2013

The Lawfare of Forum Non Conveniens: Suits by Foreigners in U.S. Courts for Air Accidents Occurring Abroad

Melinda R. Lewis

Follow this and additional works at: https://scholar.smu.edu/jalc

Recommended Citation
https://scholar.smu.edu/jalc/vol78/iss2/1

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
THE "LAWFARE" OF FORUM NON CONVENIENS: SUITS BY FOREIGNERS IN U.S. COURTS FOR AIR ACCIDENTS OCCURRING ABROAD

MELINDA R. LEWIS*

TABLE OF CONTENTS

INTRODUCTION ................................................. 320
I. INTERNATIONAL TREATIES ON AIR TRANSPORT .......................... 322
   A. PURPOSES OF THE WARSAW AND MONTREAL CONVENTIONS ............. 322
   B. FRUSTRATION OF THE CONVENTIONS' PURPOSE ...................... 325
II. FORUM NON CONVENIENS ...................................... 327
III. FORUM NON CONVENIENS UNDER THE WARSAW CONVENTION ............... 329
   A. TWA 800 .................................................................. 330
   B. MILOR V. BRITISH AIRWAYS ....................................... 332
   C. HOSAKA V. UNITED AIRLINES, INC. ............................... 333
      1. Text of the Treaty .............................................. 333
      2. Purpose and Drafting History of the Warsaw Convention ......... 335
   D. "TOMATO, TAMAHTO": LIS PENDENS IN CIVIL LAW JURISDICTIONS .......... 339
      1. Post-Ratification Understanding: Other Treaties' Applications of Forum Non Conveniens .......... 340
IV. FORUM NON CONVENIENS UNDER THE MONTREAL CONVENTION ............... 341
   A. AIR FRANCE AND BAD FAITH PLAINTIFFS ......................... 342

* J.D. Candidate, Georgetown University Law Center, May 2014. Melinda R. Lewis is a contractor employed by Science Applications International Corporation, Inc. (SAIC) working for the Federal Aviation Administration (FAA) on the NextGen Initiatives Support Services contract. She is working toward her J.D. in the evenings. The views expressed herein are those of the author in her personal capacity and do not necessarily represent those of her employer or any U.S. government agency. Special thanks to Allan Mendelsohn and Warren Dean for their editorial suggestions and guidance in developing this article.

319
“LAWFARE” IS traditionally defined as “the use of law as a weapon of war against a military adversary.” Lawfare in the context of forum non conveniens is meant to be understood on a spectrum. At one end, forum non conveniens as “lawfare” describes largely benign and metaphorical activities by players; at the other end, the term connotes ways in which forum non conveniens cases are international law violations; between either end is the evolution between the poles. First, lawfare describes the way in which forum non conveniens is used as a procedural tool to “defend” courts from being inundated with lawsuits, especially lawsuits brought by foreign plaintiffs for foreign aviation accidents with little to no connection to the United States. Second, it encompasses the often malicious acts taken by plaintiffs to defeat a court’s forum non conveniens dismissal. Finally, and most egregiously, it describes the way in which Country A attempts to subordinate Country B’s laws to Country A’s laws. While it would not fit the traditional definitions of the term lawfare as used by other scholars, it is appropriate to extend the defini-


2 The term lawfare, in its most modern application, was first coined by Major General Dunlap describing terrorists using the law as a weapon of warfare. Wouter G. Werner, *The Curious Career of Lawfare*, 43 CASE W. RES. J. INT’L L. 61, 66 (2010). However, lawfare is a nuanced term with applications in a variety of contexts, such as Guantanamo detainees and habeas corpus petitions, universal jurisdiction, hate speech litigation, the Goldstone Report, and infringements on the United States’ ability to conduct military operations. Id.; see also Laurie R. Blank, *Finding Facts but Missing the Law: The Goldstone Report, Gaza, and Lawfare*, 43 CASE W. RES. J. INT’L L. 279, 279 (2012); Brook Goldstein & Aaron Eitan Meyer, “Legal jihad”: How Islamist Lawfare Tactics Are Targeting Free Speech, 15 ILSA J. INT’L COMP. L. 395, 397 (2009); David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN.
tion to situations in which the subordination of laws infringes on Country B's sovereignty, which is a violation of customary international law. The term lawfare has extended to forum non conveniens litigation since the recent decision by France’s Cour de Cassation, which is, at best, an affront to international comity and, at worst, a violation of U.S. sovereignty.3

This article will track the evolution of forum non conveniens lawfare through a number of seminal cases from the last ten years, namely Air France,4 Hosaka,5 West Caribbean,6 and the most recent decision from France’s highest court.7 The article begins by explaining the historical context and purposes of the Warsaw and Montreal Conventions to introduce the international law governing the forum non conveniens issues presented. Although the Montreal Convention serves largely as an amendment to the Warsaw Convention, countries that are signatories only to the Warsaw Convention are not governed by the Montreal Convention.8 Thus, it is important to understand both Conventions. Next, this article will look at the ways courts use forum non conveniens as a defense mechanism and how courts have defined the doctrine in the international aviation context. Then, this article will examine the ways that plaintiffs have tried to defeat forum non conveniens. This article will next examine


3 See infra Parts IV & V.
4 In re Air Crash Over the Mid-Atlantic on June 1, 2009 (Air France), 760 F. Supp. 2d 832 (N.D. Cal. 2010).
8 See infra note 65.
the Cour de Cassation’s opinion in *West Caribbean* and explain the issues it poses for sovereignty. Finally, this article will offer conclusions on the current state of forum non conveniens and whether, going forward, there should be a clear policy for encouraging the application of forum non conveniens in suits by foreigners in U.S. courts for air accidents occurring abroad.

I. INTERNATIONAL TREATIES ON AIR TRANSPORT

A. PURPOSES OF THE WARSAW AND MONTREAL CONVENTIONS

The drafters of the 1929 Warsaw Convention wanted to develop a treaty to achieve two goals for international civil aviation: (1) establish uniformity in the legal systems; and (2) balance the interests of passengers and the then-newly-emerging air carrier industry. One way the Warsaw Convention sought to provide uniformity was by establishing four fora in which a plaintiff could obtain jurisdiction over a carrier: (1) at the flight’s final destination; (2) where the carrier was domiciled; (3) where the carrier had its principal place of business; or (4) where the carrier had a place of business that made the contract. The 1999 Montreal Convention added a fifth jurisdiction, permitting passengers to bring suit in the place where passengers have their “principal and permanent residence” at the time of the accident if the carrier provides carriage of passengers on its own aircraft or through a commercial agreement. By establishing a uniform set of rules, the interests of air carriers and passengers were balanced because these rules helped even the playing field between parties. The five fora in which a passenger could sue an air carrier represented a compromise because the passenger was limited to seeking recovery in only those five fora, but those fora were virtually guaranteed.

---

9 *Andreas F. Lowenfeld, Aviation Law* § 2.1 (2d ed. 1981). Although the United States was not one of the charter members, it did send an observer to the Warsaw Convention. See *Andreas F. Lowenfeld & Allan I. Mendelsohn, The United States and the Warsaw Convention*, 80 *Harv. L. Rev.* 497, 502 (1967). Soon after the Warsaw Convention took effect, the U.S. Department of State recommended ratification. *Id.*


Prior to the Warsaw Convention, there was no definite basis of recovery for passengers or shippers. Because of the differing standards among national laws governing air accidents, what a passenger could recover in one country might be far less than what a passenger might recover in another.\(^{12}\) "Some countries treated all transportation accidents alike," while others distinguished between automobiles and public carriers and made special provisions for aviation accidents.\(^{13}\) Compensation for aviation accidents could be governed by a nation’s contract law or by its tort law.\(^{14}\) If contract law were a country’s basis for recovery in an aviation accident, the air carrier might be liable only for foreseeable damages, not all damages caused.\(^{15}\) Additionally, a carrier could limit or exclude its liability by contract.\(^{16}\) By contrast, if tort law governed aviation accident compensation, the air carrier would be liable for all damages caused, and a plaintiff could potentially recover more.\(^{17}\)

Another way the Warsaw Convention balanced the interests of carriers and passengers was by limiting carriers’ potential liability for death or bodily injury to approximately $8,300.\(^{18}\) In a letter from Secretary of State Cordell Hull to the Senate Committee on Foreign Relations recommending ratification of the Warsaw Convention, Secretary Hull stressed the importance of the Warsaw Convention’s liability limits in aiding development of the fledgling international air transport industry, positioning that the limitations would afford air carriers “a more definite and equitable basis” for determining insurance rates.\(^{19}\) Hull urged that this certainty would create lower operating expenses and reduce transportation costs for passengers.\(^{20}\) Additionally,
the increased stability of limits allowed carriers to attract more investors and aided the overall development of international air transportation.\textsuperscript{21} Despite initially ratifying the Warsaw Convention, the United States began pushing for increased liability limits.\textsuperscript{22}

The United States advocated strongly for increasing recoveries for victims to $100,000, but the International Air Transport Association (IATA) insisted that $75,000 was the maximum limit the world’s insurance market could sustain.\textsuperscript{23} Unwilling to ratify the 1955 Hague Protocol—\textsuperscript{24} an amendment to the Warsaw Convention—without an increase in carrier liability, the United States submitted a notice denouncing the Warsaw Convention.\textsuperscript{25} Prior to the denunciation’s effective date, the United States struck a compromise by proposing the adoption of absolute liability.\textsuperscript{26} The United States wanted increased limits primarily because litigation costs were so high.\textsuperscript{27} By coupling absolute liability with the $75,000 cap, legal fees would be lower and victims’ recovery would be commensurate with the United States’ proposed $100,000 limit.\textsuperscript{28} This compromise was further developed in the Montreal Convention’s two-tier liability system in Article 21.\textsuperscript{29}

The Warsaw Convention shifted the burden of proof so that the carrier was presumed liable unless it could show beyond a doubt that it took “all necessary measures to avoid the damage.”\textsuperscript{30} Thus, even though the limits of liability set forth in the

\textsuperscript{21} Id.
\textsuperscript{23} See id.
\textsuperscript{25} Kreindler, supra note 24, at 291. The Act of Denunciation was effective May 15, 1966. Id.
\textsuperscript{27} See Mendelsohn, \textit{Forum Non Conveniens & Montreal 99}, supra note 22, at 272–73.
\textsuperscript{28} Id.
\textsuperscript{29} See Montreal Convention, supra note 11, art. 21.
\textsuperscript{30} Warsaw Convention, supra note 10, art. 20.
treaty may not have been as favorable for passengers as the prevailing law in Germany, for example, the overall advantage to passengers' rights was undeniable. Developing a uniform, multinational approach to accident compensation in international air transportation may have been the initial objective of the Warsaw Convention (and subsequent treaties), but that goal could not be further from what resulted.

B. Frustration of the Conventions' Purpose

In advocating for the absolute liability provisions, the United States hoped passengers would be able to avoid extensive and prolonged litigation over issues of negligence and to recover damages promptly, with minimal legal fees. Unfortunately, this objective is frustrated when plaintiffs and their lawyers engage in bad faith forum shopping or when the action is brought against the manufacturer under products liability principles, rather than against the air carrier on which the accident occurred.

Plaintiffs found a number of ways around the liability and jurisdictional limits in the Warsaw Convention. If plaintiffs brought suit under the Warsaw Convention against the air carrier on which the accident occurred, they were limited to an award of $75,000 under the 1966 IATA Intercarrier Agreement. But if the plaintiffs brought a products liability claim against the manufacturers of the aircraft, the Warsaw liability limits did not apply, and some U.S. states permitted the award of punitive damages. To address this issue, the Montreal Convention's drafters adopted a two-tier system of liability. First, the Montreal Convention increased strict liability limits up to 100,000 Special Drawing Rights (SDR), or $150,000 U.S. (2012). Second, Montreal did away with liability limits for airlines and air carriers unless they could successfully bear the burden of proving that the damage was not due to their negligence.

31 See Lowenfeld, supra note 9, §§ 1.52–53.
32 See Mendelsohn, Forum Non Conveniens & Montreal 99, supra note 22, at 272–73; see also discussion supra Part I.A.
33 Mendelsohn, Forum Non Conveniens & Montreal 99, supra note 22, at 274. If plaintiffs bring a products liability claim against the manufacturers of the aircraft, the Warsaw and Montreal liability limits do not apply. Id.
34 Warsaw Convention, supra note 10, art. 22 (§8,300 converted to value in 2012); Montreal Agreement, supra note 26.
35 Mendelsohn, Forum Non Conveniens & Montreal 99, supra note 22, at 274.
36 See Montreal Convention, supra note 11, art. 21.
37 See id. art. 21(1).
or, alternatively, that it was due to the negligence of a third party. Thus, even if an airline or air carrier bore only 1% of the liability, it would be responsible for the full amount of damages allowed under local law.

Because local law applies to damage awards under the Montreal Convention, plaintiffs are still incentivized to forum shop for countries that award higher damages. Moreover, because the Montreal Convention bars punitive damages, plaintiffs will still bring products liability claims against the manufacturer (or other third parties) in an amenable forum, such as the United States. Suing the manufacturers rather than the air carrier has a jurisdictional benefit when U.S. courts have personal jurisdiction over the manufacturer. Because products liability claims are covered by tort law in the United States and are not governed by the Warsaw or Montreal Conventions, plaintiffs can file suit in U.S. courts even when the accident occurred abroad and the carrier neither operates nor does business in the United States.

