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Anatomy of a Dispute Clause: Intergovernmental Arbitration under the Spacelab Agreement

By Mary M. Lovik*
Member of the Class of 1982.

I. INTRODUCTION

In the three and one-half decades since World War II, profound changes have occurred in the nature of inter-state transactions which present a great challenge in the area of dispute resolution. Rapid advances in communications and transportation have enabled states to interact with greater frequency and ease, thus increasing the volume of inter-state activity and the level of economic interdependence among states. However, the technological progress which has facilitated communication between states has also afforded new opportunity for international discord. The same technological developments which have thrust states into the frontier areas of outer space and telecommunications have made it necessary to adapt the international legal regime to cope with the novel controversies which are bound to arise. These pressures impact the individual members of the international community as well as the community as a whole. Each state's domestic process for resolving disputes with its neighbors will have to undergo reexamination and change as it responds to the legal challenges of the space age.

When faced with similar problems engendered by growth and change in international commercial transactions, private enterprises have found that the flexibility, speed, and economy of arbitration make it a particularly useful tool for dispute resolution. The utility of arbi-

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2. See D.T. Wilson, International Business Transactions 328-30 (1981); Aksen,
tration has also not escaped the notice of those who structure transac-
tions between states. Article 33 of the United Nations Charter places
arbitration on an equal footing with judicial settlement as a means of
dispute resolution; furthermore, it has been noted that the advantages
of arbitration over judicial decision by a tribunal such as the Interna-
tional Court of Justice are many.\textsuperscript{3} The influence of the parties over the
constitution of the tribunal, the possibility of a decision \textit{ex aequo et
bono} for political disputes, and the expediency of arbitral proceedings
in relation to judicial proceedings are frequently listed as positive fea-
tures of arbitration.\textsuperscript{4} In light of this, it is not surprising that dispute
resolution clauses with provisions for arbitration are found in numer-
ous international agreements currently in force.\textsuperscript{5}

While there has not been as much activity in the development of
arbitral practice as there has been in the drafting of arbitration clauses,\textsuperscript{6}
it seems likely that over time the arbitration provisions devised by the
draftsmen will be tested, particularly if the volume of inter-state activ-
ity continues to grow at its present rate. States will need predictable,
workable provisions for enforcing the obligations contained in their
agreements if inter-state business is to function on a large scale. Be-
cause the smooth working of the international legal regime is so dependent
on the cooperation of its member states, these provisions will have

\textit{International Arbitration Received Favorably in the U.S.}, in \textit{American Arbitration Asso-


4. \textit{See}, e.g., Secretary General of the Permanent Court of Arbitration, \textit{Circular Note},
54 \textit{Am. J. Int'l L.} 933 (1960). A decision \textit{ex aequo et bono} is one in which the arbitrators
are given the power to decide the case without reference to any law, in accordance with their
own notions of fairness and justice. \textit{12 M. Whiteman, Digest of International Law}

5. A list of space law instruments with clauses for dispute settlement is found in \textit{Set-
tlement of Space Law Disputes} 206-411 (K.-H. Böckstiegel, ed. 1980). A list of arbitration
clauses relating to air transport is found in \textit{International Civil Aviation Organization, Handbook on Administrative
Clauses in Bilateral Air Transport Agreements}, \textit{Circular 63-AT/6} § 11. \textit{See also U.N. Secretariat, Office of Legal
Affairs, Survey of Treaty Provisions for the Pacific Settlement of Interna-

6. \textit{See Mosler, Problems and Tasks of International Judicial and Arbitral Settlement of
Disputes}, in \textit{Max-Planck-Institute, Judicial Settlement of International Dis-

United States participation in international arbitration has been infrequent. Between the
end of World War II and 1969 it was a party to five arbitrations. \textit{Summers, The Senate
In 1978, there was an arbitration between the United States and France under the 1946 U.S.-
France Air Services Agreement. \textit{M.L. Nash, Digest of U.S. Practice in International
Intergovernmental Arbitration

to be developed on the domestic as well as on the international level. It is the purpose of this Note to further understanding of arbitration as a means of dispute resolution by examining the pertinent clauses of a "space age" agreement to see how these clauses would operate in practice. The object of study is the Agreement for a Cooperative Programme Concerning the Development of a Space Laboratory, concluded in 1973 between the United States government and the member governments of the European Space Agency (ESA). The issues raised in the process of submitting a dispute to arbitration under this Agreement will be examined in light of international law and from the viewpoint of United States domestic law. After a brief historical overview of the development of arbitration between states in this century, this study will address the basic issues presented under international law when a dispute is to be submitted to arbitration, namely, the jurisdiction of the tribunal, the applicable law, constitution of the tribunal, and the subject matter of the dispute. The discussion will then focus on the domestic requirements for United States involvement in an arbitral proceeding, asking whether the advice and consent of the Senate is needed to submit the United States government to arbitration.

A. Historical Development

During the first half of the twentieth century, the focus of international dispute resolution efforts was on general multilateral treaties providing for the arbitration of all disputes, or disputes in broadly defined categories. One of the best known examples of this type of treaty is the 1907 Hague Convention for the Pacific Settlement of Inter-

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9. Other issues beyond the scope of this inquiry concern the enforcement of an arbitral award and the domestic requirements of the ESA member governments for submitting disputes to arbitration.
10. This Note adopts the definition of arbitration given in the Hague Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, 36 Stat. 2199, T.I.A.S. 536 [hereinafter cited as 1907 Hague Convention]. Article 37 states that the object of arbitration is the "settlement of disputes between states by judges of their own choice and on the basis of respect for law." This Note will not enter into the dispute over the distinction between international arbitration and international adjudication. Regarding this issue, see von
national Disputes.\textsuperscript{11} The parties to the Convention recognized that where diplomacy has failed, arbitration is particularly useful in resolving "questions of a legal nature, . . . especially in the interpretation of application of international conventions."\textsuperscript{12} The coverage of the 1907 Convention extended to practically all conceivable situations; article 39 states that the Convention is concluded "for all disputes already existing and for disputes which may arise in the future . . . [for] any dispute or only disputes of a certain category."

A second example of this broad type of multilateral arbitration convention is the 1929 General Treaty of Interamerican Arbitration.\textsuperscript{13} This treaty was aimed at arbitration of "all differences of an international character which have arisen or may arise . . . which are juridical in their nature by reason of being susceptible of decision by the application of the principles of law."\textsuperscript{14} Still another effort at providing generalized rules for arbitration was the 1928 General Act for the Pacific Settlement of International Disputes,\textsuperscript{15} which went even further in its coverage than either the Hague or Interamerican Conventions. The 1928 Act extended its provisions to "any dispute," legal or nonlegal.\textsuperscript{16}

General agreements of the type just described did not prove to be of much practical use. States refused to accept obligatory proceedings under agreements which covered such a potentially broad range of subject matter. The Interamerican Treaty's provisions for compulsory arbitration were accepted by the United States Senate only with the reservation that any agreement submitting the U.S. government to arbitration under the Treaty be concluded subject to its advice and consent.\textsuperscript{17} The 1907 Hague Convention, which for the most part lacked compulsory provisions,\textsuperscript{18} met with the same fate before the wary U.S. Senate.\textsuperscript{19} The 1928 General Act and its 1949 successor were never suc-

\begin{thebibliography}{9}
\bibitem{12} 1907 Hague Convention, supra note 10.
\bibitem{13} \textit{Id.} art. 38.
\bibitem{14} Jan. 5, 1929, 130 L.N.T.S. No. 135.
\bibitem{15} \textit{Id.} art. 1.
\bibitem{17} 1928 Act, supra note 15, art. 21.
\bibitem{19} Limited compulsory provisions are contained in art. 53.
\bibitem{20} The United States reservation read:

cessfully implemented. Although twenty-four states signed the 1928 Act, many did so with significant reservations, and there is some doubt as to whether this treaty is still valid; only seven states have signed the 1949 Act. At the time the General Act was under consideration in 1928, arguments expressed by the United Kingdom illustrate characteristic objections to overly broad obligations to arbitrate disputes:

In contracting an international obligation towards another State a country must take into account the nature of its relations with that State. Obligations which it may be willing to accept towards one State it may not be willing to accept towards another. Reservations and exceptions which it may think necessary as regards one State may not be considered necessary as regards another. The method of signing a general undertaking, even when coupled with the power to make exceptions as to the categories of disputes to be arbitrated, lacks the flexibility which enables the measure of the obligation to be varied in the case of the particular States towards which the obligation is being accepted.

In light of the above, it is not surprising that the tendency since World War II has been to limit the scope of provisions for arbitration to more narrowed, manageable areas. A 1948 U.N. survey of dispute resolution treaties catalogues 207 agreements over a twenty-year period which deal exclusively with dispute settlement in a general context.

