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“I WILL MAKE IT LEGAL:” FROM PALPATINE TO ARTICLE XVI, AN ASSESSMENT OF THE OUTER SPACE TREATY’S WITHDRAWAL MECHANISM

*By Todd Pennington**

I. INTRODUCTION

Star Wars Episode I: The Phantom Menace may be the worst feature film in the Star Wars canon; at least, that view is widely held among many Star Wars fans and critics. Apart from the underlying merits or faults of the film, its thematic relevance in the grand arc of the Skywalker story has been questioned, to the point that some critics suggest omitting it from the Star Wars viewing sequence entirely.¹ Despite its questionable cinematic merit, the film does include many memorable scenes and sayings now famous in Star Wars lore. Episode I opens with a scene in which Darth Sidious (the Sith persona of Naboo’s Senator Palpatine) utters one such memorable line: “I will make it legal.” The ancient political, legal and military machinations of a fictional Republic from a galaxy far,

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¹ Blogger Rod Hilton went so far as to propose the now-legendary “Machete Order” for viewing the two original Star Wars trilogies in this order: Episode IV, II, III, V, then VI. The Machete Order – so called because it originally appeared as a post in a blog titled “No Juggling Machetes” – was proposed because Mr. Hilton viewed Episode I as irrelevant to the larger story told in the original trilogies, and because some scenes in Episode I tend to diminish the impact of certain story elements in the other films when viewed in Machete Order. Mr. Hilton was emphatic that the basis for his Machete Order was the thematic irrelevance of Episode I, not because parts of the film just aren’t very good (a point he nevertheless admits). Rod Hilton, *The Star Wars Saga: Introducing Machete Order*, RODHILTON.COM (Nov. 11, 2011), <https://www.rodhilton.com/2011/11/11/the-star-wars-saga-suggested-viewing-order/>.

far away have, at face value, little to tell us about the present-day law of space operations in our own solar system. However, Darth Sidious' menacing commitment to "make it legal" is a worthy stepping-stone to an assessment of the seldom-discussed penultimate Article of 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): Article XVI, which provides a mechanism for a State Party to withdraw from the Treaty.²

Withdrawal of a spacefaring State Party from the Outer Space Treaty would force other State Parties to decide their respective national positions on a matter that has, for the most part, been the province of scholars and academics: identifying those aspects of outer space law that apply to all States as customary international law, independent of treaty obligations of the Outer Space Treaty. Could a State Party, through withdrawal under Article XVI, purport to change the legal character of a currently proscribed action in outer space and thereby "make it legal?"

This article explores that possibility. It will first set the scene by describing the context of Darth Sidious' statement. Next, it will address treaties and customary international law as sources for outer space law as it stands today. Then, it will explore two scenarios in which a State Party might consider withdrawing from the Outer Space Treaty and consider the implications of such withdrawal for outer space law. The article will conclude with recommendations for protecting important legal interests of all space-faring actors.

II. I FELT A GREAT DISTURBANCE IN THE LAW: DARTH SIDIOUS, THE TRADE FEDERATION AND NABOO

Our study begins with an early scene from *Star Wars Episode I: The Phantom Menace*. The setting: the bridge of the Vuutun Palaa, a Lucrehulk-class Droid Control Ship operated by the Trade Federation, a corrupt merchant cartel both using and being used by

² Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410; 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

Darth Sidious for their respective political goals.³ The *Vuutun Palaa* is one of the ships enforcing a Trade Federation blockade of planet Naboo, a planet represented in the Galactic Senate. The Trade Federation leaders inform Darth Sidious – visible to them as a spectral hologram – that ambassadors sent by the Chancellor to mediate resolution of the blockade are Jedi knights. The evil Darth Sidious realizes that the arrival of Jedi knights means there is no prospect of a favorable resolution in the negotiations. Sidious tells the Trade Federation leaders, “This turn of events is unfortunate. We must accelerate our plans. Begin landing your troops.” Viceroy Nute Gunray of the Trade Federation famously asks Darth Sidious, “My lord, is that legal?” Darth Sidious replies with the ominous springboard for this article, “I will make it legal.”

This quote has found substantial purchase in the Star Wars humor “meme-verse,” with the image of a ghostly Darth Sidious overlaid by text suggestions of all manner of comically taboo things about which the meme author suggests, “I will make it legal.”⁴ In Episode I the thematic implications of the statement are far more consequential: the battle over the Trade Federation’s blockade of one planet ultimately leads to a galactic total war that unfolds throughout the Star Wars saga.

Did Darth Sidious actually “make it legal?” He did not secure or obtain authorization to use military force under any process of Republic law as it existed at the time. However, he did leverage the very crisis he fomented on Naboo to manipulate the generally weak and ineffectual Galactic Senate to remove Chancellor Valorem from power, and to then select himself (in his persona of Palpatine) as Chancellor. This story of consolidating power in an unaccountable dictator in the fictionalized Star Wars universe closely (and almost certainly by design) follows the history of political changes that led to the consolidation of dictatorial power in the German Third Reich. While Adolf Hitler would eventually become responsible for some of

³ Exhaustive information about the *Vuutun Palaa* and other Star Wars ship and character names, from canon and non-canon sources, may be found at the fan-sourced but extremely reliable WOOKIEPEDIA, https://starwars.fandom.com/wiki/Vuutun_Palaa (last visited Feb. 25, 2026).

⁴ The author has contributed to this tradition of Star Wars comedy, on the basis of his love of pizza with ham, pineapple and green olive toppings. Upon challenge to the social acceptability of this combination of ingredients, he has been known to reply with a meme asserting “I will make it legal.”

the worst crimes against humanity, his initial rise to dictatorial power “came through Germany’s legal political processes.”⁵ The United States maintained diplomatic relations with Germany under Hitler for several years following his assumption of power as Führer on August 2, 1934.⁶ Similarly, most worlds in the political system of the Star Wars galaxy initially accepted Palpatine’s consolidation of dictatorial power. He may not have “made the Naboo invasion legal” *ex post facto*. However, by gaining sufficient governmental power to order the invasion of a planet, and by eliminating any political opposition to his decision to do so, he changed the legal and political landscape of the galaxy regarding interplanetary warfare in ways that proved to be consequential for the Star Wars galaxy.

III. THE ONCE AND FUTURE SOURCES OF OUTER SPACE LAW

Through the Force, things you will see. Other places. The future, the past.

– Yoda

In the Star Wars universe, the basic political subdivision of intelligent civilization in the galaxy is the planet. In the present day, in our own galaxy, the most important political subdivision of civilization is the State.⁷ Relations between States are characterized by adherence to generally recognized principles of international law.⁸ International law is established by agreement between States in the form of treaties, and by the conduct of States when

⁵ Holocaust Encyclopedia, *Hitler Comes to Power*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM (last edited Feb. 23, 2025), <https://encyclopedia.ushmm.org/content/en/article/hitler-comes-to-power>.

⁶ The United States did not recall its ambassador to Germany until four years later, on November 15, 1938, following the Nazi Party’s pogrom against German Jews earlier that month. Office of the Historian, Department of State, *A Guide to the United States’ History of Recognition, Diplomatic, and Consular Relations, by Country, Since 1776: Germany*, <https://history.state.gov/countries/germany> (last visited Feb. 25, 2026).

⁷ Dani Rodrik, *Roepke Lecture in Economic Geography—Who Needs the Nation-State?*, 89 ECON. GEOGRAPHY 1, 3 (2013) (“The nation-state refuses to wither away. It has proved remarkably resilient and remains the main determinant of the global distribution of income, the primary locus of market-supporting institutions, and the chief repository of personal attachments and affiliations.”).

⁸ There are obvious and serious exceptions to this general proposition; the existence of a legally binding rule does not guarantee compliance in all cases.