This type of forum shopping is not in violation of either the Warsaw Convention or the Montreal Convention because a plaintiff is entitled to choose the forum. However, because the choice of forum in international litigation can be outcome determinative, the perceived advantages of litigating a case in the United States cause many foreign plaintiffs to file suit there. This is often the case whether or not the plaintiff or the aviation accident has any connection to the United States. For example, the availability of potentially higher awards (punitive or multiple damage awards), broader discovery rights, and contingency fee lawyers all make the United States a far more attractive forum than most foreign countries. By contrast, defendants often perceive the United States as unfavorable and try to influence the choice of forum through various legal procedural means, such as forum non conveniens; parallel proceedings and motions to stay or dismiss in favor of the parallel

38 Id. art. 21(2).
39 See id. art. 33.
40 Id. art. 29.
41 Mendelsohn, Forum Non Conveniens & Montreal 99, supra note 22, at 274.
42 Montreal Convention, supra note 11, art. 33(1) (describing jurisdiction as chosen “at the option of the plaintiff”); Warsaw Convention, supra note 10, art. 28(1).
43 Mendelsohn, Forum Non Conveniens & Montreal 99, supra note 22, at 265.
44 Id.
45 Id.
foreign proceedings; or antisuit injunctions. Consequently, litigation becomes a protracted battle, legal costs increase dramatically, and the Conventions’ purposes are frustrated.

II. FORUM NON CONVENIENS

Forum non conveniens—Latin for “an unsuitable court”—is a common law doctrine under which a court, as a matter of discretion, may decline to exercise jurisdiction when some significantly more convenient alternative forum exists. Foreign plaintiffs are then required to “sue either in the courts of their own country or, in the case of a foreign airline defendant, in a court where that airline is headquartered.” Because foreign plaintiffs often bring claims in U.S. courts in the hopes of using contingency fee counsel and getting higher awards, the forum non conveniens doctrine is an essential defense mechanism that allows U.S. courts to dismiss cases, especially those with no nexus to the U.S. forum.

In the seminal case on forum non conveniens, Piper Aircraft Co. v. Reyno, the Supreme Court established a three-part test for determining when a case may be dismissed for forum non conveniens. First, the Court assessed the degree of deference to accord to the plaintiff’s choice of forum.

---

47 BLACK’S LAW DICTIONARY 726 (9th ed. 2011).
49 Mendelsohn, Forum Non Conveniens & Montreal 99, supra note 22, at 268.
52 Id. at 257 (citing Gilbert, 330 U.S. at 511–12).
the Court observed that “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.”\textsuperscript{53} When a plaintiff chooses his or her home forum, moreover, it is presumed to be convenient and is afforded great deference.\textsuperscript{54}

Second, the Court analyzed whether an adequate alternate forum existed.\textsuperscript{55} The \textit{Piper} Court noted that the requirement for an adequate alternative forum “will be satisfied when the defendant is ‘amenable to process’ in the other jurisdiction.”\textsuperscript{56} Often, a defendant airline making a forum non conveniens motion will voluntarily consent to the jurisdiction of a foreign court and waive statute of limitations defenses and any other potential defenses it might have under Article 21(2) of the Montreal Convention.\textsuperscript{57} Courts may condition forum non conveniens dismissals upon these waivers by the defendant airline to ensure that an alternative forum will exist.\textsuperscript{58} However, the alternate forum’s “adequacy” does not necessarily require that the other available forum guarantee a win for the plaintiff.\textsuperscript{59}

Third, assuming that an adequate alternative forum existed, the Court balanced the public and private factors weighing either for or against dismissing for forum non conveniens.\textsuperscript{60} Various private factors include:

relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all

\textsuperscript{53} \textit{Gilbert}, 330 U.S. at 508.
\textsuperscript{54} \textit{Piper}, 454 U.S. at 255.
\textsuperscript{55} \textit{Id.} at 254 n.22.
\textsuperscript{56} \textit{Id.} (citing \textit{Gilbert}, 330 U.S. at 506–07); see, \textit{e.g.}, Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp., 549 U.S. 422, 433–34 (2007); Calavo Growers of Cal. v. Generali Belg., 632 F.2d 963, 968 (2d Cir. 1980) (“The doctrine of forum non conveniens presupposes that an alternative forum is available.”).
\textsuperscript{58} Leigh, \textit{supra} note 57.
\textsuperscript{59} \textit{See Piper}, 454 U.S. at 252 n.19. \textit{But see id.} at 254 n.22 (“[W]here the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative . . . .”).
\textsuperscript{60} \textit{Id.} at 256; \textit{see} Norex Petroleum Ltd. v. Access Indus., Inc., 416 F.3d 146, 153 (2d. Cir. 2005); \textit{see also} \textit{Gilbert}, 330 U.S. at 508; Clerides v. Boeing Co., 534 F.3d 623, 628–30 (7th Cir. 2008).
other practical problems that make trial of a case easy, expeditious and inexpensive.61

The public interest factors that courts have listed include: administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest "in having the trial of a diversity case in a forum that is at home with the state law that must govern the case"; the avoidance of unnecessary problems in conflict of laws or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.62

Although both the Warsaw Convention and the Montreal Convention state that the procedural rules of the court hearing the case shall govern,63 the issue has been a hotbed for litigation arising out of air accidents in recent years. There is an immense disconnect between various courts' interpretations of whether Warsaw or Montreal intended to include the forum non conveniens doctrine as a procedural right of the forum state. However straightforward this seems, several cases within the last few years cast serious doubts upon the control that a U.S. court has over its jurisdiction and, consequently, that the United States has over its own sovereignty.

III. FORUM NON CONVENIENS UNDER THE WARSAW CONVENTION

Article 28(2) of the Warsaw Convention provides that "[q]uestions of procedure shall be governed by the law of the Court seised of the case."64 Although this Article is seemingly straightforward, there is a serious disconnect between various courts' interpretations of whether the Warsaw Convention intended to include the forum non conveniens doctrine as a procedural right of the forum state. While the Montreal Convention is the more recent international transportation treaty, the Warsaw Convention will still apply to its signatories that have not yet ratified Montreal.65 Therefore, it is still essen-

---

61 Gilbert, 330 U.S. at 508.
62 Id. at 508–09.
63 Montreal Convention, supra note 11, art. 33(4); Warsaw Convention, supra note 10, art. 28(2).
64 Warsaw Convention, supra note 10, art. 28(2).
65 Note that this problem may be less important than it initially appears. All carriers operating in the United States, as part of their foreign air carrier permit, have voluntarily agreed to be bound by the Montreal Convention no matter the origin or destination of their passengers. See 14 C.F.R. §§ 203.1–3. In addition,
tial for any international litigator to be cognizant of Warsaw Convention case law.

A. TWA 800

In 1996, Trans World Airlines (TWA) Flight 800 exploded eight miles off the coast of Long Island shortly after departing New York on a flight to France. The families of 145 of the deceased passengers brought wrongful death suits against the airline, the manufacturer of the aircraft, and the manufacturer of the aircraft’s fuel pumps; the cases were consolidated in the U.S. District Court for the Southern District of New York. The defendants—Boeing (the airplane manufacturer) and TWA (the airline)—sought to dismiss the suit in favor of a French forum. In doing so, they agreed to voluntarily submit themselves to the French court’s jurisdiction and to not contest liability for full compensatory damages. The defendants preferred the French forum because France did not allow punitive damages and because the plaintiffs might be disadvantaged by the defendants’ deep pockets—especially in the absence of contingency fee representation.


69 Id. To meet the second requirement of the Piper test that another alternative forum exist, defendants will often waive defenses in the foreign jurisdiction. See supra text accompanying notes 55–59.

70 TWA 800, 65 F. Supp. 2d at 216. Note that this case was decided under the Warsaw Convention, which did not prohibit punitive damages. See id. at 212. Under the Montreal Convention, punitive damages are prohibited against air carriers, no matter how gross the alleged conduct. See Montreal Convention, supra note 11, art. 29.

71 See Mendelsohn, Forum Non Conveniens & Montreal 99, supra note 22, at 274.
Balancing the private and public interest factors, the court held that dismissal was inappropriate. The private factors, such as availability of evidence and access to witnesses, were “a wash.” The public interest factors, however, weighed heavily in favor of keeping the case in the United States. The court noted that it was unaware of any precedent dismissing a case for forum non conveniens for an air accident occurring in U.S. territory. The flight originated in the United States; the plane was manufactured by a U.S. company and flown by a U.S. carrier; and the passengers were predominantly U.S. domiciliaries: “the presence of foreign plaintiffs (who chose to sue in the United States) does not change the essentially American character of this case.”

Despite the ultimate denial of the defendants’ forum non conveniens motion, this case is significant because the court clearly recognized that, under the Warsaw Convention, Article 28(2)’s provision allows the forum’s procedural rules to govern and possibly prevail over a plaintiff’s choice of forum under Article 28(1). The court acknowledged that it would be barred from dismissing a suit brought under Article 28(1) of the Warsaw Convention but held that the treaty does not limit the court from transferring such suits to other fora not outlined in Article 28(1) because transfers are a procedural tool permitted by Article 28(2). Although forum non conveniens is actually a dismissal, the court reasoned that it was not restricted by the four fora in Article 28(1) because dismissals are considered transfers when conditioned upon the subsequent alternative forum accepting the case. Compare this result with the conclusion reached by the English Court of Appeals in the 1996 case Milor v. British Airways.

72 TWA 800, 65 F. Supp. 2d at 218.
73 Id. at 215–16.
74 Id. at 217.
75 Id.
76 Id.
77 See id. at 214; Warsaw Convention, supra note 10, art. 28(1) (listing the four fora in which a plaintiff may bring suit); Warsaw Convention, supra note 10, art. 28(2) (“Questions of procedure shall be governed by the law of the court to which the case is submitted.”).
78 TWA 800, 65 F. Supp. 2d at 212–14.
79 Id. at 212–13.
B. Milor v. British Airways

In Milor, the shippers, consignees, and forwarding agents of gold jewelry worth £750,000, or nearly $1.2 million, consigned the jewelry from Italy to Pennsylvania under an international carriage of goods by air contract with the defendant air carrier. Upon arrival in Pennsylvania, the jewelry disappeared from a bonded warehouse while under the defendant's watch. The plaintiffs filed suit in England's Commercial Court against the defendant carrier to recover the value of the jewelry. The defendants moved to stay proceedings on the ground of forum non conveniens, arguing that Pennsylvania was a more proper forum because the crime occurred there—thus, the evidence was located there—and because the defendants planned to bring third party proceedings in that jurisdiction. However, the lower court held there was no basis to challenge the plaintiffs' choice of forum as provided in Article 28 of the Warsaw Convention.

On appeal, the English Court of Appeals upheld the lower court's decision, holding that the Warsaw Convention's text precluded application of the forum non conveniens doctrine; the court of appeals reasoned that the "procedural power to stay on the ground of forum non conveniens is . . . inconsistent with the right conferred on the plaintiff to choose in which of the [four] competent jurisdictions his action will be tried." Under this interpretation, "the scope of the forum state's procedural law incorporated by Article 28(2) is subject to Article 28(1), which grants to the plaintiff an absolute right of choice as between four presumptively convenient jurisdictions." The Ninth Circuit would later weigh the TWA 800 interpretation against the "equally plausible interpretation" adopted by the Milor court in one of the leading cases on the intersection between forum non conveniens and the Warsaw Convention, Hosaka v. United Airlines, Inc.

---

83 Id. at 702.
84 Id.
85 Id. at 706; cf. TWA 800, 65 F. Supp. 2d 207, 218 (S.D.N.Y. 1999) (discussing the "essentially American character" of the TWA 800 accident).
87 Id. at 707.
88 Hosaka v. United Airlines, Inc., 305 F.3d 989 (9th Cir. 2002).
89 Id. at 994–95.
C. **Hosaka v. United Airlines, Inc.**

In *Hosaka*, the plaintiffs brought claims under the Warsaw Convention arising out of injuries sustained when their United Airlines flight from Tokyo to Hawaii encountered turbulence over the Pacific Ocean. The *Hosaka* defendants moved to dismiss the suit for forum non conveniens, noting that every plaintiff “lives in Japan, works in Japan, is a citizen of Japan, received medical care (if at all) in Japan, and otherwise sustained whatever damages he or she sustained, in Japan.” The plaintiffs implored the court to adopt the ruling outlined in *Milor v. British Airways*, but the district court dismissed the plaintiffs’ actions in favor of a more convenient forum in Japan, holding that the Warsaw Convention’s provision of four fora in which an action may be brought did not procedurally bar the court from dismissing the suit for forum non conveniens. But on appeal, the Ninth Circuit reversed the lower court’s decision, holding that Article 28(1) of the Warsaw Convention overrides the discretionary power of federal courts to dismiss on forum non conveniens grounds. The Ninth Circuit based its rationale on the Warsaw Convention’s purpose, the drafting history, and the post-ratification understanding of Warsaw.

1. **Text of the Treaty**

The circuit court in *Hosaka* began by looking at the plain language of the Warsaw Convention and determined that Warsaw was “silent on the availability” of forum non conveniens as a procedural tool. The *Hosaka* court next weighed the two “equally plausible interpretations” of Article 28’s language on questions of jurisdiction and procedure: the TWA 800 and *Milor* courts’

---

90 Brief of Defendants/Appellees United Airlines, Inc. & UAL Corp. at 7, Hosaka v. United Airlines, Inc., 305 F.3d 989 (9th Cir. 2002) (Nos. 00-15223, 01-15120).
91 Id.
92 Hosaka, 305 F.3d at 993.
93 Id. at 1004.
94 Id. at 1003.
95 When interpreting a treaty, a court must begin with the treaty’s text. See id. at 993 (citing El Al Isr. Airlines, Ltd. v. Tseng, 525 U.S. 155, 167 (1999)).
96 Id. at 994 (noting that forum non conveniens was not explicitly referenced anywhere in the treaty).
97 Id. The issue is whether Article 28(1) is an absolute right of the plaintiff (*Milor* holding) or Article 28(2) plainly incorporates the forum state’s procedural law (*TWA 800*). Id. at 994–95.
rationales. The circuit court reasoned that Article 28 was ambiguous, but also that the court’s rationale was conclusory.

