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ANNALS OF AIR AND SPACE LAW

ANNALES DE DROIT AÉRIEN ET SPATIAL

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PUBLISHER'S ADDRESS / ADRESSE DE L'ÉDITEUR

3690 rue Peel, Montréal, Québec, H3A 1W9, Canada

Internet: www.iasl.mcgill.ca
Editor-in-Chief / Rédacteur en chef: donal.hanley@mcgill.ca
Editor / Rédacteur: edannals.law@mcgill.ca
Marketing Manager / Responsable des ventes: maria.damico@mcgill.ca

ANNALS OF AIR AND SPACE LAW

ANNALES DE DROIT AÉRIEN ET SPATIAL

ANNALS OF AIR AND SPACE LAW | **ANNALES DE DROIT AÉRIEN ET SPATIAL**

2022 **VOL XLVII**

II. CASE COMMENTS / COMMENTAIRES D'ARRÊTS

PREFACE

This volume of the *Annals of Air & Space Law* is dedicated to Professor Emeritus Brian Havel, who was until recently the Director of the Institute of Air and Space Law (IASL) and Editor-in-Chief of the *Annals*. A warm personal tribute to Professor Havel follows this Preface; suffice it to note here that Professor Havel has made significant and lasting contributions to the development of air law and policy internationally, to the IASL, and to the *Annals*.

Here in Montréal, 2022 started with further public health measures: strict night-time curfews, restrictions on gatherings and in-person activities, and a vaccination booster campaign.

But unlike the previous year, this year has given us promising signs of progress. In particular, life has returned to the IASL's physical home at 3690 rue Peel as faculty and staff return to working from campus. And through the collaborative efforts of these dedicated faculty and staff, we continue to thrive as the premier educational and outreach institution in air and space law.

2022 is the *Annals* 46th year of operation. While not a traditional milestone year, the pandemic has engendered a renewed focus here at the *Annals* on our core objectives. Back in 1976, our founder, Nicholas M. Matte, opened the Preface to Volume I as follows:

> *At a time when periodicals too often encounter difficulties of continuity and sometimes have to fade away, once the first enthusiasm and motivation lose momentum confronted by inevitable and aggravating financial conditions, one could wonder: why the* Annals*?*

We have asked ourselves this very question this year. And by asking this question, we have found the enthusiasm and motivation of which Professor Matte writes. Why the *Annals*? Because the world needs engaged, critical, and reflective scholarship on air and space law – now more than ever.

The events of 2022 speak to this need. On the air law side:

- The ongoing COVID-19 pandemic continues to strongly impact the aviation industry, with global airline capacity greatly

diminished despite resurgent demand. This led to widespread flight cancellations and airport congestion throughout the northern hemisphere summer travel season.

- Price instability and a global inflationary environment further compressed the aviation industry in 2022. Oil prices hit a 13-year high in March, with follow-on effects for passengers facing increasingly higher ticket prices. Overall, the commercial aviation industry remained in a net-loss position throughout the year.

- The Council of the International Civil Aviation Organization (ICAO) has been particularly active in 2022. First, in July, the Council acknowledged that the bomb threat against Ryanair Flight FR4978 was deliberately false, endangered flight safety and that the threat was communicated to FR4978's flight crew on the orders of Belarussian officials. Russia's Council representative expressed Russia's strong objection to identifying Belarus as the source of the unlawful interference; Russia has subsequently not been re-elected to the Council seat it had held since 1971.

- Many ICAO representatives linked Russia's non-election to Russia's further invasion of Ukraine, which began on 24 February. This invasion has had a tragic human impact, devasted Ukraine's economy, and has raised pressing questions regarding the Cape Town Convention and the Chicago Convention, airspace closures, and sanctions issues.

- Sustainability is increasingly recognised as the future of the aviation industry. From 27 September to 7 October, the global aviation community came together here in Montréal for the 41st ICAO Assembly. The Assembly focused on the role of aviation in achieving global sustainable development. Similarly, the 2022 Airbus Summit in December gathered experts and industry leaders to focus on net-zero aviation.

On the space law side:

- Space science proceeds apace, opening new windows on the cosmos. The James Webb Space Telescope reached its home at the second Lagrange point in the Sun-Earth system on 24 January and has already provided new insights into the nature of the universe.

- Commercial space enterprises have demonstrated the ability to carry humans to orbit (and back) safely. On 25 April, Axiom-1, the first all-private crew to launch to the International Space Station (ISS), completed their stay onboard and landed safely on Earth. Boeing's *Starliner* spacecraft then successfully docked with the ISS on 20 May.

- More countries are gaining space capabilities. 4 August saw the launch of South Korea's first lunar orbiter, *Danuri*. The orbiter should reach the Moon by the end of the year and will be looking for lunar resources, including water ice and helium-3. South Korea has also announced its upcoming launch of a national space agency in 2023.

- Two complete space stations will soon orbit the Earth: the construction of China's *Tiangong* space station is due to be completed before the end of the year.

- Humanity's return to the Moon is getting closer. On 16 November, the United States National Aeronautics and Space Administration (NASA) successfully launched *Artemis-1*, an uncrewed test flight and a key first step in the broader *Artemis* program to return to the Moon (and then on to Mars).

Developments in the domains of air law and space law are also leading to greater convergence between the two fields. In the future, we may have to consider whether the divide between air law and space law makes sense, as single-stage-to-orbit spaceplanes and point-to-point orbital transportation become feasible. As ever, here at the *Annals*, we will remain at the cutting edge of these developments, publishing articles and commentaries that demonstrate true thought leadership in our domains.

Such thought leadership has long been at the core of the IASL. Back in 1953, Peng Ming-Min (LL.M. class of 1953 – 1954) published the IASL's first student paper, which discussed space law well before the topic was widely known and more than a decade before the launch of the first satellite, *Sputnik*. Peng graduated in the IASL's first cohort. We mourned his passing in April 2022, at the age of 98, after a long and storied career at the National Taiwan University, at the United Nations, and in Taiwanese politics.

Peng's passing came a few short months after we mourned the loss of Langhorne Bond (LL.M. class of 1963 - 1964). Bond died on 29 January 2022 at the age of 84; he had an impressive life-long career in aviation, significantly contributing to the advancement of safety in the field. He served as administrator and head of the United States Federal Aviation Administration (FAA), appointed by President Carter in 1977. During his career with FAA, significant events took place, such as the grounding of the McDonnell Douglas DC-10 shortly after take-off, killing all 258 passengers, 13 crew members, and two people on the ground, which led to his mission to improve safety in all aspects of aviation, ranging from safer protective gear to back-up positioning systems, often working *pro bono*.

Peng and Bond were recalled fondly on 25 May, when the IASL and the IASL Alumni Association held a cocktail reception to honour the graduating classes of 2019 - 2020, 2020 - 2021, and 2021 - 2022. Due to the COVID-19 pandemic and the suspension of in-person activities, the annual graduation dinner and Alumni Association reunion had not been held since 2019.

In the presence of distinguished guests such as ICAO Secretary General Juan Carlos Salazar (LL.M. class of 1998 - 1999), Professor Ram Jakhu congratulated the graduating students and took the opportunity to express his gratitude to the IASL's dedicated faculty members, adjunct professors, sessional lecturers, and guest lecturers, all of whom share their knowledge and experiences with IASL students in-person and virtually.

Professor Jakhu also took the opportunity to acknowledge and honour the contributions of two of the IASL's "unsung heroes": Senior Administrative Coordinator Maria D'Amico, and Kuan-Wei Chen (LL.M. class of 2008-2009; Taiwan), the Executive Director of the Centre for Research in Air and Space Law. Volume XLVI (2021) was dedicated to Maria for her "extraordinary commitment and outstanding contributions in helping to make the McGill Institute of Air and Space Law the premier venue for education and research in the disciplines of air and space law," while Kuan-Wei was presented with a plaque in recognition of "his ten years of outstanding contribution, extraordinary service and unwavering dedication to the Institute and Centre of Air and Space Law."

Following the summer break, on 2 September 2022, we held an in-person welcome for a cosmopolitan and diverse entering class. The IASL's current cohort includes students representing multiple countries across the globe, including Canada, Colombia, Germany, India, the United States, Qatar and Romania. That the IASL has been able to attract and

retain such a talented group of students, despite the ongoing travel disruptions, is a testament to our strength.

The beginning of the fall term also marked some changes at the IASL. The prolonged medical leave of Professor Havel made a longer-term replacement for his position as Director necessary. The Institute was pleased to welcome Professor Donal Hanley as new Interim Director and Editior-in-Chief of the *Annals*.

After over a decade of dedicated and exemplary service to the IASL family, Kuan-Wei (David) Chen stepped down from his position as Executive Director of the IASL to pursue further education abroad in Australia. He was replaced by Stefan-Michael Wedenig whose appointment as new Executive Director commenced on 1 September 2022.

Finally, Jack Wright Nelson has been appointed Editor of the *Annals*. Our gratitude goes to former Editor, René David-Cooper, who has led the *Annals* these past years.

On 15 September 2022, McGill University Faculty of Law Dean Robert Leckey addressed the American Bar Association (ABA) Air and Space Law Forum at its 2022 Annual Conference. Attended by legal aerospace professionals, senior airline executives, and high-level government representatives, Dean Leckey addressed the Forum on the pressing need for sound legal knowledge of air law and space law in academia – work that the IASL remains at the forefront of.

To this end, in 2022, the IASL extended its ties with aerospace stakeholders worldwide, including by establishing several new internships for students and recent graduates. In October 2022, the IASL concluded a Memorandum of Understanding with Korea Aerospace University, a leading Korean university specialising in aviation and aerospace. This formalises a relationship between the two institutions of more than 30 years' standing.

On the research front, 2022 also saw the publication of Volume I of the McGill Manual on International Law Applicable to Military Uses of Outer Space. The McGill Manual is the world's first manual clarifying the international law that applies to the military uses of outer space. This timely work has already attracted significant international attention. Work is underway on Volume II, which will provide detailed commentary on the 52 rules established in Volume I.

Turning now to this year's volume of the *Annals*. This volume's Air Law section opens with a timely piece considering judgments from the International Court of Justice that consider the scope of the ICAO Council's jurisdiction when the Council exercises its dispute settlement powers under Article 84 of the Chicago Convention. This piece should be compared and contrasted with Saachi Juneja's piece from Volume XVLI of the *Annals* that addresses the same topic; while publishing schedules precluded this Volume's piece from addressing the Volume XVLI piece, when read together they provide comprehensive coverage and analysis of this important issue.

The second article then leverages a recent decision from the United Kingdom and previous decisions from the Court of Justice of the European Union to shed new light on the ever-pressing question of how national courts interpret and apply the Montreal Convention.

The Space Law section opens with an assessment of the current legal framework governing a new area of commercial space activity: in-space advertising. Such advertisements raise issues relating to astronomical impacts, space debris, content control, aesthetics, space sustainability, national appropriation of property rights, and the view of space as a 'global common' – thereby presenting a near-term international legal challenge.

The second article analyses the concept of the Prevention of an Arms Race in Outer Space (PAROS) as a mechanism to manage escalation issues in the space environment. Roadblocks to PAROS are presented as stemming from a binary question of whether future governance developments should be legally binding or non-legally binding; potential paths forward for PAROS are charted and assessed.

This year's volume also contains two case comments. Coincidentally, both decisions emanate from the United States and respectively represent key developments in air and space law. The first comment focuses on *Moore v British Airways*, a decision handed down by the United States Court of Appeals for the First Circuit on 29 April 2022. The second comment addresses *Viasat v Federal Communication Commission*, a United States Court of Appeals for the District of Columbia decision dated 26 August 2022.

As always, we are grateful to have been able to count on the support of our Editorial Board, our Associate Editor Arnold Agaba, our Assistant Editor Dima Kiwan, and the good people at Hein. Our further thanks go to Stefan-Michael Wedenig, and to Maria D'Amico, the Senior Administrator of the IASL – as ever, Maria is the true heart of our Institute.

All these people played indispensable roles in bringing Volume XLVII of the *Annals* to successful publication. All articles and comments represent the personal opinions of the respective authors and do not reflect the positions or views of the IASL, the Faculty of Law, McGill University. Furthermore, authors represent only themselves; they do not represent their countries of nationality nor any organizations with which they may be affiliated.

We leave you here with the words with which Professor Matte concluded that very first Preface, back in 1976. These words remain as true today as the day they were written:

> *We trust that the* Annals *answers to a real need for a scientific and objective publication where one will find confrontations of ideas about existing air and space legislation, suggestions how to solve emerging law from new techniques and useful information about structural and doctrinal developments. The world-wide nature of the inter-dependent consequences for all nations resulting from rules yet to be globally accepted … oblige[s] mankind to strive relentlessly towards a world peace in the shadow of possible general destruction. Towards this effort, the* Annals *will try to bring, in the field of air and space law, its modest but steady contribution.*

Donal Hanley
Interim Director, Institute of Air and Space Law
Editor-in-Chief, Annals of Air and Space Law

Jack Wright Nelson
Editor, Annals of Air and Space Law

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PRÉFACE

Ce volume des *Annales de droit aérien et spatial* est dédié au professeur émérite Brian Havel, qui était jusqu'à récemment directeur de l'Institut du droit aérien et spatial (IDAS) et rédacteur en chef des *Annales*. Un chaleureux hommage personnel au professeur Havel suit cette préface ; il suffit de noter ici que le professeur Havel a apporté des contributions importantes et durables au développement du droit aérien et de la politique internationale, à l'IDAS et aux *Annales*.

Ici, à Montréal, l'année 2022 a commencé par de nouvelles mesures de santé publique : couvre-feu nocturne strict, restrictions des rassemblements et des activités en personne, et campagne de rappel de vaccination.

Mais contrairement à l'année précédente, cette année nous a donné des signes prometteurs de progrès. En particulier, la vie est revenue au domicile physique de l'IDAS, au 3690 rue Peel, alors que le corps enseignant et le personnel recommencent à travailler sur le campus. Et grâce aux efforts de collaboration de ces professeurs et employés dévoués, nous continuons à prospérer en tant qu'institution éducative et de sensibilisation de premier plan dans le domaine du droit aérien et spatial.

2022 est la 46e année d'activité des *Annales*. Bien qu'il ne s'agisse pas d'une année charnière traditionnelle, la pandémie a permis aux *Annales* de se recentrer sur leurs objectifs fondamentaux. En 1976, notre fondateur, Nicholas M. Matte, ouvrait la préface du volume I de la manière suivante :

> *A l'heure où les périodiques rencontrent trop souvent des difficultés de continuité et doivent parfois s'éteindre, une fois l'enthousiasme et la motivation première perdus face à des conditions financières inévitables et aggravantes, on peut se demander : pourquoi les* Annales *?*

C'est la question que nous nous sommes posée cette année. Et en posant cette question, nous avons trouvé l'enthousiasme et la motivation dont parle le professeur Matte. Pourquoi les *Annales* ? Parce que le monde a besoin d'une recherche engagée, critique et réfléchie sur le droit aérien et spatial - maintenant plus que jamais.

Les événements de 2022 témoignent de cette nécessité. En ce qui concerne le droit aérien :

- La pandémie actuelle de COVID-19 continue d'avoir un impact important sur le secteur de l'aviation, la capacité des compagnies aériennes mondiales étant fortement réduite malgré la reprise de la demande. Cette situation a entraîné de nombreuses annulations de vols et une congestion des aéroports tout au long de la saison estivale dans l'hémisphère nord.

- L'instabilité des prix et un environnement inflationniste mondial ont encore comprimé le secteur de l'aviation en 2022. Les prix du pétrole ont atteint leur plus haut niveau depuis 13 ans en mars, avec des effets de suivi pour les passagers confrontés à des prix de billets de plus en plus élevés. Globalement, l'industrie de l'aviation commerciale est restée en position de perte nette tout au long de l'année.

- Le Conseil de l'Organisation de l'aviation civile internationale (OACI) a été particulièrement actif en 2022. Tout d'abord, en juillet, le Conseil a reconnu que l'alerte à la bombe contre le vol Ryanair FR4978 était délibérément fausse, qu'elle mettait en danger la sécurité des vols et que la menace avait été communiquée à l'équipage du vol FR4978 sur ordre de responsables biélorusses. Le représentant de la Russie au Conseil a exprimé la forte objection de la Russie à identifier la Biélorussie comme la source de l'ingérence illégale ; la Russie n'a donc pas été réélue au siège du Conseil qu'elle occupait depuis 1971.

- De nombreux représentants de l'OACI ont établi un lien entre la non-élection de la Russie et la poursuite de l'invasion de l'Ukraine par la Russie, qui a commencé le 24 février. Cette invasion a eu un impact humain tragique, a dévasté l'économie de l'Ukraine et a soulevé des questions pressantes concernant la Convention du Cap et la Convention de Chicago, les fermetures d'espace aérien et les sanctions.

- La durabilité est de plus en plus reconnue comme l'avenir de l'industrie aéronautique. Du 27 septembre au 7 octobre, la communauté mondiale de l'aviation s'est réunie ici à Montréal pour la 41e Assemblée de l'OACI. L'Assemblée s'est concentrée sur le rôle de l'aviation dans la réalisation du développement

durable mondial. De même, le Sommet Airbus 2022, qui s'est tenu en décembre, a rassemblé des experts et des dirigeants de l'industrie pour se concentrer sur l'aviation « zéro émission nette ».

En ce qui concerne le droit spatial :

- La science spatiale progresse rapidement, ouvrant de nouvelles fenêtres sur le cosmos. Le 24 janvier, le télescope spatial James Webb a atteint son domicile au deuxième point de Lagrange du système Soleil-Terre et a déjà fourni de nouvelles informations sur la nature de l'univers.

- Les entreprises spatiales commerciales ont démontré leur capacité à transporter des êtres humains en orbite (et retour) en toute sécurité. Le 25 avril, « Axiom-1 », le premier équipage entièrement privé à se rendre à la Station spatiale internationale (SSI), a terminé son séjour à bord et s'est posé en toute sécurité sur Terre. Le vaisseau spatial « Starliner » de Boeing s'est ensuite amarré avec succès à la SSI le 20 mai.

- De plus en plus de pays acquièrent des capacités spatiales. Le 4 août, la Corée du Sud a lancé son premier orbiteur lunaire, Danuri. L'orbiteur devrait atteindre la Lune d'ici la fin de l'année et recherchera des ressources lunaires, notamment de la glace d'eau et de l'hélium 3. La Corée du Sud a également annoncé le lancement prochain d'une agence spatiale nationale en 2023.

- Deux stations spatiales complètes seront bientôt en orbite autour de la Terre : la construction de la station spatiale chinoise « Tiangong » devrait s'achever avant la fin de l'année.

- Le retour de l'humanité sur la Lune se rapproche. Le 16 novembre, l'Administration nationale de l'aéronautique et de l'espace des États-Unis (NASA) a lancé avec succès « Artemis-1 », un vol d'essai sans équipage et une première étape clé du programme « Artemis », qui vise à retourner sur la Lune (et à un jour atteindre Mars).

Les développements dans les domaines du droit aérien et du droit spatial conduisent également à une plus grande convergence entre les deux domaines. À l'avenir, nous devrons peut-être nous demander si la

séparation entre le droit aérien et le droit spatial a un sens, alors que les avions spatiaux à une seule étape et le transport orbital de point à point deviennent réalisables. Comme toujours, ici, aux *Annales*, nous resterons à la pointe de ces développements, en publiant des articles et des commentaires qui démontrent un véritable leadership dans nos domaines.

Ce leadership intellectuel est depuis longtemps au cœur de l'IDAS. En 1953, Peng Ming-Min (LL.M., promotion 1953 - 1954) a publié le premier article d'étudiant de l'IDAS, qui traitait du droit spatial bien avant que le sujet ne soit largement connu et plus d'une décennie avant le lancement du premier satellite, Spoutnik. Peng a obtenu son diplôme dans la première cohorte de l'IDAS. Nous avons pleuré sa disparition en avril 2022, à l'âge de 98 ans, après une longue et riche carrière à l'Université nationale de Taiwan, aux Nations unies et dans la politique taïwanaise.

Le décès de Peng est survenu quelques mois après que nous avons pleuré la perte de Langhorne Bond (LL.M., promotion 1963 - 1964). Bond est décédé le 29 janvier 2022 à l'âge de 84 ans. Il a mené une carrière impressionnante dans le domaine de l'aviation, contribuant de manière significative à l'amélioration de la sécurité dans ce secteur. Il a été administrateur et chef de l'administration fédérale de l'aviation des États-Unis (FAA), nommé par le président Carter en 1977. Au cours de sa carrière à la FAA, des événements importants ont eu lieu, comme l'immobilisation au sol du McDonnell Douglas DC-10 peu après son décollage, tuant les 258 passagers, 13 membres d'équipage et deux personnes au sol, ce qui l'a conduit à se donner pour mission d'améliorer la sécurité dans tous les aspects de l'aviation, allant de l'équipement de protection plus sûr aux systèmes de positionnement de secours, en travaillant souvent bénévolement.

Peng et Bond ont été rappelés avec émotion le 25 mai, lorsque l'IDAS et l'Association des anciens de l'IDAS ont organisé un cocktail en l'honneur des promotions 2019 - 2020, 2020 - 2021 et 2021 - 2022. En raison de la pandémie de COVID-19 et de la suspension des activités en personne, le dîner annuel de remise des diplômes et la réunion de l'Association des anciens élèves n'avaient pas eu lieu depuis 2019.

En présence d'invités éminents tels que le secrétaire général de l'OACI Juan Carlos Salazar (LL.M., promotion 1998 - 1999), le professeur Ram Jakhu a félicité les étudiants diplômés et a profité de l'occasion pour exprimer sa gratitude envers les membres dévoués du corps professoral de l'IDAS, les professeurs adjoints, les conférenciers de session et les conférenciers invités, qui partagent toutes leurs connaissances et leurs expériences avec les étudiants de l'IDAS en personne et virtuellement.

Le professeur Jakhu a également profité de l'occasion pour reconnaître et honorer les contributions de deux des « héros méconnus » de l'IDAS: Maria D'Amico, coordinatrice administrative principale, et Kuan-Wei Chen (LL.M., promotion 2008-2009, Taiwan), ancien directeur exécutif du IDAS. Le volume XLVI (2021) a été dédié à Maria pour son « engagement extraordinaire et ses contributions exceptionnelles pour aider à faire de l'Institut de droit aérien et spatial de McGill le premier lieu d'enseignement et de recherche dans les disciplines du droit aérien et spatial », tandis que Kuan-Wei a reçu une plaque en reconnaissance de « ses dix années de contribution exceptionnelle, de service extraordinaire et de dévouement inébranlable à l'Institut et au Centre de droit aérien et spatial ».

Après les vacances d'été, le 2 septembre 2022, nous avons accueilli en personne une classe d'étudiants cosmopolite et diverse. La cohorte actuelle de l'IDAS comprend des étudiants représentant de nombreux pays du monde entier, notamment le Canada, la Colombie, l'Allemagne, l'Inde, les États-Unis, le Qatar et la Roumanie. Le fait que l'IDAS ait été capable d'attirer et de retenir un groupe d'étudiants aussi talentueux, malgré les perturbations constantes des voyages, témoigne de notre force.

Le début du trimestre d'automne a également marqué quelques changements à l'IDAS. Le congé médical prolongé du professeur Havel a rendu nécessaire un remplacement à plus long terme de son poste de directeur. L'Institut a eu le plaisir d'accueillir le professeur Donal Hanley comme nouveau directeur ad intérim et rédacteur-en-chef des *Annales*.

Après plus d'une décennie de services dévoués et exemplaires à la famille de l'IDAS, Kuan-Wei (David) Chen a quitté son poste de directeur exécutif de l'IDAS pour poursuivre ses études en Australie. Il a été remplacé par Stefan-Michael Wedenig dont la nomination en tant que nouveau directeur exécutif a débuté le 1er septembre 2022.

Enfin, Jack Wright Nelson a été nommé rédacteur des *Annales*. Notre gratitude va à l'ancien rédacteur en chef, René David-Cooper, qui a dirigé les *Annales* ces dernières années.

Le 15 septembre 2022, le doyen de la faculté de droit de l'Université McGill, Robert Leckey, s'est adressé au forum sur le droit aérien et spatial de l'American Bar Association (ABA) lors de sa conférence annuelle 2022. En présence de professionnels juridiques de l'aérospatiale, de cadres supérieurs de compagnies aériennes et de représentants gouvernementaux de haut niveau, le doyen Leckey s'est adressé au Forum sur le besoin pressant de connaissances juridiques solides en matière de

droit aérien et de droit spatial dans le milieu universitaire - un travail pour lequel l'IDAS reste à l'avant-garde.

À cette fin, en 2022, l'IDAS a étendu ses liens avec les acteurs de l'aérospatiale dans le monde entier, notamment en établissant plusieurs nouveaux stages pour les étudiants et les jeunes diplômés. En octobre 2022, l'IDAS a conclu un protocole d'accord avec la Korea Aerospace University, une université coréenne de premier plan spécialisée dans l'aviation et l'aérospatiale. Ce protocole officialise une relation de plus de 30 ans entre les deux institutions.

Sur le plan de la recherche, l'année 2022 a également vu la publication du volume I du Manuel de McGill, le premier manuel au monde clarifiant le droit international applicable aux utilisations militaires de l'espace extra-atmosphérique.

Cet ouvrage opportun a déjà attiré une attention internationale considérable. Le travail est en cours sur le volume II, qui fournira des commentaires détaillés sur les 52 règles établies dans le volume I.

Nous abordons maintenant le volume des *Annales* de cette année. La section Droit aérien de ce volume s'ouvre sur un article opportun qui examine les arrêts de la Cour internationale de Justice portant sur l'étendue de la compétence du Conseil de l'OACI lorsque celui-ci exerce ses pouvoirs de règlement des différends en vertu de l'article 84 de la Convention de Chicago. Cet article doit être comparé et contrasté avec l'article de Saachi Juneja du volume XVLI des *Annales* qui traite du même sujet. Bien que les calendriers de publication aient empêché l'article de ce volume d'aborder celui du volume XVLI, lorsqu'ils sont lus ensemble, ils offrent une couverture complète de cette question importante.

Le deuxième article s'appuie ensuite sur une décision récente du Royaume-Uni et sur des décisions antérieures de la Cour de justice de l'Union européenne pour jeter un nouvel éclairage sur la question toujours pressante de savoir comment les tribunaux nationaux interprètent et appliquent la Convention de Montréal.

La section sur le droit de l'espace s'ouvre sur une évaluation du cadre juridique actuel régissant un nouveau domaine d'activité spatiale commerciale : la publicité dans l'espace. Ces publicités soulèvent des questions relatives aux impacts astronomiques, aux débris spatiaux, au contrôle du contenu, à l'esthétique, à la durabilité de l'espace, à l'appropriation nationale des droits de propriété et à la vision de l'espace comme un "bien commun mondial", ce qui constitue un défi juridique international à court terme.

Le deuxième article analyse le concept de prévention d'une course aux armements dans l'espace (PAROS) comme mécanisme de gestion des problèmes d'escalade dans l'environnement spatial. Les obstacles à la prévention d'une course aux armements dans l'espace sont présentés comme découlant d'une question binaire, à savoir si les développements futurs en matière de gouvernance doivent être juridiquement contraignants ou non.

Le volume de cette année contient également deux commentaires de cas. Par coïncidence, les deux décisions émanent des États-Unis et représentent respectivement des développements clés dans le droit aérien et spatial. Le premier commentaire porte sur *Moore v British Airways*, une décision rendue par la Cour d'appel des États-Unis pour le premier circuit le 29 avril 2022.

Le second commentaire porte sur l'affaire *Viasat v Federal Communication Commission*, une décision de la Cour d'appel des États-Unis pour le District de Columbia en date du 26 août 2022.

Comme toujours, nous sommes reconnaissants d'avoir pu compter sur le soutien de notre comité de rédaction, de notre rédacteur associé Arnold Agaba, de notre rédacteur adjoint Dima Kiwan et des gens bien de Hein. Nous adressons également nos remerciements à Stefan-Michael Wedenig et à Maria D'Amico, l'administratrice principale de l'IDAS - Maria est le vrai cœur de notre Institut.

Toutes ces personnes ont joué un rôle indispensable pour mener à bien la publication du volume XLVII des *Annales*. Tous les articles et commentaires représentent les opinions personnelles de leurs auteurs respectifs et ne reflètent pas les positions ou les points de vue de l'IDAS, de la Faculté de droit de l'Université McGill. En outre, les auteurs ne représentent qu'eux-mêmes ; ils ne représentent pas leur pays de nationalité ni aucune organisation à laquelle ils peuvent être affiliés.

Nous vous laissons ici avec les mots avec lesquels le professeur Matte a conclu cette toute première préface, en 1976. Ces mots restent aussi vrais aujourd'hui que le jour où ils ont été écrits :

> *Nous sommes convaincus que les* Annales *répondent à un réel besoin de publication scientifique et objective où l'on trouvera des confrontations d'idées sur la législation aérienne et spatiale existante, des suggestions sur la manière de résoudre le droit émergeant des nouvelles techniques et des informations utiles sur les développements structurels et doctrinaux. La nature mondiale des conséquences interdépendantes pour toutes les nations résultant de règles qui n'ont pas encore été acceptées au niveau mondial ... oblige l'humanité à s'efforcer sans relâche de parvenir à une paix mondiale dans l'ombre d'une possible destruction générale. C'est à cet effort que les* Annales *tenteront d'apporter, dans le domaine du droit aérien et spatial, leur modeste mais constante contribution.*

Donal Hanley
Directeur ad intérim, Institut de droit aérien et spatial
Rédacteur-en-chef, Annales de droit aérien et spatial

Jack Wright Nelson
Rédacteur, Annales de droit aérien et spatial

TRIBUTE TO PROFESSOR EMERITUS BRIAN HAVEL

Director (2017 – 2022)
Institute of Air and Space Law

The dedication of this issue of the *Annals of Air and Space Law* to Professor Emeritus Brian Havel, former Director of the Institute of Air and Space Law and of the Centre for Research in Air and Space Law and former Editor-in-Chief of these *Annals*, comes earlier than any of us expected or wanted.

For five years, from 2017 until 2022, Professor Havel led both the Institute and the Centre with great style, substance and kindness, a rare combination. In a time of great social change, he also had a rare ability to be progressive in his approach, while affording those fortunate enough to hear him, whether in the classroom or at a conference, with the great British parliamentary style of oratorical debate, crafted and perfected before the invention of the microphone and rendering it unnecessary for those who, like Professor Havel, mastered its principles.

Professor Havel's regular meetings with his students, especially in the relaxed surroundings of the McGill Faculty Club, are exemplary of his dedication to the academic and personal well-being of the next generation of air and space professionals. Such keen interest in the academic and professional development of students led Professor Havel to create several internship programmes with several airlines and industry associations, as well as inaugurate such precious networking opportunities as the IASL Colloquium Series in Air and Space Law and the Qatar Airways/McGill Air Law Speed Moot Court Competition.

Before joining us at McGill, Professor Havel was a Distinguished Research Professor of Law at DePaul University College of Law in Chicago, and before that again he was a practising attorney with Paul, Weiss, Rifkind, Wharton & Garrison LLP in New York. Together with various visiting professorships, his experience in both the practice and theory of air law is extensive. His stature in the field of public and private international air law was recognised by his *alma mater*, University College Dublin, with the award of the degree of Doctor of Laws, *honoris causa,* in 2019.

The son of famed glass Czech craftsman Miroslav Havel, chief designer for Waterford Crystal, Professor Havel excels in ways analogous to that of his father in bringing beauty through clarity. Although his lectures are entertaining in their content, engaging and memorable in their delivery, these are but means to an end in terms of his true passion, which is the dissemination of knowledge through clear education and encouragement of serious thought and debate. For all that his lectures are often funny, his preparation is extremely painstaking, as anyone who has seen him anxiously prepare beforehand or relax exhausted afterward can testify. For those unused to the parliamentary style, the ease with which he can move calmly on to the next item on the agenda after a particularly impassioned speech may seem surprising but it is a most precious link of continuity with our past and should be appreciated by all privileged to hear it.

One of us recalls the equanimity with which Professor Havel helped him to design a course for our students over an excellent aviation cocktail or two at a cocktail bar on Avenue Atwater before kindly, indeed patiently, accepting his offer to go afterwards for a second round, this time of rather lengthy Latin Vespers, at the church next door and then seeing him off after that for the late night flight to London! This speaks to an inherent kindness and curiosity which also shows through in Professor Havel's extensive writings. For those of us who have enjoyed the privilege of working with him, his wit, humour and humanity make Professor Havel such a memorable and endearing colleague.

At the beginning of the pandemic, Professor Havel convened a Zoom meeting with all the students and faculty members to appeal for calm, resilience and unity at a time of great social isolation and uncertainty. Although the past few years would have been unthinkable for all of us only a few years ago, this is even more so the case for Professor Havel. He has overcome health challenges with enormous endurance and dedication. We are glad that he and Graeme are happy in Chicago and look forward to their coming to see us in due course in Montreal.

Brian, please accept this as a small token of our friendship and appreciation. Thank you.

Ram Jakhu
Donal Hanley
Maria D'Amico
Kuan-Wei (David) Chen
Stefan-Michael Wedenig
Jack Wright Nelson

HOMMAGE AU PROFESSEUR ÉMÉRITE BRIAN HAVEL

Directeur (2017 – 2022)
Institut de droit aérien et spatial

Ce volume des Annales de droit aérien et spatial est dédié au professeur émérite Brian Havel, ancien Directeur de l'Institut de droit aérien et spatial et du Centre de recherche en droit aérien et spatial, ainsi qu'ancien rédacteur en chef des Annales. Cet hommage survient plus tôt qu'aucun d'entre nous ne l'aurait prévu ou souhaité.

De 2017 à 2022, le professeur Havel a dirigé l'Institut et le Centre en démontrant une combinaison unique de style, de substance et de gentillesse. À une époque de grands changements sociaux, il a aussi démontré la rare capacité d'être progressiste dans son approche, tout en offrant à ceux qui ont eu l'occasion d'entendre, que ce soit en classe ou lors d'une conférence, le grand style parlementaire britannique du débat oratoire, élaboré et perfectionné avant l'invention du microphone, l'ayant ainsi rendu inutile pour ceux qui, comme le professeur Havel, en maîtrisent les principes.

Les rencontres régulières du professeur Havel avec ses étudiants, notamment dans le cadre détendu du Cercle universitaire de McGill, démontrent son dévouement exemplaire au bien-être académique et personnel de la prochaine génération de professionnels dans le domaine aérospatial.

Ce vif intérêt pour le développement académique et professionnel des étudiants a incité le professeur Havel à créer plusieurs programmes de stages auprès de compagnies aériennes et d'associations industrielles, ainsi qu'à mettre en place d'excellentes occasions de réseautage telles que le « IASL Colloquium Series in Air and Space Law » et le « Qatar Airways/McGill Air Law Speed Moot Court Competition ».

Avant de se joindre à nous à McGill, le professeur Havel était professeur distingué de recherche en droit à la Faculté de droit de l'Université DePaul à Chicago. Avant cela, il était avocat chez Paul, Weiss, Rifkind, Wharton & Garrison LLP à New York.

Son expérience dans la pratique et la théorie du droit aérien, ainsi que ses diverses fonctions de professeur invité, sont considérables. Sa

stature dans le domaine du droit aérien international public et privé a d'ailleurs été reconnue par son alma mater, l'University College de Dublin, qui lui a décerné le titre de docteur en droit, honoris causa, en 2019.

Fils du célèbre artisan verrier tchèque Miroslav Havel, concepteur en chef de Waterford Crystal, le professeur Havel excelle, comme son père, dans l'art d'apporter la beauté par la clarté. Bien que ses conférences soient divertissantes dans leur contenu, engageantes et mémorables dans leur présentation, elles ne sont que des moyens pour parvenir à sa véritable passion, soit la diffusion de connaissances par le biais d'un enseignement clair afin de nous inciter à réfléchir et débattre.

Même si ses conférences sont souvent drôles, sa préparation est extrêmement minutieuse, comme peuvent en témoigner tous ceux qui l'ont vu se préparer anxieusement avant ou après, en train de se détendre une fois épuisé. Pour ceux qui n'ont pas l'habitude du style parlementaire, la facilité avec laquelle il peut passer calmement d'un point à l'autre dans l'ordre du jour après un discours particulièrement passionné, peut sembler surprenante, mais elle constitue un lien de continuité très précieux avec notre passé et devrait être appréciée par tous ceux qui ont le privilège de l'entendre.

L'un d'entre nous se souvient de la sérénité avec laquelle le professeur Havel l'a aidé à concevoir un cours pour nos étudiants autour d'un excellent cocktail d'aviation (ou deux) dans un bar de l'avenue Atwater, avant d'accepter gentiment, voire patiemment, son offre d'aller faire un deuxième tour assez long, cette fois-ci des vêpres latines à l'église voisine, puis finalement de le raccompagner pour son vol de nuit vers Londres! Cela témoigne d'une gentillesse et d'une curiosité inhérentes qui se manifestent également dans les nombreux écrits du professeur Havel. Pour ceux d'entre nous qui ont eu le privilège de travailler avec lui, son esprit, son humour et son humanité font du professeur Havel un collègue mémorable et attachant.

Au début de la pandémie, le professeur Havel a convoqué une réunion Zoom avec tous les étudiants et les membres du corps professoral pour lancer un appel au calme, à la résilience et à l'unité pendant une grave période d'isolement social et d'incertitude. Si ces dernières années avaient été impensables pour nous tous il y a quelques années seulement, cela est encore plus vrai pour le professeur Havel.

Il a surmonté des problèmes de santé avec une endurance et un dévouement extraordinaire. Nous sommes heureux que lui et Graeme soient heureux à Chicago et nous attendons avec impatience qu'ils viennent nous visiter à Montréal.

Brian, veuillez considérer cet hommage comme un modeste geste d'appréciation pour notre amitié et notre reconnaissance envers vous. Merci.

Ram Jakhu
Donal Hanley
Maria D'Amico
Kuan-Wei (David) Chen
Stefan-Michael Wedenig
Jack Wright Nelson

Brian Havel

Leading Articles

Air Law

Articles de fond

Droit aérien

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THE ICAO COUNCIL: A NON-PROPER JUDICIAL INSTITUTION?[1]

by

James Low*

SYNOPSIS

[1] At the time of writing, Netherlands and Australia have commenced dispute settlement proceedings under Article 84 of the Chicago Convention against Russia "for its role in the downing of flight MH17" (Government of the Netherlands, "The Netherlands and Australia submit complaint against Russia to the International Civil Aviation Organization", *Government of the Netherlands* (14 March 2022), online: <www.government.nl/latest/news/2022/03/14/netherlands-and-australia-submit-complaint-against-russia-to-icao>. The matter was most recently considered by the Council in a closed session on 1 June 2022 but the outcome thereof is not publicly available. See ICAO Council, "Order Of Business For The Fifth And Sixth Meetings" (31 May 2022), online (pdf) *ICAO* <www.icao.int/about-icao/Council/Council%20Documentation/226/C-OBs/C.226.OB.04.EN.pdf>. See also ICAO Council, "Summary of Decisions" (26 June 2022), online (pdf) *ICAO* <www.icao.int/about-icao/Council/Council%20Documentation/226/C-DEC/C.226.DEC.05.EN.PDF>.

* LL.M. candidate at New York University School of Law; Deputy Senior State Counsel, Attorney-General's Chambers, Singapore; former Legal Officer, International Civil Aviation Organization.

ABSTRACT

The International Court of Justice (ICJ) recently had the opportunity to consider the scope of the jurisdiction of the Council of the International Civil Aviation Authority (ICAO), when the latter discharges its dispute settlement function under Article 84 of the Chicago Convention. In its judgment, the ICJ made two pronouncements relating to the ICAO Council, viz. that it is not a judicial institution in the proper sense of the term, and that it could consider matters beyond its constituent documents when discharging this function. However, the ICJ did not elaborate on these comments.

This essay attempts to explain the ICJ's decision and offers an alternative conception of the Council's nature when performing its dispute settlement function, one that takes into account its peculiar circumstances, addresses common criticisms against its commonly perceived shortcomings, and contains adequate safeguards to ensure the proper discharge of this duty by a non-proper judicial institution.

