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RESPONSIBILITY AND LIABILITY IN INTERNATIONAL SPACE LAW AS A MATTER OF SEQUENCE AND SUCCESSION

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ABSTRACT

In situations where states incur similar legal obligations in multiple treaties, the possibility of overlap creates the need to establish rules of inter-textual interpretation in order to clarify the overall obligations undertaken as well as to resolve potential divergences and/or conflicts between the treaties. This paper analyzes the responsibilities and liabilities of various states undertaking space activities from the perspective of the *Outer Space Treaty* and *Liability Convention*. In doing so, it first addresses the rules established for the application and interpretation of successive treaties. It does so through the use of articles 30 to 32 of the *VCLT*, highlighting their underlying rationale and structure, and also to points of contention within those provisions. The paper then looks to the provisions of the *Outer Space Treaty* and *Liability Convention* to determine how these rules play out in the specific context of the responsibilities and liabilities of states conducting space activities. Having noted the overlap in provisions related to the responsibilities and liabilities of various states, the paper turns to highlighting points of legal uncertainty. It ends by making conclusions on the process of application and interpretation of the treaties and making some general recommendations on points of contention or uncertainty.

INTRODUCTION

In situations where multiple treaties address the same subject matter, it is possible to identify a 'horizontal' and a 'vertical' element to treaty interpretation. The horizontal element, which I have identified as 'sequence', relates to the chronological development of legal content in relation to a single subject matter through multiple treaties over time. The vertical element, which I have referred to as 'succession', relates to the idea of a hierarchical ordering in overlapping content between treaties. Without a particular order of succession, it becomes impossible to logically treat a problem of conflicting content contained in a sequence of treaties.

As with treaties generally, this paper is meant to be read in the light of both its object and purpose. The immediate object of this paper is to clarify the 'responsibilities' and 'liabilities' of states conveyed in the *corpus juris spatialis*, two critical issues elaborated upon in a sequence of provisions within two treaties, the *Outer Space Treaty*[1] and the *Liability Convention*.[2] The purpose, or rather purposes, of this paper are twofold. The first is didactic in nature, serving as a concise, practical exercise for students of both space law and international law generally. It thus serves as a contribution to the teaching of law. The second is to address an issue of debate regarding the potential existence and extent of overlap and conflict in relation to the responsibilities of various governments in the conduct of space activities. The problem has been complicated by transfers of satellites between registries, which have occurred, and may become more commonplace in the near future with the commercialization of space activities.[3] Such transfers are legally significant as they disaggregate the traditional link between the state whose nationals control the satellite and the launching state.[4] Thus, there exists a real and growing need for clarification for the purposes of legal certainty, as emphasized by the recent in-space collision of two satellites on 11 February 2009.[5]

The paper seeks to achieve both its object and purpose(s) in the following manner. First, we address the *application* and *interpretation* of treaties. This section seeks to identify the exact nature of the relationship between the *Outer Space Treaty* and the *Liability Convention* within a broader framework of potential tensions, what Professor Wilfred Jenks generally termed "the conflict of law-making treaties".[6] Having identified a process for establishing the sequence and succession of provisions contained within the two treaties, we next address the issues of responsibility and liability in terms of the *Outer Space Treaty* and the *Liability Convention*. In doing so, we create a 'map' using the principles established in the previous section as a means of 'legal

cartography'. Finally, the paper draws conclusions on the findings, both in relation to the application and interpretation of treaties and the practical consequences arising therefrom.

THE VIENNA CONVENTION ON THE LAW OF TREATIES: ESTABLISHING A SEQUENCE AND SUCCESSION OF INTERPRETATION AND APPLICATION

One preliminary problem in dealing with any given sequence of treaties is that the substantive provisions contained in any given sequence of treaties can 'overlap'. An overlap in and of itself may not create problems; however, an overlap in substance may also be incongruent, causing, *inter alia*, a divergence or conflict in the provisions of the treaties. Jenks identified a series of relationships between treaties which might lead to conflict between: treaties of a constitutional character and other treaties; treaties of comprehensive general treatment and those providing more specific treatment of a general issue; treaties of worldwide and those of regional (and sub-regional and bilateral) scope; treaties of general application and those addressing particular areas or special regimes; treaties addressing protection of a particular category or class of persons and those addressing a particular subject or problem; liberalizing and regulative instruments; treaties applicable during a state of war and those addressing peacetime activities which remain applicable; treaties dealing with related subjects handled by different organizations; and the original text and a revised instrument, or between successive revisions.[7] The rapid growth in overlap between treaties has generally been attributed to the growth of international legislative bodies, beginning with the Treaty of Versailles and the inter-War period.[8]

In addition to classifying types of incongruence between treaties whose substantive provisions overlapped, Jenks divided the type of incongruence into two varieties: conflict and divergence.[9] Genuine conflict exists only when the provisions of the two treaties or the outcome of the situation can not be reconciled. Divergence exists where the provisions or outcomes can be reconciled.

