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Does Anyone Have “Actual Knowledge” of What Effects the Cape Town Treaty Has Had on the Application of *Philko Aviation, Inc. v. Shacket*?

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Does Anyone Have "Actual Knowledge" of What Effects the Cape Town Treaty Has Had on the Application of *Philko Aviation, Inc. v. Shacket*?

I. Introduction

There are currently competing laws in the United States regarding how a party must register and perfect his or her interest in an aircraft object. This conflict arose after the United States signed the Cape Town Convention on International Interests in Mobile Equipment and the Protocol to Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (collectively the Cape Town Treaty or Treaty), which became United States law once later ratified by the United Stated Congress.[1] Since the Cape Town Treaty went into effect on March 1, 2006,[2] the conflict between the laws in the Transportation Code[3] and the Cape Town Treaty have left lenders, creditors, owners, and other interest holders open to great risk by obfuscating the steps required to perfect interests in aircraft objects covered by the Cape Town Treaty.[4] If creditors lack the ability to unambiguously perfect their interest and establish priority in aircraft, they risk losing all of the collateral securing a debt.

This uneasy perfection in such expensive aircraft objects could negatively affect the aircraft industry and an individual's ability to acquire these aircrafts because there is no security for lenders to guarantee that their interests in the aircraft and their investment will be protected. Although this uncertainty is attributable to the adoption of the Cape Town Treaty, according to testimony given at the Senate Committee on Foreign Relations hearing, the uncertainty for creditors in regards to aircraft objects is exactly the result the creators and supporters of the Cape Town Treaty sought to avoid.[5] In fact, during the hearing, Senator Richard G. Lugar, the Chairman of the United States Senate Committee on Foreign Relations, stated that the Cape Town Treaty "creates internationally recognized finance rights and enforceable remedies that will improve the security of aircraft financing."[6] Because improved security in aircraft financing is the goal of both the Cape Town Treaty and the Transportation Code, it is imperative that this conflict

1. See Frank L. Polk, *Cape Town and Aircraft Transactions in the United States*, AIR & SPACE L., Winter 2006, at 4-5.
2. *Id.* at 4.
3. *See generally* 49 U.S.C. § 44108 (2012).
4. *See* Polk, *supra* note 1, at 7.
5. S. EXEC. REP. NO. 108-014, at 8 (2004).
6. *Id.*

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of law be resolved and the laws applied in a clear and uniform method.[7] The resolution of the conflict of law between the Cape Town Treaty and the Transportation Code would secure parties' interests and guarantee individuals access to means of obtaining aircraft. In order to resolve this conflict, the question of "What is the impact of the Cape Town Treaty on the application of *Philko Aviation, Inc. v. Shacket*?" must be answered.

Perfection is the act of giving public notice of a security interest in a piece of collateral.[8] A security interest is a relationship between a specific piece of property and a debt such that if the debt is not paid when due, the secured creditor can require foreclosure on the specific property.[9] Typically the perfection and registration of personal property is governed by state law, under the UCC, which, as a general rule, allows a creditor to "perfect its security interest, and therefore achieve priority over all other interests in the property, by filing a UCC-1 financing statement with the Secretary of State in [the] debtor's home state."[10] However, because of "[c]ertain difficulties [that] arise with respect to the sale or lease of high-value, . . . aircraft equipment[] that can be moved easily" from one jurisdiction to another,[11] the Federal Aviation Act created an exception for aircraft to the normal rule, through codification in the Transportation Code,[12] that personal property must be perfected pursuant to the UCC.[13] In order to perfect a security interest in an aircraft object, interest holders are required to file their interests, supported by the correct documents and forms, with the Federal Aviation Administration (FAA) Registry.[14] "A secured creditor who does not register its security interest with the FAA is not perfected and does not hold priority over all other interests in the aircraft."[15] The creditor is said to have the priority interest in collateral once a security interest is perfected by the creditor.[16] To have a priority interest means that, in the case of a default or bankruptcy by the debtor, the creditor has a right to be

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7. *Id.*

8. LINDA J. RUSCH & STEPHEN L. SEPINUCK, PROBLEMS AND MATERIALS ON SECURED TRANSACTIONS 217 (2d ed. 2010).

9. *See id.* at 48, 134-35.

10. Craig T. Lutterbein, *UCC Perfection Good Enough to Protect Interests in Partially Completed Aircraft*, AM. BANKR. INST. J., Feb. 2012, at 34.

11. SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW: VOLUME 2: 2002-2004, at 385 (2006).

12. 49 U.S.C. § 44108 (2012).

13. *Id.*; *see also* Lutterbein, *supra* note 10, at 34.

14. Polk, *supra* note 1, at 6.

15. Lutterbein, *supra* note 10, at 34.

16. *See* RUSCH, *supra* note 8, at 217, 303.

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paid in full before other creditors may receive any payment from the debtor.[17] The security interest retains its effectiveness in the event of a default by the debtor of the security interest.[18]

Prior to the adoption of the Cape Town Treaty, the "U.S. priority rule [was] that the first to file a security interest at the FAA Registry has priority over all other liens against the aircraft or engine unless the filing party has 'actual notice'[19] of another claim or right in the aircraft or engine."[20] However, with the adoption and ratification of the Cape Town Treaty into United States law, it is unclear if the long-standing priority rule will continue because it conflicts with the priority provisions of the Cape Town Treaty. Cape Town's priority rule dictates that the first party to register a valid security interest in an aircraft object at the Cape Town International Registry (International Registry) maintains priority over all other competing interests.[21] Additionally, because of the clear priority rule established by the Cape Town Treaty, practitioners feel that the existence of actual knowledge is irrelevant to the determination of priority of competing interests.[22]

Consequently under Cape Town, it is possible that a party could register his interest in an aircraft with the International Registry and gain priority interest in an aircraft even if the registering party knows of a prior, although unregistered, interest in the aircraft.[23] This possibility is in direct conflict with 49 U.S.C. § 44108[24] and the Supreme Court's holding in *Philko Aviation, Inc. v. Shacket*.[25] Both *Philko Aviation* and § 44108 state that a party who registers an interest in an aircraft with the FAA has priority over all other competing interests.[26] However, *Philko Aviation* and § 44108 both carve out an exception to this general rule, which protects third parties with competing interests, by establishing that the filing party does not enjoy

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17. *See id.* at 306.
18. *See id.* at 51.
19. For the purposes of this Comment, the terms "actual notice" and "actual knowledge" are used interchangeably.
20. Polk, *supra* note 1, at 6.
21. *Id.*
22. *Id.*
23. Todd Pollack, *The Cape Town Treaty: Perfecting Interests in Aircraft Under the New Law*, ELT, July/Aug. 2006, at 13.
24. 49 U.S.C. § 44108 (2012).
25. 462 U.S. 406 (1983).
26. 49 U.S.C. § 44108(b); *see Philko Aviation*, 462 U.S. at 411-12. *Philko Aviation* addresses a provision of the Federal Aviation Act of 1958, specifically section 503(c). 462 U.S. at 409 (citing Pub. L. No. 85-726, § 503(c), 72 Stat. 731, 773). This statutory provision in *Philko Aviation* mirrors the modern provision found in 49 U.S.C. § 44108(b).

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priority in the aircraft over other competing interests if the filing party had actual knowledge of the competing interests prior to filing.[27] The Supreme Court and Congress carved out this exception to the general rule in order to protect third parties for various reasons that will be explored further in subsequent pieces of this Comment. Consequently, the adoption of the Cape Town Treaty challenges the applicability of the "actual knowledge" protection.

A party, lessor, purchaser, or owner who fails to register and properly perfect its interest in the aircraft could lose that interest, or at least lose first priority, to competing creditors or a subsequent purchaser.[28] Therefore, because the interest in these aircrafts is so important, and multiple interests can be negatively impacted by inadequately perfecting the interest in the aircraft, it is imperative for all parties to have the ability to clearly register their interest in the aircraft and perfect their interests. This Comment seeks to establish a resolution between the conflicting aircraft perfection laws that will permit interested parties to secure their interest regardless of which law applies. Part II presents an exploration of what registration and perfection of aircraft laws were in the United States were prior to the 2006 enactment of the Cape Town Treaty. Specifically, Part II analyzes Congress and the Supreme Court's reasoning and intentions for adding the protection to third party interests by preventing filing parties from gaining priority interests when the filing party has actual knowledge of a third party competing interests. Part III explores the Cape Town Treaty, its purpose, intended application, and resulting effects. Part IV concludes that the Cape Town Treaty is most likely the controlling law in the case of a direct conflict between Cape Town and the Transportation Code. Next, Part V describes how *Philko Aviation* is still relevant law in limited areas. Finally, Part VI determines how the Cape Town Treaty has and will affect the application of *Philko Aviation*. In conclusion, this Comment seeks to find and prove that there is a resolution between the two competing laws that will allow interested parties to properly and effectively secure their interests in aircraft objects covered by both the Transportation Code and the Cape Town Treaty.

II. Pre-2006: Philko Aviation, Inc. v. Shacket

With the adoption of the Federal Aviation Act of 1958, a successor of the earlier Civil Aeronautics Act of 1938, Congress carried over a means for

27. 49 U.S.C. § 44108(a)(3); *Philko Aviation*, 462 U.S. at 409, 414.
28. Polk, *supra* note 1, at 6.

