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Author: Mr. Charles Stotler
Switzerland

THE EFFECTS OF THE FRAGMENTATION OF INTERNATIONAL LAW ON AEROSPACE
REGULATION.

Abstract

During the 58th Session of the UN General Assembly in 2006, the International Law Commission submitted a report entitled, “Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law.” The ILC Report addresses the functional differentiation of international law into specialized regimes, such as trade law, environmental law, and law of the sea. The ILC defined fragmentation as “the rise of specialized rules and rule-systems that have no clear relationship to each other,” and attributes to globalization the emergence of technically specialized regimes and specialized intergovernmental organizations.

Scholarly debate over the issue of fragmentation is not new. The ILC notes that C. Wilfred Jenks—a legal pioneer who produced one of the earliest treatises on space law—sketched the background of fragmentation over a half century ago. For Jenks, the problem of conflicts between apparently autonomous treaty regimes can be likened to conflicts of laws arising between autonomous domestic legal regimes, typically resolved through the application of private international law principles. Working under this analogy, the ILC described principles of systematic integration that have developed for the resolution of apparent conflicts between treaty regimes.

Jurists have long commented on disparities between international air law and international space law as a source of potential conflict. Specific areas of discord include sovereignty, vehicle classifications, passenger and third party liability and registration of aircraft and space objects. Proposed suborbital activities, including tourism, launch of orbital payloads and point-to-point transportation, bring these disparities to the fore. They involve the use of aerospace planes employing rocket technology, traveling on a suborbital trajectory through international space—hybrid air and space activities that evade the direct application of either legal regime.

While scholars have examined issues of fragmentation pertaining to other specialized regimes, there is a notable absence of analysis of air and space law under fragmentation rubric. This paper examines the extent to which these specialized regimes epitomize the fragmentation of international law. It will be illustrated how fragmentation at the international level is necessitating the creation of hybrid regulatory regimes at the domestic level. These regulatory schemes will be analyzed in light of the ILC’s principles of systematic integration in an effort to determine whether States are properly implementing these specialized regimes. The rise of global administrative law in the form of highly specialized technical bodies, such as ICAO and COPOUS, will also be considered in a discussion of institutional fragmentation.