First, it is “well established” in U.S. case law that the forum non conveniens doctrine is “procedural rather than substantive.” Thus, questions of procedure, such as forum non conveniens, must be left to the court seized of the case, according to Article 28. The inquiry should have stopped there, but the Hosaka court reasoned that forum non conveniens was not officially recognized in U.S. jurisprudence at the time the Warsaw Convention was drafted and, therefore, could not be one of the procedural tools the drafters intended to apply. But the United States was not an original party to the Warsaw Convention, and all original signatories came from civil law jurisdictions that did not employ the forum non conveniens doctrine. Therefore, it makes little sense for the court to put such weight on the absence of a doctrine that the parties to the Convention did not utilize in their own countries. Even if the background of forum non conveniens in U.S. jurisprudence was relevant, the Hosaka court’s history was mistaken.

While the term “forum non conveniens” was not employed in the United States until 1929, the concept underlying the doctrine—that U.S. courts have the discretion to refuse jurisdiction over a case—was certainly present as early as the 17th century. In the 1869 case Great Western Railway Co. of Canada v. Miller, the court held:

98 See discussion supra Part III.A.—B.
99 Hosaka, 305 F.3d at 996 (“Where the text of a treaty is ambiguous, we may look to the purposes of the treaty to aid our interpretation.”).
101 Id. (quoting Am. Dredging Co. v. Miller, 510 U.S. 443, 453 (1994)).
102 Hosaka, 305 F.3d at 1003. The first official U.S. recognition of forum non conveniens was in 1947. See id.
103 Civil law countries objected to forum non conveniens language because “the doctrine was unknown in their jurisdictions and ought not to be imposed upon them by international treaty.” Id. at 1000.
We think that when by the pleadings, or upon the trial, it appears that our tribunals are resorted to for the purpose of adjudicating upon mere personal torts committed abroad, between persons who are all residents where the tort was committed, the inconveniences and the danger of injustice attending the investigation of such controversies render it proper to decline proceeding further.\textsuperscript{106}

Moreover, the fact that a new procedural rule crystallized under domestic law only after the treaty was ratified cannot necessarily foreclose its inclusion.\textsuperscript{107} If this were the norm, treaties would be outdated before they were ratified, and international law would lose credibility. Thus, the language of the Warsaw Convention, which clearly states that any procedural law of the forum state governs, should by consequence include the procedural doctrine of forum non conveniens.\textsuperscript{108}

Even if the \textit{Hosaka} court correctly concluded that the treaty’s text was ambiguous and required the court to engage in treaty interpretation, the court certainly exceeded the scope of its power by inserting its own interpretation of the treaty’s purposes.\textsuperscript{109}

2. \textit{Purpose and Drafting History of the Warsaw Convention}

Finding the plain text of the treaty ambiguous, the \textit{Hosaka} court next analyzed the treaty’s purposes and drafting history\textsuperscript{110}


\textsuperscript{108} See Warsaw Convention, supra note 10, art. 28(2).


\textsuperscript{110} \textit{Hosaka}, 305 F.3d at 993-94 (“If the plain text is ambiguous, we look to other sources to elucidate the treaty’s meaning, . . . including the purposes of the treaty, its drafting history, the post[-]ratification understanding of the contracting parties and the decisions of the courts of other signatories.”). The \textit{Hosaka} court concluded that “forum non conveniens is inconsistent with the Convention’s dual purposes of uniformity and balance.” \textit{Id.} at 997; see discussion supra Part I.A. Ultimately adopting the \textit{Milor} court’s rationale, the \textit{Hosaka} court noted that the Warsaw Convention’s signatories were not just creating uniformity in liability, but also uniform rules of jurisdiction. \textit{Hosaka}, 305 F.3d at 996. Forum non conveniens disturbs uniform rules of jurisdiction by denying a plaintiff “the right . . . to sue in one of the four [fora] nominated in [A]rticle 28(1).” \textit{Id.} at 997. Additionally, allowing a defendant to cancel out a plaintiff’s choice of forum would disturb the balance struck between air carriers and their customers by reneging on a “deliberate benefit” to the plaintiff to choose one of the four jurisdictions in which it enjoys a right to sue. \textit{Id.}
to see "the context in which the written words were used,"\textsuperscript{111} including the negotiations and the "practical construction adopted by the parties."\textsuperscript{112} In so holding, the \textit{Hosaka} court more than likely, as shown below, failed in giving "the specific words of the [Warsaw Convention] a meaning consistent with the shared expectations of the contracting parties."\textsuperscript{113}

The \textit{Hosaka} court stated that the drafting history was "inconclusive" and determined that the failure to explicitly incorporate forum non conveniens in the Warsaw Convention was not indicative of "silently incorporating, or acquiescing in" its inclusion.\textsuperscript{114} Instead, the court reasoned that the contracting parties intentionally left it out because it was "an alien concept" to "civil law jurists" and "unwelcome by the majority of the contracting parties" of the Warsaw Convention.\textsuperscript{115} There are several problems with these conclusions.

First, it was clear error for the \textit{Hosaka} court to summarily conclude that the absence of explicit reference to forum non conveniens in Article 28 indicated the drafters did not intend for it to apply.\textsuperscript{116} In \textit{Trans World Airlines, Inc. v. Franklin Mint Corp.}, the Supreme Court affirmed a Second Circuit decision but "reject[ed] its declaration that the [Warsaw] Convention is prospectively unenforceable."\textsuperscript{117} The Court held that the lower court erred in concluding that legislative silence abrogated the treaty limitations absent clear intent by the political branches to do so.\textsuperscript{118} Both Congress and the Executive Branch maintained that the treaty limitations remained in force, took no steps to otherwise repeal those provisions, and in fact continued to assert the treaty's vitality.\textsuperscript{119} Applying the same logic to the \textit{Hosaka} decision, the policy rationale behind the Warsaw Convention

\begin{footnotesize}
\textsuperscript{113} See \textit{Hosaka}, 305 F.3d at 994 (quoting \textit{Saks}, 470 U.S. at 399).
\textsuperscript{114} \textit{Id.} at 998-99. At the Warsaw drafting conference, the British delegation proposed expressly preserving a court's discretion to decline jurisdiction in Article 28 if it was consistent with the forum state's procedural rules. \textit{Id.} at 997. However, this language was never incorporated into Article 28 and it is unclear from the official minutes why the language was never included. \textit{Id.} at 997-98.
\textsuperscript{115} \textit{Id.} at 999.
\textsuperscript{116} See \textit{id}.
\textsuperscript{117} \textit{Trans World Airlines, Inc. v. Franklin Mint Corp.}, 466 U.S. 243, 246 (1984).
\textsuperscript{118} \textit{Id.} at 251-52.
\textsuperscript{119} \textit{Id.} at 253.
\end{footnotesize}
should also not be subject to second-guessing by the judiciary absent clear intent from the other political branches.\textsuperscript{120}

The court in \textit{Hosaka} disagreed with the Fifth Circuit's assumption that the United States would not ratify a treaty that "forfeit[ed] such a valuable procedural tool as the doctrine of forum non conveniens," noting that there are "many possible reasons" why the United States would exclude a forum non conveniens provision.\textsuperscript{121} The court rationalized that because forum non conveniens was not important until the 1947 \textit{Gilbert} decision, it had "no difficulty imagining that the United States would have sacrificed application of this modestly important procedural tool to obtain the benefits of the Convention."\textsuperscript{122} However, the \textit{Hosaka} court conceded that the United States did not expressly forfeit this right.\textsuperscript{123}

The \textit{Hosaka} court clearly lacked the discretion to impose its assumptions on what the United States might have bargained for in ratifying the treaty, and its decision does not diminish the doctrine’s immense importance to the United States today—especially in light of the increased case load and the flood of foreign plaintiffs taking advantage of a generous forum.\textsuperscript{124} Without such an express forfeiture of the right, the \textit{Hosaka} court severely exceeded its authority in ruling in such a manner because forum non conveniens is a right intrinsic to the sovereign authority of the United States over its own courts.\textsuperscript{125}

Moreover, the court mentioned that the United States had suggested amendments to the treaty that included express forum non conveniens language; the court decided that these suggestions, combined with the United States' decision to sign the treaty despite the absence of the amendments, were evidence that the United States lost the battle to include that language.\textsuperscript{126} Although this is a possible theory, a more persuasive counter-argument is that forum non conveniens was in fact an important procedural tool because the United States specifically requested its express inclusion.\textsuperscript{127} Thus, it is less likely that the United States “sacrificed application” for the benefits of the Convention

\textsuperscript{120} See id. at 252–53; \textit{Hosaka}, 305 F.3d at 996–97.
\textsuperscript{121} \textit{Hosaka}, 305 F.3d at 1002.
\textsuperscript{122} Id. at 1003.
\textsuperscript{123} Id. at 1003–04.
\textsuperscript{124} See id.; \textit{supra} note 50 and accompanying text.
\textsuperscript{125} See \textit{Hosaka}, 305 F.3d at 1003–04.
\textsuperscript{126} Id. at 1000.
\textsuperscript{127} See id.
and rather more likely that the United States reached a compromise with the civil law countries to not include specific forums' laws into the treaty.\textsuperscript{128}

Relying on the Supreme Court's decision in \textit{Eastern Airlines, Inc. v. Floyd},\textsuperscript{129} the Hosaka court reasoned that it could not adopt a reading of Article 28 that "would [be] discordant or offensive to the majority of signatories."\textsuperscript{130} The Hosaka court's effort to apply Floyd's rule to the forum non conveniens application of Article 28 is illogical.\textsuperscript{131} Extending the narrow concept of bodily injury to cover emotional damages is hardly comparable to refusing to permit certain types of judicial procedures under the broad language of Article 28.\textsuperscript{132} Bodily injury under U.S. tort law and foreign law specifically requires some physical injury that is \textit{more} than mental anguish.\textsuperscript{133} The Floyd plaintiff sought to claim compensation solely for emotional damages absent physical bodily injury.\textsuperscript{134} The Supreme Court in Floyd would have expanded the air carrier's liability dramatically under the Warsaw Convention if it were to rule otherwise, ultimately disturbing the balance sought in Warsaw between passengers and air carriers.\textsuperscript{135} However, the same concern would not apply if the Hosaka court read Article 28 to include the forum non conveniens procedure.\textsuperscript{136}

Whereas Article 17's bodily injury remedy is narrow, Article 28 is a broad grant permitting a court's procedural laws to apply.\textsuperscript{137} Interpreting that one such type of procedural law may be applied to transfer a case, even if it happens to take away one of the plaintiff's chosen forums, still cannot be construed as expanding the scope of a provision that the 1929 drafters may well

\textsuperscript{128} See id. at 1003.

\textsuperscript{129} 499 U.S. 530, 533–35 (1991) (declining to read Article 17 liability for passengers' "bodily injuries" to cover claims for purely emotional distress).

\textsuperscript{130} Hosaka, 305 F.3d at 998.

\textsuperscript{131} See id. at 999.

\textsuperscript{132} See id.

\textsuperscript{133} \textit{E.g.}, Jeffrey Jackson, Miss. Ins. Law & Prac. § 16:29 (No bodily injury claim can arise where the only claim is "embarrassment, emotional distress, or humiliation or damage to reputation."). The Supreme Court in Floyd noted that no French legal materials, judicial decisions, or scholarly articles indicated that the authentic French text of Article 17, "lésion corporelle," had any other meaning than bodily injury and did not include psychic injuries. E. Airlines, Inc. v. Floyd, 499 U.S. 530, 537–38 (1991).

\textsuperscript{134} Floyd, 499 U.S. at 533.

\textsuperscript{135} Id. at 546.

\textsuperscript{136} See Hosaka, 305 F.3d at 998–99.

\textsuperscript{137} See Warsaw Convention, supra note 10, arts. 21, 28.
have intentionally left vague (precisely as did the 1999 drafters of Montreal's Article 33(4)). In short, forum non conveniens is a procedural rule and therefore should be permitted under Article 28. The Hosaka court's assumption that forum non conveniens could not be read into Article 28 because it would be offensive to signatory states is also flawed.

D. "TOMATO, TOMAHTO": LIS PENDENS IN CIVIL LAW JURISDICTIONS

Forum non conveniens is not necessarily unwelcome in civil law jurisdictions. Instead, it seems that civil law jurisdictions simply developed a different legal procedure to dispose of "inconvenient cases" and provide for judicial economy. For example, most of the Warsaw Convention's signatories employ the lis pendens doctrine. Under the lis pendens doctrine, judges are afforded the discretion to stay the proceedings where the same case is pending in two different courts. Similar to the way in which the United States uses forum non conveniens, lis pendens is used in civil law countries to avoid parallel litigation and ensure judicial economy. Forum non conveniens and lis pendens should not be confused with one another because they are distinct legal doctrines. However, allowing a court's procedural rules to govern under the Warsaw Convention's Article 28 is essentially providing: "You say lis pendens, I say forum non conveniens."  

138 See id. art. 28; Montreal Convention, supra note 11, art. 33(4).
139 See Warsaw Convention, supra note 10, arts. 21, 28; Montreal Convention, supra note 11, art. 33(4).
140 See Hosaka, 305 F.3d at 998.
142 Stuckelberg, supra note 141, at 959.
143 See id.; discussion infra Part IV.A.
144 This is a play on the famous George Gershwin lyrics from "Let's Call the Whole Thing Off" in which two characters pronounce the same word differently, such as "tomato" and "tomahto." George Gershwin—Let's Call the Whole Thing Off. SONGMEANINGS, http://www.songmeanings.net/songs/view/3530822107859046 744 (last visited Mar. 29, 2013). Worried that this fundamental disagreement might force the couple to "call the whole thing off" or break up, the man offers to adopt his partner's pronunciation. See id. To him, it does not matter what term is used so long as they understand each other and they stay together as a couple. See id. Similarly, the Warsaw Convention drafters' ultimate goal was to draft a uniform agreement concerning air carrier liability with as many states ratifying
Treaties are complex arrangements and can involve many sovereign nations. By consequence, it is difficult to obtain an agreement regarding a treaty, and some degree of flexibility in language is necessary to encourage nations to ratify the treaty. Because of the myriad of procedural laws differing between each signatory, the treaty language would become bogged down if the details of signatories' procedural laws were explicitly included. Moreover, civil law states did not want forum legal doctrines forced upon them within their own territory. By adopting broad treaty language in Article 28 and not specifying what procedural laws do or do not apply, each party was able to keep some degree of sovereignty. Consequently, more parties may have been willing to ratify the treaty and were not forced to "call the whole thing off."