The United States approves this convention with the understanding that recourse to the permanent court for the settlement of differences can be had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute; and the United States now exercises the option contained in Article 53 of said convention, to exclude the formulation of the 'compromis' by the permanent court, and hereby excludes from the competence of the permanent court the power to frame the 'compromis' required by general or special treaties of arbitration concluded or hereafter to be concluded by the United States, and further expressly declares that the 'compromis' required by any treaty of arbitration to which the United States may be a party shall be settled only by agreement between the contracting parties, unless such treaty shall expressly provide otherwise.

1907 Hague Convention, supra note 10, at 577 n.1 (emphasis added).

20. 1 Encyclopedia of Public International Law 64-65 (1981). The 1928 Act was never signed by the United States, the U.S.S.R., or Germany; in 1939, France, Great Britain, India, New Zealand, and Australia announced that they did not recognize the 1928 General Act in conflicts essentially connected with a war. The seven states which have signed the 1949 Act are Belgium, Denmark, Luxembourg, the Netherlands, Norway, Sweden, and Upper Volta. Id.


This is in sharp contrast to a later survey, which recorded only eight such treaties.\textsuperscript{23} The later survey catalogues arbitration provisions in specific areas of inter-state activity, some of which were not covered by treaties prior to World War II. These areas include human rights, commerce and transportation, trade and economic cooperation, treatment of nationals, national security, and boundary disputes.\textsuperscript{24} 

At first blush, it appears that a major obstacle to the development of inter-state arbitration practice has been overcome. Nonetheless, recent experience shows that the development of comprehensive international arbitration practice has lagged behind the proliferation of provisions in inter-state agreements.\textsuperscript{25} One commentator notes that arbitration has been of most practical use in resolving disputes involving such traditional subjects as diplomatic protection of nationals, debt settlement, postal disputes, border disputes, and the law of the sea.\textsuperscript{26} This is not to say that mechanisms for arbitration have not been devised in agreements concerning the less traditional areas of state activity which have emerged with the advances in communication and technology since World War II. The Convention on International Civil Aviation\textsuperscript{27} and its companion agreements—the International Air Services Transit Agreement\textsuperscript{28} and the International Air Transport Agreement\textsuperscript{29}—are examples of international documents establishing elaborate machinery for the resolution of air transport disputes.\textsuperscript{30} Arbitration procedures are also set forth in the INTELSAT\textsuperscript{31} and INMARSAT\textsuperscript{32} agreements, as well as under the International Telecommunications Convention.\textsuperscript{33} Unfortunately, these arbitration provisions remain largely untested in practice. In the area of civil aviation, for example, state practice has evidenced a preference for dispute resolution by diplomatic means.

\begin{thebibliography}{33}
\bibitem{} TATIONS AND TREATIES OF MUTUAL SECURITY DEPOSITED WITH THE LEAGUE OF NATIONS, V.Legal 27.V.29; ARBITRATION TREATIES AMONG THE AMERICAN NATIONS (W.R. Manning ed. 1924).
\bibitem{} 23. 1966 Survey, supra note 5.
\bibitem{} 24. Id. at 3.
\bibitem{} 25. See note 6 and accompanying text supra.
\bibitem{} 26. von Mangoldt, supra note 10, at 466-67.
\end{thebibliography}
rather than by the arbitration mechanism in the International Civil Aviation agreements.  

The point has been made that the development of rigid rules of arbitral practice would not be a good thing for the future use of arbitration. Georges Scelle, reporter for the International Law Commission's Model Rules for Arbitral Procedure, noted that many states objected to the formulation of the rules in a draft convention because it was felt that this would distort the traditional institution of arbitration, turning it into a judicial proceeding. Those objecting noted that one strength of arbitration is its flexibility and asserted that rigid rules would detract from the freedom of the parties to determine the shape of the arbitration. Scelle remarked:

It may be thought that there is . . . no general custom with regard to arbitral procedure, for the simple reason that practice has shown it to be desirable that the compromis of arbitration should be the direct outcome of the will of the parties and that consequently they should vary according to the circumstances surrounding the dispute and the importance of the interests at stake. It might prove a difficult matter even to discern the local customs peculiar to any given group of states.

The point made by these commentators is no doubt well-taken. This may be reflected in the fact that between 1958 and 1972, the I.L.C. Model Rules were never used. However, the lack of developed rules of dispute resolution in the context of a particular dispute may be a decisive factor in a state's decision not to resort to arbitration. One commentator has noted:

States do not desire that international judges be legislators in their own affairs. The border line between adjudication and legislation becomes blurred when the applicable international law is not yet sufficiently concise, but open to further elaboration, as in the case of an international treaty containing formal compromises and general clauses to be defined and worked out more precisely.
If it is true that states do not wish judges to "legislate" in the area of arbitration by defining for a particular case the precise principles of applicable international law, then the future of arbitration between states lies in the development of clear, workable procedures to guide international tribunals. Many models for international arbitral practice are already in existence, even if they are not much used; these will be examined below as guidelines for arbitration under the NASA/ESA Agreement. First, however, the discussion turns to the NASA/ESA Agreement itself.

B. The NASA/ESA Agreement

The NASA/ESA Agreement binds the U.S. government to procure two Spacelabs from the member governments of the European Space Agency.\(^{40}\) The first Spacelab was produced in a joint cooperative program, with each side bearing the cost of its own participation.\(^{41}\) The second Spacelab is to be procured from ESA by NASA.\(^{42}\) The U.S. government will pay the European partners for this unit, the cost of which is estimated at $184 million in 1979 U.S. dollars.\(^{43}\)

The agreement to build the Spacelabs is to date contained in three documents. The basic agreement is the inter-governmental agreement between the U.S. and the ESA member states, which sets out the general parameters of the transaction.\(^{44}\) Attached to the general agreement is a memorandum of understanding, concluded between NASA and ESA on behalf of their respective governments, which sets forth "the particular terms and conditions under which such association and coordination will be effected."\(^{45}\) The third document is a contract signed in December, 1979, for long-lead items for the second Spacelab.\(^{46}\) This final document was also negotiated between the agencies on behalf of their governments.

The Agreement, Memorandum, and Contract all contain dispute resolution clauses foreseeing arbitration as an alternative. There are

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40. Agreement, supra note 7, art. 1, Memorandum, art. VIII.
41. Agreement, supra note 7, arts. 1, 7(E), 8.
44. Agreement, supra note 7.
45. Memorandum, supra note 7, preamble.
two types of clauses in these documents, each type imposing different obligations on the parties. Article 11(B) of the Agreement is specifically designed to govern a subject matter familiar to international arbitration, providing for the sharing of payment for damage claims by nationals of countries which are not parties to the Agreement:

B. In the event of damage, arising from the launch, flight or descent of the Shuttle carrying the SL, to nationals of countries which are not parties to this Agreement, for which damage there is joint liability of the Government of the United States of America and the European Partners under the principles of international law or of the Convention on International Liability for Damage Caused by Space Objects, the Government of the United States of America and the European Partners agree to consult promptly on an equitable sharing of the payment for any settlement required. If agreement is not reached within 180 days, the Government of the United States of America and the European Partners will act promptly to arrange for early arbitration to settle the sharing of such claims following the 1958 model rules on arbitral procedure of the International Law Commission.47

The second type of clause is intended to cover disputes in general, and is therefore drafted in non-specific terms. Generally, the clauses in question call for diplomatic negotiation as the first step toward resolving disputes arising under these provisions, to be followed by arbitration where the parties so agree. An example is article 12 of the Agreement:

The resolution of any dispute as to the implementation of the cooperative programme will be the responsibility of the agencies referred to in Article 3 of this Agreement. Only a dispute which, in the view of the Government of the United States of America or the European Partners, seriously and substantially prejudices the execution of the cooperative programme may be referred for resolution to a representative of the Government of the United States of America and to a representative of the European Partners. If these representatives are unable to resolve the dispute, it may be submitted for such arbitration as may be agreed.48

Article XIV of the Memorandum states:

1. Any disputes in the interpretation or implementation of the

47. Agreement, supra note 7. The Liability Convention is discussed at note 111 and accompanying text infra.
48. Agreement, supra note 7, art. 12.
terms of this cooperative programme shall be referred to the NASA Administrator and the Director General of ESRO for settlement.