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registering, perfecting, and prioritizing a party's security interest in an aircraft.[29] Title 49 U.S.C. § 44103 "specifically provides that the FAA shall register aircraft and issue a certificate of registration to its owner."[30] Further, "[s]ection 44107(a) of the Transportation Code generally provides that the FAA shall establish a system for recording conveyances that affect the following: (1) interests in civil aircraft registered in the United States; (2) leases and instruments executed for security purposes, including conditional sale contracts, assignments, and amendments . . . ."[31] Finally, § 44108 provides:

> Until a conveyance, lease, or instrument executed for security purposes that may be recorded under section 44107(a)(1) or (2) of this title is filed for recording, the conveyance, lease, or instrument is valid only against—
>
> (1) the person making the conveyance, lease, or instrument;
>
> (2) that person's heirs and devisees; and
>
> (3) a person having actual notice of the conveyance, lease, or instrument.[32]

The Federal Aviation Act, and particularly the relationship between the three above sections of the Act, has controlled United States aircraft registration and perfection law up until the implementation of the Cape Town Treaty in March of 2006.

A comparison between the United States aircraft registration and perfection laws prior to the adoption of the Cape Town Treaty with the priority rules as found within the Cape Town Treaty provides a picture of the inherent conflict in their perfection provisions. In order to make this comparison, it is necessary to consider the effects and application of *Philko Aviation*[33] and 49 U.S.C. § 44108. *Philko Aviation* was a landmark case in the aviation transaction field of law and marked the first time the United States Supreme Court evaluated the meaning and application of aircraft

29. Robert C. Newark, III, *Aircraft Recordation: Does the Artisan Have a Superior Lien Against an Aircraft Under Federal and State Law?*, 60 CONSUMER FIN. L. Q. REP. 708, 709 (2006).

30. John I. Karesh, *Repossession and Foreclosure of Aircraft from the Perspective of the Federal Aviation Act and the Uniform Commercial Code*, 65 J. AIR L. & COM. 695 (2000) (citing 49 U.S.C. § 44103(a)(1)).

31. *Id.* at 695-96 (citing 49 U.S.C. § 44107(a)).

32. 49 U.S.C. § 44108(a).

33. 462 U.S. 406 (1983).

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registration laws found in Title 49 of the United States Code. The Supreme Court's decision in *Philko Aviation* established a standard for how a party must properly register, and therefore perfect, his interests in an aircraft, which has been followed since and is still somewhat being followed today.[34] The adoption of the Cape Town Treaty challenges the application of *Philko Aviation*. However, the extent to which *Philko Aviation*'s application will be changed or discontinued has yet to be determined.

A. Philko Aviation, Inc. v. Shacket

In order to understand the relevance of *Philko Aviation*, it is necessary to first analyze the facts and the Supreme Court's rationale when addressing the issue of the case. The Court sought to determine "whether the Federal Aviation Act prohibits all transfers of title to aircraft from having validity against innocent third parties unless the transfer has been evidenced by a written instrument, and the instrument has been recorded with the Federal Aviation Administration."[35]

In April of 1978, Maurice and Sylvia Shacket, the Respondents in the case, purchased a new, custom-built Piper Navajo aircraft from a corporation engaged in buying and selling aircrafts that was operated by Roger Smith.[36] During the sale, Smith gave the Shackets photocopies of the original bills of sale, which reflected the chain of title to the plane, instead of the original copies, because he claimed that the legal title could not be delivered at that time because of uncompleted clerical work.[37] However, Smith assured the Shackets' that he would "take care of the paperwork."[38] The Shackets paid the full sales price, took possession of the aircraft, and were in possession of the aircraft from that point forward.[39] Although the Shackets interpreted "take care of the paperwork" to mean that Smith would record the "original bills of sale with the FAA," Smith did not do so, nor did the Shackets make any attempt to record their title with the FAA.[40]

Two days after closing the transaction with the Shackets, Smith sold the same Piper Navajo aircraft to Philko Aviation, Inc., the Petitioner in the

34. Kelly v. Murphy (*In re* McConnell), 455 B.R. 824, 827 (Bankr. M.D. Ga. 2011); Bank of Oklahoma, City Plaza v. Martin, 1987 OK CIV APP 42, ¶¶ 9-12, 744 P.2d 218, 220; United States v. Starcher, 883 F. Supp. 2d 1175, 1179-81 (M.D. Fla. 2012); Bank of Honolulu v. Davids, 709 P.2d 613, 617 (Hawaii App. 1985).

35. *Philko Aviation*, 462 U.S. at 407

36. Shacket v. Philko Aviation, Inc., 681 F.2d 506, 508 (7th Cir. 1982).

37. *Id.* at 509.

38. *Id.*

39. *Philko Aviation*, 462 U.S. at 407.

40. *Id.* at 407-08.

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case.[41] Philko never saw nor took possession of the aircraft, and, due to lies told by Smith, was unaware of the previous purchase of the aircraft by the Shackets.[42] During the purchasing process, Smith told Philko that the airplane was in Michigan at the time having electronic equipment installed.[43] Notwithstanding the fact that Philko had not yet seen the airplane, it proceeded to purchase the airplane, had the original bill of sale examined, and checked the title of the aircraft against FAA records.[44] Once the title check was complete and Philko and its financing bank were satisfied, Philko and Smith closed the transaction where Smith gave Philko the title documents.[45] After the closing, Philko's bank recorded the title documents with the FAA.[46] However, because the airplane was in the possession of the Shackets, Smith, of course, did not turn over the aircraft at that time.[47]

Once the Shackets discovered the subsequent sale of the aircraft they had purchased, they filed for a declaratory judgment action to determine title to the aircraft.[48] At trial, Philko argued that because section 503(c) of the Federal Aviation Act of 1958 provided that "no conveyance or instrument affecting the title to any civil aircraft shall be valid against third parties not having actual notice of the sale, until such conveyance or other instrument is filed for recordation," it possessed legal title to the aircraft.[49] Finding Philko's arguments unpersuasive, the district court awarded summary judgment to the Shackets, "and the Court of Appeals affirmed, reasoning that § 503(c) did not preempt substantive state law regarding title transfers, and that, under the Illinois Uniform Commercial Code the Shackets had title but Philko did not."[50]

After granting certiorari, the Supreme Court reversed the holdings of the lower courts based on its interpretation of the language and intent of Congress when it adopted the Federal Aviation Act.[51] The Supreme Court's analysis revolved around the meaning of section 503(a)(1) of the Act, which states:

41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 408.
50. *Id.*
51. *Id. passim*.

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> No conveyance or instrument the recording of which is provided by [§ 503(a)(1)] shall be valid in respect of such aircraft . . . against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or *any person having actual notice thereof*, until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation.[52]

The Court acknowledged that this statute *could* be interpreted to mean that this "section would not require every transfer to be documented and recorded; it would only invalidate unrecorded title *instruments*, rather than unrecorded title *transfers*."[53] If the Court had accepted this interpretation, the Shackets may have been able to prevail because Illinois law did not require that the transfer be documented by written evidence.[54] Therefore, because the Shackets had no recorded instrument to be invalidated, their unrecorded transfer would still have been valid and protected their interest in the aircraft. However, the Court did not accept this interpretation. Instead the Supreme Court determined that Congress intended section 503 to mean that "every aircraft transfer must be evidenced by an instrument, and every such instrument must be recorded, before the rights of innocent third parties can be affected."[55] The Court was adamant about this interpretation after delving into the legislative history surrounding the adoption of the Federal Aviation Act. After reviewing the Senate, House, and Conference committee reports, the court concluded that

> [a]ny other construction would defeat the primary congressional purpose for the enactment of § 503(c), which was to create "a central clearing house for recordation of titles so that a person, wherever he may be, will know where he can find ready access to the claims against, or liens, or other legal interests in an aircraft."[56]

Along with this language from the hearings before the House Committee on Interstate and Foreign Commerce, the Court further solidified its rationale by determining that the most natural reading of section 503(c) would be

52. *Id.* at 409 (quoting 49 U.S.C. § 1403(c) (1982)) (emphasis added).
53. *Id.*
54. *Id.*
55. *Id.* at 409-10.
56. *Id.* at 411 (citation omitted) (internal quotation marks omitted).

synonymous with the Court's reading because the term "conveyance" means "the act by which title to property . . . is transferred."[57]

Because of the language used in section 503(c) of the Federal Aviation Act, the intentions of Congress as evidenced in the legislative history, and the most natural reading of the term "conveyance," the Court noted that although the sale between the Shackets and Smith was valid and binding, that interest was not valid against Philko because Philko had no actual notice of the transfer to the Shackets.[58] Although the Court remanded for a determination of facts, the Court noted that if Philko had no actual knowledge of the transfer to the Shackets, and therefore no actual knowledge of a competing interest in the aircraft, Philko's registration with the FAA would be valid and result in the perfection of Philko's interest in the aircraft above the interest of all others.[59]

B. 49 U.S.C. § 44108: Congress's Incorporation of the Philko *Principle*

This holding in *Philko Aviation* and the Supreme Court's interpretation of the Federal Aviation Act resulted in the rule that is now reflected in 49 U.S.C. § 44108(a). Section 44108(a) expressly states:

> Until a conveyance, lease, or instrument executed for security purposes that may be recorded under section 44107(a)(1) or (2) of this title is filed for recording, the conveyance, lease, or instrument is valid only against—
>
> (1) the person making the conveyance, lease or instrument;
>
> (2) that person's heirs and devisees; and
>
> (3) a person having *actual [knowledge]* of the conveyance, lease, or instrument.[60]

Because of the language chosen by Congress when drafting this statute, the Supreme Court in *Philko Aviation*, along with numerous other courts, held that a conveyance is valid against any person having actual knowledge of a conveyance.[61] However, an unregistered security interest in an aircraft is

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57. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 499 (D. Philip Babcock Grove ed., 1976)).

