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CHINA'S ILLEGAL AIRSPACE CLAIMS IN THE SOUTH CHINA SEA: WHY AND HOW THE INTERNATIONAL COMMUNITY SHOULD PUSH BACK

LCDR Gregory J. Gianoni, JAGC, USN[*]

"We must be free not because we claim freedom,
but because we practice it."
- William Faulkner

I. INTRODUCTION

There are myriad categories of tension between the People's Republic of China [hereinafter "China"][1] and the United States including technology,[2] standards development,[3] intellectual property,[4] and social influence[5] – but none more dangerous than the two powers' conflicting legal positions regarding the

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[1] For the purpose of the article "China" refers to the People's Republic of China and not the Republic of China – Taiwan.

[2] Shiyin Chen et al., *Secretive Chinese Committee Draws Up List to Replace U.S. Tech*, BLOOMBERG NEWS (Nov. 16, 2021), https://www.bloomberg.com/news /articles/2021-11-16/secretive-chinese-committee-draws-up-list-to-replace-u-s-tech#xj4y 7vzkg (reporting that China is accelerating plans to compete in cloud and semiconductor markets); Kathrin Hille et al., *Huawei v the U.S.: Trump Risks a Tech Cold War*, FIN. TIMES (May 24, 2019), https://www.ft.com/content/78ffbf36-7e0a-11e9-81d2-f785092ab560 (reporting the U.S. efforts to limit the ability of Huawei to buy from suppliers whom rely on American technology, implicating broader concerns with semiconductor markets and trade generally).

[3] Matt Sheehan et al., *Three Takeaways From China's New Standards Strategy*, CARNEGIE: ENDOWMENT FOR INT'L PEACE (Oct. 28, 2021), https://carnegieendowment.org/2021/10/28/three-takeaways-from-china-s-new-standards-strategy-pub-85678 (reporting China's national strategy related to technical standards, targeted at growing the role of Chinese participation in standards development organizations in order to wield greater influence and distort the neutrality of decisions, forcing Chinese standards on the rest of the world); Alexi Drew, *The Critical Geopolitics of Standards Setting*, RUSI: TRANSATLANTIC DIALOGUE ON CHINA (May 7, 2021), https://rusi.org/explore-our-research/projects/transatlantic-dialogue-china/critical-geopolitics-standards-setting (arguing that technical standards is a source of economic, political, and normative power where Chinese private industry actors with centrally directed strategic motivations are able to leverage flaws in the system).

[4] Dennis C. Blair & Jon M. Huntsman Jr., *IP Commission 2021 Review: Updated Recommendations*, COMM'N ON THE THEFT OF AM. INTELL. PROP. (Mar. 2021) (outlining the challenge of intellectual property theft and proposing some ways in which the United States may affect protection through speed, enforcement, and informing U.S. businesses about threats to intellectual property abroad), https://www.nbr.org/wp-content/uploads/pdfs/publications/ip_commission_2021_recommendations_mar2021.pdf.

[5] Aynne Kokas & Oriana Skylar Mastro, *The Soft War That America Is Losing*, AUSTL. FIN. REV. (Jan. 15, 2021) (arguing that the United States is losing "soft power" which is "the ability to get what you want through persuasion or attraction in the forms of culture, values, and policies").

airspace in the South China Sea. For years, the United States has engaged in freedom of navigation operations ("FONOPs") to contest China's excessive maritime and airspace claims in the South China Sea, relying upon customary international law and the United Nations Convention on the Law of the Sea ("UNCLOS") for authority.[6] The United States defines excessive maritime claims as, "unlawful attempts by coastal States to restrict the rights and freedoms of navigation and overflight as well as other lawful uses of the sea."[7] Such claims may come in the form of States' laws, regulations, or other declarations.[8] One purpose of FONOPs is to evidence noncompliance and disagreement with the excessive claims to prevent them from inadvertently manifesting into customary international law through silent acquiescence.[9] The United States is sometimes accompanied by coalition partners in FONOPs in and around the Taiwan Strait, and other areas of the South China Sea.[10] By exhibiting overt objections through FONOPs as a multinational concerted force, the United States and its partners are able to deliver a more powerful message to the politic of China – disagreement with China's excessive claims.

Over the past decade China has claimed increasingly excessive airspace, required aircraft navigational requirements unsupported by international law, and harassed foreign military aircraft lawfully flying in and around the South China Sea. This article analyzes China's airspace claims and provides recommendations on how the international community can and perhaps should respond. Section II explains why the South China Sea coastal States and the United States are interested in the South China Sea, highlighting the economic riches and strategic importance of the waterway. Section III provides a snapshot of international confrontations in the South China Sea over

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[6] DEP'T OF DEF., ANNUAL FREEDOM OF NAVIGATION REPORT FISCAL YEAR 2021 2 (2021) (declaring that "the United States will continue to challenge such unlawful claims. The United States will uphold the rights, freedoms, and unlawful uses of the sea for the benefit of all nations—and will stand with like-minded partners doing the same"); Arjun Gupta, *The South China Sea: The Nexus of Political and Legal Disputes*, 28 SUPREMO AMICUS, Jan. 2022, at 1, 3, https://supremoamicus.org/wp-content/uploads/2022/01/Arjun-Gupta.pdf; Jon Marek, *US-China International Law Disputes in the South China Sea*, WILD BLUE YONDER ONLINE J. (July 9, 2021), https://www.airuniversity.af.edu/Wild-Blue-Yonder/Article-Display/Article/ 2685294/; Nguyen Dang & Lan Anh, China's Maritime Coercive Diplomacy in the South China Sea Since 2011 155 (Jan. 18, 2022) (Ph.D. dissertation, University of Hamburg) (citing various FONOPs that the U.S. had conducted over the years); *China Fires Aircraft-Carrier Killer Missile in Warning to U.S.*, AL JAZEERA: ECON. (Aug. 27, 2020), https://aljazeera.com/economy/2020/8/27/china-fires-aircraft-carrier-killer-missile-in-warning-to-us [hereinafter *China Fires Aircraft-Carrier Killer Missile*].

[7] DEP'T OF DEF., ANNUAL FREEDOM OF NAVIGATION REPORT, *supra* note 6, at 2 (internal quotations omitted).

[8] *Id.* at 2.

[9] *Id.*

[10] Liza Lin & James T. Areddy, *Record Chinese Aircraft Sorties Near Taiwan Prompt U.S. Warning*, WALL ST. J. (Oct. 3, 2021), https://www.wsj.com/articles/record-chinese-aircraft-sorties-near-taiwan-prompt-u-s-warning-11633282326; *see* Yimou Lee & Ben Blanchard, *Taiwan Says It Needs to be Alert to 'Over the Top' Military Activities by China*, REUTERS (Oct. 5, 2021), https://www.reuters.com/world/asia-pacific/taiwan-says-needs-be-alert-chinas-military-activities-2021-10-05/ ("Japanese, U.S., British, Dutch, Canadian and New Zealand navies held joint drills near Okinawa").

the past twenty years, starting with a midair collision in 2001 between China and the United States. Section IV synthesizes the legal backdrop for national and international airspace in order to understand the issues presented. Sections V and VI discuss China's and the United States' legal and policy positions on the South China Sea, respectively; China asserting it has historic rights based upon customary international law, and the United States asserting that UNCLOS controls the maritime legal issues within the four corners of the agreement. Section VII is a legal analysis of China's claims in the South China Sea based upon UNCLOS and treaty interpretations pursuant to the Vienna Convention on the Law of Treaties, ultimately concluding that China's excessive airspace claims are unlawful. Section VIII provides suggestions as to how the international community can effectively object to China's claims including strategic messaging, overflight, and surface operations by operating warships in China's claimed territorial seas to object to the airspace above. Section IX juxtaposes the risks associated with increased interactions or continued acquiescence by the international community, concluding that opposing China's claims is required to avoid erosion of international law. Finally, Section X concludes that the best course of action is to openly object to China's claims and use public affairs messaging to mitigate any potential escalation from increasingly overt and potentially escalatory, but necessary, operations.

II. THE IMPORTANCE OF THE SOUTH CHINA SEA

The South China Sea is similar to the East China Sea in that both are congested with civil aviation, and subject to complex and conflicting territorial and maritime claims between the coastal nations fueled by the Seas' strategic importance.[11] The South China Sea is made up of approximately 200 land features including islets, rocks, and reefs, mostly incompatible with human habitation.[12] There are four major groups of land features in the South China Sea: the Paracel Islands (Xisha Qundao); Pratas Islands (Dongsha Qundao); Scarborough Shoal and Macclesfield Bank (Zhongsha Qundao) which are all below sea level; and, the Spratly Islands (Nansha Qundao) which are the most contested due to their proximate location to strategic shipping lanes.[13] In addition to having strategic significance, these waters are desirable for economic and political reasons.[14]

The South China Sea is a strategic "maritime hub linking two oceans and three continents."[15] Nearly $3.4 trillion of trade—one-third of global trade, over 40% of China's total trade, and over 60% of China's maritime trade—

[11] *See generally* Su Jinyuan, *The East China Sea Air Defense Identification Zone and International Law*, 14 CHINESE J. INT'L L. 271, 300 (2015).

[12] Gupta, *supra* note 6, at 3.

[13] *Id.* at 13.

[14] *Id.* at 19.

[15] JINMING LI, CHINA'S MARITIME BOUNDARIES IN THE SOUTH CHINA SEA: HISTORICAL AND INTERNATIONAL LAW PERSPECTIVES 3 (2021).

travels through the South China Sea, lending credibility to the belief that the commercial routes are the primary motivation for control.[16] In addition, the waters are flush with natural resources including fertile fishing grounds, natural gas, and oil.[17] Moreover, it has several strategic choke-points including the Strait of Malacca, Singapore Strait, Sunda Strait, and Lombok Strait.[18] These choke-points are strategically important because they are essential to military operations, logistics, expediency of global transit, and access during armed conflict. For example, the United States transits between the Pacific and Indian oceans using these sea-lanes, making the South China Sea an important military artery.[19]

The regional territories directly affected by China's excessive claims are Brunei, Malaysia, Taiwan, Vietnam, and the Philippines. Indonesia, as well as Japan, North Korea, and South Korea, have a regional stake although they are not in competition for sovereignty or control. China believes—without specifically identifying the United States—that "some forces" outside the region wish the South China Sea to fall into disorder resulting in destabilization.[20] To the contrary, the United States' interest in these disputes is unrelated to ultimate sovereignty, but rather narrowly focused on a peaceful and lawful resolution consistent with international law. A peaceful resolution is imperative for many reasons: avoiding international armed conflict; fair disposition of the plethora of economic resources which will benefit and stabilize the region; and, peaceful enforcement of treaties and customary international law proving that world powers are capable of effective diplomacy. The United States would not benefit from disorder and destabilization in the Pacific. Understanding the legal claims enlightens each State's motivations.

China claims to have sovereign control over most of the South China Sea, while the United States and its allies insist on freedom of navigation and overflight in international waters and airspace respectively.[21] Along with competing interests come provocative interactions, often in the airspace over the

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[16] Gupta, *supra* note 6, at 6; *see also* Marek, *supra* note 6 (commenting on the global concerns related to the 3.4 trillion dollar trade route); Dang & Ahn, *supra* note 6, at 34 (stating that 3.4 trillion USD passed through in 2016 – over 60% of China's maritime trade transited the South China Sea in 2016).

[17] Gupta, *supra* note 6, at 2; Jim Sciutto, *Exclusive: China Warns U.S. Surveillance Plane*, CNN POL. (Sept. 15, 2015), https://www.cnn.com/2015/05/20/politics/south-china-sea-navy-flight; Dang & Ahn, *supra* note 6, at 34.

[18] LI, *supra* note 15, at 3.

[19] Gupta, *supra* note 6, at 6.

[20] *Wang Yi Speaks with Vietnamese Foreign Minister Bui Thanh Son on the Phone*, MINISTRY FOREIGN AFF.'S OF THE PEOPLE'S REPUBLIC OF CHINA (Apr. 14, 2022), https://www.mfa.gov.cn/eng/zxxx_662805/202204/t20220415_10668407.html [hereinafter *Wang Yi Speaks with Vietnamese Foreign Minister*] (documenting a discussion between State Councilor and Foreign Minister Wang Yi of the People's Republic of China, and Vietnamese Foreign Minister Bui Thanh Son – noting that both China and Vietnam are socialist countries).

[21] Jacob Bentley-York, *Australia Says China Warship Fired Laser at its Patrol Plane*, THE SUN: U.S. NEWS (Feb. 19, 2022), https://www.the-sun.com/news/4727202/chinese-destroyer-fires-laser-australian-warplane/; *China Fires Aircraft-Carrier Killer Missile*, *supra* note 6.

contested areas. In general, military aircraft are often challenged or escorted by another nation's military aircraft. The People's Liberation Army (PLA), China's military, maintains many military aircraft including fighters, bombers, special mission aircraft, and unmanned aerial vehicles.[22] Displaying their military bravado, China's forces regularly challenge U.S. aircraft operating lawfully in international airspace over the South China Sea.[23] China shakes its finger at the United States for *inventing* the concept of "international waters," and sending warships and military aircraft to "flex its muscles around the world,"[24] a quite hypocritical position considering China's use of military vessels and aircraft throughout the region,[25] and its claim to land features located wholly within other State's exclusive economic zones.

In order to fully clutch the gravity of China's airspace claims, we must first examine the perilous conflicts and confrontations that have occurred over the past couple decades, highlighting several of the more aggressive interactions.

III. BRIEF HISTORICAL REVIEW OF AIRSPACE INTERACTIONS

A. Operational Picture

China claims that it "always adheres to peaceful settlement of disputes in the South China Sea through negotiation and consultation . . . in accordance with international law."[26] For years, however, China has been attempting to

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[22] OFF. OF SEC'Y OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 55-57 (2021).

[23] Associated Press, *The U.S. says Chinese intercept could have caused an air collision*, NAT'L PUB. RADIO (Dec. 30, 2022), https://www.npr.org/2022/12/30/1146170609/u-s-says-chinese-intercept-could-have-caused-air-collision.

[24] Dep't Boundary & Ocean Aff's, *China Stays Committed to Peace, Stability and Order in the South China Sea*, MINISTRY FOREIGN AFF.'S CHINA (Mar. 23, 2022), https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/bianhaisi_eng_665278/plpbo/202204/t20220409_10666104.html.

[25] *See, e.g.*, John Feng, *China Air Force Warns Away Suspected U.S. Aircraft on Patrol Near Taiwan*, NEWSWEEK (Sept. 7, 2021), https://www.newsweek.com/china-air-force-warns-away-suspected-us-aircraft-patrol-near-taiwan-1626542; Lyric Li & Christian Shepherd, *Chinese Jets Menace Taiwan, Pressuring U.S. Support of Island's Defenses*, WASH. POST (Oct. 6, 2021), https://www.washingtonpost.com/world/asia_pacific/china-taiwan-warplanes-military/2021/10/06/9873c05a-2584-11ec-8739-5cb6aba30a30_story.html; Lee & Blanchard, *supra* note 10; Ramy Inocencio, *Taiwan "Very Concerned That China is Going to Launch a War" to Take Over*, CBS NEWS (Oct. 5, 2021), https://www.cbsnews.com/news/taiwan-china-war-us-warning-record-number-chinese-military-flights/; Rebecca Falconer, *Taiwan's Military Scrambles Jets After Detecting 39 Chinese Warplanes*, AXIOS (Jan. 23, 2022), https://www.axios.com/2022/01/24/taiwans-military-scrambles-jets-after-detecting-39-chinese-warplanes; Ben Blanchard, *Taiwan Warns Chinese Aircraft in its Air Defence Zone*, REUTERS (Feb. 24, 2022), https://www.reuters.com/world/asia-pacific/taiwan-reports-nine-chinese-aircraft-its-air-defence-zone-2022-02-24/.

[26] Dep't Boundary & Ocean Aff's, *supra* note 24; *see* Bingyao Li & Tao Yu, *Island Territorial Disputes and China's 'Shelving Disputes and Pursuing Joint Development' Policy*, ISLAND STUD. J. Nov. 2022, at 37, 39 (internal quotation omitted).

enforce an unlawful "de facto ADIZ [Air Defense Identification Zone]" in the South China Sea against aircraft in and around their claimed national airspace, over the land features it controls – issuing warnings to military aircraft ordering them to not approach Chinese-occupied land features and associated airspace.[27]

China's operations in the South China Sea are a "slow accumulation of small changes, none of which in isolation amounts to a *casus belli* [an act or situation provoking or justifying war], but which add up over time to a substantial change in the strategic picture."[28] Much like an artist crafting a painting, China executes strategic political and military brush strokes which on their own are indiscernible; however, by the time the observer can recognize the picture, the painting is complete. Here, opportunely, China's hope is that other States will not realize China's objectives until their political and military painting is complete. Over the past couple decades China has ramped up their tolerance for confrontation in the airspace over the South China Sea, adding more brush strokes to their South China Sea sovereignty portrait. Unfortunately, our journey starts with a perilous midair collision in 2001.

B. Airspace Confrontations with the United States

On April 1, 2001, a People's Liberation Army Navy (PLAN) F-8[29] fighter jet collided with a U.S. Navy EP-3E Aries II[30] surveillance aircraft, causing damage to the U.S. military plane which then made an emergency

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[27] MICHAEL PILGER, ADIZ UPDATE: ENFORCEMENT IN THE EAST CHINA SEA, PROSPECTS FOR THE SOUTH CHINA SEA, AND IMPLICATIONS FOR THE UNITED STATES 10 (2016) (emphasis added).

[28] *Id.* at 2; Robert Haddick, Commentary, *America Has No Answer to China's Salami-Slicing*, WAR ON THE ROCKS (Feb. 6, 2014), https://warontherocks.com/2014/02/america-has-no-answer-to-chinas-salami-slicing/ (purporting that China has a history of "salami slicing" their way to control, as they did in the East China Sea).

[29] SHIRLEY A. KAN ET AL., CONG. RSCH. SERV., RL 30946, CHINA-U.S. AIRCRAFT COLLISION INCIDENT OF APRIL 2001: ASSESSMENTS AND POLICY IMPLICATIONS 16 (2001) ("The F-8 "Finback" is a two engine, single seat air superiority fighter with a secondary ground attack role. The F-8 was designed in the 1960s and built in the late 1970s. An improved version, the F-8II, was introduced in 1996 with more powerful engines, improved avionics, and a modernized cockpit. The F-8II airframe is designed primarily for speed (maximum speed of Mach 2.2), and displays modest maneuverability for fighter aircraft. It has been compared in appearance and aeronautical performance to the U.S. F-4 Phantom, a 1960s era aircraft.") (footnote omitted).

[30] KAN ET AL., *supra* note 29, at 16 ("The EP-3E Aries is a maritime reconnaissance and signals intelligence (SIGINT) aircraft derived from P-3 Orion aircraft. The P-3 Orion is a long range, land-based anti-submarine warfare (ASW) patrol aircraft. The P-3 airframe is designed primarily for range and endurance. The EP-3E is equipped with sensitive receivers and antennas to capture a wide range of electronic emissions. The plane has a maximum speed of about 400 mph. An EP-3E mission flight profile would by typified by slow, level speed to maximize fuel. The EP3E crew includes up to 24 pilots, linguists, cryptographers, and technicians.").

landing in China.[31] The PLAN fighter jet was destroyed, and China's pilot was killed.[32] The midair collision occurred in international airspace approximately 50 miles southeast of China-controlled Hainan Island.[33] In his descent immediately following the collision, the U.S. pilot sent out a series of mayday and distress calls on an international frequency; after receiving no response he ultimately landed the aircraft at Hainan Island.[34] China responded by stating that the U.S. aircraft had "entered Chinese airspace without permission and landed on a Chinese airfield," claiming that the lawful *force majeure* aircraft landing required China's permission which was not granted.[35]

> Objectively, the PLAN pilot violated standard intercept conventions which impute the more maneuverable aircraft [China's fighter jet] with the responsibility to avoid collision, and require the intercepting aircraft [China's fighter jet] to maintain at least a 500 foot distance.[36] The U.S. surveillance plane was operating in autopilot at the time of the interception, compelling evidence that China's fighter jet was responsible for the collision.[37] Still unclear is whether China's unsafe midair maneuvering and unsafely-close escort was a

[31] Elisabeth Rosenthal with David E. Sanger, *U.S. Plane in China After It Collides with Chinese Jet*, N.Y. TIMES (Apr. 2, 2001), https://www.nytimes.com/2001/04/02/world/us-plane-in-china-after-it-collides-with-chinese-jet.html; *see also* Raul Pedrozo, *Does the Revised U.S. South China Sea Policy Go Far Enough?*, 99 INT'L L. STUD. SER. U.S. NAVAL WAR COL. 72, 74-75 (2022) (citation omitted); Marek, *supra* note 6 (noting that this was the "first international airspace incident").

[32] Rosenthal with Sanger, *supra* note 31; *see also* Pedrozo, *supra* note 31, at 90 (citation omitted); Marek, *supra* note 6 (noting that this was the "first international airspace incident").

[33] Rosenthal with Sanger, *supra* note 31; Kim Zetter, *Burn After Reading: Snowden Documents Reveal Scope of Secrets Exposed to Chinea in 20021 Spy Plane Incident*, THE INTERCEPT (Apr. 10, 2017), https://theintercept.com/2017/04/10/snowden-documents-reveal-scope-of-secrets-exposed-to-china-in-2001-spy-plane-incident/ ("…crew members had jettisoned documents out an emergency hatch as they flew over the sea and had managed to destroy some signals-collection equipment before the plane fell into the hands of the Chinese, it was highly probable China had still obtained classified information from the plane … secrets that were exposed to China – which turned out to be substantial though not catastrophic." "[T]he information the investigators considered the most sensitive on the plane were the tasking instructions for collecting data from China. These revealed information such as what data the U.S. was interested in collecting and the frequencies and call signs China used for its data.") (internal quotations omitted).

[34] Zetter, *supra* note 33 (The collision had cut the Chinese fighter jet in half, and caused the U.S. spy plane to roll upside down and immediately depressurize, dropping 14000 feet while shaking violently.).

[35] Rosenthal with Sanger, *supra* note 31 (noting that it was unclear whether the allegation of entering airspace without permission related to the initial encounter or the emergency landing); Zetter, *supra* note 33; KAN ET AL., *supra* note 29, at 20 (explaining that the *force majeure* right "exists by analogy to the right of ships in distress to enter national waters and the duty of states to render assistance to such ships," as well as the "elementary considerations of humanity").

[36] KAN ET AL., *supra* note 29, at 18.

[37] Zetter, *supra* note 33 (stating that the plane was in autopilot for the return to base).

political, military, or aircraft commander decision.[38] Unfortunately, this was not the last China-U.S. airspace encounter.

China continued asserting control and demanding retreat from their claimed national airspace. Several years later in May 2015, China issued eight warnings to a U.S. surveillance aircraft: "Foreign military aircraft. This is Chinese navy. You are approaching our military alert zone. *Leave immediately*."[39] In September 2015, China's navy again issued eight warnings directed at a U.S. surveillance aircraft in the South China Sea.[40] Despite flying in international airspace, the U.S. aircraft was ordered out of the area during each of the eight warnings, at least once to the following effect: "This is the Chinese navy, *you go*!"; followed by "This is the Chinese navy, this is the Chinese navy, *please go away, to avoid misunderstanding*."[41]

These verbal interactions, while not resulting in collisions, continued through the years and became more confrontational and escalatory starting in 2018. In November 2018, following a near collision of surface vessels, China demanded that the United States cease sending warships and military aircraft close to the regionally contested islands in the South China Sea.[42] The United States responded consistent with prior statements that they will continue to "fly, sail and operate wherever international law allows."[43] Without addressing international law, China asserted that U.S. behavior undermined China's "authority and security interests."[44]

In August 2018, China's military forces warned a U.S. military aircraft operating in international airspace six times, demanding that the lawful aircraft "*leave immediately*."[45] China instructed the aircraft to "*leave immediately and keep out* to avoid any misunderstanding."[46] The United States responded: "I am a sovereign immune U.S. naval aircraft conducting lawful military activities

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[38] *Compare* Zetter, *supra* note 33 (stating that "it is unclear whether that is a result of political decision from Beijing, a military decision by the Chinese Air Force or the judgments of Chinese pilots"), *with* Rosenthal with Sanger, *supra* note 31 (documenting that China's position was that "the U.S. plane violated aviation rules and suddenly veered toward and approached the Chinese plane").

[39] Ankit Panda, *China Issues 8 Warnings to U.S. Surveillance Plan in South China Sea*, THE DIPLOMAT (May 21, 2015), https://thediplomat.com/2015/05/china-issues-8-warnings-to-us-surveillance-plane-in-south-china-sea/ (emphasis added).

[40] Sciutto, *supra* note 17.

[41] *Id.* (emphasis added).

[42] Matthew Pennington, *US Pushes Back at China's Warning to Avoid Islands It Claims in South China Sea*, MIL.TIMES (Nov. 9, 2018), https://www.militarytimes.com/news/your-military/2018/11/09/us-pushes-back-at-chinas-warning-to-avoid-islands-it-claims-in-south-china-sea/.

[43] *Id.*

[44] *Id.*

[45] Ryan Pickrell, *'Keep Out!': China Sent 6 Warnings to a U.S. Navy Plane, But the U.S. Didn't Back Down*, BUS. INSIDER (Aug. 10, 2018), https://www.businessinsider.com/keep-out-china-warns-us-navy-plane-in-south-china-sea-2018-8 (emphasis added).

[46] *Id.*

beyond the national airspace of any coastal state. In exercising these rights guaranteed by international law, I am operating with due regard for the rights and duties of all states."[47] Undeterred, China continued: "I am warning you again, *leave immediately or you will pay the possible consequences*."[48] Despite the provocative exchange, no aircraft were specifically targeted and no further escalation ensued.[49]

In August 2020, things escalated when a U.S. aircraft flying in international airspace allegedly entered what China considered to be a "no-fly zone" during a live-fire naval drill, prompting China to fire two missiles in response.[50] At this point, this risk for miscalculation was rising.

On or about March 20, 2022, a U.S. P-8A[51] Poseidon patrol aircraft was repeatedly warned by China claiming that the aircraft had illegally entered what China claimed as its territory: "China has sovereignty over the Spratly Islands, as well as surrounding maritime areas, *stay away immediately to avoid misjudgment*."[52] The U.S. aircraft responded with familiar language: "I am a sovereign immune United States naval aircraft conducting lawful military activities beyond the national airspace of any coastal state."[53] Continuing, "exercising these rights is guaranteed by international law and I am operating with due regard to the rights and duties of all states."[54] While interactions with the United States outnumber those with other countries due to the frequency and pervasive presence of the U.S. military in the Pacific, other States have been victims of China's airspace threats. For example, China has increased its antagonistic behavior toward Taiwan.

C. China's Interactions with Taiwan

In addition to hostile interactions with U.S. military aircraft, China has amped up its harassment of Taiwan in a similar manner. China has been sending its planes near Taiwan's airspace in escalating volume and frequency throughout the past couple years.[55] In September 2021, China mobilized 19 PLA

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[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] *China Fires Aircraft-Carrier Killer Missile*, *supra* note 6.
[51] For a description of the P-8A Poseidon, see *P-8A Poseidon Multi-mission Maritime Aircraft*, AM.'S NAVY (last updated Apr. 23, 2021), https://www.navy.mil/Resources/Fact-Files/Display-FactFiles/Article/2166300/p-8a-poseidon-multi-mission-maritime-aircraft-mma/.
[52] Jim Gomez & Aaron Favila, *AP Exclusive: US Admiral Says China Fully Militarized Isles*, ASSOCIATED PRESS: NEWS (Mar. 21, 2022), https://apnews.com/article/business-china-beijing-xi-jinping-south-china-sea-d229070bc2373be1ca515390960a6e6c (emphasis added).
[53] *Id*.
[54] *Id*.
[55] Richard McGregor, *Biden and Xi Talk of a Clash of Civilizations. But the Real Shared Goal is Dominance*, THE GUARDIAN (May 2, 2021), https://www.theguardian.com/commentisfree/2021/may/02/america-has-woken-up-to-the-threat-posed-by-china-it-may-already-be-too-late.

warplanes into Taiwan's ADIZ.[56] The following day, in skies south of Taiwan, a U.S. military aircraft was warned: "This is the Chinese air force. You are approaching China's territorial airspace. *Leave immediately* or you will be intercepted."[57] On October 5, 2021, China flew 56 military aircraft into Taiwan's ADIZ, totaling 148 flights of the same nature over a four day period.[58] Taiwan mobilized combat aircraft in order to intercept China's sorties, issued radio warnings, and engaged missile systems in order to track the airspace activity.[59] On January 23, 2022, China executed a large-scale movement of 39 aircraft into Taiwan's ADIZ.[60] Then on February 24, 2022 – the same day that Russia invaded Ukraine – China sent nine aircraft into Taiwan's ADIZ consisting of eight fighter jets and one reconnaissance aircraft.[61] Such provocative military activity is potentially destabilizing, risks miscalculation, and "undermines regional peace and stability."[62] Taiwan asserts that China's "grey zone" warfare described above is intended to wear down Taiwan's military and to test their pre-planned responses.[63] Similar to the U.S. flights, China's military aircraft do not fly into Taiwan's national airspace over its territorial waters, but rather into Taiwan's ADIZ.[64] In an effort to deescalate tensions in the region, the United States has urged China to "cease its military, diplomatic, and economic pressure and coercion against Taiwan."[65] Unfortunately, China's actions do not target only the United States and Taiwan. China has also confronted Australia, another superpower, in international airspace.

D. China's Interactions with Australia, a U.S. Ally and Regional Power

In February 2022, tensions escalated beyond verbal between China and Australia. The Australian Defense Department stated that a PLAN surface vessel (warship) fired a laser at one of its surveillance aircraft – P-8A Poseidon – which detected a laser illumination while flying over Australia's northern approaches.[66] China responded claiming that Australia's statements run counter to facts and are "pure disinformation," further stating that China's vessel conducted itself in a safe and professional manner in accordance with

[56] Feng, *supra* note 25.

[57] Feng, *supra* note 25 (emphasis added).

[58] Li & Shepherd, *supra* note 25; Lee & Blanchard, *supra* note 10; *see also* Inocencio, *supra* note 25 (quoting the United States Department of State).

[59] Lin & Areddy, *supra* note 10; *see also* Inocencio, *supra* note 25 (quoting the United States Department of State).

[60] Falconer, *supra* note 25; *see also* Blanchard, *supra* note 25.

[61] Blanchard, *supra* note 25.

[62] Falconer, *supra* note 25 (quoting the United States State Department and Department of Defense).

[63] Lee & Blanchard, *supra* note 10.

[64] *Id*.

[65] Inocencio, *supra* note 25 (quoting the United States Department of State).

[66] Bentley-York, *supra* note 21.

international law and practice.[67] Australia proclaimed that lasers have the ability to injure or temporarily blind the pilots, and such unprofessional and unsafe conduct is a serious safety incident, putting the lives of the crew in danger.[68] While no further evidence was released, it would seem farfetched for Australia to invent a provocative laser tale from thin-air. A reasonable person would conclude that China did in fact engage Australia's aircraft with a laser and attempted to disarm the negative publicity by launching the term "disinformation" untargeted into the air without supporting evidence to rebut Australia's narrative.

E. China Punching Above Its Weight Class

China seems to be exaggerating its capabilities and activities to enhance a deterrent stance against the United States and regional threats, using its military to maximize a façade of force known as "gunboat diplomacy."[69] The People's Liberation Army is exercising and displaying capabilities most relevant to contingencies against the United States in the South China Sea, demonstrating that it can respond quickly to threats against its interests in the region.[70] Undeterred, the reputational cost of counter-measures and negative international press appear acceptable to China.[71] As a result, they currently trade a damaged reputation for substantive strategic gains in the South China Sea.[72]

Understanding the risks and threats posed by China in the South China Sea, we must next examine the legal framework within which to analyze the legality of its airspace claims.

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[67] *Foreign Ministry Spokesperson Wang Wenbin's Regular Press Conference on February 22, 2022*, MINISTRY FOREIGN AFF.'S CHINA (Feb. 22, 2022), https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/202202/t20220222_10644531.html [hereinafter *Wenbin's Regular Press Conference on February 22, 2022*].

[68] Bentley-York, *supra* note 21.

[69] *See* Oriana Skylar Mastro, *The PLA's Evolving Role in China's South China Sea Strategy*, CHINA LEADERSHIP MONITOR 1 (Dec. 1, 2020), https://www.prcleader.org/_files/ugd/af1ede_f71a824eb6ab4471bbfd674b1de9d558.pdf [hereinafter Mastro, *The PLA's Evolving Role*]; Dang & Ahn, *supra* note 6, at 23 ("The sheer demonstration of an actor's capabilities (not intent) can act as a form of gunboat diplomacy, signaling to another party the ability to act if provoked, and therefore the damage that will be done to the other party should this situation occur. At its most passive, according to Le Miere, a naval force may simply be showcasing its capabilities to an adversary in order to deter an attack.") (internal quotations omitted) (citations omitted).

[70] Mastro, *The PLA's Evolving Role*, *supra* note 69, at 5.

[71] Dang & Ahn, *supra* note 6, at 147.

[72] *Id.* at 147.