2. Should the NASA Administrator and the Director General of ESRO be unable to resolve such disputes, they may be submitted to such other form of resolution or arbitration as may be agreed.49

Finally, Article XI of the Contract states:

If any dispute, whether or not involving an alleged breach of this Contract, concerning a question of fact arising under this Contract and which is not disposed of by agreement, either party may mail or otherwise furnish a written appeal addressed to the NASA Administrator and ESA Director General. The joint decision of the NASA Administrator and ESA Director General or their duly authorized representatives for the determination of such appeals shall be final and conclusive, unless being a question of law and/or unless otherwise determined by court of competent jurisdiction . . . . Should the NASA Administrator and the Director General of ESA be unable to resolve such disputes, they may be submitted to such other form of resolution or arbitration as may be agreed.50

These clauses—particularly the latter two—are representative of the provisions for dispute resolution which occur in modern inter-state agreements. An analysis of how arbitral proceedings would be initiated under them will therefore be instructive, regardless of whether a dispute arising from the NASA/ESA Agreement is in fact brought to arbitration.

II. SUBMITTING A DISPUTE TO ARBITRATION UNDER INTERNATIONAL LAW PRINCIPLES

A. Jurisdiction of the Tribunal

The first step which must be taken in submitting a dispute to arbitration is to secure the jurisdiction of the tribunal. Since no international tribunal may exercise jurisdiction over a state without that state's consent, one government may not summon another to an arbitration


50. Contract, supra note 46, art. 11.
proceeding without a clear expression of mutual agreement. The manner in which consent to submit to arbitration is evidenced differs, depending upon whether the parties wish to arbitrate a dispute already in existence, or to set up a framework within which disputes arising in the future can be arbitrated.

Where the parties agree to submit an existing dispute to an arbitral tribunal, and no prior obligation to resolve the dispute in this manner exists, the proceedings begin when the parties reach a *compromis*. The *compromis* confers jurisdiction on the tribunal by expressing the consent of the parties to be bound by its decisions. The *compromis* specifies the conditions under which the arbitration will take place, establishing the tribunal to handle only the single case at hand or a group of cases arising out of one transaction. Such important matters as the applicable law, the composition of the tribunal, and the subject matter of the dispute will be to a greater or lesser extent settled in the *compromis*. This agreement may also provide for a third party to assist the disputants in naming arbitrators.

Where the parties undertake to submit disputes arising in the future to arbitration, they will generally express their consent to the jurisdiction of the tribunal in a binding international agreement. This agreement may include provisions for the substantive and procedural matters listed above, but it is not unusual for the parties to conclude a separate *compromis* making provisions for individual cases arising under the general agreement. Where an agreement to arbitrate future disputes is well-drafted and binding, failure of the parties to conclude a separate *compromis* will not be fatal to the proceedings, especially if provision is made for third party assistance in constituting the tribunal.

Because they involve long-term obligations by the contracting parties, agreements to arbitrate future disputes are most feasible where the disputes foreseen and the procedures governing the arbitration are clearly defined. Where there is no clear definition of the issues or procedures, the parties will be reluctant to enter a binding agreement to arbitrate future disputes. It is thus not surprising that most intergovernmental agreements to arbitrate involve submission of existing dis-

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54. *Id*.
55. See note 39 and accompanying text *supra*. 
Agreements of this type allow more flexibility than do agreements to arbitrate in the future; no long-term obligation to resolve disputes in a fixed manner is imposed on the parties. With either type of agreement, however, it should be remembered that arbitration is a consensual process which will not succeed unless both sides to the dispute are willing to cooperate. Attempts to compel states to arbitrate their disputes have generally not met with much success.

The NASA/ESA Agreement provides for resolution of both existing and future disputes. Article 11(B) of the Agreement, which sets up a regime for division of damage payments governed by the I.L.C. Model Rules, is an example of a provision for arbitration of a narrow category of disputes foreseen in the future. Article 12 of the Agreement, article XIV of the Memorandum, and article XI of the Contract are designed to cover a wide range of disputes; to provide flexibility, the draftsmen of these articles provided for a variety of dispute resolution techniques, with arbitration by compromis being one possibility.

Should a dispute regarding a payment for a damage claim arise under article 11(B) of the Agreement, the parties would find that they have consented to a compulsory system of dispute resolution with many safeguards against uncooperative efforts to undo the proceedings. Although the I.L.C. Rules are entitled "Model" rules, they become binding on the parties by virtue of their embodiment in a written undertaking by which the parties agree to have recourse to arbitration.

Although a compromis setting forth the parties' wishes on the conduct of the proceedings would greatly facilitate matters, the absence of such an agreement does not prevent the undertaking from being binding nor does it frustrate the proceedings. Where the parties fail to agree on the issue of the applicable law, for instance, the tribunal is to apply law derived from sources similar to those used by the International Court of Justice. Where the parties cannot agree on the constitution of the tribunal, the President of the I.C.J. may step in to appoint arbitrators.

56. von Mangoldt, supra note 10, at 488-89.
57. See Williams, Dispute Settlement According to the Conventions on INMARSAT and INTELSAT, in SETTLEMENT OF SPACE LAW DISPUTES, supra note 5, at 63.
58. See text accompanying notes 47-50 supra.
60. Id. at 3.
61. Id. at 8, 84 (I.L.C. MODEL RULES, art. 8). These sources of law are listed in article 38(1) of the Statute of the International Court of Justice, and are: international conventions expressly recognized by the contesting states, international custom, general principles of law recognized by civilized nations, judicial decisions, and teachings of publicists.
62. [1958] 2 Y.B. INT'L L. COMM'N, supra note 35, at 4-6, 83-84 (I.L.C. MODEL RULES,
The I.C.J. may also decide whether the subject matter of the dispute is subject to the obligation to arbitrate. 63

Once constituted, the tribunal may hear one side of a dispute to decide whether there is enough agreement on the essential elements of the controversy to force the parties to conclude a compromis. 64 The fact that the rules have not been extensively employed should not greatly hamper their usefulness where the parties are sincere in their wish to resolve their differences. Indeed, the section 11(B) dispute setting seems to be the ideal place to use the Model Rules; since the rigid procedures which they impose are narrowly confined to the area of sharing damage payments, the arguments of those who see a need for flexibility are weakened. 65

Unlike article 11(B), the other dispute resolution clauses in the NASA/ESA Agreement anticipate a broad range of possible disagreements. Because of the need for flexibility, the nature of the obligation incurred is much more nebulous. In all these clauses, the parties agree to negotiate their differences, and this failing, they “agree to agree” on an alternative form of dispute resolution, with arbitration as one possibility.

This type of provision is often used in anticipation of unforeseen future disputes. 66 It is known as a pactum de contrahendo and is of limited legal effect. 67 While it is not so uncertain as to make the agreement unenforceable, 68 the only obligation imposed by this sort of arrangement is the obligation to negotiate. 69 This obligation is a serious one which has been upheld by the International Court of Justice. In the North Sea Continental Shelf Case, the Court held that negotiations pursuant to inter-state agreements must be carried on with the intent of resolving the dispute. The parties are not bound to actually reach agreement; however, they must make a good faith attempt to do so. 70

Any dispute arbitrated under these clauses would necessarily be an existing one, as there is no provision for binding the parties to arbitrate

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64. Id. at 7-8, 84 (I.L.C. MODEL RULES, art. 9).
65. See note 36 and accompanying text supra.
67. Id.
future disputes. Jurisdiction would be conferred by a *compromis* submitting a particular disagreement to arbitration. The parties would have to negotiate on the issues which under article 11(B) are resolved by the I.L.C. Rules. The following sections of this Note will look to other international agreements to see what solutions have been proposed, and to investigate what options are available to the United States and the ESA governments should they submit a dispute to arbitration under the general dispute clauses.\(^7\)

**B. The Applicable Law**

One of the first problems that the parties will face in the negotiation of their *compromis* of arbitration is the determination of the applicable law which will govern the procedural, substantive, and choice of law questions raised throughout the arbitral proceedings. There are two possibilities available to the parties with regard to the applicable law; the proceedings can be governed either by public international law or by the private municipal law of a particular nation.

It is generally assumed that public international law should govern where the disputants are states or international persons (such as the United Nations).\(^7\) The parties may expressly provide that public international law will govern the arbitration, but public international law is also the preferred legal regime where the parties have made no provisions at all regarding the applicable law.\(^7\)

In ascertaining the specific rules of public international law, the parties or the tribunal will look to the sources listed in article 38 of the Statute of the International Court of Justice. These are international conventions expressly recognized by the contesting states, international custom, general principles of law recognized by civilized nations, judicial decisions, and the writings of publicists. Private municipal law has but a limited place in this system of norms. Municipal law is the source of the "general principles of law recognized by civilized nations," which according to the I.C.J. Statute are applied in the absence of unambiguous treaty provisions or rules of customary international law ac-

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\(^7\) Although the balance of the discussion in this section will be directed to arbitration provisions under the general dispute clauses, it also has relevance to arbitration under section 11(B) of the Agreement. If the parties wish, they could by a separate *compromis* contract out of proceedings governed by the I.L.C. Rules and structure the arbitration differently. In this event, the models and suggestions presented in the rest of this section of the Note would be pertinent to their negotiations.

