CAMBRIDGE INITIATIVE *on* PEACE SETTLEMENTS

Making peace work through law

UKRAINE SETTLEMENT PROJECT

UKRAINE SETTLEMENT OPTIONS:

Dispute Settlement Mechanisms and Peace Agreements

By Stefan Wolff

May 2022

UNIVERSITY OF CAMBRIDGE
Department of Politics and International Studies

Harvard Negotiation Project
HARVARD LAW SCHOOL
LEX ET IUSTITIA

OpinioJuris

Map of Ukraine on digital screen. Credit: Getty Images.

UKRAINE SETTLEMENT OPTIONS PAPER:
DISPUTE SETTLEMENT MECHANISMS
AND PEACE AGREEMENTS

Stefan Wolff *is Professor of International Security in the Department of Political Science and International Studies at the University of Birmingham. He has extensive expertise in Northern Ireland, the Balkans, Central and Eastern Europe, and the former Soviet Union, and has also worked on a wide range of other conflicts elsewhere, including the Middle East, Africa, and Central, South and Southeast Asia. Bridging the divide between academia and policy-making, he has been, and is, involved in various phases of conflict settlement processes, including in Iraq, Sudan, Yemen, Moldova, Sri Lanka, the Philippines, and Kosovo.*

This paper has been published on Opinio Juris. The views expressed in this paper are the author's alone.

1. INTRODUCTION

This contribution elaborates different dispute settlement mechanisms that may be used in a peace settlement between Russia and Ukraine and it assumes that:

- A political agreement between Russia and Ukraine will have both domestic and international aspects that require, at least in part, different types of dispute settlement mechanisms;
- The focus will be on political aspects of the Ukraine Framework Agreement developed by the Lauterpacht Centre for International Law at the University of Cambridge. This is done for illustrative purposes only and should not be seen as an endorsement or otherwise of any such aspect, including:
  - Possible neutrality and arms limitation arrangements;
  - The status of Luhansk and Donetsk oblasts;
  - The status and use of the Russian language;
  - The application of transitional justice measures;
  - The disbursement of resources from an (international) fund for the reconstruction of Ukraine; and
- While it is reasonable to expect that there could be different phases in the settlement, the main emphasis will be on one key political settlement as the reference point from which to address dispute settlement.

Dispute settlement is understood to mean any effort by the Sides and/or mediators and guarantors to resolve disagreements between them arising in the course of the implementation or operation of a political agreement in order to avoid the breakdown of this agreement and resumption of violence.

Throughout the following, reference will be made to relevant provisions in peace agreements regardless of whether the agreement was implemented or contributed to achieving sustainable peace. The point of these examples is to illustrate possible options for adoption in the Ukrainian context and not assess their effectiveness in other cases.

Furthermore, such references are not meant to suggest blueprints for inclusion in any relevant agreement between Russia and Ukraine. Rather they are offered for consideration and subsequent adaptation to the specific needs of the Sides.

Dispute avoidance is preferable to dispute settlement, but mechanisms to achieve dispute avoidance can also enable more effective dispute resolution. This should be factored in during the negotiation of any political agreement and could include:

- A detailed, pre-agreed timeline, benchmarks, and milestones for the implementation of the agreement;
- An agreed set of institutions with clearly specified competences and rules of procedure and decision-making;
- 'Alarm bell' mechanisms that allow parties to signal likely disputes emerging and allowing for early consultations and dispute avoidance.

2. Overview of Potential Mechanisms

Mechanisms to settle disputes arising in the implementation and operation of a political agreement can take various forms, depending on the specific purpose for which they are established.

Comparative analysis suggests that, although there is a wide spectrum of individual mechanisms, one can distinguish two principal types: political and judicial. In terms of their composition, these can be drawn purely from among the Sides or from third parties, or they can be hybrid bodies combining both. The mandates of dispute settlement mechanisms can be specific to particular (domestic or international) aspects of an agreement, or they can cover the full breadth of issues that might be disputed under the terms of an agreement. Such bodies can be set up as permanent, temporary, or ad hoc and they can make their decisions according to different procedures (see **Table 1**).

