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DEVELOPING A SYSTEM OF DISPUTE SETTLEMENT REGARDING SPACE ACTIVITIES

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Table of Contents

I. The Need for a New Effort

At its meeting in spring 1992 in Paris, the Board of the International Institute of Space Law decided to examine, in consultation with members present at the Space Congress in Washington in September 1992, possible efforts and contributions of the IISL in promoting a system for the settlement of disputes regarding space activities. When the International Law Association, in its presentation to the 31st Session of the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space (COPUOS) of the United Nations in Geneva in April 1992 expressed the view that developments since the ILA Draft Convention on the Settlement of Space Law Disputes of 1984 seem to indicate that, with the growth of the number of states active in space and of the volume of commercial space activities of both states and private enterprises, dispute settlement is of more and more practical importance and may have to be taken up again, a number of delegations supported that view.

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Indeed: during the exploratory stage of space activities, differing opinions in space law meant only a dispute on principles, and meant relatively little as far as collision of practical interests and of concrete application of such rules were concerned. Disputes, even between states, were more of an academic character during this exploratory stage. With the growing use of space and with the increasing number of states and private enterprises active or at least interested in space activities of some kind, a situation has evolved where disputes on various aspects of space activities can no longer be left open, allowing each state and private enterprise to persist on its view and act accordingly. Quite often these conflicting views and uses of outer space will be incompatible, not only in theory but also in practice. Space law, therefore, is and will continue to be facing a demand to develop techniques for the settlement of disputes[1].

This demand is also illustrated by the growth of recent case law regarding space activities. Though some relevant case law is found in other parts of the world[2], activities of the space industry and launch activities in the United States have especially led to litigation before US courts[3]. And even though arbitrations are confidential, it is not a secret that at least one international arbitration regarding space activities has recently started.

II. Existing Instruments for Dispute Settlement Regarding Space Activities

The already large volume of codification of space law contains few instruments for dispute settlement regarding space activities and often these few instruments do not offer an effective machinery, especially due to the lack of binding third party settlement. These existing instruments cannot be presented here in detail, but it might be useful to at least list a number of them as they were found in a relevant research[4]:

1. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 1967, Art. IX, Art. XIII.

2. Convention on International Liability for Damage Caused by Space Objects, 1972, Art. IX, Art. XI, Art. XIV seq.

3. Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT), 1971, Art. XVIII, Annex B2 (g), Annex C, Operating Agreement Relating to INTELSAT, Art. 18, Art. 19c, 20.

4. Convention on the International Maritime Satellite Organization (INMARSAT), 1976, Art. 31, Annex.

5. Operating Agreement on the International Maritime Satellite Organization (INMARSAT), Art. XVI.

6. Special Agreement Concerning the Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System, Art. 14.

7. Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System, 20.8.1964, Art. 2-12.

8. Convention on the Transfer and Use of Data of the Remote Sensing of the Earth from Outer Space, 29.6.1978, Art. VIII.

9. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979, Art. 15.

10. UN Resolution 37/92: Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting, adopted on December 10, 1982, Annex E. Peaceful settlement of disputes.

11. Convention for the Establishment of a European Organization of the Development and Construction of Space Vehicle Launchers (ELDO), Art. 22.

12. Protocol on Privileges and Immunities of the European Launcher Development Organization (ELDO), Art. 25 seq.

13. Abkommen zwischen dem Bundesminister für Bildung und Wissenschaft der Bundesrepublik Deutschland und der ELDO über die Benutzung, Unterhaltung...der Anlagen, ...Art. 7.

14. Protocol Concerning the Use of Technical Information for Purposes Not Within the Field of Space Technology (ELDO), Art. 2.