RÉSUMÉ

La Cour internationale de Justice (CIJ) a récemment eu l'occasion d'examiner l'étendue de la compétence du Conseil de l'Organisation de l'aviation civile internationale (OACI), lorsque ce dernier exerce sa fonction de règlement des différends en vertu de l'article 84 de la convention de Chicago. Dans son arrêt, la CIJ s'est prononcée sur deux points concernant le Conseil de l'OACI, à savoir qu'il ne s'agit pas à proprement Cependant, la CIJ n'a pas développé ces commentaires.

La présente rédaction tente d'expliquer la décision de la CIJ et propose une autre conception de la nature du Conseil dans l'exercice de sa fonction de règlement des différends, une conception qui tient compte de ses circonstances particulières, répond aux critiques courantes à l'encontre de ses lacunes communément perçues et contient des garanties adéquates pour assurer le bon exercice de cette fonction par une institution non judiciaire.

KEYWORDS

Article 84 of the Chicago Convention, ICAO Council, Dispute Settlement, ICJ, Airspace Blockades

I. INTRODUCTION

On 5 June 2017, a diplomatic crisis was brewing in the Gulf. Four states – Bahrain, Egypt, Saudi Arabia and the United Arab Emirates (the Quartet) severed diplomatic relations with their neighbour Qatar, and adopted certain airspace restrictions against the latter. According to the Quartet these measures were a response to Qatar's alleged support of terrorism in the region and Qatar's failure to comply with the Riyadh Agreements,[2] a series of three treaties signed between 2013 to 2014 by the six Gulf Cooperation Council States.[3] The Quartet contended that the Riyadh Agreements impose certain obligations relating to regional security, stability and peace,[4] a breach thereof by a party entitles the other parties "the right to take any appropriate action to protect their security and stability".[5] The Quartet therefore justified their airspace restrictions as lawful countermeasures under general international law,[6] as well as under the Riyadh Agreements.[7]

Qatar, for its part, considered the airspace restrictions to be in breach of the International Convention on Civil Aviation,[8] to which all five States are parties.[9] Qatar immediately raised the matter to the attention of ICAO,[10] a UN Specialized Agency formed pursuant to the Chicago Convention in 1944, and "serve[s] as the global forum of States for

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[2] *Riyadh Agreement (with Endorsement Agreement)*, Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and UAE, 24 November 2013 (entered into force 24 November 2013), *Mechanism Implementing the Riyadh Agreement*, Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and UAE, 17 April 2014 (entered into force 17 April 2014), *Supplementary Riyadh Agreement*, Bahrain, Kuwait, Qatar, Saudi Arabia and UAE, 16 November 2014 (entered into force 16 November 2014). [*Riyadh Agreements*]. The Riyadh Agreements were reproduced in the *Appeal relating to the jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)*, "Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia, and the United Arab Emirates" (27 December 2018) Vol II Annexes 19 through 21 [Quartet Memorial].

[3] See *Appeal relating to the jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)*, "Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia, and the United Arab Emirates" (27 December 2018) Vol I at para 2.8 [Quartet Memorial Vol 1-VII].

[4] *Ibid* at para 2.18.

[5] *Ibid* at paras 2.25, 2.65.

[6] *Ibid* at paras 2.56-2.62.

[7] *Ibid* at paras 2.63-2.67.

[8] *Convention on International Civil Aviation, 7 December 1944, 15 UNTS 295, ICAO Doc 7300/6 (entered into force 4 April 1947) as amended by* 2320 UNTS 79 (entered into force April 2005) [Chicago Convention].

[9] See *Appeal relating to the jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)*, "Counter-Memorial of the State of Qatar, (25 February 2019) Vol 1 [Qatar Counter-Memorial], at para 2.22.

[10] *Ibid* at para 2.13.

international civil aviation".[11] Following a series of negotiations and intervention by ICAO that saw the creation of contingency air routes into and out of Qatar,[12] Qatar formally invoked the ICAO Council's dispute settlement function on 30 October 2017[13] by filing two applications with the ICAO Secretary General pursuant to Article 84 of the Chicago Convention and Article II, Section 2 of the International Air Services Transit Agreement[14] [Transit Agreement] respectively. Article 84 of the Chicago Convention[15] provides as follows:

Settlement of Disputes

> If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.

However, on 19 March 2018, the Quartet raised two preliminary objections[16] to Qatar's applications:

(1) that the Council lacks jurisdiction; and

(2) that Qatar failed to satisfy the requisite negotiation precondition.

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[11] See *ICAO*, "Vision and Mission" online: *ICAO* <www.icao.int/about-icao/Council/Pages/vision-and-mission.aspx>.
[12] Qatar Counter-Memorial, *supra* note 9 at paras 2.16-2.19.
[13] Qatar initially filed its original application on 15 June 2017. However, there were certain deficiencies and Qatar was requested to rectify them.
[14] *International Air Services Transit Agreement*, 7 December 1944, 84 UNTS 387, (entered into force 30 January 1945). [*Transit Agreement*].
[15] Articles II (2) of the Transit Agreement provides that '[i]f any disagreement between two or more contracting States relating to the interpretation or application of the [Transit] Agreement cannot be settled by negotiation, [Articles 84-88 of the Chicago] Convention shall be applicable in the same manner as provided therein with reference to any disagreement relating to the interpretation or application of the [Chicago] Convention'. As the Transit Agreement circles back to the Chicago Convention on the matter of the ICAO Council's dispute settlement function, this essay will accordingly focus only on the application brought under the latter.
[16] Quartet Memorial, *supra* note 3 at Vol III annex 24, at 614-615.

On 29 June 2018, the Council rejected these objections by way of a secret vote of 23 to 4, with 6 abstentions.[17] The Quartet then appealed the rejection to the International Court of Justice (ICJ) on 4 July 2018.

The ICJ ultimately dismissed the appeals on 14 July 2020. In doing so, the ICJ made several interesting observations in its judgment[18] on the applicability of certain judicial principles to the Council as a result of its judicial nature (or lack thereof) when discharging its dispute settlement function under Article 84 of the Chicago Convention, as well as the contours of the latter's jurisdiction thereunder. Unfortunately, these comments were made in passing and without much exposition.

This article attempts to fill in these gaps by arguing that irrespective of the Council's judicial nature, it is bound by relevant judicial principles because it discharges a judicial function; and that its mandate is actually not strictly confined to matters of international civil aviation, as might be expected. The article then proceeds to offer an alternative perspective on the nature of the Council when performing its dispute settlement function, one which accounts for the Council's peculiar circumstances, addresses academic criticisms of its commonly perceived shortcomings in fulfilling such a function, and contains adequate safeguards to ensure the proper discharge of this duty.

II. THE TWO PRONOUNCEMENTS

One of the grounds the Quartet relied upon in their challenge of the Council's rejection of their preliminary objections was that of "judicial propriety", which the Quartet characterized as follows:

> Notwithstanding the fact that in principle [a court] may have jurisdiction over a dispute, factors may exist which mean that it would be inconsistent with its judicial function and with judicial propriety for it to exercise that jurisdiction to decide a particular issue or even to proceed to render any decision on the merits of an application…[19]

[17] Qatar Counter-Memorial, *supra* note 9, at para 1.4.
[18] *Appeal relating to the jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)*, [2020] ICJ Rep 81 [*Quartet v Qatar*].
[19] Quartet Memorial, *supra* note 2 at Vol 1 para 5.98.

In particular, the Quartet raised, as an example of one such factor, the doctrine of state consent to jurisdiction:

> The fundamental principle of the consensual basis of jurisdiction may entail that it is inconsistent with judicial propriety and the proper exercise by an adjudicative body of its judicial function for it to rule upon an issue, notwithstanding that, in principle, it may possess jurisdiction to do so…[20]

The Quartet argued that if the Council were to entertain Qatar's application, it would necessarily have to deal with the Quartet's invocation of lawful countermeasures as a defence precluding the wrongfulness of its air restrictions. However, in order to do so, the Council would have to first determine whether Qatar breached its obligations under the Riyadh Agreements in the first place – if there was no breach, the defence of countermeasures does not arise; conversely, if there was a breach, the Council would have to go on to determine whether the countermeasures were taken lawfully.[21] This would have nothing to do with the Council's dispute settlement function under Article 84 of the Chicago Convention – i.e. the "interpretation or application" of the Chicago Convention and its Annexes.[22]

Put another way, as the Quartet did not consent to the Council adjudicating a dispute arising under the Riyadh Agreements, the Council accordingly ought to have declined jurisdiction over Qatar's application as a matter of "judicial proprietary".

However, the Court disagreed, holding instead that:

> [t]he Court observes that it is difficult to apply the concept of "judicial propriety" to the ICAO Council. The Council is a permanent organ responsible to the ICAO Assembly, composed of designated representatives of the contracting States elected by the Assembly, rather than of individuals acting independently in their personal capacity as is characteristic of a judicial body. In addition to its executive and administrative functions specified in Articles 54 and 55 of the Chicago Convention, *the Council was given in Article 84 the*

[20] *Ibid* at para 5.107.
[21] See International Law Commission, *Draft Articles on Responsibility of States for internationally wrongful acts*, UN Doc A/56/10 (2001), arts 49-54. [ILC Draft Articles] (setting out the legal regime for lawfully taking countermeasures)
[22] Quartet Memorial, *supra* note 2 at Vol 1 para 5.118.

> *function of settling disagreements between two or more contracting States relating to the interpretation or application of the Convention and its Annexes. This, however, does not transform the ICAO Council into a judicial institution in the proper sense of that term.*
>
> In any event, the integrity of the Council's dispute settlement function would not be affected if the Council examined issues outside matters of civil aviation for the exclusive purpose of deciding a dispute which falls within its jurisdiction under Article 84 of the Chicago Convention. Therefore, *a possible need for the ICAO Council to consider issues falling outside the scope of the Chicago Convention solely in order to settle a disagreement relating to the interpretation or application of the Chicago Convention would not render the application submitting that disagreement to it inadmissible.*[23]

The Court's reasoning appears to be as follows: the Council is not a "judicial institution in the proper sense of that term" because it is "composed of designated representatives of the contracting States elected by the Assembly" and not 'individuals acting independently in their personal capacity.'[24] Therefore, it is difficult to apply "judicial propriety" to such a "non-proper" judicial institution (hereinafter the First Pronouncement). The ICJ then proceeded to dismiss (almost cursorily) the entire argument as a red herring, because the Council is entitled to 'consider issues falling outside the scope of the Chicago Convention' when it performs its dispute settlement function anyway (hereinafter the Second Pronouncement).

These pronouncements raise more questions than they answer, chief of which is 'why?'. The ICJ's judgment unfortunately did not expound on these questions, attracting the criticism of Judge Gevorgian, who observed in his Declaration that:

> … the propriety of the ICAO Council addressing matters unrelated to civil aviation as part of its dispute settlement function is not nearly as unequivocal as the present Judgment suggests. Given the importance of the principles at stake – most notably the principle of consent in inter-State dispute settlement – the Council's competence should be clearly defined and limited to those matters with which the States parties have affirmatively entrusted it. The Court in the present Judgment goes too far in appearing to endorse an

[23] *Quartet v Qatar*, *supra* note 18, at paras 60-61 [emphasis added].
[24] *Ibid*

> expanded definition of the Council's competence, according to which the Council may (and perhaps must) consider issues unrelated to civil aviation in resolving disputes under Article 84 of the Chicago Convention …[25]

The following part of this article seeks to rationalize the First and Second Pronouncements and argues that instead of endorsing an "expanded definition" of the Council's competence, the ICJ merely affirmed, albeit implicitly, that the Council's competence is simply broader than might initially appear.

A. FIRST PRONOUNCEMENT

On the First Pronouncement, Judge Gevorgian's views are similar to the Court's:

> Nothing like a doctrine of "judicial propriety" can properly be applied to the ICAO Council, as the Council is a body of a primarily technical and administrative nature, whose Members act as representatives of their Governments and need not be well-versed in international law, and whose dispute settlement mandate is narrowly limited to the interpretation and application of the ICAO treaties…[26]

The common position seems to be that only a body composed of professional judges is bound to act in a 'judicially proper' manner. However, if taken to its logical extreme, it would mean that the Council is free to act in a judicially *im*proper fashion under Article 84 of the Chicago Convention, even to the point of ignoring the rules of natural justice!

In the *North Cameroons* case,[27] the ICJ described the principle of "judicial propriety" as follows:

> even if, when seised of an Application, the Court finds that it has jurisdiction, it is not obliged to exercise it in all cases. If the Court is satisfied, whatever the nature of the relief claimed, that to adjudicate on the merits of an Application would be inconsistent with its judicial function, it should refuse to do so.[28]

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[25] *Ibid* at 159-160.
[26] *Ibid* at 162.
[27] See *Case Concerning the Northern Cameroons (Cameroons v. United Kingdom)*, Preliminary Objection, [1963] ICJ Rep 15 [*North Cameroons*].
[28] *Ibid* at 37.

This, the ICJ concludes, is its "duty to safeguard the judicial *function*"[29]. Although the Court does not define what this function is, it does offer as "essentials of the judicial function" the requirement that any "judgment must have some practical consequence in the sense that it can affect existing rights or obligations of the parties, thus removing uncertainty from their legal relations".[30]

The ICJ in the *North Cameroons* case clearly conceives the principle of "judicial propriety" as arising from what it does (i.e. judicial function) and not what it is (i.e. judicial quality). This is inconsistent with the First Pronouncement, especially since decisions of the Council acting under Article 84 of the Chicago Convention certainly satisfy the 'essentials of the judicial function'. In fact, Judge Nagendra Singh was of this precise view in *India v. Pakistan*:

> … *the settlement of disputes, is admittedly a judicial function*. In the discharge of this specific function the ICAO Council has to act as a judicial tribunal and must, therefore, *necessarily discharge its obligations in a judicial manner*… even though the Council is an administrative organ, because it is required under Article 84 to perform a judicial function, it is indeed indispensable for any quasi-judicial or even administrative body when required to undertake a judicial task, as in this case, not only to know to respect judicial procedures prescribed for it but also to *strive to conform to proper judicial standards*.[31]

Perhaps the better way to rationalize the First Pronouncement is the honest recognition that the ICJ was reluctant to extend the concept of "judicial propriety", which had been hitherto developed on a case-by-case basis,[32] to the present circumstances where the invocation of a wider political dispute could render an otherwise admissible claim inadmissible. After all, "the Court has never shied away from a case brought before it merely because it had political implications…"[33] These were simply inappropriate circumstances for the Council or the ICJ to stay its hand on account of "judicial propriety"; rather, it was a situation where the Quartet was attempting to challenge the competence of the Council by casting

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[29] *Ibid* at 38.
[30] *Ibid* at 34.
[31] *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)*, [1972] ICJ Rep 46 at 165. [*India v Pakistan*]
[32] See Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol 1 (Oxford: Oxford University Press, 2013) at 718-830.
[33] See *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, [1984] ICJ Rep 392, at para 96.

their defence on the merits in a particular form. This had already been held by the ICJ in *India v Pakistan* as "inadmissible",[34] and subsequently reaffirmed in *Qatar v Quartet*.[35] Unfortunately, by simply dismissing the applicability of "judicial propriety" to the Council before concluding that at the end of the day, it did not matter anyway,[36] the ICJ complicated matters unnecessarily.

B. SECOND PRONOUNCEMENT

1. ICAO'S MANDATE

In laying down the Second Pronouncement, the ICJ similarly did not explain why the integrity of the Council's dispute settlement function would not be affected if it considers issues outside of international civil aviation. Neither did the Court prescribe any limit to the scope of such issues, which Judge Gevorgian criticized as "widen[ing] the competence of the ICAO Council … without substantial legal basis, risk[ing] in the future unduly subjecting States to the Council's dispute settlement procedures without their consent".[37]

In his view, the Second Pronouncement offends the principle of State consent "[a]s Article 84 of the Chicago Convention … only provide[s] the Council with jurisdiction to adjudicate disputes relating to th[at] instrument, [and] States have not, in principle, consented to having matters unrelated to civil aviation adjudicated by the Council."[38] This conclusion merits closer examination. An increasingly globalized world does not lend itself to discrete categorization. International civil aviation, as a significant driver of such globalization, does not operate in a vacuum. The Chicago Convention's drafters recognized this almost eighty years ago and included provisions that go beyond international civil aviation's strict confines. These provisions address military necessity and public safety;[39] disease prevention;[40] customs duty;[41] intellectual property;[42] security arrangements with other international organizations;[43] land acquisition;[44] and war and national emergencies.[45]

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[34] *India v Pakistan supra* note 31 at para 27.
[35] See *Quartet v Qatar*, *supra* note 18 at paras 49-50.
[36] *Ibid* at paras 60-61.
[37] *Ibid* at 163.
[38] *Ibid* at 162.
[39] Chicago Convention, *supra* note 8 at art 9.
[40] *Ibid,* art 14.
[41] *Ibid,* art 24.
[42] *Ibid*, art 27.
[43] *Ibid*, art 64.
[44] *Ibid*, art 72.
[45] *Ibid*, art 89.

An interesting illustration of the actual breadth of the Chicago Convention is Article 9(a), which provides as follows:

> Each contracting State may, for *reasons of military necessity or public safety*, restrict or prohibit uniformly the aircraft of other States from flying over certain areas of its territory … Such prohibited areas shall be of *reasonable extent and location* so as not to interfere unnecessarily with air navigation …[46]

First, "military necessity or public safety" are more issues of national security than civil aviation; secondly, and in the words of Judge Dillard in *India v. Pakistan*:

> It is difficult to discern how the legal issues arising from the application of this Article, involving as they do, considerations of "reasons of military necessity and public safety", are not … so highly charged with political and military factors as to make them beyond the reach of the Council.[47]

Nevertheless, a dispute did in fact arise between the United Kingdom (UK) and Spain in 1967 precisely over the interpretation and application of Article 9(a), involving the Spanish prohibited zone around the airport of Gibraltar (which was at that time a British Crown Colony and is currently a British Overseas Territory). The dispute went through all four rounds of pleadings before it was suspended *sine die* after two years, with neither party filing any preliminary objections against the Council's jurisdiction to hear the dispute.[48]

The actual pleadings are not publicly available, but one can surmise the respective parties' positions from their statements in other fora. Among the accusations traded by the parties were that the prohibited area was "plainly aimed against the economy of Gibraltar"[49] and that the UK was "determined not to sacrifice its military requirements – which, in the final analysis, are what it is defending in Gibraltar and what keeps it there".[50]

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[46] *Ibid*, art 9(a) [emphasis added].
[47] *India v Pakistan*, *supra* note 31 at 106.
[48] See ICAO, *Annual Report of the Council to the Assembly for 1969,* Doc 8869 (1969), at 133.
[49] *Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, UN Doc A/6700/Add. 9 (1967), at annexure I para 16.
[50] *Ibid* at annexure I para 19.

Having fully pleaded their respective cases, it is safe to assume that the above contentions would have been placed before the Council. Had the dispute not been suspended, the Council would then have had to determine whether the prohibited area was indeed established "for reasons of military necessity or public safety" and whether the "extent and location" thereof was reasonable when measured against these reasons.

A similar illustration may be found in Article 89 of the Chicago Convention, which provides:

> In case of *war*, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of *national emergency* and notifies the fact to the Council.[51]

War and national emergencies similarly concern issues of public security, even more so than prohibited areas, and are essentially unrelated to civil aviation. Notwithstanding this, Judge de Castro in *India v. Pakistan* was of the view that, in the event of a dispute, the Council:

> … would certainly need to interpret Article 89 of the Convention in order to ascertain whether a certain State had acted lawfully, in accordance with the Convention, if … it took the view that it had freedom of action to do away with the privileges granted by the Convention, and perhaps even to declare the effects of the Convention suspended vis-à-vis another State.[52]

In these situations involving Articles 9(a) and 89 of the Chicago Convention, the primary considerations are "political and military factors";[53] the link to civil aviation is, at best, tangential, arising only because of the effects caused to it by such factors. Although the core of such disputes is "unrelated to civil aviation",[54] the Council nevertheless has jurisdiction to consider such matters, as long as they form part of a disagreement over the interpretation and application of the relevant provisions of the Chicago Convention.

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[51] See Chicago Convention, *supra* note 8 at art 89 [emphasis added].
[52] *India v Pakistan*, *supra* note 31 at 127.
[53] *Ibid* at 106.
[54] *Quartet v Qatar*, *supra* note 18 at 162.

A more contemporaneous example of how external events take ICAO beyond traditional international civil aviation boundaries is the COVID-19 pandemic. The Council established the Council Aviation Recovery Task Force (CART) on 9 March 2020, with a mandate "to provide global guidance for a safe, secure and sustainable restart and recovery of the aviation sector".[55] As one of its deliverables, CART published its "Take-off" Guidance,[56] as a "framework for addressing the impact of the current COVID-19 pandemic on the global aviation transportation system".[57] The latest edition of the Guidance was updated to provide "latest operational and public health guidance related to air travel reflecting *technological and medical advancements*".[58]

Another of CART's deliverable is a Manual on Testing and Cross-border Risk Management Measures,[59] whose foreword describes it as:

> prepared by aviation health experts led by [ICAO] with support from [various governmental and non-governmental organizations], and it has been reviewed by the World Health Organization (WHO)… Together these experts and stakeholders form the ICAO Collaborative Arrangement for the Prevention and Management of Public Health Events in Civil Aviation (CAPSCA)… [60]

CAPSCA, in turn, was established some fourteen years earlier in 2006. It is a "voluntary cross-sectorial, multi-organizational collaboration programme managed by [ICAO] with support from [WHO]",[61] with a mandate that spans a whole gamut of non-civil aviation matters: communicable diseases; chemical events; bioterrorism; volcanic ash; water and food safety; hygiene and waste management; drones in humanitarian operations; and disaster management.[62]

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[55] See ICAO, "CART Report – Executive Summary", online: *ICAO* <www.icao.int/covid/cart/Pages/CART-Report---Executive-Summary.aspx >.
[56] ICAO CART, *Take-off: Guidance for Air Travel through the COVID-19 Public Health Crisis* (3rd ed, 2021).
[57] *Ibid* at para 2.1.
[58] ICAO, "Introduction – General Context" online: *ICAO* <www.icao.int/covid/cart/Pages/Introduction---General-Context.aspx> [emphasis added].
[59] ICAO, *Manual on Testing and Cross-border Risk Management Measures,* Doc 10152 (2021).
[60] *Ibid* at i.
[61] ICAO, "Collaborative Arrangement for the Prevention and Management of Public Health Events in Civil Aviation – CAPSCA", online: ICAO <www.icao.int/safety/CAPSCA/Pages/About-CAPSCA.aspx>.
[62] *Ibid.*

Bringing the point home, the Chicago Convention already, and explicitly, includes matters outside the strict confines of international civil aviation. As ICAO adapts and responds to a changing and complex world, of which international civil aviation is such an integral part of, its mandate must necessarily expand even further. However, everything that ICAO does, no matter how removed from civil aviation, must still be grounded in its constitution – the Chicago Convention; otherwise, ICAO would be acting *ultra vires*. Therein lies the crux of the matter – if a dispute were to arise over these non-civil aviation aspects of ICAO's work, the Council is competent to entertain them because they must relate to the "interpretation and application" of the Chicago Convention and its Annexes in some form or other. Bearing in mind that no reservations were formulated *vis-à-vis* Article 84 of the Chicago Convention,[63] the contention that contracting States *only* consented to the Council adjudicating disputes strictly relating to international civil aviation[64] does not quite fly.

2. SUBSTANTIVE LAW

Even if the Council's mandate extends beyond international civil aviation, it does not necessarily follow that it is competent to consider treaties other than the Chicago Convention or apply substantive law other than international aviation law. However, consider Article 14 of the Chicago Convention:

> Each contracting State agrees to take effective measures to prevent the spread by means of air navigation of [various] communicable diseases … and to that end contracting States will keep in close consultation with the agencies concerned with international regulations relating to sanitary measures, applicable to aircraft. Such consultation shall be without prejudice to the application of *any existing international convention on this subject to which the contracting States may be parties*.[65]

In a disagreement involving Article 14, the Council may well have to examine an 'existing international convention' relating to communicable diseases and sanitary measures, in order to determine whether prejudice has been caused.

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[63] To date, Panama is the only contracting State that has formulated a reservation to the Chicago Convention. However, this reservation relates to a single term in Article 2 and has nothing to do with the Council's broader dispute settlement function. See ICAO, "Current lists of parties to multilateral air law treaties", online: *ICAO* <www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx>.
[64] See *Quartet v Qatar, supra* note 18 at 159-160.
[65] See Chicago Convention, *supra* note 8 at art 14 [emphasis added].

In fact, other treaties explicitly grant the Council jurisdiction to exercise its dispute settlement function under Article 84 of the Chicago Convention in respect of disagreements arising from the former, the most notable of which are the two other sister Chicago treaties: the Transit Agreement[66] and the International Air Services Transport Agreement.[67] In addition to these, various older bilateral air services agreements[68] (ASAs) also recognize the Council's competence to adjudicate disputes arising under those ASAs.

However, it is not at all clear that the Chicago Convention, pursuant to which the Council was created and from which it derives its powers, permits the Council to do so; unlike the ICJ, the Council does not have a general jurisdiction to hear "all cases which the parties refer to it and all matters *specially provided for … in treaties and conventions in force*".[69] The only way to rationalize this apparent conflict is to conclude that these other treaties must relate to "the interpretation and application of the [Chicago] Convention and its Annexes",[70] thereby providing the Council the "jurisdictional hook" to exercise its dispute settlement function: in the case of the sister Chicago treaties, the exercise of the privileges thereunder "shall be in accordance with the provisions of the [Chicago Convention]",[71] and in the case of the bilateral ASAs, Article 6 of the Chicago Convention on scheduled air services.[72]

A key argument in *India v Pakistan* was that the Council had no jurisdiction because the Chicago Convention had been displaced by a bilateral Special Agreement.[73] The ICJ disagreed, holding that "certain provisions of the Chicago Convention must be involved whenever two or more parties to it purport to replace the Convention, or some part of it, by other arrangements made between themselves".[74] These provisions are Articles 82 and 83, which address the consistency of future obligations, understandings, or arrangements with the Chicago Convention.[75]

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[66] See *Transit Agreement*, *supra* note14 at art II s 2.
[67] *International Air Transport Agreement*, 7 December 1944, 171 UNTS 387 [Transport Agreement], art IV s 3.
[68] See Luping Zhang, "How Are Disputes Resolved Under Bilateral Air Services Agreements? A Typology" (2021) 12 Journal of International Dispute Settlement 151.
[69] *Statute of the International Court of Justice*, 26 June 1945, 3 Bevans 1179, 59 Stat. 1055, TS No 993 (entered into force 24 October 1945), art 36(1) [emphasis added].
[70] Chicago Convention, *supra* note 8 at art 84.
[71] See *Transit Agreement*, *supra* note 14 and *Transport Agreement*, *supra* note 67 at art I s 2.
[72] See Chicago Convention, *supra* note 8 at art 6. Article 6 states: "No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization."
[73] See *India v Pakistan*, *supra* note 31 at para 29.
[74] *Ibid* at para 39.
[75] Chicago Convention, *supra* note 8 at arts 82, 83.

The ICJ then concluded that "any special regime instituted between the [p]arties, and more especially any disagreement … concerning its existence and effect, would immediately raise issues calling for the interpretation and application by the Council of [these] provisions".[76]

In *Quartet v Qatar*, the situation was analogous insofar as the Quartet appeared to take the position that the Riyadh Agreements create a "special regime" between the parties, the alleged breach thereof by Qatar entitled the Quartet to in turn breach their own obligations under the Chicago Convention *vis-à-vis* Qatar as lawful countermeasures, which would preclude the wrongfulness of the latter breach.[77] On this, Judge Jiménez de Aréchaga's views in *India v Pakistan* are apposite:

> [t]he need for such an interpretation of the [Chicago Convention] is even more necessary when … the allegedly defaulting State denies … *its responsibility for* … the breach. In such an event, differences arise between the parties which must be regarded as disagreements relating to the interpretation or application of the treaties, since they cannot be solved without reference to the instruments themselves.[78]

Put simply, a nexus with the Chicago Convention is created automatically whenever a special regime created by a separate treaty affects the rights and obligations under the former. This necessarily requires the Council to examine that separate treaty to determine its consistency with the Chicago Convention.[79] This is not to say that the parties consented to the Council exercising jurisdiction over this separate treaty; rather that by virtue of Articles 82 and 83 of the Chicago Convention, the parties agreed not to enter into inconsistent future obligations, understandings or arrangements when they became party to the Chicago Convention,[80] and it is the provisions of the latter that the Council is interpreting and applying.

Similarly, the Council is not restricted to only applying international civil aviation law. As Judge Dillard observed in *India v Pakistan*, "[i]t is, of course, axiomatic that questions of international law inhere in the interpretation or application of treaties",[81] the cornerstone thereof must

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[76] *India v Pakistan*, *supra* note 31 at para 39.
[77] Quartet Memorial Vol 1, *supra* note 2 at paras 2.63-2.67.
[78] *India v Pakistan*, *supra* note 31 at 148 [emphasis added].
[79] *Ibid* para 29.
[80] See Chicago Convention, *supra* note 8 at arts 82, 83.
[81] *India v Pakistan*, *supra* note 31 at 106.

surely be the Vienna Convention on the Law of Treaties,[82] an instrument of general international law. This situation arose precisely in *India v Pakistan*, where India argued that it was entitled to suspend or terminate the Chicago Convention under general international law following a material breach of the former by Pakistan. the ICJ held that such an allegation would, in the first place, require the Council to apply Article 60 of the Vienna Convention on the Law of Treaties (VCLT)[83] (on material breaches that allow the non-breaching party to terminate or suspend the treaty in question) to determine if the breach complained of was, in fact, a material breach.[84]

Judge Jiménez de Aréchaga, appears to go even further when he observed that "[India's] arguments,[85] while insufficient for the purposes of excluding [the Council's] jurisdiction, would still remain available … as *defences on the merits, on the question of the substantive law to be applied*",[86] suggesting that the Council might even have been able to apply the Special Agreement as the substantive law of the dispute.

More fundamentally, and in the words of Judge de Castro:

> … each organization has a constitution which provides it with a general rule to which all its members are subject. Their rights and obligations towards each other flow from this constitution … *[t]he State which is in breach of those of its obligations or duties which derive from this constitution, towards another member State of the organization, is not in breach of a single bilateral treaty between them, it is in breach of the constitution of the organization. The effects of such a breach are governed by that constitution.*[87]

As a multilateral treaty, the obligations in the Chicago Convention are owed by and to all contracting States. It cannot be that a separate regime between two or more contracting States directly affecting such obligations is sufficient to oust the jurisdiction of the Council,[88] especially

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[82] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [VCLT].
[83] *Ibid*.
[84] *India v Pakistan*, *supra* note 31 at para 38.
[85] Including India's argument that the bilateral Special Agreement had displaced the Chicago Convention.
[86] *India v Pakistan*, *supra* note 31 at 156 [emphasis added].
[87] *Ibid* at 130 [emphasis added].
[88] Having the jurisdiction and exercising it are two entirely different matters – on the latter, the Council may only do so "on the application of any State concerned in the disagreement". See Chicago Convention, *supra* note 8 at art 84. It is possible for contracting states to agree

if this regime is inconsistent with the Chicago Convention, as this would engage, at the very least, the interpretation and application of Articles 82 and 83 of the Chicago Convention. Otherwise, the entire multilateral system could be easily undone by a patchwork of separate regimes and the Council would be powerless to prevent this unravelling. According to the ICJ in *India v Pakistan*, "a mere unilateral affirmation of these contentions [of a separate regime] – contested by the other party – cannot be utilized as to negative the Council's jurisdiction. The point is not that these contentions are necessarily wrong but that their validity has not yet been determined."[89]

In *Quartet v Qatar*, the Quartet's unilateral assertion of a defence of countermeasures *per se* similarly cannot take the dispute outside the Council's jurisdiction or render it inadmissible. It is again not the case that the parties consented to the Council adjudicating a dispute arising under the Riyadh Agreements, but rather considering a defence to a breach of the Chicago Convention. As Judge De Castro put it:

> The form of words by which jurisdiction is conferred on a body to settle disputes the subject of which is the interpretation, or the interpretation and the application, of a treaty, confers on that body jurisdiction to interpret "all or any provisions [of the Treaty], whether they relate to substantive obligations" or not … which *logically includes the legal consequences of the violation of such obligations* (pacta sunt servanda).[90]

In order to determine the "legal consequences" of such violations, defences must necessarily be considered, especially since countermeasures completely preclude the wrongfulness of any breach.[91] Ultimately, if the "real issue" between the parties, as contended by the Quartet,[92] is the alleged Qatari breaches of the Riyadh Agreements, the only reason why the Council was seized of jurisdiction in the first place was because the Quartet opted to suspend an obligation under the Chicago Convention when invoking their right to take countermeasures. On the Quartet's own case, they were not limited only to reciprocal countermeasures, i.e. "suspension of the same or a closely related

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between themselves that a disagreement arising from a separate treaty shall not be referred to the Council. However, the question remains as to what the Council ought to do in the event that one party to such a disagreement refers the matter to it anyway. Perhaps that might just be an appropriate situation for the Council to exercise judicial propriety and decline jurisdiction.

[89] *India v Pakistan*, *supra* note 31 at para 31.

[90] *Ibid* at 125-126 [emphasis added].

[91] See ILC Draft Articles, *supra* note 21 art 22.

[92] Quartet Memorial Vol 1, *supra* note 2 at paras 5.81-5.82.

obligation, or an obligation arising under the same treaty as the obligation breached".[93] Having selected a countermeasure that is as far removed from the "real issue" as is calculated to apply maximum pressure, it then lies ill in the Quartet's mouth to insist that the Council cannot then consider the legality of the suspension of their obligations under the Chicago Convention.

Furthermore, the defence of countermeasures is subject to certain conditions,[94] not least the requirement of proportionality. This takes particular importance in the case where the separate regime does not itself contain a dispute settlement clause, as was the case with the Riyadh Agreements.[95] If the Council, as the last bastion of oversight in international civil aviation, is precluded from examining whether a countermeasure that implicated the international civil aviation order was properly invoked *vis-à-vis* the Chicago Convention, this would amount to a *fait accompli* by the party asserting the defence.

III. NATURE OF THE ICAO COUNCIL

A. COUNCIL AS JURY

Turning now to the question of what is the nature of the Council, if not a "judicial institution in the proper sense of the term"?[96] Even the drafters of the Chicago Convention could not agree – some conceived of the Council as a "political body rather than an impartial body of jurists like the Permanent Court of International Justice", whereas others thought that, "far from being a political body, the Council was in fact a quasi-judicial body whose membership would be well qualified to act as an arbitration court".[97]

Trying to shoehorn the Council into a traditional understanding of a court is unnecessarily restrictive. The Council is at once a political, technical, and administrative body entrusted with a judicial function – it belongs in a classification of its own, one that accounts for its unique chimeric blend of characteristics. Perhaps the best way to conceive of the Council sitting in its dispute settlement capacity is that of a jury: 36 peer States, selected triennially, and forming a representative cross-section of

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[93] *Ibid* at para 2.59.
[94] See ILC Draft Articles, *supra* note 21 arts 49-53.
[95] See Riyadh Agreements, *supra* note 2.
[96] *Quartet v Qatar*, *supra* note 18 at para 60.
[97] Department of State, *Proceedings of the International Civil Aviation Conference*, (United States Government Printing Office, 1948), at vol 1 480-481 [International Civil Aviation Conference Proceedings].

the international civil aviation community[98] – States of "chief importance in air transport", States which make the largest contribution to international civil air navigation, and all major geographical areas of the world.[99] The Council sitting as a jury would thus be "drawing on its unique knowledge and expertise in the field of civil aviation, of giving authoritative rulings as to what the Convention means and requires".[100]

The Council is composed of the representatives of elected contracting States, and not individuals who are elected to the Council in their personal capacities.[101] There is nothing in the Chicago Convention, the Council Rules of Procedure,[102] or the Rules for the Settlement of Differences[103] that require these representatives to don judges' robes (literally and figuratively) when acting under Article 84 of the Chicago Convention, i.e. they "are not … divested of their character as national representatives".[104] In other words, it is the member States of the Council that decide the disagreement before them, and "their representatives speak on [their] behalf, and not as individuals".[105] This answers the oft-levelled criticism that the representatives are not independent, but take instructions from their respective capitals.[106] It also pre-empts the philosophical question of why an individual representative, who is not a professional judge nor elected to the Council in their personal capacity, should sit in judgment over a sovereign State.

Another advantage of conceiving of the Council as a jury is that it avoids the charge that individual representatives are ill-equipped to discharge their dispute settlement functions because their expertise lies in civil aviation, and not in international law.[107] In the first place, a Council representative may not even have any expertise in civil aviation; some are

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[98] Drawing on US domestic jurisprudence on the right to an impartial jury under the Sixth Amendment to the US Constitution. See *Taylor v. Louisiana* (1975), 419 US 522 at 528.
[99] See Chicago Convention, *supra* note 8 at art 50(b).
[100] *Quartet v Qatar*, *supra* note 18 at 168.
[101] Chicago Convention, *supra* note 8 at art 50.
[102] ICAO, *Rules of Procedure for the Council,* Doc 7559/10 (2014) [ICAO Council Rules of Procedure], reproduced in Qatar Counter-Memorial, *supra* note 9 at vol II annexure 15. See Rule 1 of ICAO Council Rules of Procedure, which provides that a Representative represents their State Member of the Council.
[103] ICAO, *Rules for the Settlement of Differences,* Doc 7882/2 (1975), reproduced in Quartet Memorial Vol II, *supra* note 2 annexure 6 [ICAO Rules for the Settlement of Differences].
[104] Gerald F. Fitzgerald, "The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council" (1974) Canadian Yearbook of International Law 153, at 168-169.
[105] *Ibid* at 169.
[106] Jon Bae, "Review of the Dispute Settlement Mechanism Under the International Civil Aviation Organization: Contradiction of Political Body Adjudication" (2013) 4 Journal of International Dispute Settlement 65, at 71.
[107] *Quartet v Qatar*, *supra* note 18 at 168; Bae, *ibid* at 71.

career diplomats with no relevant civil aviation experience.[108] The only requirement prescribed by the Chicago Convention is that the representative not be 'actively associated with the operation of an international air service or financially interested in such a service'.[109] Accordingly, when it comes to the actual technical nuts and bolts, the Council is assisted by the Air Navigation Commission (ANC), which "considers and recommends [SARPs] … for adoption or approval by the ICAO Council" and "manage[s] the technical work programme of ICAO".[110] Consequently, and unlike a Council representative, an ANC member is required to have "suitable qualifications and experience in the science and practice of aeronautics".[111]

An ICAO Council representative is a representative of a sovereign State and has the support of the entire State machinery. In the context of Article 84 of the Chicago Convention, Judge De Castro observed in *India v Pakistan* that:

> [t]he Council is made up for the most part of aviation experts. But when it is in their interest to do so, States take care to send qualified lawyers to the Council, and to give instructions which have been carefully worked out beforehand in their foreign ministries.[112]

The Council Rules of Procedure accordingly provide that "[c]losed meetings of the Council shall be open to the Alternates and Advisers accompanying the Representatives",[113] and closed meetings include Article 84 proceedings.[114]

The term "Advisers" is not defined and therefore not limited – representatives may choose to bring whichever subject-matter expert (including legal counsel) whose advice they deem necessary for the particular proceeding. In fact, the Rules for the Settlement of Differences explicitly provides for the "assistance of counsel or advocates".[115]

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[108] At the time of writing, about 22% of the current representatives on the ICAO Council (8 out of 36) for the triennium 2019-2022 are career diplomats with no former civil aviation experience. See e.g., curriculum vitae of Representatives of Argentina, Brazil, Equatorial Guinea, France, Greece, Italy, Japan, and Peru for the period 2019-2022, online: *ICAO* <www.icao.int/about-icao/Council/CouncilStates/Pages/Council-State-Representatives.aspx>.

[109] See Chicago Convention, *supra* note 8 at art 50(c).

[110] See ICAO, "Air Navigation Commission", online: *ICAO* <www.icao.int/about-icao/AirNavigationCommission/Pages/default.aspx>.

[111] See Chicago Convention, *supra* note 8 at art 56.

