Airspace sovereignty in the Chicago Regime: a reality check*

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ABSTRACT
Air service agreements (ASAs) under the 'Chicago Regime' of exchanged traffic rights are coupled with the overarching principle of State sovereignty recognized in Article 1 of the Chicago Convention. The Chicago Convention was written in an era when States were the principal actors in air transport. Faced with economic realities, however, States have allowed airlines to privatize and in turn, cross-border alliances between airlines have prompted States to liberalize their ASAs. This article explores the ways in which the exercise of State sovereignty in airspace has evolved, and examines the Chicago Convention's viability 75 years on.

1. Introduction

The year 2019 marks two major milestones in the historical development of international air law: the centenary of the Paris Convention 1919 and the 75-year anniversary of the Chicago Convention 1944.[1] The commemoration of the Paris and Chicago Conventions is a befitting moment to reflect on State sovereignty in the context of airspace, as recognized originally in Article 1 of the Paris Convention and retained in Article 1 of the Chicago Convention. While the Chicago Convention is the primary source of public international air law, sovereignty is the "legal basis for rule– and policy–making powers in international air transport."[2]

This article will explore how State sovereignty has developed in the context of international civil aviation and examine if, in light of present realities, the Chicago Convention is still fit for purpose. Throughout, the focus will be on the 'Chicago Regime' of exchanged traffic rights, established by Article 6 of the Chicago Convention, which coupled with the overarching Article 1, permits the operation of scheduled international air services solely on the basis of special permission granted by States to access their sovereign airspace. The exchange traffic rights to be utilized by designated air carriers is secured using air service agreements (ASAs).

While 'sovereignty' is recognized in Article 1 of the Chicago Convention, the Convention was drafted in a time when, in most parts of the world, States were the only actors in air transport. So-called 'flag carriers' were almost exclusively State-owned; thus, a flag carrier was an extension of the State and an important symbol of State sovereignty. In an era when the exercise of 'ultra-sovereignty' thrived, it was *exclusively* States that decided whether to pursue ASAs and as to what they should contain.

States are sovereign, but do they approach sovereignty differently in practice? Can it be said that States are still the masters in international civil aviation? Or do airlines today as global actors play a more important, if indirect role in liberalising inter-State civil aviation relations? What does all this tell us about the current status of State sovereignty in international air law?

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[1] *Convention portant réglementation de la navigation aérienne* (Convention Relating to the Regulation of Aerial Navigation) ('Paris Convention'), reproduced in 11 LNTS 173; International Civil Aviation Organization (ICAO), Doc. 7300, 'Convention on International Civil Aviation 1944' ('Chicago Convention').
[2] Pablo Mendes de Leon, 'The Dynamics of Sovereignty and jurisdiction in International Aviation Law', in *State, Sovereignty, and International Governance,* ed. Gerard Kreijen (OUP, 2002) 488.

This article identifies two significant 'realities,' which taken together demand reflection on the exercise of State sovereignty and, by association, the Chicago Regime of exchanged traffic rights.

2. Airspace sovereignty

The Paris and Chicago Conventions were drafted in eras which echoed entirely the Westphalian, territorial notions of State sovereignty.[3] The Westphalian order places

> "emphasis on *territory* [which] may be evidence for a changing conception of the State from rule over people to rule over *territory*, but [also noting that this] is hardly a definitive indication of sovereign statehood."[4] (*emphasis added*)

Both conventions begin by recognising airspace sovereignty. While State sovereignty is a fundamental principle of international law, airspace sovereignty shares legal status with territorial sovereignty.

Article 1 of the Chicago Convention provides: "The High Contracting Parties recognize that every State has complete and exclusive sovereignty over the airspace above its territory."[5]

For the purpose of clarifying what is sovereign airspace, Article 2 defines territory as "the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State." Thus, a sovereign State is *recognized* as having exclusive 'control' of the airspace over its territory (land) and the territorial sea (waters).[6] A 'freedom of innocent passage' is granted to seafarers in territorial seas, however, this freedom is not applied to law of international flight.[7]

At first glance, the construct of 'airspace sovereignty' infers a post-war connotation of State sovereignty that is 'ultimate', to be interpreted in light of the balance of powers in 1919 and 1944.[8] Without a doubt, "sovereignty in aviation has a relatively strong military background," which "plays a central role in aviation."[9] Indeed, States' post–war "reliance on sovereignty served as a tool to safeguard national airspace and security."[10]

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[3] *See* Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton University Press, 2008).
[4] Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty', 21(3) *The International History Review* 569 (1999).
[5] ICAO, *supra* n. 1.
[6] Art. 3 of the 1982 UN Convention on the Law of the Sea (UNCLOS) extends the coastal state's exclusive control into the territorial waters to a total distance of 12 miles from the low watermark. *See* Paul B. Larsen, Joseph Sweeney & John Gillick, *Aviation Law: Cases Laws and Related Sources* (2d ed. Martinus Nijhoff Publishers, 2012) Ch 1.
[7] *See* Art. 3 of UNCLOS, 'Innocent Passage in the Territorial Sea'
[8] *See* Gbenga Oduntan, *Sovereignty and Jurisdiction in the Airspace and the Outer Space: Legal Criteria for Spatial Delimitation* (Routledge, 2012) 205–206.
[9] Mendes de Leon, *supra* n. 2, at 483.
[10] Ibid, at 484.