“State practice” on a matter comes to be recognized as customary international law. Each source of law is capable of establishing the rights and obligations of States in their relations with each other, and in some cases in their relations with individual persons.⁹ Treaties are written legal instruments, signifying the agreement of one sovereign State to accept as a legally binding obligation some requirement, prohibition or duty.¹⁰ Treaties have the virtue of a clear procedural origin: treaty terms are negotiated through diplomatic processes, reduced to agreed text (often in more than one official language, for the avoidance of disputes arising from translation error), signed with ceremonial formality, ratified according to States’ domestic law and taking effect on a date certain.¹¹

Customary international law lacks this procedurally neat origin. “A principle of customary international law results from a general and consistent practice of States followed by a sense of legal obligation.”¹² For a practice among States to evolve into a right or duty recognized as binding on all States as a matter of law, the practice must: be consistent among States over some period of time, and be based on *opinio juris*, a sense of legal obligation.¹³ There is no controlling definition for either the period of time, or the forms

⁹ International law may also be derived from “general principles common to the major legal systems of the world.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102(1)(c) (AM. L. INST. 1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS LAW]. This source of international law “may be invoked as supplementary rules of international law where appropriate.” For example, in an international claim by one State against another, although the passage of time as a defense may not be accepted as a principle of international law as such, it may properly be invoked as a defense in a particular claim because the defense “is a general principle to the major legal systems of the world, and is not inappropriate for international claims.” *Id.* § 102 cmt. k. “General principles common to the major legal systems of the world” are not a significant source of legal principles distinctive to activities in outer space. D.

¹⁰ Vienna Convention on the Law of Treaties, art. 2(1)(a), May 23, 1969, 21 U.S.T. 77, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The Vienna Convention defines “treaty” as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” *Id.*

¹¹ *Id.* art. 33(1) (“When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.”). The Outer Space Treaty was prepared in English, Russian, French, Spanish and Chinese texts, each being “equally authentic.” Outer Space Treaty, *supra* note 2, art. XVII.

¹² RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 9 § 102(2).

¹³ BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 6 (2010).

of evidence proving that States act from a sense of legal obligation, sufficient for State practice to become customary international law. There is not even unanimous agreement among scholars that both State practice and *opinio juris* are separate requirements: some argue that State practice is *evidence* of what international law is, but that *opinio juris* is the only essential element to the existence of a principle of customary international law.¹⁴

However, any difference between these views on the function of State practice in establishing customary international law is largely an academic question. In the absence of “general and consistent” State practice, a rule of customary international law either does not exist at all, or else lacks the best evidence for either the existence of a rule or definition of that rule.

Though treaty law and customary international law may be separate as sources of law, they can work interactively. A treaty may be declaratory of customary international law.¹⁵ Similarly, a right or obligation first undertaken as a treaty obligation may mature into a practice based on a sense of legal obligation transcending its origin as a treaty commitment.¹⁶ The International Court of Justice has opined that multilateral conventions or treaties “may have an important role to play in recording and defining rules from custom, or indeed in developing them.”¹⁷

¹⁴ Professor Bin Cheng, writing before the Outer Space Treaty was signed, suggested this view.

Indeed it may be permissible to go further and say that the role of usage in the establishment of rules of international customary law is purely evidentiary: it provides evidence on the one hand of the contents of the rule in question and on the other hand of the *opinio juris* of the States concerned. Not only is it unnecessary that the usage should be prolonged, but there need also be no usage at all in the sense of repeated practice, provided that the *opinio juris* of the States concerned can be clearly established. Consequently, international customary law has in reality only one constitutive element, the *opinio juris*.

BIN CHENG, *United Nations Resolution on Outer Space: 'Instant' International Customary Law?*, in *STUDIES IN INTERNATIONAL SPACE LAW* 138 (1997).

¹⁵ RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 9, § 102 cmt. i.

¹⁶ “Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.” Vienna Convention, *supra* note 10, art. 38.

¹⁷ Case Concerning the Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, ¶ 27 (June 3).

The Outer Space Treaty is an example of a treaty that both recites certain principles accepted as customary international law and establishes treaty obligations not otherwise found in international law. Determining which aspects of the Outer Space Treaty are which, however, is not as straightforward a task as it may seem. Scholars and academics often assert certain provisions of the Outer Space Treaty are declaratory of customary international law; their writings are accorded “substantial weight” as evidence of the existence of a rule of customary international law.¹⁸ However, also accorded “substantial weight” as evidence of customary international law are “pronouncements by States that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other States.”¹⁹ Two United Nations instruments preceding the Outer Space Treaty often treated as such pronouncements are General Assembly resolutions on international cooperation in space,²⁰ and the legal principles by which activities in outer space “should be guided.”²¹

While legal scholars recognize State acquiescence to an assertion of a rule as customary law as persuasive evidence that the rule is customary law, the reverse framing of this proposition is less clear: what result obtains if a State pronounces that a rule of customary law does NOT exist, and the pronouncement IS seriously challenged by other States? This is the situation the international community could face if a major spacefaring State party to the Outer Space Treaty were to withdraw from the Treaty.

Though seldom discussed in the literature of outer space law, the Outer Space Treaty provides within its text, at Article XVI, a mechanism whereby a State Party may withdraw from the treaty effective one year after providing written notice of such withdrawal.²² Of its origins, Professor Bin Cheng notes merely that

¹⁸ RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 9, § 103(2)(c).

¹⁹ *Id.* at § 103(2)(d).

²⁰ G.A. Res. 1721 (XVI), International Co-Operation in the Peaceful Uses of Outer Space (Dec. 20, 1961).

²¹ G.A. RES. 1962 (XVIII), Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (Dec. 13, 1963). At the time of the United Nations deliberations on the text of the Outer Space Treaty, these resolutions were the most formal statements of principles by which States’ use and exploration of outer space “should be guided.” G.A. Res. 1962 (XVIII) at Preamble (Dec. 13, 1963).

²² Article XVI states, in its entirety, “[a]ny State Party to the Treaty may give notice of its withdrawal from the Treaty one year after its entry into force by written

during negotiation of the Treaty text, a “withdrawal clause was also added.”²³ Of its current standing, the Cologne Commentary on Outer Space Law notes only, “[t]o date, no State Party has given notice of withdrawal from the Outer Space Treaty.”²⁴

The existence of a withdrawal mechanism *ipso facto* suggests substantive legal consequence to such withdrawal. Withdrawal of a spacefaring State Party from the Outer Space Treaty would raise questions about which provisions of the Treaty may continue to apply to that spacefaring State despite its withdrawal as a matter of customary international law (or other source of international law independent of the Outer Space Treaty).²⁵ What if the withdrawing State were to assert freedom to engage in an activity proscribed by the Outer Space Treaty? What if the withdrawing State denied that the activity was proscribed by customary international law? Is actual State practice regarding the activity of a sufficiently general and consistent quality to be deemed *jus cogens*, a peremptory norm of general international law comprising rules requiring “a high degree of consensus for their recognition,” which binds all States regardless of their acquiescence or objection?²⁶

These issues were anticipated during debate over the wording of the Outer Space Treaty at the Legal Subcommittee to the United Nations Committee on the Peaceful Uses of Outer Space. For example, the delegate from Romania stated,

[a]s to Article 16, there were two courses open to the Sub-Committee in drafting the treaty. If the treaty was to create new

notification to the Depositary Governments. Such withdrawal shall take effect one year from the date of receipt of this notification.” Outer Space Treaty, *supra* note 2, art. XVI.

²³ BIN CHENG, *The 1967 Space Treaty*, in *STUDIES IN INTERNATIONAL SPACE LAW* 225 (1997). The withdrawal mechanism ultimately enacted in Article XVI of the Outer Space Treaty was first proposed by the United States in its first draft treaty text.

²⁴ COLOGNE COMMENTARY ON SPACE LAW: OUTER SPACE TREATY, VOLUME I 704 (Stephan Hobe, Bernhard Schmidt-Tedd and Kai-Uwe Schrogl eds., 2009) [hereinafter COLOGNE COMMENTARY].

²⁵ “The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.” Vienna Convention, *supra* note 10, art. 38.