[112] See *India v Pakistan*, *supra* note 31 at 126.

[113] ICAO Council Rules of Procedure, *supra* note 102 at Rule 38.

[114] *Ibid* at appendix F, para 1(d).

[115] ICAO Rules for the Settlement of Differences, *supra* note 103 at art 27(2).

In addition to advisers to individual members, the Council collectively also has recourse to expert opinion when discharging its dispute settlement function. The Rules of the Settlement of Differences permit the Council to, "at any time, but after hearing the parties, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion."[116] The scope of this provision is similarly not restricted; even if the Council were to find itself "adrift … over questions of international law",[117] or for that matter, questions of other technical fields or disciplines, there are already mechanisms in place to assist the Council in discharging its duty.

B. SAFEGUARDS

To be sure, the criticism that the Council is not an impartial arbiter, but a political one with thirty-six competing national interests is a legitimate one.[118] As Judge Gevorgian describes it in *Quartet v Qatar*:

> it is one thing to say that the existence [of] a broader political dispute should not affect the competence of a body that is composed of 'independent judges', and quite another to apply the same principle to a body made up of States parties to the treaty in question, each of which is likely to have its own political agenda and the potential to be influenced by non-legal considerations.[119]

Admittedly, no system is perfect – as with a domestic jury, individuals have their natural biases, just as States have their national interests. It is for this reason that "the constitution of any international organization (such as ICAO) which requires one of its bodies to act judicially should include such safeguards as would preserve the integrity of the judicial process in that body".[120] Indeed,

> the governments on the Council and their representatives may not behave in complete disregard of legal and political constraints. Any decisions must be buttressed by sound arguments, not only in the Council chamber but also eventually in terms of public justification. Ultimately, any manifestly wrong decision on the part of the Council would

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[116] *Ibid* art 8(1).
[117] *Quartet v Qatar*, *supra* note 18 at 168.
[118] Fitzgerald, *supra* note 104 at 168-169; Bae, *supra* note 106 at 71 and 79.
[119] *Quartet v Qatar*, *supra* note 18 at 160-161.
[120] Fitzgerald, *supra* note 104 at 171.

> clearly invite an appeal to the ICJ or an ad hoc arbitral tribunal, which would likely overrule the Council's decision, thus de-legitimizing it.[121]

The most important safeguard in the Chicago Convention is therefore the recourse to an appeal against the Council's decision to an ad hoc tribunal or the Court. Judge De Castro emphasized in *India v Pakistan* that:

> [f]or [international] organizations, it is necessary that there should be a supervisory body, to exercise supervision over complicated legal decisions, and over the interpretation and application of their constitutional and internal rules…

The administrative and technical nature of the ICAO Council makes it a practical necessity that there should be the *widest possibility of appeal* to a judicial body such as the Court, with regard to the legal interpretation of the Convention and of the Agreement.[122] Although Judge De Castros' comments were made in the context of *what* may be appealed (i.e. decisions on jurisdiction), maximum supervision applies equally to *who* may appeal. On this, Article 84 of the Chicago Convention provides for an appeal mechanism as unusual as it is broad – "*[a]ny contracting State* may, subject to Article 85, appeal from the decision of the Council …"[123], a point which did not escape the attention of some of the Judges in *India v Pakistan*[124] and *Quartet v Qatar*.[125] Judge Onyeama observed that:

> contracting States though not concerned in a disagreement would be directly affected by a decision of the Council on the merits of such a disagreement, which decision could well set the pattern for a wider application of a particular, and perhaps unfavourable, interpretation of a provision of the Convention, and that one or more of such States would, therefore, wish to appeal against such a decision.[126]

However, so extraordinary is that contention that Judge de Castro could not accept it and was of the view that "any contracting State" must mean "any contracting State involved in this dispute", because appeals are

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[121] Bae, *supra* note 106 at 71 [citations omitted].
[122] *India v Pakistan*, *supra* note 31 at 123 [emphasis added].
[123] Chicago Convention, *supra* note 8 at art 84 [emphasis added].
[124] *India v Pakistan*, *supra* note **Error! Bookmark not defined.** at 77-78 (per Judge Petren) and 89 (per Judge Onyeama).
[125] *Quartet v Qatar*, *supra* note 18 at 167.
[126] *India v Pakistan*, *supra* note 31 at 89.

only 'open to parties to a dispute'".[127] A brief examination of the negotiating history of the Chicago Convention will show that the scope of appeal was indeed intended to be as the ordinary meaning of the terms in Article 84 says it is.[128]

1. UNIVERSAL APPEAL

Prior to the negotiating Conference of 1944 in Chicago, bilateral consultations had occured and two proposals in the form of draft conventions by Canada and the US were presented.[129] The drafts differed greatly in the proposed dispute settlement clause:

Canadian Draft Article XLIII

> In case of any disagreement between two or more member states relating to the interpretation or application of the present Convention, the matter shall be referred to the Permanent Court of International Justice, provided that, if any one of the states concerned has not assented to the Statute of the Court the matter shall, on the demand of such state, be settled by arbitration. [130]

US Draft Article 26

> In the case of a disagreement between two or more States relating to the interpretation of this Convention or any of its Annexes the question in dispute shall be determined by a majority of the total possible votes of the members of the Executive Council provided for in Article 24. In the event that any state a party to this Convention should be dissatisfied with the decision of the Executive Council, the question in dispute may be appealed by such state *whether or not a party to the original dispute* to the Chamber for Summary Procedure of the Permanent Court of International Justice or arbitration may be demanded in the manner hereinafter provided in this Article, provided that such appeal is taken or arbitration

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[127] *Ibid* at 120.
[128] A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty, but recourse may be had to the preparatory work of the treaty in order to confirm the meaning resulting from such an interpretation. See VCLT, *supra* note 82 at arts 31-32.
[129] International Civil Aviation Conference Proceedings, *supra* note 97 at 5.
[130] *Ibid* at 587.

> demanded within sixty days from the date on which the decision of the Council is rendered. If an appeal is taken or arbitration demanded, the decision of the Council shall remain in effect until reversed on appeal or by arbitration. [131]

The US Draft Article 26 is much closer to Article 84 of the Chicago Convention in its present form and leaves absolutely no room for doubt that "any state a party to [the] Convention … whether or not a party to the original dispute" may appeal against a Council decision taken pursuant to its dispute settlement function.

At the Conference, there was no consensus on either of the two drafts. The delegations of Canada, the UK, and the US held extensive discussions, the fruit of which was a tripartite proposal.[132] The dispute settlement clause of this proposal, now Draft Article XV, read as follows:

> [i]f any disagreement between two or more contracting states relating to the interpretation or application of this Convention and its annexes cannot be settled by negotiation, it shall be decided by the Council. No member of the Council shall vote in the consideration of any dispute to which it is a party. Any contracting state may, subject to section 2 of this Article, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.[133]

Apart from the addition of the sixty-day time period for notification of an appeal, Draft Article XV "remained unchanged in the three revisions of the tripartite proposal".[134] Subsequently, Canada proposed the inclusion of "… it shall**,** *on the application of any State concerned in the disagreement***,** be decided by the Council" in the first sentence of Draft Article XV[135] [Canadian Proposal]. The Tripartite Draft Article XV, together with the Canadian Proposal and consequential amendments, became the present-day Article 84 of the Chicago Convention.

Unfortunately, minutes of the tripartite discussion were not published. However, Tripartite Draft Article XV was, obviously by its

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[131] *Ibid* at 564 [emphasis added].
[132] *Ibid* at 5.
[133] *Ibid* at 387.
[134] *Ibid* at 1394.
[135] *Ibid* at 490 [emphasis added].

terms, inspired by US Draft Article 26, even though the latter was more explicit *vis-à-vis* a universal appeal. Considering that the Canadian Proposal was adopted to specifically require the bringing of a dispute by a disputing party, but a similar limitation was not applied to the appeal clause even after multiple revisions, the inescapable conclusion[136] must be that Article 84 of the Chicago Convention was intended to permit appeals by any contracting State, including non-parties to the dispute.

Although remarkable, the idea of a universal appeal is entirely consistent with conceiving of the Council as a jury of peer States. Council decisions taken under Article 84 of the Chicago Convention would be "authoritative determinations of general application having equal force for *all* the contracting States to the Chicago Convention".[137] However, as a mere jury, the Council does not have the final word on the legal interpretation of the Chicago Convention – that word belongs to the Court. If the disputing parties are content not to appeal the Council's decision, any third-party non-disputing State may take up the mantle and test the soundness of that decision for the benefit of all other contracting States.

In reality, an appeal by a third-party non-disputing State is unlikely to happen. The Rules for the Settlement of Differences already allows a third-party State which is "directly affected by the dispute"[138] to intervene in the proceedings. It would indeed be very rare where the disputing parties do not wish to appeal, but a third-party State, which did not intervene in the first place, does. One possible scenario would be where the third party State is not "directly affected by the dispute", but nevertheless disagrees with the Council's decision (perhaps as a matter of principle or because its interest might only be indirectly affected or will only be affected in future).

A universal appeal mechanism also raises practical questions that do not have any obvious answers for the moment. For one, if the original disputing parties decline to participate in an appeal, can the ICJ hear the matter *ex parte*? If not, who is to defend the Council's decision before the ICJ? More importantly, the Chicago Convention provides that the decision of the ICJ on appeal shall be "final and binding",[139] but does not say upon

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[136] It might be argued that, because the drafters chose not to explicitly include the phrase "whether or not a party to the original dispute" in the Tripartite Draft Article XV, they did not intend for such a wide scope of appeal. However, if that were so, the drafters had ample opportunity to make that intention clear, especially given that the Canadian Proposal was accepted. The more likely reason for the omission of this phrase therefore was that the drafters believed it was superfluous, as "any contracting State" is sufficiently broad to encompass a State "not a party to the original dispute".
[137] *Quartet v Qatar*, *supra* note 18 at 168 [emphasis in original].
[138] ICAO Rules for the Settlement of Differences, *supra* note 103 at art 19(1).
[139] Chicago Convention, *supra* note 8 at art 86.

whom.[140] The Statute of the Court in turn provides that a Court decision "has no binding force except between the parties and in respect of that particular case".[141] In an *ex parte* appeal, does the decision of the ICJ, therefore, bind the original disputing parties, especially if the Council's decision is overturned?

These issues are likely to remain within the realm of academic speculation. Even if they were to come to pass, they do not detract from the architectural design of a universal appeal mechanism as a safeguard to a jury of peer States, but are merely practical and operational difficulties in the implementation of that design, adding to the list of reforms called for by commentators.[142]

2. DUTY TO GIVE REASONS

Another important and related safeguard is the requirement for the Council to include "its reasons for reaching [its conclusions]"[143] when arriving at a decision on a dispute. Even if the decision was influenced by political or national considerations, this duty forces the Council to at least dress it up with some ostensibly legally-defensible reasoning, which denies the Council *carte blanche* to decide as it sees fit[144] or to act in a "judicially improper" manner.

Unfortunately, in *Quartet v Qatar,* the Council failed to provide any reasons for its decision, prompting the ICJ to diplomatically emphasize that it would be "best positioned to act on any future appeal if the decision of the Council contains the reasons of law and fact that led to the Council's conclusions".[145] An examination of the historical record will show that this failure was undoubtedly a natural consequence of voting via secret ballot[146] – after all, the Council can only record the reasons for its decision if its members articulate them, or at the very least engage in some form of discussion through which some reasoning might be distilled. However, to do so would defeat the very purpose of having a secret ballot in the first place, i.e. to keep secret how the State voted.

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[140] See ICAO Rules for the Settlement of Differences, *supra* note 103 at art 19(1), which provides that a third-party State intervening in a dispute "shall undertake that the decision of the Council will be equally binding upon it." This implies that the Council's decision also binds the disputing parties.
[141] Statute of the International Court of Justice, *supra* note 69 at art 59.
[142] See Fitzgerald, *supra* note 104 at 185; Bae, *supra* note 106 at 81.
[143] See ICAO Rules for the Settlement of Differences, *supra* note 103 at art 15(2)(*v*).
[144] See also Bae, *supra* note 106 at 71.
[145] See *Quartet v Qatar*, *supra* note 18 at para 125.
[146] See ICAO Council Rules of Procedure, *supra* note 102 at Rule 50.

Voting by secret ballot in an Article 84 proceeding seems to be a recent phenomenon. Of the four instances of preliminary objections before the Council, one occurred in 2016 (between Brazil and US) and the other in 2018 (between the Quartet and Qatar); it is only in these latter two cases that the Council voted through secret ballot.[147] In the 1971 dispute between India and Pakistan, not only was voting conducted by open ballot, the Council members also freely expressed their respective positions in the presence of the disputing parties.[148] In the 2000 dispute between the US and 15 European States,[149] voting was also conducted by open ballot, with the Council explicitly recording the members who had abstained from the otherwise unanimous decision, as well as its reasons in the preambular paragraphs.[150] On the other hand, the published decisions in respect of the later Brazil/US[151] and Quartet/Qatar[152] cases merely recorded the numerical results of the respective votes without any attribution or discernible reasons therefor.

It might well be that the *zeitgeist* has shifted such that Council members now perceive that expressing their positions openly is fraught with political risk. Nevertheless, not only does it remain a self-imposed requirement[153] of the Council to provide reasons for its decisions, the ICJ has explicitly reminded the Council that its decisions must contain "reasons of law and fact" in order for the Court to exercise "a certain measure of supervision".[154] It might even be said that the duty to give reasons is a constituent principle of natural justice,[155] which, as argued above, the Council must apply when discharging its judicial function.

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[147] Jiefang Huang, "Informal briefing of the Council on the Settlement of Differences" (19 June 2018), reproduced in Quartet Memorial, *supra* note 2 at Vol V annexure 51 slide 9.
[148] ICAO Council, *Minutes of the Sixth Meeting of the Seventy-Fourth Session,* C-MIN LXXIV/6 (1971), reproduced in Qatar Counter-Memorial, *supra* note 9 at Vol II annexure 8.
[149] These were: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom.
[150] ICAO, *Resolution adopted at the Sixth Meeting of the One Hundred and Sixty-First Session on 16 November 2000 relating to Settlement of Differences: United States and 15 European States (2000) regarding European Council Regulation (EC) No. 925/1999 ("Hushkits"): Preliminary Objections*, ICAO Doc C161/6 (2000), reproduced in Quartet Memorial, *supra* note 2 at Vol V annexure 28.
[151] ICAO, *Decision of the Council on the Preliminary Objection of the United States in the Matter "Brazil v. United States"*, ICAO Doc C-MIN 211/10 (2017), reproduced in Quartet Memorial, *supra* note 2 at vol V annxure 32.
[152] ICAO, *Decision of the ICAO Council on the Preliminary Objection in the Matter: the State of Qatar and the Arab Republic of Egypt, the Kingdom of Bahrain, the Kingdom of Saudi Arabia and the United Arab Emirates (2017) – Application (A)*, reproduced in Quartet Memorial, *supra* note 2 at Vol V annxure 52.
[153] ICAO Rules for the Settlement of Differences, *supra* note 103 at art 15(2)(*v*).
[154] *Quartet v Qatar*, *supra* note 18 at para 125.
[155] See V.S. Chauhan, "Reasoned Decision: A Principle of Natural Justice" (1995) 37 Journal of the Indian Law Institute 92.

Incidentally, a few months before Qatar formally invoked the Council's jurisdiction under Article 84 of the Chicago Convention, the Council had already tasked the Secretariat to review the Rules for the Settlement of Differences,[156] "with the aim of determining whether the said Rules need to be revised and updated taking into account relevant developments that had occurred since the publication of the document."[157] Following "some preliminary work", the Secretariat recommended that the matter be referred to the Legal Committee.[158] A Working Group of the Committee has been established[159] and work is pending. It remains to be seen how the Working Group intends to address the current practice of the Council not to give reasons for its decisions under Article 84 of the Chicago Convention.

IV. CONCLUSION

Judge Jiménez de Aréchaga summarized the situation aptly fifty years ago in *India v Pakistan*:

> In framing Chapter XVIII of the Chicago Convention, the founders of ICAO clearly intended to entrust functions of peaceful settlement to a body such as the Council, composed of representatives selected by member States on the basis of their experience in the actual operation of the international instruments they had to administer and apply… *[A]ccount must have been taken of the influence which may be exerted by a body composed of delegates representing all major geographic areas of the world and including States chosen for their chief importance in air transport or their large contribution to the provision of facilities for international civil air navigation. An appeal to the International Court of Justice or to an ad hoc arbitral tribunal was provided for so that when the Council takes a decision on a disagreement, its adjudication is subject to the supervision of an organ competent to determine, on the basis of international law, on the rights and duties of the parties*.[160]

When performing its dispute settlement function under Article 84 of the Chicago Convention, the ICAO Council is not transfigured into a court but remains what it is – a body of thirty-six ICAO member States

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[156] See ICAO Rules for the Settlement of Differences, *supra* note 103.
[157] ICAO, *Review of the Rules for the Settlement of Differences*, ICAO Doc LC/37-WP/3-2 (2018), reproduced in Quartet Memorial, *supra* note 2, at Vol V ann 54, para 1.1.
[158] *Ibid*, para 1.2.
[159] See ICAO Legal Committee, *37th Session Report*, at para. 6:11.
[160] *India v Pakistan*, *supra* note 31 at 153 [emphasis added].

acting through representatives, between them constituting a representative cross-section of the international civil aviation community. This arrangement is best approximated to a jury of peer States adjudicating the disputes brought before them on the basis of what they consider the Chicago Convention to mean and require, which then forms an authoritative ruling for all other contracting States.[161]

As a jury, the Council may well not be a "judicial institution in the proper sense of that term",[162] but it nevertheless discharges a judicial function and is, at the very least, a quasi-judicial body. It is, therefore, bound to apply relevant judicial principles; in fact, as an equally quasi-political body, the applicability of judicial principles is all the more important to minimize the impact of any political or national considerations.

When interpreting or applying the provisions of the Chicago Convention, the Council is competent to not only apply general international law (quintessentially the VCLT), but also to consider instruments other than the Chicago Convention, insofar as these instruments share a nexus with the latter through Articles 82 and 83 thereof. To ensure a maximum degree of supervision over the Council's determinations of essentially legal issues, any contracting State (even if not a party to the dispute) may appeal that decision to the ICJ. In order for this supervision to be meaningfully exercised, reform is required to address Council's recent reticence in providing reasons for its decision.

[161] *Quartet v Qatar*, *supra* note 18 at 168.
[162] *Ibid* at para 60.

LA DÉTERMINATION DU DROIT NATIONAL APPELÉ À SUPPLÉER LA CONVENTION DE MONTRÉAL SUR LE POINT DU PRÉJUDICE RÉPARABLE :

RÉFLEXIONS À LA LUMIÈRE DE SILVERMAN c. RYANAIR[1]

par

Laurent Chassot[*]

SYNOPSIS

[1] *Silverman c. Ryanair*, [2021] EWHC 2955 (QB) [*Silverman*].

[*] Avocat à Genève (Suisse), docteur en droit (Berne), LL.M. en droit aérien et spatial (McGill). L'auteur remercie M. Christophe Platel de son aide précieuse dans la mise au point de cet article, version légèrement remaniée d'un commentaire de jurisprudence publié par le Bulletin de l'Association Suisse de Droit Aérien et Spatial (ASDA), 2021 à la p. 39 ss.

ABSTRACT

The recent judgment in *Silverman v Ryanair* by the High Court of Justice (England and Wales) demonstrates the continued relevance of national case law, particularly from English courts, which are no longer subject to the supervision of the Court of Justice of the European Union, in interpreting the Montreal Convention.

This ruling resolves an important issue regarding the determination of national law that supplements the Montreal Convention for reparable damage. This case is the first of its kind to specifically address this issue; however, it remains superficial in its analysis, not having exhausted all the dimensions presented by the subject. Nonetheless, this case has the merit of highlighting legal points that have previously been overlooked in case law. This invites further discussion and debate on important theoretical and practical questions faced by both scholars and practitioners.

RÉSUMÉ

Le jugement rendu récemment par la Haute Cour de justice (Angleterre et Pays de Galles) dans *l'affaire Silverman c. Ryanair* démontre l'intérêt entier que conserve, dans l'interprétation de la Convention de Montréal, la jurisprudence nationale, en particulier celle des tribunaux anglais, désormais affranchis de la tutelle de la Cour de justice de l'Union européenne.

Cet arrêt résout une question importante concernant la détermination du droit national qui complète la Convention de Montréal s'agissant du préjudice réparable. Cette affaire est la première à avoir traité spécifiquement et tranché cette question ; cependant, elle reste superficielle dans son analyse, n'ayant pas épuisé toutes les dimensions du sujet.

Ce jugement a néanmoins, le mérite de mettre en lumière des points de droit qui ont été jusqu'à présent négligés par la jurisprudence, invitant ains à poursuivre la discussion et le débat sur des questions cruciales dans une optique tant théorique que pratique.

KEYWORDS

Montreal Convention, English law, European law, Private international law, Choice-of-law clauses

I. INTRODUCTION

La pandémie a vidé le ciel de ses avions et pratiquement suspendu, un temps durant, le transport aérien international, mais elle n'a cependant pas freiné le cours de la jurisprudence en la matière. En témoignent plusieurs décisions rendues ces deux dernières années par les juridictions nationales, ainsi que par la Cour de justice de l'Union européenne (CJUE), portant sur la Convention de Montréal (CM)[2] et les droits des passagers aux termes du règlement (CE) n° 261/2004.[3]

On soulignera d'ailleurs, dans ce contexte, l'importance croissante prise, en Europe, par la jurisprudence de la CJUE dans l'interprétation de la Convention de Montréal, instrument participant de l'ordre juridique communautaire, et dont l'interprétation relève par conséquent de la compétence de la Cour. Évolution attendue,[4] l'européanisation de la Convention de Montréal est en marche et semble s'accélérer, sous l'impulsion des justiciables et des juridictions nationales, dont le renvoi préjudiciel fait désormais partie des réflexes.

Si, dans l'optique du droit uniforme, l'émergence d'une interprétation à l'unisson de la Convention, à l'échelle européenne, réaliserait un progrès, la CJUE contribue hélas plus souvent à la fragmentation qu'au renforcement de la matière.

S'attachant avant tout chose à faire triompher l'unité de l'ordre juridique communautaire et ses objectifs programmatiques, elle ignore – par méconnaissance ou à dessein – un principe cardinal dans l'interprétation du droit uniforme, celui de la prise en compte de la jurisprudence émanant des autres juridictions contractantes de la Convention.[5]

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[2] *Convention pour l'unification de certaines règles relatives au transport aérien international*, 28 mai 1999, 2242 UNTS 309, OACI Doc 9740 (entrée en vigueur : 4 novembre 2003) [*CM*]. Pour la jurisprudence nationale, *cf* notamment Cass civ 1re, 12 mai 2021, non publiée, n° 19-24.229 ; Cass com, 16 juin 2021, non publiée, n° 19-24.510 ; *New Fortune Inc v Apex Logistics Int'l (CN) Ltd*, No 21-262-cv, 2021 WL 5699464 (2e Cir 2021). Pour la jurisprudence européenne, *cf SL c Vueling Airlines*, C-86/19, [2020] EU:C:2020:538 ; Y*L c Altenrhein Luftfahrt*, C-70/20, [2021] EU:C:2021:379 ; *JR c Austrian Airlines (Exonération de la responsabilité du transporteur aérien)*, C-589/20, [2022] EU:C:2022:424.

[3] CE, *Règlement (CE) n° 261/2004 du Parlement européen et du Conseil du 11 février 2004 établissant des règles communes en matière d'indemnisation et d'assistance des passagers en cas de refus d'embarquement et d'annulation ou de retard important d'un vol, et abrogeant le règlement (CEE) n° 295/91*, [2004] JO, L 46/1. On renoncera à dresser ici la liste de ces nombreuses décisions.

[4] *Cf* Laurent Chassot, *Les sources de la responsabilité du transporteur aérien international : entre conflit et complémentarité – La Convention de Montréal et son interaction avec le droit européen et national*, Genève/Zurich, Schulthess, 2012 au para. 1098.

[5] En témoignent les deux arrêts précités *Altenrhein Luftfahrt* et *Austrian Airlines*, qui portent sur la notion de d'« accident » au sens de l'article 17 de la CM, dont ils donnent une définition propre, faisant fi de la jurisprudence riche et constante rendue sur ce point dans les États contractants de la Convention.

Le jugement dont il sera ici question, rendu récemment par la Haute Cour de justice (Angleterre et Pays de Galles) dans l'affaire *Silverman c. Ryanair* (*Silverman*), démontre néanmoins l'intérêt entier que conserve la jurisprudence nationale, et particulièrement celle émanant des tribunaux anglais, affranchis, depuis le Brexit, de la tutelle de la CJUE, dans l'interprétation de la Convention de Montréal.

Il tranche en effet une question importante, à notre connaissance pour la première fois en jurisprudence[6] : celle de la détermination du droit national appelé à suppléer la Convention de Montréal sur le point du préjudice réparable, quand bien même, en l'espèce, les solutions retenues par la juge McCloud, ne sont pas exemptes de critiques.

II. LES FAITS ET LE LITIGE

Un passager s'était blessé à l'embarquement d'un vol de la compagnie Ryanair, au départ de l'aéroport de East Midlands (au Royaume-Uni, pays où il était également domicilié), à destination de Berlin-Schönefeld (en Allemagne). Le transport était international et l'applicabilité de la Convention de Montréal incontestée en l'espèce.

Le différend portait sur le droit national applicable aux questions que la Convention ne régit point : en l'occurrence, il s'agissait de la notion et de l'étendue du préjudice réparable. En effet, si la Convention règle exhaustivement les conditions de la responsabilité du transporteur aérien international, deux aspects importants échappent au régime de droit uniforme : la question de la *qualité pour agir* en responsabilité contre le transporteur et celle du *préjudice réparable* à ce titre sont exceptées du domaine conventionnel, laissées à la disposition du droit national applicable (article 29 de la CM *in fine*).

Mais quel droit, précisément, a-t-il alors vocation à s'appliquer ?

Si les protagonistes de cette affaire s'accordaient sur le silence de la Convention en matière de préjudice réparable au titre de l'article 17 de la CM, en cas d'accident causant la lésion corporelle ou le décès d'un passager, ils divergeaient sur la question de savoir quel droit national prenait le relais sur ce point : le demandeur invoquait le droit international privé, dont les règles de conflit consacrent le droit élu par les parties, en l'occurrence le droit irlandais, selon les conditions de transport de la

[6] Quelques décisions avaient évoqué la question incidemment, sans qu'elle soit cependant débattue, *cf* Chassot, *supra* note 4 au para. 477, n. 562.

compagnie Ryanair[7] ; alors que le transporteur plaidait pour sa part l'application du droit du for (*lex fori*), à savoir en l'espèce le droit anglais. Deux autres questions, connexes à la première, divisaient encore les parties dans cette affaire :

- Dans l'hypothèse où il s'agit de solliciter les règles de conflit pour déterminer le droit national applicable, de quel régime, en droit international privé, une demande fondée sur la Convention de Montréal relève-t-elle ?

- Du statut contractuel, comme le soutenait le demandeur, ou du statut délictuel, selon le défendeur (soit respectivement les règlements Rome I[8] ou Rome II[9]) ?

En outre, la *lex causae* arbitre-t-elle également les interprétations nationales divergentes du texte uniforme de la Convention, en ce sens qu'elle imposerait les solutions consacrées par sa jurisprudence ?

III. LA DÉCISION

Sans traiter du fond de l'affaire (la responsabilité du transporteur aérien *in casu*, laquelle a peut-être fait l'objet d'une étape ultérieure du procès ou d'un règlement transactionnel ; nous l'ignorons), la décision rendue dans la cause *Silverman* se cantonne à l'examen des trois points de droit susmentionnés, qu'elle a tranchés ainsi :

(1) le droit national applicable à la question du préjudice réparable sur le fondement de la Convention de Montréal est celui que désignent les règles de conflit du for ;

(2) en cas d'interprétations divergentes du texte uniforme, il convient de suivre les solutions jurisprudentielles de la *lex fori*, le caractère impératif des dispositions conventionnelles s'opposant par

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[7] Où il est stipulé que

> Except as otherwise provided by the Convention or applicable law, your contract of carriage with us, these Terms and Conditions of Carriage and our Regulations shall be governed by and interpreted in accordance with the laws of Ireland […].

Cette clause standard, présente dans la plupart des conditions de transport, tire son origine de la Recommended Practice 1724 de l'IATA.

[8] CE, *Règlement (CE) n° 593/2008 du Parlement européen et du Conseil du 17 juin 2008 sur la loi applicable aux obligations contractuelles (Rome I)*, [2008] JO, L 177/6.

[9] CE, *Règlement (CE) n° 864/2007 du Parlement Européen et du Conseil du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles (Rome II)*, [2007] JO, L 199/40.

ailleurs à l'élection d'un autre droit en la matière ; il s'agissait dès lors, en l'espèce, d'interpréter les concepts conventionnels – et notamment la notion d'« accident » au sens de l'article 17 de la CM – à la lumière de la jurisprudence anglaise ;

(3) en raison de la nature délictuelle de l'action fondée sur la Convention, les règles de conflit applicables à la désignation du droit supplétif sont celles du Règlement Rome II, lesquelles pointent en principe vers la *lex loci delicti* (le droit anglais en l'occurrence) ; considérant toutefois la réserve par l'article 4 dudit Règlement, d'une part, d'un lien manifestement plus étroit avec un autre pays, lequel peut résulter, singulièrement, d'un contrat entre les parties, et l'existence en l'espèce, d'autre part, de conditions de transport soumises au droit irlandais, il y avait dès lors lieu, selon le jugement, de faire application de ce dernier droit.

Les solutions qui se dégagent de cette décision seront résumées et commentées ci-après.

A. LE DROIT APPLICABLE À LA DÉTERMINATION DU PRÉJUDICE RÉPARABLE DANS LA CONVENTION DE MONTRÉAL

La position soutenue par le demandeur, celle du recours aux règles de conflits pour désigner le droit national applicable à cette question, pouvait se prévaloir d'un avantage, celui de la solution naturelle : là où la Convention est silencieuse, la méthode conflictuelle – soit le régime ordinaire – reprend logiquement ses droits. Toute autre voie, et particulièrement l'application du droit matériel du for, prônée par le défendeur, nécessitait de solides justifications, lesquelles n'avaient pas été offertes en l'espèce.

La jurisprudence ne s'était jusqu'alors pas directement prononcée sur cette question, mais elle était en revanche constante sur ce que la Convention de Montréal, et précédemment celle de Varsovie (CV),[10] exceptaient de leur régime de responsabilité la détermination de la qualité pour agir et du préjudice réparable, points sur lesquels elles permettaient et appelaient la « résurgence » en leur sein du droit national (voir le libellé des arts 24 CV et 29 CM : « […] sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs »).

[10] *Convention pour l'unification de certaines règles relatives au transport aérien international*, 12 octobre 1929, 137 LNTS 11, OACI Doc 7838 (entrée en vigueur : 13 février 1933) [CV].

La jurisprudence qualifiait à cet égard les Conventions de *pass-through* (« passe-plat » ; *sic* !). Elle précisait – sans toutefois avoir été appelée à trancher ce point précis – que le droit national applicable était celui désigné par les règles de droit international privé du for.[11]

Nota bene : si les contours du préjudice réparable au titre des arts 17 ss CM ou CV ressortissent au droit interne, il convient toutefois de distinguer, de cette question, les cas dans lesquels les Conventions recourent à la notion de « dommage » ou de « dommages-intérêts », afin de circonscrire l'applicabilité de leur régime de responsabilité.

Ainsi, lorsque les arts 24 CV et 29 CM déclarent les Conventions applicables, à titre exclusif, à « toute action en dommages-intérêts », ou lorsque les arts 22 CV et CM plafonnent la réparation d'un « dommage », ces concepts relèvent du droit uniforme et font l'objet d'une interprétation autonome. La circonscription du domaine conventionnel ne saurait en effet être l'affaire du droit national.[12]

Au regard de cette jurisprudence, et en l'absence d'arguments contraires convaincants (le défendeur invoquait quelques décisions plus anciennes rapportées dans un commentaire de la Convention), le magistrat conclut dès lors que le droit national applicable à la question du préjudice réparable résultait des règles de conflit :

> « *I do not read the analysis there as contradicting the position in Zicherman in terms of the 'pass-through' to the choice-of-law arrangements of the forum when it comes to the determination of what compensatory damages are recoverable. In my judgment the lex fori's choice-of-law rules apply to such matters here* »[13].

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[11] Voir l'arrêt de principe de la Cour suprême des États-Unis, *Zicherman v Korean Air Lines Co*, 516 US 217 (1996).

[12] *Cf* l'arrêt de la Cour suprême du Canada, *Thibodeau c Air Canada*, 2014 SCC 67, [2014] 3 SCR 340 au para. 77, s'appuyant sur l'opinion de Chassot, *supra* note 4 au para. 556 ss. C'est à notre avis également ainsi qu'il faut comprendre la jurisprudence de la CJUE donnant un interprétation autonome de la notion de dommage au sens de la Convention de Montréal, *cf* les arrêts *Walz c Clickair SA*, C-63/09, [2010] Rec CE I-04239, et *Air Baltic Corporation c Lietuvos Respublikos*, C-429/14, [2016] EU:C:2016:88 ; ce que tendent à confirmer les conclusions de l'Avocat général Ján Mazák, dans l'affaire *Walz* au para. 22.

[13] *Silverman*, *supra* note 1 au para. 53. Traduction du rédacteur :

> Je ne considère pas que l'analyse faite dans ce contexte contredise la position prise dans l'affaire *Zicherman* en ce qui concerne le renvoi aux dispositions relatives au choix de la loi du for lorsqu'il s'agit de déterminer quels dommages-intérêts compensatoires sont recouvrables. À mon avis, les règles de conflit de lois de la *lex fori* s'appliquent à ces questions.

Si, de prime abord, la motivation de cette décision ne prête pas le flanc à la critique, il faut pourtant noter que la thèse de la *lex fori* – celle soutenue par le défendeur – pouvait se prévaloir de certains arguments de poids. On ignore s'ils furent évoqués durant les débats. Toujours est-il que le jugement n'en fait pas état.

L'exégèse du texte conventionnel est en effet riche d'enseignements.

Un certain nombre de dispositions des Conventions de Varsovie et de Montréal renvoient au droit national.[14] Il s'agit d'aspects qui, bien que relevant du régime de la responsabilité du transporteur aérien international tel qu'envisagé par ces instruments, ne se prêtaient cependant pas à l'unification conventionnelle et en ont dès lors été exceptés.[15] La plupart de ces dispositions opèrent un renvoi exprès à la *lex fori*.[16] Les avis divergent sur le point de savoir si la mention de la *lex fori* se réfère au droit matériel ou aux règles de conflit du for. Dans le premier cas, les Conventions poseraient une règle de conflit uniforme. Le camp « uniformiste » l'emporte d'ailleurs numériquement sur celui des « conflictualistes ».[17] Or, une partie de la doctrine uniformiste pousse plus avant son raisonnement et professe que la Convention opère également un renvoi au droit matériel du for sur le point de la qualité pour agir et du préjudice réparable, nonobstant l'absence de référence expresse à la *lex fori* aux arts 24 CV et 29 CM.[18]

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[14] Outre l'article 29 de la CM, il s'agit des articles 22(6), 28, 33(4), 35(2) et 45 CM ; *cf* également les arts 21(1), 22(q1), 24, 25, 28(2) et 29(2) de la CV.

[15] *Cf* Chassot, *supra* note 4 au para. 437 ss et n° 448 en particulier.

[16] Ainsi les arts 22(6), 33(4), 35(2) et 45 CM, ainsi que les arts 21(1), 22(1), 22(4), 25, 28(2) et 29(2) CV

[17] Chassot, *supra* note 4 au para. 473, *cf* n. 555–6.

[18] René H Mankiewicz, *The Liability Regime of the International Air Carrier*, Deventer, Wolters Kluwer, 1981 au para. 189 ; Michel de Juglart et al, *Traité de droit aérien*, 2e éd, Paris, LGDJ, 1992 au para. 2661 ; Elmar Giemulla, Elmar Giemulla & Ronald Schmid, *Frankfurter Kommentar zum Luftverkehrsrecht*, vol 3, *Montrealer Übereinkommen*, Neuwied, Wolters Kluwer, mise à jour de juillet 2021, n° 29 ad art 29 de la CM ; Chassot, *supra* note 4 au para. 478 ; CI Grigorieff, *The regime for international air carrier liability – to what extent has the envisaged uniformity of the 1999 Montreal Convention been achieved?*, Leyde, Meijers-reeks, 2021 aux pp 63, 73 à la note 101, en ligne (pdf) : <hdl.handle.net/1887/3240115>. Ce dernier auteur considère l'article 29 de la CM comme un renvoi à *lex fori*, de tels renvois constituant des règles de conflit uniformes. *Contra* : Daniel Goedhuis, *La Convention de Varsovie du 12 octobre 1929*, La Haye, Nijhoff, 1933 à la p. 219 s ; Regula Dettling-Ott, *Internationales und schweizerisches Lufttransportrecht*, Zurich, Schulthess, 1993 à la p. 64 ; Fabian Reuschle, *Montrealer Übereinkommen - Kommentar*, 2e éd, Berlin/Boston, De Gruyter, 2011, n° 56 ad préambule CM ; *cf* é.g. dans ce sens la jurisprudence citée par Chassot, *supra* note 4 à la p. 150, n. 562, sans que la question y soit cependant débattue.

Plusieurs arguments plaident en faveur de cette dernière solution :

- **L'analogie avec les autres renvois à la *lex fori*.**

  Il a été dit plus haut que la Convention de Montréal contenait un certain nombre d'autres renvois – exprès – à la *lex fori*. S'il s'agit essentiellement de questions procédurales ou apparentées[19], lesquelles ressortissent par essence au droit du tribunal saisi de la cause, la Convention de Varsovie en présentait quant à elle un nombre plus important encore, qui portaient en revanche sur des points matériels du régime de responsabilité. Ainsi, les Conventions érigent-elles le renvoi à la *lex fori* en système.

  Sans doute convient-il dès lors de considérer l'absence d'un renvoi exprès par l'article 29 de la CM comme une lacune, qu'un raisonnement analogique suggère de combler par l'admission d'une référence implicite à la *lex fori*, à l'instar des autres dispositions réservant le droit national.

  On précisera que cette solution ne saurait être généralisée à toutes les questions que les Conventions ne traitent pas. Elle ne vaut qu'en matière de qualité pour agir et de préjudice réparable, deux questions relevant intrinsèquement de la matière conventionnelle (la responsabilité du transporteur aérien international), mais que le texte uniforme « renvoie » au droit national, comme un certain nombre d'autres aspects du régime de responsabilité.

  Le droit applicable aux thématiques échappant d'emblée au domaine conventionnel (par exemple l'inexécution pure et simple du transport) ne fait en revanche l'objet d'aucune règle de conflit uniforme.

  De même, le renvoi à la *lex fori* ne concerne-t-il pas les concepts juridiques indéterminés, auxquels recourent les Conventions (« aéronef », « accident », « lésion corporelle », « passager », « marchandises », etc.), et qui relèvent de l'interprétation autonome du droit uniforme.[20]

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[19] Les modalités de computation du délai péremptoire de l'article 35(2) de la CM relèvent en réalité plutôt du droit matériel.

[20] *Cf* par exemple *Guaitoli et al c easyJet Airline Co Ltd*, C-213/18, [2019] EU:C:2019:927 au para. 47 ; *Niki Luftfahrt*, C-532/18, [2019] ECLI:EU:C:2019:1127 au para. 32.

- **La simplification du droit, par la suppression du conflit de lois.**

  Le droit uniforme vise à simplifier l'application du droit et à offrir une plus grande sécurité juridique dans un contexte international sujet aux mécanismes complexes du droit international privé.

  Or, la résurgence de la méthode conflictuelle au cœur du régime uniforme de responsabilité international contredirait cet objectif.[21]

- **Un *forum shopping* favorable au passager-consommateur.**

  On objectera certes à l'application de la *lex fori* matérielle qu'elle invite au *forum shopping*, le demandeur choisissant d'assigner le transporteur dans la juridiction dont le droit lui est le plus favorable, en matière de qualité pour agir ou de quantum de la responsabilité.[22]

  Par-delà le débat concernant les méfaits avérés ou supposés de cette pratique,[23] force est de constater qu'elle sert en l'occurrence les intérêts des passagers ou de leurs ayants droit, intérêts que la Convention de Montréal entend précisément favoriser (cf. son préambule).