Table 1: Mechanisms for Dispute Settlement

Mechanism	Primary Purposes	Mandate	Composition	Set-up	Decision-making procedure
Political (Joint Committees and Implementation Bodies)	• Agree interpretation of specific agreement provisions • Coordinate policy implementation and implementation legislation	• Issue specific • Comprehensive	• Purely drawn from representatives of the Sides (including, as relevant, external belligerents) • Drawn from representatives of the Sides and the mediators, guarantors, or other nominated third parties • Purely drawn from external third parties	• Permanent • Temporary • Ad-hoc	• Simple or absolute majority • Qualified or concurrent majority • Consensus • Single or collective casting vote
Judicial (Review and Arbitration)	• Resolve disputes arising from differing interpretations of specific agreement provisions • Consider compatibility of policy or legislation with agreement provisions				

There are no hard and fast rules about how to design dispute settlement mechanisms. While sensitivity to context is essential, i.e., any mechanisms agreed need to be fit for purpose, there are some general principles to bear in mind:

- Any dispute settlement mechanism provided for in an agreement should be as clearly defined as possible with regard to the four dimensions of mandate, composition, set-up, and decision-making procedures. Otherwise, disputes over dispute settlement mechanisms themselves are more likely.
- The mandate of any body established, or charged with, dispute settlement needs to be clearly defined. This should include consideration of how and under what conditions mandates of lower-order bodies accumulate to higher-order ones, for example in the process of appealing decisions or in the case of temporary bodies whose 'residual' cases will need to be decided after they cease to function.
- The composition of the bodies established, or charged with, dispute settlement needs to reflect their mandate, i.e., the types of disputes they are meant to settle. This requires consideration, among others, of whether third parties should be included and what role, if any, independent (domestic and/or international) experts should play.
- Some dispute settlement mechanisms will be of a permanent nature, primarily because they will fulfil other functions alongside the settlement of disputes arising from the agreement, such as constitutional courts, international courts, or international organisations. Such mechanisms are also likely to be mandated with settling particularly fundamental disputes, with appeals, and with providing final rulings. Leaving all disputes arising under the terms of a settlement to such permanent bodies, however, may not be the most effective or efficient approach to dispute settlement. More specialised mechanisms could be considered on a temporary basis, such as bodies dealing with transitional justice issues (application of amnesty rules, lustration). Similarly, it would be conceivable to provide for the ad-hoc creation of dispute settlement mechanisms in areas in which fewer disputes are expected and which do not require permanent or temporary standing bodies. This option could also be extended to the ad-hoc restoration of an initially temporary mechanism after its abrogation.
- Clarity over the procedures by which dispute settlement mechanisms reach their decisions is of utmost importance. This should include consideration of procedures in cases where no decision can be reached, such as referral to a higher-level body.

The need for joint committees and implementation bodies often arises from two sources – to find common interpretations for specific provisions in agreements and to coordinate the implementation of specific policies at national and sub-national levels, including the drafting of implementation legislation and policies.

If such more political mechanisms fail to settle disputes, or in cases where they are not considered appropriate, judicial review and arbitration mechanisms become relevant, which are normally carried out by domestic or international courts. Disputants can also agree to submit to arbitration, thereby accepting in advance to be bound by the arbitrator's decision. Arbitration can be used as a last resort where other dispute settlement mechanisms have failed or can be determined as the default mechanism for particular kinds of disputes.

Judicial mechanisms can also be utilised to determine the legality of a particular decision under the terms of an agreement or of the procedure by which it was reached. Such judicial review mechanisms do not per se resolve a given dispute, but they may be important in providing judicial guidance to subsequently renewed political efforts to do so.

Both types of dispute settlement mechanisms—political and judicial—thus, can exist simultaneously and operate in parallel, covering different types of disputes or disputed issues.

When creating dispute settlement mechanisms, due consideration needs to be given to their sustainable resourcing—in terms of staffing, equipment, facilities, etc.

3. EXAMPLES

By way of illustration, consider the following examples and their potential strengths and weaknesses from the perspectives of composition, mandate, set-up, and decision-making procedures of the respective dispute settlement mechanism.