This section addresses the interpretation and application of successive treaty provisions as contained in Articles 30 through 32 of the *Vienna Convention on the Law of Treaties* (*VCLT*).[10] It does so by addressing, in turn, the processes of application and interpretation in isolation. The next section then applies these principles to the sequence of provisions relating to responsibility and liability contained in the *corpus juris spatialis*.

The Application of Successive Treaties (Article 30 *VCLT*)

The *VCLT* identifies three distinct aspects of the application of treaties;[11] however, for purposes of our discussion we restrict ourselves to the last of the three – namely, the application of successive treaties treating the same subject matter.[12]

While a number of opinions were expressed as to the application of successive treaties, the regime which found its expression in Article 30 of the *VCLT* can be summarized as follows:

1) If a later treaty says it is subject to, or not incompatible with, another, earlier treaty, the other treaty will prevail;
2) As between two parties of a treaty and a later, inconsistent treaty, the earlier treaty will apply only to the extent that it is not incompatible with the later treaty;
3) As between a party to both treaties and a party to only one treaty, the treaty to which both are parties shall apply.[13]

Sinclair notes the following points of further clarification can be drawn from the Conference records: that the rules are meant to be residuary, *i.e.* they are applicable only in the absence of express rules in the treaty; that the Chairman of the drafting committee had clarified the meaning of 'incompatibility' in the records, noting that "the mere fact that there was a difference between the provisions of a later treaty and those of an earlier treaty did not necessarily mean that there existed an incompatibility within the meaning of the last phrase of paragraph 3"; that which treaty is 'earlier' and 'later' is to be determined by the date of adoption of the text and not by the date of entry into force; and that the term 'relating to the same subject matter' should be strictly construed.[14]

Overall, the provisions of Article 30 can be seen as an attempt to place a structure on a set of legal principles, of which none "has any absolute validity or can be applied automatically and mechanically to any particular class of case."[15] The somewhat rigid structure in treaty application can generally be contrasted with a more flexible approach to interpretation.

The Interpretation of Treaties (Articles 31-32 *VCLT*)

Articles 31 and 32 *VCLT* provide the set of rules for the interpretation of treaties. More specifically, Article 31 *VCLT* sets out the rules of interpretation of the treaty itself. It:

> is based on the view that the must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.[16]

Article 32 defines the relationship between the treaty and 'supplementary' means of interpretation, including the *travaux préparatoires*.[17]

Article 31 sets out the rules of interpretation in four paragraphs. These are meant to be read together as a single unit, and are set out in terms of a logical ordering rather than a legal hierarchy.[18] Paragraph 1 reads:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[19]

According to the Drafting Commission of the *VCLT*, paragraph 1 establishes three principles of interpretation.[20] Paragraphs 2 and 3, which detail elements forming the context of the agreement and elements that are to be read together with the context, respectively, elaborate upon the principles contained in paragraph 1.[21] Finally, paragraph 4 permits the parties to deviate from the ordinary meaning by expressly defining any special meaning within the treaty.[22]

Article 32 introduces the "supplementary means of interpretation". The title is meant to reinforce the primacy of the textual interpretation adopted by first the Drafting Commission and ultimately the Convention.[23] Article 32 introduces two (non-exhaustive) supplementary means of interpretation, namely, the "preparatory work of the treaty and the circumstances of its conclusion".[24] Either means are to be used to achieve one or more of three objectives: (1) to "confirm the meaning resulting from the application of article 31"; and to determine the meaning when the application of article 31 (2) "leaves the meaning ambiguous or obscure" or (3) "leads to a result which is manifestly absurd or unreasonable."[25]

However contextualized, the use of both the treaty and supplementary materials is part of a *unitary* process of treaty interpretation. The Commission recognized this in its Commentary to the Draft Convention:

> The fact that [draft] article 28 [now article 32 of the final text *VCLT*] admits recourse to the supplementary means for the purpose of "confirming" the meaning resulting from the application of article 27 establishes a general link between the two articles and maintains the unity of the process of interpretation.[26]

