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ANZSIL Perspective

Editorial

Tēnā koutou, yumalundi, and welcome to this edition of ANZSIL Perspectives which follows the wonderful ANZSIL annual conference. I hope you all found the conference enjoyable and enriching. I hear International Law Barbie had a fine time! This year's conference was themed around the question of international law's resilience. Professors Guy Fiti Sinclair and Surabhi Ranganathan provided two excellent keynote lectures, and an incredible twenty-two panels engaged in insightful and fruitful conversation about all manner of international legal issues.

This edition of ANZSIL Perspective features Dr Penelope Ridings on the International Law Commission's (ILC) launch of a new topic: 'Settlement of Disputes to which International Organisations are Party'. Her insight makes a valuable contribution to understanding the academic research and the practical issues arising. We also have a very interesting piece by Dr. Ricky Lee analysing Saudi Arabia's withdrawal from the Moon Agreement in favour of the Artemis Accords. A huge thank you to our review team for their thoughtful reviews. I like to think we do not have a notorioius "reviewer 2". Our editorial team has identified notable legal developments over the last month which include the following:

- In the armed conflict space, Russia's war of aggression against Ukraine continues—but the situation has been complicated by internal unrest and complex questions surrounding the status of the Wagner Group. Also in the humanitarian and disarmament space, the OPCW recently confirmed that all declared stockpiles of chemical weapons have been destroyed. Confirmation that cluster munitions have been provided to Ukraine has also caused serious concern, as the use of such munitions is challenging to reconcile with the principle of distinction
- In international trade, the European Union-New Zealand FTA has been officially concluded, easing access to a major international market and protecting the interests of New Zealand producers. Negotiations for an European Union-Australian FTA are ongoing; many chapters of that FTA have already been concluded. For all three actors, these agreements

ANZSIL Perspective acknowledges the Traditional Owners of Country throughout Australia and recognises their continuing connection to lands, waters and communities. We pay our respect to Aboriginal and Torres Strait Islander cultures, and to their Elders past, present and emerging.

ANZSIL Perspective acknowledges ngā iwi Māori as the tangata whenua of Aotearoa New Zealand, and affirms its ongoing commitment to the principles and spirit of Te Tiriti o Waitangi.

represent an ambitious and complex balancing of several economic and legal interests.

- International courts and tribunals have seen an increased rate of activity in recent weeks. The ITLOS recently released all received submissions relating to Advisory Opinion 31, on sea level rise and climate change; these will undoubtedly prove of interest not only for environmental lawyers, but also for practitioners and scholars interested in how states understand not only the jurisdictional competence of the tribunal but also sources of international law.
- At the ICJ, proceedings have recently been commenced addressing issues ranging from the prohibition of torture, to state immunities, to the Montreal Convention. On Thursday, 13 July, the ICJ released its decision in *Continental Shelf (Nicaragua v Colombia)*—a ruling which identifies a customary rule for determining the outer limits of continental shelves, and which has already been the subject of scrutiny. The ICJ also recently released a note detailing its procedure for advisory proceedings, and determined on 9 June that the declarations of intervention filed by third states as part of the *Ukraine v Russia* proceedings—except for the declaration of the United States—are admissible.
- On the topic of international disputes, the International Law Commission has commenced its work on settlement of disputes to which international organisations are party. This work remains in its early stages. Dr. Penelope Ridings, member of the International Law Commission, has provided an insightful piece in this issue of *ANZSIL Perspectives* analysing the ILC's work to date on the topic, as well as its potential implications for international organisations hosted in the Pacific region.
- Finally, the relationship between law and global common spaces has also seen recent developments. The Council of the International Seabed Authority is continuing its discussion of the draft regulations on exploitation of mineral resources in the Area, an issue which remains highly controversial but of significant importance to many Pacific island nations. The regulation of activities in outer space also continues to develop: in the last two months Spain, Ecuador and India have all signed on to the Artemis Accords, which links back to our Perspective from Dr Ricky Lee.