IV. GENERAL LEGAL FRAMEWORK

Over time, "[s]overeignty has developed into a multilevel and multifaceted concept," no longer exclusive to Westphalian principles.[73] Customary international law, as well as international aviation conventions, establishes that nations have full sovereignty over their national airspace – inclusive of the airspace over territorial seas – and that all aircraft have a right of overflight with respect to all other areas, i.e. international airspace.[74]

A number of conventions and treaties codifying existing customary international law resolve that, generally, territorial waters and national airspace extend only 12 nautical miles from land.[75] Specifically, pursuant to UNCLOS—the most relevant convention—the territorial sea extends 12 nautical miles from the baseline,[76] which is established by the "low-water line along the coast."[77] Both coastal and archipelagic governments are permitted to claim territorial seas up to the 12 nautical mile threshold.[78] Since airspace is tied to its subjacent surface, it logically flows that national airspace extends to the identical 12 nautical mile mark. For land formed naturally, the mechanics of drawing a baseline and its related territorial sea measurements are quite settled, although occasionally subject to dispute. However, with modern technology land creation has become increasingly common. States are now capable of adding to their territory by reclaiming sand and other materials to build habitable land where the sea once found its tide. Such constructed land is referred to as "artificial," carrying its own difficulties affecting maritime zones and airspace regimes.

An artificial island is a constructed feature which is not naturally formed.[79] "A coastal state shall have the exclusive right to construct and to authorize and regulate the construction, operation, and use of artificial islands" in their exclusive economic zone.[80] Despite the authority to build artificial islands, such creations "do not possess the status of islands."[81] As a result, they are not entitled to a territorial sea of their own, "and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf."[82] Consequently, *de jure* there may not be any lawful airspace claims associated with artificial islands.

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[73] Li & Yu, *supra* note 26, at 48.
[74] KAN ET AL., *supra* note 29, at 20.
[75] Rosenthal with Sanger, *supra* note 31.
[76] U.N. Convention on the Law of the Sea, art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397, 400.
[77] *Id.* art. 5.
[78] Gupta, *supra* note 6, at 12.
[79] Ryan Mitchell, *An International Commission of Inquiry for the South China Sea: Defining the Law of Sovereignty to Determine the Chance for Peace*, 49 VAND. J. TRANSNAT'L L. 749, 761 (2016).
[80] U.N. Convention on the Law of the Sea, *supra* note 76, art. 60, 1833 U.N.T.S. at 419-20; Mitchell, *supra* note 79, at 762.
[81] U.N. Convention on the Law of the Sea, *supra* note 76, art. 60, 1833 U.N.T.S. at 419-20.
[82] *Id.*

Submerged features and low-tide elevations are neither subject to sovereignty nor maritime zones when located beyond the territorial sea of a coastal State.[83] When located within the territorial sea, a low-tide elevation is entitled to extend the coastal baseline, and thus the territorial sea, resulting in extended national airspace over the territorial sea zone. Entirely underwater features, however, are incapable of generating maritime zones,[84] and therefore are not entitled to national airspace claims. Similarly, rocks which are incapable of sustaining human habitation or economic life of their own are not permitted an exclusive economic zone or continental shelf,[85] but may extend territorial waters and national airspace if found within a State's territorial sea.

An archipelagic state is defined as "a State constituted wholly by one or more archipelagos and may include other islands."[86] A true archipelagic state is entitled to national airspace over their territorial waters, identical to that of coastal nations. Customary international law, as well as adjudications by courts and tribunals, confirms that continental States may not take advantage of archipelagic baselines even if their territory includes a group of islands.[87] Consequently, as a continental State, China does not have the legal right to claim archipelagic status. Demonstrably, archipelagic status is conferred through the United Nations, and while 22 nations claim it, China is not one of them.[88]

While the legality of national airspace over territorial waters is clear, restrictions on international airspace beyond territorial waters remain subject to debate. One method of restriction is an ADIZ, defined by the 1944 Convention on International Civil Aviation [hereinafter "Chicago Convention"] as "[s]pecial designated airspace of defined dimensions within which aircraft are required to comply with special identification and/or reporting procedures additional to those related to the provision of air traffic services (ATS)."[89] ADIZs are largely used during peacetime operations over land or territorial

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[83] U.S. DEP'T OF STATE, BUREAU OF OCEANS & INT'L ENV'L & SCI. AFF.'S, LIMITS IN THE SEAS NO. 150 PEOPLE'S REPUBLIC OF CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA 6 (2022) [hereinafter BUREAU OF OCEANS & INT'L ENV'L & SCI. AFF.'S]; Dang & Ahn, supra note 6, at 36 (stating that low-tide elevations do not generate any maritime zones).

[84] *See generally* U.N. Convention on the Law of the Sea, *supra* note 76, sec. 2, 1833 U.N.T.S. at 400-03 (providing maritime zones for island, rocks, and low-wide elevations, as well as other features, but none which are perpetually submerged).

[85] Mario Gervasi & Roberto Virzo, *Lighthouses and Lightships*, MAX PLANCK ENCYC. OF PUB. INT'L L. (Oct. 2020), https://opil.ouplaw.com/display/10.1093/law:epil/ 9780199231690/law-9780199231690-e159 (citing U.N. Convention on the Law of the Sea, *supra* note 76, 121(3), 1833 U.N.T.S at 442).

[86] U.N. Convention on the Law of the Sea, *supra* note 76, art. 46(a), 1833 U.N.T.S. at 414.

[87] BUREAU OF OCEANS & INT'L ENV'L & SCI. AFF.'S, *supra* note 83, at 8.

[88] Oriana Skylar Mastro, *How China is Bending the Rules in the South China Sea*, LOWY INST.: THE INTERPRETER (Feb. 17, 2021), https://www.lowyinstitute.org/the-interpreter/how-china-bending-rules-south-china-sea [hereinafter Mastro, *How China is Bending the Rules*].

[89] Convention on International Civil Aviation (Chicago Convention) Annex 15, Dec. 7, 1944, 15 U.N.T.S. 295, https://www.icao.int/publications/Documents/7300_9ed.pdf; *see* 14 C.F.R. 99.3 (defining an ADIZ as "airspace over land or water in which ready identification, location and control of all aircraft … is required in the interest of national security").

waters where overflight is restricted,[90] or where there are potential dangers to aircraft.[91] Notably, the Chicago Convention is not applicable to State (including military) aircraft.[92]

Importantly, UNCLOS states that, "sovereignty extends to the air space over the territorial sea" – not beyond.[93] An ADIZ extends beyond national airspace and is monitored by the coastal nation in order to give its military forces adequate time to respond to incoming threats.[94] The ADIZ concept is derived from a State's inherent right to self-defense established by customary international law, now codified in the U.N. Charter.[95] The theory is that an ADIZ will serve as an early warning zone in order to prevent rather than repel an attack.[96] Civil and state aircraft entering a littoral State's national airspace generally comply with identification requirements as a prerequisite to entry.[97] Since the ADIZ falls outside of sovereign controlled areas (e.g. national airspace), its enforcement is left largely to varied State practice.

V. CHINA'S POSITION ON NATIONAL AIRSPACE IN THE SOUTH CHINA SEA

China has not claimed an ADIZ in the South China Sea. Rather, it asserts historic rights over the airspace based on prior use of the land features and surrounding sea.

A. China's Current Airspace Claims

The South China Sea falls within the PLA's Southern Theater Command.[98] The Southern Theater Command often publishes statements claiming that the U.S. military has trespassed into China's territory; U.S. operations are destroying peace and stability in the region; the United States is violating and demonstrating disregard for international rules, norms, and law; and, U.S behavior is an act of hegemony and military provocation – attempting

[90] Chicago Convention, *supra* note 89, art. 9, 15 U.N.T.S. at 5-6.

[91] *Id.* Annex 2.

[92] *Id.* art. 3(a) (state aircraft are government owned and operated aircraft for official government purposes; e.g. military aircraft).

[93] U.N. Convention on the Law of the Sea, *supra* note 76, art. 2, 1833 U.N.T.S. at 400.

[94] Lin & Areddy, *supra* note 10.

[95] Jinyuan, *supra* note 11, at 283 (citation omitted); *see* U.N. Charter art. 51 ("Nothing in the present Charter shall impair the *inherent right of individual or collective self-defence* if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.") (emphasis added).

[96] Jinyuan, *supra* note 11, at 281.

[97] *Id.* at 283 (citing Chicago Convention, *supra* note 89, art. 11, 15 U.N.T.S. at 6-7; *id.* art. 3(c), 15 U.N.T.S. at 2).

[98] OFF. OF SEC'Y OF DEF., *supra* note 22, at 97.

to flex their [U.S.] discourse power domestically and abroad.[99] Despite their claims of "territory," China has yet to draw its territorial water baselines for the Pratas Islands, Scarborough Shoal and Macclesfield Bank, and the Spratly Islands, over which it claims at least some level of sovereignty.[100] As a result, it is not entitled to any colorable claims of national airspace.

Despite having no formally drawn maritime regimes, China claims nearly all of the South China Sea as its own territory.[101] Beyond merely claiming as such, China functionally controls a majority of the area to the exclusion of other regional and coastal States.[102]

China's "nine-dash line" [seen above] is a vague demarcation of the portions of the South China Sea in which it claims to have some level of

[99] Mastro, *The PLA's Evolving Role*, *supra* note 69, at 10 (stating that, "while official statements do not articulate that the United States is the target of the exercises, the timing, media strategy, and capabilities exercised suggest that the U.S. is the target audience … playing a central role in attempts to deter and dissuade the United States from engaging in military operations in the South China Sea").

[100] Dep't Boundary & Ocean Aff's, *supra* note 24.

[101] Gomez & Favila, *supra* note 52.

[102] Gupta, *supra* note 6, at 12.

sovereignty and control.[103] The origin of the nine-dash line dates back to 1936, found on a map from the New Atlas of China's Construction.[104] Despite its near 100-year existence, it has never been associated with defined coordinates which would indicate at least a negligible degree of legitimacy, but rather seems to be arbitrarily drawn.[105] Regardless, it covers approximately 90 percent of the water and airspace in the South China Sea.[106]

China's domestic law, not customary international law, aims to limit foreign militaries from operating in whatever portion of the sea China recognizes as its exclusive economic zone – arguing that military assets conducting intelligence, surveillance, and reconnaissance missions are considered to be conducting "scientific research," an abuse of the right to overfly the EEZ.[107] China contends that military activities fall outside the definition of "over-flight" as referenced in UNCLOS,[108] drawing a distinction between movement rights and operational rights.[109] In addition to China's unreasonably expansive interpretation of UNCLOS, it has also shifted foreign policy regarding the South China Sea, resulting in significant impacts to, and destabilization of, the region. Some, but not all, of China's policy changes can be attributed to changes in their political leadership.

President Xi Jinping was elected President in the spring of 2013.[110] On September 25, 2015, in a joint press conference, he stated that "China does not intend to pursue militarization" in the South China Sea.[111] In 2016, he adjusted course and asserted that China will pursue building *defenses* in the South China Sea.[112] Despite past assurances that China would not construct military bases on its reclaimed artificial islands in the South China Sea, China now claims that it has the right to develop islands in the South China Sea in whatever way it sees fit, and has subsequently "armed the islands with anti-ship and anti-aircraft

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[103] PILGER, *supra* note 27, at 8; Marek, *supra* note 6; OFF. OF SEC'Y OF DEF., *supra* note 22, at 15; Mastro, *How China is Bending the Rules*, *supra* note 87 ("While China has not been specific about the extent of its claims, it uses a "nine-dash line" which swoops down past Vietnam and the Philippines, and towards Indonesia, encompassing virtually all of the South China Sea."); Dang & Ahn, *supra* note 6, at 40 (stating that "the Chinese government has never clarified the meaning of the line" – but arguing that "according to Wu Shicun, President of the National Institute for South China Sea Studies, the nine-dash line is based on the theory of sovereignty + UNCLOS + historic rights") (internal quotations omitted); LI, *supra* note 15, at 89-133 (providing a thorough overview of the nine-dash line and its controversies).

[104] Gupta, *supra* note 6, at 2 (citations omitted).

[105] Marek, *supra* note 6.

[106] Gupta, *supra* note 6, at 10.

[107] Marek, *supra* note 6 (citations omitted); KAN ET AL., *supra* note 29, at 20.

[108] Jinyuan, *supra* note 11, at 290 (citing *see, e.g.*, Ren Xiaofeng & Cheng Xizhong, *A Chinese Perspective*, 29 MARINE POL'Y 142 (2005)).

[109] Jinyuan, *supra* note 11, at 291 (citing Charles E. Pirtle, *Military Uses of Ocean Space and the Law of the Sea in the Millennium*, 31 OCEAN DEV. & INT'L L. 7 (2000)).

[110] OFF. OF SEC'Y OF DEF., *supra* note 22, at 41.

[111] Dang & Ahn, *supra* note 6, at 144-45.

[112] *Id.* at 145.

missile systems, laser and jamming equipment, and fighter jets[.]"[113] China has fabricated over 3200 acres of artificial islands, home to over 3000 meters of runways, naval berthing, aircraft hangars, ammunition bunkers, missile silos, and radar sites for both sea and air.[114]

China's militarization on the Spratly Islands is advanced enough to support military operations including anti-ship and anti-aircraft missiles, and jamming equipment, although it does not yet have a significant presence of combat aircraft.[115] Regardless, China's military build-up and weaponization on these manmade artificial islands contribute to destabilization in the region.[116] While China has overtly "fully militarized" several islands that it built in the South China Sea, all or part of the sea is also claimed by the Philippines, Vietnam, Malaysia, Taiwan, and Brunei.[117] Moreover, the presence and use of military capabilities permit China to continue enforcing national airspace over land features that are not entitled to such claims. Militarization of land features is another brush stroke to sovereignty that China added in its effort to enforce airspace claims that are unsubstantiated by international law.

B. East China Sea Comparison

Dating back to 2013, China claims an East China Sea ADIZ wherein it "require[s]" planes to identify themselves when entering the zone which extends 200 nautical miles from China's coast.[118] In order to enforce its requirements, "China's armed forces [have] adopt[ed] *defense emergency measures* to respond to aircraft that do not cooperate in the identification or otherwise refuse to follow the instructions."[119] While often regarded as provocative, the phrasing "defense emergency measures" in Chinese refers to preventative acts such as tracking and monitoring.[120] Regardless, these measures mirror those that China has implemented in the South China Sea, essentially broadening their ADIZ to an undeclared area as part of its brush stroke to sovereignty tactics. In the East China Sea, China attempts to enforce its ADIZ requirements against military

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[113] Gomez & Favila, *supra* note 52; *see China Fires Aircraft-Carrier Killer Missile*, *supra* note 6 (reporting that China fired on intermediate-range ballistic missile in response to U.S. aerial activities in a "no-fly zone").

[114] Mastro, *The PLA's Evolving Role*, *supra* note 69, at 3 (citing Alexander Neill, *South China Sea: What's China's Plan for Its 'Great Wall of Sand'?*, BBC NEWS (July 14, 2020), https://www.bbc.com/news/world-asia-53344449); Sciutto, *supra* note 17 (offering a snapshot of the expansion as of 2015 which included 2000 acres of reclaimed island expansion in waters as deep as 300 feet).

[115] OFF. OF SEC'Y OF DEF., *supra* note 22, at 103-04; Dang & Ahn, *supra* note 6, at 134-35, 138-43 (detailing a large portion of the construction China has completed in the South China Sea).

[116] Gomez & Favila, *supra* note 52.

[117] OFF. OF SEC'Y OF DEF., *supra* note 22, at 15-16; Gomez & Favila, *supra* note 52; *China Fires Aircraft-Carrier Killer Missile*, *supra* note 6.

[118] Lin & Areddy, *supra* note 10.

[119] Jinyuan, *supra* note 11, at 284-85.

[120] Jinyuan, *supra* note 11, at 285.

aircraft, contrary to standard international law and State practice.[121] The same is true in the South China Sea, except with even less force since China does not have a declared ADIZ. U.S. military aircraft, in both the East China and South China Seas, do not comply with the zone and China's requests.[122] Congruently, China attempts on a sporadic basis to challenge U.S. military aircraft in the South China Sea. Attempting only sporadic disputes, China has not rigidly enforced its ADIZ against military aircraft in the East China Sea.[123]

As of 2016, the challenges with declaring an ADIZ in the South China Sea were numerous: few airfields; limited radar infrastructure; harsh maritime environment; rough weather; inadequate fuel storage and transportation; limited aircraft support infrastructure; limited personnel support infrastructure; and an underdeveloped joint command structure.[124] These may still be some of many reasons why China has not yet declared a formal ADIZ in the South China Sea in 2023; however, with increased militarization, artificial land, and presence, a declared ADIZ may be on the horizon. China is slowly trying to establish separate factors of sovereignty and control so that when it does declare an ADIZ it has recent State practice at which to point, rather than a spaghetti bowl of contested international airspace claims, which would otherwise be the case.

C. Legal Position

While seemingly contrary to their actions, "China firmly opposes the *willful threat or use of force*," as well as "unilateralism, protectionism and *bullying acts*,"[125] in dealing with international disputes such as the South China Sea. China declares that peace, development, equity, justice, democracy, and freedom are the common values of humanity.[126] It believes that all countries are equal members of the world order, despite their size, strength, or wealth.[127] China's position politically is that it firmly adheres to the peaceful development of the U.N.-centered world order, and is not in pursuit of hegemony or greater global influence outside of their region.[128] China is implicitly then in pursuit of regional hegemony, rather than a balanced order.

The international community has recently been tested by Russia's 2022 invasion of Ukraine. This conflict has thrust upon States a platform to formally

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[121] *Id.* at 289 (citation omitted).

[122] *See generally* Lin & Areddy, *supra* note 10 (noting that U.S. commercial aircraft have complied with the identification requirements, but that U.S. state aircraft "wouldn't honor the zone").

[123] PILGER, *supra* note 27, at 4.

[124] *Id.* at 8-10.

[125] *Position Paper on China's Cooperation with the United Nations*, MINISTRY FOREIGN AFF.'S CHINA (Oct. 22, 2021), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/wjzcs/202110/t20211022_9609380.html [hereinafter *Position Paper on China's Cooperation*] (emphasis added).

[126] *Id.*

[127] *Id.*

[128] *Id.*

voice their general positions on the law of armed conflict and unsettled areas of international law, as well as international disputes. In response to questions about the Russia-Ukraine war, China stated that, "[t]he legitimate security concerns of any country should be respected, and the purposes and principles of the U.N. Charter should be jointly upheld."[129] While China boasts compliance with international law and the U.N. Charter in reference to the Russia-Ukraine war, it has flatly rejected a legal ruling by the South China Sea Arbitration Tribunal, demonstrating the hypocrisy in their self-portrayal as a responsible actor in the international system.[130]

In 2013, the Philippines filed a claim against China pursuant to Annex VII to UNCLOS.[131] As a result, an arbitral tribunal was constituted in the matter of the South China Sea.[132] Importantly, the tribunal ruled the following: UNCLOS comprehensively governs the claims between the Philippines and China in the South China Sea and thus any claim to historic rights is invalid; none of the Spratly Islands generate an EEZ and to the extent areas are within the Philippines EEZ they exclude any claims by China; China violated the Philippines EEZ; and, the situation has been exacerbated by China's building and militarizing artificial islands.[133] Six years later, the United States released Limits in the Seas No. 150 which details the U.S. legal and policy arguments against China's excessive maritime claims in the South China Sea.[134] Regardless, China asserts that the South China Sea Arbitration Award is null and void, and that the U.S. Department of State Limits in the Seas No. 150

[129] *Wenbin's Regular Press Conference on February 22, 2022*, *supra* note 67.

[130] Pratik Jakhar, *Whatever Happened to the South China Sea Ruling?*, LOWY INST.: THE INTERPRETER (July 12, 2021), https://www.lowyinstitute.org/the-interpreter/whatever-happened-south-china-sea-ruling.

[131] U.N. Convention on the Law of the Sea, *supra* note 76, Annex VII, 1833 U.N.T.S. at 571-74.

[132] South China Sea Arbitration (Phil. v. China), PCA Case No. 2013–19, Award, ¶ 2 (Perm. Ct. Arb. 2016) [hereinafter South China Sea Arbitration].

[133] *See id.* ¶ 1203; Robert D. Williams, *Tribunal Issues Landmark Ruling in South China Sea Arbitration*, LAWFARE (Jul 12, 2016), https://www.lawfareblog.com/tribunal-issues-landmark-ruling-south-china-sea-arbitration.

[134] BUREAU OF OCEANS & INT'L ENV'L & SCI. AFF.'S, *supra* note 83, at 11.

misinterprets international law, and "misrepresents the historical context and the *status quo* of the South China Sea issue."[135]

China declares sovereignty by historic rights which it contends are "consistent and solidly grounded in history and law" over the South China Sea Islands—Pratas Islands, Paracel Islands, Scarborough Shoal and Macclesfield Bank, and Spratly Islands—informally claiming internal waters, territorial seas, contiguous zones, exclusive economic zones, and continental shelf rights.[136] While admitting that UNCLOS is a "*package deal* reached . . . through negotiation and compromise," China contrarily asserts that "UNCLOS does not negate the historic rights established through practice in the long course of history."[137] China claims that its historic rights date back over 2,000 years, established throughout history and recognized affirmatively by the international community.[138] There is no evidence, however, that China negotiated for historic rights during the several iterations of UNCLOS conferences. Despite their own silence, China argues that UNCLOS' silence concerning historic rights is governed by "general international law."[139] The tribunal disagreed with this position and concluded that historic rights for China in the South China Sea do not exist. Not only did China refuse to recognize the jurisdiction of the tribunal, it also declined to validate any of the legal theories the tribunal used to rule against it and ultimately in favor of the Philippines.

While China argues that the U.S. Limits in the Seas No. 150 is "full of fabrications and falsehoods," "preposterous," and "sheer political manipulation," it refers only vaguely to international law as the backbone of its position, lacking reference to any substantial State practice, *opinio juris*, or other

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[135] Dep't Boundary & Ocean Aff's, *supra* note 24; *see also* Pedrozo, *supra* note 31, at 73 (stating that the PRC has refused to recognize the tribunal's competency, participate in the proceedings, or accept the award); Gomez & Favila, *supra* note 52 (stating that China "dismissed the [tribunal's] ruling as a sham and continues to defy it"); Mitchell, *supra* note 79, at 752, 758 (discussing China's argument that the arbitration lacked jurisdiction over the matter because territorial sovereignty is outside the scope of UNCLOS, and because China objected in a 1996 official declaration under Article 298 that "it does not accept provisions for binding dispute resolution under UNCLOS Part XV insofar as they relate to . . . sea boundary delimitations or so-called historic rights") (internal quotations omitted); Gupta, *supra* note 6, at 14 ("Whereas both China and the Philippines are parties to the UNCLOS, China officially sais in 2006 that it would not accept compulsory dispute settlement for maritime boundary delimitation"); Dang & Ahn, *supra* note 6, at 41 (quoting China's white paper as stating that its "territorial sovereignty and maritime rights and interests in the South China Sea shall under no circumstances be affected by those awards and that China does not accept or recognize those awards) (internal quotations omitted) (citations omitted).

[136] Dep't Boundary & Ocean Aff's, *supra* note 24; Dang & Ahn, *supra* note 6, at 35 (translating the islands into English).

[137] Dep't Boundary & Ocean Aff's, *supra* note 24 (emphasis added).

[138] *Id.*; *see* Mastro, *How China is Bending the Rules*, *supra* note 87 ("Chinese leaders are relying on a historical argument to buttress their claims[.]"); LI, *supra* note 15, at 21-86 (providing a thorough review of historical records of the South China Sea).

[139] Dep't Boundary & Ocean Aff's, *supra* note 24.

forms of valid legal theories.[140] Nevertheless, the Department of Boundary and Ocean Affairs in China,[141] claims that requiring foreign warships to provide notification and obtain prior approval from a coastal State before entering territorial waters to conduct innocent passage is consistent with UNCLOS.[142]

After not gaining much international law support in their South China Sea behaviors, the National People's Congress (China) amended the PRC's domestic National Defense Law in 2020, broadening the legal justification for the PLA to mobilize in support of defending economic "development interests."[143] This amendment gave China domestic legal authority for its South China Sea airspace restrictions and requirements, arguably another brush stroke toward its desired legal legitimacy.

VI. UNITED STATES' OBJECTIONS TO CHINA'S EXCESSIVE AIRSPACE CLAIMS

The United States is interested in "maintaining maritime security, upholding freedom of navigation [including unimpeded passage for commercial shipping], and ensuring that disputes are settled peacefully."[144] Principally, the United States aims to maintain freedom of navigation by all ships and aircraft in the South China Sea and contribute to the peace and prosperity in the region, without taking a position as to competing claims of sovereignty.[145] The United States asserts that China's "claims to offshore resources across most of the South China Sea are completely unlawful, as is its campaign of bullying to

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[140] *Id.* (stating, for example: (1) that there are more than 20 continental states in the world that claim outlying archipelagos as a unit, without naming any States, whether the archipelago consists of natural features capable of sustaining human life (i.e. islands), whether such features are within the continental States lawful territorial waters, and whether the unnamed subject states assert the same excessive claims as China regarding baselines, territorial waters, and exclusive economic zones; and, (2) that historic rights as a legal principle existed before and still exist after UNCLOS entered into force, confirmed by "State practice and international jurisprudence," without naming a single State, practice, or judicial case); Michael Strupp, *Spratly Islands*, MAX PLANCK ENCYC. OF PUB. INT'L L. (Mar. 2008), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1357 ("China has never officially clarified its legal standpoint in this affair, but uses references such as 'vested historic rights of China' over the South China Sea and/or at least the features found therein."); Jinyuan, *supra* note 11, at 279 (stating that "custom" is made up of (1) the behavior of states, and (2) the subjective belief that such behavior is "law").

[141] *The Department of Boundary and Ocean Affairs*, MINISTRY FOREIGN AFF.'S CHINA, https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/bianhaisi_eng_665278/ ("Main functions: The Department of Boundary and Ocean Affairs develops policies concerning land and maritime boundaries, guides and coordinates external work concerning oceans and seas, manages land boundary delimitation and demarcation and joint inspections with neighboring countries, handles external boundary matters and cases concerning territories, maps and place names, and engages in diplomatic negotiations on maritime delimitation and joint development.").

[142] Dep't Boundary & Ocean Aff's, *supra* note 24.

[143] OFF. OF SEC'Y OF DEF., *supra* note 22, at 3.

[144] Bonnie S. Glaser, *Conflict in the South China Sea*: *Contingency Planning Memorandum Update*, COUNCIL ON FOREIGN REL., CTR. FOR PREVENTATIVE ACTION (Apr. 7, 2015), https://www.cfr.org/report/conflict-south-china-sea; *see China Fires Aircraft-Carrier Killer Missile*, *supra* note 6.

[145] Pedrozo, *supra* note 31, at 74.

control them."[146] China "use[s] intimidation to undermine the sovereign rights of Southeast Asian coastal states in the South China Sea, bully them out of offshore resources, assert unilateral dominion, and replace international law with 'might makes right.'"[147] While the United States has no claims to the water features in dispute, it has deployed aircraft for decades to "patrol free navigation in international . . . airspace."[148] The United States, and the majority of the international community, believes that UNCLOS provides freedom of navigation and overflight for foreign vessels and aircraft, outside territorial waters and its associated national airspace.[149]

The United States claims that "[t]he PRC's expansive maritime claims in the South China Sea are inconsistent with international law as reflected in the 1982 United Nations Convention on the Law of the Sea."[150] The U.S. position is that the excessive claims "gravely undermine the rule of law."[151] Although not a party to UNCLOS, the United States asserts that the unanimous arbitral tribunal ruling that, "the Convention [UNCLOS] superseded any historic rights, or other sovereign rights or jurisdiction in excess of the limits imposed therein," is binding on the parties.[152] Moreover, consistent with the tribunal ruling, the United States contends that China is not permitted to claim sovereign rights over low-tide elevations which are located within the exclusive economic zone or continental shelf of another State.[153]

The arbitral tribunal's decision has a direct impact on national airspace which limits are rooted in maritime zones. Since China is not entitled to any historic rights in the South China Sea, and does not have lawful sovereignty over any of the low-tide elevations, claiming national airspace is a legal impossibility—*a fortiori* China cannot lawfully claim even a *de facto* ADIZ. Without a lawful ADIZ, there are no lawful airspace requirements with which to comply. Regardless, the United States does not believe that military aircraft are required to comply with ADIZ requirements absent any intent to enter

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[146] *Id.* at 73 (citing Press Statement, Michael R. Pompeo, Secretary of State, U.S. Position on Maritime Claims in the South China Sea (July 13, 2020)); *see also China Fires Aircraft-Carrier Killer Missile*, *supra* note 6 (reporting that the U.S. announced a tougher stance in rejecting China's claims to offshore resources – "completely unlawful"); Mastro, *How China is Bending the Rules*, *supra* note 87 ("[B]oth the United States and Australia have risks China's wrath by officially stating that China's claims in the South China Sea are unlawful"); Dang & Ahn, *supra* note 6, at 150 (stating that the U.S. has "explicitly critici[zed] China for the island-building, construction and deployment activities, putting forwards [sic] specific suggestions to reduce tensions . . . .").

[147] Press Statement, Michael R. Pompeo, Secretary of State, U.S. Position on Maritime Claims in the South China Sea (July 13, 2020), https://2017-2021.state.gov/u-s-position-on-maritime-claims-in-the-south-china-sea/index.html.

[148] Gomez & Favila, *supra* note 52.

[149] Marek, *supra* note 6.

[150] BUREAU OF OCEANS & INT'L ENV'L & SCI. AFF.'S, *supra* note 83, at 1, 30.

[151] *Id.* at 30.

[152] BUREAU OF OCEANS & INT'L ENV'L & SCI. AFF.'S, *supra* note 83, at 2 (citing *South China Sea Arbitration*, *supra* note 132, at ¶ 278).

[153] *South China Sea Arbitration*, *supra* note 132, at ¶ 1203(B)(4); *see* U.N. Convention on the Law of the Sea, *supra* note 76, art. 48, 1833 U.N.T.S. at 415.

another State's national airspace. The United States' position can be found in the Commander's Handbook on the Law of Naval Operations, which states in relevant part that:

> The United States does not recognize the right of a coastal State to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace nor does the United States apply its ADIZ procedures to foreign aircraft not intending to enter U.S. airspace. Accordingly, U.S. military aircraft not intending to enter national airspace should not identify themselves or otherwise comply with ADIZ procedures established by other States, unless the United States has specifically agreed to do so.[154]

As a consequence of its unlawful claims, China has effectively "disrupted long-standing international law and norms, thereby solidifying its illegal claims in the SCS to the detriment of the other SCS claimants, as well as the international community at large."[155] While China's claims are not solidified in international law, they have solidified destabilization in the South China Sea. Unlike the other regional States, China benefits from chaos in the South China Sea, particularly when the alternative is a decrease in power, control, and claimed sovereignty. Currently, coastal States have overlapping claims rather than undisputed maritime zones and national airspace.

VII. LEGAL ANALYSIS OF CHINA'S SOUTH CHINA SEA AIRSPACE CLAIMS

All of the islands or island groups in the South China Sea are claimed by more than one State;[156] consequently, there are overlapping airspace claims. Since there are so many overlapping claims, it is inevitable that tensions will rise as each coastal nation attempts to secure some level of sovereignty over their claimed land features and airspace. Unfortunately for many of the coastal nations, China has more economic, political, and military power – powerful deterrents for any State desiring to push back against China's unlawful claims. Most of the regional States lack the economic stability and military strength to effectuate a fruitful resistance to China's invasive claims, despite having the political and international support of the world's super powers. As a result,

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[154] NAVY WARFARE DEV. COMMAND, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS at 2-17 (2017); *see also id*. at 1-9, 2-14, 2-17.

[155] Pedrozo, *supra* note 31, at 77.

[156] BUREAU OF OCEANS & INT'L ENV'L & SCI. AFF.'S, *supra* note 83, at 3 (detailing that the following territories claim the respective islands: Philippines (Scarborough Reef and some of the Spratly Islands), Malaysia (some of the Spratly Islands), Brunei (Louisa Reef, within the Spratly Islands), Vietnam (Spratly Islands and Paracel Islands), and Taiwan (all islands and island groups)).

China has engaged extensively in coercive diplomacy throughout the South China Sea,[157] clashing with its regional rivals on countless occasions.[158]

A. Domestic Law Does Not Affect International Law

China relies heavily upon its 2020 National Defense Law amendment which provides a domestic legal landscape for defending economic interests, in combination with its plainly refuted historic rights theory, for the purpose of legitimizing their airspace claims in the South China Sea. It claims maritime zones that are clearly prohibited by and contrary to international law, and then projects airspace claims based upon its unlawful maritime claims. Fortunately, the Vienna Convention on the Law of Treaties (VCLT) provides clear guidance regarding the role of domestic law in international affairs.

China acceded to VCLT in 1997.[159] Although the United States is not a party, it often turns to VCLT for customary guidance on treaty interpretation. In relevant part, VCLT provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[160] This clause means that China's domestic laws have no influence in interpreting UNCLOS, nor may they provide any relief for failing to follow its terms. Here, China cannot rely upon its National Defense Law amendment to justify internationally that it has sovereignty over the airspace in the South China Sea. China's domestic law justification does not fly.

B. Historic Rights Cannot Exist Outside of UNCLOS

VCLT also states that agreements outside the treaty may provide context for interpreting the terms of the agreement, to include: "(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; [and,] (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty,"[161] neither of which exist related to UNCLOS. China did not enter into any separate

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[157] Dang & Ahn, *supra* note 6, at 21 (explaining that coercive diplomacy is a threat-based strategy "employed to influence another's choices without a waging war" – achieving one's political objectives economically, by "a threat of punishment for noncompliance that he will consider credible and potent enough to persuade him to comply with the demand"); *Id.* at 24 ("Maritime coercive diplomacy activities can range from the use of limited naval forces to attack or occupy disputed land features at sea, military exercises in contested areas, blockades to harassment, physical interference with foreign activities, deployment of offshore oil rigs with the support of navy and paramilitary forces to construction works in disputed features.").

[158] Dang & Ahn, supra note 6, at 43-49 (2022) (documenting a long history of confrontations and disputes between China and other coastal nations in the South China Sea).

[159] Chapter XXIII Law of Treaties: 1.Vienna Convention on the Law of Treaties, at 1 (last viewed Apr. 27, 2022), https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf.