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[21] Chassot, *supra* note 4 au para. 478 ; ainsi, pour l'article 29 de la *Convention relative au contrat de transport international de marchandises par route (CMR)*, 19 mai 1956, 399 UNTS 189, (entrée en vigueur : 2 juillet 1961), Andreas Furrer & Juana Vasella, « 'Transportkollisionsrecht' – Zur Rolle des IPR bei grenzüberschreitenden Beförderung von Gütern », dans Pascal Grolimund et al, *Festschrift für Anton K. Schnyder*, Zurich/Bâle/Genève, Schulthess, 2018 à la p. 103 ss, à la p. 126 : « *Die überwiegende Mehrheit in Lehre und Rechtsprechung kommt zu Recht zum Schluss, dass bei Art. 29 Abs. 1 CMR von einer Sachnormverweisung auszugehen ist.* […] *Der Einbezug des entsprechenden Kollisionsrechts der* lex fori *würde diesen Kompromiss wiederum aufweichen und die Rechtsanwendung unnötig erschweren* ».

[22] Voir par exemple Jan Kropholler, *Internationales Einheitsrecht, Allgemeine Lehren*, Tubingue, Mohr Siebeck, 1975 à la p. 200.

[23] À ce propos, Markus Petsche, « What's Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice » 2011 45:4 Intl Lawyer 1005.

- **L'adoption par les États de lois spéciales déterminant la qualité pour agir dans les actions soumises à la Convention et les préjudices réparables à ce titre.**[24]

  Ces interventions législatives semblent indiquer que les États partaient du principe de l'application de leur droit matériel à toute action fondée sur la Convention et portée devant leurs tribunaux.[25]

  On pourrait d'ailleurs éventuellement voir dans ces dispositions l'expression de lois d'application immédiate (au sens, en Suisse, de l'article 18 de la Loi sur le droit international privé),[26] lesquelles s'imposent, en raison de leur but particulier, nonobstant la désignation éventuelle d'un droit étranger par les règles de conflit.[27]

- **L'article 22(1) de la Convention de Varsovie.**

  Lequel dispose que « [d]ans le cas où, d'après la loi du tribunal saisi, l'indemnité peut être fixée sous forme de rente, le capital de la rente ne peut dépasser cette limite [c'est-à-dire le plafond responsabilité fixé par cette disposition] ».

  Cette phrase confirme que la détermination du préjudice réparable et de ses modalités est l'affaire de la *lex fori*.

Le poids de ces arguments nous semble suffisant pour justifier, à l'encontre de la conclusion retenue par le jugement en l'espèce, l'application de la loi matérielle du for, s'agissant de la détermination des ayants droit et du préjudice réparable au titre de la Convention de Montréal.

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[24] *Cf* à ce propos Chassot, *supra* note 4 au para. 630. Peut-être faut-il voir un exemple de telle législation, en Suisse, dans l'article 11 al 1 de l'ordonnance du Conseil fédéral du 17 août 2005 sur le transport aérien (OTrA, RS 748.411), qui énonce qu'« [e]n cas de de décès ou de lésion corporelle d'un voyageur, la qualité d'ayant droit, la forme et le calcul des dommages-intérêts et de la réparation morale sont déterminés par les dispositions du code des obligations ». Cette disposition s'applique en effet, aux termes de l'article 1 al OTrA, « [p]our autant que la Convention de Montréal ne soit pas applicable […] à tout transport interne ou international de personnes, de bagages ou de marchandises effectué par aéronef » ; *cf contra* Regula Dettling-Ott, « Das Inkrafttreten des Montrealer Übereinkommens in der Schweiz und die neue Lufttransportverordnung », 2005 Bull ASDA 58 à la p. 67 s, pour qui l'OTrA ne s'applique que lorsque le transport n'est pas régi par la Convention de Montréal.

[25] Mankiewicz, *supra* note 18 au para. 189.

[26] *Loi fédérale du 18 décembre 1987 sur le droit international privé*, CH, RS 291 [LDIP].

[27] Sur la question, voir Bernard Dutoit, *Droit international privé suisse – Commentaire de la loi fédérale du 18 décembre 1987*, 5e éd, Bâle, Helbing Lichtenhahn, 2016, ad art 18 de la LDIP.

B. L'APPLICATION DE LA MÉTHODE CONFLICTUELLE EN CAS D'INTERPRÉTATIONS DIVERGENTES DU DROIT UNIFORME

Le défendeur soutenait que le droit national applicable à titre supplétif (le droit anglais selon lui, en tant que *lex fori*) était également déterminant dans l'interprétation de la Convention, et singulièrement des concepts de droit uniforme « accident » et « lésion corporelle » figurant à l'article 17 de la CM, des notions qui devaient être comprises dans l'acception qu'en donne la jurisprudence anglaise.

Le jugement aborde ainsi une question fondamentale, en droit uniforme,[28] dont les dispositions font souvent l'objet de divergences d'interprétation par les juridictions nationales. Confronté à de telles divergences nationales, le juge peut-il, ou doit-il même, les arbitrer, en recourant à la méthode conflictuelle, et ainsi opter pour la solution consacrée par la jurisprudence de la *lex causae* ?

À juste titre, la juge releva que les notions d'« accident » ou de « lésion corporelle », qui constituaient des conditions de la responsabilité du transporteur en droit uniforme, excluaient en principe l'application du droit national :

> « *When we come to issues relating to the ingredients of liability, such as 'accident' and 'bodily injury', which are Convention terms as well as contractual ones, the Convention does not provide a 'pass through' in the sense used by Scalia J [of the United States Supreme Court]* »[29].

[28] Voir à ce propos le débat engagé en France dans le sillage de la jurisprudence *Hocke*, Cass com, 4 mars 1963, 1964 Clunet 806 ; *cf* Vincent Grellière, *Droit aérien – droit spatial, notes élémentaires*, Toulouse, 2019, en ligne (pdf) : <publications.ut-capitole.fr/id/eprint/32897/1/TRAITE_DROIT_AERIEN_SPATIAL_Grelliere.pdf> à la p. 656 ss.

[29] *Silverman, supra* note 1 au para. 54. Traduction du rédacteur :

> Lorsqu'il s'agit de questions relatives aux éléments constitutifs de la responsabilité, tels que « accident » et « dommage corporel », qui sont des termes de la convention ainsi que des termes contractuels, la convention ne prévoit pas de renvoi au sens où l'entend le juge Scalia [de la Cour suprême des États-Unis].

Cependant, la Convention étant silencieuse sur l'effet d'une élection de droit quant à leur interprétation, la magistrate croyait devoir encore examiner si l'application du droit irlandais, en matière d'interprétation de la Convention, ne résultait pas de la clause 2.4 des conditions de transport du défendeur :

Terms and Conditions of Carriage

> « *Except as otherwise provided by the Convention or applicable law, your contract of carriage with us, these Terms and Conditions of Carriage and our Regulations shall be governed by and interpreted in accordance with the laws of Ireland* »[30].

Se fondant sur les arts 25, 26 et 49 CM, lesquels en substance interdisent et déclarent nulles toutes stipulations du contrat de transport tendant à exonérer le transporteur de sa responsabilité, fût-ce par la seule détermination de la loi applicable, Mme McCloud écarta le droit irlandais… au profit de la *lex fori*, soit le droit anglais. Elle en conclut que les concepts conventionnels, dont l'autonomie excluait une assimilation pure et simple aux notions correspondantes du droit interne, devaient néanmoins être interprétés conformément à la jurisprudence anglaise en matière de Convention de Montréal :

> « *the language of the Convention should not be interpreted by reference to domestic law principles or domestic rules of interpretation … assistance can and should be sought from relevant decisions of the courts of other Convention countries … [t]he upshot is that insofar as I need to spell it out, the expressions 'accident' and 'bodily injury' which are Convention terms forming triggers for liability, must be interpreted in accordance with Convention law as understood by this court, ie the* lex fori *in that rather special international sense* »[31].

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[30] *Ibid* au para. 8. Traduction du rédacteur :

> Sauf disposition contraire de la Convention ou du droit applicable, votre contrat de transport avec nous, les présentes Conditions de transport et nos Règlements seront régis et interprétés conformément au droit irlandais.

[31] *Ibid* aux para. 60-61 (citant *Deep Vein Thrombosis and Air Travel Group Litigation, Re*, [2005] UKHL 72, [2006] 1 AC 495, au para. 11). Traduction du rédacteur :

> le texte de la Convention ne doit pas être interprété par référence à des principes de droit interne ou à des règles d'interprétation internes ... on peut et doit se référer aux décisions pertinentes des tribunaux d'autres pays signataires de la Convention ... [l]e résultat est que, pour autant que je doive le préciser, les expressions « accident » et « dommage corporel », qui sont des

Ce raisonnement tortueux, en tant qu'il préconiserait le recours à la méthode conflictuelle pour interpréter la Convention, serait erroné : le procédé de l'unification du droit, qui vise précisément à supprimer le conflit de lois, postule une application immédiate du texte conventionnel, sans détour par un quelconque droit interne, en vue d'une interprétation idéalement unique, qu'il appartient au juge de restituer par une herméneutique idoine.[32]

Cependant, plus que l'affirmation d'une nouvelle méthode, il faut probablement voir dans les circonvolutions du jugement l'expression maladroite des spécificités anglaises de l'application de la Convention de Montréal. D'une part, se réclamant de la tradition dualiste, le droit anglais promulgue un traité par l'adoption d'une loi interne, en l'occurrence *The Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002*.[33]

L'application de la Convention passe dès lors nécessairement par la médiation du droit interne. D'autre part, le principe du *stare decisis* implique que les tribunaux sont liés par les précédents rendus en la matière, la jurisprudence constituant une véritable source du droit. Ces facteurs expliquent sans doute l'importance, dans l'optique de la juge, que revêtait la détermination du droit national applicable.

C. LE STATUT DÉLICTUEL OU CONTRACTUEL DES RÉCLAMATIONS FONDÉES SUR LA CONVENTION DE MONTRÉAL

Le jugement étant parvenu à la conclusion que le droit applicable à la détermination du préjudice réparable résultait des règles de conflit du droit international privé, se posait encore la question de savoir s'il s'agissait, en l'espèce, du règlement Rome I ou du règlement Rome II.

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termes de la Convention constituant des éléments déclencheurs de responsabilité, doivent être interprétées conformément au droit de la Convention tel qu'il est compris par cette juridiction, c'est-à-dire la *lex fori* dans ce sens international assez particulier.

[32] Fondée en particulier sur les arts 31 ss de la *Convention de Vienne sur le droit des traités*, 23 mai 1969, 1155 UNTS 331, (entrée en vigueur : 27 janvier 1980). *Cf* Chassot, *supra* note 4 au para. 88 ss. *Cf*, sur le rejet de la jurisprudence *Hocke* en matière de Conventions de Varsovie et Montréal, Grellière, *supra* n. 28 à la p. 657.

[33] *The Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002 (*R-U), SI 2002/263.

Le demandeur invoquait la nature contractuelle de ses prétentions, arguant de ce qu'elles procédaient du contrat de transport conclu avec le défendeur. Dans ce cas, le règlement Rome I, qui consacre l'application du droit élu par les parties (article 3), pointait vers le droit irlandais, conformément à la clause 2.4 des conditions de transport.

Le défendeur prétendait pour sa part que sa responsabilité étant recherchée à raison d'un dommage corporel, la demande portait intrinsèquement sur un acte illicite et ne relevait par conséquent pas de Rome I, mais de Rome II. Il contestait par ailleurs que l'existence d'un contrat de transport fût nécessaire à l'application de la Convention. Le défendeur plaidait dès lors l'application du droit anglais, celui du lieu dans lequel le dommage était survenu (article 4(1) du Rome II).

Suivant le défendeur dans son argumentation, la juge trancha qu'une demande fondée sur l'article 17 de la CM était de nature délictuelle :

> « *The correct analysis in my judgment is this: this claim under the strict liability provisions in the Convention relating to bodily injury arising from an accident is most appropriately seen as falling within Rome II in terms of the applicable law relating to forum, and to choice-of-law to which I shall turn in a moment* »[34].

Elle considéra néanmoins que le droit anglais – la *lex loci delicti* – n'était pas applicable en l'espèce, mais bien le droit irlandais, en raison de la clause d'exception figurant à l'article 4(3) du Rome II, laquelle réserve « [u]n lien manifestement plus étroit avec un autre pays [lequel] pourrait se fonder, notamment, sur une relation préexistante entre les parties, telle qu'un contrat, présentant un lien étroit avec le fait dommageable en question ».

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[34] *Silverman, supra* note 1 au para. 67. Traduction du rédacteur :

> L'analyse correcte, à mon avis, est la suivante : cette demande fondée sur les dispositions de la Convention relatives à la responsabilité objective en cas de dommages corporels résultant d'un accident est considérée de la manière la plus appropriée comme relevant de Rome II en termes de droit applicable relatif au for et au choix de la loi applicable, sur lesquels je reviendrai dans un instant.

Lien plus étroit qu'elle estima exister ici avec l'Irlande, du fait de l'élection du droit de ce pays dans les conditions de Ryanair :

> « *In this instance we have a choice-of-law clause in the contract of carriage and the airline is clearly connected with the jurisdiction in question (Ireland) rather than a jurisdiction unsuitable and unconnected with the case. The question whether in any case Art. 4(3)'s 'escape clause' applies is a case-by-case one based on the issue of 'manifest connection', but in this instance the existence of such a choice-of-law clause fixing a choice of law which is connected with the airline's own place of domicile coupled with the very fact of the clear and unambiguous contractual choice of Irish Law, in my judgment satisfies Art. 4(3) and has the effect that for issues of cognisable damage and quantum, the law of this forum relating to choice-of-law clauses operates to hold that Irish law applies* » [35].

Notons que, si la Convention de Montréal requiert pour son application la conclusion d'un contrat de transport,[36] elle ne se prononce en revanche pas sur la nature contractuelle ou délictuelle des prétentions dirigées contre le transporteur, prétentions qui ne sont d'ailleurs pas l'apanage du cocontractant de celui-ci.[37]

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[35] *Ibid* au para. 73. Traduction du rédacteur :

> Dans ce cas, nous avons une clause de choix de la loi applicable dans le contrat de transport et la compagnie aérienne est clairement liée à la juridiction en question (Irlande) plutôt qu'à une juridiction quelconque sans rapport avec l'affaire. La question de savoir si, dans tous les cas, « l'échappatoire » de l'art. 4(3) s'applique est une question à examiner au cas par cas, à l'aune de l'existence d'un « lien manifeste », mais dans ce cas, l'existence d'une telle élection de droit en faveur de la loi du domicile de la compagnie aérienne, couplée au fait même du choix contractuel clair et non ambigu de la loi irlandaise, satisfait à mon avis l'art. 4(3) et a pour effet que pour les questions de dommages réparables et de quantum, les règles de conflit du for conduisent à appliquer la loi irlandaise.

[36] Aux termes de l'article 1 de la CM, la Convention s'applique en effet en présence d'un contrat de transport aérien international ; *cf* par exemple Chassot, *supra* note 4 au para. 29 ss ; é.g. *Air Baltic Corporation AS c Lietuvos Respublikos specialiųjų tyrimų tarnyba*, C-429/14, [2016] EU:C:2016:88 au para. 41 ss ; Tribunal fédéral suisse, 28 septembre 2018, 4A_385/2017, consid. 3.

[37] Chassot, *supra* note 4 au para. 679 s.

Cette question n'intéresse pas le droit uniforme, lequel au contraire a vocation à transcender les catégories du droit national (ou européen), afin d'imposer son ubiquité, quel que soit le terrain juridique sous-jacent. C'est ainsi que l'article 29 de la CM, lorsqu'il énonce le principe d'exclusivité de la Convention, dispose que

> « toute action en dommages-intérêts, à quelque titre que ce soit, *en vertu de la présente Convention, en raison d'un contrat ou d'un acte illicite ou pour toute autre cause*, ne peut être exercée que dans les conditions et limites de responsabilité prévues par la présente Convention » (nous soulignons).

En conséquence, la qualification de contractuelle ou délictuelle d'une action fondée sur la Convention relève du seul droit national (ou européen, l'occurrence). Nous n'examinerons pas plus avant, ici, l'interprétation donnée par le jugement, sur ce point, des règlements Rome I et II, une question qui ressortit au droit international privé général.

IV. CONCLUSION

Si les questions abordées par le jugement dans l'affaire *Silverman* figurent parmi les plus fondamentales, s'agissant de l'articulation entre la Convention de Montréal et le droit interne, l'autorité des réponses qu'il y apporte paraît néanmoins restreinte. Ce non seulement du fait que la décision n'émane pas formellement d'une juridiction suprême,[38] mais surtout parce qu'elle demeure superficielle dans son analyse, n'ayant pas épuisé toutes les dimensions que présente le sujet. Elle a cependant le mérite indéniable d'attirer l'attention sur des points de droit à ce jour délaissés par la jurisprudence, en dépit de leur importance théorique et pratique, et d'inviter ainsi à une poursuite du débat.

[38] Nous n'avons pas connaissance de ce qu'un appel aurait été interjeté contre ce jugement de première instance.

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OBTRUSIVE ADVERTISING IN OUTER SPACE: THE NEXT INTERNATIONAL LEGAL CHALLENGE

by

Rebecca Connolly*

SYNOPSIS

* Dr Rebecca Connolly, (PHD Law, LLM) is an academic lecturer in the International Law Faculty of the University of Sydney Law School. She currently lectures in International Space Law and International Law and Technology.

ABSTRACT

Space exploration and activities are no longer the exclusive domain of States. In this commercial space age, private space companies pursue their corporate agendas alongside the public initiatives of national space agencies. While space advertising proposals are not new, these projects are now more technically and financially feasible. With the cost to access Low Earth Orbit rapidly decreasing, we are witnessing a rush to place commercial assets in orbit. Space advertisements raise issues relating to astronomical impacts, space debris, content control, aesthetics, space sustainability, national appropriation of property rights and the view of space as a 'global common'. The emergence of the commercialisation of space has brought with it new legal challenges, but the international regulatory framework has been slow to adapt. This paper will consider the shortfalls in the current legal framework for space advertising and pathways forward for global governance.

RÉSUMÉ

L'exploration et les activités spatiales ne sont plus le domaine exclusif des États. À l'ère de l'espace commercial, les entreprises spatiales privées poursuivent leurs programmes d'entreprise parallèlement aux initiatives publiques des agences spatiales nationales. Si les propositions de publicité spatiale ne sont pas nouvelles, ces projets sont désormais plus réalisables techniquement et financièrement. Le coût d'accès à l'orbite terrestre basse diminuant rapidement, nous assistons à une ruée pour placer des actifs commerciaux en orbite.

Les publicités spatiales soulèvent des questions relatives aux impacts astronomiques, aux débris spatiaux, au contrôle du contenu, à l'esthétique, à la durabilité de l'espace, à l'appropriation nationale des droits de propriété et à la vision de l'espace comme un 'bien commun mondial'. L'émergence de la commercialisation de l'espace a entraîné de nouveaux défis juridiques, mais le cadre réglementaire international a été lent à s'adapter. Cet article examine les lacunes du cadre juridique actuel de la publicité spatiale et les voies à suivre pour une gouvernance mondiale.

KEYWORDS

Outer Space Treaty; Low Earth Orbit; Space Advertising; Delimitation of Outer Space; Space Debris; Soft Law

I. INTRODUCTION

In December 2001, the United Nations General Assembly tasked the Committee on the Peaceful Uses of Outer Space (COPUOS) to consider the issue of obtrusive space advertising that could interfere with astronomical observations.[1] More than two decades later, with Low Earth Orbit (LEO) much cheaper for the private sector to access, space advertising is now an even more pressing legal issue for the international community. As demonstrated by the periodic launches of SpaceX's 'Starlink' mega-constellation, the placing of commercial space assets in LEO is a fast-growing and potentially profitable industry.

It seems unlikely that outer space will remain free from advertising. The vast blank canvas of the night sky holds simply too much financial potential. However, space advertising raises a plethora of legal and ethical issues, ranging from content concerns, authorisation and compliance controls, impacts on ground astronomy, and space debris. This paper will consider some of the unique legal challenges posed by commercial space advertising and the effectiveness of current international law in addressing these issues.

Part I of this paper presents an overview of past and present space advertising projects. Part II briefly covers the existing international legal framework for international space advertising activities. Part III analyses some of the conceptual challenges that exist under international law in relation to space advertising. Finally, Part IV considers the potential for a soft law approach as a way forward to bridge the normative gaps in the existing international law.

II. SPACE ADVERTISING PROJECTS – PAST AND PRESENT

There has been a long history of proposed (and aborted) space advertising projects.[2] In 1989, France proposed 'The Ring of Light' to light up the sky with satellites in celebration of the bicentennial of the French Revolution and the centennial anniversary of the Eiffel Tower. The project was discarded after it generated significant international protest. In April 1993, a United States company, Space Marketing Concepts, proposed to launch an inflatable 1-kilometre square mylar sheet into space to display commercial communications (and also scientific instruments), known as

[1] *International Cooperation in the Peaceful Uses of Outer Space*, GA Res 56/51, UNGAOR, 56th Sess, UN Doc A/RES/56/51 (2001).
[2] See generally Zeldine O'Brien, "Advertising in Space: Sales at the Outer Limits" in Jai Galliott, ed, *Commercial Space Exploration* (London: Routledge, 2015) at 91.

the 'Space Billboard' project. The proposed billboard sheet was estimated to have the illumination capacity equivalent in size and brightness to that of the full Moon. The project was never implemented. In 1996, space advertising was proposed for the Atlanta Olympics, but failed to receive the necessary funding.[3] Then in 1999, France once again proposed an illumination project – this time to celebrate the fiftieth anniversary of the United Nations Educational, Scientific and Cultural Organization (UNESCO). Known as the 'Star of Tolerance', the project involved launching a pair of large, tethered balloons in LEO which would glow as bright as Venus. The project was abandoned due to intense international objections.[4]

A less clear cut, but still nevertheless concerning example of space advertising, is the *Humanity Star* project, secretly launched by Rocket Lab in New Zealand in 2018.[5] The *Humanity Star* satellite was a three-foot-wide geodesic sphere made from carbon fibre and fitted with 65 highly reflective panels. In essence, it looked like a large reflective disco ball. It would be the brightest object in the night sky for the duration of its time in orbit (which was projected to be approximately nine months long).

The aim of the *Humanity Star* project, as enunciated by Rocket Lab's chief executive and founder Peter Beck, was to be a "reminder to all on Earth about our fragile place in the universe", and to "create a shared experience for everyone on the planet".[6] Concern was expressed over the impact the reflective sphere would have on astronomy and whether space was an appropriate place to display what essentially amounted to a piece of art.[7] The *Humanity Star* was prematurely pulled back to Earth after only two months in low orbit and burned up in the Earth's atmosphere.

The potential for space advertising hit the international media once again in January 2019, with StartRocket's 'Orbital Display' project. StartRocket, a Russian company, declared its intention to launch display

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[3] International Astronomical Union, *Obtrusive Space Advertising and Astronomical Research*, UN Doc A/AC.105/777 (International Astronomical Union, 2001) [IAU Paper].
[4] *Ibid* at para 18.
[5] Michael McGowan, "'Space Graffiti': Astronomers Angry over Launch of Fake Star into Sky", *The Guardian* (26 January 2018), online: <www.theguardian.com/world/2018/jan/26/space-graffiti-astronomers-angry-over-launch-of-fake-star-into-sky>.
[6] *Ibid*.
[7] Colombia University Professor David Kippling tweeted, "This is stupid, vandalizes the night sky and corrupts our view of the cosmos" as quoted in Sarah Scoles, "Space Billboards Are Just the Latest Orbital Stun", *Wired* (18 January 2019), online: <www.wired.com/story/space-billboards-are-just-the-latest-orbital-stunt/>. See also: Loren Grush, "Rocket Lab's Disco Ball Satellite has Plunged Back to Earth — and Some Aren't Sad to See It Go", *The Verge* (22 March 2018), online: <www.theverge.com/2018/3/22/17144208/rocket-lab-humanity-star-satellite-new-zealand-astronomy>.

billboards in Low Earth Orbit (LEO) which would shine on and off several times a day.[8] The project proposes using 200-300 CubeSats (small, low-cost satellites) in LEO each containing a folding 'sail' capable of reflecting the sun's light. Each sail would form a 'pixel' and together would create a giant billboard panel approximately 50 kilometres square.[9] The sails would roll down to display the advertisement, and then roll back up again to turn it off.

The project leader of Orbital Display, Vlad Sitnikov, expressed his view that space adverting is the next logical step:

> We are ruled by brands and events. The Super Bowl, Coca-Cola, the Olympic Games, Mercedes, FIFA, Supreme, or the Wall of Mexico. The economy is the blood system of society. If we live in space, then humanity will have to start spreading its culture in space.[10]

While initially indicating their plan for a 2020 test launch, the project timeline was adjusted. The test launch date was set for January 2021 and the formation deployment in July 2021.[11] To date, StartRocket has not released any subsequent statements confirming whether these launches occurred (or even if they were undertaken). At the time of writing, the Orbital Display website has not been updated regarding the project's status.

In August 2021, SpaceX and a Canadian company, Geometric Energy Corporation, announced that they would launch a satellite fitted out with a pixelated display screen.[12] Once in orbit, the satellite will apparently use selfie-sticks to capture its display screen and the footage will be livestreamed to YouTube or Twitch. Interested parties will be able to purchase advertisement space on the satellite's display screen using cryptocurrency.[13]

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[8] See SkyRocket, online: <theorbitaldisplay.com>.
[9] *Ibid.*
[10] Louis de Gouyon Matignon, "Orbiting Space Billboard", *Space Legal Issues* (23 January 201), online: <www.spacelegalissues.com/space-law-orbiting-space-billboards/>.
[11] Brief information on this timeline can be found on SkyRocket's website. See SkyRocket, online: <www.theorbitaldisplay.com/formation/>.
[12] Kate Duffy, "SpaceX and a Canadian Startup Plan to Launch a Satellite That Will Beam Adverts into Space. Anyone Can Buy Pixels on the Satellite's Screen with Dogecoin." *Business Insider* (7 August 2021), online: <www.businessinsider.com/spacex-start-up-launch-satellite-space-advertising-cryptocurrency-2021-7>.
[13] Alyse Stanley, "Soon You May Be Able to Buy Space Ads with Dogecoin." *Gizmodo* (8 August 2021), online: <gizmodo.com/soon-you-may-be-able-to-buy-space-ads-with-dogecoin-1847446481>.

Many of the historical space advertising projects failed to be implemented due to lack of scientific know-how, technical failures, lack of political or financial support – or a combination thereof.[14] As we are now heading well into the 21st century, many of the technical issues faced by these earlier projects pose less of a constraint. The International Astronomical Union (IAU) has raised serious concerns relating to the interference space advertising will have on ground astronomy.[15] According to the IAU, any object that is visible with the naked eye will ruin astronomical observations conducted in the same direction.[16]

Furthermore, where the brightness of the object in the night sky is comparable to the full Moon, it will generate so much scattered light in the Earth's atmosphere that observations of all faint objects would become impossible.[17] This concern has also been expressed by John Barentine of the International Dark-Sky Association. Barentine stated that light rays from a space billboard would interfere with the ability of astronomers to undertake astronomical research from the ground.[18] The IAU also raised the concern that the glow from a space advertisement placed in the night sky with an equivalent brightness to Venus could potentially damage the ultra-sensitive detector systems used on large telescopes.[19]

It is noted that many of the concerns expressed about space advertising are similar to those that were voiced about SpaceX's Starlink megaconstellation.[20] The Starlink project involves launching a large network of communication satellites in LEO to deliver high-speed, low-latency internet to users all over the world.[21] To date, it is estimated that over 3000 small Starlink satellites have been launched, however SpaceX has requested approval from the International Telecommunication Union (ITU) for 42,000 satellites as part of the whole Starlink project (of which the US Federal Communications Commission (FCC) has reportedly already authorised 12,000 satellites).[22] Notably, the many concerns about the Starlink project did not prevent the green light being given by the FCC.

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[14] IAU Paper, *supra* note 3 at para 15.
[15] *Ibid*.
[16] *Ibid* at para 14.
[17] *Ibid* at para 15.
[18] See Louis de Gouyon Matignon, *supra* note 10.
[19] See IAU Paper, *supra* note 3 at para 24.
[20] See National Science Foundation's NOIRLab and the American Astronomical Society, "Impact of Satellite Constellations on Optical Astronomy and Recommendations Towards Mitigations" (2020), online (pdf): <aas.org/sites/default/files/2020-08/SATCON1-Report.pdf>.
[21] See Starlink, online: <www.starlink.com/technology>.
[22] See Mike Wall, "SpaceX's Starlink Constellation Could Swell by 30,000 More Satellites' *Space*" (17 October 2019), online: *Space.com* <www.space.com/spacex-30000-more-starlink-satellites.html>. See also Starlink statistics online: *Jonathan's Space Pages* < planet4589.org/space/stats/star/starstats.html>.

However, SpaceX indicated that they would work to reduce the reflective brightness of its satellites and have since introduced 'DarkSat,' an experimental satellite with a darkened phased array and parabolic antennas designed to reduce orbital brightness.[23]

Additional concerns over space advertising relate to control of content, whether the right to free speech should extend to the night sky and environmental impacts such as space debris. Some of these concerns will be discussed further in this paper.

III. THE INTERNATIONAL LEGAL FRAMEWORK FOR SPACE ACTIVITIES

With the launch of the first artificial satellite, *Sputnik*, in 1957 and the subsequent 'Space Race', there was a pressing need to develop and clarify international law in relation to activities in outer space. This movement culminated in 1967 with the fundamental treaty of international space law: the Outer Space Treaty.[24] Together with four subsequent agreements (the Rescue Agreement 1968,[25] the Registration Convention 1975,[26] the Liability Convention 1972,[27] and the Moon Agreement 1979),[28] these treaties established a framework with guiding principles for international space exploration and activities.[29] This paper will, at times, refer to these five agreements collectively as the 'Space Agreements'.

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[23] See "Astronomy Discussion With National Academy Of Sciences", *SpaceX Updates* (28 April 2020) online: <www.spacex.com/updates/>.

[24] *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, 27 January 1967, 610 UNTS 205, 18 UST 2410, TIAS No 6347, 6 ILM 386, (entered into force on 10 October 1967) [*Outer Space Treaty*]. The Outer Space Treaty has been ratified by one hundred and twelve States (including the three major space-faring nations – the United States, Russia and China) and has been signed by an additional twenty-eight States. See "Status of International Agreements relating to Activities in Outer Space", *UNOOSA* (2022) online: <www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/status/index.html>.

[25] *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space*, 22 April 1968, 672 UNTS 119, 19 UST 7570, TIAS No 6599, 7 ILM 151 (entered into force 3 December 1968) [*Rescue Agreement*].

[26] *Convention on Registration of Objects Launched into Outer Space*, 6 June 1975, 28 UST 695, 1023 UNTS 15 (entered into force 15 September 1976) [*Registration Convention*].

[27] *Convention on the International Liability for Damage Caused by Space Objects*, 29 March 1972, 961 UNTS 187, 24 UST 2389, TIAS 7762, 10 ILM 965 (entered into force 1 September 1972) [*Liability Convention*].

[28] *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, 5 December 1979, 1363 UNTS 3 (entered into force 11 July 1984) [*Moon Agreement*].

[29] The Moon Agreement received only 6 ratifications (with 4 additional signatories and 7 accessions) due to its restrictive wording relating to national appropriation of space resources and is largely considered to be a failure.

In addition to the Space Agreements, there are five non-binding sets of principles (adopted by the United Nations General Assembly) that were negotiated to address specific space uses and activities.[30]

The Outer Space Treaty, being a product of its time, centred on the space activities undertaken by States, with a clear focus on ensuring the peaceful use of outer space. Article I of the Outer Space Treaty provides that the exploration and use of outer space shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all humankind. The second paragraph in Article I provides that outer space, including the Moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind.[31] Article II of the Outer Space Treaty includes a prohibition on national appropriation, stating that outer space, the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.[32] Further, Article III of the Outer Space Treaty obliges States to carry out activities in space in accordance with international law, including the Charter of the United Nations and "in the interest of maintaining international peace and security and promoting international co-operation and understanding".[33]

Article VI of the Outer Space Treaty attributes international responsibility to States for the activities of non-governmental entities and requires such activities receive authorization and continuing supervision by the appropriate State Party to the Treaty. Article VI provides strong motivations for State to introduce national space legislation, in order to ensure that States can compel corporate entities undertaking space activities to indemnify the State against potential liability under the Space Agreements.[34] As noted by Masson-Zwaan, Article VI was a compromise

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[30] *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*, GA Res 1962 (XVIII), UNGAOR, 18th Sess, UN Doc A/RES/1962 (XVIII) (1963); *Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting*, GA Res 37/92, UNGAOR, 37th Sess, UN Doc A/RES/37/92 (1982); *Principles relating to Remote Sensing of the Earth from Outer Space*, GA Res 41/65, UNGAOR, 41th Sess, UN Doc A/RES/41/65 (1986); *Principles relevant to the Use of Nuclear Power Sources in Outer Space*, GA Res 47/68, UNGAOR, 47th Sess, UN Doc A/RES/47/68 (1992) and *Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries*, GA Res 51/122, UNGAOR, 51th Sess, UN Doc A/RES/51/122 (1996).

[31] See *Outer Space Treaty, supra* note 24 art I.

[32] *Ibid*, art II.

[33] *Ibid,* art III.

[34] See Steven Freeland, "Fly Me to the Moon: How Will International Law Cope with Commercial Space Tourism?" 11:1 Melbourne Journal of International Law 90 at 17. The texts of several States' national space legislation are available online. See UNOOSA, "National Space Law", online: <www.unoosa.org/oosa/en/ourwork/spacelaw/nationalspacelaw/index.html>.

between States in favour of allowing private space activities and those States that wished to prohibit non-governmental space activities.[35]

Both the Registration Convention and the Liability Convention are relevant to the regulation of space advertising. The Registration Convention requires a launching State to maintain a national register of objects launched into earth orbit or beyond and to furnish details from the register to the Secretary-General of the United Nations.[36] The Liability Convention attributes legal liability for damage caused by a space object to the 'launching State' – meaning "[a] State which launches or procures the launching of a space object," or "[a] State from whose territory or facility a space object is launched."[37]

As the Space Agreements impose duties and liabilities on States in relation to 'space objects', it is necessary to consider whether a space advertisement is a 'space object' under the Space Agreements.[38] No definition of the phrase 'space object' is included in the Outer Space Treaty. However, the Liability Convention and the Registration Convention provide a partial definition, stating that a space object includes "component parts of a space object as well as its launch vehicle and parts thereof."[39]

This definition unhelpfully reuses the term 'space object' without providing clarity on the phrase itself.[40] In consideration of the pressing need for clarity on the definition of the term 'space object', the Colloquium of the International Institute of Space Law in 1991 devoted a special session to "Definitional Issues in Space Law".[41] Given the emergence of new technologies, it is submitted that a broad definition of the phrase

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[35] *Ibid.*

[36] See *Registration Convention*, *supra* note 26 arts II and IV. Article IV specifies that the following details must be furnished to the Secretary-General of the UN: (a) name of launching State or States; (b) an appropriate designator of the space object or its registration number; (c) date and territory or location of launch; (d) basic orbital parameters; (e) general function of the space object.

[37] See *Liability Convention, supra* note 27 art I. Pursuant to Article VI of the Outer Space Treaty the State bears international responsibility for national activities in outer space.

[38] See *Outer Space Treaty, supra* note 24 art VIII; *Registration Convention, supra* note 26 art II and *Liability Convention, supra* note 27 art I. It is noted that the phrases 'objects launched into space' has also been used in the Outer Space Treaty and has been taken to also be a reference to 'space objects'. See Bin Cheng, *Studies in International Space Law* (Oxford University Press, 1997) at 18; Arpit Gupta, "Regulating Space Debris as Separate from Space Objects" (2019) 41 University of Pennsylvania Journal of International Law 223 at 230; Stephan Hobe et al, eds, *Cologne Commentary on Space Law - Outer Space Treaty* (Berlin: BWV Berliner Wissenschafts-Verlag, 2017).

[39] See *Registration Convention*, *supra* note 26 art I(b) and *Liability Convention, supra* note 27 art 1(d).

[40] See Gupta, *supra* note 38 at 231.

[41] See Stephen Gorove, "Toward a Clarification of the Term Space Object - An International Legal and Policy Imperative" (1993) 21:1 Journal of Space Law 11–26 at 12.

'space object' (as proposed by leading space law scholars including Vladimír Kopal, Bin Cheng and Stephen Gorove) should be adopted: namely that the phrase 'space objects' covers any human-made object launched, or intended to be launched, by humans into outer space, including its component parts and its launch vehicle.[42] Accordingly, a space advertisement would be considered a 'space object' for the purposes of the Space Agreements.

It is noted at this point, that 'space advertising' is not specifically referenced in the Space Agreements – this is not surprising, given the era in which these treaties were concluded. However, it would be incorrect (or at least premature) to conclude that the mere absence of *specific* international legal provisions on space advertising amounts to such activities being wholly unregulated.[43] In addition to the broad principles in the Space Agreements, general (customary) international law, non-binding international agreements and national law might play a role. This will be discussed further in the last section of this paper as a potential way forward. Some of the conceptional challenges for the regulation of commercial space advertising under the ambit of the existing international space law framework will now be discussed.

IV. CONCEPTUAL CHALLENGES FOR REGULATING SPACE ADVERTISING

The concept of space advertising is not new. However, with the rapid advances in space technology capabilities, commercial space advertising could soon be a reality. There is concern that the Space Agreements do not properly consider the rise in commercial actors in the space industry and advances in technology.[44]

Space advertising in the night sky is a multi-faceted global issue with widespread impacts for both Earth and outer space. As such, it is important that international law play a role in establishing consistent obligations for the governance of space advertising. Some of the

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[42] See Gorove, *ibid*; Vladimir Kopal, "Some Remarks on Issues Relating to Legal Definitions of Space Objects, Space Debris and Astronaut" (1994) Proceedings of the 37th Colloquium on the Law of Outer Space; Bin Cheng, "International Responsibility and Liability for Launch Activities" (1995) 20 Air & Space Law 297; Cheng, *supra* note 38 at 508; Ioana Bratu, Arno Lodder & Tina van der Linden, "Autonomous Space Objects and International Space Law: Navigating the Liability Gap" (2021) 18:3 Indonesia Journal of International Law; *Gupta*, *supra* note 38; Tanja L Masson-Zwaan & Stephan Hobe, *The Law of Outer Space: An Experience in Contemporary Law-Making, by Manfred Lachs, Reissued on the Occasion of the 50th Anniversary of the International Institute of Space Law* (Leiden, Netherlands: The Brill, 2010) c VI.

[43] See generally Francis Lyall & Paul B Larsen, *Space Law: A Treatise*, 2nd ed (Abingdon, Oxford: Routledge, 2018) at 414.

[44] See, eg, Petr Boháček, "Peaceful Use of Lasers in Space? Potential, Risks, and Norms for Using Lasers in Space", (2022) 61 Space Policy 1 at 6.

conceptional challenges under international law for regulating space advertising include definitional disagreements, space debris, space as a global common, State responsibility for national activities and enforcement and compliance.

A. DEFINITIONAL CHALLENGES

In analysing the regulation of 'space advertising' under international law, consideration must first be given to the definitional parameters of the phrase. Comprising two essential elements – 'outer space' and 'advertising' – the definition of this term poses unique challenges for international lawyers and policy makers in attempting to obtain universal agreement on regulations.