There is such a lot to think about! As always, ANZSIL Perspective welcomes expert contributions on any of these issues, or any other topics presently testing international law, whether those contributions come from our members or beyond. We warmly invite you to submit your perspectives on public international, private international, and domestic-international interface legal matters. ANZSIL Perspectives are conversational in tone and designed to encourage debate, so we also would be glad to receive any responses you may have to pieces published. We look forward to receiving submissions from a diverse range of scholars, including new and emerging authors.

Felicity Gerry KC (Editor).

Perspectives

Settlement of Disputes to which International Organisations are a Party: A Spotlight on the ILC and its Relevance to the Pacific

Penelope Ridings[1]

Photo by Mathias Reding via Unsplash

The International Law Commission (ILC) has launched a new topic: 'Settlement of Disputes to which International Organisations are Party'. This complements its 2011 draft articles on the responsibility of international organisations and recognises that international organisations may incur responsibility but there may be no accountability without recourse to appropriate dispute settlement mechanisms. It also follows previous ILC work on legal issues involving international organisations. ILC draft articles led to a 1975 convention addressing diplomatic relations between States and international organisations and a 1986 convention on treaties with international organisations, neither of which is in force. Nevertheless, the selection of the topic acknowledges the reality that as the operational and regulatory activities of international organisations increase, there is an enhanced likelihood that the actions of an international organisation will be challenged, particularly by private parties. A recent claim against NATO for non-payment under a long-term contract with an Afghan contractor is a case in point. The preparation by the ILC of guidelines, rather than draft articles, should provide practical guidance to States and international organisations on best practices for addressing disputes to which international organisations are party. Whether it will do so may well depend on the extent and

[1] The views expressed are those of the author alone and do not represent those of any member of the International Law Commission.

nature of input from States and international organisations, including those hosted by Australia, New Zealand and Pacific States.

Discussions during the first session of the ILC's quinquennium 2023-2027 were based on the First Report of the Special Rapporteur, Professor August Reinisch, which was exploratory in nature. They resulted in the provisional adoption of draft guidelines on scope and definitions. The First Report is intended to be followed by Reports reviewing the practice of the settlement of disputes to which international organisations are party.

The topic raises some issues which are interesting both from an academic and a practical perspective. One of these is the interrelationship between the initiation of disputes with international organisations and the jurisdictional immunities of those organisations, particularly in relation to disputes with private parties. Such jurisdictional immunities have led to the perceived absence of accountability of international organisations in situations such as the outbreak of cholera in Haiti. The need to provide effective judicial remedies has been an element in the consideration of these issues by the International Court of Justice (ICJ), as well as by the European Court of Human Rights. It is also a core element of the privileges and immunities of the United Nations and its Specialised Agencies.

The precise scope of the topic will be refined in future, particularly its application to private law disputes. There had been support in the 6th Committee of the United Nations General Assembly to include disputes of a private law character within the topic. Such disputes are of practical importance and often have implications for host states. However, there is no clarity yet on exactly what disputes should be covered in the topic. At its broadest scope, the guidelines could cover all disputes to which international organisations are parties, including, potentially, those that are subject to the jurisdiction of domestic courts of the host State. A narrower scope could include disputes of a contractual or tortious nature, but not staffing matters. This is consistent with the 2016 syllabus, which suggested that the topic not cover disputes involving the staff of international organisations ("international administrative law"), for example matters subject to the jurisdiction of the Administrative Tribunal of the International Labour Organisation. A further narrowing would be to include only those disputes which raise international legal issues, including issues relating to jurisdictional immunities. It might be said that the broader the scope of the topic, the greater the practical application that the guidelines may have. However, this has to be balanced by the deference which may be owed to domestic courts of a host State which must decide cases brought before them involving disputes between private parties and international organisations.

A second relevant issue is one that goes to the heart of how to define an international organisation to which the ILC guidelines will apply. We all know what we mean by an international organisation according to what it is not: it is not a non-government organisation constituted under domestic laws, nor a transnational corporation. An international organisation also has the capacity to act on the international plane and has international legal personality. In the past the ILC has sought to define an international organisation: first in the Vienna Convention on the Law of Treaties between States and International Organisations as an 'inter-governmental

organisation', and then in 2011 when it agreed a more precise definition for the purposes of the draft articles on the responsibility of international organisations.