Although Grotius, intellectual progenitor in the 17th Century, "liked to identify sovereignty with freedom,"[11] in modern times this 'freedom' for States and their governments is seriously limited. As Ryngaert puts it, the

> "carving up of the world, as notably sanctioned by the Peace of Westphalia (1658), is historically contingent and politically constructed, and may therefore be subject to change in light of contemporary understandings of international law and society."[12]

Postmodern international relations, particularly trade relations, have evolved well beyond Westphalia. Held et al. contend that "the practice, as opposed to the doctrine, of sovereign statehood has always readily adapted to changing historical realities."[13]

According to Sir Robert Jennings, governments:

> "nowadays have very seriously limited choices in the exercise of their supposedly sovereign competence, because their theoretically important areas for decisions are much restricted and hemmed in by treaties, by customary international law, and by the consequences, and especially the *economic consequences*, of the sheer interdependence of all sovereign States of today." (*emphasis added*)[14]

One important area for States as they exercise truly 'sovereign competence' is the exchange of air traffic rights. Article 6 of the Chicago Convention provides:

> "No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization."[15]

In the absence of some express agreement between two or more States that grants the necessary permissions to air carriers registered in those States, scheduled international air services may not operate. Article 6 certainly reflects the protective tendencies of States after the Second World War, which were the driving forces of its formulation. While State protectionism intensified in the years immediately following the war, Goedhuis later commented: "In the last few years, the idea has been gaining ground that no healthy development of world air transport is possible on the basis of absolute sovereignty."[16]

This idea is mirrored in two multilateral agreements that were proposed in Chicago in 1944: (1) the International Air Transport Agreement, and (2) the International Air Services Transit

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[11] Robert Jennings, 'Sovereignty and International Law', in *State, Sovereignty, and International Governance,* ed. Gerard Kreijen (OUP, 2002) 29. *See also* Hugo Grotius, *Mare liberum, 1609–2009* (Robert Feenstra Brill, 2009).

[12] Cedric Ryngaert, 'Jurisdiction', (Utrecht University, 2014) http://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/Jurisdiction.pdf. *See also* Cedric Ryngaert, *Jurisdiction in International Law* (OUP, 2008).

[13] David Held, Anthony McGrew, David Goldbaltt & Jonathan Perraton, *Global Transformations: Politics, Economics, and Culture* (Polity Press, 1999), 9. *See also* Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (University of Pennsylvania Press, 1996).

[14] Jennings, *supra* n. 11, at 31.

[15] ICAO, *supra* n. 1. In case of the United Kingdom's exit from the EU ('Brexit'), authorizations must be in place to ensure air services to and from the UK will continue.

[16] D. Goedhuis, 'The Air Sovereignty Concept and United States Influence on its Future Development' 22 J. *Air L. & Com.* (1955) 209, 216.

Agreement. The first agreement entered into force with 17 signatories including the US, though the US and others eventually withdrew; today there are only 11 State ratifications and accessions. Article 1 of the International Air Transport Agreement established five 'freedoms of the air'.[17] Otherwise it is fair to say that this agreement is of relatively little importance today. The second agreement, the International Air Services Transit Agreement,[18] or 'Two Freedoms Agreement' named after the first two freedoms of the air, provides for exchange of rights of overflight and non–traffic stop for scheduled air services among its contracting States. At the time of writing, this Agreement has 133 State Parties.[19] While the Transit Agreement grants only rights of overflight and for technical landings rather than commercial rights, some of the States with the largest airspaces, e.g. Russian Federation, China, Canada, Brazil and Indonesia, are not parties to it. Still, it represents a crucial step in securing fundamental transit rights for a great number of air carriers; and it is a success for multilateralism.