58. *Id.* at 414.

59. *Id.*

60. 49 U.S.C. § 44108(a) (2012) (emphasis added).

61. *See Philko Aviation*, 462 U.S. at 414; United States v. Starcher, 883 F. Supp. 2d 1175, 1179-81 (M.D. Fla. 2012); Kelly v. Murphy (*In re* McConnell), 455 B.R. 824, 827 (Bankr. M.D. Ga. 2011); Bank of Oklahoma, City Plaza v. Martin, 1987 OK CIV APP 42, ¶

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not perfected and will not be enforced against innocent third parties who lacked knowledge of the prior, unregistered security interest.[62]

In order to understand what the law was regarding perfection of a security interest in an aircraft prior to the adoption of the Cape Town Treaty in 2006, it is necessary to examine why Congress felt the need to create a system that "'federalized' priorities in interests in aircraft, and preempted relevant state law."[63] Because "[a]ircraft are a unique form of collateral . . . they are extremely mobile and therefore difficult to monitor on a state-by-state basis."[64] "The FAA statute [§ 44108] was created to deal with such a narrow and unique circumstance and attempts to create a national, centralized registration system for aircraft."[65] The inability to track competing interests made parties susceptible to a large risk of purchasing a security interest in an aircraft without being able to perfect their interest and, therefore, gain the security that having first priority in case of default by the debtor provides. Courts today continue to interpret *Philko Aviation* as meaning that

> Congress intended to protect innocent third parties from unknowingly accepting the transfer of an aircraft which has some claim, lien, or other legal interest attached. The recording system creates a centralized location for all potential transferees to search the FAA records before acquiring an interest in an aircraft without clear title. Failure to record results in the misconception that title is clear when, in fact, the transferee is taking the aircraft subject to some lien, or other claim or interest.[66]

The Seventh Circuit Court of Appeals defined "actual notice"[67] on an appeal that resulted after *Philko Aviation* was remanded by the Supreme Court back to the lower courts to determine "if Philko had actual notice of the transfer to the Shackets."[68] If Philko had actual notice, "Philko would

10-12, 744 P.2d 218, 220; Bank of Honolulu v. Davids, 709 P.2d 613, 617 (Hawaii App. 1985).

62. Polk, *supra* note 1, at 4.

63. David W. Ozbirn, Philko Aviation v. Shacket: *Federal Preemption in Aircraft Conveyances*, 37 ARK. L. REV. 989, 989 (1984).

64. Lutterbein, *supra* note 10, at 53.

65. *Id.*

66. US Acquisition, L.L.C. v. Tabas, Freedman, Soloff, Miller & Brown, P.A., 87 So. 3d 1229, 1233 (Fla. Dist. Ct. App. 2012) (citations omitted).

67. Shacket v. Philko Aviation, Inc., 841 F.2d 166, 170 (7th Cir. 1988).

68. *Id.* at 168.

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not have an enforceable interest, and the Shackets would [be entitled to] retain possession of the aircraft."[69] The Seventh Circuit defined actual knowledge under 49 U.S.C. § 1403(c) to include "not only knowledge that one's seller lacks good title but also knowledge of facts that would lead a reasonable person to inquire further into the seller's title."[70] Therefore, the Seventh Circuit extended actual knowledge to protect innocent third parties against not only those that had actual knowledge of a competing interest in an aircraft object, but also against parties who reasonably should have known of the competing interest, otherwise known as "implied actual notice."[71] "'[I]mplied actual notice' requires (1) actual knowledge of (2) highly suspicious circumstances, coupled with (3) an unaccountable failure to react to them."[72] Although this extension of the definition of "actual knowledge" was determined by a circuit court of appeals and is not binding on all jurisdictions, many other jurisdictions have followed to the Seventh Circuit's definition of actual knowledge.[73]

III. Post-2006: The Cape Town Treaty

On November 16, 2001, the Cape Town Treaty was adopted in Cape Town, South Africa.[74] As of March 1, 2006, the Cape Town Treaty went into effect in the United States, along with eight other ratifying countries.[75] As of January 20, 2015, over sixty countries have ratified or acceded to the Cape Town Convention.[76] Aircraft transactions were immediately impacted following the ratification and adoption of the United States Treaty into United States law because the Treaty "creates substantive laws pertaining to

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69. Philko Aviation, Inc. v. Shacket, 462 U.S. 406, 414 (1983).

70. Shacket v. Philko Aviation, Inc., 841 F.2d at 170. Title 49 U.S.C. § 1403(c) was later revised as § 44108(a) and (d).

71. *Id.*

72. *Id.* at 171.

73. Martin v. Performance Boat Brokerage.com, LLC, 973 F. Supp. 2d 820, 828 (W.D. Tenn. 2013); Mullane v. Chambers, 349 F. Supp. 2d 190, 195 (D. Mass. 2004); Ogle v. Salamatof Native Ass'n Inc., 906 F. Supp. 1321, 1326 (D. Alaska 1995); *In re* Pan Am. World Airways, Inc. Coop. Ret. Income Plan, 777 F. Supp. 1179, 1184 (S.D.N.Y. 1991); *In re* Palm Beach Fin. Partners, L.P. 488 B.R. 758, 773 (Bankr. S.D. Fla. 2013).

74. *Frequently Asked Questions*, INT'L REGISTRY OF MOBILE ASSETS, https://www.internationalregistry.aero/ir-web/faq (last visited Jan. 20, 2015) [hereinafter *FAQ*, INT'L REGISTRY] (follow the "What Is the International Registry" hyperlink).

75. Paul B. Erickson, *A Primer on Private Aircraft Purchases and Financing After Cape Town*, 60 CONSUMER FIN. L. Q. REP. 702, 705 (2006).

76. *FAQ*, INT'L REGISTRY, *supra* note 74 (follow "What Countries Have Ratified" hyperlink).

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aircraft transactions, including default, remedies, assignments, and insolvency; . . . and changes existing laws on the perfection of ownership and security interests in aircraft and engines."[77]

A. What Is the Cape Town Treaty?

The Cape Town Treaty is a document that establishes uniform laws in each ratifying country, or Contracting State,[78] that institutes a means to deal with "most significant aspects of buying, selling, leasing, and financing aircraft and engines, including issues relating to default, remedies, insolvency, priorities, title, aircraft deregistration, and the perfection and filing of liens against airframes and engines that meet certain minimum size requirements."[79] The treaty is composed of two parts that are intended to be read and interpreted as a single instrument.[80] The first part is the Cape Town Convention on International Interests in Mobile Equipment (Convention).[81] The Convention consists of general terms that are meant to apply to "commercial transactions involving mobile equipment," such as aircrafts and trains.[82] The counterpart to the Convention is the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Protocol).[83] The Protocol applies specifically to aircraft transactions.[84]

The Convention and the Protocol, together Cape Town or the Treaty, govern all transactions involving certain aircraft and engines when three factors are present: (1) "the aircraft meets the minimum size requirements,"[85] defined by the Protocol as any aircraft certified to transport at least eight persons and helicopters certified to transport at least

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77. Polk, *supra* note 1, at 4.

78. *See* Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment art. IV, Nov. 16, 2001, 108 Stat. 1095 [hereinafter Protocol to the Convention on International Interests in Mobile Equipment], *available at* http://www.unidroit.org/English/conventions/mobile-equipment/aircraftprotocol.pdf. "Contracting state" means a country that has ratified the Cape Town Treaty. Polk, *supra* note 1, at 4.

79. Polk, *supra* note 1, at 4.

80. *Id.*

81. *Id.*; *see also* Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 108 Stat. 1095, *available at* http://www.unidroit.org/English/conventions/mobile-equipment/mobile-equipment.pdf.

82. Polk, *supra* note 1, at 4.

83. Protocol to the Convention on International Interests in Mobile Equipment, *supra* note 78; Polk, *supra* note 1, at 4.