[160] Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

[161] *Id.* art. 31(2).

agreement regarding historic rights of the South China Sea, nor the concept of historic rights generally. As a result, this term is excluded from any legal analysis related to airspace which draws its boundaries from maritime zones. Moreover, VCLT permits context for interpretation to derive from "any subsequent agreement between the parties; . . . subsequent practice in the application . . . [or] relevant rules of international law" – such factors may be taken into account when interpreting a treaty.[162] Here, there are no subsequent agreements, and there is no right of historic use in international law. UNCLOS intentionally excluded the concept of historic rights from the agreement. This logic is further bolstered by subsequent State practice, to wit: persistent and continuous objections to sovereignty based on historic rights.

Finally, VCLT permits countries to find special meaning in particular terms or clauses when it is established that "the parties so intended."[163] It is clear that the parties to UNCLOS did not intend for historic rights to survive the agreement's ratification. The term was excluded from an otherwise comprehensive treaty that addresses the law of the sea and related airspace sovereignty. Recognizing historic rights would undermine the efficacy of UNCLOS and customary international law by permitting inconsistent and unrecognized State practice to form binding legal regimes. Such interpretations must be flatly rejected.

VCLT does provide a crack in the window through which China can argue that UNCLOS "(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."[164] China may claim that the meaning of historic rights is ambiguous since the pre-existing legal theory is not specifically controverted in UNCLOS – i.e. UNCLOS does not say "historic rights no longer exist." China may argue that, since it is not explicitly rejected in the text, it would then be manifestly absurd and unreasonable to presume that it is no longer a valid legal theory. This would make *some* sense if UNCLOS did not otherwise create maritime and airspace regimes manifestly contrary to the concept of historic rights. The establishment of national and international airspace pursuant to UNCLOS is all but ambiguous, absurd, or unreasonable. In fact, it is exceptionally well-defined that national airspace can only exist over areas that are entitled to territorial waters. The historic rights concept is not ambiguous for it is completely absent from the agreement; and the application of UNCLOS by its four-corners reading does not lead to a result that is absurd or unreasonable. To the contrary, UNCLOS—in the sphere of airspace—provides a sensible, rational, and equitable balance between States' rights and those of the international community. UNCLOS took the formerly thorny and inconsistent practice of maritime law and airspace, and distilled it down to undemanding parameters and guidance, significantly simplifying the

[162] *Id.* art. 31(3).
[163] *Id.* art. 31(4).
[164] *Id.* art. 32.

once complicated question of where aircraft could legally fly. It is unambiguous that China does not have lawful airspace rights in the South China Sea based upon its historic rights theory.

One author suggests that even a prior ICJ ruling "ignored discovery and historic claims."[165] Importantly, however, UNCLOS does not include either of these antiquated and no-longer-existent concepts in maritime law. The term "historic rights" is not mentioned anywhere in UNCLOS, nor is there a consistent understanding universally of what these words do, or should, mean.[166] As a result, the historic rights theory does not exist in customary international law.

The International Court of Justice (ICJ) stated that the "construction of navigational aids . . . can be legally relevant in the case of very small islands" and "must be considered sufficient to support [a State's] claim that it has sovereignty over [them]," particularly when there are no dissenting States or protests.[167] China has built some systems which it can claim to be navigational aids within the South China Sea; however, they were mostly built on artificial islands which by definition are not entitled to any maritime rights, and thus no airspace claims, regardless of what may be constructed thereon. Moreover, the persistent objections both militarily and politically by coastal, regional, and other interested States, confirm there are not a few but numerous dissenting States and protests. Conclusively, even navigational aids do not give China airspace rights in the South China Sea.

C. Arbitral Tribunal Ruled Historic Claims Do Not Exist

China ratified UNCLOS on June 7, 1996,[168] without any reservation or objection to the absence of "historic rights" from the agreement. For States with legal objections, UNCLOS provides a forum through which disputes can be adjudicated between parties. Exercising that remedy in UNCLOS, the Philippines brought a claim against China related to the South China Sea.[169] In 2016, the South China Sea Arbitral Tribunal essentially dismissed China's claims to much of the South China Sea, stating there was no evidence that China had historically exercised exclusive control,[170] and rejected China's maritime

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[165] LI, *supra* note 15, at 207.

[166] BUREAU OF OCEANS & INT'L ENV'L & SCI. AFF.'S, *supra* note 83, at 9 (citing *South China Sea Arbitration*, *supra* note 132, at ¶ 225 ("[t]he term 'historic rights' is general in nature [. . . and] may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty")); Mastro, *How China is Bending the Rules*, *supra* note 87 ("[T]he U.N Convention for [sic] the Law of the Sea (UNCLOS) does not grant signatories the right to make claims based on historical legacy, and the concept of historic claims lacks clear basis in international law." (internal quotations omitted)).

[167] Gervasi & Virzo, *supra* note 85.

[168] BUREAU OF OCEANS & INT'L ENV'L & SCI. AFF.'S, *supra* note 83, at 5.

[169] *South China Sea Arbitration*, *supra* note 132, at ¶ 1203.

[170] Jakhar, *supra* note 130.

claims in the South China Sea as having no basis in international law.[171] It determined that China had no legal basis for affirming ancient rights to marine boundaries and other resources within the nine-dash line.[172] "The Tribunal concluded that the Convention [UNCLOS] is clear in allocating sovereign rights to the Philippines with respect to sea areas in its exclusive economic zone, having found that Mischief Reef, Second Thomas Shoal, and Reed Bank are submerged at high tide, form part of the Philippines' exclusive economic zone and continental shelf, and are not overlapped by any possible entitlement of China."[173] Despite such a clear ruling, the verdict has had little to no impact on China's conduct, reducing the judgment to a mere moral victory for the Philippines.[174] China has continued to reclaim land in order to build land-water features in the region, subsequently militarizing the artificial islands.[175] Irrespective of China's disregard, the ruling is lawful and may still be enforced by the Philippines with or without the assistance of partner nations. Ignoring the ruling does not invalidate it, despite China's greatest hopes. The tribunal's decision is still binding law on the parties, even if China refuses to presently comply.

D. China Agreed in the Declaration on the Conduct of Parties to Not Restrict Overflight

On November 4, 2002, all relevant regional parties to the South China Sea disputes – including China – signed the Declaration on the Conduct of Parties in the South China Sea [hereinafter "Declaration"].[176] Within the Declaration, signatories committed to adhere to the U.N. Charter as well as UNCLOS, proclaiming their "respect for and commitment to the freedom of navigation in *and overflight above the South China Sea*[.]"[177] The territories agreed to exercise restraint in order to not complicate or escalate disputes.[178] Moreover, China agreed not to "inhabit[] . . . the presently uninhabited islands,

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[171] Pedrozo, *supra* note 31, at 73 (citing *South China Sea Arbitration*, *supra* note 132, at ¶ 184; *see also* OFF. OF SEC'Y OF DEF., *supra* note 22, at 103.

[172] Gupta, *supra* note 6, at 17 (reporting that the tribunal acknowledged evidence that Chinese, as well as other nationalities, navigators and fisherman historically used the islands while reserving that it did not have the jurisdiction to comment on sovereignty. "Prior to the Convention, the Tribunal held that the waters of the South China Sea outside the territorial sea were legally part of the high seas, where vessels from any country might freely sail and fish. As a result, the Tribunal determined that China's historical navigation and fishing in the South China Sea amounted to the exercise of high seas freedoms rather than a historic right, and that there was no evidence that China had historically exercised exclusive control over the South China Sea's waters or prevented other countries from exploiting their resources.").

[173] *Id.*

[174] Jakhar, *supra* note 130.

[175] *Id.*

[176] *Declaration on the Conduct of Parties in the South China Sea*, ASS'N OF SE. ASIAN NATIONS (May 14, 2012), https://asean.org/declaration-on-the-conduct-of-parties-in-the-south-china-sea-2/.

[177] *Id.* (emphasis added).

[178] *Id.*

reefs, shoals, cays, and other features[.]"[179] While China has seen changes to its political Administration since 2002, it is still party to and bound by the signed Declaration. In fact, the parties are negotiating a supplemental agreement expected to be titled the South China Sea Code of Conduct to further supplement the Declaration.

China has violated the Declaration by attempting to, and in some cases successfully, restrict overflight of the South China Sea. Moreover, any habitation that China has implemented since 2002 is in violation of the Declaration. These are linked in many ways because China claims some of its national airspace, or quasi-ADIZ, based upon its occupation of land features in the South China Sea. Since the habitation is unlawful in violation of an international agreement, any claimed national airspace derived from the same has no legal basis. Irrespective of its habitation violations, China's unlawful airspace restrictions and harassment have demonstrated a blatant disregard of its agreed upon but wholly unobserved commitment to the *freedom of overflight* above the South China Sea.

E. Air Defense Identification Zones Do Not Apply to Military Aircraft

The resurgence of the ADIZ as a defense and safety measure may largely be credited to a "heightened concern over terrorist attacks employing hijacked commercial aircraft," and partly credited to maritime disputes, and safety of international civil aviation.[180] To the extent this is true, there is no need for China to be concerned with U.S. military aircraft flying in the South China Sea as the U.S. military is unmistakably not a terrorist organization, not involved in the relevant maritime disputes, and not a risk to civil aviation. Regardless, coastal States declare ADIZs for a multitude of reasons and appears to be relatively common State practice.

In general, requiring aircraft identification in an ADIZ does not unduly interfere with the freedom of air navigation and overflight over the EEZ or high seas areas.[181] Regardless, requiring *anything* from a sovereign immune aircraft in international airspace raises questions about the strength and limits of sovereignty. Ultimately, where and how an ADIZ operates is subject to lengthy debate.

As a matter of course, ADIZs only exist in international airspace. Yet, airspace beyond a States' land area and territorial sea—i.e. international airspace—cannot be validly claimed.[182] Therefore, "no ADIZ requires prior

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[179] *Id.*

[180] Jinyuan, *supra* note 11, at 302.

[181] *Id.* at 277.

[182] Chicago Convention, *supra* note 89, arts. 1-2, 15 U.N.T.S. at 2; *see* U.N. Convention on the Law of the Sea, *supra* note 76, art. 58(2), 1833 U.N.T.S. at 419; *id.* art. 89, 1833 U.N.T.S. at 433; Jinyuan, *supra* note 11, at 276.

consent for the entry of foreign aircraft [into the ADIZ which is outside national airspace]. . . since littoral States only exercise[] limited control that falls far short of sovereignty."[183] To further complicate things, customary international law is applied differently to civilian and State aircraft. Civilian aircraft often comply with ADIZ requirements when they intend to enter a State's national airspace. On the other hand, military aircraft are sovereign immune and are not held to the same requirements as civilian aircraft. Unfortunately, due to inconsistent State practice there is no customary international law regarding the right and implementation of ADIZs.[184] There is a cogent legal argument, however, that States should be permitted to identify aircraft intending to enter national airspace in order to protect their national security.[185] Nevertheless, there exists no such national security justification for aircraft not intending to enter a State's national airspace.[186] To the extent that civilian aircraft are not required to provide responses to ADIZ demand, the legal justification is considerably weaker when aimed at sovereign immune military aircraft.

F. UNCLOS Clearly Prohibits China's Excessive Airspace Claims and Requirements

China holds that the activities of the U.S. EP-3 in 2001 went far beyond the limit of freedom of overflight authorized in UNCLOS.[187] It claims that military activities directed at the coastal state such as reconnaissance and intelligence gathering, military exercises and maneuvers, testing of military weapons, and scientific research, are prohibited activities even when conducted outside of national airspace.[188]

It is a fundamental principle that the "land dominates the sea;" that is to say that maritime regimes exist only relative to land features under the authority of coastal States.[189] One Chinese scholar suggests that between national and international airspace there exists a buffer zone, derived from the notion that the legal regime of the airspace is related to its subjacent territory – in this case, the contiguous maritime zone.[190] This idea, that the airspace is reflective of the law of the sea regime, is both accurate and contrary to China's position.

UNCLOS operates under the presumption that the *status quo* is freedom of navigation, and the restrictions on such freedoms are predicated

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[183] Jinyuan, *supra* note 11, at 276-77.
[184] *Id.* at 280.
[185] *Id.*
[186] *Id.*
[187] *Id.* at 291 (internal citation omitted).
[188] *Id.* at 291.
[189] BUREAU OF OCEANS & INT'L ENV'L & SCI. AFF.'S, *supra* note 83, at 6 (citing North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 96 (Feb. 20)).
[190] Jinyuan, *supra* note 11, at 282 (citing J.C. COOPER, EXPLORATION IN AEROSPACE LAW: SELECTED ESSAYS 197 (I.A. Vlasic ed. 1968)).

upon States' lawfully asserted rights. With this in mind, the territorial sea is functionally sovereign territory, but for the surface right of innocent passage, a right intentionally not mirrored in the airspace above the territorial seas – i.e. there is no innocent passage for aircraft. Innocent passage—continuous and expeditious passage through the territorial sea—is permitted only if the surface vessel does not prejudice the "peace, good order, or security" of the coastal nation with activities that would otherwise be permitted outside of the coastal State's territorial waters including but not limited to: any threat or use of force against the coastal State; use of weapons; information collection; and launching or recovering aircraft.[191] In other words, surface vessels like warships have freedom of navigation in all waters, but are restricted from their actions only in territorial waters where innocent passage standards are required; *ipso facto*, outside territorial waters, the activities prohibited during innocent passage are permitted. Since the airspace is reflective of the water over which it exists, the airspace above international waters – i.e. anywhere beyond territorial waters – contains no limits on overflight or prejudicial activities, subject only to other existing restrictions such as threats of an armed attack and safety of navigation, *inter alia*.

From another angle, the airspace through international straits is treated as international airspace. An international strait is created when there are overlapping territorial seas,[192] connecting high seas, or EEZs on either side.[193] Surface vessels are permitted to sail in their normal mode of operation through international straits.[194] The exception for straits applies to the overlapping territorial waters which would otherwise be restricted under the innocent passage regime. Innocent passage restrictions are lifted for navigation through international straits so that ships can operate in their normal mode in territorial waters lawfully, in addition to where they can already operate in their normal mode – before and after the strait. Since international straits are overlapping territorial seas, ships operate in the contiguous zones and EEZs of the coastal nations before and after their transit through the strait. Ships are permitted to operate in their normal mode of operation through the overlapping territorial seas (i.e. international strait) as an exception,[195] *a fortiori* they must be permitted to do the same before and after the strait—without restriction. Similarly, aircraft are permitted to fly through international straits, over the overlapping territorial seas of the coastal States. While aircraft would be otherwise restricted from flying over a State's territorial seas (national airspace), this exception exists in order for aircraft to transit from international airspace to international airspace, through national airspace above overlapping territorial seas. Applying the

[191] *See* U.N. Convention on the Law of the Sea, *supra* note 76, arts. 17-19, 1833 U.N.T.S. at 404-05.

[192] Off. of the Staff Judge Advocate, U.S. Indo-Pacific Command, *International Straits*, 97 INT'L L. STUD. 39, 40 (2021).

[193] *See* U.N. Convention on the Law of the Sea, *supra* note 76, art. 37, 1833 U.N.T.S. at 411.

[194] *See* U.N. Convention on the Law of the Sea, *supra* note 76, arts. 38-39, 1833 U.N.T.S. at 411-12.

[195] *See id.* arts. 38-39, 1833 U.N.T.S. at 411-12.

surface rationality to the air, military aircraft fly in their normal mode of transit over the strait, and thus must be otherwise unrestricted before and after the strait while flying over the contiguous zone, and EEZ. As a result, military aircraft are essentially unrestricted in international airspace outside the air adjacent to territorial seas ("States do not have the right to limit navigation or exercise any control for security purposes in EEZs").[196]

China could also argue that permitted military activities in the EEZ should be frozen at the level of capabilities and technology that existed at the time that UNCLOS was ratified, consistent with customary international law at that time.[197] Again, this flips UNCLOS on its head. UNCLOS starts with the idea that freedom of navigation is king, restricted only by the lawfully claimed rights of coastal States. With this in mind, the presumption is that advances in military technology will be the rule, and unless they violate UNCLOS, they are permitted. Moreover, UNCLOS contemplates and analyzes the use of military technology in the form of intelligence gathering, weapons use, and aircraft launch and recovery under the innocent passage regime, authorizing all "prejudicial" actions so long as they take place outside of a coastal State's 12 nautical mile territorial seas. To opine that in 1982 no developed country took notice of technological developments up until that moment in time and anticipated that technology would continue to further develop in the future, is naïve and implausible. UNCLOS operates under the presumption that in the EEZ, coastal States' rights are prioritized only with respect to exploration and exploitation of resources and economic interests, and that absent or beyond such interests priority is given to the international community's freedom of navigation.[198] Since the airspace is reflective of the maritime zone over which it exists, the only logical conclusion is that military activities outside national airspace are lawful and authorized.

One author alludes to the notion that contested waters – in this case, EEZs – are subject to different rules.[199] Again, this notion actually fares against China's claims. If contested land features without clear sovereignty are incapable of establishing maritime zones and national airspace because an entering aircraft would not know from what State they would require permission, then China's claims are *prima facie* unlawful since every land feature in the South China Sea has disputed sovereignty claims between at least two suitors. The South China Sea is rife with contested waters and airspace, making prejudice to a coastal nation an impossible task since one does not know which nation they may be prejudicing.

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[196] Mastro, *How China is Bending the Rules*, *supra* note 87.

[197] Jinyuan, *supra* note 11, at 292.

[198] *Contra* Jinyuan, *supra* note 11, at 294 (arguing that the rights of the coastal State should be prioritized above all others).

[199] *Id.* at 291.

It is clear, for many reasons, that China's airspace claims in the South China Sea are unlawful. The question then remains how and to what extent the international community should refute such claims. In doing so, State's must balance the risk of eroding international law with the risk of military escalation.

VIII. HOW TO BEST CHALLENGE CHINA'S UNLAWFUL CLAIMS

A. Formally Object to China's Unlawful Excessive Airspace Claims

In international practice, a State must make a clear and open objection to "alleged acts of sovereignty infringement if it wishes to avoid being disadvantaged in future judicial proceedings."[200]

It appears that China is brush stroking its way to declaring an ADIZ in the South China Sea sometime in the predictable foreseeable future. The United States should express that an ADIZ declaration by China in the South China Sea would unequivocally not be recognized.[201] To the extent practical, regional nations and nations with blue water navies should join in this preemptive objection. A concerted opposition will put both China and the international community on notice about the legal position of the United States and its partners, and the expected objections through military demonstrations should China continue painting its current path. Moreover, an anticipatory objection will inform China that its current brush stroke to sovereignty tactics is not unnoticed.

In regard to China's current South China Sea claims, "the United States should confirm that it does not recognize any maritime claims associated with [specified] features and conduct[] its . . . air operations accordingly."[202] The United States should declare that it does not recognize any of the claimed maritime zones in the South China Sea related to land features that do not warrant entitlement—such as artificial islands—and clearly delineate the areas where the United States believes overflight is authorized. Similar to the preemptive ADIZ objection, other affected and interested nations should publicly join in overtly rejecting China's maritime and airspace claims. Confirming this position will put China, as well as other coastal nations, on notice that the United States and its partners intend to fly in these contested areas, and that such overflight is not a threat but rather an exercise of freedom of air navigation consistent with international law. Putting the impacted countries on notice will preemptively *deescalate* future airspace FONOPs.

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[200] Li & Yu, *supra* note 26, at 42-43 (referencing disputes in the South China Sea related to the Treaty of San Francisco to which China was not invited to participate, but where Vietnam made claims to the Spratlys).

[201] Glaser, *supra* note 144.

[202] Pedrozo, *supra* note 31, at 92.

B. Conduct Overt Operations Displaying Noncompliance

The United States and its capable partners should fly surveillance missions directly overhead the contested maritime features, and sail warships as close to shore as physically and safely as possible.[203] Although not the focus of this article, sailing surface vessels close to shore presents an interesting conundrum – whether sailing in such a manner is innocent passage, authorized by UNCLOS, rather than an objection to the claimed territorial seas which are reflective of national airspace. The solution is to avoid the innocent passage regime by having surface vessels conduct actions intentionally and overtly prejudicial to the peace, good order, and security of the land feature; e.g. artificial island. Clear public affairs messaging will be paramount in these higher risk operations, but unmistakably objecting to unlawful territorial water claims requires unmistakably *not* conducting innocent passage. Operations that may risk escalation but may be properly mitigated by effective messaging may include intelligence collection, use of fire control radars, and launching and recovering unmanned aerial vehicles (as opposed to a much riskier and more escalatory manned aircraft). The alternative is essentially a demonstration of innocent passage which could be perceived as acquiescence and recognition of China's unlawful claims.

The United States and its partners should continue to fly over the disputed features in the South China Sea. Without any clearly resolved sovereignty claims, these features may be treated as if they do not generate maritime zones, and in turn, do not generate national airspace.[204] Notice or consent is not required since there is no clear claimant to the disputed features.[205] Aircraft should pass within 12 nautical miles and conduct military operations—e.g. intelligence gathering—in these areas. Airspace objections are much simpler to execute because there is no airspace equivalent of innocent passage through national airspace; i.e. the presence of the aircraft itself is prejudicial. To the extent there are disputed land features which would be entitled to U.S. recognized national airspace once conflicting sovereignty claims are resolved, a more mitigated measure would be to respect the national airspace surrounding these features despite there currently being no nation to recognize. The United States will want to be careful not to play a role in the sovereignty disputes; therefore, avoiding what may in the future be valid national airspace may be prudent. Moreover, flying over these areas may have an adverse desired effect—China may ramp up its kinetic opposition to other regional claims in order to secure sovereignty. While the suggested maneuvers are a calculated risk for the United States, flying over contested areas which may have valid national airspace claims in the future is the most effective means by which the United

[203] *See* Sciutto, *supra* note 17.
[204] Pedrozo, *supra* note 31, at 73.
[205] *Id*.

States can demonstrate that without unequivocal sovereignty, national airspace cannot exist.

All of these proposals risk China opening fire on a U.S. vessel or aircraft, further escalating tensions between the powers; but with proper coordination, communication, and public affairs, any aggression by China would be clearly viewed as escalatory, and illegal.

C. *Leverage the Arbitral Tribunal Ruling in Future Agreements and in Practice*

The United States should assist the Philippines in demanding that the arbitration ruling be incorporated into the South China Sea Code of Conduct, still under negotiations between the regional States.[206] The Code of Conduct presents a *sui generis* opportunity to help restore order, and the fair and proper administration of international law into the South China Sea which has otherwise run amuck. The dilemma with the currently stalled Code of Conduct is that China has sufficient leverage over the coastal nations at the table, risking that China will steamroll its unlawful claims into the agreement much the same way that it dismissed the lawful tribunal judgment the Philippines obtained against it. The United States, as well as other developed nations, must guide the negotiations without acting as a participant. This guidance can be done by assuring the less powerful regional players that their positions, if consistent with UNCLOS, will be supported by the political branches of their partners, and consequently their armed forces.

The United States can also use the arbitral tribunal ruling as part of its international legal justification for operations in the South China Sea. Adding the relevant portions of the ruling to legal explanations does not take away from the formerly lone UNCLOS arguments. In the event another dispute is filed and receives a favorable ruling, the United States must not repeat its mistake of taking a back seat to enforcement. Delayed enforcement of the former ruling was a strategic error, but delayed enforcement related to a second ruling could be catastrophic.

IX. CONCEIVABLE CONSEQUENCES

China has a proven ability to apply pressure to achieve political goals, accurately anticipating the United States' and regional States' reactions.[207] The United States' cautious and slow responses gave way for China's decisive and fast construction in the South China Sea.[208] With rising tensions resulting from China's relentless pursuit of control, it is unlikely that the great powers operating in the region – India, Russia, Japan, and the United States – will ever

[206] Jakhar, *supra* note 130.
[207] Dang & Ahn, supra note 6, at 170.
[208] *Id.* at 171.

have a friendly and stable relationship with China, at least not in the near future.[209] Additionally, a strict and rigid adjudication of the conflicting claims bears the risk of destabilizing the region.[210] The second best, but still desirable, outcome is an economically fruitful political arrangement wherein States can equitably share resources without prejudice to territorial, maritime, and airspace claims.[211]

A. Risk of Action

One risk of taking action that simultaneously fails to deter China's aggression is that matters may escalate putting the United States in a position where they must "fight and win."[212] As discussed above, China has increased the force and frequency with which it is confronting the U.S. military flying throughout the South China Sea. With China's "increased military tempo and its extensive publicity," it is evident that "China wants the world, and especially the United States, to know that its military can inflict great costs on any country that threatens its South China Sea position."[213] The outcome may be another air collision similar to the 2001 incident, or worse, outright miscalculation resulting in a kinetic response from China, and ultimately an undesired armed conflict.

Another risk is that the United States' friendly regional partners may feel slighted by excessive U.S. involvement in what is otherwise a regional dispute. Clearly, the United States and its partners have a vested interest in the fair and equitable disposition of the South China Sea dispute—avoiding increased hostilities in the region, ensuring freedom of navigation and overflight, securing trade routes and strategic navigation, and generally ensuring that international law is not eroded by acquiescence to unlawful claims—however, the core of the dispute is sovereignty affecting maritime and airspace claims to which the United States has no direct entitlement, other than being a beneficiary of freedom of navigation.

Both of these risks can be significantly mitigated if not completely avoided with proper messaging and savvy foreign policy. It is important for the United States to support its regional partners without alienating them, and to protest China's unlawful claims without provoking it.

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[209] *See* Sam Roggeveen, Commentary, *Don't Let the China Hawks Frighten You*, LOWY INST. (Jan. 10, 2021), https://www.lowyinstitute.org/publications/don-t-let-china-hawks-frighten-you (discussing whether China is a threat to Australia, and ultimately concluding that China would need military bases closer to Australia which is a distant prospect, or China would have to sail a fleet to Australian shores, neither of which is likely due to the power competition among closer powers in the region).

[210] Strupp, *supra* note 140.

[211] *Id.*

[212] Gomez & Favila, *supra* note 52 (quoting Admiral John C. Aquilino, United States Navy).

[213] Mastro, *The PLA's Evolving Role*, *supra* note 69, at 11.

B. Risk of Inaction

Without United States' and coalition partner intervention and enforcement of international law, countries like the Philippines will lose their economic livelihoods in industries such as fishing and other South-China-Sea-based sectors.[214] If China is permitted to unlawfully control the economic resources and trade routes in the South China Sea, the impact will be felt globally. Regional partners may suffer economic and humanitarian losses, and a strategic military shift will be inevitable. Perhaps most concerning, China will be in an optimal position to invade Taiwan in pursuit of reunification, a target President Xi Jinping has long but forgotten.

In addition to economic devastation, China's erosion of UNCLOS and other customary international law norms will weaken the balance of power, currently the *status quo* in international diplomacy. China's largely successful deflection of the South China Sea ruling has reinforced its ability to get away with ignoring international law when convenient.[215] If the process by which customary international law is created and enforced is dismantled, the infection may spread to other areas of law including the U.N. Charter and the Law of Armed conflict, which is already currently being challenged by Russia's invasion of Ukraine. "The founding of the United Nations was a milestone in humanity's pursuit of peace and development";[216] therefore, the United States must play a role in preventing its collapse—a tangible threat if China's challenges go unchecked.

In order to put continued indecisiveness into perspective, it may be worth looking to the East China Sea which is further along China's brush strokes to sovereignty plan. China has a history of achieving goals through baby-steps, ultimately amounting to large international movements. A repeat of its East China Sea airspace regime is a realistic consequence of inaction.

X. CONCLUSION

The United States and China are engaged in "strategic competition," both endeavoring to shape the conduct of the other.[217] Optimally, the United States desires greater cooperation with China on global issues such as terrorism, epidemics, climate change, and nuclear proliferation.[218] More realistically, the United States wants to prevent China from obtaining autonomous power by unlawful means in the South China Sea, extinguishing any hope for peacefulness which may exist in the region.

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[214] Jakhar, *supra* note 130.
[215] *Id.*
[216] *Position Paper on China's Cooperation*, *supra* note 125.
[217] Mastro, *The PLA's Evolving Role*, *supra* note 69, at 2.
[218] Glaser, *supra* note 144.

"[T]he United States still holds a decisive military advantage due to its ability to project power and sustain operations across vast distances,"[219] but the United States must tactfully exercise its military strength in order to guarantee a judicious resolution of the South China Sea dispute. One of the strengths for the United States is that "China does not benefit from maintaining a general and absolute 'sovereignty belongs to China' policy."[220] If China alienates all of its regional partners, it may risk isolation—a shattering result if realized.

China's domestic problems are largely untroublesome.[221] If China is diplomatically crafty and maintains its economic control, it will indisputably become the biggest economy in the world, "and eventually the most capable military power in Asia," based largely upon its population.[222] Additionally, China has made enormous strides in advancing and implementing military technology.[223] The concern for countries like Australia is that the leading power in the Indo-Pacific will no longer be an ally – e.g. the United States – but rather a provocative competitor, China.[224]

China's claimed airspace in the South China Sea is unlawful. Its domestic law and historic rights theories have no foundation in either customary international law or treaty. All reasonable interpretations of UNCLOS through the lens of VCLT conclude that China's legal theories cease to exist. Moreover, a legally established arbitral tribunal has ruled definitively that China has no lawful airspace rights in the South China Sea. China's actions even run contrary to the Declaration it signed regarding activity in the South China Sea, a clear violation of its international obligations to the coastal States.

The United States and coalition partners must be expeditious and steadfast in their efforts to enforce international law over this vital airspace. It is imperative that the coastal nations with valid claims to the airspace maintain their sovereignty, and do not let their claims perish, eroding the international law construct. The United States, along with its coalition partners, must prevent China from obtaining exclusive control of the South China Sea. In the same way "[d]emocracies die behind closed doors,"[225] so too will airspace rights die behind inaction.

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[219] Mastro, *The PLA's Evolving Role*, *supra* note 69, at 10.
[220] Li & Yu, *supra* note 26, at 48.
[221] *See* Roggeveen, *supra* note 209.
[222] *Id*.
[223] *Id*.
[224] *Id*.
[225] Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).

IMMIGRATION RELATED MARRIAGE FRAUD IN THE UNITED STATES AND THE ANALYSIS OF THE SUBSTANTIVE AND PROBATIVE EVIDENCE STANDARD UNDER SECTION 204(C) OF THE IMMIGRATION AND NATIONALITY ACT

Felix O. Okpe *

I. INTRODUCTION

Immigration related marriage fraud is a topic that affects foreign nationals married to, or who are eligible immediate relatives of United States ("U.S.") citizens or permanent residents that apply to register permanent residence or adjust their status in the U.S.[1] Under U.S. immigration laws, non-citizens applying to register for permanent residence or adjust their status under family-based visa petitions should be familiar with Section 204(c) of the Immigration and Nationality Act ("Act").[2] Violation of this statutory provision is a permanent bar to the approval of any subsequent immigration benefit.[3] Understandably, denials of visa petitions under Section 204(c) have created confusion among non-citizens and generated considerable debate between attorneys, non-citizens, and U.S. immigration authorities. There are valid concerns about the approach and attempts by the United States Citizenship and Immigration Services ("USCIS") to apply this provision of the law in the adjudication of visa petitions. The marriage fraud bar under Section 204(c) is one of the most serious provisions of the Act. It is a metaphorical death sentence for the non-citizen found culpable under U.S. immigration laws and policy. Unlike other immigration related penalties, the marriage fraud bar is nonwaivable and does not expire.[4]

Marriage-based immigration enforcement during the Trump administration was relatively very aggressive in ways that diminish the idea that

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[1] *Top Story: ICE Leading Nationwide Campaign to Stop Marriage Fraud,* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Apr. 2, 2014), https://www.ice.gov/news/releases/top-story-ice-leading-nationwide-campaign-stop-marriage-fraud (applications to register permanent residence or adjust status in the U.S. are also commonly referred to as visa petitions for U.S. green cards. Green cards put non-citizen spouses and other qualified immediate relatives on a path to be eligible for U.S. citizenship. However, for ease of reference this article will focus more on marriage-based visa petitions filed by U.S. citizens).

[2] 8 U.S.C. §§ 1104–1401 (1964).

[3] 8 U.S.C. § 1182(a)(6)(C)(i).

[4] *See* 8 U.S.C. § 1182. (For example, inadmissibility based on fraud and willful misrepresentation of material facts or false claims of U.S. citizenship for unlawful voting is subject to a discretionary waiver where the non-citizen can establish extreme hardship to a qualifying relative who is a U.S. citizen or permanent resident).

the U.S. is a country of immigrants.[5] Immigration attorneys and other concerned groups often observed that several otherwise meritorious marriage-based visa petitions to adjust status or register permanent residence were being denied sweepingly under Section 204(c) of the Act.[6] One of the most common grounds for these denials has been USCIS's determination of marriage fraud based on a prior unsuccessful visa petition by the same non-citizen.[7] The debate over this issue undercut the age-long notion, that family unification and inclusion are the cornerstones of U.S. immigration law and policy. There are also legitimate questions about the due process clause and the rule of law as it applies to immigration marriage fraud under the U.S. Constitution.

At the onset of the Biden administration on January 20, 2021, President Biden signed several Executive Orders that were designed to walk back what the new administration characterized as the "bad" immigration policies of the Trump administration.[8] However, these interventions have not gone far enough to effectively address or standardize USCIS discretion in applying Section 204(c) of the Act.

In the exercise of its plenary powers over immigration law, the U.S. Congress enacted Section 204(c) of the Act to fight marriage fraud under marriage-based visa petitions by introducing a marriage fraud bar to immigration benefits.[9] Under the Act, a non-citizen determined by the USCIS to have attempted or engaged in marriage fraud during a prior marriage to a U.S.

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[5] *See* John Gramlich, *How Border Apprehensions, ICE Arrests and Deportations have changed under Trump*, PEW RESEARCH CENTER (Mar. 2, 2020), https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump/.