At the very first meeting of the permanent International Civil Aviation Organization (ICAO) in May 1947, the Assembly resolved to convene

> "a commission, open to all Member States … for the purpose of developing and submitting for consideration of Member States an agreement respecting the exchange of commercial rights in civil air transport."[20]

The Geneva Commission met in November 1947, and laboured to find common ground for a new multilateral agreement. The attending 30 States disagreed over capacity and fifth freedom rights, which meant no consensus was reached in the end. The Geneva Commission conference "took place in a time of growing West-East tension-which in general led to the fetish of an ultra-sovereignty."[21] It is unsurprising that the Commission resolved that no obligations should be imposed on States as they, and they alone, held exclusive competence to enter into route agreements. In response to the resolution, Goedhuis comments: "It is difficult to imagine a greater demonstration of separateness, of unbridled self-assertion, of a narrower nationalistic approach."[22] He goes on to identify the source of this guarded approach taken by States at the time:

> "But the specific reason for its failure has to be sought in the great majority of states being concerned only with the *short term economic interests* of their own aviation services. It was believed that these interests could be safeguarded only by rules which could be invoked against any competition of foreign airlines. This was the reason which led the delegates to indulge in a concept of sovereignty which had originally been considered *atavistic*." (*emphasis added*)[23]

In the following decades,

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[17] *See* ICAO, 'Freedoms of the Air', www.icao.int/Pages/freedomsAir.aspx.
[18] ICAO, Doc. 7500, *Administrative package for acceptance of the international air services transit agreement* (1944), www.icao.int/secretariat/legal/Administrative%20Packages/transit_en.pdf; *See also* ICAO, Doc. 9587 www.icao.int/sustainability/pages/doc9587.aspx.
[19] ICAO, 'International Air Services Transit Agreement', https://www.icao.int/secretariat/legal/List%20of%20Parties/Transit_EN.pdf.
[20] Robert J. G. McClurkin, 'The Geneva Commission on a Multilateral Air Transport Agreement', 15(1) *Journal of Air Law & Commerce* 39 (1948).
[21] Goedhuis, *supra* n. 16, at 214.
[22] *Ibid.*
[23] *Ibid*, at 215.

> "bilateral negotiations and the agreements they produced emerged as the preferred method for States to exchange commercial rights for air services and to agree on ways of regulating capacity, tariffs and other matters."[24]

In fact, one of the first bilateral ASAs was agreed by the UK and US already in 1946: the Bermuda Agreement (later referred to as 'Bermuda I'). The US used the 'ground-breaking' Bermuda I as a blueprint for subsequent agreements with other States, as detailed in section 3.3 below.[25]

Conventional bilateral ASAs set out the terms and conditions of airspace access and use, including traffic rights on the basis of the freedoms of the air, capacity, designation, ownership and control requirements, tariffs, taxes and charges. It is estimated that over 3,000 bilateral ASAs are currently in force. Thus, bilateral ASAs "constitute the largest volume of international air transport regulatory documents."[26]

3. Realities

3.1 The dynamic development of airspace sovereignty

Prof. Pablo Mendes de Leon posits:

> "Sovereignty of a State is subject to a dynamic evolution in the exercise of that sovereignty. In international aviation, the exercise of sovereignty is qualified and 'requalified' according to trends pertaining to arrangements within a State, that is with autonomous entities, as well as between States and international or supranational organizations, *and is also subject to liberalization of air services and privatization of providers of such services*." (*emphasis added*)[27]

Picking up on the final two aspects of Mendes de Leon's assessment, this author argues that owing to 'realities' reflected in the evolution of airlines and practice of States, State sovereignty has developed over time. Can it be argued that there is disparity in the context of international civil aviation between the notion of State sovereignty in 1944 as recognized in the Chicago Convention and the form of 'sovereignty' exercised by States today? States have allowed flag carriers to privatize. States now also approach the exchange of traffic rights far more liberally. The next section will consider the evolution of airlines first, and then the practice of States with respect to ASAs.

3.2 Economic reality

The first reality is economic. Modern airlines are global actors; they are no longer 'mere' extensions of States. Most formerly State-owned airlines have been privatized, after which some have even gone bankrupt. National flag carriers have merged. New private airlines have emerged as exemplified by the following transactions.

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[24] ICAO, Doc. 9626, 'Part 2 – Introduction of Bilateral Regulation' in *Manual on the Regulation of International Air Transport* (2d ed, 2004), www.icao.int/Meetings/atconf6/Documents/Doc%209626_en.pdf.
[25] Organisation for Economic Co-operation and Development (OECD), *Air Service Liberalisation and Airline Alliances* (International Transport Forum, 2014) 25.
[26] *Ibid.*
[27] Mendes de Leon, *supra* n. 2, at 486.