1. OUTER SPACE

Interestingly, while the phrase 'outer space' is widely used in the Space Agreements, there is no precise (nor universally accepted) definition of 'outer space' in international space law.[45] 'Outer space' conjures up a common picture of our solar system and far off galaxies in an expanding universe. However, difficulties arise when pinpointing the precise delineating line that marks the beginning of 'outer space'. In this regard, 'outer space' is intrinsically linked to the legal definition of earth's airspace (and territorial rights that exist thereto). As Cheng notes, the demarcation denoting the beginning of outer space, "while hitherto unimportant in air law, is one of the first and most important problems that have to be tackled in space law". [46]

Pursuant to Article 1 of the Chicago Convention, "every State has complete and exclusive sovereignty over the airspace above its territory".[47] However, there is no defined limitation of the 'height' of territorial airspace in the Chicago Convention.[48] In comparison, the Outer Space Treaty states that outer space is "not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means". There is no clear consensus on where the terrestrial airspace ends and 'outer space' begins, despite this being a long-standing

[45] Michael Byers & Andrew Simon-Butler, 'Outer Space' in *Max Planck Encyclopedia of Public International Law*, (Oxford University Press, 2020).
[46] See Cheng, *supra* note 38 at 227 referencing his previous work in Bin Cheng, "From Air Law to Space Law" (1960) 13:1 Current Legal Problems 228 at 230.
[47] Convention on International Civil Aviation, 7 December 1944, 15 UNTS 295, ICAO Doc 7300/6 (entered into force 4 April 1947).
[48] Ram S Jakhu, Tommaso Sgobba & Paul Stephen Dempsey, eds, *The Need for an Integrated Regulatory Regime for Aviation and Space: ICAO for Space?* (Springer Science & Business Media, 2011) at 50.

agenda item for consideration by COPUOS.[49] As noted by Michael Byers and Andrew Simon-Butler, the "lack of agreement on this issue represents one of the most peculiar features of space law".[50] Unsurprisingly, the demarcation line is a controversial and highly political topic. Imposing a clear geographical height boundary on terrestrial airspace arguably acts as a limitation on sovereign territory, which, predictably, has been met with resistance from States.[51]

The spatial approach to the definition and delimitation of outer space proposes a fixed boundary between airspace and outer space established on the basis of either scientific or technological criteria.[52] The Kármán Line is often referred to as the marker between Earth and the edge of space. The 'line' sits at an approximate altitude of 100km above sea level and is named after the Hungarian-American aerodynamicist Theodore von Kármán.[53] The calculations by von Kármán were founded on the aeronautical flight capabilities of aeroplanes at that time – namely the altitude limit above which the atmosphere becomes thin and requires the aircraft travelling through it to be at a certain speed to move forward (accordingly above this line traditional aircraft were unable fly).[54] This 'line' was then rounded up to 100km.[55]

The Kármán Line is adopted by the Fédération Aéronautique Internationale (FAI) (the leading international body for aeronautical and astronautical activities). Australia, Kazakhstan, and Denmark have also referenced the 100km Kármán Line in demarking the beginning of outer space and outer space activities.[56]

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[49] *Ibid* at 53–54. See also O'Brien, *supra* note 2 at 92.
[50] See Byers & Simon-Butler, *supra* note 45.
[51] See COPUOS, *Matters Relating to the Definition and Delimitation of Outer Space: Replies of the International Institute of Space Law (IISL)* (UN Doc A/AC.105/C.2/2017/CRP.29, 2017) [COPUOS-IISL].
[52] *Ibid*.
[53] See A Ferreira-Snyman, "Legal Challenges Relating to the Commercial Use of Outer Space, with Specific Reference to Space Tourism" (2014) 17(1) Potchefstroom Electronic Law Journal 2 at 10.
[54] See Gangal T, "The Non Kármán Line: An Urban Legend of the Space Age" (2017) 41 Journal of Space Law 151 at 177. Gangal concludes that the Kármán Line "has never found a practical use in engineering, and has been misinterpreted by lawyers as having some physical significance, which in fact it does not have."
[55] See Alex S Li, "Ruling Outer Space: Defining the Boundary and Determining Jurisdictional Authority" (2021) 73(4) Oklahoma Law Review 725.
[56] See COPUOS-IISL, *supra* note 52 at 1.

However, other international bodies and national space laws utilise different definitions. For example, the US National Oceanic and Atmospheric Administration notes that the US military and the National Aeronautics and Space Administration (NASA) define 'outer space' as commencing from 50 miles above the surface of Earth (being 12 miles *below* the Kármán Line).[57]

Interestingly, the Kármán Line was referred to recently in the 'race-to-space' between US billionaire owners of commercial private space companies. When Richard Branson's Virgin Galactic's *Space Ship 2*, journeyed into 'space' on 11 July 2021 by reaching 53 miles above Earth, Jeff Bezos (owner of the competing spaceflight company Blue Origin), responded on twitter pointing out that Virgin Galactic had not crossed the Kármán Line.[58]

While anecdotal, the exchange between Bezos and Branson does help to illustrate the lack of universal acceptance of the Kármán Line as the fixed boundary between Earth's atmosphere and outer space. The existence of a fixed line of demarcation would be appealing and offers a neat solution for the legal division between Earth and outer space. However, with technological advances since the 1950s, changes in State policies and power, and the emergence of new commercial players in the space industry, it is far from certain that the Kármán Line could be considered sufficiently universally accepted (so as to be customary international law) as to the demarcation of 'outer space'.

The 'functional' approach to the definition of the beginning of outer space may assist in side-stepping the difficulties associated with agreeing on a 'physical' boundary. This approach considers the 'function' (namely the objective and purpose) of the object that has been launched into outer space.[59] The functional approach has been advanced in relation to suborbital flights which have been performed below 100km, as well as up to the upper boundary of LEO.[60]

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[57] See "Where is Space?" (22 February 2016), online: *National Environmental Satellite Data and Informative Service* <www.nesdis.noaa.gov/content/where-space>.

[58] See 'Lia De La Cruz and Deborah Byrd, "The Billionaire Space Race and The Karman Line", *Earth Sky* (14 July 2021) online: <earthsky.org/human-world/the-billionaire-space-race-and-the-karman-line/>.

[59] See Paul Stephen Dempsey & Maria Manoli, "Suborbital Flights and the Delimitation of Airspace *vis-à-vis* Outer Space: Functionalism, Spatialism and State Sovereignty" (2017) 42 Annals of Air and Space Law 209 at 225.

[60] See Jakhu, Sgobba, & Dempsey, *supra* note 48 at 60; Dempsey & Manoli, *supra* note 59; Freeland, *supra* note 34; Stephan Hobe, "Aerospace Vehicles: Questions of Registration, Liability and Institutions" (2004) 29 Annals of Air and Space Law 377.

Drawing on an example from another emerging commercial space field, suborbital space tourism, Steven Freeland advocates for the adoption of a functional approach to trigger space law over air law.[61] That is, as the proposed 'function' of the spacecraft carrying tourists involves the intention to fly into and in outer space, space law is the appropriate *corpus juris* to regulate the entire journey.[62]

Considering space advertising under the functional approach, Zeldine O'Brien proposes that whether an advertisement is considered 'space advertising' would thus be determined in regard to the 'intended function of the object on or in which the advertisement is placed'.[63] For example, if the function of the launched object (in this case, the 'advertisement') is to stay in orbit and appear in the night sky, then it could be considered 'space advertising' and subject to the rules of space law. This assists in drawing a clear distinction between orbiting space advertising, and transient advertisements in territorial air space – such as sky writing and helium blimp balloons.

This author's view is that the absence of an agreed upon definition of 'outer space' is problematic given the increase in commercial activities in outer space (particularly with regards to suborbital or low LEO space activities) It is also noted that a concept of a 'Near-Space' zone has been posited for space activities that occur at altitudes between 20km-160km.[64] However, the implementation of a 'Near-Space' zone would require the creation of a new regulatory framework. Achieving legal uniformity on the definitions of the demarcation between air space, outer space (and the 'Near-Space' zone, if accepted), has so far been elusive. For this reason, at least as an interim measure, the author advocates for the adoption of the functional approach to the definition and delimitation of 'outer space' – at least in relation to the regulation of space advertising. This way forward would provide clarity on the definition of when an advertising project would be considered a space advertisement and subject to the obligations and liabilities under the Space Agreements.

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[61] Freeland, *supra* note 34.
[62] *Ibid* at 102. Freeland's preferred option would be a comprehensive legal regime for space tourist flights.
[63] See O'Brien, *supra* note 2 at 93.
[64] See Dempsey & Manoli, *supra* note 59 at 43. Dempsey and Manoli consider the 'Near-Space' zone in the context of the rising 'NewSpace' activities – a term that relates to the emerging non-traditional space activities that use advanced space technologies including human space flight, extra-terrestrial settlement, exploitation of celestial bodies' natural resources.

2. ADVERTISING

Next, one needs to consider what constitutes an 'advertisement' in relation to outer space for the purpose of regulation. At its most simple formulation, space advertising has been defined as "advertising in outer space that is capable of being recognised by a human being on the surface of the Earth without the aid of a telescope or other technological device."[65] Thus a distinction has emerged between what is determined to be 'obtrusive' space advertising on one hand, and 'nonobtrusive' space advertising on the other.[66]

Nonobtrusive advertising refers to the category of advertisements that are *not* visible to the naked eye once in orbit. We have already witnessed nonobtrusive space advertising by way of patches on the uniforms of astronauts and logos on launch vehicles and payloads. The distinction between obtrusive and nonobtrusive space adverting has been advocated for and adopted by the US. In 2000, the US introduced legislation prohibiting the Secretary of Transportation from issuing or transferring a launch licence for a commercial payload containing any material to be used for the purposes of obtrusive space advertising.[67]

However, an exemption was carved out for 'nonobtrusive' space advertising which is specified as including advertising on:

(1) "commercial space transportation vehicles";

(2) "space infrastructure payloads";

(3) "space launch facilities"; and

(4) "launch support facilities."[68]

Given the relatively low-impact nature of nonobtrusive space advertising, this paper will focus on the issues raised by *obtrusive* space advertising.

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[65] See Title 51 - National And Commercial Space Programs, 51 U.S. Code § 50902 (12).
[66] By way of example, COPUOS' Scientific and Technical Subcommittee was specifically tasked to consider the issue of limiting 'obtrusive' space advertising. See International Cooperation in the Peaceful Uses of Outer
Space, GA Res 56/51, 10 December 2001, A/56/548) at paragraph 15(c)(ii), online: <www.unoosa.org/pdf/gares/ARES_56_51E.pdf>
[67] 51 U.S. Code § 50911.
[68] 51 U.S. Code § 50911(c).

The IAU proposed that a definition of obtrusive 'advertising' in outer space could be formulated based on the following two criteria:

(1) where the advertisement has no factual, scientific, or technical function apart from attracting the attention of people on Earth; and

(2) the revenue from the advertisement flows solely to the originators of the project.[69]

The first element of the IAU definition involves a process of 'categorising' the intent or purpose of the space advertisement. While 'technical' or 'scientific' are easily understood terms, 'factual' is less clear. This term is not defined by the IAU. If an advertisement is based in fact, would it fall outside the scope of regulatory provisions? And does it need to be based on undisputed facts? What if there is some evidence to support the 'fact' in the advertisement, but it is not fully understood, rejected by a minority of people or is controversial?

It is also noted that this definition does not provide an exception for 'educational' or 'informative' advertisements – unless such advertisements could be considered factual, scientific, or technical.

This issue of 'categorisation' of permissible content also raises issues of free speech and the right of expression. A parallel example of these issues can be drawn with skywriting messages. In Australia, skywriting is not specifically regulated.[70] In 2017, "Vote No" was scrawled in the sky as a protest against the marriage equality bill.[71] Then in 2019, the words "save unborn" and "choose life" were written in the Sydney skyline in opposition to abortion.[72] This political agenda was again on show in the Sydney sky with the words "Trump" (in 2017 after winning the election)

[69] IAU Paper, *supra* note 3 at para 20.
[70] Public political messages are regulated by the Australian Communications and Media Authority – however, the *Commonwealth Electoral (Authorisation of Voter Communication) Determination 2018* specifically excludes skywriting on the basis that compliance with the authorisation framework would be "impractical". The Australian Advertising Standards Bureau has guideline standards for non-political advertising and the laws relating to defamation and criminal offensive language might apply, however it is noted that these laws have not been tested in a court of law. See generally Bradley L Garrett, 'Free Speech or Sky Vandalism? Here's What the Law Says about Skywriting in Australia' *Daily Bulletin* (20 August 2019) online: <www.dailybulletin.com.au/news/47752-free-speech-or-sky-vandalism-here-s-what-the-law-says-about-skywriting-in-australia>
[71] Meg Watson, "Who Owns Australia's Sky and What Can You Actually Write There?" *The Guardian* (25 November 2020) online: < www.theguardian.com/lifeandstyle/2020/nov/25/who-owns-australias-sky-and-what-can-you-actually-write-there>.
[72] *Ibid.*

and "Trump 2020" (in response to President Trump's 2020 election loss).[73] At least for skywriting, one may draw some comfort from the fact that it is transient in nature and location specific.

By contrast, space advertising has the potential to reach a much larger audience, across geographical borders, and for longer periods of time. How will the international community react to space advertising that supports a political agenda? What if the space advertisement is tantamount to political propaganda? Where one sits on this issue may be directly related to your viewpoint on the right to free speech – which is itself a highly controversial topic.

The second element of the IAU definition involves the revenue stream of the space advertising project. This appears to be an attempt to draw a distinction between 'commercial' advertising and not-for-profit advertising, presumably on the basis that the latter involves a public service. However, it may be challenging to draw a clear line between advertisements that are purely 'commercial' and those that are public-private partnerships. If some proceeds are donated to a charity or are designated for fundraising for a not-for-profit, such space advertising projects could arguably fall outside the scope of the definition suggested by the IAU.

It is noted that the Space Agreements do not currently categorise space objects in the way suggested by the IAU. The subjective determination of an object's usefulness or desirability is of no relevance to its categorisation as a 'space object'.[74] As Cheng notes, a "lump of rock launched into outer space for no reason at all but for the fun of it must still be considered a space object."[75] Further, the Space Agreements provide that States have free 'use' of outer space under Article I of the Outer Space Treaty. The categorisation of 'permissible' vs 'non-permitted' space advertising 'objects' based on the subjective inherent purpose of the project and its financial stream would depart from existing space law.

It is noted that many of the concerns raised over space advertising such as ramifications for the space environment, orbital clutter and impact on astronomical observations will occur regardless of the intent or revenue stream of the space advertisement. Nevertheless, there is a need for clarity on the definition of 'advertising' in outer space in order for international regulation of space advertising to be effective. The simplest and most succinct approach would be to adopt a broad definition of

[73] *Ibid.*
[74] See Cheng, *supra* note 38 at 506.
[75] *Ibid.*

advertising that includes any space object that is viewable in the night sky by the naked human eye that displays, communicates, or promotes a product, service, or cause. The debate would then turn on the content and scope of the normative provisions to regulate (or prohibit) the activity at both the international and national level.

B. STATE RESPONSIBILITY FOR COMMERCIAL ACTIVITIES

As previously mentioned, Article VI of the Outer Space Treaty imposes international responsibility on States that are party to the Treaty for national space activities, regardless of whether such activities are carried out by government, or non-governmental entities.[76] Specifically, Article VI of the Outer Space Treaty states:

> States Parties to the Treaty shall bear *international responsibility for national activities* in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by *non-governmental entities*, and for *assuring* that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require *authorization and continuing supervision* by the appropriate State Party to the Treaty. [Emphasis added]

As surmised by Lyall and Larsen, Article VI assigns rights, obligations and control relating to outer space to States.[77] It is noted that from the first space activities, outer space was viewed as being similar to a *res communis omnium* with a corresponding 'freedom' of use.[78] States do not need the prior consent of other States in order to conduct activities in outer space.[79] This principle of customary international law was recognised by Judge Lachs in the *North Sea Continental Shelf Cases* in considering the legal challenges posed by the rapid advances in technology and science:

> [t]he first instruments that man sent into outer space traversed the airspace of States and circled above them in outer space, yet the launching States sought no permission,

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[76] See Bin Cheng, "Article VI of the 1967 Space Treaty Revisited: 'International Responsibility,' 'National Activities,' and 'The Appropriate State'" (1998) 26 Journal of Space Law 7 at 14.
[77] See Lyall & Larsen, *supra* note 43 at 418.
[78] See Freeland, *supra* note 34 at 99–100.
[79] *Ibid*.

> nor did the States protest. This is how the freedom of movement into outer space, and in it, came to be established and recognized as law within a remarkably short period of time.[80]

It follows that it is within the power of States to authorise access and activities by its nationals in outer space, provided such activities are consistent with the provisions of the Outer Space Treaty and associated international agreements.[81] Accordingly, a private business wishing to place an advertisement in outer space may need only the authorisation of the State from where it will launch its space advertising into orbit. This framework makes sense in the context of the 'traditional' space launch – where the launching rocket is only visible briefly in the sky, and any remaining space object (eg. a satellite) is visibly non-obtrusive. However, a space advertisement could be (intentionally or otherwise), visible in a geographical location *other* than the territory from where it was launched. States and their nationals may be potentially subjected to the presence of a prominent space advertisement in their night sky over which they have no control and did not authorise.[82]

While this reasoning relegates the regulation of space advertising to the realm of national legislation, O'Brien argues that international law still plays an over-arching role.[83] O'Brien argues that authorisation ought not be given by a State under their domestic licensing regime if the proposed space advertisement project would violate international law.[84] Accordingly, States will bear international responsibility to ensure that space advertising projects by non-government entities comply with the provisions of the Space Agreements. This leads us to now consider some of the specific provisions of the Space Agreements and how they relate to commercial space advertising.

C. SPACE – A FREE FOR ALL?

A cornerstone principle of the Outer Space Treaty is founded on the statement that space exploration and activities are to be undertaken in the "common interest of all [hu]mankind". As stated in clause 2 of the Preamble of the Outer Space Treaty, State Parties recognise "the common

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[80] See *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) 1969 ICJ Reports 219 at 230.
[81] See O'Brien, *supra* note 2 at 95.
[82] On this point, a space advertisement can be distinguished from an orbiting satellite on the basis it the former is intended to be visible and identifiable in the night sky with the naked eye. In comparison, a satellite that is visible will appear like a small bright star to the naked eye.
[83] See O'Brien, *supra* note 2 at 95.
[84] *Ibid*.

interest of all [hu]mankind in the progress of the exploration and use of outer space for peaceful purposes." In turn, Article I of the Outer Space Treaty provides that the free exploration and use of space should be carried out "for the benefit and in the interests of all countries … and shall be the province of all [hu]mankind."

At face value, space advertisements that are for the public good, such as an emergency or public service announcement, would be consistent with the Outer Space Treaty's principles. Similarly, a case could be made that an advertisement by a not-for-profit entity relating to a humanitarian cause may fall within the spirit of Article I - or at least would not directly infringe Article I. While it is tempting to carve out an exception for such advertisements that have a 'higher-level' purpose, as previously noted, many of the same concerns on the ramifications of the space advertisement (e.g., astronomical interference, space debris, and content control) still apply regardless of the purpose of the advertisement or its 'profit' motive.

The Outer Space Treaty's principles reflect an underlying premise of *sharing* outer space and that space exploration and activities should be carried out in the spirit of the greater good and in the "common interest of mankind". By contrast, the core objective of a commercial space advertising project is to make a financial profit for the relevant corporate entities involved. As noted by Balsamello, in this regard space advertising reveals a tension between the commercial nature of these space activities and the cornerstone principles in the Outer Space Treaty.[85] It would be difficult in these circumstances (given its inherently commercial nature) to claim that a commercial space advertisement is "for the benefit" of all countries and the "province of all [hu]mankind".[86]

However, the same proposition could be advanced for the launch of commercial satellites (particularly in LEO) – which are permitted under the International Telecommunication Union regulatory framework and readily launched. It is posited that a distinction could be drawn between commercial satellites and space advertising on the basis that the very purpose of *commercial* advertising in outer space is to ultimately drive-up sales for the products or services being offered by the commercial entity. In comparison, commercial satellites (in addition to being 'for profit') have a purpose that provides some benefit to humankind – such as for navigation, communication, remote sensing, or scientific data collection.

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[85] See Frank J Balsamello, "When You Wish Upon a Falling Billboard: Advertising in an Age of Space Tourism" (2010) 98 Georgetown Law Journal 1769 at 1784.
[86] *Ibid*.

As previous mentioned, there is no specific ban or prohibition in the Space Agreements on space advertising. This raises the purported principle that is often derived from the decision of the Permanent Court of International Justice in the *Lotus* case - that States enjoy the freedom to act unless such action is specifically prohibited under international law.[87] The *Lotus* principle rests within the concept that States have complete sovereignty to control their own domestic affairs independent from other States and that such freedom is only limited by prohibitive rules to which a State has consented to be bound.[88] Although readily relied upon by scholars and international lawyers,[89] the *Lotus* principle has also been scrutinised as being outdated, misaligned and misinterpreted.[90] While the free 'use' of outer space in Article I of the Outer Space Treaty is a fundamental principle of international outer space law, it is not without limits and is therefore not absolute.[91] As surmised by David Tan, "the purpose of the existing space treaties was to ensure that no State would arrogate exclusive rights to itself or use them at the expense of others."[92]

Given the interconnected nature of the world, logic suggests that State sovereignty must be exercised with regard to the equal sovereign rights of other States.[93] It is submitted that in interpreting the normative provisions for outer space, a balance must be sort where the free 'use' of outer space by one State must be considered in light of the freedoms also afforded to every other State. Thus, as succinctly stated by Ogunsola Ogunbanwo, "the freedom to use outer space which is granted to

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[87] See *SS Lotus (France v Turkey)*, [1972] PCIJ Ser A, No 10.

[88] See An Hertogen, "Letting Lotus Bloom" (2015) 26:4 European Journal of International Law 901 at 901.

[89] Although it is noted that the Lotus principle is relied upon by lawyers representing States. For example in the ICJ *Advisory Opinion of 22 July 2010, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Austria and Denmark relied on the Lotus principle in their written statements and Germany, Croatia and Denmark referred to it in their pleadings. See Anne Peters, "Does Kosovo Lie in the *Lotus*-Land of Freedom?" (2011) 24:1 Leiden Journal of International Law 95–108.

[90] See Rosalyn Higgins, *International Trade Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law* (Martinus Nijhoff, 1991) at 114; Theodore Christakis, "The ICJ Advisory opinion on Kosovo: has International Law something to say about secession?" (2011) 24:1 Leiden Journal of International Law 73–86 at 79; Peters, *supra* note 89; Hugh Handeyside, "The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?" (2007) 29 Michigan Journal of International 72; Hertogen, *supra* note 88 at 925.

[91] See Cheng, *supra* note 38 at 402; Stephan Hobe & Kuan-Wei Chen, "Legal Status of Outer Space and Celestial Bodies" in Ram S Jakhu & Paul Stephen Dempsey, eds, *Routledge Handbook of Space Law* (Abingdon, Oxon: Routledge, 2017) at 32; Jakhu, Sgobba, & Dempsey, *supra* note 49 at 56. It is noted that this concept was proposed by Manfred Lachs is his eminent 1972 book: Manfred Lachs, *The Law of Outer Space* (Leide: Sijthof, 1972) at 117.

[92] David Tan, "Towards a New Regime for the Protection of Outer Space as the Province of All Mankind" (2000) 25 Yale J Int'l L 145 at 164.

[93] See Hertogen, *supra* note 89 at 902.; Anne Peters, "Humanity as the A and Ω of Sovereignty" (2009) 20:3 European Journal of International Law 513 at 528–529.; Georges Abi-Saab, "Whither the International Community?" (1998) 9:2 European Journal of International Law 248 at 254.

everyone must find its limits in the freedom of others."[94] Therefore, as An Hertogen submits in relation to the *Lotus* principle, the exercise of sovereignty can and should be "limited when it threatens co-existence and cooperation between States".[95] This is particularly the case in relation to actions that are to be undertaken in the 'shared' environment of outer space. On this reasoning, the absence of a specific prohibition on space advertising in the Space Agreements should not, in and of itself, permit the undertaking of the activity.

This leads us to consider the limitations included in the Space Agreements and in particular the prohibition on national appropriation. Article II of the Outer Space Treaty provides:

> [o]uter space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

While it is reasonably accepted that any claim of *territorial* sovereignty over outer space, in a proprietorial sense (e.g. planting your flag and claiming exclusive and territorial rights), would contravene Article II, the parameters of national appropriation via 'use' is less clear.[96] It is at this point worth noting that there is a movement away from the traditional interpretation of Article II as being broadly applicable to all space activities. Abigail Pershing notes the occurrence of not one, but *two* shifts in the interpretation by States of the non-appropriation principle in the Outer Space Treaty.[97]

According to Pershing, the first shift was a general move by States to advocate that the prohibition on national appropriation did not extend to extracted space resources.[98] This shift in the interpretation of Article II was evident in the objection taken by many States to the language proposed in the Moon Agreement in relation to its natural resources.[99] The

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[94] Ogunsola O Ogunbanwo, *International Law and Outer Space Activities* (Dordrecht: Springer Netherlands, 1975) at 66.
[95] See *Hertogen*, *supra* note 89 at 917.
[96] See Stephan Hobe & Philip de Man, "National Appropriation of Outer Space and State Jurisdiction to Regulate the Exploitation, Exploration and Utilization of Space Resources" (2017) 66:3 German Journal of Air and Space Law 460 at 461.
[97] See Abigail D Pershing, "Interpreting the Outer Space Treaty's Non-Appropriation Principle: Customary International Law from 1967 to Today" (2019) 44 Yale Journal of International Law 149 at 151.
[98] *Ibid*.
[99] See Cheng, *supra* note 38 at 374–380. Article 11 of the Moon Agreement provides that the moon and its natural resources are the 'common heritage of mankind', is not subject to national appropriation and that neither the 'surface nor the subsurface of the moon, nor any

United States and Luxembourg have both enacted national legislation to permit the commercial appropriation of space resources.[100] China is also investing in space mining research and development as part of its space program (both at the private and State level). In April 2021 the Chinese Shenzen Origin Space Technology Company Limited launched the NEO-1 spacecraft targeting the mining of space resources.[101]

Pershing proposes that a second shift in the interpretation of Art II of the Outer Space Treaty is currently underway, which allows for private appropriation of space property *in situ*.[102] This would be a significant departure from the standpoint of the non-appropriation of outer space under Article II and takes the purported exception for extracted resources significantly further.

With regards to space advertising, one pertinent argument is that commercial space advertising does not, at least at first glance, involve a claim of appropriation of any 'territory' through the use of outer space by commercial entities. Further, as proposed by Steven Gorove, the word "appropriation" indicates "a taking" which involves something more than just a casual or temporary use.[103] Following this reasoning, Article II of the Outer Space Treaty would not prohibit the 'use' of outer space by way of commercial space advertising.

However, this conclusion becomes precarious upon a closer consideration of the practicalities of regulating space advertising. Some examples of pertinent questions that will need to be considered include:

- Will the 'use' of the night sky for advertisements be divided up into time slots?

- Will there be exclusive 'ownership' or 'rights' to advertise in certain parts of the sky?

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part thereof or natural resources in place, shall become property of any State, international intergovernmental or non- governmental organization, national organization or non-governmental entity or of any natural person. However, it is noted that Article 11(5) of the Moon Agreement requires States to undertake to 'establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible.'

[100] U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114-90, 51303, 129 Stat. 721 (2015).

[101] See Ariel Cohen, "China's Space Mining Industry Is Prepping For Launch – But What About The US?" *Forbes* (26 October 2021) online: < www.forbes.com/sites/arielcohen/2021/10/26/chinas-space-mining-industry-is-prepping-for-launch--but-what-about-the-us/?sh=285b84c52ae0>.

[102] See Pershing, *supra* note 98 at 151.

[103] See Stephen Gorove, "Interpreting Article II of the Outer Space Treaty" (1969) 37(3) Fordham Law Review 349 at 352.

- Will there be geographical limits placed on certain advertisements?

- Will each State have limited advertisement slots?

Depending on your answers to these questions, it may not be a stretch that any 'claim' to a right of orbital space (ie. for an advertisement) may be viewed as a 'use' of outer space, particularly if such a claim is exclusive. On this point, there are some parallels that can be drawn between space advertising and the regulation of space satellites. Satellites are governed at the international level under both the Space Agreements and also under the ITU umbrella. The international community has developed a complex allotment framework for orbital satellite slots in the geostationary orbit governed by the ITU. Licenses for satellites are first issued under national jurisdiction by States – these national laws are required to be consistent with the principles and commitments in the ITU Agreements (most notably, the Radio Regulations[104]). The necessary frequency requests must then be submitted by the requesting entity to the ITU. The ITU is responsible for the allocation of bands of the radio-frequency spectrum and managing the registration of radio-frequency assignment satellites.

The allocation and allotment framework (for orbital slots) of the ITU may be viewed by some as tantamount to the creation of quasi-property rights over a shared global resource – namely the geostationary orbit.[105] However, according to Copiz, there is a general consensus that while there can be no 'appropriation' of orbital space, private parties may fully exploit the resources in that given area.[106] Thus, Copiz points out that the regulatory framework of the ITU simply adopts the legal principle of 'first-in-time, first-in-right' – that the party that first exploits the orbital spectrum is generally entitled to use it.[107] If this same reasoning is applied to space advertising, the national appropriation restriction in Article II will be side-stepped. While this may be acceptable with regards to telecommunication satellites – given the argument that communications technology is for the global greater good, the same reasoning should not automatically apply for space advertising. It is easy to imagine the

[104] ITU, *Radio Regulations*, 2020 edition. The Radio Regulations is compiled of the complete texts as adopted by the World Radiocommunication Conference (Geneva, 1995) (WRC-95) and subsequently revised and adopted by World Radiocommunication Conferences. The latest edition of the Radio Regulations was released in 2020.
[105] See Freeland, *supra* note 34 at 24.
[106] Adrian Copiz, "Scarcity In Space: The International Regulation of Satellites" (2002) 10 Commlaw Conspectus 207 at 219.
[107] *Ibid* at 218-219.

slippery slope where the 'use' of outer space for commercial advertising could lay the foundation to claims of national appropriation through claims of exclusivity.

Going forward there are significant incentives for such a claim, given that the anticipated rise in the space asset placement will result in increased competition for orbital slots. In this regard, there is a need for further debate and clarity on the application of Article II to commercial space advertising, particularly in light of its fluid application in the context of increasing commercial activities in outer space.

D. SPACE DEBRIS

Space debris has emerged as a leading contemporary issue for international space regulation. It is widely accepted that as space debris continues to grow, the probability of collisions that could lead to potential damage to crewed spacecraft is a serious cause for concern.[108] As at 11 August 2022, the European Space Agency estimated that the total number of debris objects in orbit (based on statistical models) as:

- 36,500 space debris objects greater than 10cm;
- 100,000 space debris objects from greater than 1cm to 10cm; and
- 130 million space debris objects from greater than 1mm to 1cm.[109]

Recently, a large piece of space 'junk', revealed to be from a SpaceX Dragon Capsule, crash landed on a rural farm in Australia, leading to calls for better management and communication in relation to space debris caused by commercial space activities.[110] As commercial assets in LEO rise, there is the need to limit space 'clutter' in Earth's orbit so as to mitigate

[108] See "Space Debris and Human Spacecraft" (27 May 2021) online: <www.nasa.gov/mission_pages/station/news/orbital_debris.html>. [*NASA Space Debris*]

[109] See European Space Agency, "Space debris by the numbers" (11 August 2022) online: <www.esa.int/Space_Safety/Space_Debris/Space_debris_by_the_numbers>. It is estimated by the European Space Agency that 32,560 space debris objects are regularly tracked by the Space Surveillance Networks. The US Department of Defense's global Space Surveillance Network (SSN) sensors have tracked more than 27,000 pieces of orbital space debris: *NASA Space Debris*, *ibid*.

[110] See Adriane Reardon, "SpaceX to 'Check Out' Outback Space Junk Site, Saying fall to Earth 'within expectations'", *ABC News* (7 August 2022) online: <www.abc.net.au/news/2022-08-07/spacex-to-visit-australia-where-space-junk-was-found/101299866>.

orbital collisions and to meet space sustainability goals.[111] Accordingly, it is important to consider firstly whether the international norms relating to space debris apply to a space advertisement project and secondly whether these norms adequately address the impact that the rise in space debris will have on the space 'environment'.

1. SPACE DEBRIS VIS-À-VIS SPACE OBJECTS

The phrase 'space debris' is not specifically referred to nor defined in the Space Agreements.[112] As noted by Tan, the Space Agreements were not drafted to address many of the environmental challenges in outer space (such as space debris) that we face today.[113] The Space Agreements do, however, include obligations relating to 'space objects', with overarching principles to protect the space environment from harmful conduct and attach liability to States.[114] These provisions will be triggered if 'space debris' is considered a 'space object' within the meaning of the Space Agreements.

The phrase 'space debris' raises two definitional questions *vis-à-vis* its inclusion under the umbrella of a 'space object':

(1) Is a non-functioning (but otherwise intact) space object still considered a 'space object' under the Space Agreements?

(2) Are the fragments and broken components of a space object placed into orbit considered a 'space object' for the purposes of the Space Agreements?

With regards to non-functional space objects (for example a decommissioned space advertisement that is still in orbit), Cheng notes that the definition of a 'space object' in the Space Agreements makes no reference to the object's 'usefulness'.[115] Accordingly, Cheng surmises, and this author agrees, that a non-functioning space advertisement would still be considered a 'space object' for the purpose of the Space Agreements.[116]

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[111] See Henry T Scott, "Improving the Shield: Mitigating the Danger of Space Debris by Enforcing and Developing Already Existing Space Law" (2009) 34 Annals of Air and Space Law 713 at 720.
[112] Fabio Tronchetti, "The Problem of Space Debris: What Can Lawyers Do About It" (2015) 64 German Journal of Air and Space Law 332 at 335.
[113] Tan, *supra* note 92 at 157.
[114] Scott, *supra* note 111 at 742.
[115] See Cheng, *supra* note 38 at 506.
[116] *Ibid*.

Turning now to the second question raised – whether the fragments and broken components of a space asset (in this case a space advertisement), would be considered a 'space object'. While some scholars have advocated for a narrow interpretation of a 'space object', this author concurs with the views of Cheng and Gorove that fragments of a space object should be given the same status under the Space Agreements as the entire space object.[117] This broader view has been adopted in the COPUOS Space Debris Mitigation Guidelines which specifies that space debris includes "all man-made objects, including fragments and elements thereof, in Earth orbit or re-entering the atmosphere, that are non-functional".[118]

Overall, this author's position is that space debris in the form of fragments and elements of a space advertisement as well as a non-functional space advertisement are space objects for the purposes of the Space Agreements.

2. OBLIGATIONS UNDER THE SPACE AGREEMENTS

In relation to the placement of space objects in orbit, Article I of the Outer Space Treaty imparts overarching rights (and obligations) relating to the free exploration and use of space by States. It could be argued that as space advertising prevents States from free exploration of outer space (ostensibly by cluttering up the orbit), such projects may be a breach of Article I of the Outer Space Treaty.[119] If accepted, this same analogy would apply to orbital satellites, particularly LEO satellites. However, Article I has clearly not prevented the launch of LEO satellites – as evidenced by the ongoing launches of Starlink satellites (as well as the other megaconstellation projects), despite space debris and LEO cluttering being raised as serious issues of concern.[120]

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[117] See Cheng, *supra* note 46 at 505; Gorove, *supra* note 42 at 14; Tronchetti, *supra* note 112 at 336; Marcus Schladebach, "Space Debris as a Legal Challenge" (2013) 17:1 Max Planck Yearbook of United Nations Law 61 at 70; Scott *supra* note 111 at 746. Compare with William Wirin's view that a distinction should be made between 'components' of a space objects on the one hand and other small pieces and fragments of debris that are not capable of re-entry into Earth's atmosphere – with the latter being excluded from the definition of a 'space object' under the Space Agreements. See William B. Wirin, "Space Debris and Space Objects" (1992) 34 Proceedings of the Colloquim on the Law of Outer Space 13 as cited in Gorove, *supra* note 42 at 15.

[118] *Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space* (Vienna: COPUOS, 2007) [*COPUOS Space Debris Guidelines*].

[119] See *Balsamello*, *supra* note 85 at 1785.

[120] See Elizabeth Howell, 'SpaceX Starlink Satellites Face Russia Space Debris 'Squalls' in Orbit: Report", *Space* (11 August 2022) online: <www.space.com/spacex-starlink-russia-space-debris-squalls>.

In fact, on 6 August 2022, it was reported that Starlink satellites came close to colliding with space debris generated by the destroyed Russian Cosmos 1408 satellite (a Russian direct-ascent ASAT destroyed Cosmos 1408 in a November 2021).[121] SpaceX reported that Starlink satellites performed nearly 7,000 collision avoidance manoeuvres during the months of December 2021 to May 2022 alone, proving that the cluttering of space is a real problem.[122]

As proposed by Marcus Schladebach, Article I of the Outer Space Treaty involves a balancing act in interpreting the rights it affords.[123] Specifically, this entails balancing that on the one hand States have the right to free exploration and use of outer space (e.g. placing a space advertisement in orbit), against the resulting problem that the exercise of this right may create orbital space debris that will hamper the free exploration and use of space by another State.

To date, Article I has not been applied in such a way so as to limit or restrict a State's exploration or use of space where such activity creates orbital clutter. However, it is this author's position that, with the potential for a significant increase in the placement of space assets in orbit (particularly in LEO) and the serious damage that would occur from the impact from even the smallest of space debris, Article I may become increasingly relevant going forward.[124] In this regard it will become necessary to consider whether the right to 'free' exploration and use under Article I is a right to 'safe' exploration and use of outer space.

The provisions of Article IX of the Outer Space Treaty set certain limitations on the free use and exploration of Outer Space that may be relevant to space debris. The first sentence in Article IX provides that States "…. shall conduct all their activities in outer space, including the Moon and other celestial bodies, with *due regard* to the corresponding interests of all other States Parties to the Treaty." [Emphasis added]

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[121] Jeff Foust, "Starlink Satellites Encounter Russian ASAT Debris Squalls", *Space News* (9 August 2022) online: <spacenews.com/starlink-satellites-encounter-russian-asat-debris-squalls/>.
[122] *Ibid*.
[123] See Schladebach, *supra* note 118 at 69.
[124] See Peter Stubbe, *State Accountability for Space Debris: A Legal Study of Responsibility for Polluting the Space Environment and Liability for Damage Caused by Space Debris*, Studies in Space Law (Boston: Brill, 2017) at 164–166. Stubbe comments that the pollution of space from space debris has reached a level that threatens the usability of outer space and therefore disregards the interest of other States in the use of space – although these comments were made in reference to consideration of Article IX of the Outer Space Treaty. See also: Tronchetti, *supra* note 112 at 334-335; Scott, *supra* note 111 at 720 and Katarina Damjanov, "Of Defunct Satellites and Other Space Debris: Media Waste in the Orbital Commons" (2017) 421(1) Science, Technology and Human Values 166.

John Goehring submits that, in relation to the generation of space debris, the due regard principle in Article IX requires States to balance their rights to undertake space activities with the simultaneous rights of other States under the Outer Space Treaty.[125] Namely, this involves a 'balancing of countervailing rights' (as also seen in Article I of the Outer Space Treaty).[126]

While States are obliged to have due regard to the creation of space debris resulting from a space advertising project, there is little guidance on the weight to be given to the balancing of competing interests.[127] It also noted that the due regard principle in Article IX has yet to be invoked by States as a regulatory tool to manage outer space activity.[128] Additionally, while Article IX contains a set of procedural steps for consultations where one State has reason to believe that its activity may cause harmful interference with the activities of other States, this provision stops short of acting as a pre-emptive injunction against these harmful activities.[129]

The second sentence in Article IX of the Outer Space Treaty imposes obligations on States to ensure that their exploration and studies of outer space (including the moon and other celestial bodies) are conducted in a manner so as to "avoid their harmful contamination". It is noted that the phrase "harmful contamination", is not defined in the Space Agreements. As surmised by Jasentuliyana, this omission is perhaps reflective of the lack of technological knowledge at the time of the negotiation of the Outer Space Treaty and the ability to foresee the consequences of current day space activities.[130] Accordingly, the ambiguity in the parameters of the definition of 'harmful contamination' has led some legal scholars to conclude that Article IX is not applicable (or at least it is unclear as to whether it applies) to the regulation of space debris.[131]

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[125] John S Goehring, "Can We Address Orbital Debris with the International Law We Already Have? An Examination of Treaty Interpretation and the Due Regard Principle" (2020) 85 Journal of Air Law and Commerce 309 at 317.
[126] *Ibid*.
[127] See Nandasiri Jasentuliyana, "Space Debris and International Law" (1998) 26 Journal of Space Law 139 at 140; Goehring, *supra* note 125 at 317–320.
[128] See Goehring, *supra* note 125 at 320.
[129] See Natalie Pusey, "The Case for Preserving Nothing: The Need for a Global Response to the Space Debris Problem" (2010) 21 Colorado Journal of International Environmental Law and Policy 425 at 437.
[130] See *Jasentuliyana*, *supra* note 128 at 140–141.
[131] See Christopher D Williams, "Space: The Cluttered Frontier" (1994) 60 Journal of Air Law and Commerce 1139 at 1156. Williams also cites: YM Kolossov, "Legal Aspects of Outer Space Environment Protection" (1980) Proceedings of the 23rd Colloquim of the Law on Outer Space 103; Lawrence D Roberts, "Addressing the Problem of Orbital Space Debris: Combining International Regulatory and Liability Regimes" (1992) 15 BC International and Comparative Law Review 51. See generally Jasentuliyana, *supra* note 127 at 140–141; Stubbe, *supra* note 124 at 163–164.