Yet the Commission noted two reasons why the means of interpretation listed in article 32 remain supplementary. First, whereas the elements in article 31 "all relate to the agreement between the parties *at the time when or after it received authentic expression in the text*", the *travaux préparatoires* does not.[27] Second, in many instances the *travaux* themselves are "incomplete or misleading".[28]

Finally, application of article 32 of the *VCLT* has important ramifications for parties to a multilateral treaty who do not participate in the preparatory work. The terms of article 32 do not limit its application to participant states; indeed, the Drafting Commission expressly contemplated application of article 32 to non-participant states.[29] Yet, there still exists some doubt as to whether the *travaux préparatoires* can be applied to states who do not participate in the preparatory work and who accede subsequent to the adoption of a treaty.[30] The problem can be further divided between states who are given access to the *travaux* and those to whom access is restricted.[31] While there exists some *dicta* regarding the use of *travaux préparatoires* in the interpretation of agreements against states who have not been provided access to those materials,[32] it seems that the certainty provided from a uniform application of the rules would dictate towards a such a singular form of application as regards all parties, whether participants in the drafting of a treaty or states who subsequently accede.[33]

THE CONCEPT OF RESPONSIBILITY AND LIABILITY IN INTERNATIONAL SPACE LAW: MAPPING THE *CORPUS JURIS SPATIALIS*

Having identified the various possible ways in which sequences of treaties can create conflict or divergence *inter se*, and having outlined the means of application and interpretation of treaties, we now turn to a particular sequence of treaties: the *corpus juris spatialis*. As the name suggests, the *corpus*, while comprised of five individual treaties, is generally regarded as a single body of law. The relationship between treaties is one between a primary treaty of comprehensive general treatment (the *Outer Space Treaty*) and those providing more specific treatment of a general issue (each of the subsequent treaties, including the *Liability Convention*).[34] While each specific treaty relates back to an issue generally covered under the *Outer Space Treaty*, the content between the more specific treaties often overlaps as

well. This section now addresses the application and interpretation of two treaties – the *Outer Space Treaty* and the *Liability Convention* – in relation to the provisions on the responsibility and liability of states, identifying potential overlap, conflict, divergence or gaps within and between the treaties.

Application of the *Outer Space Treaty* and *Liability Convention*

As discussed above, the application of successive treaties is a fairly mechanical task.[35] In the case of the *Outer Space Treaty* and *Liability Convention*, succession is determined by Article XXIII(1) of the *Liability Convention*, which provides that "the provisions of this Convention shall not affect other international agreements in force insofar as relations between the States Parties to such agreements are concerned."[36] Thus, in case of conflict, the provisions of the *Outer Space Treaty* should prevail. Whether such a conflict exists however will depend on the interpretation of the treaty.

Interpretation of Responsibility and Liability in the *Outer Space Treaty* and *Liability Convention*

Having identified the general priority given to provisions of the *Outer Space Treaty* in case of conflict with the provisions of the *Liability Convention*, we now turn to the content of the treaties themselves. For purposes of analysis, we will proceed under the assumption that the parties have signed and ratified both treaties.

Responsibility and Liability Distinguished Generally

In its most general sense, responsibility can be equated with the authorship of an act.[37] Responsibility connotes a level of accountability attributable to the author for the legal consequences of such act. Liability, on the other hand, is the obligation (in this case, of a state) to make reparations for a breach of a legal rule.[38] In international law, liability is attributed to the responsible state when that state's action or inaction is in breach of an international obligation owed by it to the international community, and the act is neither excusable nor justifiable. Thus, liability can 'flow to' a state by its responsibility for a wrongful act.[39] As will be seen below, however, the element of authorship is removed from the chain of legal elements required to prove liability for certain damages caused in relation to launch activities.[40]

Responsibility and Liability under the Outer Space Treaty

The responsibilities and liabilities of states in relation to space activities are governed by articles VI and VII of the *Outer Space Treaty*, respectively. For purposes of our analysis, article VI is important for two reasons. First, it sets out the responsibilities of states in relation to compliance with the treaty. Second, it establishes the 'appropriate' state's obligation of authorization and continuous supervision.

Article VI provides, *inter alia*, that:

> 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....

The first sentence of article VI provides that states are responsible for *national* activities.[41] Responsibility extends to those activities conducted by both governmental agencies and non-governmental (*i.e.* private) entities.[42] This has led Bin Cheng to identify three levels of national activities:

1) a State's own activities, wherever conducted;
2) activities within the State's effective jurisaction, whether territorial, quasi-territorial or personal; and
3) activities on board craft of its nationality where it is possible to bring them within its effective jurisdiction.[43]

Contracting states are responsible for ensuring that these activities are conducted in conformity with the provisions of the *Outer Space Treaty* and, by virtue of article III of the Treaty, with general international law.[44] Generally, the "state of nationality" will be liable to the extent that it breaches its responsibility to ensure national activities are conducted according to international law.