\(^7\) L. Oppenheim, *supra* note 51, at 24.

\(^7\) *Id.* at 25; Diverted Cargoes Case 22 I.L.R. 820, 824-25 (1955). See also note 61 *supra*. 
cepted by the parties.\textsuperscript{74} In practice, the general principles of law have not been very significant in the resolution of international disputes.\textsuperscript{75} One reason is that they are often so general as to be meaningless; also, they are rarely suitable for use in disputes involving subjects of international law.\textsuperscript{76}

When they are used, however, these general private law principles are applied by analogy in determining the rights and obligations of disputing states. Principles of contract law such as the requirement of minimal definiteness, for example, can be applied by analogy to the law of treaties. One commentator, noting the recent redefinition of the nature of international state activity, has observed that analogy to municipal law may be particularly useful where governments enter into agreements which closely resemble such private law transactions as sales, exchanges, loans, and leases.\textsuperscript{77}

The logical extension of the use of analogy would be to apply private municipal law to inter-state transactions which are of a fundamentally commercial nature, as distinguished from those of a political nature. A similar process has already occurred with respect to the doctrines of sovereign immunity\textsuperscript{78} and act of state,\textsuperscript{79} where the increase in commercialized activity by states made it necessary to distinguish between political and commercial transactions in order to prevent states from escaping their commercial obligations. Without the commercial exceptions to these doctrines, many important international transactions would be exceedingly difficult to manage. Thus, where public in-

\begin{itemize}
\item \textsuperscript{74} R.B. Schlesinger, Formation of Contracts 7-8 (1968).
\item \textsuperscript{75} Id. at 8-9.
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Id. at 9-10.
\item \textsuperscript{78} Under the classic doctrine of sovereign immunity, a sovereign state was absolutely immune from suit in the courts of another sovereign unless the immunity was waived by an expression of consent. Under the newer “restrictive theory” of sovereign immunity, immunity is recognized only as to sovereign or public acts (jure imperii), but not with respect to private acts (jure gestionis). See The Tate Letter, May 19, 1952, 26 DEPT. STATE BULL. 984 (1952); Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332(a), 1441(d), 1602-1611 (1976); Trendtex Trading Corp. v. Central Bank [1977] 1 All E.R. 884, 892-94.
\item \textsuperscript{79} The classic statement of the United States position with regard to the Act of State doctrine is found in Underhill v. Hernandez, 168 U.S. 250, 252 (1897): “Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”
A exception to this doctrine was carved out in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695 (1976), where the Court held: “[T]he concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities.”
\end{itemize}
International law has not developed at the same pace as the commercial practice of nations, it would also seem reasonable to permit states to select the private municipal law of a chosen jurisdiction to govern their commercial transactions.

The theoretical possibility of distinguishing commercialized and political inter-governmental transactions for purposes of choice of law has long been recognized but has rarely occurred in practice. However, a recent trend toward commercialization of space activities is making this distinction more useful. For example, management of ESA's Ariane space launcher, which places satellites into orbit for private and public customers, has been turned over to Arianespace, a private law company whose shareholders include the French national space agency, thirty-six European aerospace firms, and eleven banks. Despite the fact that it was established as an independent private enterprise, Arianespace remains closely connected with the French government. In response to this European competition and the budget restraints of the current administration, NASA is presently considering its own proposal for private procurement of a fifth Shuttle orbiter which will operate as a regular part of the present fleet. NASA is also considering shifting to private industry the responsibility for Shuttle processing, i.e., refurbishing the vehicle after flight and preparing it for

80. See H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 5 (1927); Böckstiegel, Settlement of Disputes in International Regimes Applicable to Space Activities, in 23D SPACE COLLOQUIUM, supra note 8, at 123, 125.

One scholar has catalogued loan agreements between Denmark and five third world nations which are expressly governed by Danish law. Mann, About the Proper Law of Contracts Between States, in F. MANN, STUDIES IN INTERNATIONAL LAW, supra note 68, at 241. The clause in question stated: "Unless otherwise provided for in the Agreement, the Agreement and all the rights and obligations deriving from it shall be governed by Danish law." Id. at 247. Mann did not believe that this clause was intended to apply to the arbitration provisions under these agreements. Id. at 250 n.1.

Mann has also commented upon a 1973 decision by the German Federal Supreme Court which held that an agreement between the United States and the Federal Republic for the return of paintings claimed by the United States under its Trading with the Enemy Act was impliedly governed by U.S. domestic law. Mann, Another Agreement Between States under National Law? 68 AM. J. INT'L L. 490, 493 (1974).

81. Two private U.S. customers have been Western Union and the Southern Pacific Communications Co. See ESA's Ariane Launcher Selected for Southern Pacific Satellite, Av. Wk. & SPACE TECH., Dec. 21, 1981, at 12.


Japan, Brazil, and India are also developing launch vehicles for commercial use. This entry into the space market place of competitors who are public, private, or a mixture of both has surely set the traditionally separated public and private international law regimes on a collision course. Old notions which divided the two for choice of law purposes are no longer sufficient to cope with modern exigencies; one means of adapting to this change may be to subject commercialized inter-state ventures to a private law dispute regime.

One problem with private law intergovernmental transactions will be the complexity generated by such arrangements. Subjecting disputes between states to private law arbitration will cause thorny practical problems regarding state sovereignty and the anchoring of the arbitration. States may be more reluctant to submit to the laws of another state than they would be to international law; it would also be difficult to devise principles for choosing a seat for the arbitration. Furthermore, it is arguable that subjecting inter-state transactions to municipal law would have a regressive effect on the development of principles of public international law governing commercialized transactions between states. The biggest obstacle, however, is the threshold problem of classifying a transaction as "commercial" and therefore amenable to a municipal law regime. Much has been written on the definition of commerciality for the purpose of sovereign immunity, and the difficulties are not fully resolved. The problem would no doubt remain in classifying a transaction as "commercial" for purposes of choice of law.

Commentators and legislators have suggested various criteria for determining when a transaction is commercial. The formulation of the transaction in a contract rather than in a treaty would be one indication

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87. This problem is by no means one of minor economic importance. As of December, 1981, Arianespace had logged sales orders worth approximately $428.5 million, 40% of which originated outside the European Economic Community. It is anticipated that 200 satellites will be orbited during 1983-1990. Id. at 91, 93-95.
88. For a discussion of the development of public international law principles dealing with commercialized inter-state transactions, see Mann, supra note 68.
of its commercial nature.\textsuperscript{90} The assumption of commercial rather than sovereign functions by the states would also indicate a commercial nature, as would state action without reference to sovereign rights.\textsuperscript{91} The United States Foreign Sovereign Immunities Act of 1976 states that "[t]he commercial character of an activity shall be determined by reference to the nature of the . . . act, rather than by reference to its purpose."\textsuperscript{92} Other nations, however, take a different view of the same matter, contending that the purpose of the state's act determines whether or not the act is commercial.\textsuperscript{93}

Perhaps the most critical factor in the determination of choice of law in international arbitration is the intent of the parties. The West German Federal Supreme Court has found implied intent to be governed by municipal law, although this decision has met with strong and justifiable criticism.\textsuperscript{94} In light of the strong precedent favoring the use of public international law where an agreement is silent, the better view seems to be that only an express provision by the parties to the contrary will overcome the presumption favoring international law as the governing legal regime.

Even where a workable definition of "commercial" exists, the problem of mixed transactions remains.\textsuperscript{95} Where an international agreement contains both commercial and political elements, it would be difficult to define the degree of commerciality needed before the transaction could be submitted to municipal law. Given the fact that the presumption in favor of public international law is so strong, it seems logical to assume that an agreement would have to be overwhelmingly commercial before private law would apply.