84. Polk, *supra* note 1, at 4.

85. *Id.*

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five persons;[86] (2) "the transaction documents create an 'international interest' in the aircraft,"[87] meaning "security interests, leasehold interests, . . . conditional sale agreements, . . . [and] ownership interests that are evidenced by a "contract of sale;"[88] and (3) "the aircraft is registered in a Contracting State or the debtor is 'situated in' a Contracting State at the time of the conclusion of the agreement."[89] The aircraft is registered in a Contracting State if the aircraft is registered in one of the countries that has ratified or acceded to the Convention.[90] Additionally, the Treaty applies to the aircraft transaction if the debtor is situated in a Contracting State.[91] A debtor is situated in a contracting state if the debtor is formed, incorporated, or has its principal place of business in a Contracting State at the time that the relevant agreement is signed and delivered.[92] If the debtor is situated in a Contracting State, then the Treaty is applicable to the transaction and must be abided by in order to properly register and perfect the interest with the International Registry.[93]

B. Purpose of the Cape Town Treaty

Because the financial interests in aircrafts are so great, and these interests are often created by parties from multiple countries, the International Institute for the Unification of Private Law drafted the Cape Town Treaty. The Cape Town Treaty was created "to extend the benefits of a consistent registration and lien recordation and enforcement system to jurisdictions other than the United States that have less clear legal systems for financing."[94] In doing so, the credit risk for lenders is reduced when providing credit for aircraft[95] because the Cape Town Treaty establishes a system that "facilitate[s] aircraft financings by bringing a consistent system of creditors' rights and remedies to ratifying nations that do not have legal systems as comprehensive as in the U.S."[96] This system has been put in

86. Protocol to the Convention on International Interests in Mobile Equipment, *supra* note 78, at art. 1.
87. Polk, *supra* note 1, at 4.
88. *Id.* at 5.
89. *Id.* at 2.
90. *Id.* at 5.
91. *Id.*
92. *Id.*
93. *Id.*
94. Erickson, *supra* note 75, at 705.
95. *FAQ*, INT'L REGISTRY, *supra* note 74 (follow "What Are the Benefits of the Cape Town Convention" hyperlink).
96. Erickson, *supra* note 75, at 705.

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effect through the use and establishment of an international registry that is "operated on a twenty-four hours per day electronic basis," which allows all parties to register their international interests in aircraft objects.[97] "By facilitating international transactions in modern equipment, the Convention is expected to lead to broad and mutual economic benefits for all interested parties and to the expanded use of newer and safer technologies."[98] According to Shaun Donnelly, the acting Assistant Secretary of State, in his testimony before the Senate Committee on Foreign Relations, the purpose of the treaty was to "make available the benefits of [United States] finance laws to our trading partners all over the world resulting in lower risks, and an expanded array of credit services, thereby increasing business transactions, manufacturing activity, and employment growth."[99] In addition to economic benefits, the Cape Town Treaty was intended to make the world's skies "safer and cleaner as newer equipment is acquired and brought into service," because "full implementation of th[e] Convention and Protocol should hasten the replacement of this equipment with state-of-the-art aircraft."[100]

C. The International Registry

The Cape Town International Registry (also referred to as the International Registry) is an electronic registry located in Dublin, Ireland, which operates under the legal framework of the Cape Town Treaty.[101] At the designation of the Treaty, the International Registry is primarily managed and administered by the International Civil Aviation Organization.[102] The International Civil Aviation Organization is authorized to appoint a registrar who will be responsible for establishing and operating the Cape Town International Registry.[103] The International Civil Aviation Authority, acting in its supervisory authority under the Treaty, appointed

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97. *Id.*

98. S. EXEC. REP. NO. 108-014, at 2 (2004).

99. *Id.* at 10 (statement of Hon. Shaun E. Donnelly, Acting Assistant Sec'y, Bureau of Economic and Business Affairs, U.S. Dep't of State).

100. *Id.* at 17 (statement of Hon. Jeffrey Rosen, General Counsel, U.S. Dep't of Transportation).

101. *Welcome to the International Registry*, INT'L REGISTRY OF MOBILE ASSETS, https://www.internationalregistry.aero/ir_web/ (last visited Jan. 12, 2014); *What's the Cape Town Registry? NBAA Offers a Refresher*, NAT'L BUS. AVIATION ASS'N, http://www.nbaa.org/admin/registration/20130830-what-is-the-cape-town-registry-nbaa-offers-a-refresher.php (last visited Apr. 9, 2015).

102. Polk, *supra* note 1, at 5.

103. *Id.*

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Aviareto, a joint venture of SITA SC and the Irish government, as Registrar.[104]

The Treaty provides for the "registration and the protection of 'international interests' which are recognized by all ratifying states, with priority being determined on a 'first-to-file' basis."[105] The International Registry provides a means of establishing the priority of security interests in airframes, aircraft engines, and helicopters.[106] The Cape Town International Registry allows for parties that hold an interest in an aircraft object to put the world on notice of that interest.[107] This allows for smooth aircraft transactions and security for debtors, creditors, and those in the market to purchase aircrafts.

The International Registry fulfills two major functions: "1) registering an interest in an aircraft asset and 2) searching against an aircraft asset to determine what registrations have been made and their relative priority."[108] Each ratifying country has its own process for gaining access to the International Registry and serves as an "entry point" for document registration.[109]

D. Ratification in the United States

After the United States ratified the Treaty, Congress "adopted amendments to the Transportation Code (49 U.S.C., subtit. VII, pt. A) and FAA Regulations (14 C.F.R. §§ 1 et seq.) [in order to] implement the Treaty."[110] In doing so, Congress designated the FAA as an exclusive entry point to the Cape Town International Registry and adopted legislation that blends the two systems.[111] Congress's attempt to blend the previous registration system and the new Cape Town registration system requires that transactions comply with the FAA requirements before the registration information can be transmitted to the International Registry.[112]

The new registration requirements that have resulted from the Cape Town Treaty have complicated the process of registering a security interest

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104. *Id.* SITA SC is a multinational provider of global information and telecommunication services for the air transport industry. *About SITA*, SITA, http://www.sita.aero/about-us (last visited Apr. 22, 2015).

105. *Welcome to the International Registry*, *supra* note 101.

106. *Id.*

107. *Id.*

108. *Id.*

109. Erickson, *supra* note 75, at 705-06.

110. Polk, *supra* note 1, at 5.

111. *Id.* at 5-6.

112. *Id.* at 6.

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in an aircraft object. In practice, this means that parties must follow a multi-step process in order to gain access to the International Registry that would include: (1) complete and file the initial FAA Form, which describes the parties, the collateral, and the international interest claimed in the collateral; (2) file copies of all relevant documents for recordation with the FAA Registry; (3) once the appropriate FAA filings have been made, "the FAA Registry will provide an FAA-Cape Town transaction code, which is required to register the international interest at the [Cape Town International Registry]."[113]

Next, once the interest has been registered with the FAA and an FAA-Cape Town transaction code has been issued, the parties must then begin the Cape Town International Registry registration process, which includes: (1) each party claiming an interest in the collateral aircraft must set up an account with the Cape Town International Registry; (2) next, one party logs on to the International Registry and enters the relevant information, which is very similar to the information that was provided in the initial FAA registration process; (3) once the initial registration is completed, the International Registry "system automatically sends notice . . . to the second party to the transaction, giving it an opportunity to claim or consent to the registration of the international interest in the aircraft object;" (4) finally, once the second party consents to the registration of the interest in the aircraft object, the registration is substantially completed, however the registration is not considered fully complete until the registration is searchable on the Cape Town International Registry system.[114]

As is now apparent, the system for registration that has been adopted by Congress is complex and leaves great room for error, missteps, and confusion.

E. Effect of Cape Town

The full effects of Cape Town have yet to be seen because it has only been ratified and in effect for less than a decade. However, it is not only international transactions that Cape Town applies to. The Cape Town Treaty "applies to purely domestic transactions as well as transactions which have an international component."[115] Accordingly, "the fact that both parties are located in the United States, and the relevant aircraft is registered in the United States, will not prevent nor disqualify the related

113. *Id.*
114. *Id.*
115. Barbra M. Goldstein & Debra Goldberg, *Perfecting Liens on U.S.-Registered Aircraft*, 43 UCC L.J. 2, 5 (2011).

International Interest from having to be registered on the International Registry in order to establish its priority."[116] Because "[t]he Treaty contains a major overhaul of the aircraft lien perfection and priority systems that have been in place in the United States for decades,"[117] "perfection of one's rights [is] more important than ever."[118]

Aside from changing the way parties will register their interest in aircraft objects and the effect of that registration on priority interests, the Cape Town Treaty also changes the timing in which parties may first register their interests. Prior to Cape Town, parties could not register their interests in the aircraft object at the FAA registry until after the closing of the transaction to sell the aircraft, helicopter, or engine.[119] However, Cape Town allows for "the perfection of interests in aircraft objects through [Cape Town International Registry] registration of a prospective international interest."[120] Therefore, unlike before Cape Town, parties may register their interests in aircraft objects with the Cape Town International Registry prior to the transactions actually closing. The interests in aircrafts are perfected upon registration; therefore, the perfection of the "prospective international interest will be effective as of the time the prospective interest is registered, assuming the transaction actually closes."[121] However, if the transaction fails to close for whatever reason, "no rights have been created and no rights can be perfected."[122]

In order to register a prospective international interest in an aircraft, Congress established requirements that must be met before that interest is recognized. The parties must file the required form with the FAA, which is AC Form 8050-135.[123] Once the parties file the correct form with the FAA, they can then register the prospective international interest with the Cape Town International Registry.[124] From that point, the parties then have sixty days to file the actual documents that prove the closing of the sale.[125] However, if the parties fail to make such a filing within sixty days, the

116. *Id.*
117. Polk, *supra* note 1, at 5.
118. *Id.* at 6.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

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Transportation Code provides that the prospective international interests are no longer valid, and therefore not perfected.[126]

The benefit of being able to register a prior interest in an aircraft is that it allows parties to acquire an earlier priority date for their interests in the aircraft. It allows for a "certain level of efficiency and comfort in closing a transaction because it allows parties can take care of the Cape Town component of a transaction before closing."[127] However, there is a downside to the registration of a prospective international interest. "[I]f transacting parties consent to registration of a prospective international interest and the transaction fails to close, a cloud is created on the title of the aircraft and engines."[128] The ability for parties to register their prospective international interests without any consideration for the party's actual knowledge of competing interests is just another example of the confusion that has been caused by the adoption of Cape Town and its competing policies from pre-2006 requirements.