15. Interim-Agreement Australia, U.K., Great Britain, ELDO, Initial Program, Art. 9 seq.

16. Agreement ELDO - Belgium: Property and Facilities, Art. 8.

17. Convention for the Establishment of a European Space Research Organization (ESRO), Art. XVI.

18. Protocol on Privileges and Immunities of the ESRO, Art. 25-29.

19. Final Act of the Conference of Plenipotentiaries (ESRO), 7.

20. Agreement Concerning the European Space Operations Centre, Art. 1, Art. 6, Art. 8, Art. 18.

21. ESRO-Arrangement Meteorological Satellite Programme, Art. 12.

22. ESRO-Agreement Special Project Concerning the Launching of Sounding Rockets, Art. 11.

23. ESRO - Vereinbarung SPACELAB-Programm, Art. 13.

24. Übereinkommen ESRO-USA Weltraumlaboratorium und Raumtransportsystem, Art. 12.

25. ESRO-Vereinbarung Fernmeldesatellitenprogramm, Art. 12.

26. ESRO-Vereinbarung Seenavigationssatelliten-Programm, MAROTS, Art. 11.

27. ESRO-Vereinbarung: Raumfahrzeugträgerprogramm ARIANE, Art. XV.

28. Agreement ESRO-Sweden: Kiruna Launching Range, Art. 28.

29. Exchange of Letters, ESRO-France: Rocket Launching, Ile du Levant, 17, 18.

30. Agreement ESRO-Norway: Kongsfjord Telemetry Station, Art. V.

31. Agreement ESRO-Norway: Rocket Launching Andoya Range, Art. VI.

32. Agreement ESRO-Great Britain: Telemetry Station in the Falkland Islands, Art. 18.

33. Exchange of Notes: Great Britain-ESRO: ESRO Launching Range, ESRAMGE, 7.

34. Arrangement ESRO-Certain Members: Special TD Project, Art. 8.

35. Agreement Italy-ESRO: Rocket Launching, Art. 20.

36. Agreement ESRO-Australia: Launching Facilities at Woomera, Art. 14.

37. Exchange of Letters, Great Britain-ESRO: ESTRACK, 8.

38. Agreement Netherlands-ESRO: European Space Technology Centre, Art. 32.

39. Exchange of Notes: Canada-ESRO, 4.

40. Convention for the Establishment of a European Space Agency, Art. XVII; Annex I, Art. IV, XXV, XXVI.

41. Memorandum of Understanding Between the European Space Agency and the United States National Aeronautics and Space Administration, Art. 18 seq.

42. Übereinkommen zur Gründung einer europäischen Organisation fü astronomische Forschung in der südlichen Hemisphäre, Art. IX.

43. Protokoll über die Vorrechte und Immunitäten der Europäischen Organisation für astronomische Forschung in der südlichen Hemisphäre, Art. 24-26.

44. The Agreement of the Arab Corporation for Space Communications, 22.7.1976, Art. 19.

45. Memorandum of Understanding Between the Federal Minister for Scientific Research of the FRG and NASA I.

46. Memorandum of Understanding Between the Federal Minister for Scientific Research of the FRG and NASA II.

47. Agreement Between the Government of the FRG and the Government of the Republic of India on Cooperation Regarding the Peaceful Uses of Atomic Energy and Space Research, Art. 10.

48. Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung des Spanischen Staates über die Errichtung und den Betrieb des deutsch-spanischen astronomischen Zentrums, Art. XVIII.

49. Abkommen zwischen der französischen Republik und der Bundesrepublik Deutschland über den Bau, den Start und die Nutzung eines experimentellen Fernmeldesatelliten, 5.5.1967, Art. 19.

50. Arrangement Between Centre National d'Etudes Spatiales and Canada Centre for Remote Sensing, 2.9.1975., Art. VII, Art. VIII.

51. UN Resolution 41/65: Principles Relating to Remote Sensing of the Earth from Outer Space, adopted on December 3, 1986, Principle XV.

52. Memorandum of Understanding Between NASA and ESA on Cooperation in the Detailed Design, Development, Operation, and Utilization of the Permanently Manned Civil Space Station, done on September, 26, 1988, Art. 18.