[6] *See e.g.*, Elizabeth Carlson, *Five Things to Know About Fraud and Marriage-Based Petitions*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (Apr. 26, 2021), https://cliniclegal.org/resources/family-based-immigration-law/spousal-petitions/five-things-know-about-fraud-and-marriage (noting that in 2020 alone, the Board of Immigration Appeals published several decisions addressing Section 204(c) of the Act. The author was emphatic that, "…it is vitally important that practitioners and their clients understand how far reaching the marriage bar can be. Even a long ago-marriage -or a conspiracy to enter one-can gravely impact a client's ability to obtain a green card…").

[7] *Id*.

[8] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2408 (2018) (where the question for determination was whether the entry suspension imposed on majority non-citizens from Muslim countries by the Trump administration, was not a violation of INA §1182(f). The section authorizes the President to, "suspend the entry of all aliens or any class of aliens whenever he finds that their entry would be detrimental to the interests of the United States". The Supreme Court held that, "§1182(f) exudes deference to the President in every clause. It entrusts to the President and the decisions whether and when to suspend entry, whose entry to suspend, for how long, and on what conditions."); *see also* President Joe Biden, *Remarks by President Biden at Signing of Executive Orders Advancing his Priority to Modernize Our Immigration System* (Feb. 2, 2020), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/02/remarks-by-president-biden-at-signing-of-executive-orders-advancing-his-priority-to-modernize-our-immigrationsystem/#:~:text=Today%2C%20I'm%20going%20to,better%20manage%20of%20our%20borders.

[9] 8 U.S.C. § 1182(a)(6)(C)(i).

citizen is permanently barred from obtaining any immigration benefit.[10] Thus, the marriage fraud bar under Section 204(c) of the Act is very serious. On this matter, consistent with the prescriptions of the rule of law and constitutionalism, one would imagine that the serious penalty prescribed under the Act will be compelling enough to offer a constitutional presumption of innocence to non-citizens alleged to have committed marriage fraud like U.S. citizens. Unfortunately, this is not the case. Under the U.S. Constitution, Congress has no constitutional duty to provide non-citizens the full benefits and protections of the Constitution in the exercise of its plenary powers over immigration laws.[11] Despite the fact that the wording of the Act appears to be targeted at the conduct of the non-citizen regardless of the role, if any, of a U.S citizen spouse in the mix, the non-citizen has a difficult task and burden of mounting a challenge to what is a clear example of constitutional discrimination under U.S. immigration laws and policy.

Depending on the jurisdiction that is applicable to the visa petition under review, the substantive and probative evidence test is the settled standard for the judicial review of any USCIS decision denying a visa petition.[12] This article argues that the standard reflects the intention of the U.S. Congress. Often, the misapplication of the test by the USCIS is unfair. The notion that non-citizens and U.S. citizens cannot be placed in the same homogenous legal classification under Section 204(c) of the Act is a weakness that is discriminatory against non-citizens under the Act. In this article, I attempt to offer valid arguments to reinforce existing judicial precedents and challenge USCIS's deviating pattern and misapplication of the statutory provision. Thus, consistent with the rule of law, Section 204(c) of the Act requires documented affirmative and direct evidence of immigration related marriage fraud against the non-citizen before accountability may be properly demanded and applied against the non-citizen under Section 204(c) of the Act.

This article is divided into four parts. Part II examines the background and the approach of the USCIS to the probative and substantive evidence standard in the determination of immigration related marriage fraud. Part III analyzes the USCIS approach, and the standard of review applied by U.S. federal courts under the Administrative Procedure Act ("APA")[13] to review the decision to deny a visa petition within the framework of the substantive and probative evidence test. This Part also analyzes case law and judicial precedents to support my argument that the interventions by U.S. federal courts have not

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[10] *Id*.

[11] Louis Henkin, *The Constitution and the United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV.. L. REV. 853, 862–63 (1987) (criticizing the plenary power doctrine, Henkin complained that the U.S. Supreme Court has removed immigration and deportation from basic constitutional protections).

[12] *In re* Tawfik, 20 I&N Dec. 166, 167 (BIA 1990); see also *In re* Singh, 27 I&N Dec. 598, 598 (BIA 2019).

[13] Administrative Procedure Act, 5 U.S.C. § 555(b) (2006).

gone far enough to inhibit a pattern of automatic application of Section 204(c) where the non-citizen has been denied a marriage-based visa petition prior, contrary to the substantive and probative evidence standard. This article argues that the only standard to determine immigration related marriage fraud against a non-citizen is one that requires complete, documented, direct, and affirmative evidence of fraud against the non-citizen beyond mere retroactive inference of marriage fraud only by reason of a failed prior marriage with a U.S. citizen spouse. I conclude the article with my remarks in Part IV.

II. BACKGROUND

A. The Purpose of the Statute

This Section 204(c) of the Act[14] provides: notwithstanding the provisions of sub-section (b) no [visa] petition shall be approved if:

> (1) the alien has previously been accorded or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or spouse of an alien lawfully admitted for permanent residence, by a reason of a marriage determine by the Attorney General to have been entered into for the purpose of evading the immigration laws, or
> (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

The implementing regulation at 8 C.F.R. § 204.2(a)(1)(ii)[15] states:

> Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien has been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

[14] 8 U.S.C. §§ 1104–1401 (1964).

[15] 8 C.F.R. § 204.2 (1990) (this regulation for § 204(c) of the Act constituted a reorganization and amendment to the Act that added the substantive and probative evidence language to the Act in 1993).

Under the Act and regulation, through delegated authority, the authority of the U.S. Attorney General is exercised by the USCIS. One tool that is very common for U.S. immigration control and enforcement is the application of this provision by the USCIS to deny otherwise approvable marriage-based visa petitions. The effects of this provision in the adjudication of visa petitions and the discharge of the evidentiary burden should be a major cause of concern for non-citizens who are applying through a marriage based petition to adjust status in the U.S.[16] Thus, one can imagine the apprehension an improper application of the Act may occasion amongst prospective immigrants, their families, and communities in a country like the U.S. that prides itself with promoting family unification as one of the cornerstones of its immigration laws.[17] But, to properly understand Congress's reasoning behind the passing of the Act and its application in the adjudication of marriage-based visa petitions, it is germane to examine the amendments introduced through the Immigration Marriage Fraud Amendments Act ("IMFA") of 1986.[18]

In the 1980s, prior to the enactment of the IMFA, contractual or unilateral marriage fraud was undermining marriage-based legal immigration in the U.S.[19] There were genuine concerns that the issue has developed into a stage where congressional intervention was warranted.[20] To address the issue, the 99th U.S. Congress introduced and passed the IMFA into law to amend the Act to deter immigration related marriage fraud.[21] In the context of U.S. immigration law, contractual marriage fraud is an agreement between a non-citizen and a U.S. citizen or permanent resident spouse to enter into a marriage for the purpose of evading the immigration laws of the U.S. to register permanent residency. Unilateral marriage fraud, on the other hand, refers to situations where the non-citizen deceives the U.S. spouse into entering a marriage for the purpose of obtaining U.S. immigration benefits.[22] Notable examples of unilateral marriage fraud include instances where the non-citizen abandons or

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[16] *See* Iyawe et al. v. Garland, No. 20-3088 (8th Cir. 2021) ("The consequences of USCIS finding that a marriage was a sham are thus significant."); *see also* Osakwe v. Mukasey, 534 F.3d 977, 979 (8th Cir. 2008) ("It goes without saying that [USCIS's] determination of marriage fraud carries great consequences as an alien may be permanently ineligible to obtain an I-130 visa even if he subsequently enters into a bona fide marriage with a U.S. citizen.").

[17] *See generally* Marcel De Armas, *For Richer or Poorer or Any Other Reason: Adjudicating Immigration Marriage Fraud Cases Within the Scope of the Constitution,* 15 AM. U. J. OF GENDER, SOC. POL'Y & THE L. 743, 744-45 (2007).

[18] Immigration Marriage Fraud Amendments Act, 8 U.S.C. §1325(c); THE UNITED STATES DEPARTMENT OF JUSTICE ARCHIVES, *1948. MARRIAGE FRAUD -- 8 U.S.C. 1325(C) AND 18 U.S.C. 1546* (January 17, 2020), https://www.justice.gov/archives/jm/criminal-resource-manual-1948-marriage-fraud-8-usc-1325c-and-18-usc-1546 (the legislative history shows that the IMFA is a subsequent amendment to the Act).

[19] *See* James A. Jones, *The Immigration Fraud Amendments: Sham Marriages or Sham Legislation?*, 24 FLA. STATE U. L. REV. 679, 681-82 (1997).

[20] *Id.*

[21] *See* 8 U.S.C. §1325(c)(1986).

[22] *See* De Armas, *supra* note 17, at 746, 749 (suggesting there is culpability where the U.S. citizen spouse engages in acts that indicate that they had a fraudulent intention before and during the marriage to the non-citizen).

divorces the U.S. citizen spouse almost immediately after being approved for permanent residence based on the underlying marriage.[23] The concept of contractual or unilateral immigration related marriage fraud must be distinguished from marriage fraud under U.S. criminal laws. The standard of proof under U.S. criminal laws is beyond a reasonable doubt. Prosecuting marriage fraud under U.S. criminal laws also accords the non-citizen constitutional rights including due process in ways that undermine the U.S. Congress plenary powers over immigration.[24] The plenary powers are exercised to exclude U.S. constitutional protections for non-citizens. However, immigration related marriage fraud under the Act is often established on the preponderance of the evidence to satisfy the substantive and probative evidence standard.[25] This standard of proof is lower than the prescriptions of U.S. criminal laws.

For the scope of this article, the most common motivation in immigration related marriage fraud cases under U.S immigration laws are financial gains, prevention of deportation from the U.S., sympathy for the non-citizen, and assisting a friend.[26] The primary purpose behind Section 204(c) is to strengthen, enforce, and prevent immigration related marriage fraud in the adjudication of visa petitions.[27] There is no statute of limitations for inquiry into immigration related marriage fraud whether or not, a specific and documented determination of marriage fraud was made in the adjudication of the prior visa petition filed for the benefit of the non-citizen.[28] The last sentence of the implementing regulation[29] cited above supports this interpretation. Similarly, in *Matter of Jongbum PAK*[30] the Board of Immigration Appeals ("BIA")[31] held that:

> … the broad phrasing and the absence of a temporal requirement suggest that Section 204(c) may be applied based on a marriage fraud finding whenever it becomes evident that there is substantial and probative evidence of an attempt or conspiracy

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[23] *Id.*

[24] *See generally*, David Moyce, *Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws,* 74 CALIF. L. REV. 1747, 1747–76 (1986).

[25] *See* Matter of Jongbum PAK, 28 I&N Dec. 113, 118 (BIA 2020).

[26] *See* De Armas, *supra* note 17, at 746.

[27] *See* Matter of Isber, 20 I&N Dec. 676, 678 (BIA 1993).

[28] *See* 8 U.S.C. § 1154(c); *see* Liliana Zaragoza, *Delimiting Limitations: Does the Immigration and Nationality Act Impose A Statute of Limitations on Noncitizen Removal Proceedings?*, 112 COLUM. L. REV. 1326, 1328-29 (2012).

[29] *See* 8 U.S.C. § 1154(c).

[30] Matter of Jongbum PAK, 28 I&N Dec. 113, 117 (BIA 2020).

[31] United States Department of Justice, *Board of Immigration Appeals* (Sept. 14, 2021), https://www.justice.gov/eoir/board-of-immigration-appeals (describing how the BIA is an agency of the U.S. Department of Justice and the highest appellate administrative body for interpreting and applying immigration laws, the BIA has a nationwide jurisdiction to hear certain appeals from immigration Courts and USCIS including appeals on visa petitions, and most BIA decisions are subject to judicial review in U.S. Federal Courts).

> to enter into a marriage for the purpose of evading the immigration laws.[32]

This BIA decision established that the USCIS has the legal authority to re-examine the prior marriage of a non-citizen to a U.S. citizen for marriage fraud including instances where the prior visa petition was denied due to insufficient evidence to support the prior petition.[33] In other words, the penalty under Section 204(c) applies to non-citizens in situations where the latter never received any immigration benefit from the previous marriage and underlying visa petition.[34] The BIA specifically stated thus:

> Where there is substantial and probative evidence that a beneficiary's prior marriage was fraudulent and entered into for the purpose of evading the immigration laws, a subsequent visa petition filed on the beneficiary's behalf is properly denied pursuant to Section 204(c) of the Immigration and Nationality Act, 8 U.S.C. § 1154(c) (2018), even if the first visa petition was denied because of insufficient evidence of a bona fide marital relationship.[35]

The IMFA reinforces and establishes immigration milestones that allow the USCIS to investigate marriage fraud in the context of U.S. immigration laws.[36] Under IMFA, to curb immigration related marriage fraud, the U.S. Congress amended the Act by introducing a conditional basis for permanent residence and the removal of the conditions attached to permanent residence based on an underlying marriage to a U.S. citizen that was under two years old at the time of approval of the visa petition.[37] Pursuant to the amendments introduced under IMFA and pertinent to the utility of Section 204(c), the USCIS has the authority to terminate a conditional permanent residence where a fee or other considerations was given or offered by the non-citizen for the filing of the visa petition based on the underlying marriage other than a fee or consideration to a lawyer or other approved professional for assistance in filing the visa petition.[38]

The USCIS may also terminate the conditional permanent residence of the non-citizen before the second anniversary of obtaining that status, where it determines that the qualifying marriage was entered for the purpose of procuring admission as a permanent resident of the U.S.[39] The general objective of curbing

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[32] Matter of Jongbum PAK, 28 I&N Dec. 113, 117 (BIA 2020).
[33] *Id.*
[34] United States Department of Justice, *supra* note 31.
[35] *Id.*
[36] *See* 8 U.S.C. § 1325(c) (1986) ; *see also* 18 U.S.C. § 1546.
[37] 8 U.S.C. § 1186a.
[38] 8 U.S.C. § 1186a(b)(1)(B); *see also* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP*:* PROCESS AND POLICY 150–54 (9th ed. 2020).
[39] *Id;* 8 U.S.C. § 1186a(b)(1)(A).

immigration related marriage fraud under Section 204(c) of the Act and the amendments introduced through the IMFA are laudable. Immigration related marriage fraud, if not properly checked, could negatively impact legal immigration and the exercise of state sovereignty over immigration laws and policies.

Despite the U.S. Congress statutory interventions aimed at fighting immigration related marriage fraud, the non-citizen is not without options to challenge improper determinations of marriage fraud by the USCIS under Section 204(c) of the Act, where there are legal grounds to do so.[40] Challenges under the Act are valid where the process and the evidence relied upon by the USCIS in making a determination of immigration related marriage fraud is flawed as a matter of law.[41] A valid challenge may be made under the APA or where the action of the USCIS is inconsistent with existing precedents and jurisprudence.[42] To analyze the application of the Act as it pertains to the determination of marriage fraud in the adjudication of visa petitions, it is important to begin from the approach of the USCIS where the issues of immigration related marriage fraud are at issue in the context of Section 204(c) of the Act.[43]

B. USCIS Recent Approaches to Section 204(c) of the Act

As a matter of policy, the USCIS has broad discretion in the application of Section 204(c) in the adjudication of marriage-based visa petitions for permanent residence.[44] Based on the Act, the application of this law presupposes that the non-citizen was the beneficiary in a prior marriage-based visa petition for permanent residence that was not approved.[45] The reasons for non-approval may include insufficient evidence, documented discrepancies arising from oral interviews on the visa petition, withdrawal of the visa petition by the petitioner, or divorce in the qualifying marriage before the adjudication of the visa petition.[46] A fair analysis of Section 204(c) does not support the proposition that a prior non-approval of a visa petition not based on a specific determination of marriage fraud is equivalent to a violation of Section 204(c). In recent times, the

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[40] *See* 5 U.S.C. § 706(2)(a).

[41] *See* Bangura v. Hansen, 434 F.3d 487, 502 (6th Cir. 2006) (citing 5 U.S.C. § 706(2)(A)).

[42] The challenge is usually by motion for summary judgment. Summary judgement is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a). In this regard, the court's review of the agency's action (the USCIS) is through a differential standard that interrogates the capriciousness or arbitrariness of the decision at issue. *See id*; *see also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[43] *See* Matter of Jongbum PAK, 28 I&N Dec. 113, 113 (BIA 2020).

[44] *Id.*

[45] *Id.*

[46] *See, e.g.*, Sallam v. Hansen, No. 20-1731, 2022 WL 462814, at *3–5 (N.D. Ohio Feb. 15, 2022) (The central reason given by the USCIS for the denial of the underlying visa petition was documented discrepancies that arose from initial interviews and field investigations).

approaches of the USCIS on this issue demonstrably indicate otherwise. Below is a list of some recent examples.

Doreen Aidoo et al. v. United States of America et al.,[47] challenges the application of Section 204(c) of the Act to deny the extant visa petition. In this case, filed against organs of the U.S. government charged with the enforcement of U.S. immigration laws, Plaintiffs Aidoo and Osei are husband and wife.[48] Plaintiff Aidoo is an American citizen, while Plaintiff Osei is a non-US citizen from Ghana.[49] The couple has children who are American citizens by birth.[50] Based on her marriage to Plaintiff Osei, Plaintiff Aidoo filed a visa petition on November 4, 2016, for the benefit of her non-citizen husband.[51] On February 21, 2017, the Plaintiffs appeared for an interview with a USCIS officer at the Cincinnati, Ohio field office of the USCIS.[52] At the end of the interview, the USCIS officer found the relationship and the *bona fides* of the Plaintiffs credible enough to approve the visa petition filed by Plaintiff Aidoo for her non-citizen spouse.[53] However, on March 31, 2017, the USCIS issued a notice of intent to deny ("NOID") Plaintiff Aidoo's visa petition because approval is barred under Section 204(c) despite the merits of the extant visa petition.[54] In the NOID, the USCIS specifically alleged that the non-citizen spouse of the petitioner's immigration record contained evidence of an attempt by the non-citizen to obtain an immigration benefit through a prior "fraudulent marriage" to another U.S. citizen.[55] The NOID was primarily based on the finding by the USCIS that the U.S. citizen in the prior marriage failed to disclose her marital status to a public benefit agency while she was married to Plaintiff Osei.[56] This decision was essentially hinging the denial of the visa petition on a prior unsuccessful visa petition filed for the benefit of Plaintiff Osei.[57] The visa petition was eventually denied by the USCIS after Plaintiff Aidoo unsuccessfully rebutted the allegations of the USCIS when she responded to the NOID. Dissatisfied with the decision of the USCIS, the Plaintiffs filed an action before the Court to challenge the unfavorable decision.[58]

In *Matter of Jongbum PAK,*[59] the USCIS denied the visa petition at issue under Section 204(c) of the Act. In this case, the USCIS based its denial

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[47] Aidoo v. United States, No. 19-225, 2022 WL 4537982, at *1 (S.D. Ohio Sept. 28, 2022).
[48] *Id.*
[49] Plaintiff's Motion for Summary Judgement at 1–2, Aidoo v. United States, No. 1:19-CV-00225 (S.D.Ohio June 5, 2020), ECF No. 16.
[50] *Id.*
[51] *Id.* at 2.
[52] *Id.* at 2.
[53] *Id.* at 2.
[54] *Id.* at 2.
[55] *Id.* at 2.
[56] *Id.* at 2.
[57] *Id.* at 2.
[58] *Id.* at 3.
[59] Matter of Jongbum PAK, 28 I&N Dec. 113 (BIA 2020).

on the allegation that the discrepancies in the answers given by the non-citizen and his former U.S. citizen spouse regarding their courtship, marriage, and family members during their visa petition interview on July 12, 2012 are evidence that the non-citizen had engaged in an immigration related marriage fraud as the term is understood under Section 204(c).[60] The record, in this case, shows that the USCIS denied the visa petition because the former wife of the non-citizen provided insufficient documentary evidence in support of the visa petition.[61] In this case, the USCIS specifically alleged that the non-citizen did not reside with his former wife in the claimed address of the couple at the time material to the adjudication of the visa petition and that they had given a significantly inconsistent account of their living arrangements.[62] During the adjudication of the visa petition connected with the prior marriage, USCIS conducted a site visit to the former couple's claimed marital address. According to the USCIS, a virtual inspection of the apartment revealed that there was no evidence of any items that belonged to a female.[63] The USCIS then denied the underlying visa petition in the former marriage, concluding that the petitioner had failed to demonstrate that her marriage to the non-citizen was entered in good faith.[64]

In *Yolanda Kyeremeh v. Jefferson B. Sessions, III,*[65] Mr. Kyeremeh's visa petition filed by his U.S. citizen spouse was denied by the USCIS under Section 204(c) of the Act because the USCIS alleged that Mr. Kyeremeh engaged in marriage fraud because of the unsuccessful visa petitions filed by two prior U.S. citizen spouses.[66] In this case, the record contained evidence that Mr. Kyeremeh did not share a joint address with his former U.S. citizen spouses.[67] There were also documented inconsistencies from USCIS interviews on the prior visa petitions filed for Mr. Kyeremeh's benefit by his former U.S. citizen spouses.[68] The record also showed that Mr. Kyeremeh had divorced his former spouse while she was appealing the USCIS's denial of her visa petition. [69] The Plaintiff was successful at the U.S. District Court in challenging the USCIS denial of the extant visa petition under Section 204(c) of the Act.[70] The decision of the District Court, in this case, will be referred to later.

[60] *Id.* at 114.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] Kyeremeh v. Sessions, No. 2:17-cv-497, 2019 WL 1114905 (S.D. Ohio. Mar. 11, 2019).
[66] *Id.* at *3.
[67] *Id.* at *2-3.
[68] *Id.* at *3.
[69] *Id.*
[70] *Id.* at *6.

The three cases cited above demonstrate the USCIS's approach to the application and interpretation of Section 204(c) of the Act.[71] However, this approach shows an inconsistent pattern of what is now a system developing into a proactive and automatic determination of immigration related marriage fraud against the non-citizen based on a prior denial of a marriage-based visa petition. This approach is inconsistent with the substantive and probative evidence standards. The standard requires an independent review that produces documented substantive, direct, and affirmative evidence of immigration related marriage fraud.[72] Several people have argued that the USCIS approach is flawed in more ways than one as we shall see below.[73]

III. CHALLENGING A MISAPPLICATION OF SECTION 204(C) IN U.S. FEDERAL COURTS

As a matter of procedure and jurisdiction, challenging and reviewing USCIS's denial of a visa petition under Section 204(c) of the Act begins with the review of the administrative record[74] of the non-citizen to determine whether the USCIS acted in accordance with the law.

Oddly, the cases establish a pattern that targets the non-citizen including instances of clear and unilateral culpability of the U.S. citizen.[75] In these cases, USCIS has denied visa petitions on grounds that exemplify that the non-citizen is culpable by association.[76] This approach is a good example of the mechanical application of Section 204(c) to justify a determination of marriage fraud in ways that are not supported by the required evidentiary standard and test documented in the record. A successful challenge of the USCIS denial of a visa petition before the BIA or the U.S. federal court system is one that establishes that the USCIS had abused its discretion by acting arbitrarily in ways that violate the settled evidentiary standard required by law under Section 204(c) of the Act.[77] Under the APA, the court will set aside an agency action, if it finds

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[71] *See* Matter of Jongbum PAK, 28 I&N Dec. 113 (BIA 2020); Aidoo v. United States, No. 1:19-cv-225, 2022 WL 4537982 (S.D. Ohio Sept. 28, 2022); Kyeremeh v. Sessions, No. 2:17-cv-497, 2019 WL 1114905 (S.D. Ohio. Mar. 11, 2019).

[72] *See* Adi v. United States, 498 F. App'x 478, 481 (6th Cir. 2012) (The 6th Circuit held that "A factual determination by the BIA that an alien's marriage was entered into for the purpose of gaining entry into the United States is conclusive if it is supported by reasonable, substantial, and probative evidence when the evidence is considered as a whole."); *see also* Matter of Tawfik 20 I&N Dec. 166, 168–69 (BIA 1990).

[73] *See, e.g.*, Samantha L. Chetrit, *Surviving an Immigration Marriage Fraud Investigation: All You Need is Love, Luck, and Tight Privacy Controls*, 77 BROOK. L. REV. 709, 741-42 (2012).

[74] The administrative record is a documented record of the immigration history of the non-citizen maintained by the USCIS. It may be stored in hard copies or electronic files.

[75] *See e.g.*, Aidoo v. United States, No. 1:19-cv-225, 2022 WL 4537982 (S.D. Ohio Sept. 28, 2022); Matter of Singh, 27 I&N Dec. 598 (BIA 2019); *see also* Simko v. Bd. of Immigr. Appeals, 156 F. Supp. 3d 300, 311, 316 (D. Conn. 2015).

[75] *Simko*, 156 F. Supp. 3d at 305.

[76] Bangura v. Hansen, 434 F.3d 487, 502 (6th Cir. 2006).

[77] *Id.*

that the agency's action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[78]

Generally, the petitioner may appeal a denial of the visa petition under Section 204(c) of the Act to the BIA.[79] Some of the notable precedents on the application of Section 204(c) have been established by the BIA.[80] However, because U.S. immigration law is part of administrative law,[81] the petitioner may exhaust administrative remedies before an appeal is filed in federal court.[82] But in *Bangura,*[83] where one of the issues for determination was whether the court could decline jurisdiction because the Plaintiff had not exhausted administrative remedies before filing the action challenging the denial of the extant visa petition, the court was affirmative when it held that, failure to exhaust administrative remedies does not deprive the court of subject matter jurisdiction.[84] In this case, where the primary issue is the denial of a visa petition by the USCIS, the court stated further that there is no dispute that no statute or administrative rule required Plaintiffs to exhaust their administrative remedies.[85] The court rightly noted that under the applicable regulations, the Plaintiffs have the discretion to appeal to the BIA before approaching the U.S. federal court system.[86] The precedent on exhaustion of administrative remedies established in *Bangura* is instructive because the USCIS could successfully challenge the judicial review of its action on the ground of non-exhaustion of administrative remedies by the Plaintiffs. Given the precedent established in *Bangura*, analysis of the appeal procedure of a visa petition to the BIA is outside the scope of this article.

A proper challenge of a USCIS decision denying a visa petition before the U.S. district court is examined under the following headings, to wit, jurisdiction, venue, and parties, the standard of review, and analysis of the requisite evidentiary standard for the application of Section 204(c).

A. Jurisdiction, Venue, and Parties

The U.S. district court is the trial court in the federal court system. The district court has the jurisdiction to review the decision of the USCIS denying a

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[78] *Id.*

[79] United States Department of Justice, *supra* note 31.

[80] *See generally* Matter of Tawfik, 20 I&N Dec. 166, 168 (BIA 1990); Matter of Singh, 27 I&N Dec. 598 (BIA 2019).

[81] *See generally* Jill E. Family, *Administrative Law Through the Lens of Immigration Law,* 64 ADMIN. L. REV. 565, 566–68 (2012).

[82] For further reading on the doctrine of exhaustion of administrative remedies under U.S. administrative law see Peter A. Delvin, *Jurisdiction, Exhaustion of Administrative Remedies and Constitutional Claims*, 93 N.Y.U. L. Rev. 1234, 1235–70 (2018).

[83] Bangura v. Hansen, 434 F.3d 487, 493–94 (6th Cir. 2006)

[84] *Id*. at 494.

[85] *Id*.

[86] *Id.* at 498; *see also* 8 C.F.R § 103.3 (a)(ii) (providing that, a party "may" appeal to the BIA).

visa petition.[87] Where a petitioner exercises the discretion of appealing a denial to the BIA first before approaching the court, the district court has appellate jurisdiction to review the decisions of the BIA on visa petitions.[88] The USCIS as an agency of the U.S. government may also appeal an unfavorable decision of the BIA to a federal court. The jurisdiction of the district court over marriage-based visa petitions is anchored on federal question jurisdiction,[89] declaratory judgment Act,[90] and jurisdictions over actions for mandamus.[91] The APA applies to lawsuits challenging agency decisions at the federal courts.[92] The venue to challenge a USCIS visa petition decisions lies in the judicial district where the Plaintiffs reside, and where the named Defendants routinely conduct official businesses.[93] The proper parties to the action are the Plaintiffs and the U.S. government.[94] Also named as defendants in their official capacities are the Secretary of DHS and the Attorney-General of the U.S.[95] The named government officials have joint responsibilities for the administration of immigration laws through the USCIS. These officials usually transact business in every judicial district through the office of the USCIS that adjudicated the visa petition.[96] In addition, the director, and the field office director of the USCIS from whence the decision being challenged originated, are appropriate defendants in any lawsuit before the federal court.[97]

B. Standard of Review

Generally, after the filing of the complaint before the court, either of the parties may file a motion for summary judgment.[98] Motions for summary judgments are usually entertained by the court where there is no dispute as to any material fact between the parties and the movant is entitled to judgment as a matter of law.[99] In the judicial review of visa petitions by the court, the

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[87] 28 U.S.C. § 1331.

[88] *See Bangura*, 434 F.3d at 493–94.

[89] 28 U.S.C. § 1331.

[90] 28 U.S.C. § 2201.

[91] 28 U.S.C. § 1361.

[92] 5 U.S.C. § 702.

[93] 28 U.S.C. § 1391(b)–(e).

[94] Through the Executive branch, the U.S. government is responsible for the administration of immigration petitions. *See* U.S. CONST. art. II.

[95] These are heads of the primary U.S. government agencies charged with the administration of U.S. immigration laws and policies. *See*, *Immigration Enforcement Actions*, DEP'T OF HOMELAND SEC., https://www.dhs.gov/immigration-statistics/enforcement-actions (last visited Feb. 15, 2023); 8 C.F.R. § 103.3.

[96] The United States Attorneys are the chief federal law enforcement officer in their assigned district. They are involved in civil litigations where the United States or federal government agency is a party. They carry out their duties under the supervision of the United States Attorney-General. *See* OFFICES OF THE UNITED STATES ATTORNEYS, https://www.justice.gov/usao (last visited Jan. 29, 2023).

[97] These officials work under the authority of the DHS and DOJ in the context of the facts and issues in this case.

[98] Fed. R. Civ. P. 56(a).

[99] *Id.*

evidence and the facts in the case are already documented in the record.[100] The central question before the court in the review of visa petition decisions is usually whether the USCIS properly reached an independent conclusion to deny the underlying visa petition based on the record or whether the denial of the visa petition is unsupported by the evidence in the record.[101]

Under this standard of judicial review, it is settled that, a material fact is one that, "affects the outcome of the suit under the governing law...[a] dispute is only genuine only if it could lead a reasonable fact finder to return a verdict for the nonmoving party."[102] It has been held that, where no genuine dispute as to material fact exists, the moving party must prevail as a matter of law, if the nonmoving party fails to make a sufficient showing on an essential element of the case.[103] However, in challenging an agency's action before the court, it is instructive to note that, summary judgment with respect to the judicial review of visa petitions, further requires the application of what has been propounded by the U.S. Supreme Court as a *differential standard*[104] by the reviewing court.

Against the foregoing analysis of the cases and Section 204(c) of the Act, the court should set aside a USCIS decision denying a visa petition, where it determines, after reviewing the record and the law that the agency's action is arbitrary, capricious, and an abuse of discretion as a matter of law. In this regard, the U.S. Supreme Court in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., held that an arbitrary and capricious agency decision is one that:

> …relied on factors which Congress has not intended it consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or product of agency expertise.[105]

The Supreme Court decision recognized two factors that a court must consider in reviewing a USCIS decision. First, the intention of the U.S. Congress in promulgating the Act under reference. Second, whether the decision under review may be justified in applying the differential standard to the agency decision at issue. Consistent with the differential standard, a court is required to

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[100] *See e.g*., Aidoo v. United States, No. 1:19-cv-225, 2022 WL 4537982 (S.D. Ohio Sept. 28, 2022).

[101] *Id.* at *2–3.

[102] Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986).

[103] *Id.*

[104] See Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc. 467 U.S. 837, 842–43 (1984). Per *Chevron*, under the differential standard, the U.S. Supreme Court stated that Courts should defer to an agency's interpretation of a status unless the status itself is clear, and that if the statute is ambiguous, the agency interpretation is controlling if it is based on a permissible reading of the statute.

[105] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

examine the rationale articulated by the agency to justify its decision.[106] Where such an explanation is made with a less than perfect clarity, a court may still be reluctant to set aside the decision, "if the agency's path may reasonably be discerned."[107] In other words, if the decision of the government agency is permissible under the differential standard, the court will sustain it. However, I contend that a court should be wary to embark on any deliberate process that attempts to discern or try to read into the underpinnings of an agency's decision. Such a duty as suggested by the differential standard will open the door for the court to enter the arena and do the work of the agency, especially in situations where the articulation of the agency's reasoning to justify a decision is weak or articulated with minimal clarity. In the judicial review of visa petitions, any court's attempt to discern the reasonable path of an agency's decision does not pass the arbitrary standard, where the agency has offered an explanation that runs counter to the record or where the process and the evaluation of the evidence do not reflect an independent review required under Section 204(c) of the Act.[108] Under Section 204(c) of the Act, a court is circumscribed to the evidence in the record.[109]

Specifically, on the standard of review, the U.S. Sixth Circuit in *Bangura* held that a determination of immigration related marriage fraud made pursuant to Section 204(c) of the Act, must be supported by substantial and probative evidence documented in the record.[110] Thus, the court has the legal authority to overturn any finding of marriage fraud not supported by substantive and probative against the non-citizen in the adjudication of visa petitions.[111] It is argued that, the evidence required by the Act to justify the application of Section 204(c) to bar the approval of visa petitions, is one that is in accordance with established precedents and upheld by the courts.