IV. Why the Cape Town Treaty Will Be the Controlling Law for Perfection of Interests in Aircraft Objects

In order to determine what effect the Cape Town Treaty has had on the applicability of *Philko Aviation* and the subsequently codified § 44108, there are three sources that must be examined: the rules for conflicting federal statutes and treaties, the legislative history behind the adoption of the Cape Town Treaty, and the opinions of experts in the aircraft transaction practice area.

A. Conflicts Between Federal Statues and Treaties

Perhaps one of the best ways to determine what effect the Cape Town Treaty has, or will have, on the applicability of *Philko Aviation* is to look at whether standing United States laws or subsequently adopted treaties are usually given priority in instances where they overlap or conflict. The best place to start when determining the relevance of treaties in the United States legal system, and where they fall within the hierarchy of those laws, is by looking at the Supremacy Clause of the United States Constitution, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made*, or which

126. *Id.* at 6-7.
127. *Id.* at 7.
128. *Id.*

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> shall be made under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[129]

Interpreting the text, it appears that treaties should be regarded the same as statutes passed by Congress and signed into law by the President.[130] This makes it clear that treaties, like federal statutes, take precedent over state laws.[131] However, it is unclear from the text of the Constitution which type of law, statutes or treaties, falls higher on the hierarchy of United States laws. In order for courts to determine whether a treaty or a statue controls when there is a conflict, courts must make two determinations. "First, a court must determine whether the treaty in question is 'self executing' as a matter of domestic law."[132] Second, if a treaty is found to be self-executing, courts must then "determine the relationship between the treaty and the form of domestic law."[133] "With respect to this question . . . courts have uniformly applied the last-in-time rule to govern conflicts between treaties and federal statutes."[134]

1. Self-executing Versus Non-self-executing Treaties

Courts have fashioned a doctrine that labels treaties as "self-executing" or "non-self-executing."[135] A self-executing treaty is a treaty capable of being directly applied as part of the internal law of the United States immediately upon entry into the agreement.[136] Alternatively, a non-self-executing treaty is one that requires legislation or some other source of United States law in order to implement it in the United States.[137] For such agreements, it is the implementing legislation, not the agreement itself that becomes the rule of decision in U.S. courts.[138]

The idea of self-executing treaties was first addressed in "1829 when Chief Justice Marshall endorsed the principle of giving some treaties self-

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129. U.S. CONST. art. VI, cl. 2 (emphasis added).

130. SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 253 (2d ed. 2012).

131. *Id.* at 253-54.

132. Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 333 (2005).

133. *Id.*

134. *Id.*

135. MURPHY, *supra* note 130, at 254.

136. *Id.*

137. *Id.*

138. *Id.*

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executing status as enforceable domestic law."[139] The endorsement by the Supreme Court was given in *Foster v. Neilson*.[140] Although the Supreme Court ruled that the treaty at issue in *Foster* was not a self-executing treaty, the Court established that for in order for a treaty to be regarded as the law of the land and to be regarded by courts as equivalent to a legislative act, the treaty must operate "without the aid of any legislative provision."[141] Alternatively, the Court distinguished the treaty at issue in *Foster* from being a self-executing treaty because that treaty was "in its nature a contract between two nations, not a legislative act" because "the legislature must execute the contract" before it could "effect . . . the object to be accomplished."[142]

Because Chief Justice Marshall established that treaties are enforceable as domestic law, which is a principle that has since been upheld by United States' courts,[143] "it created the possibility that treaties will come into direct conflict with domestic law."[144] The "understanding of the status of treaties" as equal to a law enacted by a legislature "is an important reason for applying the last-in-time rule to treaties and federal statutes."[145] However, before a last-in-time analysis is to take place, the treaty must be determined to be self-executing,[146] which is "perhaps one of the most confounding [questions] in treaty law."[147] "The question of whether a treaty is self-executing is a matter of interpretation for the courts when the issue presents itself in litigation, and . . . the courts attempt to discern the intent of the parties to the agreement so as to carry out their manifest purpose."[148] In order to discern the intent of the parties to the agreement, courts often look to the language in the treaty, statements made by the President or Congress, whether the treaty seeks to regulate a matter over which Congress as a

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139. Ku, *supra* note 132, at 333.

140. 27 U.S. (2 Pet.) 253 (1829), *overruled, in part, on other grounds by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

141. *Id.* at 314-17.

142. *Id.* at 314.

143. Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 10-11 (1936); ESAB Group, Inc. v. Zurich Ins. PLC, 685 F.3d 376, 386-87 (4th Cir. 2012); Am. Baptist Churches in the U.S.A. v. Meese, 712 F. Supp. 756, 769-70 (N.D. Cal. 1989).

144. Ku, *supra* note 132, at 334.

145. *Id.*

146. *Id.* at 333.

147. United States v. Postal, 589 F.2d 862, 876 (5th Cir. 1979).

148. *Id.*

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whole has the sole competence to legislate, and if the treaty creates a private right of action.[149]

When taking into consideration the language of the Cape Town Treaty, the statements made by the President or Congress regarding the treaty, whether the treaty seeks to regulate a matter over which Congress as a whole has the sole competence to legislate, and if the treaty creates a private right of action, it is clear that the Cape Town Treaty is a self-executing treaty.[150] First, throughout Articles Two and Seven of the Convention, the language in the Cape Town Treaty plainly creates an international interest held by a creditor in an aircraft object that is used to "provide security to creditors lending money to finance the purchase or lease of equipment."[151] Additionally, through Article Sixteen of the Convention, the Treaty also establishes the International Registry where such interests are to be registered.[152] The language in the treaty creates the international interest and International Registry on its own without asking legislatures to take steps to implement the International Registry or international interest in their respective countries.[153] Next, Article Twenty-nine of the Convention creates "rules to establish priorities among multiple interests in the same item . . . ."[154] Articles Thirty-one and Thirty-two "establish requirements for the assignment of interests under the Convention and the affect of such assignments."[155] Because the language agreed to by the parties to the Treaty establishes the international interest, rules for determining priority among multiple interests in the same item, and the International Registry,[156] it appears that the Cape Town Treaty "operate[s] . . . without the aid of any legislative provision."[157]

Next, the language from the Senate in the Report on the Cape Town Treaty from the Senate Committee on Foreign Relations makes it clear that the Cape Town Treaty is self-executing. In the Committee on Foreign Relations' report, the committee found that "[n]o implementing legislation is required for the Convention or Protocol."[158] This goes directly to the heart of what Chief Justice Marshall suggested distinguished a self-

149. MURPHY, *supra* note 130, at 254-55.
150. *Id.*
151. S. EXEC. REP. NO. 108-014, at 3.
152. *Id.*
153. *Id.* at 3-4.
154. *Id.* at 3.
155. *Id.*
156. *Id.* at 3-4.
157. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).
158. S. EXEC. REP. NO. 108-014, at 3.

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executing treaty from a non-self-executing treaty,[159] because there is no legislative act necessary in order to implement the treaty.[160]

However, there is a slight exception to the Committee on Foreign Relations' findings because, in the report, the Committee states that "technical amendments to certain authorities of the Federal Aviation Administration relating to the filing of interests in registries through the FAA" must be made via congressional action.[161] Although these small amendments to Federal Aviation Administration authority need to be made in order to aid the implementation of the Cape Town Treaty and the International Registry, it is unlikely that the need for the amendments would disqualify the Cape Town Treaty from being considered a self-executing treaty. The object to be accomplished by the Cape Town Treaty was to "establish an international legal framework for the creation, priority, and enforcement of security and leasing interests in mobile equipment—specifically high value aircraft equipment (airframes, aircraft engines, and helicopters)—and create a worldwide international registry where such interests can be registered."[162] According to Chief Justice Marshall in *Foster*, a treaty is self-executing if the goal of the treaty may be accomplished without the implementation of additional legislative acts.[163] Because the goal of the Cape Town Treaty was to create an international interest, rules for prioritizing competing interests, and creating the International Registry, and because the amendments to the Federal Aviation Administration registry procedures are not necessary to accomplish that goal, the additional legislation does not keep the Cape Town Treaty from being self-executing.