²⁶ BRIAN D. LEPARD, *CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS* 7 (2010).

law, the provision for withdrawal made in the United States draft article might be acceptable. If, on the other hand, the purpose of the treaty was to State principles which were already part of international law, and apply then to the space activities of States, withdrawal was out of the question.²⁷

The inclusion of Article XVI in the final text of the Treaty is strong evidence that at least some aspects of the Outer Space Treaty create “new law” in the form of treaty obligations not otherwise arising under customary international law. Which provisions are “new law” by operation of the Treaty is not explicitly stated, and the entry into force of the Outer Space Treaty “by and large marginalized any discussion” of whether the Treaty itself [or the General Assembly Resolutions of 1961 and 1963]²⁸ “reflected customary international law . . .”²⁹ Withdrawal of a State Party would return such discussions to the fore.

IV. OUTER SPACE TREATY WITHDRAWAL: TWO SCENARIOS

I have a bad feeling about this.

– Luke Skywalker

Why might a State Party to the Outer Space Treaty consider withdrawal? Let us consider two different scenarios: one in which a notional State aspires to an unprecedented and concerning degree of control over areas of a celestial body, and one involving the breakdown of the arms control aspect of the Outer Space Treaty.

For our first scenario, imagine a future in which space exploration technology has advanced such that State X has established

²⁷ Representative of Romania to the Committee on the Peaceful Uses of Outer Space, Statement *in* Summary Record of the Sixty-Ninth Meeting of the Committee on the Peaceful Uses of Outer Space Legal Sub-Committee, Fifth Session 4, U.N. DOC. A/AC.105/C.2/SR.69 (July 28, 1966).

²⁸ G.A. RES. 1721 (XVI) International Co-Operation in the Peaceful Uses of Outer Space (Dec. 20, 1961) and G.A. RES. 1962 (XVIII) Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (Dec. 13, 1963). At the time of the United Nations deliberations on the text of the Outer Space Treaty, these resolutions were the most formal statements of principles by which States’ use and exploration of outer space “should be guided.” G.A. Res. 1962 (XVIII) at Preamble (Dec. 13, 1963).

²⁹ Frans von der Dunk, *International Space Law*, in HANDBOOK OF SPACE LAW 38-39 (Frans von der Dunk with Fabio Tronchetti eds., 2015).

a resource mining activity at a fixed site on the surface of Earth's Moon. The site involves several modular life support units for the humans who work at the site, as well as modules, vehicles and equipment used in the mining operation itself. Space vehicles periodically land and launch from a pad near the site. State X asserts that all activity at the site is directly related to the mining activity. However, some observable activity has no apparent nexus to a mining operation, and intelligence reports indicate that in addition to the resource mining operation, other activity at the site has indications of potential military activity.

State Y requests a visit to the State X lunar site, citing Outer Space Treaty Article XII in its request.³⁰ Negotiations drag out as the States discuss protocols and precautions to avoid interference with the operations of the mining activity. Legal and political advocacy groups aligned with each State seize on different aspects of the controversy; some argue that a suitable "basis of reciprocity" is not possible and that any right to visit under Article XII is therefore moot.

Ultimately, State Y attempts to land a robotic rover about three kilometers away from the State X site to conduct a close-in inspection of the site. However, other robotic rovers and hovercraft are deployed from the State X site to obstruct the State Y landing. Political controversy reaches fever pitch as State Y accuses State X of being in violation of the Outer Space Treaty's Article I (by impeding the right of free access), Article II (by engaging in a means of use or occupation of its mining site that is tantamount to national appropriation), Article IX (by failing to exercise due regard for the interests of State Y in conducting its own lunar exploration) and Article XII (by unreasonably denying the visit request).³¹ To protect the intelligence sources and methods through which the possible military activity at the site was detected, State Y does not make

³⁰ Outer Space Treaty, *supra* note 2, art. XII.

All stations, installations, equipment and space vehicles on the moon and other celestial bodies shall be open to representatives of other State Parties to the Treaty on a basis of reciprocity. Such representatives shall give reasonable advance notice of a projected visit, in order that appropriate consultations may be held and that maximum precautions may be taken to assure safety and to avoid interference with normal operations in the facility to be visited.

³¹ *Id.* arts. I, II, IX & XII.

public its concerns that State X is also violating limitations on military activity found at Article IV.

For its part, State X retorts that State Y's attempted rover landing interfered with State X's own space activities. The United Nations Security Council convenes to consider the matter, but every proposed resolution addressing the matter is vetoed by either State X or State Y (each of whom holds a veto in the Security Council). At the United Nations General Assembly, a resolution condemning State X's actions is narrowly passed, but many member States either vote against the resolution or abstain. State Y announces that it views State X's actions as amounting to national appropriation of that area of the Moon, and declares its intent to conduct "freedom of navigation" operations against this "improper lunar claim" by conducting further robotic probe landings near the site.³²

State X denounces this decision, and accuses State Y of "abusing the law" by making unreasonable demands, engaging in dangerous activities and attempting to interfere with State X's "lawful use and exploration of outer space." State X's leader addresses the United Nations General Assembly, stating:

The Outer Space Treaty is no longer a sufficient safeguard for our national interests. Some members of this assembly, State Y first among them, were happy to make the promises of the Outer Space Treaty when they thought they held the technical advantage. Now that things have changed, they like only those rules that are convenient. As State Y likes to cite many rules

³² "Freedom of navigation operations" is a term of art referring to maritime activities on the high seas designed to challenge an excessive maritime claim. For example, if a state were to claim a territorial sea extending twenty nautical miles from their coastal baseline, that would exceed the 12 nautical mile limits of territorial sea claims permitted by the United Nations Convention on the Law of the Sea (a limit widely recognized as reflecting customary international law). United Nations Convention on the Law of the Sea, art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

The Department of State (DOS) protests excessive maritime claims, advocating for adherence to international law, while the Department of Defense (DoD) exercises the United States' maritime rights and freedoms by conducting operational challenges to excessive maritime claims. In combination, these efforts help preserve for all states the legal balance of interests established in customary international law as reflected in the 1982 Law of the Sea Convention.

DEPT. OF DEF., ANNUAL FREEDOM OF NAVIGATION REPORT TO CONGRESS FOR FISCAL YEAR 2023 (2024), [https://policy.defense.gov/Portals/11/Documents/FON/DoD%20FON%20Report%20for%20FY23%20\(Corrected\).pdf](https://policy.defense.gov/Portals/11/Documents/FON/DoD%20FON%20Report%20for%20FY23%20(Corrected).pdf)

of the Outer Space Treaty, I will also cite one: in accordance with Article XVI of the Outer Space Treaty, we withdraw from this Treaty effective one year from today. In the meantime, and for all time, we will defend our rights as a lunar nation under customary international law.

State X declines to elaborate on precisely what it means by its “rights as a lunar nation under customary international law,” but scholars and advocates from and aligned with State X begin writing articles asserting that withdrawal from the Outer Space Treaty made State X legally eligible to assert a claim of sovereignty over those areas of the Moon for which it could exercise control and governance.

Those familiar with events in the South China Sea over the last decade will recognize in this scenario a fictional story similar to the all-too-real revanchist campaign by China to use, occupy and control maritime features in the South China Sea. China asserts “indisputable sovereignty over the islands in the South China Sea and the adjacent waters.”³³ China’s claim over the islands of the South China Sea is also recited in its domestic laws.³⁴ However, China’s claims of territorial sovereignty over these islands are disputed by other coastal States of the South China Sea. Further, China has never precisely defined what it means by “adjacent waters,” and appears to operate with respect to “adjacent waters” from an understanding at odds with any recognized convention of international maritime law.³⁵

³³ Permanent Mission of the People’s Republic of China Note Verbale to the United Nations, U.N. DOC. CML17/2009 (May 7, 2009), https://www.un.org/Depts/los/cles_new/submissions_files/mys85_2019/CML_14_2019_E.pdf [hereinafter China Note Verbale].

³⁴ 中华人民共和国领海及毗连区法 Law on the Territorial Sea and the Contiguous Zone [National People’s Congress trans.] art. 2 (Feb. 25, 1992) (English translation available from the United Nations Division for Ocean Affairs and the Law of the Sea, at https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf).