Adopting a different view, Gorove proposed that space debris is a form of 'contamination' as it poses a threat to future space exploration and travel due to the danger of collision and the potential for damage to people and property upon re-entry to the Earth's atmosphere.[132] Applying the ordinary meaning to the word 'contamination', Stubbe concluded, and this author agrees, that as space debris is a man-made alteration of the outer space environment, it would (depending on its magnitude) be considered pollution of outer space. [133] Following the reasoning of both Gorove and Stubbe, it is this author's opinion that space debris falls under the provisions of Article IX of the Outer Space Treaty.

This then raises the question of what level of 'harm' is necessary to invoke the obligations in Article IX. This turns to an analysis of the nature and scope of the space activity – in this case, the launch of a space advertisement into orbit. Given the number of satellites launched into orbit, it would be difficult to see how the launch of a single functional space advertisement (as an isolated project), would be held to be an activity that would cause 'harmful' contamination of outer space.

In this regard, Stubbe notes that the threshold for 'harm' in the scope of Article IX has become a limitation on the effectiveness of this provision to address *ex ante* the collective challenge of space debris cluttering LEO. While preferable, it is not at all clear that Article IX allows for a 'cumulative view' that considers the potential for a space asset to *add* to the growing space debris problem – at least from the evidence to date in relation to the volume of satellite launches. It is submitted that there is a need to address this issue and to seek clarity on the interpretation of 'harmful contamination' in Article IX as a tool to regulate a proposed space activity's *cumulative impact* on the growing volume of orbital debris.

3. SPACE DEBRIS GUIDELINES

The challenge of controlling space debris has also been addressed at the soft law level with the IDAC Space Debris Mitigation Guidelines (IDAC Guidelines) and the COPOUS Space Debris Mitigation Guidelines

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[132] Stephen Gorove, "Pollution and Outer Space: A Legal Analysis and Appraisal" (1972) 5:1 NYU Journal of International Law and Policy 53–65 at 56.

[133] See Stubbe, *supra* note 124 at 164–166. This view was also adopted by Gupta, who concluded that space debris should be considered harmful contamination within the meaning of Article IX on the basis that it is a "man-made alteration to the environment of outer space that interferes with the access of other states to outer space." See Gupta, *supra* note 39 at 242–243. It is noted that other authors have concluded that space debris falls within the ambit of Article IX based on its harmful effects, and long-term consequences and also the due regard principle. See Sergio Marchisio in Hobe et al, *supra* note 39; Goehring, *supra* note 125.

(COPUOS Space Debris Guidelines).[134] Both of these guidelines have helped to address on some of the gaps left in the Space Agreements regarding space debris and State obligations.[135]

The COPUOS Space Debris Guidelines built upon (and adopted various definitions from) the first version of the IDAC Guidelines. Pursuant to the COPUOS Space Debris Guidelines, the mitigation of space debris should be considered as part of the mission planning, design, manufacture and operational (launch, mission, and disposal) phases of spacecraft and launch vehicle orbital stages.[136] Relevant to space debris and space advertising, Guideline 6 of the COPUOS Space Debris Guidelines aims to limit the long-term presence of spacecraft and launch vehicle orbital stages in LEO after the end of their mission. Specifically, States are required to remove from orbit in a controlled fashion:

> spacecraft and launch vehicle orbital stages that have terminated their operational phases in orbits that pass through the LEO region … [i]f this is not possible, they should be disposed of in orbits that avoid their long-term presence in the LEO region.[137]

This *may* trigger consideration of the impact that the infrastructure of a space advertising project would have on the overall space debris population. However, both the COPUOS Space Debris Guidelines and the IDAC Guidelines are non-binding with no enforcement mechanism and compliance remains a matter for individual States.[138] Further, the COPUOS Space Debris Guidelines do not contemplate (nor address) the launch of a *functional* space object such as a space advertisement that in itself might be considered by some as 'useless debris' that is polluting the outer space environment - although as previously noted this subjective litmus test of 'usefulness' of a space object has no foundational basis in the Space Agreements.[139]

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[134] See IADC Space Debris Mitigation Guidelines, Revision 3 (Inter-Agency Space Debris Coordination Committee, 2021); COPUOS Space Debris Guidelines, *supra* note 118.
[135] See Scott, *supra* note 111 at 755.
[136]COPUOS Space Debris Guidelines, supra note 119 at para 4.
[137] *Ibid* at Guideline 6.
[138] See Lyall & Larsen, *supra* note 43 at 34. See also Scott, *supra* note 111 at 726. Additionally, it is noted that it is in State's self-interest to comply with the Guideline, with national mechanisms for space debris adopted by many States including (but not limited to) the US, the United Kingdom, Austria, Canada, France, Germany, Denmark, and the Russian Federation: COPUOS, *Compendium - Space Debris Mitigation Standards Adopted By States And International Organizations* (2021) online: < www.unoosa.org/oosa/en/ourwork/topics/space-debris/compendium.html>.
[139] See Cheng, *supra* note 38 at 506.

With the issue of 'space sustainability' and space debris clearly on the international agenda, it is not far-fetched that we will witness a further shift in policy towards prioritising the protection of the space environment.[140] In fact, Tan raises the idea of an emerging norm of sustainable development in space, advocating that the "freedom of exploration and use of outer space must be constrained by a prohibition on pollution of the outer-space environment".[141] In conclusion, it would be a stretch to conclude that the non-binding COPUOS Space Debris Guidelines or the IDAC Guidelines would in any way prohibit space advertising *per se*. That said, they will have some impact on the scope of a space advertising project, particularly in the context of the creation of orbital debris in LEO upon the conclusion of its project timeline.[142] With the growing dangers from space debris, it is worth considering strengthening the obligations in the COPUOS Space Debris Guidelines to give sufficient weight to the cumulative impact the proposed space asset will have on the increase in orbital clutter in LEO.

E. ENFORCEMENT AND COMPLIANCE

The Outer Space Treaty embraces the approach of cooperation and consultation – a cornerstone element of many international treaties.[143] Of the Space Agreements, only the Liability Convention includes a robust dispute resolution mechanism.[144] As noted by Christina Isnardi, taking all of the Space Agreements together, there is a notable absence in enforcement provisions, or any real avenue for the resolution of space disputes at the international level.[145]

The lack of enforcement or compliance mechanisms is often viewed as a central problem for international law on the premise that "law is only really law when accompanied by authoritative interpretation and

[140] The long-term sustainability of Outer Space has been a COPUOS agenda item since 2016, with a Working Group established and guidelines published. See: "Long-term Sustainability of Outer Space Activities", online: *UNOOSA* <www.unoosa.org/oosa/en/ourwork/topics/long-term-sustainability-of-outer-space-activities.html>. Further, 'space sustainability' was the theme of the World Space Week in 2022. See Nikolai Khkystov, "World Space Week 2022: 8 Industry Leaders Explain How to Make Space Travel More Sustainable" (27 October 2021), online: *World Economic Forum* <www.weforum.org/agenda/2021/10/how-can-we-address-space-debris-experts-explain/>.

[141] See Tan, *supra* note 92 at 175.

[142] See COPUOS Space Debris Guidelines*, supra* note 119 at Guideline 6.

[143] See Balsamello, *supra* note 89 at 1787.

[144] It is noted that the Registration Convention includes some provisions to ensure compliance with the mandatory registration requirements.

[145] Christina Isnardi, "Problems with Enforcing International Space Law on Private Actors" (2020) 58(2) Columbia Journal of Transnational Law 489 at 515.

enforcement".[146] This line of reasoning rests on the incorrect assumption that in the absence of an enforcement mechanism, signatories are not obliged to (or will fail to) comply with their treaty obligations.

However, there is a fundamental principle in international law of *pacta sunt servanda* - that treaty obligations must be fulfilled in good faith.[147] This principle is reflected in Article VI of the Outer Space Treaty which imposes an obligation on States to authorise and continually supervise the space activities of non-governmental entities. Further, as Lukashuk submits, in addition to fulfilling treaty obligations to which the State is a signatory, the principle of good faith also requires States to *refrain* from acts that could defeat the object and purpose of their treaty obligations.[148] This good faith principle of *pacta sunt servanda* has been codified in the Vienna Convention on the Law of Treaties.[149]

While States that are a party to the Space Agreements are obligated to observe the normative provisions of the agreements, one rising issue of concern is the potential for private entities to 'forum shop' across national jurisdictions. As demonstrated by the 2018 actions of the American satellite start-up company Swarm Technologies, reliance purely on national laws (with no avenue for international enforcement of obligations under international space law) could allow private companies to side-step their home State approval regime in favour of jurisdictions with more lenient (or no) regulatory licensing process for space activities.[150]

In this example, Swarm Technologies was denied approval by the FCC for the launch of its SpaceBEE satellites due to concerns that the tiny size of their satellites would be difficult to track in orbit.[151] In defiance of the FCC, Swarm Technologies then launched its satellites from India without receiving US regulatory approval. While Swarm Technologies was investigated and then fined by the FCC for its actions, to date there is

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[146] See Robert Howse & Ruti Teitel, "Beyond Compliance: Rethinking Why International Law Really Matters: Beyond Compliance" (2010) 1:2 Global Policy 127 at 128.
[147] See I I Lukashuk, "The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law" (1989) 83:3 American Journal of International Law 513 at 513.
[148] *Ibid* at 515.
[149] See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 18 and 26.
[150] See Adrian Taghdiri, "Flags of Convenience and the Commercial Space Flight Industry: The Inadequacy of Current International Law to Address the Opportune Registration of Space Vehicles in Flag States" (2013) 19 BU Journal of Science and Technology Law 405; Frans Gerhard von der Dunk, *Towards 'Flags of Convenience' in Space?* (IISL/ECSL LSC Colloquium, 2012); Paul Stephen Dempsey, "National laws governing commercial space activities: Legislation, regulation, & enforcement" (2016) 36 Northwestern Journal of International Law and Business 1.
[151] Michael Sheetz, "Former Google Engineer's Start-Up Slammed by FCC for Unauthorized Satellite Launch" *CNBC* (9 March 2018) online: <www.cnbc.com/2018/03/09/swarm-technologies-slammed-by-fcc-for-unauthorized-satellite-launch.html>.

still no legal mechanism to prevent corporate space entities forum-shopping for approvals going forward.[152]

This can be viewed as a significant shortfall of the international space law framework. It is necessary for States to harmonize their laws to achieve consistency across international jurisdictions and reduce the opportunity for flag-of-convenience type forum shopping.

In the absence of any compliance or dispute resolution mechanism (at the international level), how then do States remedy a non-compliant, unwanted, or otherwise offensive space advertisement that is visible over their geographical territory? In the context of space advertising this could be as simple as permitting the impacted State to 'take down' the infringing space advertisement. This assumes, of course, that normative provisions can be negotiated to determine the parameters of 'permissible' space advertising. This could potentially open up an entirely new industry for technical research and development – space capability technology to 'take down' space advertisements. Unsurprisingly, the negotiation of such an enforcement mechanism raises many pertinent legal questions:

- Who, or what international body will determine non-compliance with the normative provisions?
- Who authorises the 'take down' of the space advertisement?
- What exactly does a 'take down' entail?
- Who pays for the 'take down'?
- What sort of compensation is made, if any?
- Who is liable for any damage that occurs from the 'take down' of the space advertisement?

In the absence of any easy answers to these questions, one element is clear – the ever-increasing involvement by private commercial entities in space activities warrants re-considering the need for a consistent global compliance and dispute resolution framework.

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[152] Devin Coldewey, "FCC Fines Swarm Technologies $900K Over Unauthorized Satellite Launch", *TechCrunch*, (21 December 2018) online: <techcrunch.com/2018/12/20/fcc-fines-swarm-technologies-900k-over-unauthorized-satellite-launch/>.

V. CUSTOMARY INTERNATIONAL LAW AND SOFT LAW – A WAY FORWARD?

Alongside treaties between States, customary international law is a recognised source of international law.[153] According to Cheng, customary international law has played a significant role in the regulation of space activities, sitting alongside the Space Agreements.[154] This warrants a consideration of what, if any, role customary international law plays in regulating space advertising going forward.

The elevation of legal norms to the standing of customary international law requires that such norms be universally accepted as well as invoking an "opinio juris" (*a belief in a legal obligation*). The International Court of Justice considered the elements of customary international law as a source of law in the *North Sea Continental Shelf Cases*, and stated (relevantly) that

> [n]ot only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it.[155]

Cheng proposes that the rapidly developing nature of space activities arguable gives rise to almost 'instant customary international law' as the guiding legal principles rush to keep pace with technological development.[156] However, as no further international space treaties have been developed since the Moon Agreement failed to receive substantive ratification, it is unclear whether any recent space-related practices or principals rise to the status of being customary international law.

As surmised by Melissa de Zwart, beyond the clearly aspirational wording of the Outer Space Treaty, there has been little consensus on customary international law to fill in the gaps to provide clarity on these

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[153] See *Statute of the International Court of Justice*, 26 June 1945, 3 Bevans 1179, 59 Stat 1031, TS 993, 39 AJIL Supp 215 (entered into force 24 October 1945) [*ICJ Statute*] art 38.

[154] See Steven Freeland & Yun Zhao, "Rules of the 'Space Road:' How Soft Law Principles Interact with Customary International Law for the Regulation of Space Activities" (2020) 44(2) Journal of Space Law 405 at 406, citing Bin Cheng, "Custom: The Future of General State Practice in a Divided World" in R. St. J. MacDonald & Douglas M. Johnston, eds, *The Structure And Process Of International Law: Essays In Legal Philosophy Doctrine And Theory* 513 at 532 (The Hague: Martinus Nijhoff, 1983).

[155] See *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) Merits 1969 ICJ Reports 219 at 44.

[156] Proposed by Bin Cheng in 1965 in his article "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?" (1965) 5 Indian Journal of International Law 23; and more recently: Cheng, *supra* note 38. See also, discussion by Freeland & Zhao on this topic: Freeland & Zhao, *supra* note 154.

provisions.[157] With States pursing their own space agenda and mega private space companies driving forward commercial space projects, it is difficult to see how customary international law will play a role in the regulatory framework for space advertising going forward.

In the absence of formal international treaties (and the 'instant' development of any customary international law), Freeland and Yun Zhao argue that a tendency has emerged over time for the international community to increasingly resort to and rely upon 'soft law instruments' for the creation of principles governing the use of outer space.[158] These 'soft law instruments' are *non-binding* multilateral instruments that are in the public domain.[159]

This soft law approach, via the development of a set of non-binding principles, could be a way forward to address governance of commercial space advertising. In fact, the development of guidelines to address the environmental impact of space advertising activities on astronomy was proposed by the IAU back in 2001.[160]

To date, progress on the development of non-binding principles has been made in areas relating to space sustainability (Guidelines for the Long-term Sustainability of Outer Space Activities[161]), transparency and confidence building (Report of the Group of Governmental Experts on Transparency and Confidence Building Measures in Outer Space Activities[162]) and space debris (COPUOS Space Debris Guidelines). In December 2021, the UN General Assembly Resolution "Reducing Space Threats through Norms, Rules and Principles of Responsible Behaviour" opened a new pathway for the creation of space law principles.[163] The Working Group met twice in 2022. It is yet to be seen whether space advertising will be included on the agenda of this Working Group (within the purview of its mandate focussed on 'space threats'). Nevertheless, it is promising to see this step in the direction of negotiating and making recommendations on possible new norms and rules to address emerging space issues.

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[157] Melissa de Zwart, "How Can Space Be Governed?" *Australian Institute of International Affairs* (14 September 2022) online: <www.internationalaffairs.org.au/australianoutlook/how-can-space-be-governed/>.
[158] See Freeland & Zhao, *supra* note 154p at 413.
[159] *Ibid* at 414.
[160] IAU Paper, *supra* note 3. UN General Assembly Resolution 56/51, 10 December 2001, paragraph 15 (c) (ii).
[161] COPUOS, *Guidelines for the Long-term Sustainability of Outer Space Activities*, UN Doc A/AC.105/CRP.20 (2018).
[162] UNGA, *Report of the Group of Governmental Experts on Transparency and Confidence-Building Measures in Outer Space Activities*, UN Doc A/68/189 (2013).
[163] UNGA, *Report of the Secretary-General on Reducing Space Threats through Norms, Rules and Principles of Responsible Behaviours*, UN Doc A/76/77) (2021).

The last two years has also seen the emergence of multilateral and bilateral agreements that operate outside of the UN framework. Most notable is the US-led Artemis Accords. The stated purpose of these Accords is

> to establish a common vision via a practical set of principles, guidelines, and best practices to enhance the governance of the civil exploration and use of outer space with the intention of advancing the Artemis Program.[164]

The Artemis Accords apply to civil space activities conducted on the "Moon, Mars, comets, and asteroids, including their surfaces and subsurfaces, as well as in orbit of the Moon or Mars, in the Lagrangian points for the Earth-Moon system, and in transit between these celestial bodies and locations."[165] The signatories to the Accords agree to implement the principles set out in the agreement, but it is noted that the Accords are non-binding in nature. While based on the principles of the Outer Space Treaty, the Accords include a number of clarifying (perhaps even *diverging*) clauses to the Space Agreements – the most contentious being Section 10, concerning the national appropriate of space resources.

The Accords have been viewed as an informal governance mechanism by which the US has sought to modify outer space law rather than revise the existing Outer Space Treaty or negotiate a new formal international agreement.[166] As surmised by Rachel Neef, the Artemis Accords highlights the potential for a new path forward whereby the creation of soft law agreements by dominant space faring nations may modify existing, and introduce new, outer space law, albeit to the benefit of their own interests.[167]

An additional option (or an alternative) worth considering is to regulate space advertising through the creation of an international industry code targeted at private space companies. These private space companies (such as SpaceX, Boeing, Blue Origin, and Virgin Galactic) provide the launching capability for corporations to engage in space advertising.

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[164] *Artemis Accords - Principles for Cooperation in the Civil Exploration and use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes*, National Aeronautics and Space Administration (13 October 2020).
[165] *Ibid*.
[166] David P Fidler, "The Artemis Accords and the Next Generation of Outer Space Governance", *Council on Foreign Relation*s (Blog Post, 2 June 2020) online: <www.cfr.org/blog/artemis-accords-and-next-generation-outer-space-governance>.
[167] Rachel Neef, "Artemis Accords: A New Path Forward for Space Lawmaking?" (2021) 42(2) Adelaide Law Review 569 at 579.

Industry codes are an effective means of self-regulation in other contexts. For instance, an industry code was recently, and successfully, implemented in the EU, with the release of the 2022 Code of Practice on Disinformation.[168] This Code address the misuse of data information across the EU and contains a set of principles and commitments that form a set of "self-regulatory standards to fight disinformation".[169]

The Code has been signed by Google, Meta, TikTok, Twitch (owned by Amazon), Adobe, Clubhouse and Vimeo amongst other industry and social organisations.[170] Through the adoption of an industry code on space advertising these mega private space companies would effectively have a gatekeeper role in ensuring that the code of practice for space advertising is implemented across the private sector. With the pressing influence on companies to adopt environmental, social, and governance – or "ESG" – goals as part of their organizational strategy, it is reasonable to assume that these private space companies could be influenced by these non-financial factors when determining whether to facilitate a space advertising project.

In the absence of a State-based solution, an industry code could go a long way to addressing many of the uncertainties surrounding acceptable behaviour of corporate space entities, promote activities that are consistent with social and environmental goals and would establish a practical set of best practices standards to enhance the global governance of space advertising.

VI. CONCLUSION

Opportunities for human commercial activities in space will continue to expand. As the cost to access space (particularly LEO) decreases, the number of proposed space advertising projects is likely to increase. Concerns over space advertising include light pollution, space debris, content control, aesthetics, space sustainability, national appropriation and the overall impact and desirability of this activity as a 'use' of the natural resource of outer space.

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[168] European Commission, "2022 Strengthened Code of Practice on Disinformation", online: <digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>. Commitments include: the 'dissemination of disinformation; guaranteeing transparency of political advertising; enhancing cooperation with fact-checkers; and facilitating researchers access to data'.

[169] *Ibid.*

[170] European Commission, "Signatories of the 2022 Strengthened Code of Practice on Disinformation" online: <www.digital-strategy.ec.europa.eu/en/library/signatories-2022-strengthened-code-practice-disinformation>.

The prospect of commercial space advertising raises many legal questions in relation to the adequacy of existing international space law. While the negotiation of a new space agreement between States to address these new commercial space activities would be the preferred approach, history has demonstrated the difficulties in achieving a consensus on new treaties, particularly in space law.

In the absence of the creation of a formal international agreement, the negotiation of guidelines or an industry code would at least provide a starting point for the international regulation of commercial obtrusive space advertising. Lack of enforceability is often highlighted as a fundamental flaw of international law and this is particularly the case for 'soft law' with non-binding principles – however, this is not a reason to abstain from attempting to create a global governance framework for space advertising.

International law will be crucial in shaping the parameters around the commercialisation of outer space. For commercial space advertising, we have a small opening in time to determine the regulatory framework to control the space advertising content to which we are willing to be subjected. It is hoped that we seize this opportunity to create a purposeful and deliberate international legal framework for space advertising.

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THE FUTURE OF PAROS: BUILDING A FRAMEWORK TO REDUCE STRATEGIC RISK

by

P.J. Blount*

SYNOPSIS

ABSTRACT

Space law has long been focused on creating security and stability among states as they engage in space activities. Space's original governance framework facilitated cooperation and communication between major space actors with the aim of reducing the risk of threat and escalation. However, the shift from a bipolar to multipolar international relations environment has strained the existing system, potentially reigniting great power competition. The international community has turned to the concept of the Prevention of an Arms Race in Outer Space (PAROS) to provide a mechanism for further managing issues of escalation in space. This paper discusses the historical and current context of PAROS and evaluate the causes and effects of the impasse in developing international law and policy on space security further. It suggests that the roadblocks to PAROS stem more from a political question of whether growth in the field should be legally binding or non-legally binding.

RÉSUMÉ

Le droit de l'espace a longtemps été axé sur la création de la sécurité et de la stabilité entre les États qui s'engagent dans des activités spatiales. Le cadre de gouvernance de l'espace initial facilitait la coopération et la communication entre les principaux acteurs spatiaux dans le but de réduire le risque de menace et d'escalade. Cependant, le passage d'un environnement bipolaire à un environnement multipolaire dans les relations internationales a mis à rude épreuve le système existant, ce qui pourrait raviver la concurrence entre grandes puissances. La communauté internationale s'est tournée vers le concept de prévention d'une course aux armements dans l'espace (PAROS) pour mettre en place un mécanisme permettant de mieux gérer les problèmes d'escalade dans l'espace. Cet article examine le contexte historique et actuel de la PAROS et évalue les causes et les effets de l'impasse dans laquelle se trouve le développement du droit international et de la politique en matière de sécurité spatiale. Il suggère que les obstacles à la prévention d'une course aux armements dans l'espace proviennent davantage d'une question politique, à savoir si la croissance dans ce domaine doit être juridiquement contraignante ou non.

KEYWORDS

Arms Control, Peaceful Uses of Outer Space, Soft Law, Space Weaponization, United Nations

I. INTRODUCTION

Since its inception, space law has been concerned with creating security and stability among states as they engage in space activities. This goal springs from the inherently dual-use applications of a significant amount of space technology. In the original Cold War context, a governance framework facilitated cooperation and communication among the central space actors with the goal of reducing the risk of threat and escalation. This governance framework was structured on the multilateral space treaty regime and a number of bilateral arms control agreements between the United States and the USSR. As is well documented, the context of space and international relations in general has shifted from bipolar to multipolar in the wake of the Cold War, which has strained the existing system as it has sought to accommodate a diversity of actors and interests and potentially reignited great power competition. While cooperation and communication are still critical tools in achieving a conflict-free space environment, the complex interrelations among states, the variety of interests being pursued in space and terrestrially, together with technological change over time, have left the governance framework less capable of providing security and stability and in need of further development.

In this current multipolar context, the international community has turned to the concept of the Prevention of an Arms Race in Outer Space (PAROS) to provide a mechanism to further manage issues of escalation in the space environment. This article seeks to develop the thinking on PAROS through a holistic assessment of the past and present mechanisms that have been employed to manage state relations in space and reduce the risk of conflict. This narrative will culminate in an assessment of the current state of the PAROS project and evaluate the causes and effects of the seeming impasse in developing the international law and policy of space security further. Specifically, this article will suggest that the roadblocks to PAROS are less substantive, and stem more from a binary question of whether growth in the field should be legally binding or non-legally binding. This binary is a political question that stands before substantive discussions can take place, thereby blocking any advancement on establishing new governance mechanisms. Based on this analysis this article will address the causes and effects of this political impasse and evaluate ways in which the PAROS project might move forward for the benefit of all states.

This paper will proceed by first addressing core issues in space security through a brief evaluation of the legal threshold "peaceful uses of outer space" and investigate the historical context of limitations on

weaponization of the space environment. Second, this paper will discuss the various contemporary strands of PAROS, including those occurring at the United Nations (UN) through the General Assembly, the Conference on Disarmament, Groups of Governmental Experts, as well as those being pursued outside of the UN framework. This paper will then turn to addressing the key controversies that stand in the way of negotiating and adopting either hard or soft PAROS obligations. Finally, this paper will build on this analysis by suggesting ways in which PAROS can be advanced to manage strategic risk in the space domain within the contemporary geopolitical context.

II. DEFINING THE PROBLEM

A. PEACEFUL USES OF OUTER SPACE

Even before the launch of *Sputnik I*, states were concerned with the military applications of space technologies. States understood the power of space launch as a potential means for the delivery of nuclear warheads through Intercontinental Ballistic Missiles (ICBMs), and states also recognized that there would be an ability to have an unprecedented view into other states' territories from the orbital vantage point of space. This knowledge of military applications drove much of the early rhetoric on space and the emergence of the norm of the "peaceful uses" of outer space. This was explicit in the US approach to space activities and its insistence that its first space launch be non-military.[1] This approach was intended to serve as a foundation for a normative order based on the peaceful uses of outer space. This normative push can be seen as successful in that the term "peaceful uses" became prominently used within the international discussions on space, including the first UN General Assembly (UNGA) resolution on space and its memorialization in the title of the committee is formed to address these issues: the UN Committee on the Peaceful Uses of Outer Space (UNCOPUOS).[2]

However, while states were accepting the norm of "peaceful uses," they were also actively engaging in military exploitation of outer space including ICBM testing, military remote sensing, and the testing of atomic

[1] See, for example, "Memorandum of Conference with President Eisenhower", *National Archives* (8 October 1957), online: <www.catalog.archives.gov/id/186623>. For more on the early rhetoric of the space age, *see* P. J. Blount, "Space Security Law," in *Oxford Encyclopedia of Interplanetary Science* (Oxford: Oxford University Press, 2018) and P.J. Blount, "The Ethical Foundation of Space Security," in Cassandra Steer and Matthew Hersch, eds, *War and Peace in Outer Space* (Oxford: Oxford University Press, 2021).
[2] United Nations General Assembly, Resolution 1348 (XIII): Question of the Peaceful Use of Outer Space (December 13, 1958).

weapons in space. This of course leads to a central tension in the term "peaceful uses" and what its underlying definition may be. There is a great deal of scholarship exploring the content of peaceful purposes examining it across the dynamic of non-aggressive, non-weaponized, and non-military.[3] It is beyond the scope of this article to recount this historical debate, rather this article will focus on several observations that help us to discern the contemporary content of peaceful purposes. The present author has previously argued that peaceful purposes is a term of customary international law with malleable content and must be analyzed in light of contemporary state practice.[4]

Through this lens we can first observe that 'non-aggressive' functions as a baseline meaning for peaceful uses that flows from the dictates of Article 2(4) of the UN Charter and documents such as the UNGA resolution on the definition of aggression.[5] Under this baseline, *defensive* capabilities constitute *peaceful* technologies until such time as they are used in an aggressive manner. Second, we can note that the non-militarized definition has long been abandoned in practice. In the early days of space, both Cold War superpowers, at different times, endorsed the non-militarized definition, but abandoned this as their own capabilities advanced.[6]

Today, there are examples of non-spacefaring nations using non-militarized in diplomatic statements, but such statements must be read as aspirational in the face of extensive military use of the space domain. Third, it is unclear to what extent space is *de facto* weaponized, and this is in no small part due to the lack of clarity in the definition of what

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[3] See, for example, Michel Bourbonnière and Ricky J. Lee, "Legality of the Deployment of Conventional Weapons in Earth Orbit: Balancing Space Law and the Law of Armed Conflict" 18 European Journal of International Law 5 (2007) 873; Jackson Nyamuya Maogoto and Steven Freeland, "Space Weaponization and the United Nations Charter Regime on Force: A Thick Legal Fog or a Receding Mist?" (2007) The International Lawyer 1091–1119; Michael C. Mineiro, "The United States and the Legality of Outer Space Weaponization: A Proposal for Greater Transparency and a Dispute Resolution Mechanism" (2008) Annals of Air and Space Law 441; Christopher M. Petras, "Space Force Alpha-Military Use of the International Space Station and the Concept of Peaceful Purposes" (2002) 53 Air Force Law Review 135; and P. J. Blount, "Limits on Space Weapons: Incorporating the Law of War Into the Corpus Juris Spatialis," *Proceedings of the 51st Colloquium on the Law of Outer Space* (2009), online: <www.papers.ssrn.com/abstract=1393321>.

[4] See Blount, *Space Security Law*, *supra* note 1 and P.J. Blount, "The Shifting Sands of Space Security: The Politics and Law of the Peaceful Uses of Outer Space," 17:1 Indonesian Journal of International Law 1–18.

[5] UN Charter (1945) and United Nations General Assembly, Resolution 3314(XXIX): Definition of Aggression (December 14, 1974).

[6] *See* James Clay Moltz, *The Politics of Space Security: Strategic Restraint and the Pursuit of National Interests* (Stanford: Stanford Security Studies, 2008), 69-123.

constitutes a space weapon.[7] Some states have shown counter space capabilities. For instance, in the post-Cold War era, four states (US, China, India, and Russia) have demonstrated surface-to-space kinetic kill capabilities and Russia has been accused of testing and on-orbit kinetic kill capability.[8] Further, as dual-use technologies mature, in particular those related to active debris removal and on-orbit servicing, the line between weapon and application will become increasingly blurred. In addition to these capability displays, there is a contemporary trend of states establishing specific military units devoted to space with an emphasis on defending space assets.[9]

Based on these three observations, it is possible to see that the idea of peaceful uses of outer space sits somewhere between non-aggressive and non-weaponized, but exactly where on this spectrum the legal term can be situated is difficult to pinpoint. This means that, as states change and reinterpret the narratives surrounding their security stances in space, there is the possibility for shifts in the normative meaning of peaceful purposes. Due to this malleability, and considering current trends in space security, it is unclear to what extent this norm will serve to restrain states that want to pursue armaments for defensive purposes.

B. WEAPONIZATION

Though peaceful purposes as a norm lacks specificity in the context of what is allowed *vis-à-vis* armaments in space, there are various legal sources that do place substantive limitations on the deployment of weapons in, to, and from the space environment. This section will briefly summarize the most significant of these prescriptions; namely, provisions directly limiting weapons, noninterference provisions, and international humanitarian law provisions. Again, the scope of this paper prevents full analysis of these prescriptions. Instead, this section serves to give a survey in order to contextualize the debate surrounding PAROS.

1. DIRECT LIMITATIONS

There are two direct limitations on the weaponization of space. Both are treaty-based. The first of these is the ban on nuclear explosions in space found in the Limited Test Ban Treaty of 1963 (LTBT). This treaty bans the

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[7] Michael C. Mineiro, "The United States and the Legality of Outer Space Weaponization", *supra* note 3 at 446.
[8] Brian Weeden and Victoria Samson, eds, *Global Counterspace Capabilities: An Open Source Assessment* (Secure World Foundation, 2021).
[9] For context and analysis of this trend, see P.J. Blount, "The Shifting Sands of Space Security: The Politics and Law of the Peaceful Uses of Outer Space", *supra* note 4.

"nuclear weapon test explosion, or any other nuclear explosion" in the atmosphere, in outer space, and underwater.[10] Early in the space age, both the United States and the Soviet Union conducted in space nuclear tests, which demonstrated the capability to create an electromagnetic pulse in the space environment to disable unhardened satellites.[11] The ban in the LTBT is limited to nuclear explosions and does not reach further into banning the presence of these weapons in the space environment.

The second direct limitation is Article IV of the Outer Space Treaty, which takes a two-prong approach to the problem. First, in the void of space, the treaty prohibits the placement "in orbit around the Earth" of nuclear weapons or weapons of mass destruction. Second, on the Moon or other celestial bodies, the treaty adopts a non-militarized approach and bans all weapons including conventional ones. There are two important implications here. First, is the idea that when juxtaposing these two approaches, it becomes clear that conventional weapons are not affirmatively limited in the void of space (including Earth orbit). Second, due to the idea that the ban on WMDs is connected to their being 'place[d]' in orbit around the Earth or 'station[ed]' in space means that WMDs transiting space (i.e., a nuclear warhead on an ICBM) is still within the scope of legal activities.

A final note should be made that the Moon Agreement of 1979, again takes up the issue of weaponization in terms of the Moon and other celestial bodies, but its low number of signatories means that its provisions are not operative with regards to the major actors in this area.[12]

2. NON-INTERFERENCE

The next set of limitations comes from a variety of non-interference provisions found in several treaties. The first of these is Article IX of the Outer Space Treaty, which requires that states act with "due regard" to the interests of other states. Though the meaning of 'due regard' is undefined, at a minimum it can be read that states should take into account the activities of other states when planning and executing their space activities.[13] This baseline reading is confirmed at the end of Article

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[10] Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water (10 October 1963) art I.

[11] Moltz, *supra* note 6 at 97. For a report on a specific US test see, Defense Nuclear Agency, "Operation ARGUS 1958" (30 April 1982).

[12] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (entered into force July 11, 1984), art 3.

[13] See generally, John Goehring, "The Russian ASAT Test Caps a Bad Year for the Due Regard Principle in Space," *Just Security* (12 January 2022), online: <www.justsecurity.org/79820/the-russian-asat-test-caps-a-bad-year-for-the-due-regard-principle-in-space/>.

IX, which sets a duty on states to seek consultations with other states when they think they may cause or be a victim of "harmful interference." It is important to note that Article IX does not place a prohibition on interference, rather it establishes a normative framework in which states should cooperate and communicate in order to avoid interference and resolve potential conflicts. Despite this, Article IX was a central topic in the legal discourse after both the Chinese and American ASAT tests in 2007 and 2008, with commentators querying to what extent states needed to apply Article IX in the context of such tests.[14]

A second noninterference principle comes from the International Telecommunication Union (ITU) and its core goal of preventing "harmful interference" in international radiofrequency usage.[15] The ITU concept of non-interference is limited in scope as it applies only to interference with frequency usage and does not apply to physical interference with satellites.[16] However, the ITU's definition and restrictions would be applicable to systems that interfere with a satellite's transmission such as jamming or spoofing attacks.[17]

The third source of noninterference is found in the series of bilateral disarmament agreements between the United States and the USSR/Russia. These agreements adopted verification through "National Technical Means" (NTM), which was understood to be satellite remote sensing capabilities.[18] To bolster the verification mechanism, the parties to these treaties agreed not to interfere with the NTM of the other party.[19] Of course, this obligation is a bilateral one and does not apply to all space

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[14] Eugene Marder, "CPR for the OST: How China's Anti-Satellite Weapons Test Can Breathe New Life into Article IX of the Outer Space Treaty" (Center for Defense Information, 2008) and Michael C. Mineiro, "FY-1C and USA-193 ASAT Intercepts: An Assessment of Legal Obligations under Article IX of the Outer Space Treaty" 34:2 Journal of Space Law 321.

[15] Constitution of the International Telecommunication Union (2018) art 1(2)(a-b), 45.

[16] The ITU Constitution's Annex on definitions defines Harmful Interference as "Interference which endangers the functioning of a radionavigation service or of other safety services or seriously degrades, obstructs or repeatedly interrupts a radiocommunication service operating in accordance with the Radio Regulations."

[17] On these types of attacks, see generally, David Wright, Laura Grego, and Lisbeth Gronlund, *The Physics of Space Security: A Reference Manual* (Washington, DC: American Academy of Arts and Sciences 2005) 118 - 122.

[18] For example, Anti-Ballistic Missile Treaty, U.S.-U.S.S.R. (3 October 1972) art XII. The fact that NTM was intended to represent satellite remote sensing capabilities was confirmed in a speech by US President Jimmy Carter. Jimmy Carter, "Remarks at the Congressional Space Medal of Honor Awards Ceremony" (1 October 1978), online: <www.presidency.ucsb.edu/ws/index.php?pid=29897>.

[19] For example, Article XII of the 1972 Anti-Ballistic Missile Treaty states "Each Party undertakes not to interfere with the national technical means of verification of the other Party."

actors. However, it has been posited that during the Cold War this was one of the core provisions bolstering space security, but it is unclear to what extent these provisions advance space security in the post-Cold War world, in particular in light of many of these bilateral agreements have been withdrawn from.[20]

3. INTERNATIONAL HUMANITARIAN LAW

The final place to find provisions that may place limitations on the placement or use of weapons in the space environment is the body of International Humanitarian Law (IHL), which is briefly noted here. IHL is a body of law that is primarily concerned with the conduct of hostilities and lessening the suffering to both combatants and noncombatants alike. A central doctrine within this body of law is that there are limitations to the "methods and means" of warfare that a state may employ.[21] To support this, IHL has specific requirements that deployed weapons meet basic standards of legality and that legal weapons be used in a manner that does not violate the law. For example, and of specific interest to kinetic space weapons, there are provisions that ban weapons that cause "widespread, long-lasting or severe" damage to the environment.[22]

It is difficult to make blanket assertions about how IHL applies to space weapons, since the inquiry under IHL is made on a case-by-case basis that evaluates the specifics of each weapon as well as the complexities of application of competing sources in IHL. Indeed, as part of the process for developing and testing new weapons systems, states are required to do a legal analysis of the system to ensure that it complies with the tenants of IHL.[23] These same limitations would be applied to the development of weapons systems in the space environment. It is important to note that generally, IHL only applies during the existence of an international armed conflict, the provisions on weapons apply outside that limited scope as weapons must be vetted before entering the field of conflict.

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[20] Roger G. Harrison, *Space and Verification, Volume. 1: Policy Implications* (Colorado: United States Air Force Academy, Eisenhower Center for Space and Defense Studies) 9.
[21] International Committee of the Red Cross, "Methods and Means of Warfare" (29 October 2010), online: <www.icrc.org/en/doc/war-and-law/conduct-hostilities/methods-means-warfare/overview-methods-and-means-of-warfare.htm>. See also Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004) 55-81.
[22] *Ibid* at 176-197.
[23] *Ibid* at 80-81.

