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A PROPORTIONALITY FRAMEWORK FOR ASSESSING LAUNCH ACTIVITIES

Abstract

Pursuant to the 1967 Outer Space Treaty, activities of non-governmental entities in outer space require authorisation and continual supervision by the appropriate State Party. This will also include launch activities. Increasingly, States have met this responsibility by enacting into national space law a system for the assessment and granting of launch 'permits' or 'licences'. When considering an application for a launch permit, domestic regulators are required to consider and weigh a number of often competing policy considerations. These typically include but are not limited to: the right of launch companies to conduct legitimate commercial activities, the economic interests of the State in promoting a launch industry, the need to mitigate space debris and the risk of collision, a State's national security interests, public safety concerns, and a State's international relationships. These represent polycentric decisions for regulators.

This give rise to the question: how are decision-makers to weigh these considerations in a principled way? And, in the event that a launch permit is refused, and that decision is judicially challenged (if that is possible), how may domestic courts best weigh these factors and review such decisions?

In this paper, we will assess whether a proportionality analysis might provide a principled and transparent way for regulators (and courts) to approach this dilemma. Proportionality analysis is a tool for the balancing of competing rights and interests. In many jurisdictions, it provides a useful and coherent tool for polycentric decisions in various fields. We will analyse two jurisdictions which have, to differing degrees, incorporated proportionality analysis into their domestic law: Australia and the UK. We set out how proportionality analysis might be applied in respect of launch permit decisions for both of these case studies and consider whether it would represent a useful frame of analysis for determining and adjudicating space launch permits.