³⁵ U.S. DEP’T OF STATE, BUREAU OF OCEANS AND INT’L ENV. AND SCI. AFFS., LIMITS IN THE SEAS NO. 143, CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA (Dec. 5, 2014), <https://www.state.gov/wp-content/uploads/2019/10/LIS-143.pdf> [hereinafter Limits in the Seas: China].; *See also* BEN DOLVEN, SUSAN LAWRENCE, & RONALD O’ROURKE, CONG. RSCH. SERV. IF10607, CHINA PRIMER: SOUTH CHINA SEA DISPUTES (Dec. 22, 2025), <https://crsreports.congress.gov/product/pdf/IF/IF10607>.

Under international law, as set out in the United Nations Convention on the Law of the Sea, maritime claims are derivative of territorial sovereignty.³⁶ However, China does not frame its maritime claims in the South China Sea with reference to territorial sovereignty over land: rather, China's assertion is depicted on maps as a "nine-dash line" (see figure, page 29) encompassing hundreds of islands, rocks and low-tide elevations within the South China Sea, but not associated with either the maritime baseline of the Chinese mainland or the maritime baselines of the contested features in the South China Sea.³⁷

China's assertion of sovereignty within the nine-dash line is widely viewed as unlawful. In 2013, the Republic of the Philippines sought arbitration at the Permanent Court of Arbitration over China's actions in the South China Sea. The arbitral tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea had jurisdiction to render legally binding decisions in disputes between State Parties arising under the Convention. The Permanent Court of Arbitration administered the proceedings.³⁸ China did not answer or appear in the proceedings, though the Court considered Chinese statements and papers issued in

³⁶ UNCLOS, *supra* note 32, art. 3. China ratified the Convention on June 7, 1996. Many States, including the United States, international courts and tribunals consider many aspects of the Convention to reflect customary international law. See J. Ashley Roach, *Today's Customary International Law of the Sea*, OCEAN DEV. & INT'L L., 45, 239-252 (2014).

³⁷ Maritime features, as defined in the United Nations Convention on the Law of the Sea (UNCLOS), include "islands," "rocks" and "low-tide elevations." Maritime claims (such as a territorial sea or an exclusive economic zone) under UNCLOS are based on sovereignty over land, either coastal territory or a maritime feature. UNCLOS does not permit maritime claims untethered from sovereignty over an adjacent maritime feature or coastal territory. The type and extent of legally available maritime claims depend on the type of feature involved, its proximity to coastlines or other maritime features, and its ability to support human habitation. See Eleanor Freund, *Freedom of Navigation in the South China Sea: A Practical Guide*, BELFER CTR. FOR SCI. AND INT'L AFFS., HARVARD KENNEDY SCHOOL (June 2017), <https://www.belfercenter.org/publication/freedom-navigation-south-china-sea-practical-guide>. The writings of Chinese academics regarding China's "historic rights" in the South China Sea, while not formally adopted by China as its international legal position, offer some insight into Chinese views on the matter. See *e.g.*, Jianming Shen, *China's Sovereignty Over the South China Sea Islands: A Historical Perspective*, 1(1) CHINESE J. OF INT'L L. 94, 94, 104-105 (2002).

³⁸ In the Matter of the South China Sea Arbitration (Phil. V. China), P.C.A. Case No. 2013-19, Award on Jurisdiction and Admissibility, Oct. 29, 2015 ¶ 413 (Perm. Ct. Arb. 2015), <https://pcacases.com/web/sendAttach/2579>.

other contexts to fairly evaluate China's position. The Court ultimately issued several rulings, including that China's nine-dash line claim had "no legal basis."³⁹ However, China has neither disavowed its nine-dash line claim nor ceased actions designed to enforce its unlawful claims therein.⁴⁰

That said, the Court's ruling only addresses maritime claims: the Court demurred on addressing any question of territorial sovereignty (such questions being beyond the scope of the United Nations Convention on the Law of the Sea). Though China's nine-dash line claim is wholly without legal basis, at least some of the features within the South China Sea could be susceptible to a claim of territorial sovereignty, which in turn could support at least some maritime claims.⁴¹ The question of territorial sovereignty over individual features of the South China Sea remains disputed, leaving the legal authority to assert at least some maritime claims consistent with the United Nations Convention on the Law of the Sea's Regime of Islands unsettled as well.⁴² In other words, China does not need to withdraw from the United Nations Convention on the Law of the Sea to assert a cognizable (albeit disputed) basis under international law for at least some claims over and adjacent to features in the South China Sea.

³⁹ In the Matter of the South China Sea Arbitration (Phil. V. China), P.C.A. Case No. 2013-19, Award, July 12, 2016 ¶ 631 (Perm. Ct. Arb. 2016), <https://pcacases.com/web/sendAttach/2086> [hereinafter P.C.A. Award]. "The Tribunal has already held... that there is no legal basis for any Chinese historic rights, or sovereign rights and jurisdiction beyond those provided for in the Convention, in the waters of the South China Sea encompassed by the 'nine-dash line'."

⁴⁰ Keith Johnson, *China's South Sea Aggression Is Backfiring*, FOREIGN POLY (Jun. 6, 2024), <https://foreignpolicy.com/2024/06/06/south-china-sea-philippines-fishing-ves-sels-maritime-conflict-shoal/>.

⁴¹ P.C.A. Award, *supra* note 39, ¶ 624.

⁴² As a general proposition, "the United States makes no territorial claim in the [South China Sea] and takes no position on sovereignty over any of the geographic features in the [South China Sea], but U.S. officials have urged that disputes be settled without coercion and on the basis of international law." Ben Dolven et al., *China Primer: South China Sea Disputes*, CONG. RSCH. SERV. IF10607, (Dec. 22, 2025), <https://crsreports.congress.gov/product/pdf/IF/IF10607>. Official statements about United States positions on disputes in the South China Sea are circumspect and precise. *See, e.g.* Sec'y of State Michael Pompeo, *U.S. Position on Maritime Claims in the South China Sea* (Jul. 13, 2020), <https://2017-2021.state.gov/u-s-position-on-maritime-claims-in-the-south-china-sea/>. *See also* Dep't of State Spokesperson Matthew Miller, *U.S. Support for the Philippines in the South China Sea* (Mar. 23, 2024), <https://2021-2025.state.gov/u-s-support-for-the-philippines-in-the-south-china-sea-12/>.

China has apparently judged *ultra vires* actions in the South China Sea sufficient for its present purposes, and formal condemnation by an international tribunal has failed to change its behavior. Further, China has an important interest in remaining within the Convention in that they retain their ability to participate as a State Party under the Convention notwithstanding their non-compliance with the Permanent Court of Arbitration's ruling.

Compare this to our notional State X on the Moon, which holds a State interest similar to China's in the South China Sea: an expansionist goal limited by a treaty commitment. However, State X's legal obstacle on the Moon is more categorical than China's legal obstacle in the South China Sea. The legality of a maritime claim on Earth is contingent on territorial sovereignty, a factor which can be contested as between States. The Outer Space Treaty leaves no room for such contingency: all claims or acts of national appropriation of any area of any celestial body are prohibited by the Treaty. Our notional State X of the future may judge the benefits of remaining in the Outer Space Treaty very differently than the China of today has apparently judged the benefits of remaining within the United Nations Convention on the Law of the Sea. If State X values the perception of conforming to legal obligations, it may prefer to withdraw from a treaty rather than simply violate it, particularly if it expects that other States will (for reasons principled or transactional) join it in objecting to the treaty's principles continuing to apply to State X as *jus cogens*.

In 1972, Manfred Lachs wrote that "it is scarcely conceivable that by withdrawing from [the Outer Space Treaty] a State could acquire freedom of action or the right to extend its sovereignty into outer space."⁴³ His argument holds true insofar as it pertains to assertions of sovereignty derivative of territorial sovereignty extending from one's national borders on the surface of the Earth through the air to infinity. In such a case, the rotation of the Earth would result in every State's territorial sovereignty over areas of space continually changing, with celestial bodies constantly passing "over" sovereign territory at distances far beyond any ability of a State to exercise control and governance. It is considerably "more conceivable" that a State could, by withdrawing from the Outer

⁴³ MANFRED LACHS, THE LAW OF OUTER SPACE: AN EXPERIENCE IN CONTEMPORARY LAW-MAKING 42 (Reissued 2010).