III. PAROS

As can be seen in the previous section, both international space law and general international law place minimal restrictions on the deployment of conventional weapons in, from, and through space. To this end, there has been an ongoing push in the international community to adopt further measures to reduce the likelihood of the deployment or use of weapons in the space environment. Such initiatives come from a variety of *loci* but can all be placed under the umbrella of 'Prevention of an Arms Race in Outer Space' (PAROS). While there is seeming widespread support for the underlying idea of PAROS, there has been little movement in pushing forward the adoption of new measures to secure the space environment and reduce the opportunities for conflict. This is due to international geopolitics resulting from the strategic mismatch of states regarding space security (and security in general). In particular, there is a lack of consensus and cooperation among major space powers on breaking the deadlock on the PAROS issue.

This section will survey the various focal points for PAROS discussions and evaluate their current state and the roadblocks that stand in the way of movement forward. Specifically, it will examine PAROS in the context of the UNGA, the CD, the Group of Governmental Experts (GGE) initiatives, and soft law mechanisms with a potential to influence the debate. Throughout this discussion there will be a focus on the big three players in space, China, Russia, and the United States. This is because it is unlikely that any effort at PAROS will be successful without all three of these states accepting it.

A. THE UNITED NATIONS GENERAL ASSEMBLY AND PAROS

The UNGA annually passes a raft of resolutions related to space, and these resolutions have become a core site of contestation within the PAROS discourse. Though UNGA resolutions are not binding international law, they represent a place in which states vie for the narrative of international law. In general space resolutions have wide support from the international community. For instance, there is an annual resolution on cooperation in space that is passed by UNGA without a vote [24] This means that states seem to have a common agreement

[24] A rare example of this resolution not passing unanimously is 1994's Resolution 49/34: International cooperation in the peaceful uses of outer space, including the question of the review of the Agreement Governing the Activities of States on the Moon and Other

about the rights and obligations related to the norm of international cooperation.[25] If unanimous votes show agreement on norms, then recorded votes can reveal divisions on normative development and contested narratives as to how the law should develop.

This section will look at three series of resolutions and a new resolution that may become a series and suggest that the voting strings across time show that there is indeed a contested narrative over PAROS, which reveals how states are attempting to shape the rights and obligations related to space security. For the substantive analysis of this section, the data is drawn from the first year a resolution was introduced to 2020, and for ease only the first and 2020 iterations of the resolutions in a series have been consulted for textual analysis. Though the analysis only addresses the resolutions adopted as of 2020, resolutions adopted in subsequent years do not indicate a significant impact on the analysis found herein.

1. PAROS RESOLUTIONS

The oldest, and most pertinent, series in the PAROS category is the annual resolution on the Prevention of an Arms Race in Outer Space. It was first introduced in 1981. This resolution, Resolution 36/97[26] - taken seemingly in response to ASAT testing by the United States and the Soviet Union[27] - scopes itself within the normative concept of "peaceful purpose," which is mentioned twice in the preamble. Its operative text does three primary things. First, it endorses "further effective measures to prevent an arms race in outer space," and requests that states contribute to the establishment of such. Second, the operative text requests the Committee on Disarmament - the precursor to the Conference on Disarmament - to place PAROS on its agenda with the goal of negotiating a treaty on the matter. Finally, it places PAROs on the agenda of the UNGA.

Celestial Bodies. This is explained by its inclusion of the Review of the Moon Agreement. The US voted against this resolution under its longstanding policy rejecting the Moon Agreement and to reject new legal binding instruments related to space as discussed below.

[25] This is confirmed by 1996's Resolution 51/122: Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries, which was adopted without consensus indicating consensus on the norm of international cooperation that can be throughout space law.

[26] A/RES/36/97C: Prevention of Arms Race in Outer Space (1981).

[27] The preamble directly references ASATs and the failed US-USSR negotiations on an ASAT Treaty: *Ibid.*

The most recent resolution on PAROS is Resolution 75/35, which was adopted in December 2020.[28] It too scopes itself within the context of "peaceful purposes," with surprisingly concrete language: "Reaffirming the will of all States that the exploration and use of outer space, including the Moon and other celestial bodies, shall be for peaceful purposes . . ." Its operative provisions follow a similar pattern to its 1981 predecessor. It first recognizes "the necessity of further measures with appropriate and effective provisions for verification to prevent an arms race in outer space" and admonishes states to pursue such measures. Second, it recognizes the Conference on Disarmament as "the sole multilateral disarmament negotiating forum" with "the primary role in the negotiation of a multilateral agreement or agreements, as appropriate, on the prevention of an arms race in outer space in all its aspects." It requests that the CD establish a working group on PAROS. In the context of this reference to the CD, it should be noted that the preamble directly mentions the "draft treaty on the prevention of the placement of weapons in outer space and of the threat or use of force against outer space objects" (PPWT) introduced by China and Russia at the CD. Finally, it retains PAROS as a UNGA agenda item.

If these two texts are indicative, this resolution's content has remained generally flat over time and has consistently endorsed pursuing "further measures." It also endorses, through its emphasis on the CD, legally binding measures. The voting record on this resolution reveals some interesting patterns. The first thing to be noted is that there is broad support for the PAROS resolution, with the vast majority of states voting in favor of it annually (see *Figure 1*, next page). Indeed, at the end of the 1990s an established pattern of all but a handful of states - no more than four - voting for it. These other states either vote against it or abstain from the vote.

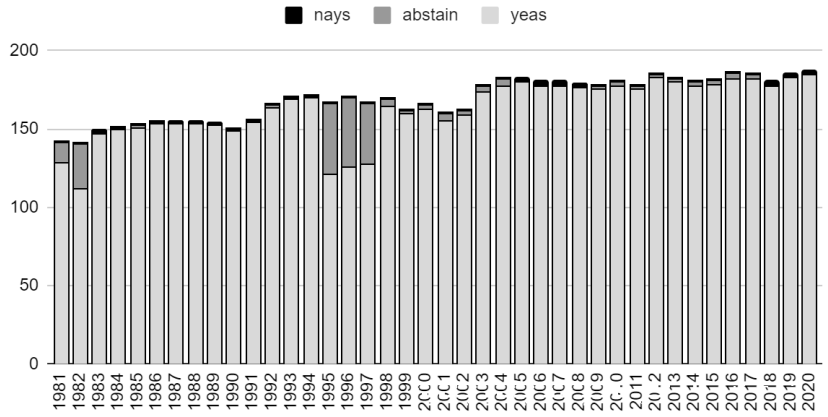
An analysis of the voting record of the three space powers US, Russia, and China, also reveals some interesting data. In the first two years of the resolution (1981-1982), the United States voted in favor and the USSR abstained. Following that the USSR (and then the Russian Federation) voted in favor of the resolution and the US has waffled between abstentions and no votes (see *Table 1*, Annex). China has consistently voted in favor of the resolution, except for in 1982 when it did not cast a vote. Similar voting patterns will be seen across all the resolution series.

[28] A/RES/75/35: Prevention of Arms Race in Outer Space (2020).

Finally, it should be noted that there are other voting data points that would need further research to explain. For example, there is a relatively high number of abstentions in the mid-1990s. Such an analysis would necessitate a careful reading of the subject resolutions and correlation with the statements made by member states at the UNGA and in the First Committee.

Figure 1

PAROS Voting - 1981-2020



2. TCBMS RESOLUTIONS

The next oldest series of resolutions endorse Transparency and Confidence Building Measures (TCBMs) as a potential avenue for normative content related to PAROS. The first of these, Resolution 60/65, from 2005 requests states to share their views on TCBMs with the Secretary General and places TCBMs on the UNGA agenda.[29] The 2020 version, Resolution 75/69, draws on the report of the Group of Governmental Experts on TCBMs, and generally calls on states to pursue TCBMS.[30] Though this resolution does not seem focused on legally binding measures, it is notable that there is in the preamble a reference to the PPWT.

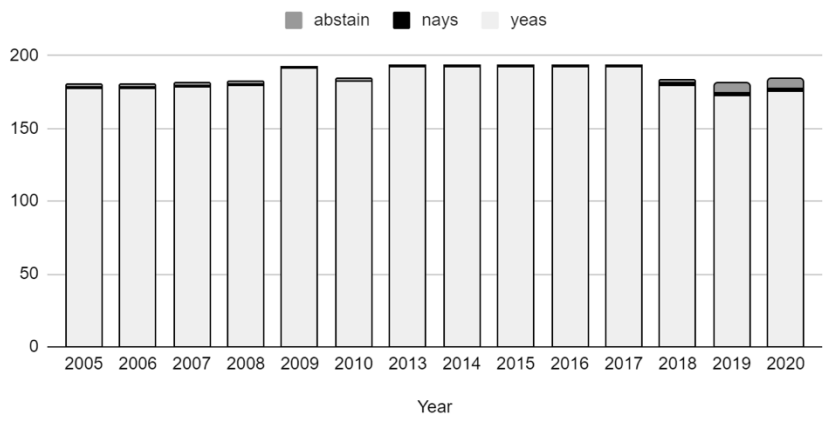
[29] A/RES/60/66: Transparency and Confidence-Building Measures In Outer Space Activities (2005). It should be noted that there was a significantly earlier resolution on TCBMs that is not part of the contemporary series, namely A/RES/48/74B: Study on the Application of Confidence-Building Measures in Outer Space (1993).

[30] A/RES/75/69: Transparency and Confidence-Building Measures in Outer Space Activities (2020).

Again, the voting record reveals a similar pattern to that found in the PAROS series. There is wide support for the resolution, and only a few states vote against or abstain from voting (see *Figure 2*). The number of states in this category has increased recently with eight states voting against or abstaining in both 2019 and 2020. Unlike the PAROS series though, the TCBM series experienced a number of years where the resolutions were adopted without a vote (2009, 2013-2017).

When we turn our attention to the voting records of the three major space powers, we see a similar pattern to the PAROS series. Russia and China have consistently supported the TCBM resolution. The US has voted somewhat erratically (see *Table 2*, Annex) swinging from supporting no vote adoption to voting against the TCBM resolution.

Firgure 2



3. NO FIRST PLACEMENT RESOLUTIONS

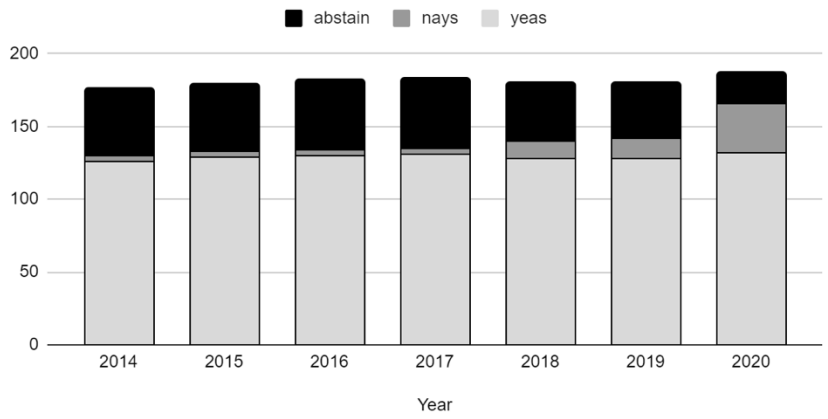
The next series is the Russian-initiated "No First Placement" series. The first resolution in this series is Resolution 69/32 of 2014,[31] and the 2020 version is Resolution 75/37.[32] This text is very consistent. It scopes itself with the context of PAROS and peaceful purposes in its preamble. It then, in its operative text, endorses the CD as the primary forum for PAROS discussions and endorses the PPWT. It then states that other measures may be necessary until such time as a legally binding treaty is completed, and requests that states "consider the possibility of upholding, as

[31] A/RES/69/32: No First Placement of Weapons in Outer Space (2014).
[32] A/RES/75/37: No First Placement of Weapons in Outer Space (2020).

appropriate, a political commitment not to be the first to place weapons in outer space." It should be noted that within the context of the CD, Russia has pursued the conclusion of bilateral political agreements on no first placement of weapons in space with states, including Indonesia, Argentina, Cuba, Venezuela, Vietnam, and Pakistan.[33]

The voting record here displays more ambivalence from the international community as a larger number of states are voting against and abstaining (See *Figure 3*). While the resolution still gains support from a majority of states, it does not maintain the near-universal support found in the PAROS or TCBM series. The votes of the three major space powers here show more consistency with Russia and China voting in favor of every iteration of the resolution and the United States voting against every iteration (see *Table 3*, Annex).

Figure 3



4. NORMS RESOLUTION

In 2020, the United Kingdom led an effort behind Resolution 75/36: Reducing space threats through norms, rules, and principles of responsible behaviors.[34] This resolution also places itself within the context of PAROS and peaceful purposes through its preambulatory text.

[33] See: UN Doc CD/1954 (31 July 2013); UN Doc CD/1991 (24 June 2014); UN Doc CD/2001 (4 September 2014); UN Doc CD/2060 (4 April 2016); UN Doc CD/2098 (6 September 2017); and UN Doc CD/2160 (13 June 2019).

[34] A/RES/75/36: Reducing Space Threats Through Norms, Rules and Principles of Responsible Behaviours (2020)

The most significant operative provision is as follows:

> Encourages Member States to study existing and potential threats and security risks to space systems, including those arising from actions, activities, or systems in outer space or on Earth, characterize actions and activities that could be considered responsible, irresponsible or threatening and their potential impact on international security, and share their ideas on the further development and implementation of norms, rules, and principles of responsible behaviours and on the reduction of the risks of misunderstanding and miscalculations with respect to outer space.

The resolution does request states to share information with the CD but does not endorse it as the primary forum for discussion, nor does it mention the PPWT. The use of the phrase "norms, rules and principles" seems to encompass a number of mechanisms, either legally or politically binding, that contribute to the reduction of threat. Despite this, there does seem to be a perception that the resolution is intended to push forward nonbinding measures. The resolution also places this topic as a sub-item under PAROS on the UNGA agenda, so this resolution could become a series.[35] A notable feature of this resolution is that it focuses on responsible behavior rather than the armament technology itself.

The voting on this resolution brings into focus the divisions noted in the previously discussed series. The votes on this resolution were 164 in favor, 12 against, and 6 abstentions. Strikingly though, the United States voted in favor of this resolution, while Russia and China voted against it. This reveals one of the central division points among the space powers: the United States seems to be insistent on its policy that there is no need for new legal instruments governing space, and China and Russia seem equally insistent that the discussion be held in the context of legally binding rules. This binding/nonbinding binary has become the dominant feature in the PAROS landscape.

[35] Indeed, a version has been adopted in 2021 – see A/RES/76/231: Reducing Space Threats Through Norms, Rules and Principles of Responsible Behaviours (2021).

B. CONFERENCE ON DISARMAMENT AND PAROS

The CD is the sole international body for negotiating multilateral disarmament agreements. It is a "semi-autonomous body" that is considered part of the "UN Disarmament Machinery".[36] Any potential for PAROS to manifest in a legally binding multilateral agreement has its path through the CD. There are three significant issues at the CD with regards to PAROS: the CD's deadlock, the PAROS Working Group, and the draft PPWT that has been introduced to the CD.

The CD works on a consensus basis, and its members must adopt a program of work by consensus annually.[37] Significantly, without a program of work the CD is unable to move on to substantive work. This has led to a significant procedural problem in that the CD has been deadlocked for over two decades. This deadlock was historically due in part to the PAROS issue. After the Cold War, the United States adopted the policy that there was no need for new rules or limitations on space activities. Though this policy predated it, the Bush Administration made this policy explicit in its 2006 space policy.[38] As a result, in the late 1990s, after the CD had successfully negotiated the Comprehensive Nuclear Test Ban Treaty, the United States began to vote against any program of work that included PAROS while China and Russia refused to accept a program of work that did not include it.[39] This situation continued until in 2009, when the Obama Administration in the US changed its approach to the CD and voted in favor of a program of work for that year.[40] However, the CD soon deadlocked on other issues such as fissile materials. The continuing deadlock, whether the result of opposition to PAROS or not, means that the CD cannot at the plenary level take substantive action on the PAROS agenda item.

One of the substantive results of the brief thaw in the deadlock in 2009 was the establishment of a number of Working Groups to address specific issues including PAROS.[41] The PAROS Working Group is mandated "to discuss substantively, without limitation, all issues related to the prevention of an arms race in outer space" and "shall take into

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[36] Andrej Stefanovic, "Breaking the Deadlock: The Conference on Disarmament between Continuation, Dissolution and Renewal" (2020) 14:24 *Godišnjak FPN* 127.
[37] *Ibid* at 129.
[38] "NSPD-49: U.S. National Space Policy" (2006) <www.fas.org/irp/offdocs/nspd/space.html>.
[39] Stefanovic, *supra* note 36 at 133-136.
[40] "Decision for the Establishment of a Programme of Work for the 2009 Session", UN Doc CD/1864 (29 May 2009).
[41] *Ibid*.

consideration all relevant views and proposals past, present and future."[42] These working groups were re-established as "subsidiary bodies" in 2018.[43] These working groups have served as places for discussion and created reports highlighting the various impasses in negotiating further measures, but they have not resulted in forward movement at reconciling differences among the stakeholders.[44]

Despite the deadlock in the CD, China and Russia have introduced the draft PPWT.[45] This text was originally introduced in 2008[46] and a revised draft was introduced in 2014.[47] This text is the only draft treaty text on PAROS before the CD; it has been heavily critiqued by the United States.[48]

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[42] *Ibid*.
[43] "Decision", UN Doc CD/2126 (27 March 2018).
[44] See "Letter Dated 15 September 2009 from the President of the Conference on Disarmament on behalf of the 2009 Presidents Addressed to the Secretary-General of the Conference Transmitting the Reports of the Seven Coordinators Submitted to the President of the Conference on the Work Done During the 2009 Session on Agenda Items 1 to 7", UN Doc CD/1877 (15 December 2009); "Subsidiary Body 3: Prevention of an Arms Race In Outer Space – Report", UN Doc CD/2140 (11 September 2018); and "Note Verbale Dated 20 August 2014 from the Permanent Mission of the Russian Federation addressed to the Secretariat of the Conference on Disarmament Transmitting the Comments Made by the Delegation of the Russian Federation on the Report of the Informal Meetings Prepared by the Coordinator on Item 3 of the Agenda of the Conference entitled "Prevention of an Arms Race in Outer Space", UN Doc CD/1996 (25 August 2014).
[45] This draft text was based on earlier work. See, for example, "Working Paper Presented by the Delegations of China, the Russian Federation, Vietnam, Indonesia, Belarus, Zimbabwe and Syrian Arab Republic on Possible Elements for a Future International Legal Agreement on the Prevention of the Deployment of Weapons in Outer Space, the Threat or Use of Force Against Outer Space Object", UN Doc CD/1679 (28 June 2002).
[46] "Letter Dated 12 February 2008 from the Permanent Representative of The Russian Federation and the Permanent Representative of China to the Conference on Disarmament Addressed to the Secretary-General of the Conference Transmitting the Russian and Chinese Texts of the Draft "Treaty on Prevention of the Placement of Weapons in Outer Space And Of The Threat Or Use Of Force Against Outer Space Objects (PPWT)" introduced by the Russian Federation And China", UN Doc CD/1839 (29 February 2008).
[47] "Letter Dated 10 June 2014 from the Permanent Representative of the Russian Federation and the Permanent Representative of China to the Conference on Disarmament addressed to the Acting Secretary-General of the Conference Transmitting the Updated Russian and Chinese Texts of the Draft Treaty on Prevention of the Placement of Weapons in Outer Space and of the Threat or Use of Force Against Outer Space Objects (PPWT) introduced by the Russian Federation and China", UN Doc CD/1985 (12 June 2014).
[48] For the US critiques see, "Letter Dated 19 August 2008 from the Permanent Representative of the United States Of America Addressed To The Secretary-General Of The Conference Transmitting Comments on the Draft Treaty On Prevention Of The Placement of Weapons in Outer Space and of the Threat or Use of Force Against Outer Space Objects (PPWT) as Contained in Document CD/1839 of 29 February 2008", UN Doc CD/1847 (26 August 2008) and "Note Verbale dated 2 September 2014 from the Delegation of the United States of America to the Conference on Disarmament addressed to the Acting Secretary-General of the Conference Transmitting the United States of America Analysis of

The core provisions of this draft text are in its Article II, in which potential state parties would agree:

- "Not to place any weapons in outer space;"
- "Not to resort to the threat or use of force against outer space objects of States Parties to the Treaty;"
- "Not to engage, as part of international cooperation, in outer space activities that are inconsistent with the object and purpose of this Treaty;" and
- "Not to assist or induce other States, groups of States, international, intergovernmental or non-governmental organizations, including non-governmental legal entities established, registered or located in territory under their jurisdiction and/or their control, to participate in activities inconsistent with the object and purpose of this Treaty".[49]

While work is being done at the CD, there remain significant questions as to whether it can fulfill its role in promoting PAROS due to its long-term deadlock and inability to move forward on substantive discussions. Though the informal discussions at the CD likely have value as a forum for state discussion, many of the documents that have resulted from these discussions reveal clear dividing lines in how states approach issues of PAROS.

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the 2014 Russian-Chinese draft treaty on the prevention of the placement of weapons in outer space, the threat or use of force against outer space objects", UN Doc CD/1998 (3 September 2014). Russia and China have responded to these critiques: "Letter Dated 18 August 2009 From The Permanent Representative Of China And The Permanent Representative Of The Russian Federation to the Conference On Disarmament Addressed To The Secretary-General Of The Conference Transmitting Answers To The Principal Questions And Comments On The Draft "Treaty on Prevention of the Placement Of Weapons In Outer Space and of the Threat or Use of Force Against Outer Space Objects (PPWT)" Introduced By The Russian Federation and China and Issued as Document Cd/1839 Dated 29 February 2008", UN Doc Cd/1872 (18 August 2009) and "Letter Dated 11 September 2015 from the Permanent Representative of China to the Conference on Disarmament and the *Charge d'affaires* of the Russian Federation addressed to the Secretary-General of the Conference Transmitting the Comments by China and the Russian Federation Regarding the United States of America Analysis of the 2014 Updated Russian and Chinese Texts of the Draft 'Treaty on Prevention of the Placement Of Weapons in Outer Space and of the Threat or Use of Force Against Outer Space Objects'", UN Doc CD/2042 (14 September 2015).

[49] UN Doc CD/1985.

C. GROUP OF GOVERNMENTAL EXPERTS

The UNGA, in addition to its set of annual resolutions addressing space security, has attempted to push the conversation forward through the establishment of two GGEs. GGEs are a mechanism that can be used by the UN to pull together experts from state parties to study and release a consensus report on a topic. These are established through UNGA resolutions, and the experts are then appointed by the UN Secretary-General.

The first GGE relating to space was tasked with addressing Transparency and Confidence Building measures and was established in 2011.[50] The GGE released its final consensus report in 2013. The report analyzed a number of potential TCBMs and concluded that states should "on a voluntary basis . . . consider and implement the transparency and confidence building measures described in the present report."[51] In general, the report covered a variety of information exchange mechanisms that could help increase transparency in the space environment. While the group's recommendations wholeheartedly endorsed TCBMs, the recommendations are seemingly limited to non-legally binding measures, or in the words of the GGE "political commitments."[52]

A second GGE was established in 2017 to address "further effective measures for the prevention of an arms race in outer space."[53] This GGE held meetings in 2018 and 2019, but failed to reach consensus on a final report.[54] In this case consensus was broken by the expert from the United States based on the fact that the report made "recommendations on substantial elements of an international legally binding instrument on the prevention of an arms race in outer space."[55]

The draft report was made available as an attachment to a Working Paper submitted by Nigeria on behalf of the African Group to the UN Disarmament Commission.[56] The report itself laid out general elements for a potential treaty and did not recommend a specific set of provisions,

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[50] A/RES/65/68: Transparency and Confidence-Building Measures in Outer Space Activities (2011).
[51] Group of Governmental Experts on Transparency and Confidence-Building Measures in outer Space Activities, UN Doc A/68/189 (29 July 2013) at 68.
[52] *Ibid* at 69.
[53] A/RES/72/250: Further Practical Measures for the Prevention of an Arms Race in Outer Space (2018).
[54] Shpetim Bajrami and Stefan Talmon, "Preventing an Arms Race in Outer Space and Political Game-Play at the United Nations", German Practice in International Law (7 February 2020).
[55] *Ibid*.
[56] UN Doc. A/CN.10/2019/WP.1 (25 April 2019).

but rather addressed the general elements that "could form basic obligations" and the various approaches to each element discussed by the group.[57]

D. OTHER RELEVANT MECHANISMS

There are a number of other relevant mechanisms and fora that also contribute to the debates being had on PAROS, though they do not necessarily adopt the formal title of 'PAROS.' For the most part these constitute initiatives geared towards soft-law and policy type initiatives to bolster security in the space environment.

Possibly the most significant of these is the EU Code of Conduct (EUCoC) initiative. EUCoC was an attempt at circumventing the deadlocked CD by introducing a non-legally binding political agreement on responsible behavior in the space environment. The initial draft code was 'circulated' (rather than introduced) at the CD in 2007, but as it was a non-legally binding text formal discussions could take place outside of the CD context.[58] Subsequently, the EU hosted three multilateral consultations on the agreement before opening a negotiation on a text at UN Headquarters in New York in 2015.[59]

These negotiations failed for a number of reasons. First, the rules of procedure distributed with the negotiation were objectionable to a number of states, which felt that UN rules should apply or that the negotiating body should establish its own rules.[60] Second, there were a number of objections to the adopted forum for the negotiations, with a variety of states arguing that talks should occur within the UNGA, UNCOPUOS, or the CD.[61] Specifically, Russia and China endorsed the CD as the proper venue for discussions. Finally, the substantive issue of whether such an agreement should include the 'right to self-defense' was an issue for a number of developing states, who stood in opposition to US insistence that the right be included.[62] To date there has been no further movement on the EUCoC in the wake of the failed negotiations.

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[57] *Ibid* at 11.
[58] Wolfgang Rathgeber, Nina-Louisa Remuss, and Kai-Uwe Schrogl, "Space Security and the European Code of Conduct for Outer Space Activities" (2009) 4 Disarmament Forum 33–41.
[59] *Ibid*.
[60] P. J. Blount, "Sorting Out Self-Defence in Space: Understanding the Conflicting Views on Self-Defence in the EU Code of Conduct" in Maria Manoli and Sandy Belle Habachi, eds, *Conflicts in Space and the Rule of Law*, ed. (Montreal: McGill University, 2017) at 320.
[61] *Ibid*.
[62] *Ibid* at 321-327.

In general, UNCOPUOS does not directly address security issues, instead it focuses on the idea of 'peaceful uses' of outer space. However, a number of UNCOPUOS initiatives and discussions touch on matters of space security. A prime example of this is the recently adopted Long-term Sustainability Guidelines (LTS Guidelines).[63] The LTS Guidelines are focused on ensuring the future usability of space and endorse practices that can contribute to the maintenance of sustainability in the space environment. Among, these are a number of provisions that endorse information exchange among states, which is a core method of building transparency and confidence in the space context.[64]

There are other international fora that serve as places for discussion and norm development in space security. For instance, the Inter-Agency Committee on Space Debris (IADC) is a forum for technical discussions on space debris issues. Though the IADC does not directly touch on security issues, the forum indirectly addresses security through measures that intersect with security concerns.[65] There are a number of international, regional, and civil society groups that contribute to norm building in the context of space security, which go beyond the scope of the present study, but nonetheless play an important role in the overall fabric of the PAROS discourse.

Finally, the newest push in this area is US commitment to a moratorium on destructive direct ascent ASAT testing, which was announced in April 2022.[66] This commitment has been joined by a number of other states including Switzerland, Canada, New Zealand, Japan, Germany, the United Kingdom, South Korea, and Australia.[67] This new attempt by the US at building norms around ASAT testing will have much ground to gain if it is to be successful in solidifying as a norm. Specifically, it will need to gain traction from other states with counterspace capabilities and from states that are not traditionally seen as close allies of the US. The problem of strategic mismatch discussed below will have significant implications for the future success of the moratorium.

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[63] "Report of the Committee on the Peaceful Uses of Outer Space", UN Doc A/74/20 (20 August 2019).

[64] For instance, guidelines A.5, B.1, B.2, B.3, B.6, C.1, C.2, and C.4 could all be said to have transparency and confidence-building functions.

[65] See, for example, IADC Space Debris Mitigation Guidelines, Revision 3 (Inter-Agency Space Debris Coordination Committee, 2021)

[66] Marcia Smith, "VP Harris Pledges no U.S. Destructive ASAT Tests, Calls for Others to Join," *Space Policy Online* (18 April 2022), online: <www.spacepolicyonline.com/news/vp-harris-pledges-no-u-s-destructive-asat-tests-calls-for-others-to-join/>.

[67] Marcia Smith, "U.S.-Led ASAT Test Moratorium Gains Ground," *Space Policy Online* (3 November 2022), online: <www.spacepolicyonline.com/news/u-s-led-asat-test-moratorium-gains-ground/>.

IV. KEY CONTROVERSIES

As can be seen in the discussion in the previous sections there are a number of issues dividing the international community with regards to PAROS. These divisions have created significant barriers to moving forward on adopting further measures for the advancement of PAROS. This section will address a number of these and evaluate their impact.

A. FORM AND FORUM

The core identifiable blockade to movement on the PAROS issue is political and procedural rather than legal and substantive in nature. Based on the analysis above, it is fair to say that the issue of form - that is whether discussions should be on a legally binding or nonbinding instrument - is the most significant issue driving the impasse among states. To this end, the forum for negotiation is often contested as a proxy for form. This can clearly be seen in the dispute over forum at the EUCoC negotiation. The EUCoC was an intentional effort to escape the deadlock of the CD by pursuing a nonbinding agreement, and the EU was successful in courting the United States to join this effort, despite the US policy of opposing new rules in space. At the negotiation, however, Russia and China both backed the idea that the CD was the proper place for such discussions and that such discussions should be on a legally binding agreement.

The tension between legally binding and nonbinding may be one of the more difficult hurdles to overcome as it serves as a binary barrier to substantive discussion. Indeed, the other issues identified in this section are issues of substance, and while they do present challenges to any agreement on PAROS, they are substantive issues ripe for negotiation between and among states. The entrenchment of the major powers on either side of the binding/nonbinding binary clearly displays a lack of political will to pursue discussions that could potentially resolve substantive problems.

B. DEFINITIONS

A consistent theme in the debates over PAROS have been definitions and specifically the definition of a space weapon or armament. Such a definition is a threshold issue for any instrument seeking to assert limitations on such technologies. However, the adoption of a definition is fraught with difficulty. If it is defined too narrowly, then potential technologies will escape control and if it is defined too broadly then it could serve to inhibit potentially beneficial technologies. For instance, there are new technologies being developed to enable on-orbit servicing

and active debris removal. Such technologies could prove to be extraordinarily beneficial to space sustainability, but also harbor latent ASAT capabilities. Any definition of a space weapon will need to be able to cope with such problems, which is very difficult.

To address these difficulties numerous commentators have sought to endorse positions that ban particular types of activities or behaviors rather than specific technologies. For instance, the Stimson Center (a US-based think tank) proffered a model code of conduct focused on behavior.[68] This is also the tact taken by the "Norms, Principles, and Rules" UNGA resolution discussed above. Such an approach may be fruitful in overcoming the obstacles presented by the definitional problem. However, some states have expressed skepticism regarding the term "responsible behavior."

C. VERIFICATION

Another traditional roadblock to adopting further measures on PAROS is verification.[69] Arms Control Agreements in the wake of WWII have been plagued by a need for effective verification measures in order to ensure that parties were complying with the terms of the agreement. The advent of the space age introduced satellite remote sensing as a form of verification that enabled US-Soviet agreement on arms control agreements, as it reduced the need for mechanisms such as on-site inspections, which were not acceptable to the Soviet Union at the time. It is likely that any legally binding agreement will need some sort of verification mechanism. Unfortunately, space can be a particularly ambiguous place of operation, and it is difficult to verify that a space object is what its owners claim it to be.

The verification problem is one of the reasons that some states have endorsed non-binding agreements. The argument here is that since the degree of obligation is lessened, so too is the degree of the need to ensure that other parties are complying with the agreement.

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[68] "Model Code of Conduct" *Stimson Center* (16 September 2010), online: <www.stimson.org/2010/model-code-of-conduct/>. See also Michael Krepon, Theresa Hitchens, and Michael Katz-Hyman, "Preserving Freedom of Action in Space: Realizing the Potential and Limits of U.S. Spacepower," in Charles D. Lutes and Peter L. Hays, eds, *Toward a Theory of Spacepower: Selected Essays* (Washington, DC: National Defense University Press, 2011), 119–36.

[69] For example, see the US comments on the PPWT set out in UN Doc CD/1998 (2014).

Similarly, proposals that seek to limit behavior rather than technologies, discussed above, give another alternative to verification as proponents argue that verifying behavior is easier than verifying the specifics of deployed technologies.[70]

For example, it is easier to verify whether a close approach has happened compared to whether a co-orbital ASAT has been deployed. Such an approach does lessen the technical requirements of verification, and information exchange within such a framework could lead to enhanced transparency and confidence. However, it would also allow states to develop a range of counter space technologies as long as they do not test them in a way that results in outlawed conduct.

D. INCLUSION OF A RIGHT OF SELF-DEFENSE

Another sticking point, seen primarily in the EUCoC, is the inclusion of the right to self-defense. The right to self-defense debate is interesting as its inclusion in a potential agreement would not change the existing right to self-defense guaranteed by the UN Charter.[71] This is because all three of the major states seem to agree on the inclusion of a right to self-defense. It is in the Russia-China PPWT, and its inclusion in the EUCoC was pressed by the US. At the EUCoC negotiation, there was a significant voice from developing nations that opposed the inclusion of the right to self-defense. This stance seems, to some extent, driven by a mistrust of the US expansive application of a right to self-defense post-9/11.[72]

E. POTENTIAL OBLIGATIONS AND STRATEGIC MISMATCH

The potential obligations in any agreement on PAROS would most certainly be hotly contested. States will be reluctant to give up certain types of activities and limit their options for economic or strategic gain. In practice this means that if states (and in particular the core spacefarers) perceive an agreement to be disadvantageous to themselves and advantageous to adversaries, then states will not join the treaty.

This is particularly salient in the post-Cold War world. The two Cold War powers - the US and the USSR - though locked in bipolar enmity, had somewhat similar strategic interests. Both were vying to

[70] See, for example, the approaches outlined in the GGE on Legally Binding Measures: UN Doc A/CN.10/2019/WP.1 (2019).
[71] UN Charter, art 51.
[72] Blount, *supra* note 60 at 321-327.

spread their ideological influence globally, but the core security threat that both were guarding against was a nuclear attack from the other. While the attack systems they built differ functionally, the strategic goal of having enough weapons to survive and respond to an attack led to a semblance of symmetry in the strategic advantage they were seeking over the other. Such parity made coming to arms control agreements an easier task.

This situation is different in the multipolar world that followed the Cold War era.[73] This is because adversary states often have very different strategic outlooks that can prove to be a stumbling block in negotiations. For instance, if placed in the context of signaling and deterrence, then different types of space weapons hold different strategic value. A kinetic ASAT that may serve as a deterrent for one state, may lack the same deterrence value for its adversary. Such a situation complicates arms control negotiations, as one state may be willing to negotiate on space-based weapons but not ground to space weapons, and another state may have the completely opposite view . . . and third and fourth states may have altogether different views.[74] In such cases, negotiations encounter a two-fold challenge.

On the one hand, pursuing an agreement that only deals with a certain type of armament will fail to incentivize some states to come to the table, but on the other hand agreements that seek to comprehensively address various types of disarmament will become over complicated and lead to impasse. One potential way to address this problem is to focus potential negotiations on behavior rather than technology as discussed above in the context of verification. Defining responsible and irresponsible space behavior can help to address strategic mismatch as it shifts the focus away from technological development and strategic posture and to rules that in theory should be acceptable to all space actors.

V. MAKING PROGRESS

A. COMING TO THE TABLE

As should be clear from the foregoing analysis, the most significant hurdle for advancing PAROS substantively is the inability to get the major space powers at the same table for discussions. The United States has maintained a policy that eschews discussions on any new legally binding

[73] As an example of this strategic mismatch, see the analysis of potential U.S.-China conflict in Michael E O'Hanlon, "Balancing U.S. Security Interests in Space" in Charles D Lutes and Peter L Hays, eds, *Toward a Theory of Spacepower: Selected Essays* (Washington, DC: National Defense University Press, 2011), 119–36.
[74] This is one of the core objections of the US to the PPWT: see, UN Doc CD/1998 (2014).

rules, though this stance seems to be shifting under the Biden Administration. This has manifested most recently in the US opposition to the GGE report on elements of a legally binding instrument, adoption of which was presumably blocked by the US not on substance, but on the position that new law is unnecessary.

At the same time, Russia and China have refused to come to the table on non-legally binding agreements, which can be seen in the EUCoC negotiation, as well as their votes against the recent UNGA resolution on 'norms, rules, and principles', which has been interpreted to endorse nonbinding mechanisms (though the text does not clearly limit itself to nonbinding agreements).

This situation is problematic. As a former Canadian diplomat pointed out, there is a situation where there seems to be general agreement that there is a need to advance the PAROS agenda, yet there seems to be no movement forward.[75] Of course, this general agreement can be seen in the UNGA votes chronicled above, taking into account the US voting record on TCBMs and its recent approval of the "norms, rules, and principles" resolution. However, if states cannot enter into discussions due to a dispute over the form of the final output, then it will be very difficult for PAROS to advance, and likely the current trend of major powers blocking initiatives in order to favor their preferred form.

There is no clear way to escape this impasse, but this paper recommends that the major space powers begin to engage in bilateral, trilateral, and multilateral engagements beyond the standard UN forums. This would allow states to gain a more nuanced understanding of the other state's views and could create conditions in which key stakeholders can begin to identify principles with common support that could serve as the basis for future norms. This paper has focused on China, Russia, and the United States, and it is critical that these states begin to pursue discussions to identify commonly supported principles. It is likely though that other states, such as India or the United Kingdom, may need to be involved in such bilateral discussions. Norm building, whether legally binding or nonbinding, will not emerge spontaneously and states must begin to abandon non-cooperative attitudes and engage in discussions.

[75] Paul Meyer, "The Diplomacy of Space Security: Whither the International Code of Conduct?" *Simons Papers in Security and Development* (Vancouver: Simon Fraser University, 2014) 5.

B. SUBSTANCE BEFORE FORM

Related to and likely indivisible from the need to come to the table is the need to overcome the barrier over the form of the agreement. Baseline bilateral discussions about shared principles could help to identify areas that are ripe for articulating in more formal documents. However, these discussions may not clear the way for fruitful multilateral discussions if the major powers are still focused on the binding/nonbinding binary.

This binary though seems to be more of a straw man than an actual blockage to negotiations. Indeed, the history of space law shows that this is less of a binary choice and more of an evolving spectrum of normative development than the states involved seem to acknowledge. The first articulation of international space law is the 1963 Declaration of Legal Principles,[76] a nonbinding UNGA resolution. However, the principles enunciated in that resolution went on to form the basis of the treaty regime for outer space and are considered by many scholars as customary international law. This example shows that normative escalation is achievable and may be a preferred method of norm development in international law.

The current UNGA resolutions on PAROS, though, are focused less on the substance of a potential normative paradigm for PAROS, and more on the perceived binding/nonbinding paradigm for PAROS. This situation locks out the three major powers from agreeing even when there is substantial overlap in potential interests. This is clearly seen in the most recent year of UNGA resolutions and the way that the three space powers voted on the PAROS resolution (China and Russia = yea; US = nay) and on the "norms, rules, and principles" resolution (China and Russia = nay; US = yea). These resolutions do not diverge on substance, rather they diverge on the emphasis on binding versus nonbinding rules.

PAROS may need to follow a similar process to other normative building in space, such as the series of principles adopted by the UNGA or the LTS Guidelines. While it is of course true that a legally binding agreement would be the preferable mechanism, as it would have the potential to create more stability than a nonbinding agreement, the focus on the binding/nonbinding agreement has resulted in a paucity of work on building the actual norms that should underpin PAROS. It is recommended that states decouple PAROS from the binding/nonbinding

[76] UN Resolution 1962 (XVIII): Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (13 December 1963).

binary in order to discuss substance before discussing the form of a potential document of articulation. Such discussions can begin in the recommended bilateral and trilateral forums, but also need to be advanced in multilateral forums such as UNCOPUOS, UNGA, and CD, as well as in regional fora such as Asia-Pacific Space Cooperation Organization, Asia-Pacific Regional Space Agency Forum, and the European Union.