53. European Convention on Transfrontier Television, done on May 5, 1989, Art. 26.

54. Vienna Convention for the Protection of the Ozone Layer, done on March 22, 1988, Art. 11.

55. Convention on Early Notification of a Nuclear Accident, done on September 26, 1986 Art. 11.

56. Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, done on September 26, 1986, Art. 13.

57. Principles on the Use of Nuclear Power Sources in Outer Space, as agreed upon in UNCOPOUS between 1986 and 1991, Principle 10.

Though this list, and later additional instruments of similar kind, at first sight, may look quite impressive, scrutiny soon reveals major weaknesses: The major space law treaties, including the Liability Convention, do not provide a machinery for binding dispute settlement. Such binding dispute settlement is only found in very specific instruments for highly limited areas of space activities. The scrutiny, therefore, confirms the need for a new effort in developing a system of dispute settlement regarding space activities.

III. Relevant Criteria

In order to avoid a merely academic and unrealistic effort, and in order to take into account political feasibility and practical relevance, the major criteria for the development of a system of dispute settlement regarding space activities could be described by the following questions[5]:

1. Are we looking for a universal formula for all states or is only a limited number of states involved and in the latter case do they have common denominators with regard to factual, political, economic or legal circumstances?

2. What is the character and the political importance of the interest involved for the states?

3. How strong is the pressure to come to a solution? Or vice versa: Which negative effects, if any, will the states have to face in practice in case no solution is reached?

4. How wide is the gap between legal equality and factual inequality in the respective area of space activities between the states concerned?

5. Are the types of disputes predominantly or even exclusively either political or legal?

6. Is an international institution or organization available for the respective area that might host the dispute administration?

7. Will the type of dispute be exclusively relevant for the parties concerned or will the interests of other states be directly or indirectly involved by any decision?

8. Do the disputes concern well codified areas of space law or areas for space law still in an early development?

9. Can a non-binding settlement procedure be expected to be followed by the parties?

10. Does the nature of the disputes require a fast and final decision?

11. Do the disputes concern questions of space law to which many states have already expressed a definite view?

12. Will it require special technical or other expertise to adequately deal with the disputes in procedure and substance?

13. Would a flexible or a well codified set of rules of procedure seem preferable for the types of disputes concerned?

14. Must difficulties as to the applicable substantive law be expected?

15. Are only states to be expected to be parties to disputes or also international organizations, private enterprises, individuals?

16. Have the states concerned already

expressed a preference for a specific settlement method at some recent other occasion?

This list is selective and tries to name those criteria which normally can be expected to be of major relevance. The order of criteria mentioned in this list is no indication of their relative importance. Indeed, under various circumstances, for various types of cases or various areas of space activities, the importance of each criteria will have a varying standing as well.

IV. Disputes Between States

In drafting any instrument in this field, obviously, the legal aspects and the objectives are not always the same for disputes between states on one hand and for disputes involving private enterprises on the other hand.

If one first turns to disputes between states, though other means of settlement known in public international law such as negotiations and conciliation should not be forgotten, the decisive question is, how a binding solution can be achieved in cases where the parties cannot agree on a settlement between themselves. As already mentioned above, it is this binding third-party settlement machinery, which is lacking in the major space law instruments. Regarding compulsory and binding third-party settlement there are three options:

1. Adjudication, be it by the International Court of Justice or by a specific international court.

2. Arbitration, be it by ad hoc arbitration or administered arbitration.

3. A combination of both, with a choice of the parties between these two methods, but also with an obligation to accept one of them.

The many considerations entering into the choice between those options cannot be dealt with here in detail. But at least it may be useful to list the major advantages between adjudication and arbitration.

The major advantages of adjudication are:

a. immediate availability;

b. continuity in case law and in the development of such a young field as space law;

c. high degree of independence of judges;

d. availability of interim measures;

e. effective rules of procedure making it difficult to sabotage proceedings.