3.1. *Dispute Settlement concerning Domestic Aspects of an Agreement*

The **2006 Comprehensive Peace Accord for Nepal** contains the following provision:

> *If any dispute arises in the interpretation of this agreement, a joint mechanism consisting of both parties shall make the interpretation on the basis of the preamble and the documents included in the addendum of this agreement, and this interpretation will be final.*

While this provision specifies the parameters within which a dispute is to be settled, including by noting that the normally not legally binding preamble be part of the basis for interpretation, it is otherwise unhelpfully vague because it fails to detail whether there is to be parity between the parties (presumably yes), who decides on the representatives and their numbers (presumably the parties themselves), and how decisions are made (presumably by consensus). Nor is it clear whether this "joint mechanism" will be a permanent arrangement or convened as needed. A single dispute settlement mechanism with the power to issue final (and binding) decisions on all disputes would also run the risk of being overwhelmed with the potential number of cases to settle and expertise required to do so.

By contrast, the **2001 Bougainville Peace Agreement** offers much more specificity regarding the arrangements provided:

> *Joint Supervisory Body*
> *263. The autonomous Bougainville Government and the National Government will consult over implementation of autonomy through a joint supervisory body, which will also be used to consult with a view to resolving any disputes.*
> *264. The joint supervisory body (whose name will be mutually determined) will consist of equal numbers of members representing the National Government and the autonomous Bougainville Government; its functions will be to:*
> - *oversee implementation of arrangements for the establishment and operation of the autonomous Bougainville Government;*

- *prepare draft legislation to further the objectives of this Agreement;*
- *finalise matters of detail; and*
- *resolve any differences or disputes.*

Concerning the body's dispute settlement function, the agreement further specifies:

> *Settling Disputes*
> *265. The autonomous Bougainville Government and the National Government will try to resolve disputes by consultation, or, where required, through mediation or arbitration.*
> *266. If a dispute cannot be resolved in one of the above ways, then it may be taken to court.*
> *267. The details of dispute resolution procedures, including their application to particular provisions, will be specified and integrated during drafting of Constitutional Laws to give legal effect to this Agreement.*

The agreement, thus, establishes a body with equal representation by the Sides and provides for a sequence of steps, prioritising political agreement over a judicial ruling, although it is unclear what the role of arbitration would be in this. Likewise, there is a risk if "details of dispute resolution procedures" are left out of the actual agreement. While it is potentially important to define these separately in constitutional or other legislation, such legislation should form part of the actual agreement and could, for example, be included in relevant appendices.

The **1991 Agreement in South Africa** also gives initial preference to achieving a political consensus and failing that arbitration is to be sought:

> *9.3 Where the dispute cannot be resolved by the National Peace Committee or the committee to whom it has been referred to by the National Peace Committee, it shall be referred for arbitration.*

Alternatively, as illustrated by the **1997 Sudan Peace Agreement**, disputes (in this case over the residual powers between the State and Federal authorities) can be referred to judicial institutions (in this case to the Federal Supreme Court). In the subsequent **2005 Comprehensive Peace Agreement for Sudan**, the specification of the court's jurisdiction gives an insight into the mandate that this judicial institution has in relation to the settlement of disputes arising under the agreement:

> *2. 1 1.3.2. The Constitutional Court shall*
> *…*
> *(iii) Have original jurisdiction to decide disputes that arise under the National Interim Constitution and the constitutions of Northern States at the instance of individuals, juridical entities or of government;*
> *(iv) Adjudicate on the constitutionality of laws and set aside or strike down laws or provisions of laws that do not comply with the National, Southern Sudan, or the relevant State constitutions;*
> *(v) Have appellate jurisdiction on appeals against the decisions of Southern Sudan Supreme Court on the Constitution of Southern Sudan and the constitutions of Southern Sudan states;*
> *(vi) Adjudicate on constitutional disputes between organs and levels of government, with respect to areas of exclusive or concurrent competencies;*

Such an arrangement, applicable in the context of Ukraine to disputes over the future status of Donetsk and Luhansk oblasts, has the advantage of adding dispute settlement functions to an existing institution, thereby automatically adopting that body's composition and decision-making procedures. Where this is not considered appropriate, it would be possible to mandate a particular composition (for example, by including a judge from a specific region), establish a separate chamber of the court (such as a hybrid international chamber as was done in the **2005 Dayton Peace Agreement**). When discharging its dispute settlement functions, the court could also adopt particular decision-making procedures, such as requiring a qualified or super majority or, given that it may have appellate jurisdiction, provide a casting vote to its chair or international member.