Conversely, based on the forgoing analysis, the USCIS may want to argue in a judicial review that the Plaintiffs are asking the Court to reweigh the evidence in the record by challenging the decision of the agency. This argument is not persuasive because it can be distinguished and contextualized. In contrast, I submit that in arguing that the USCIS decision to deny a visa petition is inconsistent with the law, the Plaintiffs are calling on the court to review the rationale articulated by the USCIS to deny the visa petition of the Plaintiffs. In this way, the Plaintiffs are contending that the USCIS rationale for the denial is inconsistent with the record and evidence as a matter of law. Thus, the Plaintiffs'

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[106] *See Chevron*, 467 U.S. at 842–43.

[107] See Alaska Department of Environmental Conservation v. Environmental Protection Agency, 540 U.S. 461, 497 (2004).

[108] *See* Matter of Tawfik, 20 I&N Dec. 166, 166 (BIA 1990) (Stating that to make a determination of marriage fraud within the purview of Section 204 (c) of the Act, "…the district director should not give conclusive effect to the determination made in prior proceedings, but, rather, should reach an independent conclusion based on the evidence of record…").

[109] *Id.*

[110] Bangura v. Hansen, 434 F.3d 487, 502 (6th Cir. 2006).

[111] See *Tawfik,* 20 I&N Dec. at 167.

argument in this instance distinguishes, if at all, the U.S. Supreme Court's reasoning under the differential standard that a reviewing court should not upset an agency's decision on an account of reasonable discernment of the agency's path to justify the decision at issue.

For the USCIS to successfully oppose a motion for summary judgment that is seeking to overturn the denial of a visa petition as a matter of law, the USCIS "must point to concrete evidence in the record. A mere scintilla of evidence in favor of the nonmoving party, without more, will not give rise to a genuine dispute at trial."[112] I submit that summary judgment challenging the propriety of the USCIS denial of a visa petition based on alleged marriage fraud should be granted by the court, except there is evidence in the record that goes beyond mere allegations, conclusions, conjecture, and speculation. The nonmoving party, the USCIS in this case, has the burden of presenting definite and competent evidence in rebuttal, otherwise, summary judgment to challenge the agency decision succeeds. Overall, the standard of review based on the record rests on the plank of the substantive and probative evidence standard and whether the USCIS decision under review satisfies the elements of the test as established by administrative and judicial precedents.

C. The Elements of the Substantive and Probative Evidence Standard

Having established that it is on the basis of the substantive and probative evidence standard that a USCIS decision under Section 204(c) may be reviewed by the court, it is necessary to understand the elements of the tests as they should be applied under Section 204(c) of the Act. The substantive and probative evidence test to support a proper finding of marriage fraud in the context of Section 204(c) was laid down by the BIA in the case of *Matter of Tawfik*.[113] This precedent, amongst other procedural factors, is the most concrete foundation for the review of USCIS decisions on denials of marriage-based visa petitions under Section 204(c) of the Act.[114]

In *Tawfik*, a U.S. citizen, filed a visa petition for her spouse, an Egyptian citizen.[115] The visa petition was approved by the predecessor agency of the USCIS on 14 September 1987.[116] However, in a letter dated July 25, 1989, the USCIS district director revoked the visa petition on the ground that the beneficiary had previously attempted to be accorded an immediate relative status[117] as the spouse of a U.S. citizen in a prior marriage determined by the Attorney General of the U.S. to have been entered into for the purpose of

[112] Anderson v. Liberty Lobby, 477 U.S. 242, 242 (1986).
[113] Matter of Tawfik, 20 I&N Dec. 166, 170 (BIA 1990).
[114] The test was first applied in Matter of Agdinaoay, 16 I&N Dec. 545, 546 (BIA 1978).
[115] *Tawfik*, 20 I&N Dec. at 167.
[116] *Id.* at 166.
[117] *Id*.

evading the immigration laws. In this case, the record reflects that this was the beneficiary's third marriage, and his second to a U.S. citizen.[118]

In the *Tawfik* case, the BIA established *inter alia* that, to make the right decision under Section 204(c) of the Act, "the District Director should not give conclusive effect to determinations made in prior proceedings, but, rather, should reach his own independent conclusion based on the evidence before him."[119] The BIA allowed the appeal of the petitioner in this case and overturned the decision of the USCIS.[120] The BIA explained its reasoning for allowing the appeal of the Plaintiff this way:

> …it is to be noted, however, that in the determination of the first visa petition submitted on behalf of the beneficiary, it was not found that the beneficiary had attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. Rather the district director involved in the determination of that noted that the record contained evidence which had been rebutted, 'from which it [could] be reasonably inferred' that the beneficiary entered into a marriage for the primary purpose of obtaining immigration benefits. Such a reasonable inference does not rise to the level of substantive and probative evidence requisite to the preclusion of approval of a visa petition in accordance with Section 204(c) of the Act.[121]

For the USCIS to properly apply Section 204(c) of the Act to bar the approval of marriage-based visa petitions under U.S. law, *Tawfik* established that the evidence relied upon to make an independent review of the record of the non-citizen to determine the liability of the non-citizen must demonstrably show two fundamental elements-documented and affirmative evidence of marriage fraud.[122] The reasoning and intention of the U.S. Congress are inherent in the precedent established in *Tawfik*. It supports the proposition that any independent review of the record of the non-citizen that is based on mere inference of marriage fraud from the record makes an unfavorable determination by the USCIS arbitrary, and a violation of Section 204(c) of the Act.[123] The mere evidence of a prior marriage to a U.S. citizen by the non-citizen upon which a visa petition was not approved by the USCIS, is not, by itself, automatic

[118] *Id.* at 167.
[119] *Id*. at 166.
[120] *Id.* at 170.
[121] *Id.* at 168.
[122] *Id.* at 170.
[123] *Id*.

evidence of immigration related marriage fraud under Section 204(c) of the Act and the precedent established in *Tawfik.*

D. Substantive and Probative Evidence of Marriage Fraud Under Section 204(c)

To analyze a documented and affirmative evidence of immigration related marriage fraud, it is instructive to refer to the approach of the USCIS explained earlier in this Article. In *Aidoo*,[124] the USCIS contended before the Court that, the omission of the former U.S. spouse of the non-citizen to disclose her marital status to a government agency unbeknownst to the non-citizen is evidence of immigration related marriage fraud against the latter. In *Matter of Jongbum,*[125] the BIA accepted the USCIS argument that documented discrepancies and insufficient evidence that prevented the approval of the prior visa petition filed for the benefit of the non-citizen in a prior marriage justifies the application of Section 204(c) to statutorily bar a subsequent visa petition for the non-citizen.[126] In *Kyeremeh*, which has similar facts and issues for determination with *Aidoo* and *Jongbum*, the court rejected the USCIS approach that documented inconsistencies and the evidence that the non-citizen did not share a joint address with his former U.S. spouse is enough to apply Section 204(c) against the non-citizen in a subsequent visa petition adjudicated by the USCIS.[127]

Under *Tawfik*, the USCIS must show that there is documented direct and affirmative evidence against the non-citizen in the record to satisfy the substantive and probative evidence standard, otherwise, any denial of a visa petition violates Section 204(c) of the Act.[128] The evidence against the non-citizen on the record must be affirmative beyond mere inference of fraud. Any determination of immigration related marriage fraud must be reached through an independent review of the record *ab initio* consistent with the precedent established in *Tawfik*.[129] In this context, direct and affirmative evidence is one that is direct and unilateral on the part of the non-citizen. It should establish that the non-citizen engaged directly in an act beyond the mere fact of a prior marriage, which demonstrates an intention to evade immigration laws. In *Lutwak v. United States*, the Supreme Court held that a valid determination of marriage fraud requires a higher proof independent of the ordinary inference

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[124] Aidoo v. United States, No. 1:19-cv-225, 2022 WL 4537982 at *13–14 (S.D. Ohio Sept. 28, 2022) (The Court rejected this argument of the USCIS which was hitherto adopted by the BIA in this case. The Court rightly noted that, the former wife's deception or omission to correctly disclose her marital status when she applied for public housing without the knowledge of the Plaintiff, "shed no light on Mr. Osei's [Plaintiff] intentions in entering the marriage." According to the Court, only the non-citizen's, "intentions are the proper focus of the INA §204(c) inquiry").

[125] Matter of Jongbum PAK, 28 I&N Dec. 113 (BIA 2020).

[126] *Id.*

[127] Kyeremeh v. Sessions, No. 2:17-cv-497, 2019 WL 1114905, at *15 (S.D. Ohio. Mar. 11, 2019).

[128] Matter of Tawfik, 20 I&N Dec. 166, 170 (BIA 1990).

[129] *Id*. at 166.

that a marriage was entered solely for the purpose of evading the immigration laws.[130]

The Sixth Circuit appeared to follow the reasoning of the Supreme Court in *United States v. Chowdhury.*[131] In *Chowdhury*, the court held that in criminal marriage fraud cases, conviction is proper where it can be established that a defendant acted willfully by acting intentionally and purposely with the intent to do something that is forbidden by law or acting with the knowledge that his conduct was unlawful.[132] Applying this rationale to U.S. immigration law, the court stated, thus, "we believe that the language knowingly enters a marriage for the purpose of evading any provision of the immigration laws is best understood as another way of saying that in knowingly entering a marriage, the defendant knowingly violated the immigration laws."[133] The non-citizen should not be held liable for immigration related marriage fraud by the association on account of a prior marriage to a U.S. spouse without more, except by the fact of marriage or an unsuccessful prior visa petition. In a ruling that appears to throw more light on the nature of evidentiary standard necessary to validate immigration related marriage fraud, the court in *Bangura* echoed the U.S. Supreme Court decision in *Bryan v. United States.*[134] The court stated *inter alia* that, to prove that a defendant [the non-citizen] has acted intentionally and willfully to sustain a conviction for marriage fraud, the government must prove more than the defendant knowing of the facts constituting the crime. According to the court, the government must prove (1) the alien knowingly entered the marriage (2) the purpose of the marriage was to evade the immigration laws, and (3) the alien knew or had reasons to know of the immigration laws.[135]

Therefore, specific to the *Aidoo* case,[136] any inference about the Plaintiff's former U.S. spouse's dealings with the government agency wherein she failed to disclose her marital status, is insufficient to sustain the allegation of marriage fraud. Indeed, prior marriage to a U.S. citizen, without any affirmation of fraud on the record, does not warrant the application of Section 204(c) in the adjudication of visa petition. The failure of the former U.S. spouse to disclose her marital status is not direct and affirmative evidence of immigration related marriage fraud against the non-citizen. Section 204(c) is not a blank check given by the U.S. Congress to the USCIS to automatically deny visa petitions. This statement is true for non-citizens who had been unsuccessful in prior visa petitions because their former U.S. spouse was suspected or alleged by the USCIS to have acted improperly or unilaterally on an application for

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[130] Lutwak v. United States, 344 U.S. 604, 611(1953).

[131] United States v. Chowdhury, 169 F.3d 402, 406-407 (6th Cir. 1999).

[132] *Id.*

[133] *Id.*

[134] Bangura v. Hansen, 434 F.3d 487, 502-03 (6th Cir. 2006); Bryan v. United States 524 U.S. 184 (1998).

[135] *Bangura*, 434 F.3d at 502-03.

[136] Aidoo v. United States, No. 1:19-cv-225, 2022 WL 4537982 (S.D. Ohio Sept. 28, 2022).

public benefit with another government agency. On the contrary, Congress will not intentionally pass a law that will violate the rights of U.S. citizens without qualification in the public interest. In *Griswold v. Connecticut*, the Supreme Court opined unequivocally that the constitutional protection of the right to privacy extends to marriage as a "right so basic and fundamental and so deeply rooted in our society…"[137]

Based on this constitutional pronouncement, the USCIS may only infringe on the rights of U.S. citizens to deny them the opportunity to enjoy a family life based on their marriage to non-citizens, where the legitimate purpose is narrowly tailored. Any regulatory infringement that is founded on speculation and unfair suspicion does not satisfy this standard. Based on the authority of *Griswold*, the rights of U.S. citizens married to non-citizens may be implicated in situations of improper denial of visa petitions filed for their foreign spouses. Reviewing the import of Section 275(c) which is in *pari materia* with Section 204(c), the Ninth Circuit was very persuasive when it held that, "if one spouse intended the marriage to be a sham when the ceremony took place, but the other intended the marriage to be genuine, then the one committed the fraud, but not the other."[138]

Based on established precedents and the reasoning of the U.S. Supreme Court in the cases cited above, substantive, and probative evidence of fraud is one that is direct and affirmative evidence of immigration related marriage fraud against the non-citizen. The requisite evidence must be documented against the non-citizen on the record. The U.S. courts have attempted to give concrete examples of affirmative evidence that satisfy this standard. In *United States v. Islam*, applying this standard, the Tenth Circuit, held that the payment to U.S. citizens under a marriage fraud ring to marry Pakistani men to help them obtain permanent residence in the U.S. was sufficient motivation to support a conviction of marriage fraud against the aliens.[139] In this case, the court found that the couples got married to evade the immigration laws of the U.S. The Seventh Circuit also properly found immigration related marriage fraud in *United States v. Darif*, where a Moroccan paid a U.S citizen $3,000 to fly to Morocco to marry him and assist to obtain immigration papers to work and live in the U.S.[140] In both cases, the courts made it clear that to sustain a conviction and by extension make a valid determination of immigration related marriage fraud, the government must show that the goal of evading the immigration laws of the U.S. motivated the defendants.[141] The reasoning of the courts in *Islam* and *Darif* above was re-established in the latter case of *Nazar Simko et al. v. BIA*[142]

[137] Griswold v. Connecticut, 381 U.S. 479, 491–92 (1955).
[138] *See* U.S. v. Orellana-Blanco, 294 F. 3d 1143, 1151 (9th Cir. 2002).
[139] United States v. Islam, 418 F.3d 1125, 1127, 1130 (2005).
[140] United States v. Darif, 446 F.3d 701, 703–04 (2006).
[141] *Id*. at 710.
[142] Simko v. Bd. of Immigr. Appeals, 156 F. Supp. 3d 300, 309 (D. Conn. 2015).

on the quality of evidence that satisfies the substantive and probative evidence standard.

The subject of the case in *Nazar Simko et al.* was a Ukrainian national. The USCIS obtained evidence that the former U.S. spouse of the Ukrainian national was involved in a fraudulent marriage ring while they were married.[143] On whether that was sufficient evidence to apply Section 204(c) to bar the approval of a subsequent visa petition filed for his benefit, the U.S. District Court for the District of Connecticut found that the USCIS acted arbitrarily and capriciously when it denied the subsequent visa petition filed for the Ukrainian by his extant U.S. spouse.[144] According to this federal court, the USCIS relied on evidence in the record that was not "substantive and probative" or affirmative to support the conclusion that the Ukrainian national had directly engaged in immigration related marriage fraud to evade the immigration laws of the U.S.[145] It is instructive to note that, the evidence relied on in this case by the USCIS to deny the underlying visa petition, was that the non-citizen's former U.S. spouse was alleged to have been part of a fraudulent marriage ring. The court found that "substantive and probative evidence requires more than facts that could create a reasonable inference of fraud."[146] The decision of the U.S. District Court in *Simko et al.*, that declared the denial of the underlying visa petition arbitrary and capricious was based on the reasoning of the court that, the evidence of fraud cited by the USCIS was against the former U.S. spouse of the beneficiary. The *Simko* court concluded that more evidence was required to satisfy the substantive and probative evidence test.[147]

As the *Nazar Simko et al.* court rightly noted, "[i]n the decades since *Matter of Tawfik* was decided, the BIA has maintained this policy of requiring evidence of fraud in the non—citizen's file to warrant the application of the marriage fraud bar."[148] Similar to the approach of the USCIS in the recent case of *Aidoo et al*, and in *Kyeremeh,* it is significant that the USCIS deployed resources to conduct conclusive field investigations on the joint addresses Mr. Kyeremeh and his former U.S. spouse submitted in support of his prior visa petition[149] The USCIS also interviewed witnesses, including neighbors, family, the property managers.[150] Still, on the question of whether Mr. Kyeremeh's subsequent meritorious visa petition approval could be barred under Section 204(c) of the Act based on the denial of the prior visa petition and the circumstances of his prior marriages, the Court held that USCIS denial of the

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[143] *Id*. at 304–05.
[144] *Id.* at 314.
[145] *Id*. at 310.
[146] *Id*. (quoting Matter of Tawfik, 20 I&N Dec. 166, 168 (BIA 1990)).
[147] *Simko,* 156 F. Supp. 3d at n. 9, n. 15.
[148] *Id.*
[149] Kyeremeh v. Sessions, No. 2:17-cv-497, 2019 WL 1114905, at *5 (S.D. Ohio Mar. 11, 2019).
[150] *Id.* at *4.

visa petition under Section 204(c) violated the APA.[151] The *Kyeremeh* Court hinged its decision on the premise that the USCIS erred in improperly discounting the evidence of *bona fides* on the record by providing a conclusory explanation that rendered the USCIS decision, in this case, arbitrary and capricious under the APA.[152]

Recently, the opposing view presented by the BIA in *Matter of Singh*[153] is a futile attempt to distinguish *Tawfik* in favor of circumstantial evidence, without more, to justify the application of Section 204(c) of the Act to the adjudication of marriage-based visa petitions. Circumstantial evidence is grounded in the inference of fraud contrary to the ratio in *Tawfik*.[154] The BIA's opinion in this case to the extent that circumstantial evidence alone is sufficient to constitute substantive and probative evidence contradicts most federal courts' decisions on the characteristics of the evidentiary standard that should amount to substantial and probative evidence of fraud under Section 204(c).[155] Federal court's jurisprudence on this matter is superior to the opinions of the BIA in the U.S. judicial hierarchy. In *Singh*, there was an admission by the former spouse of the non-citizen during a field investigation by the USCIS that her former marriage with the beneficiary of the extant visa petition was a sham marriage.[156] The unchallenged admission is substantive, probative, direct, and affirmative to justify the application of Section 204(c) in this case. Instead of hinging its entire decision on the plank of the admission to make it more consistent with existing precedents and federal court decisions, the BIA in this case went on a needless legal journey to attempt to make the case that, "circumstantial evidence alone may be sufficient to constitute substantial and probative evidence."[157] Though the BIA in *Singh* agreed with its ruling in *Tawfik* that, "a reasonable inference of fraud is not sufficient to meet the substantive and probative evidence standard",[158] its attempt to differentiate between a "reasonable inference" of fraud and substantial and probative evidence is not valid under Section 204(c) to elevate circumstantial evidence to the level of substantive and probative evidence standard without any qualification.[159] On the contrary, the BIA's concession that a reasonable inference of fraud is insufficient, supports my

[151] *Id.* at *5.

[152] *See also* Daneshvar v. Ashcroft, 355 F.3d 615, 625–26 (6th Cir. 2004).

[153] Matter of Singh, 27 I.&N. Dec. 598 (BIA 2019).

[154] Matter of Tawfik, 20 I&N Dec. 166, 166 (BIA 1990).

[155] *See e.g.*, Kyeremeh v. Sessions, No. 2:17-cv-497, 2019 WL 1114905, at *4 (S.D. Ohio Mar. 11, 2019); Simko v. B.I.A., 156 F.Supp.3d 300, 310–11 (D. Conn. 2015); Boansi v. Johnson, 118 F.Supp.3d 875, 880-81 (E.D.N.C. 2015) (where the U.S. district Court for the E.D.N.C. criticized the USCIS for inappropriate application of Section 204(c) of the Act to deny a visa petition despite pointing to no direct evidence of marriage fraud in the record); Zemeka v. Holder, 989 F.Supp.2d 122, 132 (D.D.C. 2013).

[156] Matter of Laureano, 19 I.&N. Dec. 1, 2–3 (BIA 1983) (per the BIA, a sham marriage is one, "entered into for the primary purpose of circumventing the immigration laws…[t]he central question in determining whether sham marriage exists, is whether the parties intended to establish a life together at the time they were married").

[157] Matter of Singh, 27 I. & N. Dec. 598, 598 (BIA 2019).

[158] *Id*. at 602.

[159] *Id.*

contention that the substantive and probative evidence standard requires direct and affirmative evidence of fraud that is documented in the record.

However, as seen in *Jongbum, Singh,* and the agency's argument in *Aidoo*, recent trends in the application of Section 204(c) of the Act by the USCIS and BIA demonstrate a disturbing trajectory in favor of a mechanical application and over-reliance on circumstantial evidence without corroboration and standard qualification.[160] This trend violates the precedent established in *Tawfik* and is a fundamental deviation from the substantive and probative evidence standards. In *Jongbum*, the BIA upheld the decision of the USCIS denying the extant visa petition by relying on documented inconsistencies during the interviews conducted on a prior visa petition as the basis to apply Section 204(c) to a subsequent visa petition.[161] In this case, the record only contains documented interview inconsistencies and the fact that the prior visa petition was denied for insufficient evidence.[162] There was no direct and affirmative evidence of immigration related marriage fraud against the non-citizen.[163] The BIA decision in *Jongbum* also raises the question of whether the USCIS conducted an independent review of the record of the non-citizen to apply Section 204(c) as stipulated in *Tawfik.* The USCIS is making the same argument it made in *Jongbum* in the *Aidoo* case. The BIA decision in *Jongbum* and the argument of the USCIS in *Aidoo* violate the established precedent and policy laid down in *Tawfik* which stipulated documented substantive and probative evidence of immigration related marriage fraud against the non-citizen before the application of Section 204(c) can be justified as a matter of law.

IV. CONCLUSION

Based on the intention of Congress and the consideration of family unification in U.S immigration law and policy, the substantive and probative evidence standard established in *Tawfik* is a condition precedent before the USCIS may validly apply Section 204(c) of the Act to deny an otherwise approvable visa petition filed for the benefit of the non-citizen. Substantive and probative evidence as understood under the Act, judicial precedents, and U.S. immigration policy, is evidence that is documented, substantive, probative, direct, and affirmative against the non-citizen. A proper inquiry under Section 204(c) of the Act must begin and end with the analysis of the intentions and culpability of the non-citizen in the context of the substantive and probative evidence standard. Section 204(c) of the Act does not give the USCIS an unfettered discretion to abuse the agency deferential standard under the APA to automatically deny a subsequent visa petition on the ground of prior documented insufficient evidence or interview inconsistencies without more. A

[160] *See id.*
[161] Matter of Jongbum PAK, 28 I&N Dec. 113, 114 (BIA 2020).
[162] *Id.*
[163] *Id*. at 114–19.

mechanical reference to Section 204(c) and the utility of the unilateral culpability of the U.S. citizen spouse for marriage fraud is not sufficient to deny a visa petition. USCIS's adoption of this approach and any attempt to deviate from the substantive and probative standard established in *Tawfik* is arbitrary and capricious. Federal courts should always, as a matter of law, reject this trajectory and reverse the trend whenever it is called upon to do so.

THERE'S A FILTER FOR THAT: RETHINKING U.S. COMMERCIAL SPEECH DOCTRINE IN THE DIGITAL AGE

Lucas Green

I. INTRODUCTION

The average American is estimated to be exposed to 4,000 to 10,000 advertisements each day.[1] Much of this exposure may be attributed to the rise of internet platforms providing advertisers the ability to reach hundreds of thousands of users every day. The generation that is growing up in the midst of this advertising boom is known as Gen Z. Members of Gen Z (persons born in 1997 and later) have been dubbed "digital natives," a phrase alluding to their widespread technological fluency from an increasingly young age.[2] Data collected in 2018 proved this nomenclature to be accurate, reporting that ninety-five percent of teens in the United States had access to a smartphone.[3] Yet, perhaps the most shocking typification of a young digital native is experienced when watching a toddler confidently open a smartphone through a swipe or press of the home button. Unfortunately, increased access to the internet for Gen Z has also led to revelations concerning the correlation between increased depression and anxiety with the use of social media platforms like Facebook.[4] Even more concerning is the fact that Facebook has sought to keep information secret about the harms its platforms are causing young users.[5] Since online advertising is such lucrative business model[6] and general online use has been

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[1] Jon Simpson, *Finding Brand Success in the Digital World*, FORBES AGENCY COUNCIL (Aug. 25, 2017), https://www.forbes.com/sites/forbesagencycouncil/2017/08/25/finding-brand-success-in-the-digital-world/?sh=1ba2fd12626e.

[2] *See Digital Native*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/digital-native.

[3] *See* Kim Parker & Ruth Igielnik, *On the Cusp of Adulthood and Facing an Uncertain Future: What We Know About Gen Z so Far*, PEW RSCH. CTR. (May 14, 2020), https://www.pewresearch.org/social-trends/2020/05/14/on-the-cusp-of-adulthood-and-facing-an-uncertain-future-what-we-know-about-gen-z-so-far-2/.

[4] *See* Jean M. Twenge, *Has the smartphone destroyed a generation?*, 320 THE ATLANTIC MONTHLY, Sept. 2017, at 58, 63-64.

[5] *See* Damian Gayle, *Facebook Aware of Instagram's Harmful Effect on Teenage Girls, Leak Reveals*, THE GUARDIAN (Sept. 14, 2021), https://www.theguardian.com/technology/2021/sep/14/facebook-aware-instagram-harmful-effect-teenage-girls-leak-reveals.

[6] *See, e.g.*, Alphabet Inc., Annual Report (Form 10-K) at 6-7 (Dec. 31, 2020) (Google Services generates revenues primarily by delivering both performance advertising and brand advertising); *see also* Facebook, Inc., Quarterly Report (Form 10-Q) at 35 (Apr. 29, 2021) ("Facebook generate substantially all of our revenue from advertising"); *see generally* Megan Graham & Jennifer Elias, *How Google's $150 Billion Advertising Business Works*, CNBC (last updated Oct. 13, 2021), https://www.cnbc.com/2021/05/18/how-does-google-make-money-advertising-business-breakdown-.html ("Google's main business is online advertising. In 2020, Alphabet generated almost $183 billion in revenue. Of that, $147 billion — over 80% — came from Google's ads business, according to the company's 2020 annual report. Google has been the market

linked with matters of public health, it would seem natural for there to be a large amount of regulation concerning online advertising practices to protect children, but this is hardly the case in the United States.[7]

As such, the United States relies predominantly on the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC) to regulate advertisements directed at children. However, both agencies have in recent years been relatively inactive in targeting commercial advertising practices that are directed at children.[8] In fact, scholars have pointed out that there exists a recent trend in the courts to assign commercial speech greater protections, even in matters of public health.[9] Moreover, the application of the *Central Hudson*[10] intermediate scrutiny test for commercial speech looks more like a strict scrutiny test in its recent legal applications.[11] The combination of a gap in regulatory action for online advertising directed at children and an increased protection of commercial speech begs the question of whether there is an alternative approach to the United States' hands-off strategy.

For the United States to stay abreast of the current online climate while adequately protecting children's right to privacy and wellbeing, the U.S. Supreme Court's *Central Hudson* intermediate scrutiny analysis for commercial speech should interpret its "no more extensive than necessary" requirement to be more aligned with Canada's *R. v. Oakes*[12] test's minimal impairment prong. Moreover, to avoid a ruling of unconstitutionality, American legislation and agency rules addressing advertisements directed at children online would need to be narrower than the Quebec Consumer Protection Act (Quebec CPA) and

leader in online advertising for well over a decade and is expected to command nearly a 29% share of digital ad spending globally in 2021").

[7] *See* Rita-Marie Reid, *Embedded Advertising to Children: A Tactic That Requires a New Regulatory Approach*, 51 AM. BUS. L.J. 721, 743 (2014).

[8] *See id.* at 744.

[9] *See* Micah L. Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 WASH. U. J. L. & POL'Y 53, 54 (2016) [hereinafter Berman, *Clarifying Standards*]; *see also* Samantha Rauer, *When the First Amendment and public health collide: the Court's increasingly strict constitutional scrutiny of health regulations that restrict commercial speech*, 38 AM. J. L. & MED. 690, 702 (2012).

[10] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562-63 (1980) (noting that the Constitution grants "a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.").

[11] *See generally* Rauer, *supra* note 9, at 702 (citing Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 525 (2001); *and* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489-90 (1996)) ("Although the Supreme Court originally conceived of the Central Hudson test as an intermediate standard of review, it essentially appears to apply strict scrutiny to public health regulations.").

[12] *See* R. v. Oakes, [1986] 1 S.C.R. 103, 138–49 (Can.).

more akin to the FTC's 900-Number Rule[13] or the United Kingdom's Age Appropriate Design Code (AADC).[14]

Section II of this comment details the dangers of advertising to children before examining child directed advertising regulations in the United States, the United Kingdom, and Canada. Additionally, this section analyzes the United States' intermediate scrutiny standard for protecting commercial speech before reviewing the origins of the proportionality analysis within Europe and Canada. Section III applies the Quebec CPA within the United States and the United States' Child Online Protection Act in Canada to better display how each legal test differs. Section III also examines lessons learned from the comparative analysis. Finally, Section IV concludes that the U.S. could utilize the reasoning in the *Oakes* test to better protect children's wellbeing from negative advertisements and that the AADC or the FTC's 900-Number Rule could serve as legislative or agency templates for regulating child directed advertising.

II. BACKGROUND

This section will examine the controversy surrounding advertisements directed towards children before analyzing various regulations in the United States, United Kingdom, and Canada that protect children from advertising. Next, the section will review how the United States uses intermediate scrutiny to protect commercial speech. Finally, it will overview the theory and history that guides the proportionality analysis prior to examining how Canada's Supreme Court utilizes proportionality analysis concerning commercial speech.

A. Advertising and the Impact on Children

In the 1970s, there was a large push to limit child directed advertising.[15] The primary factor motivating this policy shift was a fear that advertising could have negative consequences for the wellbeing of children who watched them.[16] Studies that substantiated this fear analyzed how children perceive commercials utilize three stages of cognitive development: the perceptual stage, the analytical stage, and the reflective stage.[17]

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[13] See generally 16 C.F.R. § 308.3(e) (prohibiting pay-per-call services and ads for 900-number services directed to children under 12).

[14] *See also Age Appropriate Design Code*, U.K. INFORMATION COMMISSIONER'S OFFICE 3 (Sept. 2, 2020), https://ico.org.uk/media/for-organisations/guide-to-data-protection/ico-codes-of-practice/age-appropriate-design-a-code-of-practice-for-online-services-2-1.pdf [hereinafter ICO].

[15] *See* Deborah Roedder John, *Consumer Socialization of Children: A Retrospective Look at Twenty-Five Years of Research,* 26 J. CONSUMER RES. 183, 188 (1999); J. Howard Beales, III, *Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present*, 12 GEO. MASON L. REV. 873, 878 (2004).

[16] *See* John, *supra* note 15, at 188.

[17] *See id.* at 186–87.

In the perceptual stage (ages three to seven), research suggests that children do not critically view the commercial and accept the viewing as entertaining and truthful.[18] However, research indicates that children by the age of five are capable of distinguishing a commercial from regular programing.[19] Yet, this distinction is often attributed to perceptual cues and length of time that a commercial plays for.[20] Once in the analytical stage (ages seven to eleven), children utilize more abstract reasoning and are capable of employing a "decision strategy" that takes into account environmental cues.[21] It is at this stage that children first begin to understand the informational and persuasive intent of advertisements.[22] Moreover, in this analytical stage children develop the capacity to understand viewpoints from the perspective of others.[23] Consequently, children within this stage begin to grasp the concepts of negotiation and persuasion.[24] At the final reflective stage (ages eleven to sixteen), children's thinking evolves in a manner of degree, not kind, to grasp the social and consumer underpinnings of advertisements.[25]

Research demonstrated that advertisements influence children in a myriad of fashions. For example, advertisements have the capacity to influence knowledge, attitudes, and values in relation to products and brands.[26] Moreover, advertisements may function to socialize children to consumerism by raising a child's awareness of product availability and encouraging the purchase of products.[27] Unintended consequences of advertisements occur as well. For instance, children cultivating unhealthy eating habits may be a consequence of food advertisements.[28] Additionally, poor body image and self-identity in teenagers may result from reinforced stereotypes in advertisements.[29]

Much of the research available on advertising and its impact on children concerns television advertising. Therefore, the issues surrounding advertising in a world where access to the internet is widely available only heightens the concern that advertising will negatively impact the development and overall wellbeing of children. In the United States, the FTC and Congress

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[18] *See id.* at 187; BARRIE GUNTER ET AL., ADVERTISING TO CHILDREN ON TV: CONTENT, IMPACT, AND REGULATION 28 (2004) (summarizing previous research suggesting that children ages three to seven find advertising entertaining without analyzing the persuasive intent of the advertisement.).

[19] *See* John, *supra* note 15, at 187.

[20] *See id.*; GUNTER ET AL., *supra* note 18, at 31-33.

[21] John, *supra* note 15, at 184.

[22] *See id.* at 185; GUNTER ET AL., *supra* note 18, at 34. Research in this field, however, does not always agree on what constitutes "understanding advertisements," which impacts at what age researchers claim children acquire said ability, *see id.* at 38.

[23] *See* John, *supra* note 15, at 187.

[24] *See id.* at 187.

[25] *See id.*

[26] *See* GUNTER ET AL., *supra* note 18, at 87.

[27] *See id*. at 38.

[28] *See id.* at 117.

[29] *See id.* at 118.

set out regulations in an attempt to mitigate these negative consequences but have done so in a limited fashion.

B. United States Regulations for Advertising to Children

Section five of the FTC Act grants the FTC the general power to regulate advertising and prohibits unfair or deceptive practices in commerce.[30] Specifically, the FTC Act designates false advertising as unfair or deceptive.[31] The FTC finds a practice to be deceptive if a representation or omission is likely to mislead the customer and the inclusion or exclusion of the deceptive information is material.[32] Though such legislation applies equally to both advertising directed at children and adults, the FTC would later propose rules that particularly addressed child directed advertising.