In applying the above principles to the NASA/ESA Agreement, the cooperative and cost-reimbursable programs should be distinguished.\textsuperscript{96} Arbitration under the cooperative program would best be conducted under public international law, as the transaction involved fails to meet the threshold test of commerciality. The Agreement is cast as a treaty rather than as a contract. The parties have entered into it in the exercise of their functions as states; the preamble to the Agreement

\textsuperscript{90} Mann, \textit{The Law Governing State Contracts}, 21 \textit{Brit. Y.B. Int'l L.} 11, 25 (1944); Böckstiegel, \textit{supra} note 80.
\textsuperscript{91} Mann, \textit{supra} note 90, at 25.
\textsuperscript{92} 28 U.S.C. § 1603(d) (1976).
\textsuperscript{93} \textit{Restatement (Second) of Foreign Relations Law of the United States} § 69 (1965).
\textsuperscript{94} See note 80 \textit{supra}.
\textsuperscript{95} Mann, \textit{supra} note 90, at 24.
\textsuperscript{96} See text accompanying note 43 \textit{supra}.
speaks of such noncommercial goals as to "strengthen the bonds of friendship between the countries involved and . . . contribute to world peace." Also, this is not in purpose or nature the sort of transaction into which private commercial entities usually enter. No profit is expected; indeed, it may well be against ESA's commercial interests to assist NASA in development of equipment for the Shuttle, which will soon be directly competing with ESA's Ariane project for launch customers.97 Finally, the parties have not expressed any intent that the agreement should be governed by private law nor is there any language from which such intent may be inferred. Of course, the parties have not yet had the opportunity to fully express themselves on this matter with regard to any particular dispute; should a compromis be concluded, its language will have to be examined for expressions of intent. Given the nature of the cooperative program, however, there is no reason to expect that the parties will wish to arbitrate under private law.

Although the cost-reimbursable program contains more commercial elements than does the cooperative program, it is also not a likely candidate for arbitration under private law. The transaction is partly formulated in a contract concluded under the original Agreement. This is not determinative, however. According to the Armed Services Procurement Regulations, intergovernmental contracts are to be governed by the underlying treaty provisions relating to a particular issue (such as dispute resolution) which may arise under the contract.98 The fact that money is being paid by the U.S. government is also not dispositive, because the parties expressly renounce any profit motives in the preamble to the Contract.99 Given these circumstances, as well as the absence of expression of intent to the contrary by the parties, it seems unlikely that disputes arising under the cost-reimbursable program will be governed by private law. As is the case with the cooperative agreement, however, it will be necessary to look to the particular compromis between the parties to reach a definite conclusion on this issue. It is conceivable that where a dispute arises under the Contract which is not

97. See text accompanying notes 81-85 supra. Ariane currently is in competition with the U.S. Delta launcher. It is anticipated that the Shuttle will be declared operational after its fourth flight later in 1982, after which time NASA will be making arrangements for use of the Shuttle as a launch vehicle. Ariane Space Markets Launch Service, supra note 83, at 93-95.


covered by the underlying international agreement, the parties will wish to have the matter governed by private law.

C. Constitution of the Tribunal

A second important issue to be decided under the *pactum de contrahendo* is the constitution of the tribunal. Once the tribunal has been formed, it can resolve many of the preliminary issues itself;\(^\text{100}\) without a tribunal, however, the proceedings will never take place. In drafting the *compromis*, the single most difficult problem may well be preventing one party from thwarting the arbitration by refusing to name an arbitrator.

Although arbitration is sometimes conducted by a single arbitrator, the more common practice is to conduct the proceedings before a collegiate body of three or five members.\(^\text{101}\) Where the collegiate body format is used, each side chooses one member who in turn appoints one or three neutral members, with one of the neutral members serving as president of the tribunal.\(^\text{102}\) The procedure can become more complicated, however, when no provision has been made in the *compromis* for compelling the constitution of the tribunal. Where the *compromis* is silent on this point, the only available means under international law for forcing a reluctant party to name its arbitrator is to bring the issue before the International Court of Justice. The contentious jurisdiction of the Court could be invoked where the parties have expressed consent pursuant to article 36(1) of the Court’s Statute.\(^\text{103}\) The Court’s compulsory jurisdiction could also be invoked under article 36(2) of the Statute, where all parties involved have filed a declaration of consent to be bound.\(^\text{104}\) Where neither basis of jurisdiction exists, the parties will be

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\(^{101}\) J.L. SIMPSON & H. Fox, *supra* note 66, at 81-82.

\(^{102}\) *Id.*

\(^{103}\) Article 36(1) of the Statute of the International Court of Justice states: “The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”

\(^{104}\) Article 36(2) states:

The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
without remedy, absent provisions in the *compromis*. As a practical matter, it seems unlikely that a party determined to thwart the arbitration proceedings would consent to the I.C.J.'s contentious jurisdiction by a separate agreement. In the case of the NASA/ESA Agreement, there are no treaties in force between the United States and all of the ESA member governments which would confer jurisdiction on the Court in a case arising under the NASA/ESA Agreement. Under these circumstances, it would be risky for the United States and the ESA member states to rely on contentious proceedings before the I.C.J. to resolve their disputes over the constitution of the tribunal. Likewise, it would be futile to rely on the compulsory jurisdiction of the Court for a resolution of the matter. Not all ESA members have filed declarations under the optional clause of the I.C.J. Statute; notably missing are declarations from France and Germany, the two largest contributors to the Spacelab venture. If these states did not participate in the proceedings, a resolution by the I.C.J. would be meaningless.

Given the infeasibility of resorting to the I.C.J. to constitute the tribunal, it seems most advisable for the parties to the NASA/ESA Agreement to provide for some sort of third-party assistance in case of failure to name an arbitrator. This is the tested means of insuring that arbitrators will be chosen in spite of disagreement between the parties. There is ample precedent for this procedure in the making of international agreements. Some of the early general arbitration conventions devised a roundabout means of selecting arbitrators, whereby the disputants each named a neutral third state to choose the arbitrators. This scheme was incorporated into the 1907 Hague Convention and the 1928 General Act; its major disadvantage was that any party wishing to delay or stop the arbitral proceedings could easily refuse to nominate a neutral third-party state. The modern approach has been to provide in advance for a single third party to select the arbitrators for the disputants.

The third party is now most often an official of a respected international organization rather than a neutral state. The President of the I.C.J. or the U.N. Secretary General is often named in these agree-

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106. 1907 Hague Convention, *supra* note 10, art. 45.

ments; sometimes the parties call upon the head of a standing organization which manages affairs regarding a particular area that is the subject matter of the dispute. The INMARSAT Agreement is one example of an agreement calling for selection of arbitrators by the I.C.J. President, or Vice President, if the President is disqualified for being of the same nationality as one of the parties. 108 This arrangement is also found in a number of the bilateral transport agreements, including the 1946 Agreement on Air Transport Services between the United States and France. 109 The I.C.J. President may act at his discretion in deciding whether or not to accept this function; the Statute of the Court does not impose an obligation on him to do so. The President may refuse to act where he thinks that he may prejudge some matter which may come before the Court, or prejudice the settlement. 110

Under the Convention on International Liability for Damage Caused by Space Objects 111 and the proposed amendments to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 112 assistance will be rendered by the U.N. Secretary General in the event of failure to designate an arbitrator. The Liability Convention provides for selection of the Chairman of the tribunal by the Secretary General should the named arbitrators fail to reach agreement on this point. 113 If no appointment of arbitrators is made, the chairman named by the Secretary General will constitute a one-member claims commission. 114 The Marine Waste Convention provides that the Secretary General will select the tribunal chairman from an agreed list of qualified persons nominated by the contracting parties. The Chairman will then request the uncooperative party to nominate an arbitrator. If no nomination is made, the Chairman will select the arbitrator from the list. 115

108. INMARSAT Agreement, supra note 32, Annex, art. 3.
110. J.L. SIMPSON & H. FOX, supra note 66, at 84.
113. Liability Convention, supra note 111, art. 15.
114. Id. art. 16.
115. Marine Waste Convention, supra note 112, art. 3.
Some of the bilateral air transport agreements provide examples of arbitration agreements calling for selection of arbitrators by a neutral head of a specialized organization. The President of the International Civil Aviation Organization (ICAO) is sometimes called upon to designate arbitrators under these agreements; an Agreement for Air Transport Services between the United States and Italy provided that the ICAO President may on request of either contracting party appoint arbitrators. Under the INTELSAT Agreement, a standing eleven-member panel is to be nominated for the purpose of dispute settlement with the members of the panel to be chosen from a list submitted by all parties to the agreement. The Chairman of this panel is then responsible for naming arbitrators for the disputing parties. Under the International Telecommunications Convention, each party to a dispute is to choose an arbitrator, who will then choose the president of the arbitral tribunal. Where these two arbitrators fail to select the tribunal chairman, the Secretary General of the International Telecommunications Union will draw lots between the two nominees suggested by the already seated tribunal members.

Selection of arbitrators by the U.N. Secretary General or by another organizational head has some advantages over selection by the President of the International Court of Justice. The potential conflict with the judicial duties of the I.C.J. President is not a factor under the former arrangements, and an organizational head may be less inhibited than the I.C.J. President in making his choice. However, an organizational head may be less acquainted with the international lawyers from whom the arbitrators are to be selected. The choice of arbitrators by the head of a standing council will be particularly useful in specialized areas, where some expertise in the matters at hand will aid in the selection process. Of course, with regard to the NASA/ESA Agreement, it will be impossible to entrust the selection of arbitrators to the chair-

116. See T. Buergenthal, supra note 30, at 176.
118. INTELSAT Agreement, supra note 31, Annex C, art. 3.
119. Id. art. 5.
121. Id.
122. J.L. Simpson & H. Fox, supra note 66, at 85.
123. The U.S.-France Air Transport Agreement, supra note 109, at art. X provides that the President of the I.C.J. shall make the appointment after consultation with the ICAO Council President, thus attempting to combine the advantages of both arrangements.
man of a specialized international organization, as none exists.\textsuperscript{124} Most likely, the third party would be the I.C.J. President or U.N. Secretary General.