Furthermore, the second sentence of article VI establishes that non-governmental activities in outer space need be authorized and continuously supervised by "the appropriate state".[45] This

provision causes some problems in its interpretation. First, unlike the first sentence, where "Contracting states" envisions a plurality of actors and obligations (and thus a possibility of more than one responsible state), the "appropriate state" in its singular form suggests that the responsibility of only one state is triggered by this provision.[46] There are, however, no clear indications as to which state should assume these obligations. Karl-Heinz Boeckstiegel has noted that any attempt to confirm a particular interpretation through the *travaux* itself yields multiple interpretations.[47] It is possible to draw at least three conclusions from this. First, as previously mentioned, whereas there may be more than one "state of nationality", it is generally considered that there is only one "appropriate state". Second, the "appropriate state" and "state(s) of nationality" are not coterminous, and may or may not coincide with each other, depending on the circumstances of the case at hand.[48] Finally, the "appropriate state" has the obligation to authorize and continuously supervise the conduct of the non-governmental entity in question, and liability for a failure to do so resulting in damages could trigger that state's liability. Furthermore, it seems that the "state(s) of nationality" has the responsibility of ensuring that the "appropriate state" actually authorizes and continuously supervises such activity,[49] and is distinguishable from the actual performance of the activities of authorization and continuous supervision.

In contrast, article VII, which determines 'liability', relates to four categories of "launching states": the state that launches a space object; the state that procures the launch of a space object; the state from whose territory a space object is launched; and the state from whose facilities a space object is launched.[50] Any one or more launching states can be held liable for damages, it being generally held that such liability is joint and several. While there seems to be some debate as to what constitutes a launching state, especially in relation to the 'state procuring the launch' as well as the extension of territory and facilities to aircraft and ships,[51] the difficulty of interpreting article VII of the *Outer Space Treaty* lies in the 'level' of responsibility required of the launching state. In other words, there is a question as to whether the phrase "is internationally liable for damage" removes the requirement of a breach of an obligation (*i.e.* the level of liability becomes absolute in nature) or merely classifies the activities of states to which responsibility for launch activities can be attributed.[52] The provisions of the *Liability Convention* address this question in detail, and it is to this that we now turn.

Responsibility and Liability under the Liability Convention

In brief, the *Liability Convention* was promulgated to clarify the legal liabilities of the "launching state", and bears an intimate relation with article VII of the *Outer Space Treaty*. Paragraph 3 of the Preamble makes this clear, declaring that, "notwithstanding the precautionary measures to be taken by States and international intergovernmental organizations involved in the launching of space objects, damage may on occasion be caused by such objects".[53] The *Liability Convention* introduces a two-tier system of liability for launching states:[54]

1) for damages caused to the surface of the Earth or in the airspace, absolute liability; and
2) for damages caused in outer space, fault liability.[55]

Articles IV and V introduce the concept of joint and several liability in relation to third parties.[56] Finally the provisions of articles VI and VII relate to the exoneration of liability for damages caused wholly or partially be the claimant state's own gross negligence where the launching state had not violated international law and to the non-applicability of the treaty in relation to damages caused to nationals or non-national invitees within the immediate vicinity of the launch, respectively.[57]

There is some inherent tension between articles II and III of the *Liability Convention*, which propose two distinct levels of liability, depending on the location of the damages, and article VII of the *Outer Space Treaty*, which provides for a single level, namely 'international' liability. This is further complicated by article XXIII(1) of the *Liability Convention*, which states that the provisions of the *Liability Convention* itself do not affect other, pre-existing international agreements between the states parties. The most plausible resolution of this problem is that the *Liability Convention* is itself to be considered a subsequent agreement on the interpretation or application of article VII of the *Outer Space Treaty*. The ILC Draft Committee noted this possibility in its Draft Articles:

> But it is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty, it is to be regarded as forming part of the treaty. Thus, in the *Ambatielos* case the Court said: "...the provisions of the Declaration are in the nature of an interpretation clause, and, as such,

> should be regarded as an integral part of the Treaty...". Similarly, an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.[58]

Paragraph 4 of the Preamble to the *Liability Convention* further builds on this interpretation. Having recalled the *Outer Space Treaty* and taken into consideration the precautionary measures undertaken by launching states to prevent damage, the *Liability Convention* recognizes the need to "elaborate effective international rules and procedures".[59] A logical assumption then is that the Convention is meant to subsequently detail rules in relation to a pre-existing norm or standard, in this case article VII of the *Outer Space Treaty*. This approach would then need to be confirmed through recourse to the *travaux préparatoires*.