But these advantages obviously can only come into play if states in practice accept the jurisdiction of such a court. However, though the International Court of Justice has had recently some more cases than before, the practice of states in recent decades shows that most of them are very hesitant to subject to the compulsory jurisdiction either of the ICJ or of another court[6]. The only area where one - on the basis of the experiences of the European Court of Justice or the European Court of Human Rights - might perhaps under favourable circumstances foresee a chance of acceptance are closely integrated organizations of states with a high degree of homogeneity. But even there the example of the European Space Agency seems to indicate a preference for arbitration[7].

As major advantages of the second option, namely arbitration, one may list:

a. arbitration, in the view of many states, implies less a loss of sovereignty for the state parties;

b. arbitration leaves more room for the autonomy of the parties;

c. the possibility to choose arbitrators having special expertise for the concrete dispute in question may be useful;

d. a greater flexibility in the legal procedure is possible;

e. arbitration proceedings will be often more simple and quicker;

f. the procedure is less spectacular, often confidential, and therefore has less political implications for the state parties;

g. a compromise may be reached easier;

h. the terms of reference and thereby the scope of the dispute may more easily be limited by the parties;

i. the parties may even entrust the arbitral tribunal to decide ex aequo et bono;

j. it may be easier for states to accept individuals and private enterprises as parties in arbitration.

Some of these advantages may be of special importance for disputes in space law which still contains many of the weaknesses and uncertainties of a young field of international law. A comparison between the advantages of adjudication and arbitration, if one had to decide for either one of them, would probably have to lead to the conclusion that arbitration would be the one method which is both objectively more effective in most cases and subjectively more acceptable for a relatively greater number of states[8].

However, if one chooses the third option mentioned above, one might not have to decide between adjudication and arbitration. For, in this third option, an instrument for dispute settlement would have to be drafted, with the choice of the parties between adjudication and arbitration, but also with an obligation to accept one of them. The experience of the Law of the Sea Conferences presents a forceful argument to give the state parties a choice of such a kind also in space law. In this context it should be pointed out that the difficulties the Law of the Sea Convention has met in not finding ratification by major industrial states is in no way connected to the dispute settlement procedure. Quite to the contrary, the concept of compulsory judicial settlement with this third option solution has neither been controversial at the Law of the Sea Conferences nor in later discussions regarding the ratification of the Law of the Sea Convention.

When the Space Law Committee of the International Law Association, some ten years ago, elaborated a Draft Convention on the Settlement of Space Law Disputes[9], the draft, therefore, followed as much as possible and as closely as possible the dispute settlement procedure of the Law of the Sea Convention. Obviously, certain adaptations had to be made in wording as well as in substance in order to comply with the different scope of application and to avoid unnecessary complications. Thus, for example, Articles dealing with the International Seabed Authority, the Seabed Disputes Chamber and the Special Arbitration could be deleted. Furthermore, contrary to the International Tribunal for the Law of the Sea, the ILA Draft Convention provided for an "International Tribunal for Space Law" only as an option of the High Contracting Parties if they wished to establish such a Tribunal at a later stage.

Since it would obviously be sensible, for any new efforts in developing a system of dispute settlement regarding space activities, to make use of the experience and discussion in connection with the ILA Draft Convention, the major decisions made in this Draft Convention may be best illustrated by citing the relevant Articles:

"Art. 1 Scope of disputes settled under this Convention

1. This Convention applies to all activities in outer space and all activities with effects in outer space, if such activities are carried out by High Contracting Parties (HCPs), by nationals of HCPs, or from the territory of HCPs.
2. Any HCP, on depositing its instrument of ratification, may declare
   (a) that it excludes from the applicability of this Convention space activities of a specific kind described in such declaration,
   (b) that it limits the applicability of this Convention to certain space activities or to specific areas of space law as may be dealt with in specific bilateral or multilateral treaties described in such declaration,
   (c) that it will not be bound by certain sections or articles of this Convention described in such declaration.
3. A HCP may only benefit from this Convention in so far as it is itself bound.
4. A HCP which is bound by only part of this Convention, or which has made reservations, may at any time, by a simple declaration, either extend

the scope of its obligations or abandon all or part of its reservations.