Dispute settlement bodies, such as constitutional courts, would be set up as permanent institutions and serve other purposes beyond resolving disputes arising under peace agreements. Their primary function would be to settle disputes related to domestic aspects of an agreement. Given the often high degree of politicisation of peace agreements, especially during their implementation period, and the specialised nature of some of their provisions, the creation of temporary institutions with more specific mandates should considered as well.

By way of illustration, consider the Nile Water Commission established under the **2005 Comprehensive Peace Agreement for Sudan** which is charged with "*the management of the Nile Waters, transboundary waters and disputes arising from the management of interstate waters between Northern states and any dispute between Northern and Southern states*". The same agreement also created an ad hoc mechanism in the context of disputes over the division of government assets, in which case "*the Parties agree that such dispute shall be referred to a committee comprising a representative of each of the Parties involved in the dispute and a mutually agreed expert.*" Similarly, the **2006 Darfur Peace Agreement** establishes a Land Commission which has among its functions "*arbitrating disputes between the willing contending parties over rights to land*".

In the Ukrainian context, such arrangements could be applied, among others, to disputes arising in relation to the disbursement of reconstruction funds or language and cultural rights. In both cases, the bodies created could be composed of representatives of the Sides and international (expert) members. The latter could, in turn, be drawn from relevant regional and international institutions with particular expertise and/or a stake in the issues involved, such as the Council of Europe or the OSCE High Commissioner on National Minorities or the World Bank or EBRD.

When such more specialised dispute settlement mechanisms are created, i.e., bodies with a more narrowly defined mandate, consideration also needs to be given to decision-making procedures. In most peace agreements, there is an implicit (and sometimes explicit) consensus requirement, especially if mechanisms are purely composed by representatives of the Sides or their (expert) nominees. If (international) third-party representatives are included, majority rulings are conceivable as well. An alternative would be to adopt a provision akin to a provision the **2006 Darfur Peace Agreement**, which states:

> *223. If the Parties are unable to resolve the dispute through consensus, the Chairperson of the Joint Commission shall consult with the international members of the Joint Commission and issue a final Ruling. The Parties shall be bound by the ruling.*

In either case, procedures need to be in place for cases of deadlock and for appeals. Negotiators should also consider specifying any quora needed for decision-making, how such mechanisms are resourced, when they will be convened, for how long they will be in operation, and which bodies will deal with their residual case load.

3.2. *Dispute Settlement concerning International Aspects of an Agreement*

Article 3 of the **2002 Sri Lanka Agreement** established a monitoring mission which gave the Norwegian government the power to appoint the Head of the Sri Lanka Monitoring Mission who was to *"be the final authority regarding interpretation of this Agreement"*. The monitoring mission was to be composed entirely of members drawn from the Nordic countries and was to be advised by local monitoring missions, composed equally of representatives of the Sides. While provided in the context of a ceasefire agreement, the arrangements themselves merit broader consideration also for application to wider political agreements and their provisions. In the Ukrainian context, for example, such a purely third-party body could be set up under the auspices of the UN or OSCE and be charged with resolving any disputes arising from potential neutrality arrangements in an agreement. This would then be a dispute settlement mechanism with a very specific mandate and composition that could be created on a permanent basis.