Responsibility and Liability in Situations of Disaggregated Interests

To briefly recapitulate, the interpretation of articles VI and VII of the *Outer Space Treaty*, together with the provisions of the *Liability Convention*, identifies the following forms of liability:

1) to the "state(s) of nationality": liability resulting from a breach of its responsibility to ensure space activities of governmental agencies and non-governmental entities are in conformity with the provisions of the *Outer Space Treaty* and general international law,
2) to the "state(s) of nationality": liability resulting from failure to ensure that the "appropriate state" authorizes and continuously supervises a particular space activity activity;
3) to the "appropriate state": liability resulting from a breach of its obligation to authorize and continuously supervise space activities of its non-governmental entities;
4) to the "launching state(s)": liability for the breach of its obligation to avoid damage to other space objects;
5) to the "launching state(s)": absolute liability for damage caused by the space object to the surface of the Earth or to objects in the Earth's airspace;

What is evident from the list above is that there exists an extreme variation in terms of forms of liability as well as degrees of legal certainty. Whereas there may exist a plurality of "state(s) of nationality" and "launching state(s)", only the terms provide for only one "state of registry" (the state "on whose registry an object launched into outer space is carried")[60]and "appropriate state". The state of registry is entitled to assert "jurisdiction and control" over the space object, and may therefore play an important role in determining the "appropriate state".[61] Furthermore, the "appropriate state" seems to be defined by the individual circumstances of the fact pattern, informed by the relationships between the "state(s) of nationality", "launching state(s)" and "state of registry".[62] There is, however, no clear answer as to how one determines which state is the "appropriate state".

At the time of the treaties' drafting, the roles of the various "states" identified in the *Outer Space Treaty* tended to converge on a single state. As space activities commercialize and privatize, however, the determination of the four types of states may well fragment and diverge. Moreover, such divergence can potentially occur at any point in the life of the space object. A number of problems arise from this divergence. Such problems are perhaps most pronounced in the case of the "launching state". While it may be argued that a subsequent transfer of jurisdiction and control of a space object from the "launching state" may well expunge the launching state's liability for damages caused in outer space.[63] In such a case, the chain of responsibility is broken with respect to the space object and another, equally rigorous level of responsibility exists in relation to the "state of nationality" and/or the "appropriate state". However, a "launching state" remains absolutely liable for damage caused upon re-entry. Because the absolute liability of the "launching state" is not expunged at any point, any subsequent transfer would require the notification and indemnification of each "launching state" (as well as each "launching state's" acceptance of such indemnification). This creates an extremely cumbersome process for subsequent transfers, especially where multiple "launching states" exist. Furthermore, this indemnification is 'good' only *vis-à-vis* the parties to the transaction, as third parties maintain an independent cause of action against the "launching state" for damages.[64]

Another problematic element in relation to the identification of international responsibilities in the *Outer Space Treaty* is in relation to the "appropriate state". There is generally little guidance as to what determinants in identifying the "appropriate state". Where a unity of relationships exists towards any particular space object, the riddle is *de facto* solved. However, in instances where the

relationship between a space object and the "state of registry", "launching state" and "state of nationality" disaggregate, there is little guidance from the text of the treaty, and little more from the *travaux*.[65] Moreover, the "appropriate state" may shift at any time,[66] particularly when contemplating a transfer of assets. A determination between the parties as to who the "appropriate state" should be is critical in such situations.[67] Nevertheless, such a determination would not create absolute legal certainty, as third parties may again challenge the agreement.[68]

CONCLUSIONS: CLARIFYING OBLIGATIONS AND REACHING LEGAL CERTAINTIES

This paper has addressed issues of interpretation and application of sequences of treaties, from both a legal and teaching of law perspective. Accordingly, we make the following conclusions:

1) The *corpus juris spatialis* follows a sequence described by Jenks as a primary treaty of comprehensive general treatment (the *Outer Space Treaty*) and those providing more specific treatment of a general issue (each subsequent treaty).
2) Article 30 of the *VCLT* provides a set of fairly mechanical rules to determine the succession of provisions within sequences of treaties. Article XXIII(1) of the *Liability Convention* establishes that the obligations of the *Outer Space Treaty* take precedence over its own provisions.
3) Conflict between law-making treaties occurs only to the extent such contradictory provisions are irreconcilable. Where the provisions can be reconciled, there is said to be a divergence between the provisions of the treaties. While technically distinct, the effects may be similar. Whether a particular conflict or divergence exists shall be determined by the interpretation of the treaties. The rules of interpretation are contained in articles 31 and 32 of the *VCLT*. Article 32 of the *VCLT* identifies use of the *travaux préparatoires* as a supplementary means of interpretation.
4) While substantial overlap exists between the responsibilities of various states in relation to outer space, there appears to be no inherent divergence or conflict between the provisions of the two treaties analyzed. While there is a discrepancy between the two-tiered system of absolute and fault liability established in the *Liability Convention* and the single-tier of "internationally liable" contained in article VI of the *Outer Space Treaty*, this discrepancy is clarified by recourse to article 31(3)(a) of the *VCLT*. Such interpretation would need to be confirmed, through article 32 of the *VCLT*, by recourse to the *travaux*.
5) It is possible to divide states holding some direct form of responsibility into the following: the "state(s) of nationality"; the "appropriate state"; and "the launching state(s)". Furthermore, the "state of registry", which exerts jurisdiction and control over an object, may play an important role in determining which state is the "appropriate state".
6) Liability may develop from a wrongful act or omission within the scope of each state's responsibility. An exception exists in terms of the liability of the "launching state(s)", which runs with the object (rather than the event). While fault liability exists where the damage is in relation to damage caused in outer space, it is absolute in nature with respect to damage caused on the surface of the Earth or in Earth's airspace. This means that a "launching state" will maintain a fundamental interest in each transfer of the object, and should require its consultation in each instance of transfer. Moreover, it may be necessary to devise an alternative mechanism for determining the liabilities of a launching state when commercial space enterprises begin to transfer in-space assets.
7) In instances where multiple interests in a space object exist, it is unclear which state is the "appropriate state". According to Boeckstiegel, use of the *travaux* to confirm a particular interpretation is also unavailing. In this regard, it would be useful to conduct, as a preliminary measure, a study of subsequent agreements or practices in relation to the interpretation or application of the treaty.
8) Finally, agreements between parties with an interest in a particular space object do not affect any state's rights and obligations *vis-à-vis* third parties. This results in a large degree of legal uncertainty with respect to the transfer of space objects.

REFERENCES

[1] See generally, *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, done at London, Moscow and Washington, D.C.*, 27 January 1967, arts. VI & VII [*Outer Space Treaty*].

[2] See generally *Convention on International Liability for Damage Caused by Space Objects, done at London, Moscow and Washington, D.C.*, 29 March 1972 [*Liability Convention*].

[3] We assume, for the purposes of this study, that the free transfer of satellites between state registries is of itself permissible.

[4] The text of the treaties seems not to have contemplated this situation. See e.g. *Outer Space Treaty, supra* note 1, arts. VI-VII.

[5] See e.g. "Two satellites collide in orbit" (11 February 2009), online: <http://www.spaceflightnow.com/news/n0902/11iridium/>. The article identifies (although concludes that no threat exists as to) the possibility of damage to the International Space Station, including persons on board, threatening not only property loss or damage, but also loss of life.

[6] See generally Wilfred Jenks, "The Conflict of Law-Making Treaties" (1953) 30 B.Y.I.L. 401.

[7] *Ibid.* at 403-18; *cf. ibid.* at 418 ("The possibility of conflict is not limited to [1] instruments of different types, [2] instruments of different geographical scope, [3] instruments approaching a problem from different angles, and [4] instruments dealing with different subjects or aspects of a subject which are related to each other; one of the most important times of conflict to be considered consists of [5] conflicts between an original and a revised instrument, or between successive revisions of an instrument which is of the same potential scope but is in fact in force for different groups or parties." [*numerals added*]). The typology addressed in the text fits within one or more categories contained in the statement above. However, certain distinctions made in the former are applicable to the context of the present debate. Therefore, we address distinctions in terms of the more detailed list.

[8] See *ibid.* at 405; Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984) at 93.

[9] Jenks, *ibid.* at 425-26 ("A divergence between treaty provisions dealing with the same subject or related subjects does not in itself constitute a conflict. Two law-making treaties with a number of common parties may deal with the same subject form different points of view or be applicable in different circumstances, or one of the treaties may embody obligations more far-reaching than, but not inconsistent with, those of the other. A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties.").

[10] See generally *Vienna Convention on the Law of Treaties, done at Vienna*, 23 May 1969, arts. 30-32 [*VCLT*].