5. This Convention shall not apply to disputes which the parties have agreed or may agree to submit to another procedure of peaceful settlement, if that agreement provides for a procedure entailing binding decisions.

Art. 6 Choice of procedure

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:
   (a) the International Tribunal for Space Law, if and when such Tribunal has been established in accordance with Section VI;
   (b) the International Court of Justice;
   (c) an arbitral tribunal constituted in accordance with Section V.
2. A HCP, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Section V.
3. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.
4. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Section V, unless the parties otherwise agree.
5. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.
6. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this Article, unless the parties otherwise agree.
7. Declarations and notices referred to in this Article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the HCPs.

Art. 10 Access

1. All the dispute settlement procedures specified in this Convention shall be open to HCPs.
2. The dispute settlement procedures specified in this Convention shall be open to entities other than HCPs, unless the matter is submitted to the International Court of Justice in accordance with Article 6.

Art. 13 Finality and binding force of decision

1. Any decision rendered by a court or tribunal having jurisdiction under this Convention shall be final and shall be complied with by all the parties to the dispute.
2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.

Art. 37 International Tribunal for Space Law

1. Any time after the deposit of the 30th instrument of ratification or accession to this Convention, if at least 21 of the HCPs so agree, an International Tribunal for Space Law shall be created in conformity with this Section VI.
2. The International Tribunal for Space Law is constituted and shall function in accordance with the provisions of this Convention and this Section.
3. The seat of the Tribunal shall be determined at the time of its creation.
4. The Tribunal may sit and exercise its functions elsewhere whenever it considers this desirable."

V. Disputes Involving Private Enterprises

Private enterprises have always played a role in space activities as suppliers to states and state agencies for their respective space activities. In addition to this indirect involvement in space activities, recent years have shown a growing direct participation of pri-

vate enterprises in space activities, especially regarding communication and remote sensing satellites. Since this development will certainly continue, any drafting of an instrument for the settlement of disputes regarding space activities will therefore have to take into account that it is not sufficient to provide access for states as parties - as it is exclusively possible before the International Court of Justice - , but also to provide, in some way, direct access for private enterprises as parties to the dispute settlement procedure. Experience over decades of international dispute settlement has shown that indirect representation of private interests by diplomatic protection through their respective states is neither sufficient nor effective.

As seen above, the ILA Draft Convention, in its Article 10, expressly states that the dispute settlement procedures "shall be open to entities other than High Contracting Parties unless the matter is submitted to the International Court of Justice". This means in particular, that arbitration is open to private enterprises under that Draft Convention. This is not surprising, because international arbitration has become the preferred and mostly used machinery of dispute settlement between private enterprises engaged in international trade and investment for many decades already.

On the other hand, taking into account this practice in international trade and investment, for disputes which are not occurring between states on one side and private enterprises on the other side, but are occurring between private enterprises, it would not seem necessary to provide for an additional settlement machinery. For, indeed, existing and widely used arbitration procedures such as those of the International Chamber of Commerce[10], of the UNCITRAL Arbitration Rules[11], of the International Centre for the Settlement of Investment Disputes[12], of the London Court of International Arbitration[13], of national centres for international arbitration[14] especially in Switzerland and Austria, as well as ad hoc arbitrations either under specific tailor-made rules or under the UNCITRAL Rules[15] have proved to be widely accepted and an efficient framework for the binding settlement of disputes between private enterprises. As a matter of fact, these established arbitration procedures are widely used also in disputes between states and state agencies on one side and private enterprises on the other side on the basis of contracts and arbitration clauses in international trade and investment[16]. An attempt to create anything specific for this field for the space industry would therefore neither seem feasible nor necessary. Indeed, it might be a step backwards, because a multilateral system of enforcement of arbitration awards is available for international commercial arbitration and has been accepted worldwide by industrialized and developing countries by ratification of the 1958 New York Convention[17].

VI. Conclusion

From the above considerations one may draw the following conclusions:

There is a need for new efforts to develop a system of dispute settlement regarding space activities.