Space Treaty, purport to assert authority over areas of a celestial body tantamount to national appropriation. Indeed, in the case of China, such an action would be wholly consistent with their doctrine of “legal warfare” (under which the law is subordinate to national interests as the highest controlling standard, and is “flexibly” applied to best accomplish military objectives).⁴⁴

For our second scenario, consider how a State might judge withdrawal from the Outer Space Treaty to be in its interest if the arms control aspects of the Outer Space Treaty were to become intolerable to that State’s perceived interests. The Outer Space Treaty provides a broadly scoped framework of law for many aspects of the use and exploration of outer space. However, the principal national interests that led to the Treaty were rooted in Cold War politics, with both the United States and the Soviet Union each fearful of the other achieving military dominance, and outer space being the ultimate high ground in that contest. The Outer Space Treaty is “much more strongly marked by Realpolitik” than are the “traditional pages of international law.”⁴⁵

Sputnik-1 launched in the early days of the Cold War, as the United States and the Soviet Union found themselves in a nuclear arms race. Each feared the other did – or soon would – possess an overwhelming military advantage in nuclear warheads and delivery systems. This “missile gap,” real or perceived, was a major factor in security policy at the time. The United States perceived itself at a strategic disadvantage in light of the Soviet’s space and nuclear weapons program successes; for its part, the Soviet Union probably realized that its advantage over the United States was “more propagandistic hype than a strategic reality,” and that its long-term interests would be best served by a legal regime that precluded United States military dominance of space once the United States caught up technologically.⁴⁶ “This unique constellation of mutual perception of one’s own inferiority versus the other’s superiority... gave rise to a fundamental willingness on both sides to work together and arrive at a legal regime entailing substantial limitations

⁴⁴ Jill I. Goldenziel, *Law as a Battlefield: The U.S., China, and the Global Escalation of Warfare*, 106 CORNELL L. REV. 1085, 1093 (2021).

⁴⁵ Peter Jankowitsch, *The Background and History of Space Law*, in HANDBOOK OF SPACE LAW 5 (Frans von der Dunk & Fabio Tronchetti eds., 2015).

⁴⁶ *Id.* at 36.

to all, but notably of course military, activities in outer space.”⁴⁷ The weight the superpowers afforded these considerations is apparent in the speed of the development of the Outer Space Treaty, which entered force less than a decade after *Sputnik-1* entered Earth orbit in October 1957.⁴⁸

Central to the Outer Space Treaty is Article IV, which provides for a total prohibition on the placement of nuclear weapons or other weapons of mass destruction in outer space, including on any celestial bodies, and places more generalized prohibitions on all military activities (conventional or involving weapons of mass destruction) on the Moon or other celestial bodies. The gist of the arms control provisions of Article IV is not found in the Principles Declaration of 1963: they appear first in the Outer Space Treaty.⁴⁹

Arms control arrangements, particularly those regarding the fielding, testing and deployment of nuclear weapons, are generally creatures of treaty law. The International Court of Justice, ruling on the basic legality of nuclear weapons, opined that “the emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.”⁵⁰ The law of war, including both *jus ad bellum* and *jus in bello*, govern the legality of the use of weapons (including nuclear weapons) in any particular instance. However, the Court found no comprehensive customary international law prohibition on nuclear weapons as such, notwithstanding important treaty-based limitations and the constraints imposed by the law of armed conflict.⁵¹

⁴⁷ *Id.*

⁴⁸ UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS, *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html> (last visited Feb. 25, 2026).

⁴⁹ Jankowitsch, *supra* note 45, at 15. According to Jankowitsch Article IV, like the Partial Test Ban Treaty that came before it (Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (Partial Test Ban Treaty), Aug. 5, 1963, 14 U.S.T. 1313; 480 U.N.T.S. 43; 2 I.L.M. 889 (1963)) is “first and foremost not much more than an extra-terrestrial extension of arms control measures designed for more traditional theatres of warfare.”

⁵⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Reports 226 ¶ 73 (July 8) [hereinafter Nuclear Weapons Case].

⁵¹ *Id.*

In our evaluation of the Outer Space Treaty's withdrawal mechanism, the history of previous examples of State Parties withdrawing from arms control treaties merits consideration. In December 2001, the United States announced its intent to withdraw from the Anti-Ballistic Missile Treaty.⁵² The Treaty had prohibited the United States and Russia from developing national defenses against long-range ballistic missiles, on the premise that such defenses would undermine the strategic stability of a credible posture of mutually assured destruction.⁵³ The Treaty included, at Article XV, a provision for withdrawal (to become effective six months following written notice).⁵⁴ In announcing its withdrawal, the United States commented on the then-prevailing trend of easing tensions with Russia,⁵⁵ but noted the concurrent rise in emerging threats from rogue States and non-State actors.

These events pose a direct threat to the territory and security of the United States and jeopardize its supreme interests. As a result, the United States has concluded that it must develop, test, and deploy anti-ballistic missile systems for the defense of its national territory, of its forces outside the United States, and of its friends and allies.⁵⁶

The United States withdrawal from the Anti-Ballistic Missile Treaty became effective on June 13, 2002.⁵⁷

⁵² Diplomatic Note from the United States Embassy to Russia, Belarus, Kazakhstan and Ukraine, December 13, 2001, 2001 DIGEST OF U.S. PRACTICE IN INT'L L., ch. 18, §B(1), 830 [hereinafter ABM Withdrawal Diplomatic Note].

⁵³ Lynn F. Rusten, *U.S. Withdrawal from the Antiballistic Missile Treaty*, Center for the Study of Weapons of Mass Destruction Case Study No. 2, NAT'L DEF. UNIV., January 2010, 1 [hereinafter ABM Withdrawal Case Study].

⁵⁴ Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, 23 U.S.T. 3435, T.I.A.S. No. 7503, art. XV (1972, lapsed by United States withdrawal effective June 13, 2002) [hereinafter ABM Treaty].

⁵⁵ As a general rule, treaty obligations of the Soviet Union continued as treaty obligations of the Russian Federation following the breakup of the Soviet Union. See Lucinda Love, *International Agreement Obligations After the Soviet Union's Break-up*, 26 VANDERBILT L. REV. 373 (2021).

⁵⁶ ABM Withdrawal Diplomatic Note, *supra* note 52.

⁵⁷ Rusten, *supra* note 53, at 13.

In January 2003, North Korea announced its intent to withdraw from the Nuclear Non-Proliferation Treaty.⁵⁸ The Treaty prohibits non-nuclear weapons States from developing nuclear weapons,⁵⁹ and provides a mechanism for State Parties to withdraw (effective three months following written notice).⁶⁰ North Korea had ratified the Treaty as a non-nuclear weapon State in 1985.⁶¹ Although the legal effect of that notice remains disputed,⁶² North Korea nevertheless began a nuclear weapons testing program in 2006 and has since then conducted six nuclear weapons tests.⁶³ Several international law mechanisms outside the Nuclear Non-Proliferation Treaty restrict North Korea from maintaining a nuclear weapons capability,⁶⁴ though “State Parties to the Treaty continue to express divergent views regarding the status of the DPRK under the [Nuclear Non-Proliferation Treaty].”⁶⁵

In February 2019, the United States provided notice of its withdrawal⁶⁶ from the Intermediate Nuclear Forces Treaty.⁶⁷ In the 1980s, the forward deployment to eastern and western Europe

⁵⁸ Frederick Kirgis, *North Korea’s Withdrawal from the Nuclear Non-Proliferation Treaty*, AM. SOC’Y OF INT’L L., INSIGHTS Vol. 8 Issue 2 (Jan. 2003), <https://www.asil.org/insights/volume/8/issue/2/north-koreas-withdrawal-nuclear-nonproliferation-treaty>.

⁵⁹ Treaty on the Non-proliferation of Nuclear Weapons, 21 U.S.T. 483, art. II.; 729 U.N.T.S. 161; 7 I.L.M. 8809 (1968).