1. Post-Ratification Understanding: Other Treaties' Applications of Forum Non Conveniens

The court deemed it "instructive" that the Brussels Convention governing enforcement of judgments among European Union countries contains no express language on forum non conveniens, and scholars have concluded that this silence must be construed as barring the doctrine's application. However, the Hosaka court's reliance on the Brussels Convention, a treaty drafted nearly forty years after the Warsaw Convention, is perplexing.

The Brussels Convention was drafted "to establish an expeditious procedure for securing the recognition and enforcement of judgments . . . [within] the European Economic Commu-

---

145 The Hosaka court was aware of the potential for this type of conflict between civil law and common law countries, noting that in drafting the 1999 Montreal Convention, "[a]ttempts were made by delegates from common law states to introduce language which would specifically permit the application of the doctrine of forum non conveniens." Hosaka, 305 F.3d at 999–1000. However, "[c]onsiderable objections were made by delegates from various civil law jurisdictions" because "the doctrine was unknown in their jurisdictions and ought not to be imposed upon them by international treaty." Id. at 1000.

146 See supra note 144.

147 Hosaka, 305 F.3d at 1001.

148 See id. at 1001–02.
nity." Whereas the purpose of the Warsaw Convention is establishing uniformity in substantive rules of air carrier liability, the provisions of the Brussels Convention outline and clarify procedural rules to ensure judgments are enforced and recognized. Consequently, the Hosaka court compared apples to oranges when it reasoned that the Brussels Convention’s silence on forum non conveniens shed light on the Warsaw drafters’ intent.

The Hosaka court made it clear that it was offering “no opinion as to whether the text and drafting history of the Montreal Convention demonstrate whether forum non conveniens would be available.” Thus, the opinion very clearly does not extend to the 1999 Montreal Convention. However, Hosaka is still relevant because it applies to countries that are signatories to the Warsaw Convention and not to the Montreal Convention. Also, courts often cite the Hosaka court’s discussion on the Montreal Convention’s negotiating history. Although much of the language in the Montreal Convention is the same as the language in the Warsaw Convention, “the Montreal Convention is an entirely new treaty” requiring a new interpretation.

IV. FORUM NON CONVENIENS UNDER THE MONTREAL CONVENTION

Article 33(4) of the Montreal Convention states: “Questions of procedure shall be governed by the law of the court seised of the case.” In 2010, the U.S. District Court for the Eastern District of New York distinguished the ruling in Hosaka by analyzing the forum non conveniens doctrine with respect to the 1999

150 See Brussels Convention on Jurisdiction, supra note 141, arts. 21–24; discussion supra Part I.A.
151 See Hosaka, 305 F.3d at 1001–02.
152 Id. at 1001 n.17.
153 See id.
154 See id.
157 Montreal Convention, supra note 11, art. 33(4).
Montreal Convention. The Khan court noted that it was "well established" that the forum non conveniens doctrine was "procedural rather than substantive." Thus, the court only looked to the express language in Article 33(4) of the Montreal Convention—establishing that procedural questions are governed by the forum state—and concluded that it had the discretion to dismiss a case brought under the Montreal Convention on forum non conveniens grounds. Consequently, it is now well established that even if forum non conveniens did not apply under the Warsaw Convention, courts have interpreted it to apply under the Montreal Convention.

In the future, foreign plaintiffs bringing cases arising out of air crashes abroad under the 1999 Montreal Convention will need to be very resourceful in attempting to defeat motions to dismiss for forum non conveniens. Recent case law illustrates that plaintiffs will engage in interesting defendant swaps and litigation gymnastics to protect their choice of a U.S. forum.

A. AIR FRANCE AND BAD FAITH PLAINTIFFS

Following the June 2009 crash of the Air France flight operating from Brazil to Paris, the victims' families sued Airbus (the airline manufacturer) and various component parts manufacturers in the U.S. District Court for the Northern District of California. In 2010, the court dismissed all Air France Flight 447 cases for forum non conveniens, ruling that the families of the 228 passengers (including only two U.S. citizens) should have filed suit in France. The threshold question was whether dismissal for forum non conveniens was even available following the Ninth Circuit's Hosaka decision.

Deciding that forum non conveniens was available under the 1999 Montreal Convention, the court concluded that the forum non conveniens doctrine was well-recognized at the time the 1999 Montreal Convention was adopted, and sufficient drafting history supported application of the doctrine. When balanc-

158 Khan, 2010 WL 3210717, at *2.
159 Id. (quoting Am. Dredging Co. v. Miller, 510 U.S. 443, 453 (1994)).
160 Id.
161 See id.
162 In re Air Crash Over the Mid-Atlantic on June 1, 2009, 760 F. Supp. 2d 832, 835–36 (N.D. Cal. 2010).
163 Id. at 835.
164 Id. at 839–41.
165 Id. at 840.
ing the public and private interests, the judge agreed that the United States had a legitimate interest in "ensuring the quality of component parts on aircraft," but because the flight was headed for France and had far more French than U.S. passengers, U.S. interests were "not sufficient to justify the enormous commitment of judicial time and resources."166 Additionally, the court found that evidence would be obtained more easily abroad because a criminal investigation into the cause of the crash was taking place in France at the same time, and defendants "agreed to provide all of their evidence in France."167

After the U.S. district court granted the forum non conveniens dismissal, the plaintiffs’ counsel did not re-file their case in the French forum. Instead, they dropped all the European defendants and re-filed their suit in the United States without the European nationals originally included as plaintiffs, arguing that dismissal on forum non conveniens grounds was no longer possible because there could be no jurisdiction in the French courts for a suit brought by non-French plaintiffs against non-French defendants.168 Although the plaintiffs were accurate that forum non conveniens was no longer possible without the alternative available forum, the court nonetheless dismissed the case based solely on the plaintiffs’ bad faith and improper conduct.169

The Air France case plays an interesting role in the historical evolution of courts' treatment of forum non conveniens cases because it illustrates a willingness by the United States to dismiss a case for forum non conveniens even when there are American plaintiffs involved and the majority of products liability evidence rests in the United States.170 This could signify that courts are

166 Id. at 845.

167 Id. at 844.

168 Plaintiffs' Motion for Reconsideration of the Court's October 4, 2010 Order on Forum Non Conveniens at 2, In re Air Crash Over the Mid-Atlantic on June 1, 2009, 760 F. Supp. 2d 832 (N.D. Cal. 2010) (No. C 10-02144 CRB); see In re Air Crash Over the Mid-Atlantic on June 1, 2009, 760 F. Supp. 2d 832, 845 (N.D. Cal. 2010) (the removal of the European plaintiffs mitigates the public interest argument that France was more interested in the litigation).

169 In re Air Crash Over the Mid-Atlantic on June 1, 2009, 792 F. Supp. 2d 1090, 1095-96 (N.D. Cal. 2011) (noting that "a long line of jurisprudence holds that a plaintiff whose case is dismissed for forum non conveniens must litigate in the foreign forum in good faith"); see, e.g., Gutierrez v. Advanced Med. Optics, Inc., 640 F.3d 1025, 1031 (9th Cir. 2011); MBI Grp., Inc. v. Credit Foncier Du Cameroun, 616 F.3d 568, 573-74 (D.C. Cir. 2010); Huang v. Advanced Battery Techs., Inc., No. 09-8297, 2011 WL 813600, at *2 (S.D.N.Y. Mar. 8, 2011).

170 See In re Air Crash Over the Mid-Atlantic, 760 F. Supp. 2d at 842-43.
being more protective of their resources due to the ever-increasing international litigation that U.S. courts face. More importantly, *Air France* illustrates the evolution of the lengths plaintiffs' counsel will go to in order to bully their way into a U.S. forum, and also how courts adapt and tweak the law to maintain control over their dockets.

The most recent case on forum non conveniens in the aviation context, *In re West Caribbean Airways*, further illustrates that forum non conveniens litigation has reached very contentious levels in the international community.

**B. IN RE WEST CARIBBEAN AND THE SUBORDINATION OF U.S. LAWS**

Following a 2005 airplane crash over Venezuela while en route from Panama to Martinique, the survivors of the victims, 152 residents of Martinique, filed suit against (1) Newvac Corporation, a Florida corporation; (2) Newvac's owner, Jacques Cimetier; and (3) West Caribbean Airways, a Columbian flag carrier that did not fly to or do business in the United States. The plaintiffs argued that suit in the United States was appropriate under Article 39 of the Montreal Convention because Newvac met the definition of a "contracting carrier" and was domiciled and had its principal place of business in Florida.

West Caribbean Airways moved to dismiss the suit for lack of jurisdiction, while Newvac and Cimetier moved to dismiss the case on forum non conveniens grounds. Relying on the three-part test outlined in *Piper Aircraft*, Cimetier and Newvac contended that Martinique was an "adequate alternative forum" because Martinique was both the place of destination and where all the passengers had their principal and permanent residence at the time of the accident. Martinique was an available forum to the plaintiffs as citizens of Martinique, and the plaintiffs

---

171 See id.
172 See id.
175 *In re W. Caribbean*, 619 F. Supp. 2d at 1302–03.
177 Motion & Supporting Memorandum of Law of Defendants Jacques Cimetier, Newvac Corp., & GO2 Galaxy, Inc. to Dismiss on Grounds of Forum Non
could therefore bring suit in Martinique without undue inconvenience or prejudice because West Caribbean Airways had already agreed to waive its defense and submit to Martinique’s jurisdiction.\textsuperscript{178} Finally, relevant public and private interests weighed in favor of dismissing to Martinique because, as the domiciliary forum, its court was in the best position to determine how its citizens should be compensated.\textsuperscript{179}

The defendants further relied on the 1999 Montreal Convention’s Article 33(4), arguing that forum non conveniens was in fact a recognized procedural tool.\textsuperscript{180} The plaintiffs argued on the other hand that forum non conveniens could not be used to defeat their right of choice of forum as provided to them under Article 33(1).\textsuperscript{181} Whether the court could use forum non conveniens as a procedural tool under Article 33(4) was a case of first impression in U.S. courts.\textsuperscript{182} As such, the U.S. Department of Justice submitted a Statement of Interest detailing the travaux préparatoires of the Montreal Convention, which supported the conclusion that the drafters clearly intended that forum non conveniens be used as a procedural tool under Article 33(4).\textsuperscript{183} Writing for the district court, Judge Ursula Ungaro agreed and dismissed the case on forum non conveniens grounds, leaving as the only outstanding issue the amount of damages to be awarded under and according to Martinique law.\textsuperscript{184}

The plaintiffs appealed to the U.S. Court of Appeals for the Eleventh Circuit, which affirmed the district court’s decision; the plaintiffs’ petition for \textit{certiorari} to the U.S. Supreme Court was later denied.\textsuperscript{185} The indefatigable plaintiffs, however, chose not simply to bring their case in Martinique, but rather requested that the Martinique court reject the U.S. district court’s decision by refusing to hear the case.\textsuperscript{186}

The trial court in Martinique, however, agreed with Judge Ungaro’s opinion that dismissal was proper and that Article 33(4)
allowed the use of forum non conveniens.\textsuperscript{187} The French Cour d'Appel affirmed the lower Martinique court's decision.\textsuperscript{188} But on final appeal in 2011 to the highest French court, the Cour de Cassation, the plaintiffs finally had their victory.\textsuperscript{189} The Cour de Cassation adopted the plaintiffs' arguments that a U.S. court could not use a domestic procedural law to defeat the plaintiffs' right to their choice of forum under Article 33(1) and dismissed the case back to the U.S. court.\textsuperscript{190}

Armed with the Cour de Cassation's decision, the plaintiffs returned to Judge Ungaro and requested that she vacate her earlier order; the plaintiffs argued that the threshold requirement for forum non conveniens—the existence of an adequate alternative forum—was no longer met following the Cour de Cassation's dismissal.\textsuperscript{191} Nevertheless, Judge Ungaro denied the plaintiffs' motion, concluding that the plaintiffs' claim that failure to vacate would cause them "extreme and undue hardship"\textsuperscript{192} was "more than disingenuous—it [was] ridiculous."\textsuperscript{193} The plaintiffs chose to risk the available Martinique forum in favor of potentially greater financial rewards in the U.S. forum.\textsuperscript{194} Thus, to vacate the motion would be an "utter abrogation of the forum non conveniens doctrine,"\textsuperscript{195} "sanction . . . disrespect" for U.S. courts, and "encourage other litigants to engage in similar conduct."\textsuperscript{196} Judge Ungaro very assiduously noted that if a foreign court is willing to turn its own citizens away, then U.S. courts should feel no obligation to "devote resources to the matter."\textsuperscript{197}

\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} The “Bapte” Plaintiffs' Rule 60(b)(6) Motion to Vacate Judgment Because Martinique is Not an Available Forum & Incorporated Memorandum of Law at 1–2, In re W. Caribbean Airways, No. 06-22748, 2012 WL 1884684 (S.D. Fla. May 16, 2012) (No. 06-22748), ECF No. 273.
\textsuperscript{192} In re W. Caribbean Airways, No. 06-22748, 2012 WL 1884684, at *6 (S.D. Fla. May 16, 2012); The Bapte Plaintiffs' Rule 60(b)(6) Motion, supra note 191, at 9.
\textsuperscript{193} In re W. Caribbean Airways, 2012 WL 1884684, at *9.
\textsuperscript{194} Id. at *10.
\textsuperscript{195} Id. at *8 (citing Morales v. Ford Motor Co., 313 F. Supp. 2d 672, 676 (S.D. Tex. 2004)).
\textsuperscript{196} Id. at *12.
\textsuperscript{197} Id. at *8 (citing Scotts Co. v. Hacienda Loma Linda, 2 So. 3d 1013, 1017–18 (Fla. Dist. Ct. App. 2008)).
V. WAS THE FRENCH DECISION IN IN RE WEST CARIBBEAN "LAWFARE"?