If such new efforts are taken up, it seems recommendable to take into account previous work in this field as well as a number of legal and practical considerations the major ones of which this paper has tried to identify.

The aim of any such drafting effort should be a text which, even if it does not fully satisfy academic wishful thinking, has a realistic chance of being accepted by a major part of the states participating in space activities.

Footnotes

1. See Böckstiegel, K.-H., Space Law - Changes and Expectations at the Turn to Commercial Space Activities, Forum Internationale No. 8, Kluwer Publishers, Deventer 1987, p. 12.

2. See e.g. cases of the Court of Justice of the European Communities, published in Böckstiegel, K.-H./Benkö, M., Space Law - Basic Legal Documents, Nijhoff Publishers, Dordrecht et. al., Vol I/1 Part B. 10.

3. See e.g. cases published in Gorove, S., United States Space Law, Oceana Publishers, Binder II I.A.5.(1) (selected cases), and in Böckstiegel, K.-H., Case Law on Space Activities, in: Jasentuliyana, N. (ed.), Space Law: Development and Scope, dedicated to Eilene Galloway, New York 1992, p. 205 seq.

4. See Böckstiegel, K.-H. (ed.), Settlement of Space Law Disputes - The present state of the law and perspectives of further development, Proceedings of an International Colloquium Munich, 13-14 September 1979, organized by the Institute of Air and Space Law of Cologne University, Carl Heymans Publisher, Cologne et. al. 1980.

5. See Böckstiegel, K.-H. (ed.), Settlement of Space Law Disputes - The present state of the law and perspectives of further development, supra, p. 153f.

6. Böckstiegel, K.-H., Dispute Settlement by Intergovernmental Arbitration, in: Adjudication of International Trade Disputes in International and National and Economic Law (Petersmann, E.U., Jaenicke, G., ed., Fribourg 1992) pp. 64; Werner, J., Interstate Political Arbitration: What lies next?, Journal of International Arbitration 9 (1992), no. 1, pp. 73.

7. Art. XVII of the ESA-Convention (Convention for the Establishment of a European Space Agency, done on May 30, 1975) declares "that any dispute between two or more Member States, or between any of them and the Agency, ... which is not settled by or through the Counsel shall... be submitted to arbitration."

8. See also: Paulsson, J., Cross-Enrichment of Public and Private Law Dispute Resolution Mechanisms in the International Arena, Journal of International Arbitration 9 (1992), no. 2, pp. 62.

9. International Law Association, Report of the 61st Conference, Paris 1984, p. 325, 334 seq. For further details see: Böckstiegel, K.-H., Beilegung von weltraumrechtlichen Streitigkeiten, in: Handbuch des Weltraumrechts (Böckstiegel, K.-H., ed., Cologne 1991), pp. 805.

10. ICC Rules of Conciliation and Arbitration, reprinted in: Yearbook Commercial Arbitration I (1976), pp. 157, as amended 1988, reprinted in: ICC, Rules of Conciliation and Arbitration, ICC publication No. 447 (1988).

11. Reprinted in: Yearbook Commercial Arbitration II (1977), pp. 161.

12. Convention on the Settlement of Investment Disputes between States and Nationals of other States, UNTS 575, p. 160, no. 8359.

13. Rules of the London Court of International Arbitration, reprinted in: Yearbook Commercial Arbitration X (1985), pp. 157.

14. See: International Handbook on Commercial Arbitration (Sanders, P., ed., looseleaf since 1984).

15. Redfern, A., Hunter, M., Law and Practice of International Commercial Arbitration (1991), pp. 53.

16. Böckstiegel, K.-H., Arbitration and State Enterprises - Survey on National and International State of the Law and Practice, Deventer/Paris 1984; by the same author, States in the International Arbitral Process, Arbitration International 2, 1986, pp. 30; Toope, J., Mixed International Arbitration, Cambridge 1990, pp. 199; Werner, J., Interstate Political Arbitration: What lies next?, Journal of International Arbitration 9 (1992), no. 1, p. 74.

17. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, UNTS No. 4739 (1959), p. 38.