⁶⁰ *Id.* art. X.

⁶¹ *Treaty on the Non-Proliferation of Nuclear Weapons: Declarations, Statements, and Notes*, UNITED NATIONS OFFICE OF DISARMAMENT AFFAIRS TREATY DATABASE, <https://treaties.unoda.org/t/npt/declarations> (last visited Feb. 25, 2026) [hereinafter NPT Status Website].

⁶² North Korean announced its withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons “effective immediately” rather than three months following written notice of withdrawal. Kirgis, *supra* note 58.

⁶³ Mary Beth Nikitin, *North Korea’s Nuclear Weapons and Missile Programs*, CONG. RSCH. SERV. IF10472, (May 23, 2025).

⁶⁴ These include United Nations Security Council Resolutions 1718, 1874, 2087, 2094, 2270, 2321, 2371, 2375, and 2379, summarized at *U.N. Security Council Resolutions on North Korea*, THE ARMS CONTROL ASSOCIATION, <https://www.armcontrol.org/factsheets/un-security-council-resolutions-north-korea> (last visited Jun. 10, 2024).

⁶⁵ NPT Status Website, *supra* note 61.

⁶⁶ United States Withdrawal from the INF Treaty, 2019 DIGEST OF U.S. PRACTICE IN INT’L L., ch. 4, §B(1), 119.

⁶⁷ Treaty Between the United States and the Union of Soviet Socialist Republics on the Elimination of Intermediate-Range and Shorter-Range Missiles, reprinted in 27 I.L.M. 90 (1988), lapsed by United States withdrawal effective Aug. 2, 2019) [hereinafter INF Treaty].

of both U.S. and Soviet nuclear-capable missiles with ranges between 500 and 5,500 kilometers was of mutual concern to each superpower. The short flight time (as little as 10 minutes) of these missiles was perceived as a “hair-trigger for nuclear war.”⁶⁸ The Intermediate Nuclear Forces Treaty was designed to lower that risk. Like the other examples discussed here, the Treaty included a withdrawal mechanism.⁶⁹ However, as early as 2014, the United States assessed that Russia was in violation of the Treaty.⁷⁰ After several years in which diplomatic efforts failed to bring Russia back into compliance with the Treaty, the United States announced its withdrawal. Once the withdrawal was effective, the United States tested a weapon that would have been restricted under the Treaty.⁷¹

More recently, in November 2023 Russia withdrew⁷² from the Treaty on Conventional Armed Forces in Europe.⁷³ The Treaty had established limits on various types of conventional military weapon systems that the North Atlantic Treaty Organization and the Warsaw Pact could deploy between the Atlantic Ocean and the Ural Mountains. Several years before formal withdrawal, Russia had suspended its compliance with Treaty limits citing its

⁶⁸ Andrew Kramer and Megan Specia, *What is the I.N.F. Treaty, and Why Does It Matter?*, N.Y. TIMES (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/world/europe/inf-treaty.html>.

⁶⁹ INF Treaty, *supra* note 67, art. XV.

⁷⁰ U.S. DEP’T OF STATE, BUREAU OF ARMS CONTROL, VERIFICATION AND COMPLIANCE, ADHERENCE TO AND COMPLIANCE WITH ARMS CONTROL, NONPROLIFERATION, AND DISARMAMENT AGREEMENTS AND COMMITMENTS (July 2014), <https://2009-2017.state.gov/documents/organization/230108.pdf>.

⁷¹ *DOD Conducts Ground Launch Cruise Missile Test*, U.S. DEP’T OF DEF. (Aug. 19, 2019), <https://www.defense.gov/News/Releases/Release/Article/1937624/dod-conducts-ground-launch-cruise-missile-test/>.

⁷² Russia withdrew from the treaty effective Nov. 7, 2023; the United States suspended its obligations under the treaty effective Dec. 7, 2023. *See* Statement from National Security Advisor Jake Sullivan on United States’ Suspension of the CFE Treaty Alongside NATO Allies, The White House, Nov. 7, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/11/07/statement-from-national-security-advisor-jake-sullivan-on-united-states-suspension-of-the-cfe-treaty-alongside-nato-allies/>.

⁷³ Treaty on Conventional Armed Forces in Europe, reprinted in 30 I.L.M. 1 (1991).

“anachronistic” quality being “absolutely out of sync with the present realities.”⁷⁴

These examples demonstrate the range of circumstances that may drive States to consider withdrawing from arms control treaty obligations. The limitations of the Outer Space Treaty’s Article IV could become unacceptable for one or more State Parties in changed future circumstances in which the Outer Space Treaty and its Article IV (in the words of the United States’ withdrawal from the Anti-Ballistic Missile Treaty) “jeopardize its supreme interests.”⁷⁵

The prospect of such an outcome is higher in more distant possible futures. Large-scale human colonization of the Moon or other celestial bodies could lead to circumstances that result in conflict between the terrestrial States responsible for the colonies. Similarly, celestial body settlers who purport to politically organize as a new sovereign entity could find themselves in conflict with other groups of celestial body residents, or with one or more terrestrial States of Earth.

A more imminent example looms in the headlines: United States officials have stated in public Congressional testimony that Russia has a program to develop what may be a space-based nuclear anti-satellite weapon.⁷⁶ Article IV explicitly prohibits the deployment in space of such a weapon. If Russia does have such a program, would it be more likely to violate the Outer Space Treaty, or withdraw from it? Neither outcome would be desirable. Yet recent history provides examples of Russia selecting between each approach: violating the Anti-Ballistic Missile Treaty, and formally withdrawing from the Treaty on Conventional Armed Forces in Europe. The tenor of Moscow’s relations with the West ebbs and flows over time. Treaty withdrawal is an available mechanism, and in some circumstances could be the preferred approach. In that regard, it is notable that some Russian authors have suggested a

⁷⁴ Kingston Reif, “Russia Completes CFE Treaty Suspension,” ARMS CONTROL TODAY (Apr. 2015), <https://www.armscontrol.org/act/2015-04/news-briefs/russia-completes-cfe-treaty-suspension>, quoting Russian Foreign Minister Mikhail Ulyanov.

⁷⁵ ABM Withdrawal Diplomatic Note, *supra* note 52.

⁷⁶ “Russia is also developing a concerning anti-satellite capability related to a new satellite carrying a nuclear device that Russia is developing.” John D. Hill, *Statement Before the Senate Armed Services Committee Subcommittee on Strategic Forces on Fiscal Year 2025 National Security Space Programs* (May 21, 2024), https://www.armed-services.senate.gov/imo/media/doc/hill_statement1.pdf.

direct nexus between the United States' withdrawal from the Anti-Ballistic Missile Treaty and the "requirement for many new types of weapons, including (anti-satellite) weapons and munitions that could be placed in space"⁷⁷ including "weapons based on new physical principles."⁷⁸

All State Parties to the Outer Space Treaty are in a very different technology and security environment today compared to the time of their accession to the Treaty. Such changed circumstances have driven States to withdraw from other treaties in the past: the Outer Space Treaty is not immune from these dynamics. Further, as more aspects of the Outer Space Treaty are acknowledged as customary international law, fewer principles of outer space law require the Treaty as a source of law. The narrower the operation of the Treaty, the more imperiled it may be by changing circumstances. Article IV is chief among the rules of outer space law most reliant on the continued force and effect of the Outer Space Treaty. It also establishes the rule most akin to those arms control treaties from which States have withdrawn in recent history.

What then, should States do to protect principles of outer space law they hold dear?

V. FACING THE FUTURE

That place is strong with the Dark Side of the Force. A domain of evil it is. In you must go.

– Yoda

First, spacefaring States should be unflinchingly candid in their internal assessment of the origin of rules they believe to be legally binding. Scholarly and academic views about whether a rule is customary international law are afforded great weight, but such views are not dispositive. As the Nuclear Weapons Case demonstrates, State practice counter to an asserted international rule can

⁷⁷ Alexis Blanc et al., *Chinese and Russian Perceptions of and Responses to U.S. Military Activities in the Space Domain*, RAND CORP. RSCH. REPORT RRA-1835-1 (2022) (footnote omitted).

