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THE ELUSIVE FRONTIER: REVISITING THE DELIMITATION OF OUTER SPACE

Abstract

This paper proposes a reassessment of the legal concerns related to the vertical extension of State territory, considering the different regimes applicable to air space and outer space. Taking into consideration the vast number of proposals offered by scholars and diplomatic delegations on this subjected matter, as well as principles of Comparative Law, it is hereby formulated an alternative for delimitation of this elusive final frontier. It shall be recalled that, in accordance to the Chicago Convention, of 1944, States hold absolute and exclusive jurisdiction in relation to their respective air spaces. On the other hand, the Space Treaty, of 1967, establishes that the outer space cannot be subjected to national claims of any kind. Nevertheless, the border that distinguishes these two distinct legal regimes remains to be identified. At the United Nations Committee on the Peaceful Uses of Outer Space (COUPOS), it has been possible to identify two approaches related to this topic: the first, of the group of countries recognized as “spatialists”, defends the clear demarcation of the frontier between air space and outer space, founded on scientific or commonly accorded criteria; the other, of the ones known as “functionalists”, sustains that such delimitation is rather unnecessary or even impossible, and, consequently, activities performed in those territories should be accessed in accordance to their own objectives. The stalemate between these two schools of thought contributed to a contradictory reality: outer space constitutes the vertical frontier of national territories, which, even though finite, extend themselves above the surface of the Earth up to an undetermined altitude. For this reason, a compromising solution is hereby proposed, in favor of the delimitation of the frontier between air space and outer space, by an international agreement, at 100 km above sea level, but contemplating regulation of passage rights for space objects during launching and reentries, as long as those space activities are peaceful, conducted in accordance with International Law, and respecting the sovereign interests of the territorial State.