In 1978, the FTC issued a notice of proposed rulemaking that would have restricted advertisements aired during children's television programs.[33] The proposed rule suggested banning television advertising directed at children under the age of eight, banning television advertising of sugared food products to children between eight and twelve, and requiring a significant amount of health disclosures in food advertisements.[34] Public and congressional outcry was swift.[35] In response to the proposed rule, Congress allowed the FTC's funding to lapse and shut down the agency for a temporary period.[36] Consequently, the FTC has been reticent to regulate child directed advertising in such an encompassing manner.[37] However, an example of a narrow FTC rule that restricts child directed advertising is the 900-Number Rule.[38] This rule bans child directed advertisements for kids under twelve from containing 900 number call services.[39] For older children, ages twelve to eighteen, the advertisement

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[30] *See* 15 U.S.C. § 45 (2018).

[31] *See id.* § 52.

[32] *See* FTC Policy Statement on Deception, appended to *In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984).

[33] *See* Children's Advertising, 43 Fed. Reg. 17967 (proposed Apr. 27, 1978) (to be codified at 6 C.F.R. pt. 461).

[34] *See id.* at 17969.

[35] William A. Ramsey, Note, *Rethinking Regulation of Advertising Aimed at Children,* 58 FED. COMM. L.J. 361, 362–63 (2006) ("FTC received harsh political and public response to this proposed rulemaking. The Washington Post called the proposal 'a preposterous intervention that would turn the FTC into a great national nanny.' Congress responded to the FTC's proposal not only by passing legislation limiting the FTC's power to enforce any rule relating to children's advertising, but also by failing to renew the FTC's funding, in effect shutting down the agency temporarily.") (quoting Editorial, *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22).

[36] *See* Beales, *supra* note 15, at 879.

[37] *See* M. Neil Browne et al., *Advertising to Children and the Commercial Speech Doctrine: Political and Constitutional Limitations*, 7 ECON. FAC. PUBL'N'S 68, 81 (2009).

[38] *See* 16 C.F.R. § 308.3(e) (1993).

[39] *See id.* § 308.3(e)(1).

must display clearly that the child must have the parent's permission to call.[40] This narrow regulatory rule is still functioning today.

In 1998, Congress passed the Child Online Protection Act (COPA).[41] Though COPA did not address child directed advertising, it did impose criminal penalties on violators who posted online for "commercial purposes . . . material that is harmful to minors."[42] Material that is "harmful to minors" included "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that . . . the average person, applying contemporary community standards, would find, . . . is designed to pander to, the [minor's] prurient interest."[43] However, a violator may assert the defense that access to the harmful material was restricted by requiring the use of a credit card, a digital certificate of age, or any other technologically feasible means of verifying age.[44] Thus, the primary goal of COPA was to reduce children's access to pornography and protect the vulnerable online from generally harmful material. Nevertheless, COPA would be struck down as unconstitutional under the strict scrutiny standard in 2004.[45] COPA thus displays that any regulation and legislation passed by the FTC, FCC, or Congress would need to pass the U.S. Supreme Court's scrutiny standard if challenged in court.

On the other hand, the Children's Online Privacy Protection Act (COPPA)[46] has not been struck down as unconstitutional. COPPA's primary purpose is to protect children's information by giving parents greater clarity and control over their child's online data.[47] COPPA generally requires that online services directed to children are prohibited from collecting personal data from children under thirteen without parental consent.[48] Moreover, the FTC, who is empowered to enforce COPPA, stipulated that apps and websites are bound by COPPA if they (1) are directed to children under thirteen and collect personal data from children, (2) are general audience apps or websites but have actual knowledge that they collect personal information from children under thirteen,

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[40] *See id.* § 308.3(f)(1).

[41] *See* Elizabeth R. Purdy, *Child Online Protection Act of 1998*, *in* ENCYCLOPEDIA OF THE FIRST AMENDMENT 266 (John Vile et al. David Hudson, & David Schultz eds., 2009), https://dx.doi.org/10.4135/9781604265774.

[42] Child Online Protection Act of 1998, 47 U.S.C. § 231(a)(1) (1998).

[43] *Id.* § 231(e)(6)(A).

[44] *See id.* § 231(c)(1)(A)-(C).

[45] *See* Ashcroft v. Am. Civ. Liberties Union, 542 U.S. 656, 666-67 (2004) ("Filters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source. … Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished.").

[46] 16 C.F.R. § 312.1 (2013).

[47] *See* Ariel Johnson, *Reconciling the Age Appropriate Design Code with COPPA*, INT'L ASS'N OF PRIV. PRO.'S (Feb. 23, 2021), https://iapp.org/news/a/reconciling-the-age-appropriate-design-code-with-coppa/.

[48] 16 C.F.R. § 312.2.

or (3) are website or app operators with actual knowledge they are collecting personal information on behalf of another website from children under thirteen.[49] A child directed website is then one where the operator has actual knowledge that it is collecting personal data from children under the age of thirteen or the characteristics of the website in general suggest it is directed at children.[50] Practically speaking, COPPA means that targeted advertising to children under thirteen would not be permitted on websites that have actual knowledge of child data collection nor without parental consent. COPPA also requires that online services establish procedures to protect collected personal data.[51]

C. United Kingdom Regulations for Child Activities Online

A regulatory scheme in the United Kingdom that attempts to protect children online from online advertising and more is the Age Appropriate Design Code (AADC).[52] The AADC is a Code of Practice that displays how the Information Commissioner's Office (ICO) plans to interpret the General Data Protection Regulation against violators.[53] The AADC stipulates fifteen standards that apply to online platforms, including apps and social media sites, that are (1) directed at children or (2) are likely to be accessed by children.[54] Importantly, children are defined as persons under the age of eighteen.[55] A quick summation of the major premises in the AADC follows.

First, all platforms that are subject to the AADC are required to design their services with the child's best interest in mind without using a child's data in ways known to be detrimental to their wellbeing or against regulatory standards.[56] Naturally, this requires conducting a data protection impact assessment to assess the rights of children accessing the platform and verifying the ages of users unless all the AADC's standards are applied equally to adult and child users.[57] Second, there is a requirement that privacy protection is set to high for children by default unless a compelling reason not to exists.[58] Privacy protection includes no data sharing, geolocation, or profiling of child users without considering the best interest of the child and having a compelling reason.[59] If a child is under the age of thirteen, parental consent is needed before

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[49] FTC Children's Online Privacy Protection Rule, 16 C.F.R. § 312.3 (2022).
[50] 16 C.F.R. § 312.2.
[51] *Id.* § 312.3(e).
[52] *Introduction to the Age appropriate design code*, U.K. INFORMATION COMMISSIONER'S OFFICE (n.d.), https://ico.org.uk/for-organisations/guide-to-data-protection/ico-codes-of-practice/age-appropriate-design-code/.
[53] ICO, *supra* note 14, at 4.
[54] *Id.* at 17.
[55] *Id.*
[56] *See id.* at 7.
[57] *See id.* at 29.
[58] *See id.* at 7.
[59] *See* ICO, *supra* note 14, at 7.

utilizing personal data.[60] Lastly, privacy information provided to users must (1) be understandable to a child while (2) not collecting more data than what is needed and (3) providing prominent tools for children to exercise their rights of data protection.[61] Though the success of the AADC is yet to be fully seen, YouTube, TikTok, and Instagram have already altered their practices with YouTube blocking ad targeting for all children.[62]

D. Quebec Regulations for Advertising to Children

In Quebec, Canada, the Consumer Protection Act (Quebec CPA) limits advertising "directed at persons under thirteen years of age."[63] This limitation applies to a variety of formats including online advertising directed at children in Quebec.[64] In determining whether an advertisement is directed to children, the Quebec CPA advises an accounting of context, "and in particular of (a) the nature and intended purpose of the goods advertised; (b) the manner of presenting such advertisement; [and] (c) the time and place it is shown."[65] However, there are exceptions for advertisements in magazines or inserts,[66] for advertisements that "announce a program or a show directed at [children under thirteen],"[67] and for advertisements "constituted by a store window, a display, a container, a wrapping or a label or if it appears thereon."[68] The Quebec CPA has then promulgated a list of actions that advertisements must not do if they are to be exempt from the Quebec CPA.[69] Some of the more notable prohibited actions include exaggerating the character of the goods or service, use of an animated cartoon or comic to advertise a good besides a cartoon show or comic book, and employing a well-known celebrity that appears in publications or programs directed at children.[70] Nevertheless, as long as an advertisement is of general

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[60] *See id.* at 106.

[61] *See id*. at 38-40.

[62] *See* Jane Wakefield, *Children's Internet Code: What is it and how will it work?*, TECH. – BBC NEWS (Sept. 1, 2021), https://www.bbc.com/news/technology-58396004.

[63] Consumer Protection Act, C.Q.L.R. 1978, c P-40.1, ss. 248-49 (Can.).

[64] OFF. DE LA PROT. DU CONSOMMATEUR, ADVERTISING DIRECTED AT CHILDREN UNDER 13 YEARS OF AGE: GUIDE TO THE APPLICATION OF SECTIONS 248 AND 249 CONSUMER PROTECTION ACT 3 (2012), https://cdn.opc.gouv.qc.ca/media/documents/consommateur/sujet/publicite-pratique-illegale/EN_Guide_publicite_moins_de_13_ans_vf.pdf.

[65] Consumer Protection Act s. 249(a)-(c).

[66] *See* Regulation respecting the application of the Consumer Protection Act, C.Q.L.R. 1981, c P-40.1, r. 3, s. 88 (a)-(d) (Can.) (outlining the conditions that exempt advertisements).

[67] *Id.* at s. 89 (if the "advertisement is in conformity with the requirements of section 91").

[68] *Id.* at s. 90 (if the "requirements of paragraphs *a* to *g*, *j*, *k*, *o* and *p* of section 91 are met").

[69] *See id.* at s. 91 (outlining the restrictions placed on ads directed at children, for "purposes of applying sections 88, 89 and 90").

[70] *See id.* at s 91.

appeal and its content was not designed to appeal to children, it will not be subject to the Quebec CPA.[71]

It should also be noted that Quebec, Canada does not represent the federal regulatory culture in Canada. Nationally speaking, Canada has legislation that prohibits false or misleading advertising in general, but the advertising industry is predominantly self-regulated.[72] Specifically, the Broadcast Code for Advertising to Children outlines measures for legally advertising to children.[73] Unlike the Quebec CPA, this self-regulatory regime does not outright ban advertisements to children, rather it requires compliance with scheduling stipulations, safety requirements, and endorsement procedures.[74] Consequently, the Quebec CPA represents a markedly different tactic in addressing advertisements to children.

Regardless of the regulatory track that is taken by an agency or congressional body, it will eventually need to pass whatever level of scrutiny or test that the court system applies. The following subsection will thus examine both the United States' intermediate scrutiny analysis and Canada's proportionality analysis as applied to commercial speech.

E. Intermediate Scrutiny for Commercial Speech in the U.S.

In the United States, the First Amendment of the Constitution protects freedom of speech.[75] Unlike the Canadian Charter and the European Convention though, the U.S. Bill of Rights does not contain an explicit limitation on when or how to deduce if interference with an enshrined right is proportionate or even permitted.[76] Some scholars have thus posited that the absence of a limitation clause is indicative of a constitutional culture that was suspicious of government power and consequently preferred categorical protections against government intrusions.[77] Moreover, the lack of a limitation clause effectively grants the judiciary large discretion to formulate tests concerning unconstitutionality.[78]

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[71] *See* Consumer Protection Act ss. 248-49; *see also* OFF. DE LA PROT. DU CONSOMMATEUR, *supra* note 64, at 26.

[72] Catherine Bate & Kelly Harris, *Advertising & Marketing in Canada*, LEXOLOGY (May 2, 2019), https://www.lexology.com/library/detail.aspx?g=883c4ac1-215f-40c6-a045-27920b9402fe.

[73] *The Broadcast Code for Advertising to Children*, AD STANDARDS (last updated Aug. 2022), https://adstandards.ca/preclearance/advertising-preclearance/childrens/childrens-code/.

[74] *See id.*

[75] U.S. CONST. amend. I ("Congress shall make no law… abridging the freedom of speech, or of the press…").

[76] *Compare* U.S. CONST. amend. I–X *with* Canadian Charter of Rights and Freedoms, Part I of Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11 s. 1 *and* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 sec. 1.

[77] *See* MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 55 (2013).

[78] *See* TOR-INGE HARBO, THE FUNCTION OF PROPORTIONALITY ANALYSIS IN EUROPEAN LAW 219 (2015).

Commercial speech is generally defined as speech that proposes a commercial transaction.[79] The U.S. Supreme Court has held that commercial speech may fall within the First Amendment's protection of free speech.[80] The U.S. Supreme Court in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York* created a four-pronged test to deduce if commercial speech is protected.[81] First, the commercial speech must be lawful and not misleading.[82] Second, the government must have a substantial interest to regulate the speech in question.[83] Third, if there is a substantial governmental interest and the speech is lawful and not misleading, then the court must ascertain whether the regulation directly advances the government's interest.[84] Fourth and finally, the regulation must be no more extensive than is necessary.[85] The final prong does not require the least restrictive means like strict scrutiny,[86] yet the Supreme Court has been critiqued for applying the final prong in a similar fashion.[87]

The *Central Hudson* test was applied in *44 Liquormart, Inc. v. Rhode Island* for a state regulation that banned advertisements containing the price of alcohol except for price tags or signs within a licensed premise that was not visible from the street.[88] The Court only addressed the final two prongs in *Central Hudson* and found that the government failed on both accounts.[89] For the third prong, the Court noted that common sense arguments were not sufficient to establish the regulations would materially decrease market-wide consumption of alcohol.[90] As for the final prong, the Court reasoned that the government could have used alternative methods such as taxation or education

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[79] *See* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976); Bigelow v. Virginia, 421 U.S. 809, 822 (1975); Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rel.'s, 413 U.S. 376, 385 (1973).

[80] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980).

[81] *Id.* at 566.

[82] *Id.*

[83] *Id.*

[84] *Id*.

[85] *Id*.

[86] *See* Bd. of Tr.'s of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989).

[87] *See* Beales, *supra* note 15, at 887 ("It seems very likely that there will be further evolution of commercial speech/First Amendment principles as they pertain to the broadcast media; moreover, the direction of doctrinal change thus far suggests more protection, rather than less, for commercial speech on radio and television."); Donald L. Beschle, *Clearly Canadian? Hill v. Colorado and Free Speech Balancing in the United States and Canada*, 28 HASTINGS CONST. L.Q. 187, 231 (2001) ("In cases involving commercial speech and hate speech, replacing allegedly clear categorical rules with more open-ended balancing-type analysis has led to stronger protection for the free speech right."); Micah L. Berman, *Commercial Speech Law and Tobacco Marketing: A Comparative Discussion of the United States and Canada*, 39 AM. J.L. & MED. 218, 234 (2013) [hereinafter Berman, *Commercial Speech Law*] ("As mentioned above, the commercial speech doctrine in the United States started out by emphasizing the interests of consumers. Since that time, however, the focus of the courts has gradually shifted from the consumer to the speaker.").

[88] *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996).

[89] *Id.* at 505, 507.

[90] *See id.* at 506.

campaigns.[91] Therefore, the near total ban on commercial speech was found to be unconstitutional.[92]

Another application of the *Central Hudson* test can be found in *Lorillard Tobacco Co. v. Reilly*.[93] In *Lorillard*, a Massachusetts regulation prohibited the advertising of tobacco within 1000 feet of a school, among other things, and the government asserted its interest was the protection of minors from the harms of tobacco.[94] The Supreme Court then engaged in the *Central Hudson* test.[95] The Court presumed that the first prong was met and that the advertisements were lawful and not misleading, and no party contested the second prong i.e., that the government had a substantial interest in protecting the health of minors.[96] For the third prong, the Court stated that the government may "justify speech restrictions by reference to studies" that show the regulations may directly advance the government interest.[97] The government subsequently provided a sufficient amount of evidence after presenting various studies on the issue of protecting children from tobacco-related products.[98] The Court then turned to the final prong of analyzing if the regulation was more extensive than necessary.[99] Of particular concern for the Court was that the restrictions would constitute a near total ban in certain areas for advertising to adults.[100] Consequently, the regulation failed the final prong and was found to be unconstitutional.[101]

Neither one of these two cases involve regulations of speech on the internet, but both still provide insight into how the U.S. Supreme Court has employed the *Central Hudson* test in a strict fashion and elevated commercial speech interests above protecting child welfare online. Of particular note, the U.S. Supreme Court has repeatedly placed an emphasis and a preference for the use of filters by parents to protect children instead of banning certain content from being online and accessible to children.[102] Though the cited cases involve

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[91] *See id.* at 507.
[92] *See id.* at 516.
[93] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554-55 (2001).
[94] *Id.* at 534-35.
[95] *See id.* at 552-54.
[96] *See id.* at 555.
[97] *Id.* (quoting Florida Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995)).
[98] *See Lorillard Tobacco Co*., 533 U.S. at 561.
[99] *See id.*
[100] *See id.* at 561–62.
[101] *See id.* at 565–66.
[102] *See* Ashcroft v. Am. Civ. Liberties Union, 542 U.S. 656, 669 (2004) ("[Congress] could also take steps to promote their development by industry, and their use by parents. It is incorrect, for that reason, to say that filters are part of the current regulatory status quo. The need for parental cooperation does not automatically disqualify a proposed less restrictive alternative."); United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 825–26 (2000) (finding that between a blanket speech restriction and technology available to parents to restrict child access to sexually explicit material, the government failed to show that the less restrictive option was not as effective); Reno v. Am. Civ. Liberties Union, 521 U.S. 844, 875 (1997) (finding a statute that criminalized the knowing transmission of obscene material to minors under the age of eighteen as too broad because there was

the use of strict scrutiny because the regulations police speech-content, they still offer the insight that when it comes to internet regulations the Supreme Court finds filters to be a viable alternative to near total bans.

In light of both the *Central Hudson* test and the tendency of the U.S. Supreme Court to offer filters as the best alternative in cases concerning content regulation online, three conclusions arise. First, near total bans will rarely be found to be acceptable under the *Central Hudson* test. Second, the greater the infringement on adult freedoms the greater the possibility that the government action will be unconstitutional. Lastly, the *Central Hudson* test is increasingly employed to protect commercial speech over the wellbeing of the consumer. With these deductions in mind, this comment will now examine the proportionality analysis' history and its use in Canada.

F. The Theory and History of the Proportionality Analysis

The theory supporting proportionality analysis is not a modern invention.[103] Scholars trace proportionality analysis in its modern doctrinal form to Prussian administrative law.[104] Article 10(2) of the 1794 Prussian *Allgemeines Landrecht* states, "[t]he police is [sic] to take the *necessary* measures for the maintenance of public peace, security and order."[105] The concept of limiting government action to what was necessary was then coupled with the Prussian principle *Rechtsstaat* which limited government intervention on individual rights to what was explicitly authorized by the law.[106] Therefore, Prussian proportionality analysis was a two-step process where government intervention of individual rights must have been necessary and explicitly authorized by the law.

Proportionality analysis was then adopted by the European Court of Justice in 1970 and then by the European Court of Human Rights in 1976.[107] Consequently, the adoption of the proportionality analysis in these reputable courts led to many Western European jurisdictions adopting proportionality analysis and eventually contributed to proportionality analysis' spread across the globe.[108] A notable exception to the proportionality analysis trend is the

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"available *user-based* software . . . that [was] a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate for their children.") (emphasis in original).

[103] *See* COHEN-ELIYA & PORAT, *supra* note 77, at 24 n.1 ("Traces of the concept of proportionality can be found in Ancient times: … images of balancing in Egyptian tomb paintings … and … in the Hammurabi Codex and the Old Testament … [and] the Magna Carta").

[104] *Id.* at 24.

[105] *Id.* at 25.

[106] *See id.*

[107] *See id.* at 11.

[108] *See* COHEN-ELIYA & PORAT, *supra* note 77, at 11-13. Examples of countries that have adopted a proportionality analysis in Western Europe include Belgium, France, Greece, Italy, Portugal, Spain, Switzerland, and the United Kingdom. *Id.* at 11 n.8. Eastern European countries

United States which some scholars identify as having either a categorizing analysis or a balancing test.[109]

As alluded to in the Prussian history of proportionality analysis, proportionality analysis is employed in modern times whenever citizens' individual rights are threatened by government action; in other words, proportionality analysis is used by the courts to examine the scope of exceptions to protected individual freedoms enshrined in a country's constitution.[110] Moreover, as Prussian administrative law performed the proportionality analysis in a two-step process, modern European proportionality analysis also involves an overarching two-step procedure.[111] First, the court assesses whether the government has a legitimate ground to infringe on protected freedoms.[112] Second, if the government is found to have a legitimate ground, the intrusion on individual freedoms must be proportionate.[113]

The general framework of a necessary action by the government and only a proportional intrusion on the individual's freedom plays out in Canada as well. However, when applying the proportionality analysis to commercial speech, the Canadian Supreme Court implements a multi-pronged test that analyzes proportionality and necessity in greater depth than the two-step process outlined above.

G. Canada's Commercial Speech Doctrine

The Canadian Charter of Rights and Freedoms (Canadian Charter) enshrines the civil rights and freedoms of all Canadians.[114] The Canadian Charter particularly protects the "freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication."[115] In conjunction with the Canadian Charter, the province of Quebec also has a Charter of Human Rights and Freedoms (Quebec Charter) that states, "Every person is the possessor of the fundamental freedoms, including . . . freedom of expression."[116] Thus, both the federal Canadian

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with proportionality analysis include Albania, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Lithuania, Moldavia, Poland, Romania, Slovakia, and Slovenia. *Id.* at 12 n.10. In Asia, states that have adopted proportionality analysis include Hong Kong, South Korea, and India. *Id.* at 12. In Latin America, Brazil, Columbia, Mexico, and Peru employ a proportionality analysis. *Id.* "Two other bodies of law that have contributed to the global diffusion of proportionality are international law and Canadian constitutional jurisprudence." *Id.*

[109] *See id.* at 15; Beschle, *supra* note 87, at 190–91.

[110] *See* HARBO, *supra* note 78, at 15 ("The proportionality principle is often applied as a means to limit the scope of an exception to the freedom/right.").

[111] *See id.* at 22.

[112] *See id.*

[113] *See id.*

[114] *See* Canadian Charter of Rights and Freedoms, c 11 s. 1.

[115] *Id.* at s. 2.

[116] Charter of Human Rights and Freedoms, C.Q.L.R. 1975, c C-12 s. 3 (Can.).

Charter and the provincial Quebec Charter protect freedom of expression which was found to apply to commercial speech like advertising.[117]

However, the Canadian Charter also possesses an explicit limitation to all freedoms protected therein: "The [Canadian Charter] guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[118] The Canadian courts then developed a multi-step test that is applied whenever the government infringes on a right, including commercial speech.[119] The name for the test is the *Oakes* test derived from the case *R. v. Oakes*.[120] The *Oakes* test engages in an initial two-step examination with the second prong containing multiple steps within it.[121] First, the court examines the legislative objective to see if it is sufficiently "pressing and substantial" to limit an individual right.[122] Second, the court analyzes if the means to achieve the objective are proportional.[123] This proportionality prong includes three steps: (1) the means employed must have a rational connection to the objective, (2) the infringement on individual rights must interfere no more than needed on the rights to achieve its objective, and (3) the costs of the intrusion must not outweigh the benefits sought.[124] Though this comment focuses primarily on one case applying the *Oakes* test in the 1980s, the structure of the *Oakes* test remains the same today.[125]

The leading case for employing the *Oakes* test to commercial speech directed at children in Canada is *Irwin Toy Ltd. v. Quebec*.[126] *Irwin Toy Ltd. v. Quebec* involved an advertiser challenging the constitutionality of the Quebec CPA, specifically the near total ban on child directed advertising, claiming it infringed upon freedom of expression guaranteed in the Canadian Charter and the Quebec Charter.[127] After identifying that commercial speech was protected under freedom of expression and that government restrictions in Quebec were over the content of speech,[128] the Canadian Supreme Court required that the Quebec CPA pass the *Oakes* test in order to be justified.[129] First, the Canadian

[117] *See* Irwin Toy Ltd. v. Quebec, [1989] 1 S.C.R. 927, 969-71 (Can.).
[118] Canadian Charter of Rights and Freedoms, c 11 s. 1.
[119] *See* R. v. Oakes, [1986] 1 S.C.R. 103, 138-39 (Can.).
[120] *See id.*
[121] *See id*.
[122] *Id.*
[123] *See id.* at 139.
[124] *See id.* at 139; *see also* L. W. SUMNER, THE HATEFUL AND THE OBSCENE: STUDIES IN THE LIMITS OF FREE EXPRESSION 56 (2004) ("The proportionality test subdivides in turn into three parts: (a) *Rational connection*. … (b) *Minimal impairment*. … [and] (c) *Proportional effects*.").
[125] *See* R. v. K.R.J., [2016] 1 S.C.R. 906, 938 (Can.); Alberta v. Hutterian Brethren of Wilson Colony, [2009] 2 S.C.R. 567, 593–94 (Can.); Thomson Newspapers Co. v. Canada, [1998] 1 S.C.R. 877, 903 (Can.).
[126] *See* Irwin Toy Ltd. v. Quebec, [1989] 1 S.C.R. 927, 928-29 (Can.).
[127] *See id.*
[128] *See id.* at 967–79.
[129] *See id.* at 986.

Supreme Court required that the Quebec CPA possess a pressing and substantial objective. This prong was satisfied because the Canadian Supreme Court found that the Quebec CPA's objective was "the protection of a group [children] which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising."[130] Second, the Canadian Supreme Court went on to examine the proportionality of the legislative means through a three-step analysis.[131]

Firstly, the Canadian Supreme Court found the advertising ban to be "rationally connected" to its objective of protecting the vulnerable because (1) the ban is clearly directed to protect children and (2) the ban is not total since there are exceptions and advertisements can still be directed at adults.[132] Secondly, the Canadian Supreme Court held that the ban was the "minimal impairment of free expression" because "while evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set."[133] Lastly, the Canadian Supreme Court noted that the impact of the ban did not outweigh the government's objective because advertisers are always free to direct messages to parents.[134] Therefore, with these three steps met the Quebec CPA was held proportional and constitutionally sound.[135]

Three major premises are distilled from this case about proportionality analysis. First, proportionality analysis may be used to offer deference to the legislators' concerns and to remove discretionary judgments on behalf of the judicial branch when competing claims of individual and community rights are at issue.[136] Second, the deference within the proportionality analysis lends itself to fostering a constitutional culture where communal rights are not viewed as a threat to individual rights and consumer protection is highly valued.[137] Third, bans of commercial speech for the purpose of protecting minors must contain

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[130] *Id.* at 989. The Canadian Supreme Court noted that this first prong is an evidentiary inquiry that only requires a reasonableness justification for the legislative action. *Id.* at 990. Specifically, the Canadian Supreme Court relied on a U.S. Federal Trade Commission report which the legislature used as evidence that advertising to children is "*per se* manipulative." *Id.* at 988.

[131] *See Irwin Toy Ltd*., [1989] 1 S.C.R. at 991.

[132] *See id.* at 933.

[133] *Id.* at 934 (in finding the Quebec CPA passed the minimal impairment step, it was noted that "[t]his Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups. There must nevertheless be a sound evidentiary basis for the government's conclusions.").

[134] *See id.* at 934. The Court noted here that impact on advertisers' revenue is not a sufficient reason to hold that the legislation's impact outweighed the objective. *Id.* at 1000.

[135] *See id.* at 1000.

[136] *See Irwin Toy Ltd*., [1989] 1 S.C.R. at 990 ("Where legislature mediates between the competing claims of different groups in the community . . . [and] if that if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess.").

[137] *See* COHEN-ELIYA & PORAT, *supra* note 77, at 155.

sufficient exceptions to not function as a total ban on adults' rights, but near total bans are not *per se* invalid.

III. ARGUMENT

The previous section displayed that the form of the *Central Hudson* test is similar to Canada's proportionality analysis, yet the application of these tests has led the courts in different directions. The U.S. Supreme Court has increasingly applied the "no more extensive than necessary" prong of the *Central Hudson* test in a strict scrutiny fashion to protect commercial speech, which results in near total bans of speech being contradictory to the First Amendment.[138] The Canadian Supreme Court, on the other hand, is not as wary about near total bans of commercial speech when done for a legitimate end,[139] and consequently commercial speech analysis is done with greater emphasis on protecting the consumer.

To draw out these differences in more detail and to examine a possible regulatory solution for curtailing advertisements directed to children online in the United States, this section will take the Quebec CPA and put it into the United States legal context as well as place COPA in the Canadian legal context. What will follow is a hypothetical challenge to the Quebec CPA on U.S. First Amendment grounds from a company that advertised a toy directly to children under thirteen and the U.S. Supreme Court consequently applying the *Central Hudson* test to examine if the Quebec CPA is constitutional in preventing such a practice. Then, the inverse will be analyzed by placing COPA in the Canadian context and applying the *Oakes* test. Though COPA in the United States was struck down on strict scrutiny grounds, Canada applies the *Oakes* test for all alleged infringements of freedom of expression.[140]

A. Applying the U.S. Central Hudson *Test to Quebec CPA*

The *Central Hudson* test asks four questions. First, is the commercial speech lawful and not misleading?[141] Second, is the government interest

[138] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555-56 (2001); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 (1996).

[139] *See Irwin Toy Ltd*., [1989] 1 S.C.R. at 933.

[140] *See* Berman, *Commercial Speech Law*, *supra* note 87, at 227-28.

[141] *See Cent. Hudson Gas & Elec. Corp*. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

substantial?[142] Third, does the regulation directly advance the government's interest?[143] Finally, is the regulation no more extensive than necessary?[144]

First, the Supreme Court is likely to find that the practice of advertising a toy on YouTube to children is not a misleading nor an unlawful form of speech since the advertisement is clearly displaying corporate affiliations.

Second, the government's legislative goal of protecting minors from harmful advertising will likely be found as a substantial government interest. This may be deduced from the fact that in *Reno v. ACLU* the Supreme Court noted that "we have repeatedly recognized the governmental interest in protecting children from harmful materials."[145] Therefore, the second prong of the *Central Hudson* test is likely passed as long as the government details how advertising may be harmful to children.

Third, the Supreme Court is likely to hold that a near total ban on child directed advertising directly advances the government's interest. The government here would need to rely on more than common sense arguments that near total bans logically advance the government's interest in protecting child welfare and present actual studies that show such a restriction would be successful.[146] Nevertheless, this prong would likely be met since there are studies that display the need to limit child directed advertising and the dangers associated with advertising to children.[147] This leaves the final prong for the Court's analysis.

Finally, the Court will likely find that the Quebec CPA is not narrowly tailored to the government's interest. Though the final prong does not require the least restrictive means of regulation, precedent displays that near total bans have been found to almost be *per se* overly broad under the *Central Hudson* test.[148] However, it could be argued that the Quebec CPA is not a near total ban due to the exceptions listed: the exceptions include advertisements in magazines directed at children, advertisements announcing shows for children, and advertisements included on a store window, a display, a container, or a wrapping label.[149] Thus, the government could argue that the Quebec CPA is distinguishable from both *Lorillard Tobacco Co. v. Reilly* and *44 Liquormart, Inc. v. Rhode Island* because both of the regulations in these respective cases

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[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Reno v. Am. Civ. Liberties Union* , 521 U.S. 844, 875 (1997).

[146] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001); 44 Liquormart, Inc. v. Rhode Island, 517 U.S 484, 505 (1996).

[147] *See* John, *supra* note 15, at 183–84; GUNTER ET AL., *supra* note 18, at 103, 117.

[148] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505 (1996).

[149] *See* Regulation respecting the application of the Consumer Protection Act, C.Q.L.R. 1981 c P-40.1 r. 3, ss. 88-9 (Can.).

essentially denied adults access to advertising whereas the Quebec CPA still permits adults access to advertising.[150] The problem with this distinction is that the Quebec CPA applies to the online setting and thus the U.S. Supreme Court will likely reason that filters used by parents would be less intrusive and still achieve the same goal.[151] Therefore, the Quebec CPA would be deemed unconstitutional in the United States by failing the *Central Hudson* test's final prong.

B. Applying the Canadian Oakes *Test to COPA*

The *Oakes* test asks two overarching questions: (1) was the legislative aim pressing and substantial and (2) was the means proportional to the end.[152] For the latter analysis, there must be (a) a rational connection between the means and the end, (b) the impairment of individual freedom must be minimal, and (c) the costs must not outweigh the benefits.[153]

First, the legislative aim of COPA is likely to be found as substantial. Similar to the Quebec CPA in *Irwin Toy Ltd. v. Quebec* where the Canadian Supreme Court found that protecting those who are easily susceptible to manipulation was a substantial interest,[154] COPA too was passed by legislators intending to protect children from harms arising online. [155] Thus, the first step of the *Oakes* test will likely be met.

As for the proportionality examination, all three subsections will likely be satisfied by COPA. First, COPA is rationally connected to its legislative end since COPA's requirements of age verification to access adult content online clearly restrict the capacity of children gaining access to pornography and other similarly harmful material.[156] Second, the Court does not require the least intrusive legislation available but only that the government presents evidence that supports the necessity of the legislation.[157] Therefore, this prong will likely be met since Congress can point to the fact that the FCC has known since the 1970s that advertising to children is dangerous.[158] Finally, the Court is likely to hold that the costs of COPA do not outweigh the benefits. In *Irwin Toy Ltd. v.*

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[150] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 562 (2001); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 (1996).

[151] *See* Ashcroft v. Am. Civ. Liberties Union, 542 U.S. 656, 666–67 (2004) ; *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 825–26 (2000); *Reno v. Am. Civ. Liberties* Union, 521 U.S. at 879.

[152] *See R. v. Oakes*, [1986] 1 S.C.R. 103. 138–39 (Can.).

[153] *See id.* at 139.

[154] See Irwin Toy Ltd. v. Quebec, [1989] 1 S.C.R. 927, 987 (Can.).

[155] *See* 47 U.S.C. § 231 (1998). Purdy, *supra* note 41, at 266.