As a final point, the parties concluding a \emph{compromis} should bear in mind that the International Court of Justice has held that the normal sequence of events in constituting an arbitral tribunal progresses in three steps. First, each disputant selects one national member to represent it on the tribunal. Next, a third neutral member is appointed by either the parties or the two existing tribunal members. Failing this, the neutral member is appointed by an outside authority.\textsuperscript{125} The Court held that absent express provisions showing intent to depart from this sequence, provisions in peace treaties for the third party appointment of a neutral tribunal member will apply only after each party has taken the first step of appointing a national member.\textsuperscript{126} The International Telecommunications Convention\textsuperscript{127} and the U.S.-Italian Air Transport Agreement\textsuperscript{128} are examples of agreements following this sequence; however, it is possible for the parties to depart from this pattern by express agreement. The Space Liability Convention allows the U.N. Secretary General to appoint a single-member claims commission;\textsuperscript{129} likewise, the INMARSAT Agreement\textsuperscript{130} and the U.S.-French Air Transport Agreement\textsuperscript{131} allow the I.C.J. President to take the first step of appointing a national member.

The above brief survey of schemes for constituting the tribunal does not consider the simplest solution of all; it is possible for the parties to merely name the arbitrators in the \textit{compromis}. This would be the best way for NASA and ESA to deal with the problem of constituting a tribunal, but where this cannot be negotiated in the \textit{compromis}, some form of third-party assistance provides a means for compelling a resolution of this issue. In no case should the constitution of the tribunal be left unresolved by the \textit{compromis}. Given the impossibility of invoking the compulsory jurisdiction of the I.C.J. against major ESA participants, this would leave parties wishing to arbitrate with no rem-

\begin{footnotesize}
\begin{enumerate}
\item Interpretation of Peace Treaties, [1950] I.C.J. 227, 228-29.
\item \textit{Id.}
\item Air Transport Agreement, supra note 117.
\item Liability Convention, supra note 111.
\item See INMARSAT Agreement, supra note 32.
\item See U.S.-France Air Transport Agreement, supra note 109, art. 10.
\end{enumerate}
\end{footnotesize}
edy against parties wishing to halt the proceedings by uncooperative behavior.

D. The Subject Matter of the Dispute (Arbitrability)

The final critical question in concluding a compromis under the pactum de contrahendo involves defining the subject matter competence of the arbitral tribunal. Although the clauses under discussion are designed to allow arbitration of a broad range of dispute situations, their scope is not completely unlimited. When the parties to the NASA/ESA Agreement negotiate the compromis, it will be necessary to look to the language of the Agreement, Memorandum, and Contract to see whether their disagreement is truly subject to the language of the dispute resolution clauses. Once it is ascertained that the dispute falls within the scope of the general agreement, the compromis itself must be carefully drafted so that its language covers all the elements of the particular disagreement.

The first problem relating to arbitrability is whether negotiation is a condition precedent to arbitration. Customary international law does not require that the parties attempt to negotiate their differences before submitting them to arbitration. Nonetheless, some international agreements require that negotiations be conducted before arbitration as a means of narrowing the issues. The NASA/ESA Agreement is one such arrangement, as all the clauses under discussion state that arbitration is to occur only after negotiation has taken place. As a practical matter, it will be difficult to prove whether or not a dispute can be resolved by negotiation. Tribunals called upon to decide this question will no doubt defer to the judgment of a state that a dispute cannot be settled by means short of arbitration.

Once it is decided that an issue is ripe for arbitration, the subject matter of the dispute must be defined. It is often said that nonlegal disputes are not arbitrable. Article 38 of the 1907 Hague Convention restricts the Convention's coverage to "questions of a legal nature," and legal commentators have frequently expressed support for this view. Many arbitration conventions have provided for arbitration of nonlegal

132. T. Buergenthal, supra note 30, at 130 n.24.
133. Id. at 130.
134. See text of the clauses at text accompanying notes 48-50 supra.
136. 1907 Hague Convention, supra note 10.
137. L. Oppenheim, supra note 51, at 29-30.
disputes, however; the General Act of 1928 is one such example.\(138\) The NASA/ESA clauses fall into the latter category, for like the General Act they contemplate arbitration of "any disputes,"\(139\) including nonlegal disputes.

A further distinction should be made between article 12 of the Agreement and article XIV of the Memorandum of Understanding. Article 12, which was negotiated between governments, is aimed at higher-level disputes that "seriously and substantially prejudice the execution of the cooperative programme." Article XIV, negotiated between the government agencies, covers lower-level disputes over the "interpretation or implementation of the terms of this cooperative programme." Disputes to be settled by arbitration would have to fit into one of the areas defined by these clauses; however, the clauses are drafted so broadly that it is difficult to imagine a situation in which they would not be construed to apply.

Once the parties conclude their compromis, the issue to be arbitrated will be more limited than that described under articles 12 and XIV. At this stage, disagreement may arise over whether a particular issue connected with the dispute falls within the scope of the undertaking to arbitrate expressed in the compromis. Where the tribunal has been constituted or where means exist for constituting it independently of an uncooperative party, the tribunal may decide whether an issue falls within the parties' definition of the subject matter in dispute. Where there is no means of constituting the tribunal, recourse to the International Court of Justice may be the only way to resolve these questions. As was seen above,\(140\) however, the I.C.J. will be unable to assist where there is no expression of consent by the parties to its jurisdiction. In any event, even where the jurisdiction of the I.C.J. is successfully invoked, the effectiveness of a decision that a dispute is arbitrable will ultimately depend on whether means exist to constitute the tribunal. If none are available, the parties will still only have a pactum de contrahendo.\(141\)

The foregoing discussion has shown that when viewed in the light of international law, the clauses in the NASA/ESA Agreement are quite workable. Article 11(B) of the Agreement specifically covers disputes involving the sharing of payments for liability arising from damage caused by space objects, an area which is frequently the subject of

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139. See text accompanying notes 48-50 supra.
140. See text accompanying notes 103-05 supra.
arbitration. The general provisions of articles 12 of the Agreement and XIV of the Memorandum are also workable, despite, and perhaps because of, their generality. These provisions cover foreseeable and unforeseeable disputes arising under the NASA/ESA Agreement and are drafted broadly enough to allow the parties to use the most appropriate means of dispute resolution under the circumstances. Should the parties decide to submit to arbitration under these provisions, such basic issues as the constitution of the tribunal, the applicable law, and the subject matter of the dispute will have to be negotiated, but this fact does not render the provisions unworkable. Great flexibility is needed to cover the many issues which may arise, and the parties will find many examples from international law to guide them. It should be kept in mind, however, that where one or more of the parties has a fundamental objection to resolving a dispute by arbitration, the process will not be of much use. Arbitration is basically a consensual proceeding, and there must be some fundamental agreement as to its use between the parties before it will succeed. Where this fundamental agreement exists, however, these clauses will provide an adequate framework within which to institute arbitral proceedings.

III. SUBMITTING A DISPUTE TO ARBITRATION UNDER UNITED STATES DOMESTIC LAW

In examining the U.S. domestic issues which the NASA/ESA Agreement presents, the major problem to be addressed is whether a dispute involving the United States government may be submitted to arbitration by executive agreement or whether this must be done by treaty with the advice and consent of the Senate.

Although there is no express authority in the U.S. Constitution for international agreements other than treaties, the legal validity of the executive agreement has long been recognized in practice. The first executive agreements were concluded in 1792, to provide for international postal service. Since then, the executive agreement has become an indispensable means of doing business with foreign nations

144. For the purposes of this discussion, the term "executive agreement" will be used to refer to binding international agreements entered into on behalf of the United States by the executive acting alone, without Senate advice and consent. For a further discussion of what constitutes a binding international agreement, see Rovine, *Separation of Powers and International Executive Agreements*, 52 IND. L.J. 397, 401-02. (1977).
146. Act of Feb. 20, 1792, ch. 7, § 26, 1 Stat. 239 (1792).
and is generally considered to be on equal legal footing with the treaty. The executive agreement is used more frequently than the treaty in conducting U.S. foreign affairs. The sharp increase in the use of executive agreements has been attributed to the growth in the number of nations since World War II, increased U.S. activity abroad, and the broadening range of subject matter handled between modern states. Besides the numerical increase in the number of executive agreements employed by the United States government, change has occurred in the means by which they are negotiated. Agencies within the executive branch which formerly had little to do in the area of foreign affairs are now entering into executive agreements with foreign governments.