At its recent session, the ILC Drafting Committee developed an alternative definition, based on the proposal of the Special Rapporteur, which has four elements. Three of these are found in the 2011 definition: possessing its own international legal personality; established by a treaty or other instrument governed by international law; and that may include as members, in addition to States, other entities. To these have been added the element that the organisation "has at least one organ capable of expressing a will distinct from that of its members".

In part this definition seeks to respond to modern conceptions of the theory of international organisations and international legal personality, on which there has been much scholarly debate. The functionalist theory which has dominated discourse on international organisations throughout much of the last century was based on the idea that the powers of an international organisation are conferred on it by its members and are limited to those necessary for the organisation to fulfil the functions set out in its constituent instrument. However, this theory has been heavily criticized, particularly by Jan Klabbers as it does not sufficiently explain the relationship between international organisations and the rest of the world. Neither does it account for the need for legal constraints which operate to ensure the accountability of international organisations to external stakeholders, a point made by Anne Peters. This is highly relevant for a topic which seeks to address disputes between international organisations and third parties, either States, other international organisations, or private parties.

Scholars also continue to debate the legal basis and effects of the 'international legal personality' possessed by international organisations and referenced by the ICJ in the *Reparations Advisory Opinion*. As recently explained by Fernando Lusa Bordin, different scholars have debated the "will theory" according to which at least one organ of the international organisation ought to have a 'will' that is distinct from that of its members and the "objective personality theory", according to which an international organisation, as a subject of international law, possesses 'objective legal personality' in the sense that it must be treated as a subject of international law by any other subject of international law. While the 'will' theory has been generally adopted, the latter theory has also found its way into some mainstream texts.

These issues are not only of academic interest but also have practical application. There are international organisations considered by its members to be an expression of their cooperative and collective will, where decisions are taken by consensus and the organs carry out the directions of its members. The ILC Drafting Committee has made it clear that the new definition has the same scope as the 2011 definition. There is no intention, therefore, to exclude such international organisations from the ambit of the topic. Nevertheless, the views of States will be important in ensuring that there is no perceived gap in the coverage of international organisations that are within the scope of the topic.

The next stage for the topic is for the Special Rapporteur to prepare commentaries on the draft guidelines, which will be considered by the ILC in July 2023 and by the 6th Committee later in 2023. This will provide an opportunity for States to express their

views on the draft guidelines. States and international organisations have also been requested to provide answers to a 2022 questionnaire which will assist the Secretariat to prepare a memorandum on the practice of States and international organisations relevant to future work on the topic. The Special Rapporteur will use this as a basis for his review and analysis of actual disputes between international organisations and other parties.

The ILC topic has the potential to be relevant to the operations of international organisations, including those based in the Pacific region. It will be important to ensure that these perspectives are brought to bear, not only so that the practice of international organisations hosted by Australia, New Zealand and Pacific States are reflected in the ILC's guidelines, but also so that the ILC's work adds value to the framework of international organisations in our region.

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Saudi Arabia's Withdrawal from the Moon Agreement

Ricky J Lee[2]

Photo by NASA via Unsplash

On 5 January 2023, Saudi Arabia gave notice to the United Nations of its withdrawal from the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the "*Moon Agreement*"), to take effect on 5 January 2024. This marks the first time any State has withdrawn from any of the five "United Nations Space Treaties", the most widely accepted of which is the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the "*Outer Space Treaty*").

As the withdrawal follows Saudi Arabia's signing of the Artemis Accords with the United States, there is speculation that the withdrawal is prompted by a perceived incompatibility between the Moon Agreement and the Artemis Accords. Since Australia and Mexico are signatories to the Artemis Accords and also Parties to the Moon Agreement, it is prudent to explore this further.

The Moon Agreement

The Moon Agreement was adopted in 1979 to provide (eventually) a legal framework for the utilisation and exploitation of resources on the Moon and other celestial bodies. With 18 States Parties, some commentators have found this anaemic compared with the uptake of the other U.N. Space Treaties; even though this is a treaty relating to the Moon, which only a handful of States have reached by uncrewed spacecraft, only one sent humans there, and none have begun mineral prospecting.

