."[26] Again, the topic of enforceability of the arbitral award is beyond the scope of this article. Suffice it to say, international enforceability of arbitral awards remains a frustrating proposition to the prevailing party.[27]

### Confidentiality

Sensitive or proprietary information is protected through the selection of a confidentiality adviser to ensure that opposing parties and even the tribunal do not see the confidential information. The expectation of greater than usual confidentiality in space activity dispute resolution is addressed in § III, which covers arbitral proceedings, under the following articles.

Article 17, paragraph 5:

> The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties.

Article 17, paragraph 8:

> The arbitral tribunal may also, at the request of a party or on its own motion, appoint a confidentiality adviser as an expert … in order to report to it on the basis of the confidential information … without disclosing to the confidential information either to the party from whom the confidential information does not originate or to the arbitral tribunal.

Article 28, paragraph 3:

> Hearings shall be held *in camera* unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, … except that a witness … who is a party to the arbitration shall not, in principle, be asked to retire.[28]

### Flexibility

The PCA, as an institution available to entities ranging from status to private parties, is suited to handle arbitrations arising out of space activity. The parties may modify procedures by agreement. Indeed, the parties who select the Optional Rules may not be engaged in a space dispute at all.

Recall that the nature of arbitration as a trade-based dispute resolution mechanism means the members of the arbitral panel may themselves be active in space activities. These confidential provisions guard against the accidental or intentional sharing of parties' proprietary information or trade secrets.

## Conclusion

What is the usefulness of the PCA's 2011 Optional Rules? I believe the rules provide a viable forum for dispute resolution in a specialized field of business activity and law. The application of other, current space law to dispute resolution suffers from the ambiguity of diplomatic procedure and the inapplicability to a variety of actors. As space activity continues to involve private actors and private international law, it is likely these rules will be considered in the negotiation of space activity contracts. When private actors seek redress in tort, these rules should be useful for those seeking resolution. The ability to select an arbitral panel composed of arbitrators who know space activity and space law should be a boon to the development of space law and the resolution of disputes arising from outer space activity or other highly technical and specialized commercial activities. As of this writing, I found no report of pending arbitration cases using these rules. I hope that in the future, there will be ample evidence of Optional Rules use and their contribution to the development of international space law, as well as that the Optional Rules are neither too hard, nor too soft, but just right. ⊙

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## Endnotes

[1]*See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 18 U.S.T. 2410, 64 U.N.T.S. 205, art. III. (Jan. 27, 1967) [hereinafter Outer Space Treaty].

[2]Permanent Court of Arbitration, Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (Dec. 6, 2011), https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Permanent-Court-of-Arbitration-Optional-Rules-for-Arbitration-of-Disputes-Relating-to-Outer-Space-Activities.pdf.

[3]Geraldine Meishan Goh, Dispute Settlement in International Space Law A Multi-Door Courthouse for outer Space, Martinus Nijhoff Pulbishers (2007) at 23 (citing George Paul Sloup, *Peaceful Resolution of Outer Space Conflicts Through the International Court of Justice: The Line of Least Resistance,* 20 DEPAUL L. REV. 618 (1971))

[4]Outer Space Treaty, *supra* note 1, art. III.

[5]U.N. Charter, art. 3.

[6]*Id.*, art. 1, para. 1.

[7]*Id.*, art. 2, para. 3.

[8]*Id.*, art. 33, para. 1.

[9]*Id.*

[10]Outer Space Treaty, *supra* note 1, art. VI.

[11]GOH, *supra* note 3, at 28 (citing *Draft Articles on State Responsibility*, 2 INT'L L. COMM'N Y.B. 30-34, arts. 1, 2, & 4 (1980)); IAN BROWNLIE, THE SYSTEM OF THE LAW OF NATIONS 22-31 (1983); MANFRED LACHS, THE LAW OF OUTER SPACE: AN EXPERIENCE IN CONTEMPORARY LAW-MAKING, REISSUED ON THE OCCASION OF THE 50TH ANNIVERSARY OF THE INTERNATIONAL INSTITUTE OF SPACE LAW 14, et. seq. (2011).

[12]Outer Space Treaty, *supra* note 1, art. VII.

[13]Convention on International Liability for Damage Caused by Space Objects ("Registration Convention"), 1023 U.N.T.S. 15, 28 UST 695 (1975).

[14]If a state party to the treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment. A state party to the treaty which has reason to believe that an activity or experiment planned by another State Party in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities in the peaceful exploration and use of outer space, including the moon and other celestial bodies, may request consultation concerning the activity or experiment. Outer Space Treaty, *supra* note 1, art. XI.

[15]U.N. COMM'N ON INT'L TRADE L., UNCITRAL ARBITRATION RULES (AS REVISED IN 2010) (Apr. 2011), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.

[16]Fausto Pocar, *An Introduction to the PCS's Optional Rules for Arbitration of Disputes Relating to Outer Space Activities*, 38 J. OF SPACE L. 171 (2012); Michael Listner, *A New Paradigm for Arbitrating Disputes in Outer Space*, SPACE REV. (Jan. 9, 2012), http://thespacereview.com/article/2002/1. The author of this article did not undertake independent research to verify these claims.

[17]It should be noted that UNCITRAL rules address enforceability of arbitral awards and there is much commentary on that subject, which is not addressed in this article.

[18]Tare Brisibe, Alternative Dispute Resolution of International Investment Disputes in Public-Private Space Projects (PCA Advisory Grp. Discussion Paper 2010); Joanne Irene Gabrynowicz, Remote Sensing and Potential Optional Rules for Arbitration of Disputes Relating to Outer Space (PCA Advisory Grp. Discussion Paper 2010); Ram S. Jakhu, Dispute Resolution Under the ITU Agreements (PCA Advisory Grp. Discussion Paper 2010); Frans G. von der Dunk, Private Commercial Manned Spaceflight and Dispute Settlement (PCA Advisory Grp. Discussion Paper 2010); & Maureen Williams, Satellite Data and its value as evidence in international litigation (PCA Advisory Grp. Discussion Paper 2010).

[19]Optional Rules, *supra* note 2, art. 1, para. 6.

[20]*Id.,* art. 1, para. 1 (emphasis added).

[21]Pocar, *supra* note 16, at 181.

[22]Optional Rules, *supra* note 2, art. 3, para. 3(d).

[23]*See* UNCITRAL Rules, *supra* note 15, at art. 3, para. 3(d): The notice of arbitration shall include … identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship.

[24]Note, however, that both the Optional Rules and the UNCITRAL Rules provide for pleas to the jurisdiction of the arbitral tribunal. *See*, Optional Rules, *supra* note 2, art. 23; *and* UNCITRAL Rules, *supra* note 15, art. 23.

[25]Optional Rules, *supra* note 2, art. 1, para. 2.

[26]*Id.*

[27]Note that the signatory states to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards must enforce international commercial arbitration awards. As of this writing, the United States is a signatory to this convention.

[28]Optional Rules, *supra* note 2, art. 17, paras. 5 & 8; art. 28, para. 3.