C. PROCESS AND FORM

If states can come to the table and find common ground in the substance of norms that might contribute to the advancement of PAROS, then there will be a need to advance discussions on how to advance such norms. This will require creativity as there will be a need to approach the drafted text so as to overcome the procedural barrier presented by the binding/nonbinding binary. This section presents some options on how such a document could be structured, but the presented options are by no means exhaustive.

The first suggestion is to pursue a UNGA resolution sponsored by the three dominant space powers that adopts the broad common principles to which these states can agree. A benefit of such a document is that it could serve as the basis for further discussions and for the development of customary norms of responsible behavior in space. It would also link the effort to the history of using UNGA resolutions to adopt principles for space, which is an important feature of international space law. Finally, it would place the negotiation of the text squarely within an accepted forum for action. There are drawbacks to this strategy. First, a UNGA resolution would fall squarely within the nonbinding end of the agreement spectrum, which some states see as insufficient, but this might be mitigated by the fact that the UNGA process is already so prevalently used in the PAROS context. Second, it is unclear where such a principles document might originate. In the past, the space principles have originated in UNCOPUOS, but that may not be the proper forum for the negotiation of squarely security-related principles. However, the UN's First Committee could certainly serve as the forum for introducing the document.

A second option could be a legally binding document similar to the Convention on Conventional Weapons.[77] Such a document would consist of a main treaty text that would lay out general commonly accepted PAROS principles. This text would allow for additional protocols that

[77] *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects* (entered into force 2 December 1983).

could address specific technologies or behaviors related to PAROS, and these protocols would be legally binding documents that would require additional signature and ratification by the parties that choose to adopt them. The benefit of this approach is that it allows states to opt into the restrictions that they see in alignment with their interests. However, this is a core drawback as well, as it could also allow for the amplification of the strategic mismatch problem since it would alienate issues from each other and reduce the bargaining power for states to make tradeoffs.

A third option could be a hybrid document of some sort. For instance, there could be a core treaty adopting broad common principles that allows for the adoption of nonbinding technical rules that describe responsible behavior in space. Such a model could be adaptable to a variety of different forms depending on the preferences of the negotiating states. This model would benefit from splitting the binding/nonbinding binary, which might be acceptable to the factions on either side of this issue. It would also benefit from the use of technical parameters that could help to build norms of behavior. Such technical documents have been favored in the past in the space community as can be seen in the IADC and UNCOPUOS guidelines on space debris mitigation. Possibly, one of the biggest obstacles to such an agreement would be an agreement on the forum and process for adopting technical guidelines.

As stated above, this is a non-exhaustive list, and numerous, different formulations are certainly conceivable. Indeed, the EUCoC process was an attempt at establishing a creative forum to circumvent deadlock in the established international forums. There are numerous configurations that states can use to adopt governance mechanisms (regardless of the extent of their binding nature), but all will be premised on states coming to the table in good faith. This means that the design of such a forum or document should take into account the parameters that states are likely to accept and reject.

VI. CONCLUSION

Reaching agreement on the furtherance of PAROS is not an unachievable goal, but it will require careful consideration of the political will of all parties to find creative solutions around the major obstacles to agreement. At the moment, the most significant barrier is bringing the major powers to the table to exchange views and negotiate in good faith. Though this article makes recommendations on how to move forward on such a project, it should be noted that the geopolitical relationships among these three powers are currently fraught, and space is just one slice of larger geopolitical tensions and conflicts. While geopolitical tensions will

likely continue to be the biggest factor influencing the possibility of negotiations, space has in the past overcome such barriers and allowed adversary states to cooperate. Such an example is important as the preservation of safety and security in space is a collective action problem, and the space environment is a particularly fragile one. PAROS will play an important role in achieving stability in space but will necessitate states to recognize the need for cooperation in this domain.

ANNEX

UNITED NATIONS GENERAL ASSEMBLY VOTING RECORDS

CHINA, RUSSIA, AND THE UNITED STATES

Table 1: PAROS Series, 1981-2020

Year	Resolution	United States	Russia	China
1981	A/RES/36/97C: Prevention of arms race in outer space	Y	A	Y
1982	A/RES/37/99D: Prevention of an arms race in outer space and prohibition of anti-satellite systems	Y	A	NV
1983	A/RES/38/70: Prevention of an arms race in outer space	N	Y	Y
1984	A/RES/39/59: Prevention of an arms race in outer space	A	Y	Y
1985	A/RES/40/87: Prevention of an arms race in outer space	A	Y	Y
1986	A/RES/41/53: Prevention of an arms race in outer space	A	Y	Y
1987	A/RES/42/33: Prevention of an arms race in outer space	N	Y	Y
1988	A/RES/43/70: Prevention of an arms race in outer space	N	Y	Y
1989	A/RES/44/112: Prevention of an arms race in outer space	N	Y	Y
1990	A/RES/45/55A: Prevention of an arms race in outer space	A	Y	Y
1991	A/RES/46/33: Prevention of an arms race in outer space	A	Y	Y
1992	A/RES/47/51: Prevention of an arms race in outer space	A	Y	Y
1993	A/RES/48/74A: Prevention of an arms race in outer space	A	Y	Y
1994	A/RES/49/74: Prevention of an arms race in outer space	A	Y	Y

1995	A/RES/50/69: Prevention of an arms race in outer space	A	Y	Y
1996	A/RES/51/44: Prevention of an arms race in outer space	A	Y	Y
1997	A/RES/52/37: Prevention of an arms race in outer space	A	Y	Y
1998	A/RES/53/76: Arms race prevention in outer space	A	Y	Y
1999	A/RES/54/53: Prevention of an arms race in outer space	A	Y	Y
2000	A/RES/55/32: Prevention of an arms race in outer space	A	Y	Y
2001	A/RES/56/23: Prevention of an arms race in outer space	A	Y	Y
2002	A/RES/57/57: Prevention of an arms race in outer space	A	Y	Y
2003	A/RES/58/36: Prevention of an arms race in outer space	A	Y	Y
2004	A/RES/59/65: Prevention of an arms race in outer space	A	Y	Y
2005	A/RES/60/54: Prevention of an arms race in outer space	N	Y	Y
2006	A/RES/61/58: Prevention of an arms race in outer space	N	Y	Y
2007	A/RES/62/20: Prevention of an arms race in outer space	N	Y	Y
2008	A/RES/63/40: Prevention of an arms race in outer space	N	Y	Y
2009	A/RES/64/28: Prevention of an arms race in outer space	A	Y	Y
2010	A/RES/65/44: Prevention of an arms race in outer space	A	Y	Y

2011	A/RES/66/27: Prevention of an arms race in outer space	A	Y	Y
2012	A/RES/67/30: Prevention of an arms race in outer space	A	Y	Y
2013	A/RES/68/29: Prevention of an arms race in outer space	A	Y	Y
2014	A/RES/69/31: Prevention of an arms race in outer space	A	Y	Y
2015	A/RES/70/26: Prevention of an arms race in outer space	N	Y	Y
2016	A/RES/71/31: Prevention of an arms race into outer space	A	Y	Y
2017	A/RES/72/26: Prevention of an arms race in outer space	A	Y	Y
2018	A/RES/73/30: Prevention of an arms race in outer space	N	Y	Y
2019	A/RES/74/32: Prevention of an arms race in outer space	N	Y	Y
2020	A/RES/75/35: Prevention of an arms race in outer space	N	Y	Y

Table 2: TCBMs, 1993, 2005 – 2020

Year	Resolution	US	Russia	China
1993	A/RES/48/74B: Study on the application of confidence-building measures in outer space	Y	Y	Y
2005	A/RES/60/66: Transparency and confidence-building measures in outer space activities	N	Y	Y
2006	A/RES/61/75: Transparency and confidence-building measures in outer space activities	N	Y	Y
2007	A/RES/62/43: Transparency and confidence-building measures in outer space activities	N	Y	Y
2008	A/RES/63/68: Transparency and confidence-building measures in outer space activities	N	Y	Y
2009	A/RES/64/49: Transparency and confidence-building measures in outer space activities	Y	Y	Y
2010	A/RES/65/68: Transparency and confidence-building measures in outer space activities	A	Y	Y
2013	A/RES/68/50: Transparency and confidence-building measures in outer space activities	Y	Y	Y
2014	A/RES/69/38: Transparency and confidence-building measures in outer space activities	Y	Y	Y
2015	A/RES/70/53: Transparency and confidence-building measures in outer space activities	Y	Y	Y

2016	A/RES/71/42: Transparency and confidence-building measures in outer space activities	Y	Y	Y
2017	A/RES/72/56: Transparency and confidence-building measures in outer space activities	Y	Y	Y
2018	A/RES/73/72: Transparency and confidence-building measures in outer space activities	N	Y	Y
2019	A/RES/74/67: Transparency and confidence-building measures in outer space activities	N	Y	Y
2020	A/RES/75/69: Transparency and confidence-building measures in outer space activities	N	Y	Y

Table 3: TCBMs, 1993, 2005 – 2020

Year	Resolution	United States	Russia	China
2014	A/RES/69/32: No first placement of weapons in outer space	N	Y	Y
2015	A/RES/70/27: No first placement of weapons in outer space	N	Y	Y
2016	A/RES/71/32: No first placement of weapons in outer space	N	Y	Y
2017	A/RES/72/27: No first placement of weapons in outer space	N	Y	Y
2018	A/RES/73/31: No first placement of weapons in outer space	N	Y	Y
2019	A/RES/74/33: No first placement of weapons in outer space	N	Y	Y
2020	A/RES/75/37: No first placement of weapons in outer space	N	Y	Y

CASE COMMENTS

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BRITISH AIRWAYS' POSITION ON MONTREAL CONVENTION ACCIDENT DETERMINATION REJECTED

United States Court of Appeals for the First Circuit[1]

A case comment by
Erin R. Applebaum *

On April 29, 2022, the United States Court of Appeals for the First Circuit handed down a landmark decision in *Moore v British Airways PLC* (*Moore*) clarifying how the courts should determine an essential element of a Montreal Convention claim: whether an "accident" has occurred under Article 17. The decision provides critical support for plaintiff passengers who are injured by an event that the passenger considers to be unusual or unexpected, while the defendant airline deems the occurrence to be an ordinary part of air travel.

I. FROM WARSAW TO MONTREAL

The laws governing the legal rights of passengers injured or killed on international flights are notably different from the laws governing most personal injury or wrongful death cases. International aviation cases have different deadlines, unique liability triggers, and challenging jurisdictional hurdles.

Claims are litigated under the Montreal Convention,[2] a multinational treaty that provides a single universal liability regime governing injuries and deaths occurring on international flights. This section provides a brief introduction to the Montreal Convention and its predecessor, the Warsaw Convention.

A. THE WARSAW CONVENTION

The international aviation laws date back to the dawn of commercial aviation. In October of 1929, just two years after Charles Lindbergh made his historic flight from Paris to New York, a draft set of rules pertaining to

[1] *Moore v British Airways PLC*, 32 F 4th 110, 120 (1st Cir 2022) [*Moore*].

* Partner, Kreindler & Kreindler LLP.

[2] The Montreal Convention is formally known as the *Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999, 2242 UNTS 309; S Treaty Doc No 106-45 (2000), (entered into force 4 November 2003) [*Montreal Convention*].

liability in international aviation was presented at the Warsaw Conference. These rules became known as the Warsaw Convention, which entered into force in 1933.[3]

The Warsaw Convention's primary purpose was to limit the liability of air carriers "in order to foster the growth of the fledgling commercial aviation industry."[4] But as time passed and the aviation industry grew, signatory countries grew frustrated by the Warsaw Convention's low liability limits and perceived deference to industry.

B. THE MONTREAL CONVENTION

The drafters of the Montreal Convention of 1999, which entered into force in 2003, attempted to better protect passengers while striking an "equitable balance of interests"[5] with the airlines.

The Montreal Convention updated, modernized, and largely replaced the Warsaw Convention.[6] The Montreal Convention applies to "international carriage" by air, where the place of departure and place of destination are within the territories of signatory countries.[7] The Montreal Convention, like the Warsaw Convention before it, supersedes domestic liability law; if a claim that falls within the Montreal Convention's scope is invalid under the Convention, there will be no remedy under any local law.[8]

The Montreal Convention has a two-year limitations period to bring injury or death claims.[9] Article 17 of the Montreal Convention imposes strict liability on air carriers for damages up to 128,821 Special Drawing

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[3] The Warsaw Convention is formally known as the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, 49 Stat 3000, 137 LNTS 11 (entered into force 13 February 1933).

[4] *Eastern Airlines v Floyd*, 499 US 530, 546 (1991).

[5] *Moore*, *supra* note 1 at 120 (citing *Montreal Convention*, *supra* note 2 at preamble).

[6] The Montreal Convention entered into force in the United States on November 4, 2003.

[7] *Montreal Convention, supra* note 2 at art 1(2); See *Motlagh v Qatar Airways, QCSC*, 445 F Supp 3d 852, 860 (SD Cal 2020) (Warsaw Convention applies to round trip international flight from and to Iran since Iran is not a signatory to the Montreal Convention. Where plaintiff purchased tickets in Iran, there is no subject matter jurisdiction in the US under the Warsaw Convention).

[8] *Smith v American Airlines, Inc,* Case No C 09-02903 WHA, 2009 WL 3072449 at 1 (ND Cal 2009); *Seales v Panamanian Aviation Co,* Case No 07-CV-2901 (CPS) (CLP), 2009 WL 395821 at 7–8 (2d Cir 2009); *Jones v USA 3000 Airlines,* Case No 4:08–CV–1855 CEJ, 2009 WL 330596 at 3–9 (ED Mo 2009); *Knowlton v American Airlines, Inc,* Civil Action No RDB–06–854, 2007 WL 273794 at 4 n 3 (D Md 2007).

[9] See *Cohen v American Airlines, Inc*, 13 F 4th 240 (2d Cir 2021) (Montreal Convention pre-empts all local law, including the limitations period); *Dagl v Delta Airlines, Inc*, 961 F 3d 22 (1st Cir 2020) ("Accident" of false imprisonment commenced during the flight and, therefore, fell within the scope of the Montreal Convention and rendered untimely by the two-year limitations period).

Rights[10] – approximately US$ 170,000 – in the event of accidental death or bodily injury of a passenger.[11] A plaintiff may exceed the cap on damages if the airline cannot disprove its responsibility for the plaintiff's injuries.[12] Airline defendants can also reduce their liability under the Montreal Convention by proving that the passenger's own conduct, or that of a third party, contributed to the passenger's damages.[13]

II. LIABILITY FOR "ACCIDENTS" AND THE REASONABLE PASSENGER

To establish liability against an airline under the Montreal Convention, the plaintiff must prove that he or she sustained a bodily injury[14] as the result of an "accident" which occurred either on the airplane or during the course of boarding or disembarking.[15] The courts have liberally characterized a myriad of varying circumstances as Article 17 accidents.[16] Although the occurrence of an "accident" is a prerequisite to

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[10] See *Montreal Convention*, *supra* note 2 at arts 21(1), 23; *Inflation Adjustments to Liability Limits Governed by the Montreal Convention Effective December 28, 2019*, 85 Fed Reg 3104 at 3105 (2020); International Monetary Fund, "SDR Valuation", online: *International Monetary Fund* <www.imf.org/external/np/fin/data/rms_sdrv.aspx>.

[11] *In re Korean Air Lines Disaster*, 932 F 2d 1475, 1485 (DC Cir 1991).

[12] *Montreal Convention, supra* note 2 at art 21(2).

[13] *Ibid*; *Eastern Airlines v Floyd, supra* note 4.

[14] The plaintiff must show that he sustained a physical injury; purely psychological injury is not sufficient. *Tharp v Delta Air Lines, Inc,* 552 F Supp 3d 1091, (D Or 2021) (The court found that under the Montreal Convention, the airline is not liable where the passenger did not suffer a bodily injury from an alleged assault by a fellow passenger.) *Tharp* followed the Supreme Court's decision in *Eastern Airlines v Floyd*, *supra* note 4 at 552 (interpreting the Warsaw Convention).

[15] *Air France v Saks*, 470 US 392, 405 (1985) (addressing the meaning of "accident" in the Warsaw Convention); see also *Olympic Airlines v Husain,* 540 US 644 (2004) (airline liable when a passenger suffered an asthma attack and died aboard a flight where the flight attendant rejected the asthmatic passenger's wife's request to be moved away from smoking passengers). Courts have applied the *Saks* definition of "accident" to Montreal Convention cases. See e.g. *Moore*, *supra* note 1 at 112.

[16] See e.g. *Krystal v British Overseas Airways Corp,* 403 F Supp 1322 (CD Cal 1975) (aircraft hijacking); *Evangelinos v Transworld Airlines, Inc,* 550 F 2d 152 (3d Cir 1977) (in-flight **Error! Main Document Only.**terrorist attack); *Wallace v Korean Air,* 214 F 3d 293, 299 (2d Cir 2000) (sexual assault against a sleeping passenger); *Kantonides v KLM Royal Dutch Airlines*, 802 F Supp 1203, 1209 (DNJ 1992) (passenger injured on a moving walkway in the airport terminal); *Chutter v KLM Royal Dutch Airlines*, 132 F Supp 611 (SDNY 1955) (passenger injured on the boarding ramp while waving to her daughter as the ramp pulled away from the plane); *Fishman v Delta Air Lines, Inc*, 938 F Supp 228 (SDNY 1996) (burns suffered by a minor as the result of a flight attendant spilling scalding water); *McCarthy v Northwest Airlines, Inc*, 862 F Supp 17 (D Mass 1994) (passenger injured by falling on an airport escalator); *Gezzi v British Airways PLC*, 991 F 2d 603 (9th Cir 1993) (passenger injured by a slip and fall caused by the presence of water on stairs); *Shen v Japan Airlines*, 43 F 3d 1459 (2d Cir 1994) (prolonged detention of passengers without food, plus illegal search and seizure); *Walsh v KLM Royal Dutch Airlines*, Case No 09-civ-01803 RKE, 2011 WL 4344158 (SDNY 2011) (passenger injured by a trip and fall over a low-positioned metal bar in the departure terminal); *Waxman v CIS Mexicana de Aviacion SA de CV*, 13 F Supp 2d 508, 512 (SDNY 1998) (passenger struck in the leg by a hypodermic needle protruding from the seat in front of him); *Wipranik v Air Canada*, Case No CV 06-3763 AHM (AJWx), 2007 WL 2441066 (CD Cal 2007) (jolt from one passenger's reclining seat caused the tray table behind it to shake and spill hot tea onto another passenger).

success in a Montreal Convention claim, the treaty does not explicitly define the term. This leads to frequent disagreements between litigants over its meaning. In cases where no question of fact exists, the issue of whether an Article 17 accident has occurred may be decided by the court as a matter of law.[17] In cases where there is contradictory evidence, however, it is for the trier of fact to determine whether a passenger's injury was caused by an accident.[18]

The United States Supreme Court has interpreted "accident" in the context of the Montreal Convention to mean "an unexpected or unusual event or happening that is external to the passenger." Where a passenger's injury results from the passenger's "own internal reaction to the usual and expected operation of the aircraft," however, "it has not been caused by an accident."[19] The court noted that the term should be applied "flexibly" and "broadly," and only "after assessment of all the circumstances surrounding a passenger's injuries."[20] The term "unexpected and unusual" was put into context by the Massachusetts District Court in *Maxwell v Aer Lingus Limited*, in which the court held that a bag of liquor bottles falling from an overhead bin "[w]as an accident in the sense of being an 'unexpected or unusual event'" because a "reasonable passenger […] would not expect, as an ordinary incident of the operation of the aircraft, to be struck on the head by a falling object when the bin above her seat is opened by a fellow passenger." In other words, the determination of whether or not an occurrence was "unexpected or unusual" should be based on a reasonable passenger's expectations of what could occur during an ordinary commercial flight. The court also explained that "[a]n event may be a foreseeable, or even accepted, risk of a given activity, while at the same time being unexpected."[21]

Defendant airlines tend to argue that whether an occurrence was "unexpected or unusual" should be determined by an objective standard, because a uniform metric will ostensibly eliminate perceptive discrepancies between passengers with varying levels of experience aboard commercial aircraft. For instance, a moderate turbulence event that a reasonable seasoned traveller would consider usual and expected conceivably could be deemed completely unusual and unexpected by a reasonable first-time flier. Conversely, plaintiff passengers tend to argue that whether something is "unexpected or unusual" is an inherently subjective concept and should be interpreted accordingly by the courts.

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[17] *Sak*s, *supra* note 15 at 405.
[18] *Ibid*.
[19] *Ibid* at 405–06 (an injury may have more than one cause; the plaintiff need only "prove that some link in the chain was an unusual or unexpected event external to the passenger").
[20] *Ibid*.
[21] *Maxwell v Aer Lingus Ltd,* 122 F Supp 2d 210, 211–12 (D Mass 2000).

III. THE PROBLEM OF PERSPECTIVE

In *Moore*, a passenger was injured while deplaning from a Boeing 777 at London's Heathrow Airport. The flight did not deplane the passengers through the usually employed jet bridge because it was inoperable. Instead, the flight deplaned passengers down a mobile staircase and onto the tarmac. The staircase steps had riser heights of 7.4 inches, with one notable exception: the distance from the last step to the ground measured thirteen inches. The passenger fell while descending from the last step onto the ground. She claimed that the distance to the ground was further than she expected, and that the unexpected drop caused her to lose her balance and fall.[22]

A. THE DISTRICT COURT

The Massachusetts District Court, departing from the position it assumed in *Maxwell*, granted summary judgment for the airline. The District Court found that the plaintiff's injuries had not been caused by an accident within the context of the Montreal Convention because the plaintiff could not show that the use of a mobile staircase was unusual in the aviation industry.[23]

But the District Court's basis for summary judgment was inherently flawed because it addressed the wrong event, thanks in part to the plaintiff's clumsily argued opposition. Plaintiff mistakenly chose to identify the use of a mobile staircase as the unexpected and unusual occurrence, even though her expert had presented evidence that the final step down was much higher than those preceding it.[24]

With that in mind, the District Court reasoned that "the use of a mobile staircase to disembark" was not an unexpected event and noted that British Airways had provided evidence that using a mobile staircase to disembark passengers is a routine operation in the industry.[25] In a vacuum, the District Court's basic reasoning is correct. But in consideration of the totality of the evidence, the District Court made the wrong call, and the plaintiff was right to appeal to the First Circuit.

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[22] *Moore*, *supra* note 1 at 112.
[23] *Moore v British Airways PLC,* 511 F Supp 3d 1, 6 (D Mass 2020).
[24] *Ibid.*
[25] *Ibid.*

B. THE FIRST CIRCUIT

The First Circuit reversed the lower court's decision, and in so doing, squarely addressed the question of whose perspective should dictate whether something "unexpected" or "unusual." According to the First Circuit, "the problem of perspective looms large: what is or not expected often lies in the eye of the beholder."[26]

From the airline's perspective, there was nothing "unusual or unexpected" about the staircase: a post-accident inspection confirmed that the stairs were in their normal operating condition, free of defects and working as intended.[27] Though British safety standards indicate that the maximum rise people can be expected to negotiate safely is 8.7 inches, those standards are merely voluntary guidance that British Airways is not required to follow.[28] Plaintiff's counsel even admitted at argument that there was "no 'evidence that the height of the last step was unusual for mobile staircases' or that the design was 'atypical from other mobile staircases used to disembark passengers.'"[29]

The plaintiff, however, testified that the long step down to the ground was "further down than [she] was expecting," while a second passenger testified that she "was surprised at the last step being a little further than a normal cadence of a staircase" and that "the bottom step didn't arrive when I thought it would."[30]

Evidently, though the height discrepancy between the final step and those preceding it may not have been unusual or unexpected from an industry standpoint, it was most certainly abnormal to the passengers descending the staircase. The core issue for the First Circuit then became one of perspective – namely, whose perspective should prevail?

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[26] *Moore*, *supra* note 1 at 114.
[27] *Moore (2020)*, *supra* note 25 at 6.
[28] *Ibid* at 6.
[29] *Moore, supra note 1* at 116
[30] *Ibid* at 113.

The plaintiff submitted that the First Circuit should consider the perspective of a "hypothetical average traveler" in determining whether an occurrence was unusual or unexpected. British Airways argued that the First Circuit should adopt the perspective of the airline industry.[31] In a major victory for plaintiffs, the First Circuit vacated and remanded the District Court's decision on grounds that accident determination should be based on the perspective of a "reasonable passenger with ordinary experience in commercial air travel."[32]

In analyzing the lower court's decision, the First Circuit focused its attention on the phrase "unusual or unexpected," noting that the District Court had analyzed only whether the cause of plaintiff's fall had been unusual, ignoring entirely whether it had been unexpected. The court noted the *Saks'* court's intentional use of "or" rather than "and" in defining an "accident," concluding that plaintiff need only fulfill one of the two terms, not both.[33] In other words, while the arrangement of the subject staircase may not have been *unusual* within the industry, this fact does not preclude the possibility that the height discrepancy between the stairs was *unexpected*. But the question of perspective remained: unexpected by whom?

The First Circuit examined worldwide authority in making its decision, looking favourably on Lord Scott's lead speech in *Deep Vein Thrombosis and Air Travel Group Litigation* – a Warsaw Convention case heard by the House of Lords. Lord Scott expressed the view that courts must examine whether the event was "'unintended and unexpected' from the viewpoint of the victim of the accident."[34] However, the First Circuit pointedly rejected the notion that a passenger's subjective expectations should control whether an event is an "accident," noting that the test must be an objective one due to potential for idiosyncrasies among passengers.[35]

In defense of its rejection of a subjective test unique to each plaintiff, the First Circuit also looked to the Court of Justice of the European Union (CJEU), which explained that a purely subjective approach "could extend [the concept of 'accident'] in an unreasonable manner to the detriment of air carriers."[36] However, the First Circuit was clear that it would not defer to the judgment of the air carrier or the aviation industry. The First Circuit stated that "what is [...] 'unexpected' [...] should be ascertained from the

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[31] *Ibid* at 117.
[32] *Ibid* at 117.
[33] *Ibid* at 116.
[34] *Ibid* at 118 (quoting *Deep Vein Thrombosis and Air Travel Group Litigation, Re,* [2005] UKHL 72, [2006] 1 AC (HL) 495, at para 14).
[35] *Ibid* at 118
[36] *YL v Altenrhein Luftfahrt GmbH,* C-70/20, [2021] ECLI:EU:C:2021:379 at para 35.

viewpoint of an ordinary, reasonable passenger,"[37] quoting with approval a decision from the Supreme Court of Victoria[38] that was subsequently affirmed by the High Court of Australia.[39] The First Circuit noted that the Montreal Convention is a treaty that "favors passengers rather than airlines" and plainly rejected the British Airways' argument that the staircase's bottom step could not have been unexpected or unusual since it was normal throughout the industry.[40]

The essential holding in *Moore* is that an event may be deemed unexpected "when a reasonable passenger with ordinary experience in air travel, standing in the plaintiffs' shoes, would not expect the event to happen." Based on that definition, the First Circuit found that there was sufficient evidence[41] to support a finding that an accident occurred.[42] The case was remanded back to the District Court and settled before trial.

IV. FINAL REMARKS

The *Moore* decision is important because it will permit cases to go forward when passengers are injured by events that could be considered unusual or unexpected by an ordinary and reasonable traveller, even if the airline shows that no proprietary or regulatory standards were violated in the accident. On the other hand, the decision renders the subjective expectations of passengers irrelevant: plaintiffs are prevented from arguing the pre-eminence of their own opinions, while at the same time the airlines are compelled to meet ordinary passenger expectations. Ultimately, the First Circuit has brokered a compromise between passengers and the aviation industry – just as the Montreal Convention's drafters intended.

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[37] *Moore, supra note 1* at 118–119.
[38] *Qantas Ltd v Povey*, [2003] VSCA 227, 11 VR 642 at para 22.
[39] *Povey v Qantas Airways Ltd*, [2005] HCA 33, 223 CLR 189.
[40] *Ibid* at 117; Though not mentioned in its opinion, the First Circuit's analysis was correct for another reason: although regulatory requirements may be relevant to the "accident" analysis, they are not dispositive of it. *Phifer v Icelandair,* 652 F 3d 1222, 1224 (9th Cir 2011). In fact, the Supreme Court has suggested that a *per se* rule requiring a regulatory violation would be outright improper. *Ibid* (citing *Saks, supra* note 15 at 405).
[41] The court cited the testimony of plaintiff Moore and her travelling companion; the testimony of plaintiff's expert that the staircase did not comply with certain voluntary standards concerning stair height; the lack of any warning by the airline concerning the step down from the staircase; and other evidence to find the existence of triable questions of fact. *Moore*, *supra* note 1 at 121–22.
[42] The First Circuit noted a decision that it considered an "outlier": *Blansett v Continental Airlines*, 379 F 3d 177, 182 (5th Cir 2004). In *Blansett*, the United States Court of Appeals for the Fifth Circuit held that failure to warn passengers of the risk of developing deep vein thrombosis on long-haul flights could not be an accident because such practice was not unusual in the industry and complied with the expectations of the Federal Aviation Administration. The *Moore* court squarely rejected *Blansett* to the extent that the decision is interpreted to reject a "passenger-focused perspective as to whether an event is unexpected." *Moore*, *supra* note 1 at 119 n 7.

SPACEX MODIFICATION TO SATELLITE CONSTELLATION PROCEEDS AFTER SUSTAINED LEGAL CHALLENGES

United States Court of Appeals for the District of Columbia Circuit[1]

A case comment by
Matthew H. Ormsbee*

Two rivals of Space Exploration Holdings, LLC (better known as "SpaceX") placed the United States Federal Communications Commission (FCC) in the middle of a spat, raising novel considerations about the FCC's regulatory authority and SpaceX's expanding satellite constellation.

In the end, the United States Court of Appeals for the District of Columbia Circuit gave SpaceX a high stakes win that upheld a 2021 FCC decision on all counts. At issue was SpaceX's request to move its Starlink broadband satellite constellation to a lower orbit. When the FCC approved this request, DISH Network Corporation (DISH), Viasat, Inc. (Viasat), and The Balance Group objected to the FCC action.

DISH, Viasat and The Balance Group alleged:

(1) that the FCC did not adequately consider the risk of signal interference; and

(2) that the FCC's decision violates the United States National Environmental Policy Act (NEPA).

I. THE REGULATORY REGIME

As background, the Communications Act of 1934 empowers the FCC to grant radio station licenses, including for the operation of communications satellites.[2] The FCC is further empowered to modify

[1] *Viasat Inc. v Federal Communications Commission*, DC Cir, No. 21-1123, Judgment of 26 August 2022 [*Viasat*].

* Commissioned officer in the United States Air Force Judge Advocate General's Corps; J.D., Benjamin N. Cardozo School of Law; B.A., Hendrix College. Opinions, conclusions, and recommendations expressed are solely those of the author and do not necessarily represent the views of any part of the United States Government.

[2] Communications Act of 1934, 47 U.S. Code § 307(a).

licenses if such modification would further the public interest, convenience, and necessity.[3] Relatedly, the Telecommunications Act of 1996 requires the FCC to facilitate the provision of broadband internet service to underserved areas of the United States.[4]

Under this statutory framework, the FCC granted SpaceX a license in 2018 to provide internet service by satellite to unserved areas of the United States. SpaceX deployed most of its satellites in non-geostationary orbit (NGSO) between 1,100 and 1,300 kilometers, resulting in noticeable latency to the broadband network.

After receiving FCC authorization for its Starlink constellation, SpaceX sought permission to lower its constellation to an altitude of approximately 550 kilometres to address the broadband latency. When possible, the FCC is encouraged to allow licensees "to modify the technical design of their satellites as they are being built."[5] Such modifications are of considerable value to commercial parties. This is because satellite design and manufacturing often has lengthy lead times, while market opportunities are ever-changing.

However, this lenient approach is balanced against potential interference with signals from other satellites.[6] Thus, the FCC must determine that any proposed license modification "does not present any significant interference problems."[7]

II. INTERFERENCE ISSUES

At issue in this case was the FCC's rules governing interference determinations. FCC regulations require the Commission to prioritize frequencies of satellites in geostationary orbit (GSO) over those in NGSO.[8] An NGSO system cannot cause "unacceptable interference" to a GSO system.[9] More to the point, NGSO systems must operate within power limits set by the International Telecommunications Union (ITU).

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[3] *Ibid* at § 316(a)(1).
[4] *Ibid* at § 1302.
[5] *Teledesic LLC, Order and Authorization*, 14 FCC Rcd. 2261, 2264 (Int'l Bureau 1999).
[6] *Viasat*, *supra* note 1 at 4.
[7] *Ibid*.
[8] *Ibid*.
[9] 47 Code of Federal Regulations § 25.289.

To show compliance, licensees implement ITU-approved software, which determines compliance with the ITU power limits.[10] Generally, the first step requires the licensee to enter its satellite data into the ITU's software and certify the results to the FCC. Thereafter, the ITU independently reviews the data and makes a finding before the licensee may provide the proposed service.

A. FIRST MODIFICATION

In 2019, the FCC's International Bureau found no undue interference from SpaceX's satellites and issued its first modification order relating to approximately half of the satellites in SpaceX's lower orbit request. Under unique circumstances, the FCC did so during a backlog of requests at the ITU, thus permitting partial fulfilment of the ITU-finding requirement.

Specifically, SpaceX was required to fulfil only the compliance self-certification, subject to the FCC later reviewing the results and re-opening the case, if necessary. There were no objections from third parties to the first modification order in 2019.

B. SECOND MODIFICATION

In 2021, the FCC authorized SpaceX to lower the remainder of its constellation in its second modification order. Again, the FCC approved the modification based on self-certified results from SpaceX, subject to re-inspection by the FCC, if necessary.

When the FCC granted its second modification order, DISH objected based on interference with its GSO satellite television service. Additionally, Viasat and The Balance Group jointly objected based on the lack of an environmental assessment before the modification was granted. The FCC rejected both contentions, and DISH, Viasat, and The Balance Group appealed the FCC's order.

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[10] *Viasat*, *supra* note 1 at 4.

III. THE CIRCUIT COURT'S FINDINGS

In affirming the FCC order and dismissing some claims, the Circuit Court's decision offers several important takeaways for satellite operators and environmental organizations:

1. **Courts give the FCC great latitude in enforcing regulatory standards.**

   DISH, for example, argued that the FCC's interference determination was "arbitrary and capricious," which provide grounds for setting aside the FCC's decision under the Administrative Procedure Act.[11] DISH put forth certain expert findings (which indicated interference) that it believed used more advanced methods than those required by the FCC. DISH also argued that the FCC did not demonstrate good cause for waiving part of its ITU-findings requirement.

   The Circuit Court was unconvinced by both arguments. The Circuit Court found that the FCC must "adhere to its own rules and regulations," thus concluding that the set-aside of the allegedly more advanced expert findings from DISH was appropriate in lieu of baseline expert findings.

   The Circuit Court also held that waiving the second step of the ITU certification process was for good cause, which was clearly indicated by the FCC (i.e., the pre-existing ITU backlog).

   Therefore, federal courts seem inclined to grant the FCC broad latitude in the granting, modifying, and defending of licenses. Further, the FCC's baseline administrative rules for judging satellite interference will continue to be the governing standard, even if competitors argue for more advanced and sensitive methods of determining signal interference.

[11] Administrative Procedure Act, 5 U.S. Code § 706(2)(A).

2. Courts may grant additional deference in defense of the Telecommunications Act of 1996.

Though perhaps not expressly stated in the Circuit Court's opinion, a key factor behind the Circuit Court's reasoning may have been the mission of SpaceX's Starlink constellation: to provide broadband internet to Americans who remain "totally unserved by other broadband solutions."[12]

Indeed, the Telecommunications Act urges and empowers the FCC to facilitate this important mission as the internet is deemed more and more essential to everyday life.

This quasi-philanthropic aspect may have elevated this legal dispute from the realm of everyday disputes between business competitors; SpaceX's mission could be seen as greater than corporate profit.

Considerations about internet service to unserved regions may tip the scales for future litigants seeking to provide internet to those most in need.

3. Objections to FCC determinations must be raised early and often.

DISH argued that the requirement of a favorable ITU finding violates constitutional and statutory rights to judicial review because courts cannot review the ITU finding. Additionally, DISH argued that the regulation in question impermissibly delegates FCC authority to the ITU.

In response to both of these arguments, the Circuit Court found that it lacked jurisdiction because DISH failed to tee up these claims for the FCC before they were pursued in federal court.

Based on this failure, the Circuit Court did not entertain DISH's novel legal arguments, citing precedent that the Circuit Court could "not review arguments that have not first been presented to the Commission."[13] These arguments may well have merit but because they were not raised earlier at the appropriate level with the FCC, DISH was unable to avail itself of judicial consideration on these points.

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[12] *Viasat*, *supra* note 1 at 9.
[13] *Ibid* at 11.

4. NEPA claims may face an uphill battle based on notions of standing and the zone of interests under the NEPA.[14]

In this case, both Viasat and The Balance Group alleged that the FCC's second modification order violated NEPA by granting the modification to SpaceX without first preparing an environmental assessment.

However, the Circuit Court never considered this claim on the merits, finding that Viasat and The Balance Group both lacked standing.

Viasat alleged standing based on three distinct injuries:

a) SpaceX's satellites may cause debris to collide with Viasat's satellites;

b) SpaceX's constellation increases Viasat's operation costs by making it more complex and expensive to launch Viasat's satellites; and

c) the FCC inappropriately licensed SpaceX's operation, thus tipping the scales of competition against Viasat.

On the first injury, the Circuit Court found Viasat's potential injury much too speculative, resulting from a series of small possibilities that does not rise to the level of a substantial, impending harm under constitutional jurisprudence. On the second and third injuries, the Circuit Court found that orbital crowding and competition suppression constitute economic harms, which fall outside the zone of interests protected by NEPA (which are chiefly environmental in nature).

This is the only part of the decision that the author disputes, since orbital crowding, congesting, and debris are certainly questions primarily of an environmental nature. Future claims of this nature must argue to the FCC that general environmental impact (unlinked from the NEPA) mandate constraints on deploying 'megaconstellations' of satellites.

[14] Interestingly, satellites are categorically exempted from the NEPA; the FCC and other agencies are empowered to assess environmental impact of satellites rather than the Environmental Protection Agency. This exemption was passed in the mid-1980s based on findings that individual satellite launches would not measurably impact the environment. In the present case, Viasat argued otherwise, maintaining that Starlink and similar large-scale constellations raise novel and previously unforeseen issues of environmental impact.

Finally, The Balance Group could not prove standing due to lack of concrete, imminent injury, and inability to establish organization standing. Therefore, based on issues of standing, lack of concrete injury, and economic rather than environmental harms, none of the NEPA-based claims survived to the merits phase of trial.

In the future, successful litigants may comprise direct competitors that can prove concrete, non-economic injuries and demonstrate how orbital crowding, for instance, is an environmental harm worthy of protection under the NEPA.

5. **For now, the FCC and federal courts are not heaping extra scrutiny on SpaceX and similarly situated companies merely because they are deploying "mega-constellations" in low earth orbit.**

   While competitors may allege unique issues of orbital congestion and environmental impact, such arguments on these bases are thus far not convincing to federal judges in the United States. The appropriate recourse for companies like DISH and Viasat is to compete more ably by launching more of their own satellites—more frequently and more often. Assuming the FCC continues to grant DISH and Viasat licenses of their own, copious launches will preserve priority and relative safety in signal interference determinations.

   Overall, competitors hoping to set back SpaceX or other major players based on regulatory technicalities or quasi-environmental harms are likely to be left behind in the commercial space race.

IV. FINAL REMARKS

Looking ahead, internet service providers in outer space will continue to operate in a highly competitive realm in which any irregularities from the FCC or other gatekeepers may open the door to claims of favoritism or regulatory abdication. SpaceX may view this as the cost of doing business. Yet, for regulatory standards and compliance, the judiciary will likely continue to grant administrative bodies broad latitude to pursue governmental mandates. That will not stop billionaire-backed companies from fighting for every inch. However, if this decision is any indication, plunging the government into a business dispute is unlikely to yield a cognizable victory for a claimant contesting an FCC action.