This raises another important aspect of dispute settlement mechanisms, namely their composition (membership). The principal distinctions to be drawn here are between purely domestic membership (or membership from the Sides only), hybrid bodies, including international members (or members not directly affiliated with a Side, often referred to as "independent experts"), or purely international bodies which can either be ad hoc, such as the Sri Lanka Monitoring Mission referred to above, or permanent bodies who will assume dispute settlement functions under the terms of an agreement. An example of the latter would be the African Union Commission in the context of the **2006 Darfur Peace Agreement**:

> *508. The Parties agree to settle any disagreement or dispute arising under this Agreement by peaceful means. The Parties further agree that in the event of a dispute concerning the interpretation or application of this Agreement, they shall refer the matter to the AU Commission.*

In the Ukrainian case, such an arrangement would be particularly useful given the part-domestic and part-international nature of any likely agreement. It would offer the opportunity of dealing with disputes related to the domestic aspects of the agreement first in a domestic setting (utilising both political and judicial dispute settlement mechanisms) before referring any unresolved matters to an international body. Such an international body could, in parallel, deal with any disputes arising from the international aspects of the agreement.

Alternatively, one could consider a hybrid body, for example along the lines of the *Joint Supervisory Body* established by the **2001 Bougainville Peace Agreement** (see above), but with additional international representation. A slightly different option would be to co-opt representatives of the Sides onto a purely international body (such as a version of the Sri Lanka Monitoring Mission), including on an ad hoc basis as may be required by the kind of dispute to be settled.

Regardless of the final arrangements, the key point would be establishing a final authority that can issue binding rulings on any dispute left unresolved by lower-level dispute settlement mechanisms. While such a body would need to be purely international and third-party in its composition, lower-level bodies would need to involve representatives of the Sides, not least to allow for the elaboration of political consensus between them in the implementation and operation of their agreement.

4. CONCLUSIONS

Mechanisms to settle disputes are often written into peace agreements. They then become part of the overall implementation and operation process of such agreements. While their establishment is thus ensured, their effective use cannot be guaranteed, and their proper and effective functioning is heavily dependent on the commitment of all parties involved. This includes ensuring that the Sides are adequately represented on the bodies created. It is also important to make sure that procedures are put in place that enable compromises acceptable to all parties are found.

The proper and effective functioning of dispute settlement mechanisms also depends on the precision with which they are defined in agreements. Here, "constructive ambiguity" is unlikely to be helpful.

Furthermore, using a variety of different mechanisms for their appropriate purposes ensures that they can function efficiently, address relevant problems in a timely manner, and ensure the commitment of all parties to the process and its outcomes.

Different mechanisms can, moreover, be used to provide necessary checks and balances. Judicial review and arbitration can function as a means of both dispute settlement *and* providing input into the working of more political mechanisms, while these other mechanisms can be used to guide the interpretation of specific, disputed agreement provisions.

5. RECOMMENDATIONS FOR UKRAINE

There is no agreement yet in the case of Ukraine, so any discussion of dispute settlement mechanisms is purely speculative. However, the absence, as yet, of an agreement does not mean that thinking about dispute settlement mechanisms is pointless. On the contrary, proper consideration of such mechanisms in advance of an agreement is essential to ensure that it can be implemented and sustainably operated over time.

Given that the agreement is likely to have both domestic and international aspects, it is important to reflect on similarly framed dispute settlement mechanisms. International mediators and guarantors need to be part of some of these mechanisms but not all.

As with most peace agreements, the implementation phase is likely to be more intensely politicised before agreement provisions bed down and create a more stability normality in which relevant institutions can function in predictable and acceptable ways. This will most likely require specific dispute settlement mechanisms to be set up for an implementation period which will subsequently become redundant or whose residual functions can be absorbed into permanent judicial bodies. At the same time, particular

issue areas may require specialised bodies of a more technical nature that can depoliticise recurring disputes.

It will also be important to consider how decisions are achieved in dispute settlements. This relates to both overcoming institutional paralysis within the same body and creating an appeals process that allows for a review of a particular decision. However, it is equally critical to have agreement on how, and by whom, a final decision in any dispute is achieved and that the Sides commit to respecting that decision. It is in this context that there will need to be a role for external third parties to be involved in dispute settlement and to "coordinate" dispute settlement mechanisms with (security) guarantees for the settlement as a whole.