The French Cour de Cassation’s decision might constitute "lawfare." Lawfare is traditionally defined as "the use of law as a weapon of war against a military adversary." While applying the term lawfare to the forum non conveniens discussion does not fit the traditional uses of the term, it is appropriate to extend the definition when one country attempts to subordinate another country’s laws beneath its own. Such subordination of laws infringes on the latter country’s sovereignty, which is a violation of customary international law. The decision by France’s Cour de Cassation can be seen, at best, as an affront to international law and comity and, at worst, a violation of U.S. sovereignty. Describing the French court’s decision as lawfare may be hyperbolic, but it is certainly worth discussing.

According to the director of the Lawfare Project, "[Lawfare] must be defined as a negative phenomenon to have any real meaning. Otherwise, we risk diluting the threat and feeding the inability to distinguish between that which is the correct application of the law, on the one hand, and that which is lawfare, on the other." Consequently, analyzing whether the Cour de Cassation’s recent decision was lawfare could help the legal community understand the threat the decision poses to U.S. sovereignty, the Montreal Convention, and international law.

A. AN AFFRONT TO INTERNATIONAL LAW AND COMITY

The lawfare analysis requires consideration of the following question: "What is the intention?" behind the legal action: Is it to pursue justice, . . . or is the intent to undermine the very system of laws being manipulated? In the context of the Montreal Convention, does the French court’s conclusion further the purposes of the Convention (uniformity and the balancing of carrier–passenger interests), or does it manipulate the treaty language to support an outcome the French court prefers?

198 Luban, supra note 1, at 457.
199 See sources cited supra note 2. The Lawfare Project lists five goals of modern-day lawfare, one of which is "[t]o delegitimize the sovereignty of democratic states." What Is Lawfare?, supra note 2.
200 See Ruiz & Mendelsohn, Forum Non Conveniens in Jeopardy, supra note 7.
202 Id.
The Cour de Cassation's opinion was an affront to international law because it departed from accepted methods of treaty interpretation by completely ignoring both the *travaux preparatoires* of the 1999 Montreal Convention and the decisions of its own two lower courts. Nor did the Cour de Cassation respect the international comity standard by at least examining the well-considered and detailed conclusions reached by Judge Ungaro and the Eleventh Circuit. This is not altogether surprising considering that the French courts not only seem to enjoy a reputation for imposing their interpretations of law on other countries, but also that civil law countries pay little deference to their own intermediary courts' decisions. However, it is widely accepted both in U.S. courts and in international law that treaty interpretation must be based on the treaty's text and context, including the negotiations and *travaux preparatoires*.

By not basing its decision on these basic treaty interpretation constructs, the Cour de Cassation ultimately defeated the fundamental purposes that the Montreal Convention and its predecessor, the Warsaw Convention, sought to uphold: uniformity in rules of liability and adequate limits on liability. This is a violation of international law because both Conventions are international treaties to which France is a signatory and thus has an obligation to uphold under the doctrine of *pacta sunt servanda*—"promises must be kept." The Cour de Cassation was certainly—or certainly should have been—cognizant that neither Newvac nor Cimetier were insured in the United States and that its citizens would not receive adequate reparations without such insurance. This hardly serves to balance the interests of the plaintiffs in receiving reparations under the Montreal Convention. Moreover, the Cour de Cassation's decision eradicates the balance that the Convention tried to promote.

---

204 Id.
205 See Lowenfeld, *supra* note 9, at 7–14 (noting that since the French Revolution, "France has done a great export trade in law").
206 Id. ("[I]ntermediate appellate courts [in civil law countries] tend to have more freedom to review lower court findings of fact and in some countries (e.g., France) are empowered to make their own findings de novo.").
207 See supra note 95.
208 See discussion *supra* Part I.A.
209 See Black's Law Dictionary 1217 (9th ed. 2009).
211 See id.
212 See id.
The Montreal Convention attempted to create a system of liability that was fair to both air carriers and passengers. A rule of law that condones, indeed encourages, a plaintiff's forum shopping and the wasteful use of judicial time and resources hardly instills fairness in the system. In West Caribbean, the plaintiffs' conduct was equally as improper as the Air France plaintiffs' conduct. Following Judge Ungaro's dismissal on forum non conveniens grounds, the plaintiffs chose to continue to dispute her decision in the alternate French forums rather than accept the decision. This bad faith forum shopping hardly serves to foster the Montreal Convention's purposes of uniformity and consistency in the application of rules. Not only does the Cour de Cassation's decision defeat policy rationales, but the decision also casts aside established principles of international law and hence violates the United States' sovereignty.

The Cour de Cassation's decision also violated the customary international law of "comity." Comity refers to the spirit of cooperation that a court adopts when resolving cases that touch the laws and interests of other sovereign states. First defined in the 1895 case Hilton v. Guyot, the U.S. Supreme Court described comity as

neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Thus, the French high court's refusal to enforce the U.S. judgment does not necessarily violate a legal requirement, but it is a foundational part of customary international law that a state will recognize another nation's judgments. The notion behind this is reciprocity; in other words, "tit for tat" among states. The Cour de Cassation's refusal to respect the U.S. court's forum non conveniens dismissal could lead U.S. courts to ignore

---

213 See discussion supra Part I.A.
214 See discussion supra Part IV.A.
216 See id.
217 See id.
219 Id.
220 See Ruiz & Mendelsohn, Forum Non Conveniens in Jeopardy, supra note 7.
French decisions if the roles are reversed.\textsuperscript{221} The French court’s decision may even be regarded as a direct act of defiance of U.S. sovereignty.\textsuperscript{222}

B. An Attack on U.S. Sovereignty

It is well recognized that law, as well as arms, are two means of waging war on other countries. A 2005 U.S. Department of Defense paper suggests that some foreign powers attack the United States by “employ[ing] a strategy of the weak,” by manipulating “international fora and judicial processes.”\textsuperscript{223} Following the September 2001 terrorist attacks, Colonel Charles J. Dunlap first described the rise of law as a prime feature of modern warfare; he also pointed to the direct role that lawyers often play.\textsuperscript{224} He noted that “the rule of law is being hijacked into just another way of fighting.”\textsuperscript{225} Similarly, the recent decision by the French Cour de Cassation evidenced a “hijacking” of U.S. courts.\textsuperscript{226}

One of the most ancient and recognized rules of international law governing jurisdiction is that the sovereign has power to adjudicate within its own territory.\textsuperscript{227} Thus, a sovereign’s control over whether to hear a case is, by consequence, a sovereign right.\textsuperscript{228} Given the frequency with which foreign plaintiffs avail themselves of the benefits of U.S. forums, the French high court’s decision is a huge infringement on that right.\textsuperscript{229} Effectively, the opinion demands that the United States submit to the French court’s ruling on when the United States may decline to

\textsuperscript{221} See id.
\textsuperscript{222} See id.
\textsuperscript{225} Id.
\textsuperscript{226} See id.; Ruiz & Mendelsohn, \textit{Forum Non Conveniens in Jeopardy}, supra note 7.
\textsuperscript{227} Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukr., 311 F.3d 488, 497 (2d Cir. 2002) (“[F]orum non conveniens finds its roots in the inherent power of the courts ‘to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’” (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991))).
\textsuperscript{228} See id.
\textsuperscript{229} See Ruiz & Mendelsohn, \textit{Forum Non Conveniens in Jeopardy}, supra note 7.
adjudicate cases within its own territory.\textsuperscript{230} The United States should have the right to limit access to its courts just as it has the right to limit access to its borders. To allow foreign countries to dictate the terms by which the United States exercises its right to adjudicate would inevitably control how U.S. case law is shaped and what precedent develops in the future. In fact, the international community has strongly rebuked the United States for exactly that type of sovereign infringement with respect to obtaining evidence abroad.\textsuperscript{231}

In \textit{In re Uranium Antitrust Litigation}, the U.S. court sanctioned a Canadian citizen for failing to produce subpoenaed evidence that was not only located in Canada but also illegal to produce under Canadian law.\textsuperscript{232} Despite this showing, the U.S. court held that neither the existence of the conflicting Canadian law nor the location of the evidence prevented the court from ordering production of the evidence, provided that (1) the court had personal jurisdiction over the person; and (2) the person had control over the evidence.\textsuperscript{233} The Canadian government submitted a diplomatic note to the U.S. Ambassador stating that such action “subordinate[d] [Canada] to the procedures of U.S. courts.”\textsuperscript{234} Furthermore, the U.S. court’s failure “to recognize the authority of the Canadian government to prohibit such disclosure would be contrary to generally accepted principles of international law and would have an adverse impact on relations between the United States and Canada.”\textsuperscript{235} In layman’s terms, Canada saw the U.S. ruling as an infringement on its sovereign authority to prescribe laws within its jurisdiction, a subordination of its laws to those of the United States, and consequently, a violation of customary international law.\textsuperscript{236} Similarly, France’s Cour de Cassation holding subordinated the United States to

\footnotesize{
\textsuperscript{230} See id.
\textsuperscript{232} In re Uranium Antitrust Litig., 480 F. Supp. 1138, 1143, 1150 (N.D. Ill. 1979).
\textsuperscript{233} Id.
\textsuperscript{235} Id.
\textsuperscript{236} See id.
}
the procedures France has prescribed.\textsuperscript{237} As described earlier, these French-prescribed procedures are highly questionable under the Montreal Convention.\textsuperscript{238}

The Hague Evidence Convention, adopted in 1970, was an effort to prevent the types of international conflicts illustrated by \textit{In re Uranium}.\textsuperscript{239} This is exactly what needs to be done with respect to the forum non conveniens issues under the Montreal Convention. The lawfare of forum non conveniens is not going to disappear, and as illustrated by the evolution of cases on this issue, it is only getting more contentious. The issue of forum non conveniens is best addressed through a treaty revision or an independent treaty on the subject.

\section*{VI. DISARMING THE "LAWFARE" OF FORUM NON CONVENIENS}

Whether or not labeling the forum non conveniens case history as lawfare is hyperbolic, the ratcheting up of tensions over forum non conveniens is undeniable: from courts' corner-cutting on the \textit{Gilbert} factors, to bad faith plaintiffs, to courts refusing to acknowledge other sovereign courts' decisions. The forum non conveniens hostilities in the legal arena seem to increase with each new case, and there needs to be a détente. The best method to disarm the international community over forum non conveniens is to develop a new treaty provision. Whether the parties agree on a procedural tool or "agree to disagree" going forward, something needs to be resolved before the issue escalates further. An additional measure might be to limit the types of defendants that passengers may sue under Montreal.

\section*{A. REQUIRING MONTREAL TO BE PASSENGERS' EXCLUSIVE CAUSE OF ACTION}

One scholar proposed that U.S. courts should require the victims of international air crashes to bring their claims "exclusively and only against the airline on which the death or injury occurred."\textsuperscript{240} This scholar's proposal was inspired by the 1999 Supreme Court decision in \textit{El Al Israel Airlines, Ltd. v. Tseng}.\textsuperscript{241}

\begin{itemize}
\item \textsuperscript{237} See Ruiz \& Mendelsohn, \textit{Forum Non Conveniens in Jeopardy}, supra note 7.
\item \textsuperscript{238} See discussion supra Part V.A.
\item \textsuperscript{240} Mendelsohn, \textit{Forum Non Conveniens \& Montreal 99}, supra note 22, at 275.
\item \textsuperscript{241} Id.; see \textit{El Al Isr. Airlines, Ltd. v. Tseng}, 525 U.S. 155 (1999).
\end{itemize}
In *Tseng*, the plaintiff brought suit against El Al Israel Airlines for injuries sustained prior to boarding her flight.\(^{242}\) Relying on the language in Article 24 of the Warsaw Convention, which provides that "cases covered by Article 17" may only be brought "subject to the conditions and limits set out in this [C]onvention,"\(^ {243}\) the Court held that the Warsaw Convention provides the sole causes of action for which a plaintiff can bring a claim against an airline.\(^ {244}\) Because Article 17 of the Warsaw Convention requires injuries to occur during "embarking or disembarking,"\(^ {245}\) the plaintiff had no claim under the Convention as her injuries occurred *prior* to boarding the flight.\(^ {246}\) Extending the ruling in *Tseng*, U.S. courts could avoid many forum non conveniens confrontations if victims seeking damages for a death or injury aboard an aircraft were unable to bring suit against the aircraft or component parts manufacturers.\(^ {247}\) The plaintiffs would be limited to suing only the airline on which the death or injury occurred.\(^ {248}\) While this proposal would not foreclose all future forum non conveniens lawfare,\(^ {249}\) it would certainly provide more uniformity in both passengers' and carriers' expectations.

In conclusion, limiting plaintiffs to filing suit against only the airline would be more consistent with the fundamental goals of uniformity and balancing carrier–passenger interests that the Conventions sought to achieve when adopting absolute liability limits. Victims would recover damages more expeditiously because there would be less legal red tape, and lawyers' fees would be lower because of the quicker process. Consequently, plaintiffs might well receive more damages because less money would be paid to lawyers. The airline would not be harmed by such a system either because the airline could always bring a claim.