Next, to determine if a treaty is self-executing, an inquiry into whether the treaty seeks to regulate a matter over which Congress as a whole has the sole competence to legislate must be made.[164] If a treaty seeks to regulate a matter over which Congress has sole competence to legislate, the treaty is likely not self-executing because the power to legislate on that topic may not be taken from Congress.[165] Therefore, before a treaty seeking to regulate a matter that Congress has sole power to regulate can be implemented into United States law, Congress would have to pass

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159. *Foster*, 27 U.S. (2 Pet.) at 314.
160. S. EXEC. REP. NO. 108-014, at 3-4.
161. *Id.* at 3.
162. *Id.* at 2.
163. *Foster*, 27 U.S. (2 Pet.) at 314.
164. MURPHY, *supra* note 130.
165. *Id.*

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legislation doing so.[166] Because a treaty that sought to regulate a matter exclusively regulated by Congress would have to be implemented through legislation in addition to the treaty, that treaty would be a non-self-executing treaty.[167] However, because security interests and aircraft transactions may also be regulated by state law, and not only legislation implemented by Congress, the Cape Town Treaty does not seek to regulate a matter of which Congress has sole authority to regulate.

Finally, if the treaty creates a private right of action, that may also suggest that the treaty is self-executing.[168] A private right of action that is created within the language of the treaty suggests that the treaty is self-executing because it does not need to be supplemented by additional legislation by Congress in order to create a private right of action.[169] According to the findings in the report from the Senate Committee on Foreign Relations, "the Convention and Protocol provide for private rights of action based on their provisions in the courts of States parties to them."[170]

Accordingly, after examining the language found in the Cape Town Treaty, the comments made by Congress, the treaty's lack of an attempt to regulate any matter exclusively controlled by Congress, and the creation of a private right of action by the Cape Town treaty, the Cape Town Treaty is a self-executing treaty. Because the Cape Town Treaty is a self-executing treaty, it is "equivalent to an act of legislature."[171] "Courts faced with a conflict between a treaty and a state law generally will give effect to the treaty (if it is self-executing), whereas courts faced with a conflict between a treaty and the Constitution generally will give effect to the Constitution."[172] However, because the Transportation Code and its requirement of "actual knowledge" is a federal statue, the conflict with the Cape Town Treaty occurs between a treaty and a federal statute.[173] Therefore, because this is a conflict between a treaty and a federal statute, a court should apply the last-in-time rule to determine whether the

166. *Id.*
167. *Id.* at 254.
168. *Id.* at 253.
169. *Id.*
170. S. EXEC. REP. NO. 108-014, at 4.
171. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).
172. Ku, *supra* note 132, at 334.
173. 49 U.S.C. § 44108 (2012).

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Transportation Code, which was codified as a result of *Philko Aviation*, or the Cape Town Treaty controls.[174]

2. The Last-in-Time Rule

In the event that there is a "conflict between a treaty and a statute, the [last]-in-time rule prevails, just as it would between two statutes, unless Congress evidences a contrary intent."[175] The last-in-time rule is a rule that has been applied by courts used to resolve conflicts between treaties and federal statutes.[176] This rule states that whichever law, either conflicting federal statute or treaty, was enacted later in time will be given effect over the earlier law.[177] However, whenever possible, courts will interpret a later statute or treaty as consistent with an earlier statute or treaty "on an assumption that Congress normally does not seek to violate U.S. obligations under international law."[178]

The last-in-time rule was first articulated in *Taylor v. Morton* in 1855.[179] In *Taylor*, the Plaintiff's challenged a federal statute that imposed certain duties on the importation of hemp because the federal statute violated treaty obligations.[180] After determining that the treaty in question was self-executing, Justice Curtis reasoned that, "as a functional matter, the Constitution must grant some part of the United States government the authority to repeal a treaty."[181] Therefore, the Court found that the last-in-time rule was necessary because "Congress must have the sovereign power to repeal a treaty's domestic effects."[182] Justice Curtis and the Court found that because the federal statute was enacted after the treaty was implemented, the federal statute controlled because it was Congress's exercise of its sovereign power to repeal a treaty.[183] Justice Curtis, however, did not address the question of whether a treaty could likewise repeal a federal statute.[184]

Although Justice Curtis' opinion in *Taylor* is considered the first articulation of the last-in-time rule, his rationale for the rule has not been

174. Ku, *supra* note 132, at 334-35.
175. MURPHY, *supra* note 130, at 254.
176. Ku, *supra* note 132, at 334-35.
177. *Id.*
178. MURPHY, *supra* note 130, at 254.
179. 23 F. Cas. 784 (C.C. Mass. 1855); *see also* Ku, *supra* note 132, at 335.
180. *Taylor*, 23 F. Cas. at 784-85; Ku, *supra* note 132, at 335.
181. Ku, *supra* note 132, at 335.
182. *Id.*
183. *Id.*
184. *Id.*

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widely adopted.[185] Instead, the Supreme Court has adopted an equality rationale for the last-in-time rule, which is analogous to Chief Justice Marshall's holding in *Foster*. In *Cherokee Tobacco*, the Supreme Court held that a treaty is equivalent to an act of legislation, and therefore "[a] treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty."[186] Later, in *Whitney v. Robertson*, the Supreme Court found:

> By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. . . . [I]f the two are inconsistent, the one last in date will control the other[.][187]

A treaty that "operates by its own force, and relates to a subject within the power of Congress to control," is deemed to be equivalent to a legislative act.[188] Due to the equivalency of treaties and federal statutes, courts found that the most logical approach for resolving a conflict between two acts of legislature was to apply the last-in-time rule.[189]

Because the Cape Town Treaty is a self-executing treaty and § 44108 is a federal statute, precedent holds that the last-in-time rule should apply to determine which rule controls. The predecessor to § 44108 of the Transportation Code, section 503(c), was enacted into law as part of the Federal Aviation Act in 1958, and recodified as § 44108 in the Federal Aviation Administration Act of 1994.[190] The Cape Town Treaty was signed by the United States on May 9, 2003,[191] and went into effect on March 1, 2006.[192] Therefore, according to the last-in-time rule, because the Cape Town Treaty was implemented almost fifty years after the ratification of the Federal Aviation Act, the Cape Town Treaty's priority rules control.[193] Consequently, the Cape Town Treaty's rule that the first party to file his or her interest in an aircraft object with the International Registry has priority

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185. *Id.*
186. Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870).
187. 124 U.S. 190, 194 (1888).
188. Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889).
189. Ku, *supra* note 132, at 336.
190. Act of Jan. 25, 1994, Pub. L. No. 103-272, 108 Stat. 745 (codified as amended at 49 U.S.C. § 44108 (2012)).
191. S. EXEC. REP. NO. 108-014, at 2 (2004).
192. Polk, *supra* note 1, at 4.
193. *See* Ku, *supra* note 132, at 335-39.

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interest over all other competing interests is the controlling law. As a result, it appears that the previous rule found in § 44108(a), which states that "[u]ntil a conveyance, lease, or instrument executed for security purposes . . . is filed for recording, the conveyance, lease, or instrument is only valid against . . . a person having actual notice of the conveyance, lease or instrument"[194] would not be controlling law in the event of a conflict with the Cape Town Treaty priority rule.

B. Legislative History

The Cape Town Treaty ratification process consisted of several hearings, testimonies, and reports to clarify the intent of the future effects of the Cape Town Treaty.[195] Throughout these hearings, testimonies, and reports, drafters and supporters of the Cape Town Treaty repeatedly stated that the Cape Town Treaty establishes rules for priority of security interests in aircraft objects.[196] Additionally, proponents of the treaty stated that "in the case of conflict [between otherwise applicable law], the provisions of the Convention would prevail."[197]

In testimony by Marion Blakey, the Administrator of the Federal Aviation Administration, Mrs. Blakey stated: "And importantly, to avoid any confusion over what legal standards apply during the rulemaking process, the bill provides that the Treaty's provisions would supersede inconsistent FAA regulations."[198] The bill that Mrs. Blakey is referring to is the Cape Town Treaty Implementation Act of 2004, which adds language to § 44108(c)(2) of the Federal Aviation Act which says: "This subsection does not take precedence over . . . the Cape Town Treaty, as applicable."[199] Therefore, it appears clear that Congress intended for the Cape Town Treaty to control over the Federal Aviation Act of the Transportation Code in the case of a conflict between the two laws.

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194. 49 U.S.C. § 44108(a) (2012).

195. *See, e.g.*, *Federal Aviation Adminstration (FAA) Oversight: Hearing Before the Subcomm. on Aviation, S. Comm. on Commerce, Sci. & Transp.*, 108th Cong. (2004); S. EXEC. REP. NO. 108-014, at 2; H. REP. NO. 108-526, *passim* (2004).

196. S. EXEC. REP. NO. 108-014, at 11-13 (statement of Hon. Shaun E. Donnelly, Acting Assistant Att'y Gen., Bureau of Economic and Business Affairs, U.S. Dep't of State).

197. *Id.* at 28.

198. *Statement of Marion C. Blakey, Administrator*, FED. AVIATION ADMIN. (May 18, 2004), http://www.faa.gov/news/testimony/news_story.cfm?newsId=6150&print=go (statement of Blakey before the U.S. Senate Comm. on Commerce, Science and Transportation, Subcomm. on Aviation, on the future of the U.S. air traffic system).

199. 49 U.S.C § 44108(c)(2) (2012).