These developments have added to the confusion which has always existed regarding the appropriate use of international executive agreements. Congress and the executive branch have long been embroiled in controversy over when executive agreements may legally be used, with Congress struggling to maintain control over U.S. foreign affairs and the executive branch vying for more freedom to act independently of congressional control. The ongoing debate has not produced a clear definition of the requirements for submission of a dispute involving the U.S. government to arbitration. The last widespread dis-

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147. See L. Henkin, supra note 145, at 180, 184-87.
149. Id. at 406-07.
cussion of this question took place during the era of the general arbitration treaty.\textsuperscript{152} When asked to ratify the general treaties of the pre-World War II era, the Senate consistently demanded that any \textit{compromis} concluded under such an agreement be subject to its advice and consent.\textsuperscript{153} The reservations to the 1907 Hague Convention and the Treaty of Interamerican Arbitration are two typical examples of the restrictions imposed by the Senate on the general treaties for the peaceful settlement of disputes.\textsuperscript{154} Similar reservations effectively barred ten identical general arbitration treaties with France, Germany, Switzerland, Portugal, Great Britain, Italy, Spain, Austria-Hungary, Mexico, Norway, and Sweden in 1904 and 1905.\textsuperscript{155}

Since World War II, arbitration agreements have become more specialized,\textsuperscript{156} but uncertainty in this area has not subsided.\textsuperscript{157} Arbitration agreements have been concluded with and without the Senate’s advice and consent, with little discussion of the underlying legal rationale. It is important that this area of U.S. foreign relations be clarified because reservations requiring Senate ratification of a \textit{compromis} could neutralize many of the advantages of arbitration agreements. Requiring Senate consent would greatly slow the proceedings and upset the often delicate negotiations involved. It would also make a third-party selection of arbitrators more difficult and hamper the tribunal in deciding such issues as the applicable law or the subject matter of the dispute. It is thus necessary to reexamine the available guidelines for executive agreements in general and to apply them to the NASA/ESA Agreement. The following issues must be confronted in deciding whether an executive agreement is the proper form by which to submit disputes to arbitration: 1) is there a proper source of constitutional or other legal authority for making the agreement? and, if so, 2) is it preferable—for constitutional or other reasons—to conclude the agreement as an executive agreement rather than as a treaty?

In general, there are four sources of legal authority for executive

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\textsuperscript{153} See Summers, \textit{supra} note 6, at 575-82; W.S. Holt, \textit{Treaties Defeated By the Senate} 204-35 (1933).

\textsuperscript{154} See text accompanying notes 17-19 \textit{supra}.

\textsuperscript{155} W.S. Holt, \textit{supra} note 153, at 204-05.

\textsuperscript{156} See text accompanying notes 22-24 \textit{supra}.

\textsuperscript{157} A recent case before the U.S. Supreme Court dealt with the issue of the President’s authority to suspend claims in U.S. courts by U.S. citizens against the Iranian government, and to submit these claims to arbitration. Dames & Moore v. Regan, 453 U.S. 654 (1981). This issue is discussed more fully at notes 175-76 \textit{infra}. 

An executive agreement may be entered into pursuant to and for the purpose of implementing particular treaty provisions or in fulfillment of a legislative mandate. A third type of executive agreement is concluded by an executive agency subject to subsequent congressional approval. Finally, the agreement may emanate solely from the "pure" power of the executive conferred by the Constitution.\(^{159}\)

The source of NASA's authority to engage in international cooperative activity is found in its enabling statute. Section 2475 of the National Aeronautics and Space Act of 1958 states:

The Administration, under the foreign policy guidance of the President, may engage in a program of international cooperation in work done pursuant to this act, and in the peaceful application of the results thereof, pursuant to agreements made by the President with the advice and consent of the Senate.\(^{160}\)

On its face, this section appears to preclude the use of executive agreements, but upon signing the act in 1958, President Eisenhower added an important gloss:

The new Act contains one provision that requires comment. Section 205 authorizes cooperation with other nations and groups of nations in work done pursuant to the Act and in the peaceful application of the results of such work, pursuant to international agreements entered into by the President with the advice and consent of the Senate. I regard this section merely as recognizing that international treaties may be made in this field, and as not precluding, in appropriate cases, less formal arrangements for cooperation. To construe the section otherwise would raise substantial constitutional questions.\(^{161}\)

The Senate apparently has acquiesced in the President's view, as this has been the interpretation followed in practice.\(^{162}\)

\(^{158}\) Congressional Review of International Agreements, supra note 151, at 14.

\(^{159}\) Id.


\(^{162}\) Under 42 U.S.C. § 2475, NASA participates in two types of international negotiation. Intergovernmental agreements, such as the Agreement under discussion between the United States and the ESA governments, are negotiated and concluded by the State Department on behalf of NASA, with NASA assisting insofar as is necessary. NASA also enters into interagency agreements directly with its counterpart agencies abroad; the Memorandum of Understanding attached to the NASA/ESA Agreement is an example of such an agreement. Normally, cooperative agreements are concluded by interagency memoranda of un-
Although it acknowledges that executive agreements may be concluded in connection with NASA activities, President Eisenhower's statement does not shed any light on what an "appropriate case" for an executive agreement would be. It is generally agreed that where an agreement is authorized by legislation, treaty, or some other source, the executive has much discretion as to its formulation as a treaty or executive agreement. It would seem to follow from President Eisenhower's remarks regarding section 2475 that a compromis to arbitrate disputes arising from a properly concluded executive agreement would be legally authorized even without submitting it to the Senate for advice and consent. If this were not so, United States ability to enter into cooperative space research programs abroad would be seriously hampered. Therefore, when determining whether to conclude an agreement as a treaty or executive agreement, it is not enough merely to locate a source of legal authority for the arrangement selected. Competing constitutional and practical considerations must also be taken into account in deciding which form an international arrangement will take. Most commentators have not attempted to develop precise rules for determining whether an executive agreement or treaty should be selected, asserting that this would involve the impossible task of defining the entire range of executive and congressional power under the Constitution. Several general guidelines for the exercise of executive discretion have been proposed, however.

One suggested test for the exercise of executive discretion stresses practicality, extending the scope of executive power "to all the occa-
sions on which an international agreement is believed by the Chief Executive to be necessary in the national interest, but on which resort to the treaty making process is impracticable or likely to render ineffective an established national policy." 165 Another approach relies on precedent, requiring adherence to the "customs and practices which have developed since the conclusion of the first executive agreements in the early years of the Republic." 166 A third criterion focuses on the constitutional requirement that Congress maintain control of the national pursestrings. 167 These vague criteria have all been taken into consideration in the State Department's Circular 175, 168 which sets forth in more concrete form the factors to be weighed by the executive branch in deciding whether or not to conclude an agreement as a treaty. These factors are:

a. the extent to which the agreement involves commitments or risks affecting the nation as a whole;
b. whether the agreement is intended to affect state laws;
c. whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
d. past U.S. practice with respect to similar agreements;
e. the preference of the Congress with respect to a particular type of agreement;
f. the degree of formality desired for an agreement;
g. the proposed duration of the agreement, the need for prompt conclusion . . . and the desirability of concluding a routine or short-term agreement; and
h. the general international practice with respect to similar agreements. 169

An application of these guidelines to the NASA/ESA Agreement shows that from a purely practical point of view, there should be little objection to arbitration by executive agreement. There is no effect on the states in terms of requiring them to act or refrain from acting. There is also no real long-term national commitment involved. Although Spacelab is an important project which will greatly augment the

167. Summers, supra note 6, at 568-69.
168. 11 FOREIGN AFF. MANUAL ch. 700, reprinted in Congressional Review of International Agreements, supra note 151, at 387.
169. Id., ch. 721, reprinted at 392-93.
capabilities of the Space Shuttle, failure of the program will not mean the demise of the entire operation.

The implications of the program in terms of national security are also not so great as to require Senate advice and consent. While Spacelab does have military applications, the requirement that the United States procure the second and subsequent Spacelab units from ESA alone might arguably not preclude the Department of Defense from obtaining necessary equipment from United States sources for defense purposes. Article 5 of the Agreement provides that the United States Government will "refrain from separate and independent development of any [Spacelab] substantially duplicating the design and capabilities of the first [Spacelab] unless the European Partners fail to produce such [Spacelabs], components and spares in accordance with agreed specifications and schedules and at reasonable prices." It also prohibits the United States Government from procuring from non-ESA sources such Spacelab units "as substantially duplicate the design and capabilities of the first [Spacelab], as are needed by the Government of the United States of America, including needs arising from its international programmes. . . ." These clauses can be construed so that defense-oriented units fall outside their purview. A defense-oriented unit arguably would not "substantially duplicate the design and capabilities" of an ESA-produced Spacelab; furthermore, the requirement that ESA produce the Spacelab units in accordance with agreed specifications and at reasonable prices could be construed to provide an escape hatch for the United States in case the NASA/ESA Agreement becomes disadvantageous in terms of national security.