\(^{242}\) *Tseng*, 525 U.S. at 161.  
\(^{243}\) Warsaw Convention, *infra* note 10, art. 24.  
\(^{244}\) *Tseng*, 525 U.S. at 161.  
\(^{245}\) Warsaw Convention, *infra* note 10, art. 17.  
\(^{246}\) *Tseng*, 525 U.S. at 166.  
\(^{248}\) See id.  
\(^{249}\) This proposal does not necessarily stop forum non conveniens lawfare altogether because, even if suit were limited to the airline, forum non conveniens might still be relevant where the accident occurs abroad but a plaintiff can still obtain jurisdiction through one of the five fora. See Montreal Convention, *infra* note 11, arts. 33(1)–(2). *TWA 800* and *Air France* are perfect examples of cases where the airline could be sued in the United States.
directly against the responsible manufacturer. Thus, the Conventions' goals of uniformity and balancing carrier-passenger interests would be greatly enhanced.
THE DELIMITATION BETWEEN AIRSPACE AND OUTER SPACE AND THE EMERGENCE OF AEROSPACE OBJECTS

DR. JINYUAN SU*

TABLE OF CONTENTS

ABSTRACT .................................. 355
I. INTRODUCTION .......................... 356
II. TRADITIONAL FLIGHT CRAFT AND THE FREEDOM OF TRANSIT PASSAGE FOR SPACE OBJECTS .................................. 357
   A. DIFFERENT LEGAL REGIMES GOVERNING AIRSPACE AND OUTER SPACE .................. 357
   B. THE DELIMITATION BETWEEN AIRSPACE AND OUTER SPACE ........................... 361
   C. THE RIGHT OF TRANSIT PASSAGE THROUGH THIRD-STATE AIRSPACE ................. 364
III. AEROSPACE OBJECTS AND THE RIGHT OF INNOCENT PASSAGE .......................... 366
   A. THE LAW APPLICABLE TO AEROSPACE OBJECTS ........................................ 367
   B. THE RIGHT OF INNOCENT PASSAGE THROUGH THIRD-STATE AIRSPACE .............. 369
       C. THE RECONCILIATION .................................. 374
IV. CONCLUSION ............................ 377

ABSTRACT

Although the legal border between airspace and outer space still awaits international agreement, this lacuna has not given rise to significant difficulties in the determination of applicable law with respect to traditional flight craft—aircraft and space objects—due to their separated spheres of activity. The emergence

* Lecturer, School of Law, Xi'an Jiaotong University, China; PhD in Law, Xi'an Jiaotong University; Visiting Fellow (2009–2010), the Lauterpacht Center for International Law, University of Cambridge; Visiting Scholar (2008–2009), King’s College London.

355
of aerospace objects\(^1\) does not justify the urgency of delimitation. In the alternative, the difficult question of delimitation could be circumvented if the law is determined based on the objects' nature or purpose. Those performing space missions should be governed by space law, but their traverse through other states' airspace should be regulated.

I. INTRODUCTION

Since the dawn of the Space Age, the exploration and use of outer space have been accompanied by mankind's effort to regulate space activities through legal means. The many legal issues relating to this new frontier have consumed a great deal of international space lawyers' time and effort. Amongst these issues, the delimitation between airspace and outer space is one of the most discussed questions. The question seems so fundamental, as if its settlement is a precondition for the consideration of all other questions relating to outer space. But over fifty-five years into the space age, states still have not agreed on where airspace ends and outer space begins, or whether a clear line of demarcation is even necessary. Perhaps far beyond the prediction of early space lawyers, this lacuna has not given rise to any significant problems, but there has never been a lack of concern in either the political or scholarly arenas. It does not follow, however, that a boundary will never be needed. The delimitation question should be studied by considering new technological developments.

This article studies the reasons and consequences of the long-lasting absence of a legal boundary between airspace and outer space, and the challenge posed by the emergence of aerospace objects. After an overview of the separate legal regimes governing space and aerial activities, Part II discusses why the absence of a boundary between airspace and outer space has not created significant problems for the determination of law applicable to traditional flight craft—aircraft and space objects. Part

---

\(^1\) The term "aerospace object" is undefined in international legal literature and regulations. Space law often uses the terms "spacecraft" or "space object"; air law often uses the term "aircraft." See U.N. Secretariat, Questionnaire on Possible Legal Issues with Regard to Aerospace Objects: Replies from Member States, 3, Comm. on the Peaceful Uses of Outer Space, U.N. Doc. A/AC.105/635 (Feb. 15, 1996) (German response) [hereinafter UNCOPUOS Questionnaire]. The United Nations (U.N.) attempted to define an "aerospace object" as "an object which is capable both of travelling through outer space and of using its aerodynamic properties to remain in airspace for a certain period of time." Id.
III examines whether the advent of aerospace objects necessitates delimitation, how the applicable law should be determined, and how the objects’ traverse through other states’ airspace should be regulated. Part IV summarizes the conclusions with respect to these issues.

II. TRADITIONAL FLIGHT CRAFT AND THE FREEDOM OF TRANSIT PASSAGE FOR SPACE OBJECTS

The space above the surface of the Earth—not only the atmosphere surrounding the planet but also the vast, void space beyond—provides spacious room for flight craft. The study of this space can be based on different physical theories. According to the current flight theories of aerodynamics and astrodynamics, flight craft are divided into two main categories: aircraft and space objects. Correspondingly, space is divided into airspace and outer space, which, under international law, are subject to the various regimes of air law and space law, respectively.

A. DIFFERENT LEGAL REGIMES GOVERNING AIRSPACE AND OUTER SPACE

A firmly established principle of international law states that the airspace above a sovereign state’s territory is subject to its full and exclusive sovereignty. The Convention Relating to the Regulation of Aerial Navigation of 1919 (Paris Convention), which was largely based on the Roman dictum *cujus est solum, ejus est usque ad coelum* (“he who owns the soil owns up to the sky”), provides: “The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the airspace above its territory.” The Convention on International Civil Aviation of 1944 (Chicago Convention), which replaced the Paris Convention, stipulates: “The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.” The rule also finds support in the jurisprudence of the International Court of Justice (ICJ). In *Nicaragua v. United States*, the ICJ asserted that “[t]he principle

---

3 Id.
5 Id.
of respect for territorial sovereignty is also directly infringed by the unauthorized overflight of a State's territory by aircraft belonging to or under the control of the government of another State.” The ICJ further noted in the *Benin/Niger* case that “a boundary represents the line of separation between areas of State sovereignty, not only on the Earth’s surface but also in the subsoil and in the superjacent column of air.” It is worth mentioning that “the sovereignty of a coastal State extends beyond its land territory and internal waters and, in the case of an archipelagic State, [from] its archipelagic waters” to the territorial sea and the airspace over it, as well as its bed and subsoil.

The airspace beyond the outer limit of the territorial sea is open to all states. Although the Chicago Convention distinguishes between civil aircraft and state aircraft—which include military, customs, and police aircraft—and regulates only the activities of civil aircraft in detail, it requires that military aircraft be granted special authorization to fly in the airspace above another sovereign’s territory. In reality, any aerial intrusion by foreign military aircraft would be deemed an infringement upon sovereignty and could be countered with the use of armed force. A well-known case is the Soviet downing of a U.S. U-2 reconnaissance aircraft in 1960; the U-2 was flying at an altitude of twenty kilometers over the Soviet Union. Given that the aircraft was in Soviet airspace, the United States did not protest the attack on the U-2 or the pilot’s conviction and imprisonment. In contrast, a state’s right to counter unarmed civilian aircraft serving no military purpose with the use of armed force is doubtful. The 1983 KAL-007 incident, in which a Korean Airlines Boeing 747 deviated from its assigned flight path into Soviet airspace and was destroyed by a Soviet fighter jet, provoked severe criticism. This incident led

---

8 The Frontier Dispute (Benin/Niger), 2005 I.C.J. 90, 142 (July 12).
10 See id.
11 Chicago Convention, *supra* note 6, art. 3; Paris Convention, *supra* note 4, art. 32.
13 Id.
14 Id. at 257–78.
to the adoption of a new Article 3 bis in the Chicago Convention forbidding the use of weapons against in-flight civilian aircraft.\textsuperscript{15}

Despite the clarity of substance, neither the Paris Convention nor the Chicago Convention defines its scope of application—airspace.\textsuperscript{16} From a geographical point of view, the Earth's atmosphere consists of five layers from bottom to top, in decreasing density: troposphere, stratosphere, mesosphere, thermosphere, and exosphere.\textsuperscript{17} Approximately 75\% of the total atmospheric mass gathers in the troposphere, the lowest portion of the Earth's atmosphere, which has a depth of 7 to 20 kilometers and reaches roughly 10,000 kilometers above the Earth's surface.\textsuperscript{18} However, the scope of legal airspace does not equate to geographical boundaries. The Chicago Convention defines aircraft as "any machine which can derive support in the atmosphere from the reactions of the air."\textsuperscript{19} It is widely agreed that this definition includes both instruments that are lighter than air, such as balloons and airships, and those that are heavier than air, such as gliders and aeroplanes.\textsuperscript{20} It could thus be inferred that the Conventions give states sovereignty only over atmospheric space where sufficient air exists to sustain aircraft flight, an altitude much lower than the outer limit of the atmosphere.\textsuperscript{21}

While the Conventions left the legal status of the area beyond the point of aerodynamic functionality undetermined, the status became partially defined as the Space Age dawned. When the Soviet Union and the United States began launching artificial satellites, neither country sought consent from other states over whose territory the satellites orbited.\textsuperscript{22} Furthermore, the launches did not elicit any accusations that a state's sovereignty had been violated.\textsuperscript{23} Within a short span of time, a customary rule emerged that Earth orbits are beyond the sovereignty of

\textsuperscript{15} See id. at 277-78; Chicago Convention, supra note 6, Annex 7.
\textsuperscript{16} See Chicago Convention, supra note 6; Paris Convention, supra note 4.
\textsuperscript{18} Id.
\textsuperscript{19} CHENG, supra note 2, at 18.
\textsuperscript{20} Id.
\textsuperscript{21} See generally The Layers of the Earth's Atmosphere, supra note 17 (noting that satellites orbit in the exosphere, the International Space Station orbits in the thermosphere, and the ozone ends with the stratosphere).
\textsuperscript{23} See Jakhu, supra note 22, at 73-74.
subjacent states and are free for exploration and use. This customary international law of the freedom of outer space was recognized by the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, adopted by the General Assembly on December 13, 1963, as Resolution 1962 (XVIII). It was then codified in the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty), which recognizes that outer space “shall be free for exploration and use by all states without discrimination of any kind, on a basis of equality and in accordance with international law.” Additionally, outer space is “not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.” Although some equatorial states, through the Bogotá Declaration of 1976, have staked claims over the arcs of the geostationary orbit, their position is unilateral and unsupported by other states.

Similar to international air law, international space law does not clearly define its sphere of application. In the general sense, outer space refers to the known and unknown areas of the universe beyond airspace. In the legal sense, the term is defined as the space surrounding the planet that, in accordance with the Outer Space Treaty, is not subject to a claim of appropriation by any national sovereignty. This definition does not explicitly define the scope of outer space, but it could be inferred from the constant practice of states that the space where artificial satellites orbit belongs to outer space. In other words, outer space begins at least at the lowest perigee of artificial satellites. It does not necessarily follow, however, that the altitude is also the upper limit of airspace.

---

25 Id.
27 Id. art. 2.
29 BLACK'S LAW DICTIONARY 1135 (9th ed. 2009).
B. THE DELIMITATION BETWEEN AIRSPACE AND OUTER SPACE

It seems only natural that the different legal regimes governing airspace and outer space would necessitate a clear line of demarcation to determine the law applicable to the activities of aircraft and space objects. However, as previously noted, existing international law merely establishes the space where aircraft fly as airspace, and the space where space objects orbit as outer space. According to the predominant view, the highest altitude at which traditional aircraft fly is approximately twenty-one kilometers, while the lowest perigee for artificial satellites is ninety-six kilometers. The atmosphere in the intermediate zone between these two altitudes, which scientists refer to as "near space," is too thin to sustain aircraft and too dense for spacecraft. Under the two-layer approach of delimitation, it is somewhere in this zone that the boundary between airspace and outer space lies. As Professor Bin Cheng stated at the 1966 Helsinki Conference of the International Law Association,

First, there is that layer of a State's superincumbent space closest to the surface of the Earth which is incontrovertibly subject to national sovereignty. There is, secondly, beyond the point stated in the draft Resolution, the vast space which is equally incontrovertibly not subject to national sovereignty or appropriation. But . . . there is, thirdly, an intermediate zone of uncertainty lying below the point stated in the draft Resolution and above the undisputed zone of national airspace, in which, at a height that is not yet clearly defined, lies the actual boundary line between national space and outer space . . . .

Nor is outer space clearly defined within the realm of domestic law. States were invited by the Working Group on Matters Relating to the Definition and Delimitation of Outer Space of the Committee on the Peaceful Uses of Outer Space (COPUOS) to "submit information on national legislation or any national practices that may exist or are being developed relating directly or indirectly to the definition and/or delimitation of outer space." According to the information submitted, most states

31 Id. at 12.
34 The invitation was recommended in 2005 by the Working Group on Matters Relating to the Definition and Delimitation of Outer Space at the forty-fourth session of the Legal Subcommittee of the Committee on the Peaceful Uses of
do not have any such national legislation or practices. Australia's Space Activities Act of 1998 (the Act), which regulates the launch from (and the return to) Australia of space objects and the launch of space objects by Australian nationals outside of Australia, was amended in 2002 to clarify where the Act applies and what activities the Act regulates. As a result, the Act applies to space activities that occur or are intended to occur above 100 kilometers in altitude. However, Australia further clarified that the identification of the 100-kilometer altitude in the Act was not an attempt to define or delimit "outer space."