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Throughout the ratification process of the Cape Town Treaty, the stated purpose of the Cape Town Treaty as identified by the Senator Lugar, the Chairman of the Senate Committee on Foreign Relations, and Jeffrey Rosen, the General Counsel of the Department of Transportation, was that the Cape Town Treaty "establishe[d] an 'international interest,' which is a secured credit or leasing interest with defined rights in a piece of equipment."[200] One of the rights referred to in the previous statement was "the holding of a transparent finance priority in the equipment."[201] During the legislative process, Mr. Rosen explained that the priority in the equipment would be established "when a creditor files, on a first-in-time basis, a notice of its security interest, in a new high-technology international registry."[202] The Senate's subsequent ratification of the Cape Town Treaty, after it was made clear by Mr. Rosen and others that priority in an aircraft object would be gained by a party being the first-to-file that interest with the International Registry, made it apparent that the Cape Town Treaties priority rules were intended.[203]

C. Expert Opinions

In addition to the last-in-time rule analysis and comments made through the legislative process, experts in the aircraft transaction field have also weighed in on the effects, and future impact, of the Cape Town Treaty on prior existing aircraft security interest laws and priorities laws. For instance, according to Paul Erickson, an attorney who practices aircraft transactions and financing, the "Cape Town Convention was ratified by the [United States] Senate under the Treaty clause of the [United States] Constitution and therefore preempts current federal and any state law to the contrary."[204] Because the International Registry is meant to supplement FAA recordation law involving International Interests in aircraft objects, and not preempt it, "[w]here federal law can be read consistently with treaties, both will be applied."[205]

However, when there is a conflict between federal statues and the treaty, both will not be able to be applied. The conflict between the priority rules

200. S. EXEC. REP. NO. 108-014, at 14 (statement of Hon. Jeffrey Rosen, General Counsel, U.S. Dep't of Transportation).

201. *Id.*

202. *Id.*

203. Cape Town Treaty Implementation Act of 2004, Pub. L. No. 108-297, 118 Stat. 1095 (codified as amended at 49 U.S.C. §§ 44101-44113 (2012)).

204. Erickson, *supra* note 75, at 706.

205. *Id.*

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found in the Transportation Code[206] and priority rules under the Cape Town Treaty are a perfect example of a time when both federal statute and a treaty cannot both be applied. According to Frank Polk,[207] the current United States priority rule, which says the first to file a security interest at the FAA Registry has priority over all other liens against the aircraft or engine unless the filing party has "actual notice" of another claim or right in the aircraft object,[208] "will be changed and simplified because the Treaty establishes one priority rule: whoever is first to register a valid interest at the [Cape Town International Registry] has priority over all other competing interests."[209] As a result, "[t]he existence of actual notice is simply not relevant to the determination of the priority of competing liens or interests."[210]

Finally, in the opinion of John Pritchard,[211] the Cape Town Treaty, as in effect in the United States, preempts other federal and state laws relating to the rights or interests that are covered or affected by the Cape Town Treaty.[212] Mr. Pritchard further states that "[u]nlike the general position under the Transportation Code, actual notice of an interest is not relevant to determine priority in relation to interests that are registered in the International Registry."[213]

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206. 49 U.S.C. § 44108(a) (2012).

207. Frank Polk is a shareholder and previous leader of the Aviation Group in the law firm McAfee & Taft, P.C. in Oklahoma City. *Frank L. Polk*, MCAFEE & TAFT, http://www.mcafeetaft.com/?t=3&A5583&format=xml&p=591 (last visited Feb. 23, 2015). Mr. Polk has been recognized in *The Best Lawyers in America*, *Oklahoma Super Lawyers*, and *The International Who's Who of Aviation Lawyers*. *Id.* "He currently serves as a representative to the Legal Advisory Panel of the Aviation Working Group and as a technical advisor to the International Registry Advisory Board, both dealing with the Cape Town Convention." *Id.*

208. 49 U.S.C. § 44108(a).

209. Polk, *supra* note 1, at 6.

210. *Id.*

211. John Pritchard is a partner with the firm Holland & Knight in New York City, New York. Mr. Pritchard has "more than 20 years of experience in aircraft, equipment and facility finance" and has been recognized in *The Best Lawyers in America*, *The International Who's Who of Aviation Lawyers*, and *New York Super Lawyers*. *John F. Pritchard*, HOLLAND & KNIGHT, http://www.hklaw.com/John-Pritchard/ (last visited Feb. 23, 2015). Additionally, Mr. Pritchard serves as the Chairman of the Legal Advisory Panel of the Aviation Working Group. *Id.*

212. John Pritchard, *United States of America*, *in* AIRCRAFT FINANCE: REGISTRATION, SECURITY & ENFORCEMENT 14 (Release No. 39, Graham S. McBain & Richard Hames eds., 2007).

213. *Id.*

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In summary, after taking into consideration the last-in-time rule, the comments made by Congress and others during the legislative process, and the opinions of experts in aircraft transactions and financing, it is almost certain that in instances where the priority rules of the Transportation Code and the Cape Town Treaty conflict, the Cape Town Treaty will control.

V. Even Though the Cape Town Treaty Controls, Philko Aviation *Is Still Applicable and Relevant*

Although there is great support for why the Cape Town Treaty will be the dominant law controlling the registration and perfection of aircraft transactions going forward, it is not clear that the usefulness and applicability of *Philko Aviation* has been eliminated completely. In fact, since the implementation of the Treaty in March of 2006, several courts have continued to cite the Supreme Court's holding in *Philko Aviation* as authority for their decisions in cases where the priority of a security interest in an aircraft object is in question.[214] Because courts are still using *Philko Aviation* as support for their decisions in aircraft perfection cases, it suggests that *Philko Aviation* is still good law, in some fashion.

As recently as July 2012, over six years after the implementation of the Cape Town Treaty, in *United States v. Starcher*, the United States District Court of the Middle District of Florida used *Philko Aviation* and § 44108 as a decisive factor in their holdings that in order for a transfer of title to aircraft to have validity against innocent third parties, the transfer must have been evidenced by a written instrument that has been recorded with the FAA.[215] In May 2011, Starcher was indicted on "criminal drug conspiracy activity that took place from May 2009 to January 2010."[216] Prior to the indictment, Homeland Security Investigations agents seized the aircraft that Starcher had admitted to using in the drug activity.[217] As a

214. *See, e.g.*, G & B Aircraft Mgmt. v. Smoot (*In re* Utah Aircraft Alliance), 342 B.R. 327, 333-40 (B.A.P. 10th Cir. 2006); 1473219 Ontario Ltd. v. Alt. Aviation Servs., Inc., No. 12–10540, 2013 WL 2295453, at *1 (E.D. Mich. Jan. 15, 2013); United States v. Starcher, 883 F. Supp. 2d 1175, 1179-81 (M.D. Fla. 2012); Kelley v. Murphy (*In re* McConnell), 455 B.R. 824, 827 (Bankr. M.D. Ga. 2011); Tradewinds Airlines, Inc. v. AAR-Aircraft Servs.-Miami, Inc. (*In re* Tradewinds Airlines, Inc.), 394 B.R. 614, 620-21 (Bankr. S.D. Fla. 2008); Malloy v. Pub. Bldg. Comm'n of St. Clair Cnty., Ill. (*In re* Ozark Air Lines, Inc.), No. 04-10361-R, 2007 WL 43742, at *4-6 (Bankr. N.D. Okla. Jan. 4, 2007); U.S. Acquisition, L.L.C. v. Tabas, Freedman, Soloff, Miller, & Brown, P.A., 87 So. 3d 1229, 1233 (Fla. Dist. Ct. App. 2012).

215. *Starcher*, 883 F. Supp. 2d at 1179-80.

216. *Id.* at 1177.

217. *Id.* at 1177-78.

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result of the forfeiture, the court required the Government to notify all known third parties who had a legal interest in the aircraft.[218] The Petitioner in the case, a third party who was notified because of his interest in the aircraft, filed a claim that it had an ownership interest in the aircraft and that the aircraft could not be forfeited.[219] However, because the Petitioner claimed an interest in the aircraft based on an "oral 'conditional sale agreement,'"[220] the Court used *Philko Aviation* to determine that the "Petitioners acquired no legal interest through their transaction with Defendant preceding the forfeiture."[221] The Court supported their decision by quoting the holding from *Philko Aviation* and determined because the Petitioners failed to "reduce their oral 'conditional sale agreement' with the Defendant Starcher into writing" that could be filed with the FAA, the Petitioners had no valid interest against innocent parties, such as the Government.[222]

However, although *Philko Aviation* is still used for support in the holding in *Starcher*, the central issue of the case dealt with a conflict between federal law, specifically § 44108, and the UCC, which is state law.[223] So, although the continued use of *Philko Aviation* in this case shows that *Philko Aviation* is still applicable law, it only proves that *Philko Aviation* remains as applicable law when international interests are not at play.