[156] *See* Child Online Protection Act of 1998, § 231(c)(1).

[157] *See Irwin Toy Ltd*., [1989] 1 S.C.R. at 934.

[158] *See* H.R. REP. NO. 100–675, at 7 (1988) (noting that the FCC had, in its 1974 policy statement, concluded "that children cannot distinguish conceptually between programming and advertising" and are "far more trusting of and vulnerable to commercial 'pitches' than are adults").

Quebec, the Court held that advertisers were still free to advertise to adults even with the restrictions surrounding child directed advertising and that merely a revenue cost was not sufficient to outweigh the substantial legislative aim.[159] Here, the costs would be requiring adult content sites to implement an age verification system which may deter website visitors. This deterrent principle is in fact the impact the legislation aims to achieve for children and those who are adults would still be able to access the content by merely verifying their age. Thus, the Court is likely to find the final prong of the *Oakes* test satisfied. Therefore, COPA would be upheld as constitutional in Canada.

C. Lessons Learned

The above comparative analysis of the *Central Hudson* test and the *Oakes* test highlights that the major difference between these tests is that the Canadian proportionality analysis elevates the wellbeing of the consumer by not interpreting its proportionality prong in a strict fashion. This is not to say that the *Oakes* test is impervious from being interpreted strictly, rather the Canadian Supreme Court has set the precedent that the proportionality prong is not a legal instrument that will be used to subjugate consumer wellbeing for the sake of commercial speech rights.[160] However, the tendency to elevate the wellbeing of the consumer may also be traced back to Canada's constitutional culture where the Canadian Charter possesses an explicit limitation clause for individual rights.[161] Canada's constitutional culture combined with the *Oakes* test enables Canada to possess regulations that aim to protect the wellbeing of children even at the expense of commercial speech.

The increasingly strict nature of the *Central Hudson* test, on the other hand, lends itself to the constitutional culture where individual rights are perceived in absolutes. This categorical perspective is evidenced by the fact that the U.S. Bill of Rights does not have limitation clauses for the individual rights enumerated therein.[162] Yet, the similar structure between the *Central Hudson* test and the *Oakes* test provides the U.S. courts with an opportunity to reverse engineer the present constitutional culture. The *Central Hudson* test is an intermediate scrutiny test, which means that courts are not required to interpret it in the vein of strict scrutiny. Rather, as the Canadian Supreme Court noted in *Irwin Toy Ltd. v. Quebec*, minimal impairment could be understood to require the government to present evidence that supports the necessity of the legislation while the court should "not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups."[163] Therefore, the *Central Hudson* test can be implemented in a fashion that proportionately

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[159] *See Irwin Toy Ltd*., [1989] 1 S.C.R. at 1000.
[160] *See* Berman, *Commercial Speech Law*, *supra* note 87, at 234.
[161] *See* COHEN-ELIYA & PORAT, *supra* note 77, at 13.
[162] *See* U.S. CONST. amend. I–X; COHEN-ELIYA & PORAT, *supra* note 77, at 13.
[163] *Irwin Toy Ltd*., [1989] 1 S.C.R. at 999.

elevates consumer wellbeing and changes the United States' constitutional culture because the structure of the test is similar to Canada's *Oakes* test.

A natural question that arises from this suggestion for *Central Hudson* interpretation is why the Court would be motivated to do so. First, as shown above, American children are being placed in harm's way for the sake of protecting commercial speech rights.[164] Second, online advertising is a global industry that requires a concerted global effort to protect the vulnerable and the United States' current stance puts children from across the globe at risk since online advertisements may originate in various countries. Lastly, there is an international trend in protecting children's rights online and limiting the scope of commercial speech.[165] The United States need not become a legal outlier and a safe haven for overly protected commercial speech. Therefore, interpreting the *Central Hudson* test like the proportionality analysis in the *Oakes* test can help the United States return to the origins of commercial speech doctrine and protect vulnerable consumers.[166]

Nevertheless, some may question the value in examining Canadian legal principles to address a United States constitutional issue. In response, it is important to note what this comment is not advocating. Specifically, this comment is not advocating a wholesale adoption of the Canadian *Oakes* test into the United States legal context to replace the *Central Hudson* test for First Amendment analysis. Rather, the *Oakes* test may serve as a template for reasoning through the *Central Hudson* test because there are enough structural similarities between the two tests. With the *Central Hudson* test being interpreted in a strict fashion, despite being an intermediate scrutiny analysis, the *Oakes* test provides a roadmap on how to stop the strict interpretation of the *Central Hudson* test and better elevate consumer wellbeing above the ever-increasing protection of commercial rights. Thus, by examining Canadian legal principles, the United States could return to commercial speech doctrine's original task – protecting the consumer.[167]

Another major takeaway from the above analysis is that even with the numerous exceptions included in the Quebec CPA, it was still too similar to a near total ban and thus unconstitutional under the *Central Hudson* test. Consequently, regulating advertising directed at children will need to be narrower in its scope. An example of a narrow FTC rule that targets advertising

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[164] *See* GUNTER ET AL., *supra* note 18, at 87.

[165] *See* Natasha Singer, *Britain Plans Vast Privacy Protections for Children*, N.Y. TIMES (Jan. 21, 2021), https://www.nytimes.com/2020/01/21/business/britain-children-privacy-protection-kids-online.html.

[166] *See* Berman, *Commercial Speech Law*, *supra* note 87, at 234.

[167] *See id.* Though commercial speech doctrine undoubtedly has the goal of protecting commercial speech, the fact that the doctrine originated with an intermediate scrutiny analysis lends itself to the inference that there is a co-equal purpose of protecting the wellbeing of consumers. Otherwise, the U.S. Supreme Court should have used a strict scrutiny test to protect commercial speech rights from infringement.

directed to children is the 900-Number Rule.[168] This rule bans child directed advertisements for kids under twelve from containing 900 number call services.[169] For older children, ages twelve to eighteen, the advertisement must clearly display that the child must have the parent's permission to call.[170] The 900-Number Rule displays a narrowly tailored regulation that also effectively restricts commercial speech for the purpose of protecting children from being manipulated.

Regulations for online advertisements then could specifically target advergames as the FTC did with the 900-Number Rule. Advergames are videogames specifically created by companies or in collaboration with companies to promote a brand's product.[171] Examples of advergames include Doritos VR Battle, Chex Quest, and Chipotle's Scarecrow.[172] Applying the regulatory scheme of the 900-Number Rule to advergames, the FTC could ban advergames for children under the age of twelve and require the online platform to obtain parental permission before allowing older children to play.[173] This would successfully limit advertisements to the most vulnerable children while also being sufficiently narrow to survive an attack on constitutional grounds.

Additionally, the United Kingdom's AADC could also serve as a template for American legislation combating targeted advertising. First, the AADC applies to online services that are either directed at children, defined as under eighteen, or are likely to be accessed by children.[174] AADC thus expands legal obligations beyond COPPA's two primary applications: online platforms directed at children under thirteen that collect personal data from children and general audience apps or websites that have actual knowledge that they collect personal information from children under thirteen. [175] By incorporating the AADC's definition of children and its broader application to websites likely to be accessed by children, U.S. legislation could encapsulate website operators who rely on the excuse of not having actual knowledge that they collect data from children under thirteen or that their websites are not directed at children to target children with advertising.

Second, the AADC's expanded legal application is coupled with the concept that operators of online platforms can adapt their platform designs to the audience that is using their services; [176] meaning that a website operator must

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[168] *See* 16 C.F.R. § 308.3.
[169] *See id.* § 308.3(e).
[170] *See id.* § 308.3(f).
[171] *See* Reid, *supra* note 7.
[172] *See* Mitch Swanson, *Advergaming: How Videogame Advertising Helps with Consumer Engagement*, GAMIFY, https://www.gamify.com/gamification-blog/advergaming-how-game-advertising-is-built-for-consumer-engagement.
[173] *See generally* Seth Grossman, *Grand Theft Oreo: The Constitutionality of Advergame Regulation*, 115 YALE L.J. 227, 235 (2005).
[174] *See* ICO, *supra* note 14, at 17.
[175] *See* FTC Children's Online Privacy Protection Rule, 16 C.F.R. § 312.3 (2022).
[176] *See* ICO, *supra* note 14, at 97.

design the platform by creating parental consent requirements for users under thirteen but not for older children who can opt into behavioral advertising on their own. Additionally, the AADC mandates website tools be easily displayed for children to exercise their rights to privacy on their own.[177] In contrast, COPPA's requirement of primarily utilizing parental consent as a tool to protect children displays a focus on empowering parents as gatekeepers but not empowering children or other teenagers.[178] Therefore, legislation could place a greater onus on website operators to implement designs that empower children under the age of eighteen to exercise their privacy rights to not be targeted by behavioral advertising while still being more protective of the most vulnerable children in requiring parental consent. These regulatory suggestions also have the benefit of being sufficiently narrow for the *Central Hudson* test because they do not impair the flow of information that is directed at adults since, unlike the Quebec CPA, advertisements are not outright banned.

IV. CONCLUSION

By comparing the trajectory of the United States' commercial speech doctrine and regulatory approach with Canada and the United Kingdom, it is possible to see how the United States could better address the issue of online advertising directed at children on both an agency and judicial level. In understanding that Canada's proportionality analysis prioritizes the consumer's wellbeing over individual commercial speech rights and shares a structural similarity with the *Central Hudson* test in the United States, it begs the question why the United States should not also interpret the *Central Hudson* test to prioritize the consumer's wellbeing by refraining from strictly interpreting the *Central Hudson* test. As for regulatory action, though the Quebec CPA and COPA were too expansive for the U.S. Supreme Court, rules derived from the 900-Number Rule or the AADC could provide a template for regulating online advertising strategies without being too expansive.

[177] *See id.* at 8.
[178] *See* Johnson, *supra* note 47.

SHOULD NFT'S BE CONSIDERED "GOODS" FOR THE PURPOSES OF THE EU'S "FREE MOVEMENT OF GOODS" PROVISION?

Faith Harrison

I. INTRODUCTION

On March 11, 2021, a piece of art titled "Everydays- The First Five Thousand Days" was sold at Christies Auction House for $69.3 million, making it the third-most expensive piece of art ever sold by a living artist.[1] What was so unique about this piece that it warranted that high price? It doesn't physically exist. "Everydays- The First Five Thousand Days" is an NFT, a non-fungible token, essentially a digital work of art.[2] The work was created by digital artist Beeple, the professional name of the artist Mike Winkelmann, who has posted an image online every day since 2007.[3] As the title suggests, "Everydays- The First Five Thousand Days" is a collage of the first 5,000 of these images, many of them containing commentary about the modern digital age.[4] Beeple is not the only one selling digital images for huge sums. Jack Dorsey, the co-founder of Twitter, sold an NFT of his first tweet for nearly $3 million in 2021.[5] And some speculate that digital clothes in the form of NFTs will be the next big fashion trend.[6] Indeed, as the metaverse gains traction and users, NFTs could become increasingly relevant in the ways people interact with each other.[7]

All this suggests the growing importance of NFTs as a combination of technology and art. With the growing cultural importance of NFTs, several legal questions have been raised about them: Can NFTs be copyrighted?[8] Do NFTs

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[1] *See* Abram Brown, *Beeple NFT Sells for $69.3 Million, Becoming Most-Expensive Ever*, FORBES (Mar. 11, 2021, 10:03 AM), https://www.forbes.com/sites/abrambrown/2021/03/11/beeple-art-sells-for-693-million-becoming-most-expensive-nft-ever/?sh=1770302a2448.

[2] *See id.*; James Tarmy & Olga Kharif, *An NFT Sold for $69 Million, Blasting Crypto Art Records*, BLOOMBERG (Mar. 11, 20210, 10:06 AM), https://www.bloomberg.com/news/articles/2021-03-11/beeple-everydays-nft-sells-at-art-auction-for-60-million-paid-in-ether.

[3] Brown, *supra* note 1.

[4] *See id.*

[5] *See* Taylor Locke, *Jack Dorsey Sells his First Tweet Ever as an NFT for Over $2.9 Million,* CNBC (Mar. 22, 2021, 3:07 PM), https://www.cnbc.com/2021/03/22/jack-dorsey-sells-his-first-tweet-ever-as-an-nft-for-over-2point9-million.html.

[6] *See* Thuy Ong, *Clothes That Don't Exist Are Worth Big Money in the Metaverse*, BLOOMBERG (June 16, 2021, 5:00 PM), https://www.bloomberg.com/news/features/2021-06-16/non-fungible-tokens-and-the-metaverse-are-digital-fashion-s-next-frontiers.

[7] *See* Oleg Fonarov, *What is the Role of NFTs in the Metaverse?*, FORBES (Mar. 11, 2022, 8:45 AM), https://www.forbes.com/sites/forbestechcouncil/2022/03/11/what-is-the-role-of-nfts-in-the-metaverse/?sh=91d203d6bb87.

[8] *See* Tonya M. Evans, *Cryptokitties, Cryptography, and Copyright*, 47 AIPLA Q. J. 219, 224 (2019) (arguing that copyright law should apply to crypto assets like NFTs).

qualify as securities or commodities under US law?[9] Do property rights apply to NFTs?[10] This paper endeavors to answer a question that has not been asked before: Do NFTs qualify as "goods" for the purposes of the European Union (EU)'s "free movement of goods" trade provisions?[11] Specifically, this paper will argue that NFTs should be considered goods under the EU's "free movement of goods" provisions, meaning customs duties should be banned for the movement of NFTs within the EU.

Section II of this comment will provide background information on NFTs and EU trade law, explaining six key concepts. First, it will explain what NFTs are and how they work. Second, it will describe the history of the EU and its internal market. Next, this section will explain what the "free movement of goods" provisions are, how they function, and how they've been interpreted. Then, there will be a brief explanation of the "free movement of services" provisions and how they differ from the "free movement of goods" provisions. The section will then address pending EU legislation, the Markets in Crypto-Assets (MiCA) proposal. Finally, the section will address how the World Trade Organization (WTO), of which the EU is a member, might regulate NFTs. Section III will argue that NFTs should be considered goods under EU trade law because they fit the definition of "goods," they are similar to other things which are considered goods, and considering NFTs goods would promote the goals of the EU. This section will also address how the MiCA proposal and WTO law might affect the EU's determination of whether NFTs are goods. Finally, section IV will provide a concise conclusion of the background on NFTs and EU law and reiterate the argument that NFTs should be considered "goods."

II. BACKGROUND

A. What NFTs Are and How They Work

Many people's understandings of NFTs start and end with the notion that NFTs are pictures of monkeys used as Twitter avatars.[12] While the "Bored Ape" pictures commonly-seen on Twitter are NFTs, NFTs are much more complicated than this, as the term "NFT" applies to a diverse set of digital works.[13] Therefore, NFTs are a lot of different kinds of things, but they all share

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[9] *See* Diana Qiao, *This is Not a Game: Blockchain Regulation and its Application to Video Games*, 40 N. ILL. UNIV. L. REV. 176, 219 (2020) (arguing NFTs should not be regulated as securities or commodities).

[10] *See* Lawrence J. Trautman, *Virtual Art and Non-Fungible Tokens,* 50 HOFSTRA L. REV. 361, 413 (2021) (noting that NFTs are not currently treated as property, but arguing they should be).

[11] *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 26, Oct. 26, 2012, O.J. (C 326) 49.

[12] *See* Kyle Chayka, *Why Bored Ape Avatars are Taking Over Twitter*, THE NEW YORKER (July 30, 2021), https://www.newyorker.com/culture/infinite-scroll/why-bored-ape-avatars-are-taking-over-twitter.

[13] *See* Mitchell Clark, *NFTs, Explained: What They Are, and Why They're Suddenly Worth Millions,* THE VERGE (Aug. 18, 2021, 9:20 PM), https://www.theverge.com/22310188/nft-explainer-what-is-blockchain-crypto-art-faq.

a few key characteristics. NFT stands for "non-fungible token," and they are digital assets like images, sounds, or videos that people can actually own.[14] The "non-fungible part" of the name means that each NFT is unique and two NFTs don't have the same value.[15] Currencies, including cryptocurrencies, are fungible; one dollar has the same value as any other dollar, but this is not true of NFTs.[16] NFTs are similar to trading cards in this respect.[17] A rare Pokémon card is worth more than a common one, and the same is true of NFTs.[18] In some rare cases, NFTs represent physical works, but the vast majority of NFTs are solely digital.[19] Most NFTs are enabled through the Ethereum blockchain, and many are purchased using its cryptocurrency, Ether.[20] A blockchain is a type of database, a collection of information stored digitally in groups called blocks. Blocks are sort of like spreadsheets containing a set of information about a certain topic.[21] In the case of NFTs, these blocks record all the data on transfers of the NFT, like the price paid and the identity of the new owner.[22] These blocks of information are then chained together so that each set of blocks called a node contains a full record of all the data that has been stored on the database.[23]

Many NFTs use pieces of code called "smart contracts" which control the transfer of the NFT.[24] Smart contracts are sometimes described as being like a virtual vending machine; if you send money to purchase an NFT, the NFT is automatically transferred to you, but an NFT can't be obtained without transferring money, much like how a vending machine won't dispense a snack until someone inserts money into the machine.[25] In addition to governing how NFTs are transferred, smart contracts control the transfer of funds, and can be programmed to automatically grant royalties to creators for secondary, downstream sales.[26] Many creators prefer NFTs to traditional physical works

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[14] *See* Brown, *supra* note 1.

[15] Clark, *supra* note 13.

[16] *See id.*

[17] *See id.*

[18] *See id.*; Robyn Conti & John Schmidt, *What You Need to Know About Non-Fungible Tokens (NFTs)*, FORBES (May 14, 2021, 12:17 PM), https://www.forbes.com/advisor/investing/nft-non-fungible-token/.

[19] *See Physical NFTs*, APPLIED BLOCKCHAIN (Sept. 21, 2021), *https://appliedblockchain.com/physical-nfts*.

[20] *See* Clark, *supra* note 13.

[21] *See* Luke Conway, *Blockchain Explained*, INVESTOPEDIA (May 31, 2021), https://www.investopedia.com/terms/b/blockchain.asp.

[22] *See id.*

[23] *See id.*

[24] *See* Ghaith Mahmood, NFTs: *What Are You Buying and What Do You Actually Own?,* THE FASHION LAW (Mar. 18, 2021), https://www.thefashionlaw.com/nfts-what-are-you-buying-and-what-do-you-actually-own.

[25] *See* Evans, *supra* note 8, at 245.

[26] *See* Alex Gomez, *NFT Royalties: What Are They and How Do They Work?*, CYBER SCRILLA, https://cyberscrilla.com/nft-royalties-what-are-they-and-how-do-they-work/ (last visited Oct. 30, 2021).

because NFTs can be programmed to give royalties automatically, simplifying the process of getting paid.[27]

While NFTs are unique in that there is only one of any given work, they can be split into smaller parts called fractionalized NFTs.[28] When someone creates an NFT, they can split it into any number of pieces, but once those pieces are created, the number of pieces forming the entire work can't be changed.[29] Aside from the fact that there are multiple of them, fractionalized NFTs function just like typical NFTs once created.[30] Fractionalized NFTs are enabled by smart contracts, which ensure that money is paid for the transfer of fractionalized NFTs just like for typical NFTs.[31] Some of the benefits of fractionalized NFTs include giving more people the ability to own NFTs and granting greater liquidity to the NFT market.[32] Currently, the most popular site for buying and selling fractionalized NFTs is called "Fractional", though fractionalized NFTs are not as common as their non-fractionalized counterparts.[33]

All NFTs are digital goods but not all digital goods are NFTs. The term "digital good" has several different definitions depending on the context, but the term generally refers to goods that are stored, sold, delivered, or transferred in digital form.[34] While NFTs are digital goods under this definition, the term "digital good" applies to a much broader array of products than just NFTs, including e-books, downloadable music, and even websites.[35] NFTs are also distinct from cryptocurrencies because NFTs are non-fungible, so NFTs cannot be exchanged for one another.[36] However, both NFTs and cryptocurrencies are enabled by blockchain, which creates a digital record of transactions.[37]

Part of the difficulty of understanding NFTs is in understanding what rights an owner gets. Owning an NFT doesn't grant the owner intellectual

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[27] *See id.*

[28] *See* Jinia Shawdagor, *What Are Fractionalized NFTs?*, CRYPTO VANTAGE (Oct. 29, 2021), https://www.cryptovantage.com/non-fungible-tokens/what-are-fractionalized-nfts/; Edward Wilson, *What Are Fractionalized NFTs?*, ARGENT (Sept 3, 2021), https://www.argent.xyz/learn/fractionalized-nfts/.

[29] *See* Wilson, *supra* note 28.

[30] *See id.*

[31] *See id.*

[32] *See* Shawdagor, *supra* note 28.

[33] *See id.*; Wilson, *supra* note 28.

[34] *See* Vangie Beal, *Digital Goods*, WEBOPEDIA (May 24, 2021), https://www.webopedia.com/definitions/digital-goods/; *Digital Goods*, TECHOPEDIA, https://www.techopedia.com/definition/1467/digital-goods (last visited Oct. 30, 2021).

[35] *See What Is a Digital Good, Anyway?*, QUADERNO (Jul. 16, 2020), https://www.quaderno.io/blog/digital-good-anyway.

[36] *See* Sylvia Jablonski, *Are NFTs the New Crypto? A Guide to Understanding Non-Fungible Tokens*, FORBES (Jun. 9, 2021, 7:30 AM), https://www.forbes.com/sites/forbesbusinesscouncil/2021/06/09/are-nfts-the-new-crypto-a-guide-to-understanding-non-fungible-tokens/?sh=2432107a3d95.

[37] *See id.*

property rights, most notably the ability to control distribution.[38] NFTs can be freely reproduced regardless of who owns them.[39] The creator of an NFT does have the intellectual property rights associated with the work, including potentially the ability to copyright such work, but the current owner of the NFT does not have these rights.[40] In the parlance of traditional property rights, owning an NFT does not give the full "bundle of sticks" or rights associated with a work, but it does give some of the major rights.[41] Owners of NFTs have the right to own and sell the token, but since NFTs are digital and generally have no physical form, owning an NFT gives little more than prestige.[42] In fairness, though, ownership of physical works of art is also primarily about prestige and doesn't grant the right to reproduce the work, so NFTs are not so different from physical art.

As of now, there are no US laws regarding NFTs, so it remains unclear how NFTs could be categorized. Diana Qiao has discussed whether NFTs could be considered commodities and regulated under the Commodities Exchange Act.[43] Other scholars, like Tonya Evans, have argued about whether NFTs could be considered intellectual property and whether they should be copyrightable.[44] Tax law provides some guidance, but gives no definitive classification. The IRS has stated that cryptocurrencies are treated as property for income tax purposes, but it has not made an explicit statement on NFTs.[45] Most scholars agree with Robert Frank in that NFT purchases could be subject to the capital gains tax, suggesting NFTs are equivalent to property.[46] In short, there is no consensus in US law about what NFTs are and how they should be regulated.

B. History of the European Union

The precursor to the EU was the European Coal and Steel Community (ECSC), founded in 1951, which included France, Germany, Italy, Belgium, Luxembourg, and The Netherlands.[47] Its goal was to prevent war by granting collective control over the steel and coal industries.[48] In 1957, those same six countries signed the Treaty of Rome, which created the European Economic

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[38] *See* Mahmood, *supra* note 24.
[39] *See* Clark, *supra* note 13.
[40] *See* Mahmood, *supra* note 24.
[41] *See* Anna di Robilant, *Property: A Bundle of Sticks or a Tree*, 66 VAND. L. REV. 869, 872 (2013).
[42] See Mahmood, *supra* note 24; Clark, *supra* note 13.
[43] *E.g.,* Qiao, *supra* note 9, at 221-26.
[44] *E.g.,* Evans, *supra* note 8, at 245 (arguing NFTs should be copyrightable).
[45] I.R.S. NOTICE 2014-21, 2014-16 I.R.B. 938.
[46] *E.g.,* Robert Frank, *Tax Surprise Looms for NFT Investors Who Use Crypto*, CNBC, (Mar. 17, 2021, 8:09 AM), https://www.cnbc.com/2021/03/17/tax-surprise-looms-for-nft-investors-who-use-crypto-.html.
[47] *See* Treaty Establishing the European Coal and Steel Community, art. 2, Apr. 18, 1951, 261 U.N.T.S. 140 (expired July 23, 2002).
[48] *See id.*

Community, with goals of integration and economic growth.[49] The Treaty had a goal of establishing a single market in Europe, based on the free movement of goods, people, services and capital, but the Treaty didn't provide sufficient powers to create a single market.[50] A single market would remove legal, technical, and bureaucratic barriers and allow EU citizens to live and work in any EU country and trade between other member nations freely.[51] Around this time, several countries joined the European Economic Community: Denmark, Ireland, and the UK in 1973,[52] Greece in 1981[53], and Portugal and Spain in 1986.[54] Nearly thirty years after the signing of the Treaty of Rome, in 1986, the Single European Act (SEA) passed, setting a goal of establishing the single market by January 1, 1993.[55] To achieve this goal, the SEA expanded the powers of the European Parliament, the EU's primary legislative body at the time.[56] It also created the European Council, a second legislative body that could make decisions about the single market by a simple majority rather than unanimity, making it easier to enact laws to create the single market.[57]

This transnational organization was still called the European Economic Community, not the European Union.[58] In 1992, with the Maastricht Treaty, the EU was officially created.[59] In addition to officially creating the EU, the Maastricht Treaty also established a common foreign policy for the Union, and began the process of creating a single European currency: the euro.[60] Shortly after, Austria, Finland, and Sweden joined the EU in 1995.[61] In 2004, ten more countries joined: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.[62] In 2007, the Treaty of Lisbon was signed, defining the institutions of the EU and describing how they function.[63] The Treaty of Lisbon also renamed some previous treaties.[64] The Maastricht Treaty, which began the process of creating the euro, was renamed

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[49] *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3, 4 Eur. Y.B. 412 (now TFEU).

[50] *See id.;* ALEX WARLEIGH-LACK, EUROPEAN UNION: THE BASICS 23-25 (2nd ed. 2009).

[51] *See Single Market*, EUROPEAN UNION, https://europa.eu/european-union/topics/single-market_en (last visited Apr. 2, 2023).

[52] *See A Growing Community- The First Enlargement*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/history/1970-1979_en (last visited Feb. 4, 2023).

[53] *See The Changing Face of Europe - The Fall of the Berlin Wall*, EUROPEAN UNION https://europa.eu/european-union/about-eu/history/1980-1989_en (last visited Feb. 4, 2023).

[54] *See id.*

[55] *See* Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1, 25 I.L.M. 506.

[56] *See id.*

[57] *See id.*

[58] *See* WARLEIGH-LACK, *supra* note 50, at 26-27.

[59] *See* Treaty on European Union, Feb. 7 1992, 1992 O.J. (C191) 1, 31 I.L.M. 253.

[60] *See id.*

[61] *See A Europe Without Frontiers*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/history/1990-1999_en (last visited Feb. 4, 2023).

[62] *See id.*

[63] *See* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, O.J. (C 306) 1.

[64] *See id.*

as the Treaty on the European Union (TEU).[65] The Treaty of Rome, which defined the European Economic Community, was renamed as the Treaty on the Functioning of the European Union (TFEU).[66] Three more countries joined the EU at this time: Bulgaria and Romania joined in 2007[67], and Croatia joined in 2013.[68] With the UK leaving the EU in 2020, the EU currently has 27 member countries.[69]

As it currently stands, there are four main lawmaking institutions in the EU: the European Parliament, the Council of the European Union, the Commission of the European Communities, and the European Court of Justice.[70] The European Parliament (EP) has 705 members elected directly by member countries, with the number of members elected by each country roughly proportional to its population.[71] The EP oversees EU institutions and, along with the Council of the European Union, passes laws and creates budgets.[72] The EP is sort of akin to the House of Representatives in the US because it is primarily legislative and is proportional to the member states' population.[73] The Council of the European Union is also a legislative body, but its members are government officials from member countries in specific areas.[74] The Council has several different compositions depending on the topic at issue.[75] So, for

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[65] *See id.*

[66] *See id.*; Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3, 4 Eur. Y.B. 412.

[67] *See Further Expansion*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/history/2000-2009_en (last visited Feb. 4, 2023).

[68] *See A Decade of Opportunities and Challenges*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/history/2010-2019_en (last visited Feb. 4, 2023).

[69] *See Countries*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/countries_en (last visited Feb. 4, 2023).

[70] *See* WARLEIGH-LACK, *supra* note 50, at 41-47.

[71] *See European Parliament,* EUROPEAN UNION, https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/european-parliament_en (last visited Feb. 4, 2023); *European Parliament*, CITIZEN'S INFORMATION, https://www.citizensinformation.ie/en/government_in_ireland/european_government/european_union/european_union.html (last visited Feb. 4, 2023); WARLEIGH-LACK, *supra* note 50, at 43-44.

[72] *See European Parliament,* EUROPEAN UNION, https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/european-parliament_en (last visited Feb. 4, 2023); *European Parliament*, CITIZENS INFORMATION, https://www.citizensinformation.ie/en/government_in_ireland/european_government/european_union/european_union.html (last visited Feb. 4, 2023).

[73] *See Legislative Branches,* EUROPEAN PARLIAMENT LIAISON OFFICE IN WASHINGTON D.C, https://www.europarl.europa.eu/unitedstates/en/eu-us-relations/legislative-branches (last visited Feb. 4, 2023).

[74] *See Council of the European Union*, EUROPEAN UNION, https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/council-european-union_en (last visited Feb. 4, 2023); *Council of the European Union*, CITIZENS INFORMATION, https://www.citizensinformation.ie/en/government_in_ireland/european_government/eu_institutions/council_of_the_european_union.html (July 12, 2022).

[75] *See id.*

example, each country will send its key agriculture minister to the Council to discuss agriculture and its top financial officer to discuss banking and finance.[76] The Council determines EU law and creates budgets along with the EP, but a main difference between the EP is that the Council coordinates policy among member countries.[77] Since the Council is formed of existing government officials, its members are able to influence policy in member countries so that law is consistent throughout EU member countries.[78] The Council also differs from the EP in that Council decisions must be passed by 55% of countries, representing at least 65% of the EU's population, and decisions can be vetoed by four countries representing at least 35% of the EU's population.[79] The Council is similar to the US Senate because of its ability to block decisions, similar to the filibuster, and its non-proportional representation.[80]

The Commission of the European Communities, also called the European Commission, is the main executive arm of the EU.[81] The Commission is composed of one Commissioner from each member country, with each Commissioner being responsible for a certain policy area.[82] The European Parliament elects a President who decides which Commissioner is responsible for which policy area.[83] The Commission can propose new laws to be passed by the Council and Parliament, and it initiates budget proposals, in addition to representing the EU outside of Europe.[84] The Commission's main function, however, is ensuring that EU law is enforced consistently in member countries.[85] The Commission is similar to the President's cabinet in the US because of the policy specializations and the enforcement function of the two bodies.[86]

The last major institution in the EU is the European Court of Justice (ECJ). This Court is divided into two distinct bodies. First, there is the General Court, which consists of two judges from each member country, appointed by

[76] *See id.*; *Council of the European Union*, CITIZENS INFORMATION, *supra* note 74.
[77] *See Council of the European Union*, EUROPEAN UNION, *supra* note 74.
[78] *See id.*
[79] *See id.*
[80] *See Legislative Branches*, *supra* note 73.
[81] *See European Commission*, EUROPEAN UNION, https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/european-commission_en (last visited Feb. 4, 2023); *European Commission*, CITIZENS INFORMATION, https://www.citizensinformation.ie/en/government_in_ireland/european_government/eu_institutions/european_commission.html (June 21, 2022).
[82] *See id.*
[83] *See European Commission*, *supra* note 81.
[84] *See id.*
[85] *See id.*
[86] *See EU-US Relations*, EUROPEAN PARLIAMENT LIAISON OFFICE IN WASHINGTON DC, https://www.europarl.europa.eu/unitedstates/en/eu-us-relations/executive-branches (last visited Feb. 4, 2023).

the joint agreement of all member countries.[87] Then there is the Court of Justice, which includes one judge from each member country, plus eleven Advocates General, which are lawyers who provide arguments to help the judges make decisions.[88] Both courts are tasked with interpreting and enforcing the law, but the General Court rules on actions for annulments and focuses primarily on competition, trade, agriculture, and trademarks.[89]

The Court of Justice hears requests for preliminary actions as well as annulments and appeals, so the courts have somewhat overlapping jurisdictions.[90] In the Court of Justice, each case is assigned a single judge and a single Advocate General, who read written arguments and determine how many judges should hear the case.[91] Most cases are dealt with by five judges, some are heard by only three judges, and in certain situations, cases are heard by the entire court.[92] The case then proceeds to oral argument and, if requested, an Advocate General provides an opinion.[93] Advocate General opinions are somewhat similar to *amicus curae* briefs, but they are given by court officials rather than the public. The General Court operates similarly, except that cases are generally heard by three-judge panels and there are no Advocates General to help judges make decisions.[94] The European Court of Justice is similar to the US Supreme Court in that it is independent of the political process, but it is different because of its division into two bodies and its inclusion of Advocates General.[95]

C. How the "Free Movement of Goods" Provisions Function

The Treaty on the Functioning of the European Union (TFEU) identifies the "four freedoms": free movement of goods, persons, capital, and services.[96] The TFEU specifies that "free movement of goods" prohibits customs duties or charges with equivalent effect on imports and exports of all goods originating in member states or in free circulation in member states.[97]

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[87] *See Court of Justice of the European Union (CJEU),* EUROPEAN UNION, https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/court-justice-european-union-cjeu_en (last visited Feb. 4, 2023); *Court of Justice of the European Union (CJEU)*, CITIZEN'S INFORMATION, https://www.citizensinformation.ie/en/government_in_ireland/european_government/eu_institutions/european_court_of_justice.html (June 27, 2022).