[11] The other two aspects are: application *ratione temporis* and application to territory. See generally *VCLT, ibid.*, arts. 28-30. For a discussion of the other two elements, see generally Sinclair, *supra* note 8 at 84-92.

[12] *VCLT, ibid.*, art. 30.

[13] *Ibid.*, para. 2-4; Sinclair, *supra* note 8 at 94.

[14] Sinclair, *ibid.* at 97-98. This last provision has direct relevance to the maxim *generalia specialibus non derogant*. *Ibid.* at 98;

[15] Jenks, *supra* note 6 at 453. Jenks lists seven legal principles relevant to the application of treaties: the hierarchic principle; the *lex prior* principle; the *lex posterior* principle; the *lex specialis* principle; the autonomous operation principle; the 'pith and substance' principle; and the legislative intention principle. See generally *ibid.* at 436-50; see also Sinclair, *supra* note 8 at 96 (noting Nascimento e Silva's list of six principles, which excludes the 'pith and substance' principle).

[16] International Law Commission, *Draft Articles on the Law of Treaties with Commentaries 1966*, Y.B. of the I.L.C., 1966, Vol. II 187 at 220, para. 11 [ILC, *Draft Articles*].The text of the *VCLT* 'solves' the debate between jurists as to the relevant weight given to: "(a) the text of the treaty as the authentic expression of the intentions of the parties; (b) the intentions of the parties as a subjective element distinct from the text; and (c) the declared or apparent objects and purposes of the treaty." *Ibid.* at 218, para.2. These approaches have been labeled as the 'objective', 'subjective', and 'teleological' approaches, respectfully. See Sinclair, *supra* note 9 at 115.

[17] See *VCLT, supra* note 10, art. 32.

[18] See ILC, *Draft Articles, supra* note 16 at 220, para. 9. In setting out Article 31 (then Article 27), the Draft Commission:

> considered that the article, when read as a whole, cannot properly be regarded as laying down a legal hierarchy of norms for the interpretation of treaties. The elements of interpretation in the article in the nature of things to be arranged in some order. But it

was considerations of logic, not any obligatory legal hierarchy, which guided the Commission in arriving at the arrangement proposed in the article.

[19] *VCLT*, *supra* note 10, art. 31(1).
[20] ILC, *Draft Articles*, *supra* note 16 at 221, para. 12. According to the Commission, those principles are:

> The first – interpretation in good faith – flows directly from the rule *pacta sunt servanda*. The second principle is the very essence of the textual approach: the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them. The third principle is one both of common sense and good faith; the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose.

[21] *Ibid.* at 220-222, para. 8 & 13-16.
[22] *VCLT*, *supra* note 10, art. 31(4). *Cf.* Sinclair, *supra* note 8 at 119-40.
[23] See *supra* note 16.
[24] *VCLT*, *supra* note 10, art. 32.
[25] *Ibid.*
[26] ILC, *Draft Articles*, *supra* note 16 at 220, para. 10 & 222-23, para. 18.
[27] *Ibid.* at 220, para. 10.
[28] *Ibid.*
[29] *Ibid.* at 224, para. 20. See also Sinclair, *supra* note 8 at 142-44.
[30] See ILC, *Draft Articles*, *ibid.* (questioning the decision reached in *Territorial Jurisdiction of the International Commission of the River Oder P.C.I.J.* (1929), Series A, No. 23).
[31] *Ibid.*
[32] See Sinclair, *supra* note 8 at 143-44 (citing *dicta per* the majority (4-3) in the *Young Loan* arbitration: "A further prerequisite if material is to be considered as a component of the *travaux préparatoires* is that it was actually accessible and known to all the original parties.... If doubts already exist amongst the experts on international law and in international case law on whether the *travaux préparatoires* can be held against a State which accedes to a treaty at a later date...such doubts become certainty when, as in the present case, it is a fact that the Federal Republic of Germany, even though it was an original contracting party...had no knowledge of certain documents and was excluded from certain negotiating committees, albeit temporarily." But *cf.* the dissenting opinion at 143).
[33] See also *ibid.* at 143: "Despite the majority decision in the *Young Loan* arbitration, the better view would still appear to be that recourse to *travaux préparatoires* does not depend on the participation in the drafting of the text of the State against whom the *travaux* are invoked. To hold otherwise would disrupt the unity of a multilateral treaty.... The opinion is qualified in that the *travaux* should remain in the public domain.
[34] See *supra* note 7 and accompanying text.
[35] See *supra* notes 13, 15 and accompanying text.
[36] *Liability Convention*, *supra* note 2, art. XXIII(1). *Cf. VCLT*, *supra* note 10, art. 30(2).
[37] See e.g. Bin Cheng, "International Responsibility and Liability for Launch Activities" (1995) XX:6 Air & Sp. L. 297 at 300.
[38] See e.g. *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, [1949] *I.C.J. Reports* 4 at 22.
[39] See *ibid.*
[40] See also Bin Cheng, *supra* note 37 at 306.
[41] *Outer Space Treaty*, *supra* note 1, art. VI.
[42] *Ibid.*
[43] Cheng, *supra* note 37 at 309.
[44] *Outer Space Treaty*, *supra* note 1, arts. III, VI.
[45] *Ibid.*, art. VI.
[46] See Cheng, *supra* note 37 at 309 ("The fact that the Treaty uses the singular in referring to the appropriate State has given rise to the view that there can be only one single appropriate State.").
[47] See Karl-Heinz Boeckstiegel, "The Term "Appropriate State" in International Space Law", Proceedings of the 37th Colloquium of the International Institute of Space Law, 77 (IISL.2-94-828-A)[Boeckstiegel, "The "Appropriate State""].
[48] See *ibid.* at 78-79.
[49] Bin Cheng, *Studies in International Space Law* (Oxford: Clarendon Press, 1997) at 632-33 [Cheng, *Studies*].
[50] *Outer Space Treaty*, *supra* note 1, art. VII:

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

[51] *Cf.* Karl-Heinz Boeckstiegel, "The Term "Launching State" in International Space Law", Proceedings of the 37th Colloquium of the

International Institute of Space Law, 77 (IISL.2-94-828-B); Cheng, *Studies*, *supra* note 49 at 637-38.

[52] See Cheng, *Studies*, *ibid.* at 238 (By late 1965, it would appear that agreement had already been reached on the principle of absolute liability, though not on some of the exceptions to it. But in itself, Article VII cannot be regarded as asserting the principle of absolute liability.").

[53] *Liability Convention*, *supra* note 2, Preamble, para. 3.

[54] The 'launching state' is defined along the same criteria as in art. VII of the *Outer Space Treaty*: see *Liability Convention*, *ibid.*, art. I(c).

[55] *Ibid.*, arts. II & III, respectively.

[56] See *ibid.*, arts. IV-V.

[57] *Ibid.*, arts. VI-VII.

[58] ILC, *Draft Articles*, *supra* note 16 at 221, para. 14.

[59] *Liability Convention*, *supra* note 2, Preamble, paras. 2-4.

[60] See *Outer Space Treaty*, *supra* note 1, art. VIII.

[61] *Ibid.* While article II of the *Convention on Registration of Objects Launched into Outer Space* establishes the obligation of the launching state to create a national register and to register the space object on its national register, this may well be viewed as an obligation independent of art. VIII of the *Outer Space Treaty*. See *Convention on Registration of Objects Launched into Outer Space*, *done at New York*, 14 January 1975, art. II. The potential 'conflict' between these treaties is outside the scope of this paper.

[62] See generally Boeckstiegel, "The "Appropriate State", *supra* note 47.

[63] This seems to have been suggested by the United Kingdom: Motoko Uchitomi, "State Responsibility/Liability for "National" Space Activities", Proceedings of the Forty-Fourth Colloquium of the International Institute of Space Law, 51 at 51 (IISL-01-IISL.1.07). This would also assume that the state conducted with due diligence an investigation as to whether the state to whom the object is transferred has the capability to supervise and authorize such activities.

[64] See *VCLT*, *supra* note 10, part III, s. 4.

[65] See *supra* notes 47-48.

[66] See e.g. Uchitomi, *supra* note 63 at 53.

[67] *Cf.* the rules in relation to the state of registry where multiple launching states exist in the *Registration Convention*: see *Registration Convention*, *supra* note 61, art. II(2).

[68] See e.g. Cheng, *Studies*, *supra* note 48 at 239 ("Even so, it is not to be forgotten that whilst Article VIII explicitly recognizes only the jurisdiction of the State of registry, Article VI makes contracting States internationally responsible for national space activities, and Article VII imposes international liability on a contracting State which launches or procures the launching of a space object, as well on a contracting State from which of from the facility of which a space object is launched. Consequently, a State, unless it is also the State of registry, may be held responsible for activities in extraterrestrial space over which it has no jurisdiction recognized by the treaty, and liable for any damage resulting therefrom."). See also *ibid.* at 630-31.