⁷⁸ A. V. Supryaga, *O Voynakh XXI Veka [On Wars of the 21st Century]*, *Voennaia Mysl' [Military Thought]*, No. 6, (2002), quoted in translation in Alexis Blanc et al., *Chinese and Russian Perceptions of and Responses to U.S. Military Activities in the Space Domain*, RAND CORP. RSCH. REPORT RRA-1835-1 (2022).

preclude recognition of *opinio juris* that the asserted rule is in fact customary international law, notwithstanding the existence of persuasive moral and academic arguments.⁷⁹

Some principles of the Outer Space Treaty undoubtedly enjoy recognition as customary international law, and would remain binding on all States regardless of their status as a State Party to the Treaty. For example, the Article I principle of free access and the Article II principle of non-appropriation, as applied to areas of void space through which satellites orbit the Earth, appears to be unassailable. State practice pre-dating the Outer Space Treaty tolerated the “overflight” by such satellites in Earth orbit, and this State practice has enjoyed near-universal⁸⁰ acquiescence by all

⁷⁹ Nuclear Weapons Case, *supra* note 50, ¶ 73.

⁸⁰ Even this most fundamental principle of space law is not settled beyond all dispute. Several equatorial States have asserted special rights with respect to areas of Geostationary Earth Orbit above their territory. *See generally* Thomas Gangale, *Who Owns the Geostationary Orbit*, 1 ANNALS AIR & SPACE L. 425 (2006). The equatorial States’ claims to sovereign rights over portions of the geostationary orbit, first articulated in the 1976 Bogotá Declaration, have never gained widespread recognition among major space-faring States. Bogotá Declaration of 1976, *available at* <https://bogotadeclaration.wordpress.com/declaration-of-1976/> (last visited Feb. 22, 2026). When ratifying space law treaty instruments relevant to Geostationary Earth Orbit, United States practice is to renew its reservations and declarations that accompanied its accession to the Constitution of the International Telecommunication Union, including one reservation explicitly objecting to the equatorial States’ claim: “(R)efERENCE in Article 44 of the Constitution to the ‘geographical situation of particular countries’ does not imply a recognition of claim to any preferential rights to the geostationary-satellite orbit.” *See e.g.*, S. TREATY DOC. NO. 108-28, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING 1995 REVISION OF THE RADIO REGULATIONS, WITH APPENDICES, SIGNED BY THE UNITED STATES AT GENEVA ON NOVEMBER 17, 1995 (THE “1995 REVISION”), TOGETHER WITH DECLARATIONS AND RESERVATIONS OF THE UNITED STATES AS CONTAINED IN THE FINAL ACTS OF THE WORLD RADIOCOMMUNICATION CONFERENCE (WRC-95). Dec 7, 2004, VIII, <https://www.congress.gov/108/cdoc/tdoc28/CDOC-108tdoc28.pdf>. Nevertheless, equatorial States have not entirely abandoned this claim. As recently as March 2024, Colombia acceded to the Outer Space Treaty with its own declaration accompanying ratification. Its declaration is quoted in the formal depositary action. U.S. DEPT OF STATE, *Depositary Notification Reference No. 2024-018, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies Done at London, Moscow, and Washington on January 27, 1967, Republic of Colombia: Ratification*, March 21, 2024, <https://www.state.gov/wp-content/uploads/2024/04/Space-Outer-Space-Treaty-Notification-of-Deposit-of-Instrument-Colombia-March-21-2024.pdf>. Colombia’s declaration refers to back to the Constitution of Colombia which, in defining the borders of Colombia, asserts that “[a]lso part of Colombia is . . . the segment of the geostationary orbit . . .” over Colombia. CONSTITUTION OF COLUMBIA, 1991 (rev. 2015) *translated by* Max Planck Institute with updates by the

States for more than 60 years with respect to thousands of satellites.⁸¹ State practice, *opinio juris*, and the physics of Earth orbit all work in harmony to support the principles of free access and non-appropriation regarding areas of void space in Earth orbit.

However, different rules of physics describe activities on large celestial bodies such as the Moon or other planets.⁸² There, the relevant principles of physics are more akin to those describing activities on the surface of the Earth, with allowances for gravity and atmospheric conditions that vary on different celestial bodies. Today Outer Space Treaty Article I guarantees free access to use and explore celestial bodies and Article II prohibits the national appropriation of areas of celestial bodies. A majority of scholars treat Outer Space Treaty Articles I and II in their entirety (i.e. as applied to both void space and celestial bodies) as declaratory of customary international law, though many allow the possibility of “any express provision to the contrary at some point in time emerg[ing] in the form of another *jus cogens* norm as part of the corpus of international law.”⁸³ Customary international law is characterized by stability, but not immutability. For the time being, human-directed

Comparative Constitutions Project, https://www.constituteproject.org/constitution/Columbia_2015 (last visited Feb. 25, 2026).

⁸¹ COLOGNE COMMENTARY, *supra* note 24, at 224-225. As of 1:53 A.M. June 26, 2024 (Universal Time Coordinated), the U.S. Space Force was tracking 10,200 active payloads in addition to many thousands more inactive space objects. Data derived from SPACE-TRACK.ORG, <https://www.space-track.org> (last visited Feb. 25, 2026).

⁸² LACHS, *supra* note 43, at 45. While viewing this as an issue of implementation rather than of jurisdiction, Professor Manfred Lachs conceded, “one cannot ignore the fact that celestial bodies by their very nature pose specific problems which require specific solutions.”

⁸³ COLOGNE COMMENTARY, *supra* note 24, at 253-254. The editors of the commentary view such a possibility as remote:

A subsidiary question may arise as to whether the emergence of a latter *jus cogens* norm, perhaps in another area of international law, that explicitly conflicts with the express terms of Article II supersedes non-appropriation as a *jus cogens* norm at international space law? Such an eventuality is (theoretically) possible, in relation to the principle of non-appropriation both under customary international law and the Outer Space Treaty itself. However, given the fundamental nature of non-appropriation as an integral element within the general framework of international space law, as well as the difficulty in determining the existence of a new *jus cogens* norm – particularly one that conflicts with an existing *jus cogens* norm – this possibility will in all likelihood remain within the realm of academic curiosity rather than reality, at least in the short to medium term.

activity on celestial bodies remains rare. It is still remarkable enough to be newsworthy when it occurs. Is this relative paucity of celestial body activity today sufficient to form a “general and consistent practice of States,”⁸⁴ particularly when the activity is not at sufficient scale to bring State interests into potential conflict such that “the provisions could have been violated?”⁸⁵

Viable arguments could be made either way. That is why it is important for States to have a well-considered position on which view they hold, and why. States have valid reasons to be circumspect in their public statements about which principles of treaty law they consider to be declaratory of customary international law. So long as the treaty endures, the fact of the treaty text suffices to describe the rule of international law in question. Moreover, by specifically affirming a treaty provision as declaratory of customary international law a State may constrain its own sovereign prerogatives in the future in the event of the treaty’s lapse. States have valid reasons to treat as confidential their views on such matters; however, that confidentiality should be a shield to protect the rigor and candor of internal deliberations on the limits of customary international law for outer space activities, not an obstacle to the deliberations occurring.

Second, this carefully considered position should guide States’ approaches to addressing law-related problems in international relations in space. It is one thing for a State to violate a treaty; the problem takes on a different character when a State seeks to escape a constraint through treaty withdrawal. Was North Korea’s withdrawal from the Nuclear Non-Proliferation Treaty ahead of their first nuclear test something that was anticipated by other States? Probably not: but the several United Nations Security Council Resolutions prohibiting North Korea from developing nuclear weapons were an especially prudent safeguard against that eventuality. Even if they merely restated an existing treaty obligation of North Korea under the Nuclear Non-Proliferation Treaty, the Security

⁸⁴ RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 9, § 102(2).