Finally, speed and convenience may be preferable to formality in concluding an arbitration agreement, as the amount of time needed for Senate ratification could render such an agreement impracticable as a dispute resolution tool.

It is not immediately clear whether arbitration by executive agreement would be permitted when the issue is viewed in the light of precedent; the Senate's history of objection to arbitral agreements without its

170. See also Memorandum, art. VIII(2), which states:

NASA will refrain from separate and independent development of any SL substantially duplicating the design and capabilities of the first SL unless [ESA] fails to produce such SLs . . . in accordance with agreed specifications and schedules and at reasonable prices to be agreed. For any NASA SL programme requirements which are not met by SLs developed under this cooperative programme, NASA will have the right to meet such requirements either by making the necessary modifications to the SLs developed under this cooperative programme, or by manufacturing or procuring another SL meeting such NASA requirements.
consent has been discussed above. However, the Senate's reluctance to accept the aforementioned general arbitration treaties without an advice and consent reservation can be explained by its unwillingness to relinquish its control over a potentially unlimited range of dispute settlement agreements. More recently, disputes in clearly defined areas have been submitted to arbitration by executive agreement without Senate unrest. In 1963, for example, the United States and France entered by executive agreement into a compromis of arbitration\textsuperscript{172} to settle a dispute arising under their bilateral air transport agreement\textsuperscript{173}. Since the NASA/ESA Agreement is confined to a particular cooperative project of even more limited dimension than an air transport agreement, it too can be distinguished from the general arbitration treaties of the pre-World War II era. Given this distinction, a good case can be made that precedent does not stand in the way of arbitration by executive agreement in the NASA/ESA situation.

The most significant problem to be encountered in determining whether a dispute should be submitted to arbitration by executive agreement is engendered by the constitutional requirement that Congress control the payment of funds on behalf of the United States government. This requirement is embodied in 31 United States Code section 665(a), which prohibits the creation of an obligation in excess of the amount of appropriated funds. In making appropriations, Congress is limited to expenditures authorized by law; Rule XXI-2 of the Rules of the House of Representatives states that "[n]o appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for an expenditure not previously authorized by law. . . ."\textsuperscript{174}

These provisions are of particular concern when dealing with arbitration under article 11(B) of the NASA/ESA Agreement, which provides for arbitration regarding the payment of claims for damages against the United States and the ESA governments as joint tortfeasors. Although claims by United States citizens against foreign governments were put to arbitration without Senate consent even in the days of unrest over general arbitration treaties,\textsuperscript{175} claims by foreign nationals

\textsuperscript{171} See text accompanying notes 17-19, 152-55 \textit{supra}.  
\textsuperscript{173} U.S.-France Air Transport Agreement, \textit{supra} note 109.  
\textsuperscript{175} \textit{See} 79 Cong. Rec. 969-71 (1935), which lists 40 claims by United States citizens which were put to arbitration without advice and consent, and W. McClure, Interna-
against the United States may only be submitted to arbitration where
the Senate has consented or where some other prior legal authority ex-
ists. This is because only the latter category of claims involved the pos-
sibility of the United States being held liable to pay. Thus, when asked
to comment on the legality of an arbitration clause in a contract be-
tween the United States Navy and a Swedish corporation which con-
templated payment of damages by the Navy to the corporation, the
United States Comptroller General said, "In the absence of statutory
authorization, either express or implied, officers of the government
have no authority to . . . agree to submit to arbitration claims which
they themselves would have no authority to settle and pay."176

Because it involves the claims of foreign nationals against the
United States, payment of money under article 11(B) of the
NASA/ESA Agreement will have to be based on additional statutory
or equivalent authority. This authority is found within the article's lan-
guage. Article 11(B) provides only for division of damages among the
United States and the ESA member governments in case they are held
jointly liable under the Liability Convention.177 Thus, the decisive is-

tue of the joint liability of the United States Government is governed
by the Liability Convention rather than by the NASA/ESA Agreement
itself, which merely incorporates the provisions of the Liability Con-
vention. The Senate has ratified the Liability Convention,178 indicating
that it has consented to pay damages where the United States Govern-
ment is found liable under the Convention's terms. A treaty ratified by
the Senate has been held to be a proper source of legal authority to
support an appropriation of funds; in 1906, payment to Germany of a
$40,000 claim adjudicated under the authority of a treaty was found to
be authorized by law under a precedent of the House of Repre-
sentatives.179

Unlike the claims arising under article 11(B), claims under the
general dispute resolution clauses of article 12 of the Agreement and
article XIV of the Memorandum of Understanding are not necessarily
covered by existing treaty provisions. Disputes submitted to arbitration

176. 32 COMP. GEN. 333-36 (1953).
177. See Liability Convention, supra note 111.
178. Id. The Senate gave its advice and consent on Oct. 6, 1972. The Convention was
ratified by the President on May 18, 1973, and entered into force on Oct. 9, 1973. Id.
179. 4 A.C. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, § 3644 (1907).
by executive agreement under these clauses will have to be examined on an ad hoc basis to see if it is foreseeable that the United States will be held liable to pay an award. If no such award is contemplated and if the expenses of the arbitration itself are small, no appropriation will be necessary, and submission to arbitration by executive agreement will be appropriate.\textsuperscript{180} Because an executive agreement is not a proper source of legal authority for an appropriation, however,\textsuperscript{181} where expenses of the arbitration are great or where an award against the United States is foreseeable, a source of legal authority independent of the executive agreement is necessary.

In the case of the NASA/ESA Agreement, one source of statutory authority for payment of an arbitral award against the United States may be found in 31 United States Code section 724(a). This section appropriates on behalf of NASA "such sums as may be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements, which are payable in accordance with the terms of section 2414 . . . of title 28 . . . together with such interest and costs as may be specified in such judgments or otherwise authorized by law." Section 2414 states:

\begin{quote}
Payment of final judgments rendered by a State or foreign court or tribunal against the United States, or against its agencies or officials upon obligations or liabilities of the United States, shall be made on settlements by the General Accounting office after certification by the Attorney General that it is in the interest of the United States to pay the same.
\end{quote}

Two questions arise under these sections. The first is whether section 2414 is intended to cover arbitral awards. An arbitration panel is arguably a "foreign tribunal" under the statute, even though the United States government participates in the selection of the arbitrators. The statute does not cover awards on its face; however, awards are included in the list of payments authorized under section 724(a).

The second question goes to the intent of section 2414. Its legislative history appears to put a limitation on the use of its provisions. In its previous form as enacted in 1956, its application was limited to judgments of less than $100,000; the Senate Report states that its purpose was to establish "a simplified procedure for the payment of routine

\textsuperscript{180} Summers, \textit{supra} note 6, at 568. To meet the expenses of an arbitration, the State Department may assign Foreign Service or State Department personnel for duty with the tribunal, or obtain limited funds from its own Appropriations Act under the rubric of "International Conferences and Contingencies." \textit{Id.}

\textsuperscript{181} 7 C. CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 1135 (1935).
judgments of State and foreign courts. Thus, where a potential judgment may be unusually large or where it involves extraordinary circumstances, it is conceivably not covered by the statute. Otherwise, this legislation appears to authorize payments of awards by arbitral tribunals. Except in extraordinary circumstances, there would be no need to submit a compromis of arbitration concluded under the general dispute clause to the Senate to satisfy the appropriations requirements.

IV. CONCLUSIONS

The dispute clauses of the NASA/ESA Agreement provide a workable structure for resolving differences by means of arbitration. Article 11(B) binds the parties under international law to submit their disputes to arbitration. The use of arbitration under the general clauses will be contingent upon the willingness of the parties, but these provisions also provide a workable setting in which to conduct arbitration proceedings. Although there is little arbitral practice from which a customary international law of arbitration between states can be derived, parties drafting a compromis under the general clauses have a great accumulation of models for formulating the proceedings. These could easily be incorporated into their agreement to arbitrate, as the need arises. The arbitration would also not be hampered by the U.S. domestic law regarding executive agreements. Absent unusual circumstances, there are no legal, practical, historical, or fiscal reasons for submitting a compromis concluded under this Agreement for Senate ratification. In short, arbitration is a viable alternative for settling disputes related to this space age agreement.