Similarly, in May 2012, a Florida District Court applied *Philko Aviation* to reach the conclusion that the Defendant in *US Acquisition, L.L.C. v. Tabas, Freedman, Soloff, Miller & Brown, P.A.* did not have a valid security interest in an aircraft.[224] In this case, Rockbridge Commercial Bank served as the lender in a transaction with Kaizen Aviation, L.L.C. (Kaizen), in which Kaizen borrowed over five million dollars.[225] Kaizen defaulted on the loan when it failed to make the monthly payments required by the promissory note, which was secured by an aircraft as the collateral.[226] Rockbridge retained Tabas, Freedman, Soloff, Miller & Brown, P.A.

218. *Id.* at 1178.
219. *Id.*
220. *Id.*
221. *Id.* at 1179-80.
222. *Id.*
223. *Id.* at 1180.
224. US Acquisition, L.L.C. v. Tabas, Freedman, Soloff, Miller & Brown, P.A., 87 So. 3d 1229, 1231 (Fla. Dist. Ct. App. 2012).
225. *Id.*
226. *Id.*

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(Tabas Freedman) to file a writ of replevin.[227] The court issued an order granting the writ of replevin, which stated that "there was a perfected security interest in the aircraft and the owner of the collateral aircraft undisputedly defaulted."[228] Subsequent to filing the replevin action, Rockbridge was acquired by the "Federal Deposit Insurance Corporation ("FDIC") and FDIC was substituted for Rockbridge in the action."[229] During the original replevin action, Tabas Freedman withdrew as counsel and filed a notice and claim of attorney's charging lien, which "attaches to the judgment to ensure an attorney is compensated for his services," alleging its representation of Rockbridge, as well as unpaid attorney's fees in the amount of $56,425.21.[230] US Acquisition was later substituted for the FDIC as the party to Tabas Freedman's action against FDIC when it acquired the loan at an auction sale.[231] The court enforced the charging lien against US Acquisition, and US Acquisition appealed.[232]

On appeal, "US Acquisition argued that because Tabas Freedman did not record the charging lien," which was in effect an interest in the collateral aircraft, with the FAA, "the lien was not perfected and, therefore, invalid."[233] However, Tabas Freedman argued that because it put US Acquisition on notice of the lien, which is usually the method used to perfect a charging lien, that the lien was perfected and enforceable against the aircraft.[234] The court held that although a charging lien usually only requires timely notice, the charging lien in this case is different because it attached to the actual aircraft.[235] Therefore, the court held that in order for Tabas Freedman to have perfected its lien on the aircraft, its interest in the aircraft must have been filed with the FAA in order "to protect any third parties from subsequently purchasing an interest in the aircraft which inaccurately appears to have free and clear title."[236] Because Tabas Freedman failed to file its interest with the FAA, US Acquisition purchased

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227. *Id.* A writ of replevin is a writ "authorizing the retaking of personal property wrongfully taken or detained." BLACK'S LAW DICTIONARY 1413 (9th ed. 2009).

228. *US Acquisition, L.L.C.*, 87 So. 3d at 1231.

229. *Id.*

230. *Id.* at 1231-32 (citing Leiby Taylor Stearns Linkhorst & Roberts, P.A. v. Wedgewood Air Conditioning, Inc., 801 So. 2d 127, 128 (Fla. Dist. Ct. App. 2001)).

231. *Id.* at 1231.

232. *Id.*

233. *Id.* at 1232.

234. *Id.* at 1231-32.

235. *Id.*

236. *Id.* at 1233.

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the loan to the aircraft without notice that a lien was attached.[237] So, pursuant to § 44108, because Tabas Freedman failed to file its interest in the aircraft at the FAA, and because US Acquisition was a third party who lacked actual knowledge of Tabas Freedman's competing interest in the aircraft, Tabas Freedman had no valid, perfected security interest in the aircraft and, therefore, no claim on the aircraft.[238]

However, likewise as in *Starcher*, although *US Acquisitions, L.L.C.* exemplifies *Philko Aviation*'s applicability when addressing a civil aircraft perfection and priority issue, it does not address the applicability of *Philko Aviation* in an aircraft perfection case that involves an international interest. In fact, in all of the cases that have been heard since the implementation of the Cape Town Treaty in March of 2006, there has not been an example of a court applying *Philko Aviation* to a case involving an international interest in an aircraft that would be covered by the treaty.[239]

Although the case in *US Acquisition, L.L.C.* did not involve an international interest, the court did find that the reasons for considering "actual knowledge" did still exist. The court determined that, pursuant to federal law, a lien attached to an aircraft should be recorded with the FAA in order to protect third parties from subsequently acquiring an interest in an aircraft that does not have free and clear title.[240] The court stated, "US Acquisition purchased the loan to the aircraft without notice, actual or constructive, that a lien was attached by Tabas Freedman. This is the exact situation which recordation would prevent, thereby shifting responsibility to the transferee to diligently search the FAA's registry before obtaining interest in the aircraft."[241] This holding suggests that the reasoning for Congress and the Supreme Court's requiring that a conveyance be valid against any party having actual knowledge of the conveyance thereof, until such conveyance is registered, still exists. The relevance of the reasoning behind "actual knowledge" suggests that the consideration of "actual knowledge" may, at least in some cases, be a necessary consideration.

Moreover, the fact that courts have not yet applied *Philko Aviation* to a case involving an international interest in an aircraft does not necessarily mean that courts no longer believe it is applicable to those cases. To date, there are no cases treating *Philko Aviation* negatively when addressing an aircraft perfection issue involving an international interest, it appears that a

237. *Id.*

238. *Id.*

239. *See supra* note 214.

240. *US Acquisition, L.L.C.*, 87 So. 3d at 1233.

241. *Id.*

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case dealing with the issue of the perfection of an international interest in an aircraft has not made it to trial since the implementation of the Cape Town Treaty. However, with the case law that has developed since the Treaty's implementation in March 2006, it appears that *Philko Aviation*'s application has been limited by the Cape Town Treaty as only being applicable in issues of purely civil aircraft interests.

Finally, when courts look at the statutory construction of a statute to determine the particular meaning of that statute, the court takes into consideration the plain language of the statute.[242] Aside from looking at the language of the statue, there is a presumption that the legislature acted intentionally and purposely when it includes language in a statute.[243] Therefore, because Congress chose to include "actual knowledge" in the Transportation Code and because Congress kept "actual knowledge" in the Transportation Code when it made changes to the Transportation Code after the adoption of the Cape Town Treaty, it may be presumed that Congress intended for the "actual knowledge" consideration to still have a role in the priority of security interests in aircraft transactions.[244]

VI. Conclusion

The Cape Town Treaty has "brought about a sea-change in the aircraft industry worldwide."[245] The Cape Town Treaty's creation of the international interest, "change[] of the rules for perfecting priorities and legal right[] in aircraft equipment," and the establishment of the Cape Town International Registry has added a complexity aircraft transactions and financing.[246] In addition to the added complexities, the Cape Town Treaty has left many legal issues that the legal community has just begun to address.[247] Many of the legal issues created have not yet been settled, and

242. Bread Political Action Comm. v. Fed. Election Comm'n, 455 U.S. 577, 580-81 (1982) ("Our analysis of this issue of statutory construction must begin with the language of the statute itself, and absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); *see also Statutory Construction*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/statutory_construction (last visited Jan. 12, 2014).

243. *Id.*

244. *See id.*; Cape Town Treaty Implementation Act of 2004, Pub. L. No. 108-297, 118 Stat. 1095.

245. Maria Gonzalez & Erin Van Laanen, *The Cape Town Convention: Key Issues for the Practitioner*, MCAFEE & TAFT (2013), http://mcafeetaft.com/?t=40&an=19586&format=xml&p=5790.

246. *Id.*

247. *Id.*

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an example of one of the unsettled legal issues is the conflict of priority rules that was created between Transportation Code and the Cape Town Treaty. Although the conflict between the Transportation Code and the Treaty, regarding whether or not “actual knowledge” is still a relevant consideration when determining the priority of security interests in an aircraft object, has not yet been settled either through the courts or Congress, the legislative history of the Treaty and the last-in-time rule appear to have addressed this issue. With certainty, in cases where the Transportation Code and the Cape Town Treaty conflict, the consideration of “actual notice” when determining priority interest in an aircraft object is irrelevant. In these cases, the party who was the first-in-time to file their interest in the aircraft object at the International Registry, regardless of a party’s actual knowledge of a competing interest, has the priority interest in the object. However, in cases where an interest in an aircraft object is purely domestic and not registered with the International Registry, and in other cases where the Transportation Code is not preempted by the Cape Town Treaty, it appears that a party has a valid security interest against all persons having actual knowledge of his or her interest, regardless of whether the interest has been registered.[248] In these instances, and seemingly only in these limited instances, the holding in *Philko Aviation* is still applicable.

Until a case regarding this conflict is brought to the courts or the legislature acts by eliminating the language in § 44108(a)(3), which states that a conveyance is valid against “a person having actual notice of the conveyance, lease, or instrument,”[249] then the uncertainty of the applicability of *Philko Aviation* will remain. Until either Congress or the courts act, practitioners and those who hold interests in aircraft objects should attempt to comply with both the Transportation Code and with the Cape Town Treaty in order to perfect interests in aircraft objects.

Kaitlyn Schrick

248. *See supra* notes 214, 239 and accompanying text.
249. 49 U.S.C. § 44108(a)(3) (2012).

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