[88] *See id.*

[89] *See Court of Justice of the European Union (CJEU)*, *supra* note 87.

[90] *See id.*

[91] *See id.*

[92] *See id.*

[93] *See id.*

[94] *See id.*

[95] *See Judicial Branches*, EUROPEAN PARLIAMENT LIAISON OFFICE IN WASHINGTON DC, https://www.europarl.europa.eu/unitedstates/en/eu-us-relations/judicial-branches.

[96] *See* Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) art. 26, Oct. 26, 2012, O.J. (C 326) 59.

[97] *See id.* at art. 28.

While the TFEU prohibits duties and similar charges, the EU does allow countries to impose some charges when importing goods. The main ones are charges imposed to fulfill EU obligations, like the cost of required inspections of goods.[98] Some of the reasons for these provisions include facilitating a closer relationship between European nations, eliminating obstacles to economic expansion, and spurring economic progress.[99] Frustratingly, the TFEU does not define the term "goods."[100] A guide to the application of the "free movement of goods" provisions published by the EU states that "the range of goods covered is as wide as the range of goods in existence," indicating that the term "goods" should be interpreted broadly.[101]

Duties, also called tariffs, are taxes imposed when goods cross international borders.[102] They are either calculated based on the value of the goods being transported, called an *ad valorum* duty, or imposed based on the number of units being transported, called a specific duty, or some combination of the two.[103] Export duties, which are paid when a good leaves a country, are rarely used in the modern world, though they still apply to some mineral, petroleum, and agricultural products.[104] Most modern duties are import tariffs, which are paid when a good enters a new country.[105] Duties are paid by the company importing the goods, and they are sometimes passed on to consumers in the form of increased prices.[106]

In addition to barring customs duties on goods moving between member countries, the "free movement of goods" provisions also prohibit quantitative restrictions on imports and exports, and measures with equivalent effect.[107] This means outright bans on certain products or quotas on imports from certain countries are not allowed for goods moving within the EU.[108] In *Procureur de Roi v. Dassonville*, the European Court of Justice said that all trading rules enacted by member states capable of hindering trade within the EU have equivalent effect to quantitative restrictions and cannot be imposed on goods moving within the EU.[109] However, the Court later said that provisions

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[98] *See* ALAN DASHWOOD ET. AL., EUROPEAN UNION LAW 394–95 (6th Ed. 2011).

[99] *See* TFEU, *supra* note 96, at art. 26.

[100] *See id.*

[101] *See Free Movement of Goods: Guide to the Application of Treaty Provisions Governing the Free Movement of Goods*, PUBLICATIONS OFFICE OF THE EU 9 (July 7, 2010).

[102] *See* Moses L. Pava, *Tariff: International Trade*, BRITANNICA, https://www.britannica.com/topic/tariff (last visited Oct. 30, 2021).

[103] *See id.*

[104] *See id.*

[105] *See id.*

[106] *See* Howard Gleckman, *What is a Tariff and Who Pays It?*, TAX POLICY CENTER, https://www.taxpolicycenter.org/taxvox/what-tariff-and-who-pays-it (last visited Oct. 30, 2021).

[107] *See* TFEU, *supra* note 96, at art. 26.

[108] *See Free Movement of Goods: Guide to the Application of Treaty Provisions Governing the Free Movement of Goods*, PUBLICATIONS OFFICE OF THE EU 11 (July 7, 2010).

[109] *See* Case 8/74, Procureur du Roi v. Benoît and Gustave Dassonville, ECLI:EU:C:1974:82 (July 11, 1974).

restricting selling arrangements do not have equivalent effect to quantitative restrictions and are legal.[110]

A foundational case from the European Court of Justice is *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein*, known commonly as *Cassis de Dijon*.[111] In this case, a German company wanted to import Cassis de Dijon, a blackcurrant liquor with 10-15% alcohol produced in France.[112] German law specified that products marketed as fruit liquor had to have over 25% alcohol, so the German company would be unable to market the liquor as fruit liquor.[113] The European Court of Justice held that the effect of the German law was equivalent to a customs duty, so it was held invalid.[114] The Court declared that laws essential to protecting public health, ensuring fair commercial transactions, and protecting consumers which result in obstacles to free trade are permissible, but non-essential provisions cannot impose obstacles to the free movement of goods.[115] While not explicitly stated, the Court also suggested that countries should create identical regulations on certain goods.[116] The process of creating uniform standards, called harmonisation, continues to this day and involves countries compromising on regulations in areas ranging from consumer safety to sustainable packaging.[117] *Cassis de Dijon* also laid out the principle of mutual recognition, which states that products produced legally in one member state can move freely into other member states, even if those goods would be illegally produced in other member states.[118]

A 1994 European Court of Justice ruling considered the line between goods and services. In *Her Majesty's Customs and Excise v. Schindler,* the court determined that a UK law prohibiting the importation of lottery tickets did not violate the "free movement of goods" provisions.[119] The main reason for this was a finding that lottery tickets are not goods, but are services because they give buyers the ability to participate in the lottery and potentially win prizes.[120] So, things which merely give access to a service which could provide goods are not goods themselves.

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[110] *See* Joined Cases C-267/91 and C-268/91 Keck and Mithouard, 1993 E.C.R. I-6097, ¶ 16.

[111] *See* Case C-120/78, Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein, ECLI:EU:C:1979:42 (Feb. 20, 1979).

[112] *See id.*

[113] *See id.*

[114] *See id.*

[115] *See id.*

[116] *See id.*

[117] *See Harmonised Standards*, EUROPEAN COMMISSION, https://ec.europa.eu/growth/single-market/european-standards/harmonised-standards_en (last visited Feb. 4, 2023).

[118] *See* Case C-120/78, Rewe-Zentral, ECLI:EU:C:1979:42; Case C-110/05 Commission v Italy, 2009 E.C.R. I-519; *Free Movement of Goods: Guide to the Application of Treaty Provisions Governing the Free Movement of Goods*, PUBLICATIONS OFFICE OF THE EU 15 (July 7, 2010).

[119] *See* Case C-275/92, Her Majesty's Customs and Excise v. Schindler, 1994 E.C.R. I-1089.

[120] *See id.*

Another key European Court of Justice case, *Jägerskiöld v. Gustafsson*, supports this conclusion that things which provide access to a service are not goods.[121] In that case, a Finnish law gave people the right to fish in certain waters for a fee paid annually to the Finnish government.[122] The court had to determine whether fishing rights were goods under the "free movement of goods" provisions of the Treaty and, if so, whether the Finnish law imposed an impermissible obstacle to the free movement of goods.[123] The Court determined that fishing rights are not goods, saying they make certain waters available for fishing, which is the provision of a service.[124]

On the other hand, there are several cases defining things that *are* considered goods. A 1964 ruling suggested that electricity could be considered a good,[125] and a 1994 decision confirmed that electricity is protected under the "free movement of goods" provisions, meaning customs duties or equivalent charges cannot be imposed on the transport of electricity.[126] This indicates the goods need not have a tangible form, which supports the notion that NFTs could be considered goods. This case has been criticized, though, and some suggest its holding isn't about tangibility at all.[127] In fact, an alternate opinion in *Jägerskiöld* says electricity was only considered a "good" in this case so that it could be treated similarly to gas and oil to promote competition within the energy industry.[128] Nonetheless, the case does hold that electricity is a good, and later cases have expanded upon this, with one case holding that computer software should be analyzed under the "free movement of goods" provisions.[129] The first case suggesting electricity could be a good is from 1964, showing that the debate about whether things without physical form can be goods is not a new one, and neither is the argument that only tangible things can be goods.[130]

Also of relevance is *Commission of European Communities v. Italian Republic*, where the European Court of Justice considered whether artistic and historical works were considered goods.[131] In that case, the Italian government imposed a tax on the exportation of works with artistic or historical significance,

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[121] *See* Case C-97/98, Jägerskiöld v. Gustafsson, 1999 E.C.R. I-7344.

[122] *See id.*

[123] *See id.*

[124] *See id.*

[125] *See* Case 6/64 Flaminio Costa v. E.N.E.L., ECLI:EU:C:1964:66 (July 15, 1964).

[126] *See* Case C-393/92 Mun. of Almelo v. NV Energiebedrijf Ijsselmij, ECLI:EU:C:1994:171 (Apr. 27, 1994).

[127] *See* Janka Hojnik, *Technology Neutral EU Law: Digital Goods within the Traditional Goods/Services Distinction*, 25 INT'L J.L. & INFO. TECH. 63, 68 (2017).

[128] Case C-97/98, Jägerskiöld, ECLI:EU:C:1999:315, opinion of Advocate General Fennelly, ¶ 20 (June 17, 1999).

[129] *See* Case C-128/11, UsedSoft GmbH v. Oracle Int'l Corp., ECLI:EU:C:2012:407, ¶¶ 99-100 (July 3, 2012).

[130] *See* Flaminio Costa, 1964 ECLI:EU:C:1964:51, opinion of Advocate General Lagrange, at 600, 611 (June 25, 1964); Mun. of Almelo, ECLI:EU:C:1994:42, Opinion of Advocate General Darmon, ¶¶ 62, 67 (Feb. 8, 1994); Jägerskiöld, ECLI:EU:C:1999:315, opinion of Advocate General Fennelly, ¶¶ 20 - 21.

[131] Case 7/68, Comm'n of European Cmtys v. Italian Republic, 1968 E.C.R. 432, 432 .

which was challenged as a violation of the "free movement of goods" provisions.[132] The Court defined "goods" as "products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions."[133] Using this definition, the Court concluded that artistic and historical works are goods, and invalidated the Italian law.[134] However, this opinion, too, has been criticized, with some arguing that not all things which can be valued in money and form the subject of commercial transactions are goods.[135] The Merriam-Webster dictionary provides a slightly different definition of "good," defining it as "something that has economic utility or satisfies an economic want," although this definition still doesn't include tangibility as a prerequisite.[136] In US law, the definition of "good" emphasizes moveability rather than tangibility or valuation in money. The current Uniform Commercial Code defines goods as things "which are movable at the time of identification to the contract for sale," excluding money, investment securities, and things in action.[137]

The few EU cases that discuss digital goods at all have come to varying conclusions. A 1974 case found that transmission of television signals should be considered under the free movement of services, but the film and tapes used to enable television were considered under the free movement of goods.[138] A 2011 case assessed decoding devices as services because they gave owners access to encrypted broadcasting signals, essentially a service.[139] On the other hand, the 2012 case *UsedSoft v. Oracle* applied the "principle of exhaustion," which had previously only been applied to goods, to computer software. [140] The principle of exhaustion says that when an intellectual property holder sells their intellectual property, they no longer have rights to that intellectual property.[141] *UsedSoft* took a big step toward eliminating the distinction between digital and physical goods, and it suggested that computer software is a good.[142] All of this indicates that the EU does not yet have a consistent system for determining what digital goods are and how they should be treated. In some cases, EU courts apply the law to digital goods to produce the ultimate results they want to achieve rather than creating a uniform set of rules on digital goods.[143]

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[132] *See id.*

[133] *Id* at 428.

[134] *See id* at 429, 431.

[135] *See* Hojnik, *supra* note 127, at 68; Jägerskiöld, ECLI:EU:C:1999:315, opinion of Advocate General Fennelly, ¶ 19.

[136] MERRIAM-WEBSTER, "good,", https://www.merriam-webster.com/dictionary/good, (last visited Oct. 30, 2021).

[137] U.C.C. § 2-105 (AM. L. INST. & UNIF. L. COMM'N 2012).

[138] Case 155/73, Giuseppe Sacchi, 1974 E.C.R. 00409, ¶¶ 6, 7.

[139] Joined Cases C-403/08 and C-428/08, Football Association Premier League v. QC Leisure, Others and Karen Murphy v. Media Protection Services Ltd, 2011 E.C.R., ¶169.

[140] Case C-128/11, UsedSoft GmbH v. Oracle Int'l Corp., ECLI:EU:C:2012:407, ¶¶ 43, 101.

[141] *See* Hojnik, *supra* note 127, at 74.

[142] *See* UsedSoft GmbH, ECLI:EU:C:2012:407 at ¶ 76.

[143] *See* Hojnik, *supra* note 127, at 68.

D. Free Movement of Services

Interestingly, many of the things which are not considered goods are considered services, and the EU also provides for "free movement of services." Article 56 of the Treaty on the Functioning of the European Union specifies that "restrictions on freedom to provide services within the Union shall be prohibited."[144] Article 57 specifies that "services" includes industrial activities, commercial activities, activities of craftsmen, and activities of the professions.[145] The "free movement of services" provisions are designed to prevent discrimination on the basis of nationality and to allow professionals and companies to freely move throughout the EU.[146] So, while the "free movement of goods" provisions are about eliminating customs duties and promoting free trade,[147] the "free movement of services" provisions are about eliminating discrimination and allowing companies and workers to operate transnationally.[148] Services and goods are thus treated differently under EU law, so it is important to clearly determine whether something is a good or a service.

E. The Markets in Crypto-Assets (MiCA) Proposal

This proposed EU regulation, Markets in Crypto-Assets (MiCA), would regulate the issuance and use of crypto-assets, but it's unclear if NFTs qualify as crypto-assets under this proposal.[149] The proposal defines a "crypto-asset" as "a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology."[150] Distributed ledger technology means "technology that support the distributed recording of encrypted data,"[151] which includes blockchain and similar programs.[152]

The main thrust of the proposal is requiring issuers of crypto-assets to draft and publish crypto-asset white papers, which are documents containing extensive and accurate information about the issuer, the offer to the public, and the crypto-asset itself, including a description of the rights and obligations

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[144] TFEU, *supra* note 96, at art. 56.

[145] TFEU, *supra* note 96, at art. 57.

[146] *See Freedom of establishment and freedom to provide services,* EUROPEAN PARLIAMENT, https://www.europarl.europa.eu/factsheets/en/sheet/40/freedom-of-establishment-and-freedom-to-provide-services.

[147] *See generally* TFEU, *supra* note 96, at art. 56-63.

[148] *See* TFEU, *supra* note 96, at art. 56; *Freedom of establishment and freedom to provide services,* EUROPEAN PARLIAMENT, https://www.europarl.europa.eu/factsheets/en/sheet/40/freedom-of-establishment-and-freedom-to-provide-services.

[149] *See Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-Assets, and amending Directive EU 2019/1937,* COM (2020) 593 final (Sept. 24, 2020).

[150] *Id.* at art. 3, para. 1, no. 2.

[151] *Id.* at 1.

[152] *See* Jake Frankenfield, *Distributed Ledger Technology (DLT)*, INVESTOPEDIA (Aug. 27, 2021), https://www.investopedia.com/terms/d/distributed-ledger-technology-dlt.asp.

attached to it, the technology used to store it, and the risks involved in issuing such a crypto-asset.[153] However, unique, non-fungible crypto-assets, potentially including NFTs, are exempted from the white paper requirements. Issuers of non-fungible crypto-assets must be legal entities and must communicate honestly, avoid conflicts of interest, and comply with security protocols, but do not have to draft or publish crypto-asset white papers.[154] A portion of the proposal addresses asset-referenced tokens, which it defines as "a type of crypto-asset that purports to maintain a stable value by reference to one of several fiat currencies that are legal tender."[155] The proposal specifies that issuers of asset-referenced tokens must be authorized to issue such assets by their home country.[156]

In summary, the MiCA proposal would regulate how crypto-assets are issued to provide a uniform framework and instill confidence in users of these assets.[157] The proposal focuses on banking, and it doesn't address trade law or the "free movement of goods" provisions.[158] It is not clear whether NFTs would be covered under this proposal, since its definition of a crypto-asset does not clearly cover NFTs. One article argues that fractionalized NFTs could be regulated under MiCA, but notes that until NFTs are more clearly defined, it is unclear how this proposal and EU law more broadly will apply to them.[159] The proposal is pending in the European Commission, so it does not apply to anything yet,[160] but how it will apply to NFTs if it is enacted remains unclear.

F. The World Trade Organization's Regulation of NFTs

The WTO is an international organization providing global trade rules with the goal of producing predictable, stable, free trade across the world.[161] The EU is a member of the WTO, and its member nations are also members in their own rights.[162] In 1998, the WTO issued the Declaration on Global Electronic Commerce, also called the moratorium on e-commerce, in which member countries agreed to continue their practice of not imposing customs duties on electronic transmissions.[163] The WTO has agreed to extend this moratorium

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[153] *See Proposal for a Regulation, supra* note 149, at art. 5.

[154] *See id.* at art. 13.

[155] *See id.* at art. 3.

[156] *See id.* at art. 15.

[157] *See id.*

[158] *See id.* at art. 4.

[159] *See* Claudia Di Bernardino et al, *NFT - Legal Token Classification*, EU BLOCKCHAIN OBSERVATORY AND FORUM NFT REPORTS (July 22, 2021).

[160] *See Proposal for a Regulation*, *supra* note 149.

[161] *See WTO In Brief*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm (last visited Feb. 4, 2023).

[162] *See The European Union and the WTO,* WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (last visited Feb. 4, 2023).

[163] *See* The Geneva Ministerial Declaration on Global Electronic Commerce, WTO Doc. WT/MIN(98)/DEC/2 (May 25, 1998).

several times, the most recent extension occurring in 2022 and extending the moratorium until at least December 2023.[164] The WTO has defined "electronic commerce" as "the production, distribution, marketing, sale or delivery of goods and services by electronic means."[165] The WTO has not explicitly stated whether NFTs are covered by this provision.

Recently, some countries, mainly India and South Africa, have voiced opposition to the moratorium on e-commerce.[166] India and South Africa distributed communication to WTO members explaining their opposition to the moratorium's ban on customs duties for electronic transmissions.[167] India and South Africa note that most of the world's e-commerce is conducted by the US, the EU, and China, while developing countries have little participation in the digital economy.[168] The communication cites a United Nations Conference on Trade and Development report which found that the moratorium on e-commerce tariffs results in a loss of revenue of more than $10 billion annually, with 95% of this revenue loss being suffered by developing countries.[169] This revenue loss is limited to five key areas of e-commerce: printed matter, music downloads, video downloads, software, and video games.[170] The communication notes that as electronic transactions become more prevalent, the amount of revenue lost by developing countries from the moratorium on e-commerce tariffs is likely to increase.[171]

Because of this, India and South Africa conclude that the moratorium on e-commerce will be catastrophic for economic development and job creation, as well as increase economic inequality between countries.[172] Based on this, India and South Africa say the moratorium on e-commerce "must be reconsidered."[173] As previously mentioned, the WTO renewed the moratorium

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[164] *See* Emma Farge, *WTO Provisionally Agrees to Extend E-Commerce Tariff Moratorium – Sources*, REUTERS (June 16, 2022, 10:40 AM), https://www.reuters.com/markets/commodities/wto-provisionally-agrees-extend-e-commerce-tariff-moratorium-sources-2022-06-16/.

[165] Work Programme on Electronic Commerce, WTO Doc. WT/L/274, Sec. 1.3 (Sept. 30, 1998).

[166] *See WTO Members Highlight Benefits and Drawbacks of E-commerce Moratorium*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (July 23, 2020), https://sdg.iisd.org/news/wto-members-highlight-benefits-and-drawbacks-of-e-commerce-moratorium/.

[167] *See* Work Programme on Electronic Commerce, The E-Commerce Moratorium: Scope and Impact, Communication from India and South Africa, WTO Doc.WT/GC/W/798 (Mar. 10, 2020).

[168] *See id.*

[169] *See id.*; U.N. Conference on Trade and Development, *Growing Trade in Electronic Transmissions: Implications for the South*, UNCTAD/SER.RP/2019/1 [hereinafter UNCTAD].

[170] *See* Work Programme on Electronic Commerce *supra* note 167; UNCTAD, *supra* note 169.

[171] *See* Work Programme on Electronic Commerce *supra* note 167.

[172] *See id.*

[173] *See id.*

on e-commerce in 2022, but it is possible changes will be made to the moratorium in the future.

III. LEGAL ANALYSIS: WHY NFTS SHOULD BE CONSIDERED "GOODS" UNDER EU LAW

A. NFTs Fall Under the Definition of "Goods"

NFTs should be considered goods because NFTs are goods by any reasonable definition of the term. Merriam-Webster defines "good" in the economic sense as "something that has economic utility or satisfies an economic want."[174] NFTs are goods under this definition because they satisfy an economic want, specifically a person's want to have a virtual work of art. NFTs can bring people happiness and satisfaction, which is a form of economic utility.[175] While some earlier definitions of "good" included a requirement of tangibility and some suggest tangibility is still a definitional element of goods, most modern law does not include tangibility in the definition of a "good."[176] In fact, the current Uniform Commercial Code defines goods as things "which are movable at the time of identification to the contract for sale," excluding money, investment securities, and things in action.[177] This definition emphasizes "movability" rather than tangibility, and NFTs are covered under this definition because they can be moved from one digital location to another digital location. This definition is sort of a middle ground between people who argue that only tangible works can be goods and people who take the more expansive view that anything with value is a good.

While the EU doesn't seem to emphasize movability in its interpretation of the "free movement of goods" provisions, movability could be one reason for the seemingly divergent conclusions EU courts have come to about digital works.[178] One case found that television signals were not goods, while another case suggested that computer software is a good.[179] This doesn't make much sense if tangibility is the defining factor of whether something is a good, since television signals and computer software are both intangible, but it can be explained using moveability as a defining factor. Computer software can be moved from a location in one computer's hard drive to a location in another

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[174] *Good*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/good (last visited Apr. 2, 2023).

[175] *See* Michael J. Boyle, *Utility*, INVESTOPEDIA (Jan. 16, 2021), https://www.investopedia.com/terms/u/utility.asp.

[176] *See, e.g.*, ADAM SMITH, THE WEALTH OF NATIONS 16 (1776); NASSAU WILLIAM SENIOR, AN OUTLINE OF THE SCIENCE OF POLITICAL ECONOMY 8 (1836).

[177] U.C.C. § 2-105 (AM. L. INST. & UNIF. L. COMM'N 2012).

[178] *See* Case 7/68, Comm'n v. Italian Republic, 1968 E.C.R. 432.

[179] Case 155/73, Giuseppe Sacchi, 1974 E.C.R. 409, 439; Case C-128/11, UsedSoft GmbH v. Oracle Int'l Corp., ECLI:EU:C:2012:407, (July 3, 2012).

computer's hard drive, but television signals don't move.[180] Television signals are broadcast in the air as electromagnetic waves, which antennae can receive.[181] These signals are always present and don't move from one location to another, so they are not movable, perhaps explaining why the EU Court found that television signals are not goods.[182]

The European Court of Justice has given a fairly clear definition of "goods," as used in the "free movement of goods" provisions. In *Commission of European Communities v. Italian Republic,* the Court defined "goods" as "products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions."[183] Some argue that this is not the true definition of "good" under EU law, claiming that not everything which falls under this definition is a good because tangibility is a prerequisite to being a good.[184] The main thrust of this argument is that non-tangible goods should not be considered goods because they don't physically move across borders.[185] Regardless of whether tangibility *should* be a requirement for goods, the definition articulated in *Commission of European Communities v. Italian Republic* doesn't include a tangibility requirement, and this is the accepted definition used within the EU.[186] NFTs fall under this definition and therefore are goods for the purposes of the "free movement of goods" provisions. NFTs can be valued in money. NFTs are typically bought and sold using cryptocurrency, but the EU recognizes cryptocurrency as a qualified financial instrument, and EU laws do not prohibit the use of cryptocurrencies.[187] Additionally, NFTs can be valued in non-cryptocurrencies by using known exchange rates.[188] Further, NFTs can and do form the basis of commercial transactions. There are several marketplaces for buying and selling NFTs, and NFT transactions are becoming increasingly popular.[189] In 2020, the NFT market involved $338 million in transaction volume.[190] NFTs can be valued in money and are capable of forming the subject of commercial transactions,

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[180] *See* Linda Rosencrance, *What is Software? Definition, Types, and Examples*, TECHTARGET, (Dec. 5, 2021), https://searchapparchitecture.techtarget.com/definition/software.

[181] *See* Chris Woodford, *Television*, EXPLAIN THAT STUFF! (June 1, 2021), https://www.explainthatstuff.com/television.html.

[182] Case 155/73, Giuseppe Sacchi, 1974 E.C.R. 409, 439.

[183] Case 7/68, Comm'n v. Italian Republic, 1968 E.C.R. 432, 428.

[184] *See* Hojnik, *supra* note 127, at 68; Case C-97/98, Jägerskiöld v. Gustafsson, ECLI:EU:C:1999:315, opinion of Advocate General Fennelly, ¶ 20 (June 17, 1999).

[185] *See, e.g.*, Case C-97/98, Jägerskiöld v. Gustafsson, ECLI:EU:C:1999:315, opinion of Advocate General Fennelly, ¶ 20.

[186] *See* Case 7/68, Comm'n v. Italian Republic, 1968 E.C.R. 432, 428.

[187] *See Cryptocurrency Regulations in the EU*, COMPLY ADVANTAGE (July 6, 2018), https://complyadvantage.com/knowledgebase/crypto-regulations/cryptocurrency-regulations-eu-european-union/.

[188] *See* Clark, *supra* note 13.

[189] *Id.*

[190] Luke Lango, *Why the NFT Market Could Really Grow by 1,000X*, NASDAQ (Sep. 5, 2021, 7:30 AM), https://www.nasdaq.com/articles/why-the-nft-market-could-really-grow-by-1000x-2021-09-05.

meaning NFTs are goods under the EU's "free movement of goods" provisions and should not have customs duties imposed on them.

B. NFTs Are Similar to Other Products Classified as "Goods"

If NFTs should be considered "goods" for the purposes of the EU's "free movement of goods" provisions because NFTs are similar to other products which have been considered "goods" and they are dissimilar from products that have been deemed not to be goods. As previously mentioned, a European Court of Justice case determined that artistic works are considered "goods" under the "free movement of goods" provisions.[191] NFTs are essentially digital works of art, so they should be given the same status as physical art. The only real difference between NFTs and traditional art is that NFTs have no tangible form, which may seem to disqualify NFTs from being considered "goods." However, as previously mentioned, a European Court of Justice ruling determined that electricity is covered by the "free movement of goods" provisions, indicating that tangibility is not required for a product to be considered a good.[192] While some have argued this ruling was not meant to create a general principle about tangibility and was instead trying to regulate electricity like other forms of energy, the plain language of the opinion states that "electricity constitutes a good."[193] Additionally, later cases have built upon this opinion, with a 2012 case indicating that computer software can be considered a "good."[194] If non-tangible products like electricity and computer software are considered goods, NFTs can be considered goods as well. And since works of art are considered goods and NFTs are just virtual art, NFTs should be considered goods.

The types of things not considered goods are often classified as services instead, but NFTs cannot be considered services. The European Court of Justice has ruled that fishing rights and lottery tickets are not goods, saying fishing rights merely give access to goods and lottery tickets give access to a service, the lottery.[195] Purchasing an NFT does give the buyer access to the work, but NFTs themselves are not like fishing rights because an NFT is a good in itself, rather than just giving the owner the right to acquire a good. Owning a license to fish in a certain area doesn't grant ownership of the area or any of the fish. Owning an NFT, on the other hand, grants ownership of the image. In short, NFTs are not like fishing rights and do not merely give access to goods because they grant ownership of goods. Similarly, NFTs are not equivalent to lottery tickets because NFTs do not grant access to a service. While lottery tickets grant

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[191] *See* Case 7/68, Comm'n v. Italian Republic, 1968 E.C.R. 432, 428.

[192] *See* Case C-393/92 Mun. of Almelo, ECLI:EU:C:1994:42, opinion of Advocate General Darmon (Feb. 8, 1994).

[193] *Id.*

[194] *See* Case C-128/11, UsedSoft GmbH, ECLI:EU:C:2012:407.

[195] *See* Case C-97/98, Jägerskiöld, 1999 E.C.R. I-7344; Case C-275/92, Her Majesty's Customs and Excise, 1994 E.C.R. I-1089.

buyers the ability to participate in a service, namely the lottery, NFTs do not grant any such participation in a service. There is no service involved in NFTs. Buying an NFT grants ownership of a work of art; it does not grant a service. Because NFTs are not services and do not merely grant the right to search for a good, NFTs should be considered "goods" under the EU's "free movement of goods" provisions.

C. *Considering NFTs Goods Promotes the Purposes of the Internal Market*

The EU was created with many goals, including promoting economic development and preventing military conflict. Similarly, the EU's internal market has several goals, including promoting a closer relationship between European nations, eliminating obstacles to economic expansion, and ensuring economic progress.[196] Imposing customs duties or similar charges on the transfer of NFTs would undermine these goals, so NFTs should be considered goods and made free from customs charges.

Imposing import or export charges on NFTs would be administratively difficult, if not impossible. Duties are imposed on goods when they cross international borders, and they are usually paid by importers when goods enter a new country.[197] For virtual goods, the logistics of collecting duties would be difficult. There is no opportunity for officers to check that duties have been paid for virtual goods because they don't physically cross borders. Essentially, there is no way to ensure that customs duties for virtual goods get paid. To ensure duties are paid on all virtual transfers of goods would use a considerable amount of resources which could be spent on other aspects of economic development. In essence, imposing customs duties on virtual goods like NFTs and ensuring these duties get paid would be a barrier to economic expansion, which the internal market sought to eliminate. Exempting NFTs from customs duties by considering them goods would avoid these barriers to economic development and support the goals of the internal market.

As previously discussed, NFTs are becoming increasingly prevalent, but countries are unsure what they are and how to deal with them. Coming up with a definite regulatory scheme for NFTs would indicate economic development in addressing concerns of the digital age. So, the EU declaring NFTs goods and committing to not impose customs duties on them would fulfill the goal of ensuring economic progress. Additionally, not imposing customs duties on NFTs would promote the internal market's goal of removing barriers

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[196] *See* TFEU, *supra* note 96, at Preamble.

[197] *See* Mos Moses L. Pava, *Tariff: International Trade*, BRITANNICA (Dec. 16, 2022), https://www.britannica.com/topic/tariff; Howard Gleckman, *What is a Tariff and Who Pays It?*, TAX POLICY CENTER (Sep. 25, 2018), https://www.taxpolicycenter.org/taxvox/what-tariff-and-who-pays-it.

to trade and reducing variation between nations.[198] In short, declaring NFTs goods and not imposing customs duties on their import and export would promote the goals of the EU's internal market and modernize the European economy.

D. How the MiCA Proposal and WTO Law Affect EU Regulation of NFTs

The Markets in Crypto-Assets (MiCA) proposal discussed in Section II.C is an effort by the EU to give uniform guidance and promote good practices in the crypto-asset market.[199] If enacted, its regulations on crypto-asset white pages would not apply to NFTs because unique, non-fungible goods are exempted from these provisions, but the regulations on asset-referenced tokens could apply to NFTs.[200] However, based on the context and substance of the proposal, NFTs should not be covered at all. If NFTs are covered under this proposal, it would not affect whether NFTs are considered goods under the "free movement of goods" provisions because this proposal does not relate to trade law. First, this proposal should not apply to NFTs. The proposal defines a crypto-asset as "a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology."[201] The purchase of an NFT does convey some rights, mainly the right to sell, but NFTs themselves are not representations of rights. Additionally, the proposal is designed to regulate the financial industry, as evidenced by its goal of enabling tokenization of traditional assets, its implementation by the European Banking Authority and the European Securities and Markets Authority, and its role as part of the EU's Digital Finance package. Based on the definition given and the context of the proposal, NFTs should not be regulated by this proposal. Second, if NFTs are regulated under this proposal, this would not affect whether NFTs are considered goods and granted freedom from customs duties under the "free movement of goods" provisions. The MiCA proposal is part of the EU's Digital Finance package, which provides strategies for transitioning into the digital age.[202] The Digital Finance package is not intended to alter EU trade law, including the "free movement of goods" provisions. In short, the MiCA proposal does not affect whether NFTs are considered goods.

The WTO's "moratorium on e-commerce" is an agreement by member countries to not impose customs duties on electronic transactions.[203] Electronic commerce is defined as "the production, distribution, marketing, sale or delivery

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[198] *See* TFEU, *supra* note 96, at Preamble.

[199] *See Proposal for a Regulation, supra* note 149.

[200] *See id.* at arts. 4(2)(c), 15(1).

[201] *See id.* at art. 3(1)(2).

[202] *See Digital Finance Package*, EUROPEAN COMMISSION (Sept. 24, 2020), https://ec.europa.eu/info/publications/200924-digital-finance-proposals_en.

[203] *See* General Council Decision, *Work Programme on Electronic Commerce*, WT/L/1079 (Dec. 11, 2019).

of goods and services by electronic means," which does seem to include NFTs, though no official WTO documents confirm this.[204] If NFTs are protected from customs duties by a WTO agreement, the EU might not need to ban customs duties on NFTs independently. However, the WTO's moratorium on e-commerce is not guaranteed to continue due to opposition from developing countries like India and South Africa.[205] So, it would benefit the EU to be certain that customs duties will not be imposed on NFTs, which would undermine the EU's goals of economic development and unity. For this reason, the EU should declare NFTs to be goods, free from customs duties under the "free movement of goods" provisions notwithstanding the WTO's ban on customs duties for e-commerce.

IV. CONCLUSION

NFTs are an emerging and complex combination of technology and art. If NFTs are going to continue to increase in relevance, there must be clear answers about how the law applies to them, and so far, there is very little law addressing NFTs. It remains unclear how NFTs should be regulated under tax law, intellectual property law, securities law, and more, but it is clear how EU trade law should apply to NFTs. NFTs should be considered goods for the purposes of the EU's "free movement of goods" provisions, meaning there should be no customs duties imposed on NFTs moving between EU member countries. Considering NFTs goods is in line with past European Court of Justice cases addressing what is considered a good, and this classification promotes the goals of the EU's internal market.

[204] Work Programme on Electronic Commerce, *supra* note 165.
[205] *See* The E-Commerce Moratorium, *supra* note 166.