Relatedly, Belarus divides its airspace into classified and unclassified airspace. Classified airspace is that below an altitude of 20,100 meters, and flights therein are governed by domestic legislation: the Air Code and the Rules for the Use of Airspace. Airspace above 20,100 meters is considered outer space and is regulated by international agreements. The Belarusian legislation basically adopts the upper operative limit of aircraft as the boundary and classifies "near space" as part of outer space. Serbia, looking to radio frequencies as the determining factor, defines the term "outer space" as "space at a distance of 2 million [kilometers] or more from the Earth." This criterion is unlikely to become generally accepted because artificial satel-
lites orbit much lower than two million kilometers, and state practice has established that the space where they orbit belongs to outer space.\textsuperscript{44}

In fact, there is a clear disagreement in both political and scholarly circles regarding the necessity of delimitation between airspace and outer space.\textsuperscript{45} Those who advocate a physical boundary are referred to as “spatialists.”\textsuperscript{46} Proponents of this approach have suggested various lines based on different standards,\textsuperscript{47} further dividing themselves into a number of subgroups. However, out of the variety of proposals, no consensus has been achieved.\textsuperscript{48} In contrast to spatialists, the group of “functionalists,” led by Professors Myers S. McDougal, Harold D. Lasswell, and Ivan A. Vlasic, argue that drawing a physical line would be premature and arbitrary, and that the applicable law should be determined by the nature and purpose of activities.\textsuperscript{49} This approach is particularly attractive to space powers that are reluctant to have their hands constrained by a fixed physical line. With the question of delimitation remaining unresolved, the functionalist approach has been predominant in the last few decades because it is sufficient for determining the law applicable to traditional flight craft.\textsuperscript{50} This is largely because the spheres of aerial and space activities do not overlap. As previously stated, the highest altitude of traditional aircraft flight is approximately twenty-one kilometers, while the lowest perigee of artificial satellites is ninety-six kilometers.\textsuperscript{51} The intermediate “near space” has been called “no-man’s land.”\textsuperscript{52} One would have little difficulty applying air law to aerial activities and space law to space activities. Perhaps this is the reason why the long-lasting lack of a clear legal boundary between airspace and outer space has not created any significant problems thus far.

\textsuperscript{44} See Katherine M. Gorove, supra note 30, at 11–12.
\textsuperscript{45} Id. at 11.
\textsuperscript{46} Id. at 16.
\textsuperscript{47} See id.
\textsuperscript{48} Id. at 17.
\textsuperscript{49} Id. at 16.
\textsuperscript{50} Id. at 17.
\textsuperscript{51} Id. at 12.
\textsuperscript{52} Id.
C. THE RIGHT OF TRANSIT PASSAGE THROUGH THIRD-STATE AIRSPACE

Although the spheres of aerial and space activities do not overlap, in some cases space objects need to traverse the airspace of other states to reach outer space or return to Earth. There have been discussions as to whether such space objects enjoy the right of transit through third-state airspace at the stages of ascent and descent. Among proponents of the right is Judge Manfred Lachs, who believes that some unwritten rule of law concerning transit through airspace to reach outer space has come into being. In reality, most space objects are launched into outer space through the launching state’s own airspace, and sometimes through the open airspace above the high seas. But in some instances, states cross a neighboring state’s airspace without seeking prior consent.

Wei Zhou, an experienced Chinese practitioner in international commercial satellite launching services, wrote that as a customary rule, the launching state need not seek prior consent from neighboring states for the overflight of its launching vehicles. Some other proponents of the right draw an inference from the purpose of the Outer Space Treaty. As written by Professor Stephen Gorove, “the freedom of exploration and use of outer space . . . implies the freedom to go into outer space and also the freedom to return to Earth from outer space.”

The right of transit is vital for launching states, particularly those with the inherent disadvantage of small territorial size, because without the right, the freedom of space exploration and use would be meaningless. But the right of transit is not complete—transit states have the legitimate concern that complete freedom of transit would compromise their full and exclusive sovereignty over their airspace. Their legitimate interest should be respected. This resembles the right of access to and from the

55 Katherine M. Gorove, supra note 30, at 13.
sea and freedom of transit for landlocked states in the Law of the Sea. In this regard, the United Nations Convention on the Law of the Sea (UNCLOS) provides:

1. Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention[,] including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.

2. The terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States concerned through bilateral, subregional[,] or regional agreements.

3. Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part for land-locked States shall in no way infringe their legitimate interests.

The UNCLOS provides a useful reference for reconciliation between the right of transit to and from outer space for “space-locked” states and the requirement that the sovereignty of transit states be respected. The guiding principle is that each side should pay due regard to the rights and duties of the other. On the one hand, states shall have the right of access to and from outer space for the purpose of exercising rights provided by the Outer Space Treaty, including the freedom of space exploration and use. To this end, states’ spacecraft shall enjoy freedom of transit through the airspace of transit states. Transit states, on the other hand, shall have the right to take all measures necessary to ensure that launching states’ transit activities do not infringe on their legitimate interests, such as national security and air traffic control. Specific terms need to be set out in international agreements. Due to the rarity of such occasions, such agreements would most likely be concluded on a bilateral basis.

60 See UNCLOS, supra note 9, art. 125.
61 Id.
62 See id.
63 See id.
64 See id.
65 See id.
66 See id.
III. AEROSPACE OBJECTS AND THE RIGHT OF INNOCENT PASSAGE

The question of legal delimitation between airspace and outer space must be studied with due regard for new trends of technological development in flight craft that might necessitate delimitation or the adjustment of existing international law. One example is aerospace objects, which combine the functional characteristics of aircraft and space objects and are capable of flying in both airspace and outer space.

Aerospace objects have been or are being planned, researched, and tested in the public and private sectors and at the multinational level. Suborbital spacecraft are an example. In the 1960s, the United States conducted a series of tests of its X-15 rocket research aircraft, a type of suborbital winged spacecraft. The X-15 was launched from the air and because of its wings, it could land and be reused. It also had a rocket engine that enabled it to operate outside the presence of significant atmosphere. It is worth noting that the maximum altitude reached by the X-15 varied from 18.73 miles to 67.08 miles.

The U.S. Air Force awarded astronaut wings to X-15 pilots who flew above an altitude of 50 miles, while the National Aeronautics and Space Administration (NASA) required its pilots to fly above 62 miles (100 kilometers) before considering them astronauts. Other examples of suborbital spaceplanes are the SpaceShipOne (Scaled Composites of Mojave, California), the Bristol Spaceplanes Ascender (Bristol Spaceplanes), and the Xerus spaceplane (XCOR Aerospace). Unlike the X-15, some other aerospace objects are launched by ballistic technologies. Examples include the Dyna-Soar (United States, 1957–1963), Hermes (European Space Agency, 1987–1993), HOPE (Japan, 1992–2003), and Kliper (Russia, 2004–present). To increase lift, the development of the spaceplane has also led to the piggyback concept, whereby a winged orbiter is mounted to the side.

68 Id. at 78.
69 Id. at 72.
70 Id.
71 See id. at 76.
72 Id. at 72.
73 Id. at 80.
74 See id. at 86–89.
75 Id.
or astride the back of a booster stage. The two components take off together and reach as high an altitude and as fast a speed as possible using the booster's engines. The orbiter then separates, ignites its own rocket engines, and continues to accelerate to orbital velocity. An example is NASA's Space Shuttle, which was used on a total of 135 missions from 1981 to 2011. The Soviet Union's version of the Space Shuttle, the Buran, flew only once, on November 15, 1988. More recently, Bristol Spaceplanes and others have developed much more ambitious plans to take passengers to orbit by Spacecab and Spacebus, which are also based on the piggyback concept.

In a typical complete flight, an aerospace object takes off or is launched from the Earth's surface, traverses airspace, reaches into outer space, and then reenters airspace before touching down on Earth. During this process, an aerospace object crosses the boundary between airspace and outer space at least twice. One of the foremost legal issues arising from the advent of aerospace objects is the applicable law and, more broadly, its impact upon the delimitation between airspace and outer space.

A. The Law Applicable to Aerospace Objects

The development of aerospace objects prompted the COPUOS to invite its state members, by a note verbale of the Secretary-General dated August 21, 1995, to give their opinions on various legal issues that may arise from this new development through the Questionnaire on Possible Legal Issues with Regard to Aerospace Objects. The replies were to provide the Legal Subcommittee with a basis for deciding how it might continue its consideration of matters relating to the definition and delimitation of outer space. With respect to the law applicable to aerospace objects, states following the spatialist approach held that an aerospace object is an aircraft subject to air law in airspace and a space object subject to space law in outer space.
Those following the functional approach, on the other hand, asserted that the legal regime applicable to the flight of aerospace objects is decided by the purpose or function of the activity, rather than by the location. In other words, if the aerospace object is used for Earth-to-space transportation, it would be subject to the law of outer space; if it is used for Earth-to-Earth transportation, it would be subject to air law. The two approaches divide the responding state members of the COPUOS into two camps of more or less equal number.

However, many functionalists acknowledge that aerospace objects must observe some principles and rules of the spatialist legal regime if they move through another state’s airspace. For instance, some functionalist states, such as the Czech Republic, Germany, and Mexico, maintain that the application of space law to aerospace objects does not exclude the application of certain provisions of air law, in particular those relating to authorization of passage and air traffic, when aerospace objects move through another state’s airspace. A few states mentioned the possibility of establishing a sui generis regime. As argued by Argentina and Turkey, the special characteristics of aerospace objects and future technological developments in this field may necessitate the establishment of a special regime that accounts for situations not provided for under current international air and space law.

As previously mentioned, the area below the twenty-one-kilometer line is definitely airspace of the subjacent state and the area above the ninety-six-kilometer line is definitely outer space, while the legal status of the zone in between remains ambigu-

---

85 See, e.g., id. (regarding the responses of Benin, Chile, Costa Rica, Ecuador, Germany, India, Italy, Lebanon, Mexico, Morocco, Russian Federation, Slovakia, South Africa, Ukraine, Nigeria, and Egypt, memorialized in addendums one through sixteen).

86 Id. at 6–10; U.N. Secretariat, Questionnaire on Possible Legal Issues with Regard to Aerospace Objects: Replies from Member States, 8–11, Comm. on the Peaceful Uses of Outer Space, U.N. Doc. A/AC.105/635/Add.7 (Jan. 13, 2003) [hereinafter UNCOPUOS Questionnaire Add.7].


ous. To have a clear demarcation between airspace and outer space would bring more certainty. But as one moves away from the Earth, there is a continuum of ever-diminishing atmospheric thickness, and any line of delimitation seems arbitrary. Unsurprisingly, no agreement has been reached on this question in the COPUOS over the past few decades. The advent of aerospace objects does not make the delimitation process easier. Rather, the difficult question could continue to be shelved and circumvented if the functionalist approach is adopted. As previously discussed, under the functionalist approach, aerospace objects performing Earth-to-space transportation are likened to space objects and governed by space law, while aerospace objects performing Earth-to-Earth transportation are governed by air law even though they may temporarily traverse outer space.

B. The Right of Innocent Passage Through Third-State Airspace

The primary hurdle toward applying the functionalist approach to aerospace objects is the right of passage through the airspace of third states. Like traditional space objects, aerospace objects, even if performing the function of Earth-to-space transportation, may have to traverse the airspace of third states. This raises the question of whether aerospace objects enjoy the right of free passage during the stages of ascent and descent.

State members of the COPUOS were invited to submit precedents with respect to the passage of aerospace objects during takeoff and reentry into Earth’s atmosphere. Germany and

90 Id.
91 Katherine M. Gorove, supra note 30, at 13–14.
92 At its thirty-eighth session, the Committee on the Peaceful Uses of Outer Space noted:

[At] the thirty-fourth session of the Legal Subcommittee, the Working Group of the Subcommittee on an agenda item on "Matters relating to the definition and delimitation of outer space and to the character and utilization of the geostationary orbit" had finalized the text of a questionnaire on possible legal issues with regard to aerospace objects. The Committee agreed with the Legal Subcommittee ([UN Doc.] A/AC.105/607 and Corr.1, para. 38) that the purpose of the questionnaire was to seek the preliminary views of States members of the Committee on various issues relating to aerospace objects. The Committee also agreed that the replies to the questionnaire could provide a basis for the Legal Subcommittee to decide how it might continue its consideration of this agenda item.
Morocco mentioned that in 1988, the Buran of the former Soviet Union overflew foreign countries before touching down in Baikonur. However, no information associated with consultations on the mission was available. Kazakhstan noted the existence of at least one precedent in which space objects of the Russian Federation passed through its airspace. It also clarified that "such passage was provided for under the Agreement between the Russian Federation and the Republic of Kazakhstan of 28 March 1994 on the Main Principles and Conditions for Utilization of the Baikonur Launch Site." The conclusion of the agreement is arguably proof that the right of innocent passage does not exist ipso facto, but rather must be recognized sui generis. Russia confirmed that in March 1990, the United States communicated information to the USSR regarding the final flight stage of the Atlantis space shuttle just a few hours before the overflight took place. However, an agreement was reached that such furnishings of information should not be deemed to

At its forty-first session, the Legal Subcommittee endorsed the report of the Working Group on agenda item 6 (a), "Matters relating to the definition and delimitation of outer space." The working group revised the questionnaire on possible legal issues with regard to aerospace objects and agreed to amend questions 7 and 8 and to add a question 10. The Working Group agreed that the questionnaire, as amended, should be circulated to all Member States of the United Nations ([UN Doc.] A/AC.105/787, annex II, paras. 8, 10 and 11).


93 UNCOPUOS Questionnaire, supra note 1, at 30; U.N. Secretariat, Questionnaire on Possible Legal Issues with Regard to Aerospace Objects: Replies from Member States, 17, Comm. on the Peaceful Uses of Outer Space, U.N. Doc. A/AC.105/635/Add.6 (Jan. 21, 2002).

In their responses, the Netherlands likened the Buran to the U.S. Space Shuttle and distinguished the two from aerospace objects that possess autonomous maneuverability. UNCOPUOS Questionnaire Add.4, supra note 88. However, this article categorizes both the Buran and the U.S. Space Shuttle as a kind of aerospace object.

95 U.N. Secretariat, Questionnaire on Possible Legal Issues with Regard to Aerospace Objects: Replies from Member States, 7, Comm. on the Peaceful Uses of Outer Space, U.N. Doc. A/AC.105/635/Add.3 (Dec. 4, 1996) [hereinafter UNCOPUOS Questionnaire Add.3].

96 Id.

set a precedent. A few states also mentioned the incidents of Apollo 13, SNAP 27, COSMOS-954, Mir, Skylab, and COSMOS-1402.