⁸⁵ COLOGNE COMMENTARY, *supra* note 24, at 348. This passage from the Cologne Commentary concerns Article IV, not Article II or the principle of non-appropriation as a rule of customary international law. However, the basic proposition I suggest here – that technology has not yet advanced to a point where legal challenges to principles of law regarding use of the Moon are feasible – is true of the Moon generally, regardless of the legal principle in question.

Council Resolutions preserved a legal basis for counter-proliferation actions regarding North Korea's nuclear program that might become necessary, regardless of any outcome of North Korea's withdrawal from the Nuclear Non-Proliferation Treaty.

Reports that Russia has a program to develop a space-based nuclear anti-satellite capability raise a more vexing problem. If Russia were to withdraw from the Outer Space Treaty, would deployment of such a weapon violate some other rule of law? The answer to that question may bear on the suitability of various response options States threatened by such a weapon might consider, and the legal basis for those response options.⁸⁶

Third, States making advances in the use and exploration of outer space should be intentional about advancing the "general and consistent practice of States" in ways that reinforce principles of space law they value.⁸⁷ States are already doing this in some ways. For example, Japanese commercial space company ispace launched its privately operated Hakuto-R lander to the Moon to obtain a specimen of lunar regolith and return that specimen to Earth, where it would be transferred to NASA pursuant to a commercial contract.⁸⁸ The contract structure was intentionally designed to set a precedent for the commercial sale of lunar resources. Although the first ispace mission was unsuccessful, the contract signaled the United States' intentions for State practice regarding lunar resources. It is only a matter of time before that intention becomes an example of State practice. The first commercial transaction of extracted lunar resources will not settle the question, but it will be a first step toward what may become a new general and consistent practice of States.

Finally, scholars and academics should continue to explore the hard question of which principles of outer space law exist only as a treaty obligation, and which have salience as rules of customary

⁸⁶ See e.g., *Legal and Practical Consequences of a Blockade of Cuba*, available at <https://irp.fas.org/agency/doj/olc/cuba.pdf>. This an unsigned, unaddressed memorandum was cited in *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, 25 Op. O.L.C. 188 (2001), and is illustrative of the nexus between the legal quality of an unfriendly act by another state and the legal options available to the United States.

⁸⁷ RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 9, § 102(2).

⁸⁸ *ispace Receives Interim Payment on Lunar Regolith Transfer Contract from NASA* (Sep. 22, 2022), <https://ispace-inc.com/news-en/?p=3696> (last visited Feb. 22, 2026).

international law. The writings of scholars and academics are afforded great weight in determining the existence and definition of rules of customary international law. Such writings are more persuasive when they identify the State practice that demonstrates a rule, show how such practice is “general and consistent” in quality, and explain the reasons why State practice reflects a sense of legal obligation (as opposed to considerations of a practical, operational or transactional character).⁸⁹

There is little appetite for new treaties governing outer space activities in the foreseeable future. The examples of recent treaty withdrawal or violation discussed herein highlight the importance of an understanding of customary international law that is firmly grounded in the gritty reality of State practice. Many principles of outer space law may be less settled as customary international law than we wish to admit. This is especially true with respect to activities on the Moon or other celestial bodies.

Scholarship on the extent and limits of customary international law in outer space should also wrestle with the legal and political dilemma of a treaty that is mostly declaratory of customary international law. The more provisions of the Outer Space Treaty are recognized as rules of customary international law, the narrower and more transactional the State interest which might prompt a State Party to withdraw from the Treaty. If Article IV is one of the few aspects of the Treaty not declaratory of customary international law, then States contemplating military activities in space may find the Treaty as a whole helpful or troublesome based on their military judgment of the implications of Article IV. The history of State withdrawal from treaties of a fundamentally arms control character caution against assuming the perpetual effect of such treaties.

⁸⁹ COLOGNE COMMENTARY, *supra* note 24, at 161. “One should be careful in assuming too early the existence of customary international law for outer space activities.”

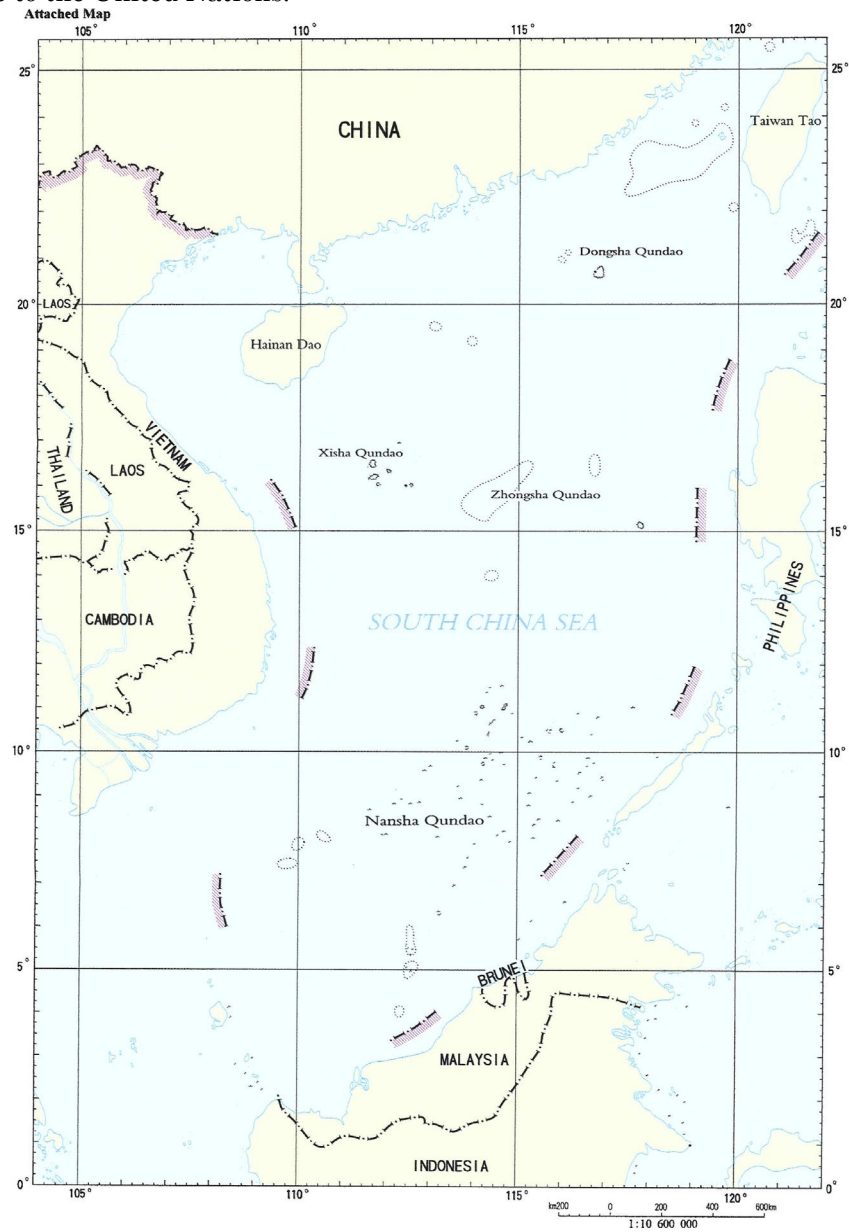
VI. CONCLUSION

Never tell me the odds.

– Han Solo

Hopefully you will accept this article's invitation to thoughtfully consider which aspects of outer space law are customary international law, and which aspects are only the products of national agreement to a legally binding treaty. Although there is no imminent prospect of a State Party withdrawing from the Outer Space Treaty, the political changes that could motivate a State Party to announce such withdrawal under Article XVI could occur much faster than the process by which State practice and *opinio juris* harden into customary international law. We should do our thinking about the customary international law of outer space now, while there is still near-universal acceptance and adherence to the Outer Space Treaty. And lest any of us become too sure – too *absolutely* sure – that our view on the matter is right, we should remain mindful of Obi Wan Kenobi's admonition, "only a Sith deals in absolutes."

Figure: The Nine-Dash Line, as represented by China in its 2009 note verbale to the United Nations.⁹⁰



⁹⁰ China Note Verbale, *supra* note 33.