The Moon Agreement does not establish a regulatory framework directly; Article 11(5) provides that the Parties are to meet and formulate this framework "as such exploitation is about to be feasible". It is not surprising that many States adopt a wait-and-see attitude, both in terms of the framework eventually created as well as the

[2] The statements, views, and opinions given in this article are those of the author personally and do not reflect necessarily any belief, view, opinion, or position held or adopted by any other person or entity with which the author may be associated at any time in any capacity.

technological innovation needed. After all, the International Seabed Authority was created in 1994 under the U.N. Convention on the Law of the Sea ("*UNCLOS*") to regulate deep seabed mining and yet, nearly 30 years later, no mining is yet to occur.

Article 11(7) of the Moon Agreement commits the proposed regulatory framework to:

- the orderly and safe development of space resources;
- the rational management of these resources;
- expand opportunities in the use of those resources; and
- the equitable sharing by all States Parties in the benefits derived from those resources.

Moratorium under the Moon Agreement?

Some commentators have suggest that, as States are obliged under Article 11(5) to implement the regulatory framework when space mining becomes feasible, no space mining can occur until the framework is in place – in effect, that there is a moratorium until this happens. This is perhaps supported in the timing of the implementation of the deep seabed mining regime under UNCLOS, for there was a great deal of urgency in 1993 to (re)negotiate the features of this framework before UNCLOS entered into force in 1994.

One difficulty with the proposition of a moratorium is Article 11(8) of the Moon Agreement, which requires all space resources activities to be conducted consistently with the principles for the future framework prescribed in Article 11(7) – a redundant provision if there is indeed a moratorium. Further, Part XI of UNCLOS required the regulatory regime to be created as and when it entered into force and not on a later date. In any event, the *travaux préparatoires* of the Moon Agreement suggest pointedly that the agreed *quid pro quo* for deferring the creation of the regulatory framework was that there was to be no moratorium in the meantime.

Artemis Accords

In 2020, the Artemis Accords was signed by the space agencies of 8 States, including Australia. By 1 June 2023, the space agencies of 25 States have signed the Artemis Accords. The Artemis Accords is a bilateral non-binding agreement between the U.S. and the other signatories, setting out the rules and principles relating to activities on the Moon and Mars as well as participation in the U.S. Artemis Program.

Section 10 of the Artemis Accords states that resource extraction and utilisation activities are consistent with the Outer Space Treaty, and Section 11 sets out how "safety zones" would be established around areas on the Moon to conduct these activities. Some commentators and States have based their criticisms on these two provisions and it is prudent to consider them, albeit briefly, here.

Some suggested that the Artemis Accords is an U.S.-centric rewriting of international law. This opinion must be balanced with the fact that the Artemis Accords have attained 25 signatories in 3 years, all spacefaring States, while the Moon Agreement has 18 Parties after 44 years. Meanwhile, any other space power, e.g. China, India, or the Russian Federation, can adopt similar instruments if they can convince others to sign; indeed, China and Russia have signed such a bilateral protocol, while India is signing the Artemis Accords. As for rewriting the law, as both Sections 10 and 11

reinforce consistency and compliance with the Outer Space Treaty, this is hardly a radical rewriting of existing space law.

Arguably the most controversial aspect of the Artemis Accords is that "safety zones" are no more than a classic flag-planting land grab. Even if the legal basis for these safety zones is questionable, this is hardly the first example of exclusive rights being granted in space; for decades the International Telecommunication Union has allocated exclusive orbital slots on the geostationary orbit. Further, the concept of safety zones is also not new – The Hague Space Resources Governance Working Group suggested the same in Article 11 of its so-called "Building Blocks" (and stated specifically that they are compatible with the Outer Space Treaty). It is curious that not even a murmur of objection was raised by some of those same critics as they voiced their support when the Building Blocks were presented to the U.N. Committee on the Peaceful Uses of Outer Space and its Legal Subcommittee.

What Do Australia, Mexico, and Saudi Arabia Have in Common?