As a matter of fact, so far, very few precedents exist with respect to the passage of aerospace objects through the airspace of third states. Aerospace objects can be designed to take off from one's own territory, reenter the Earth's atmosphere over the high seas, and touch down on one's own territory so that flight over foreign countries is not necessary. Many of the above instances pertain to traditional space objects rather than aerospace objects. As Finland correctly noted, "[t]he fall of Cosmos 954, the re-entry of Skylab, the Shuttle disintegrations, the splash-down of Mir[,] and other related incidents pertain to the passage of 'space objects' upon re-entry into the Earth's atmosphere" rather than to "aerospace vehicles" in the strict sense. The unintentional reentry of space objects and their fragments is governed by current space law, in particular the Outer Space Treaty, the Agreement on the Rescue of Astronauts, and the Liability Convention.

COPUOS states hold different views regarding the existence of customary law permitting the innocent passage of aerospace objects through the airspace of third states. Due to the scarcity of state practice, many responding states held that there is insufficient support for the conclusion that the right of passage for an ascending or descending aerospace object has been generally recognized as a customary rule of international law. On the other hand, several states supported the existence of the right. For instance, based on the lack of objection or opposition to the passage of U.S. Space Shuttles through third-state

---

98 Id.
99 See, e.g., UNCOPUOS Questionnaire, supra note 1, at 11.
100 Katherine M. Gorove, supra note 30, at 13.
101 See id. at 12–13.
102 See id.
105 Katherine M. Gorove, supra note 30, at 23.
106 Id.
107 Id.
airspace, Greece, Slovakia, and Benin contended that an international customary law—right to innocent passage—had been created.108 Chile also submitted that customary law exists with respect to aerospace objects, on the basis that “they are regarded as craft performing a space mission to which the norms of air law do not apply.”109 The fact that, in practice, invasive passage occurs without protest is widely recognized, even by states skeptical of the existence of the right, such as the Czech Republic.110 India and Peru also noted that no state has sought to exercise jurisdiction over spacecraft of another state during invasive passage.111 However, the lack of protest does not always equate to approval.112 As the Republic of Korea pointed out,

[t]he fact that most of the countries did not raise any objection to the passage of space objects over their airspace does not signify their approval of the passage as international practice or precedents; they just did not have any information about the passage and there was no special perceptible disadvantage [connected] with the passage at that time.113

If the functionalist approach is taken, wherein aerospace objects with Earth-to-space purposes are likened to traditional space objects, they should reasonably enjoy the freedom of transit through the airspace of third states. But the predominant attitude of states seems to point in the other direction.114 State members of COPUOS have been asked whether the norms of national and international air law are applicable to an aerospace object of one state while it is in the airspace of another state.115

108 UNCOPUOS Questionnaire Add.3, supra note 95, at 7; UNCOPUOS Questionnaire Add.10, supra note 104, at 10; U.N. Secretariat, Questionnaire on Possible Legal Issues with Regard to Aerospace Objects: Replies from Member States, 6, Comm. on the Peaceful Uses of Outer Space, U.N. Doc. A/AC.105/635/Add.9 (May 7, 2003) [hereinafter UNCOPUOS Questionnaire Add.9].
109 UNCOPUOS Questionnaire Add.3, supra note 95, at 7.
110 UNCOPUOS Questionnaire, supra note 1, at 10.
111 UNCOPUOS Questionnaire Add.4, supra note 88, at 7; UNCOPUOS Questionnaire Add.9, supra note 108, at 6.
112 See UNCOPUOS Questionnaire Add.1, supra note 97, at 6.
113 Id.
114 See generally U.N. Office for Outer Space Affairs, Compilation of Replies Received from Member States to the Questionnaire on Possible Legal Issues with Regard to Aerospace Objects, available at www.oosa.unvienna.org/oosa/en/SpaceLaw/aero/index.html [hereinafter Questionnaire Replies Compilation].
115 UNCOPUOS Questionnaire, supra note 1, at 10.
Most responding states answered in the affirmative. Among them are many proponents of the functionalist approach. Aerial safety is the primary concern for those states. But the Republic of Korea and the Syrian Arab Republic noted that national security is also a concern. In contrast, only a few states adhered to the functionalist approach in determining the law applicable to aerospace objects traveling through the airspace of other states. They determined that when the final destination of an aerospace object is outer space, its movement through airspace is simply an obligatory passage, similar to the innocent passage of a space object through the airspace of a foreign state. Therefore, aerospace objects serving the purpose of astronautics should have the right of innocent passage through the airspace of third states, although the launching state must pay due regard to the complete and exclusive sovereignty of the third state and its national security interests by observing the norms of air law regarding safe navigation and environmental protection.

In summary, there is disagreement among states as to whether aerospace objects enjoy the right of innocent passage through the airspace of third states, and it seems highly unlikely that states will tolerate free passage of foreign aerospace objects through their airspace. As research in aerospace objects is conducted by an increasing number of countries, particularly those with less favorable geographical positions, overflights through third-state airspace are more likely to occur. It is likely that unauthorized overflights will provoke objections from subjacent states. To cope with the new development and avoid conflict, the passage of aerospace objects through third-state airspace must be regulated in a way that reconciles the legitimate right of

116 See, e.g., Questionnaire Replies Compilation, supra note 114 (regarding responses of Algeria, Argentina, Benin, Brazil, Chile, Colombia, Costa Rica, El Salvador, Fiji, Finland, Iraq, Kazakhstan, Lebanon, Mexico, Morocco, Peru, Philippines, Rwanda, Slovakia, Syrian Arab Republic, the Netherlands, Turkey, Libyan Arab Jamahiriya, Nigeria, Spain, and Belarus).
117 See id.
118 See, e.g., UN COPUOS Questionnaire Add.11, supra note 103, at 9 (Finnish response).
119 UN COPUOS Questionnaire Add.1, supra note 97, at 5; UN COPUOS Questionnaire Add.3, supra note 95, at 6.
120 See Questionnaire Replies Compilation, supra note 114 (regarding responses of Czech Republic, Ecuador, Greece, Iran, Portugal, South Africa, Ukraine, and Egypt).
121 See id.
122 See id.
transit states to ensure aerial safety and protect national security, and the right of user states to conduct aerospace missions.

C. THE RECONCILIATION

To determine whether an aerospace object will traverse the airspace of other states, it is important to know the object's typical trajectory. In this context, the German response to the 1996 COPUOS Questionnaire provides a valuable reference. The German submission included a trajectory chart reflecting reentry data gathered from the flight of the U.S. Space Shuttle. This trajectory data would similarly apply to other space transportation systems. As demonstrated by the chart, while an aerospace object is usually only dozens of kilometers away from the landing strip as it descends from an altitude of 21 kilometers, it would be over 7,000 kilometers away at an altitude of 96 kilometers. Therefore, aerospace objects are much more likely to overfly other states through the ambiguous 21-to-96-kilometer zone than through the undisputed 21-kilometer zone.

The traverse of aerospace objects through the 21-kilometer zone of other states, albeit rare, needs to be regulated due to considerations such as the intrinsic value of sovereignty, national security, aerial safety, and safety on the ground. Such regulation would both contribute to the avoidance of possible conflicts between user states and transit states, and dilute the urgency of delimitation. If the transit right of aerospace objects performing Earth-to-space transportation is recognized and regulated within the 21-kilometer zone that is undisputedly airspace, aerospace objects should also enjoy an equivalent, if not greater, right in the 21-to-96-kilometer zone. In reality, states are more tolerant of aerospace objects traversing through the latter portion of atmosphere above them. As observed by historian James Oberg, the U.S. Space Shuttle has flown over Canada below 80 kilometers without asking permission. There are several likely reasons for this tolerance. First, it is not prudent to claim sovereignty over this atmospheric zone given its ambiguous legal status. Second, the traverse of aerospace objects does not lead to interference in the zone because human activities

123 UNCOPUOS Questionnaire, supra note 1, at 3–6.
124 Id. at 4–5.
125 Id. at 3–6.
126 See id.
127 See JAMES OBERG, SPACE POWER THEORY 80 (1999).
therein remain scarce. Third, aerospace objects are used merely for the purpose of transportation and do not impose a significantly perceptible disadvantage upon the subjacent state. Therefore, the advent of aerospace objects does not bring compelling incentives for delimitation. But it will be a completely different matter when new flight craft are made to remain stationary and conduct certain activities in the 21-to-96-kilometer zone above other states. The so-called near-space vehicles (NSVs) undergoing testing in some countries may be capable of such activity.\textsuperscript{128}

When such a situation arises, some states may object to the operation of other states' NSVs in the 21-to-96-kilometer zone above them, and some may even extend their claim of vertical sovereignty. Thus, the delimitation issue will become a vital one.

Reconciliation of the right of passage with the principle of sovereignty is not impossible, as is demonstrated by the right of innocent passage through territorial waters.\textsuperscript{129} Proposals have been made for the codification, in treaty form, of norms for the peaceful passage of aerospace objects through the airspace of other states when they return from orbit. Chile—while holding that aerospace objects traveling through Chilean airspace will be subject to Chilean air regulations (particularly those related to air safety)—conceded that air law should provide for special, appropriate norms for cases where passage is obligatory and the sole objective is to reach outer space.\textsuperscript{130} Portugal suggested that in determining those norms, reference could be made to the model provided by the law applicable to innocent passage through territorial waters.\textsuperscript{131}

As previously noted, in reality, states are more cautious when aerial matters are concerned. In fact, the right of innocent passage does not exist for aircraft at the customary international law level. Under conventional law, the International Air Services Transit Agreement of 1944, signed by 129 parties, allows aircraft engaged in scheduled air services to travel through the airspace of the respective parties.\textsuperscript{132} Article 5 of the Chicago Convention

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{128} See William B. Scott, \emph{The Fringe of Space; Novel Hybrid Near-Space Platform Awaits a Visionary Financial Angel}, \textit{Aviation Wk. & Space Tech.}, Jan. 30, 2006, at 60.
\item \textsuperscript{129} See UNCLOS, \textit{supra} note 9, art. 397.
\item \textsuperscript{130} UNCOPOUS Questionnaire Add.10, \textit{supra} note 104, at 5.
\item \textsuperscript{131} UNCOPOUS Questionnaire Add.11, \textit{supra} note 103, at 5.
\item \textsuperscript{132} International Air Service Transit Agreement art. 1, Dec. 7, 1944, ICAO Doc. 7500, 59 Stat. 1693, 84 U.N.T.S. 389.
\end{itemize}
\end{footnotesize}
gives a transit right only for nonscheduled operations.\textsuperscript{133} These agreements are applicable only to their state parties. Therefore, the passage of aerospace objects through third-state airspace should be subject to stricter regulations than space objects. Specific rules of transit need to be negotiated between states, taking full account of the aerial safety and national security of the transit state. Reference could be made to the right of innocent passage in the law of the sea. UNCLOS provides that "ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea,"\textsuperscript{134} and that "[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State."\textsuperscript{135} Examples of non-innocent passage include:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(b) any exercise or practice with weapons of any kind;

(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

(d) any act of propaganda aimed at affecting the defence or security of the coastal State;

(e) the launching, landing or taking on board of any aircraft;

(f) the launching, landing or taking on board of any military device;

(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

(h) any act of willful and serious pollution contrary to this Convention;

(i) any fishing activities;

(j) the carrying out of research or survey activities;

(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

(l) any other activity not having a direct bearing on passage.\textsuperscript{136}

By analogy, there are rules that should be complied with by states whose aerospace objects traverse third-state airspace. First, aerospace objects' transit routes should be projected in a way that infringes upon other states' sovereignty as little as possible.

\textsuperscript{133} Chicago Convention, supra note 6, art. 5.
\textsuperscript{134} UNCLOS, supra note 9, art. 17.
\textsuperscript{135} Id. art. 19, ¶ 1.
\textsuperscript{136} Id. art. 19, ¶ 2.
For instance, coastal states should use the open airspace above the high seas to the greatest extent feasible. Second, the state through which the object may travel should be consulted in advance. Third, the transit should be incidental to the passage into or from outer space unless rendered necessary by force majeure or distress. Other activities without a direct bearing on passage, such as research and survey activities, should be strictly prohibited. In this regard, a useful reference could be made to the distinction between movement rights and operational rights in the law of the sea. According to Professor Petros Liacouras, the “category of movement rights relates to mobility and includes navigation on the high seas outside the limit of the territorial sea, innocent passage through the territorial sea[,] and transit passage through straits used for international navigation,” while the category of operational rights includes, “apart from resource-oriented activities, intelligence gathering, military exercises and maneuvers, testing of military weapons, as well as scientific research.” Fourth, foreign aerospace objects exercising the right of transit through foreign airspace shall comply with laws and regulations of the transit states with respect to aerial safety, regulation of aerial traffic, and the preservation of the environment. The transit state may require foreign aerospace objects exercising the right of transit through its airspace to use such air lanes as it may designate for the passage of aerospace objects.

IV. CONCLUSION

The unresolved state of the boundary between airspace and outer space can be attributed to both technical difficulty and political reluctance. Drawing a line based on any of the existing criteria at this stage would appear arbitrary. As states’ interest in having a clear demarcation is not yet manifest, many countries have adopted a “wait and see” attitude. The lack of a boundary has not given rise to any significant problems so far, largely because of the noncontiguous nature of space and aerial activities. In the few cases where space objects must traverse third-state airspace to reach and return from outer space, bilateral or regional


agreements are needed to establish a balance between the freedom of space exploration and use, and the full and complete sovereignty of states over their airspace.

Technical innovations targeted at new flight craft may necessitate delimitation or, alternatively, require the flexible adjustment of international law. The emergence of aerospace objects, which combine the functional characteristics of aircraft and space objects, poses a challenge to, but does not seem to justify, the urgency of delimitation. Rather, the difficult question could be resolved by a unitary law wherein aerospace objects are governed based on their nature or purpose. Space law would be applicable to those objects that perform Earth-to-space transportation, but they should also be required to respect air traffic rules when transiting airspace. Due to their partial aerial nature, aerospace objects should be subject to stricter regulations than space objects when traversing through other states' twenty-one-kilometer airspace.
Comments