Australia, Mexico, and Saudi Arabia are the only overlapping parties to both the Artemis Accords and the Moon Agreement. There has been some unfounded speculation that Saudi Arabia's withdrawal from the Moon Agreement was prompted by its incompatibility with the Artemis Accords, yet none has pointed to any incompatible provision between the two instruments. Although it is tempting to dismiss such concerns on grounds such as the non-binding nature of the Artemis Accords or that it is a subsequent treaty to the Moon Agreement over the same subject matter, neither of them provides a complete answer. A State cannot sign a later inconsistent, albeit non-binding, agreement and assert that it continues to observe the earlier treaty in good faith. Further, as a bilateral instrument, the Artemis Accords is not a subsequent treaty *vis-à-vis* the Moon Agreement when the U.S. is not party to the Moon Agreement, and in any event only 3 of the 18 States Parties to the Moon Agreement have signed the Artemis Accords.

Accordingly, one must turn to the substance of the purported inconsistencies.

There are perhaps two potential areas of conflict between them. The question of a moratorium is discussed and dismissed above. The other is the requirement in Article 11(7) of the Moon Agreement for the equitable sharing in the benefits derived from space resources. However, a deeper consideration of the provisions would show that no such conflict exists. First, the Artemis Accords is focused exclusively on the means of carrying out space activities (each being an *obligation de moyens*), while the equitable sharing principle relates to the ends derived (an *obligation de résultat*). Accordingly, all a State has to do to comply with both is to carry out its activities consistently with the Artemis Accords, and then share any benefits derived equitably as per the Moon Agreement.

Second, even if the Moon Agreement does not exist, all relevant States are already bound under Article I of the Outer Space Treaty to carry out all uses of the Moon and other celestial bodies "for the benefit and in the interest of all countries". Therefore it is reasonable to suggest that the equitable sharing of benefits derived from space activities is implied already; yet commercial activities in outer space have taken place for decades without any international levy or mandatory profit-sharing. If anything, the fact that space resources would either be utilised *in situ* to further space exploration or made available on international commodity markets, already gives a greater public good than commercial remote sensing or satellite broadband ever did.

Third, Saudi Arabia could have called for a Conference of Parties under Article 18 of the Moon Agreement, either unilaterally or jointly with Australia and Mexico. At such a conference, any purported incompatibility can be resolved or waived, or even a compatible framework under the Moon Agreement could have been negotiated.

Fourth, it is important to consider all four requirements of Article 11(7) of the Moon Agreement. The orderly and safe development and rational management of space resources, and the expansion of opportunities in their use, are precisely what the Artemis Accords offers. In this light, not only are the Artemis Accords compatible with the Moon Agreement, they are in fact in furtherance of the objects of the Moon Agreement.

Playing the Speculation Game

It is very tempting to speculate as to the reason behind Saudi Arabia's withdrawal from the Moon Agreement. If compatibility with the Artemis Accords is indeed the issue, Saudi Arabia would have likely said so – as it would help minimise the usual negative perception of any withdrawal from any treaty – though perhaps it refrained out of diplomatic regard for Australia and Mexico. It is less probably to be a matter of external pressure from the U.S. or other signatories, for it would be surprising that Australia can remain party to the Moon Agreement as an original signatory and a steadfast U.S. ally, while Saudi Arabia is prevailed upon to withdraw. Further, China's ambitions for the Moon cannot be a factor when Saudi Arabia has already declared itself firmly in the U.S. camp by signing the Artemis Accords and, in any event, China is not party to the Moon Agreement.

In the writer's respectful (and totally unfounded) contention, it is more likely that Saudi Arabia withdrew from the Moon Agreement because it felt ready to join the league of major space powers, none of which are party to the Moon Agreement. In other words, it is a declaration of its maturity as a major space power and its readiness to be in the Premier League to leave behind the minor players and non-players in the lower divisions of the Moon Agreement. Such reasoning is also more fitting with the Saudi general approach to treaties that is based more on *realpolitik* and policy intent than legal doctrine or principle.

In a world increasingly driven by the emotional and the superficial, the role of international lawyers must remain the same – to review and analyse carefully the relevant legal provisions and principles in the wider context of the whole instruments and where they sit in the entire body of the relevant law, and then give one's opinion built on such solid foundations. The question of the compatibility between the Artemis Accords and the Moon Agreement is no different and can only be resolved after such an analytical exercise has taken place, without relying too much on unfounded speculation of the possible motives behind the unilateral actions of individual States.

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