In Europe, developments have been facilitated by the European Union (EU) liberalisation process that created a single market for air transport.[28] Take British Airways (BA) for example. BA was formed in 1974 following a consolidation merger, and was privatized in 1987. Despite its privatisation and now-multinational character owing to mixed national and international ownership, BA remains the UK's national flag carrier. Iberia (IB), the Spanish flag carrier founded in 1927 and privatized in 2001, merged with BA in 2010. A new multinational holding company based in Spain, known as International Airlines Group (IAG), was formed in 2011. IAG owns BA and IB, although the airlines continue to operate as separate carriers with aircraft registered in the UK and Spain, respectively. IAG absorbed British Midland International (BMI) in 2012, and acquired Spanish low-cost carrier Vueling in 2013, and Irish flag carrier Aer Lingus in 2015.

So, the UK, Spain and Ireland 'allowed' their State-owned airlines to be privatized or semi-privatized. Then they allowed their three national flag carriers to merge. This example demonstrates that just as once State-owned airlines have privatized, so too has the legal relevance of the State seemed to weaken. While the political relevance of the flag may continue to play great importance for these airlines in terms of reputation and prestige: ultimately, they are no longer extensions of their States.

Another example is the merger of Air France (AF) and KLM Royal Dutch Airlines in 2004. Both airlines were partly State-owned at the time. While it may be that France and The Netherlands are two nations with quite different cultures, merging the two States' flag carriers made good economic sense. This shows that States are prepared to relax the notion of their sovereignty, in this case pooling sovereignty. Faced with economic realities, States conclude that a merger of two flag carriers is better than the alternative: having no flag carrier at all.

That is precisely what has happened with flag carriers elsewhere in Europe. The Belgian flag carrier SABENA was declared bankrupt in 2001, Swissair in 2002, the 'old' Alitalia (Linee Aeree Italiane) and flyLAL-Lithuanian Airlines in 2009, MALÉV Hungarian Airlines in 2012, and Cyprus Airways in 2015.

In 1944, and in the many decades to follow until SABENA's demise, it would have been unthinkable that a fully or partly State-owned airline would go bankrupt. Such an act would have been perceived as tantamount to State bankruptcy. So, presumably States would do more to protect and, if required, to save their flag carriers.

Following deregulation of the US airlines in 1978, "strong market forces gave way to consolidation by way of numerous mergers, bankruptcies and successive acquisitions by the dominant carriers."[29] Pan American World Airways (Pan Am) survived deregulation. While it was the largest US airline from 1927 until its collapse in 1991, Pan Am was neither State-owned nor a flag carrier; the US has never had an official flag carrier.

A group of Belgian investors, which included some State investment, founded SN Brussels Airlines in 2002, which merged with Virgin Express to form Brussels Airlines (Brussels) in

[28] The third liberalisation package established a single EU air transport market in 1993.
[29] Steven Truxal, *Competition and Regulation in the Airline Industry: Puppets in Chaos* (Routledge 2012) 18.

2006. Brussels, Belgium's new flag carrier, commenced operations in 2007. Lufthansa purchased 45 percent of the airline's stock in 2009, and by 2017 had acquired full ownership.

The Italian flag carrier, Alitalia, was reincarnated following liquidation of 'old' Alitalia. The 'new' Alitalia was established in 2009 when *Compagnia Aerea Italiana* acquired the brand, call sign and assets from the 'old' Alitalia. The 'new' Alitalia (now *Società Aerea Italiana*), which is 49 percent owned by Etihad Airways (UAE), went into administration in 2017. Now the airline is up for sale. At the time of writing there is speculation that the Italian State may again seek State-ownership but only up to 15 percent, on the basis that this would be consistent with the French State's ownership of Air France, a long-standing partner of Alitalia.

Following Swissair's bankruptcy, Swiss International Airlines (Swiss) was formed in 2002 and was initially majority State-owned, that is by the Swiss Confederation, cantons and municipalities. Once the airline recovered, and after unsuccessful attempts at partnering with Air France-KLM then BA, the management looked to attach the airline to a different airline group. Around the same time, the Austrian State decided to privatize Austrian Airlines, more specifically to sell it to a foreign airline. Lufthansa Group completed its takeover over Swiss in 2007, and purchased Austrian in 2009. Lufthansa German Airlines owns Lufthansa Group, which include Swiss, Austrian, Brussels Airlines, and others in its portfolio of subsidiaries. In 1944, it would probably have been unimaginable that a State would allow its flag carrier to fail, only to let it rise from the ashes with State investment before selling it to Lufthansa.[30]

New private players have also come to the market, such as entrepreneurial carriers, e.g. Virgin Atlantic, and low-cost carriers, e.g. Southwest, Ryanair, EasyJet, AirAsia, JetStar and Norwegian. These new airlines have been private from their very beginnings. Completely detached from the State, they are driven by the bottom line: profit. In addition, the Malaysia-based AirAsia Group has been successful in winning approval from several States in Asia

> "for the establishment of common branded joint venture low-cost airlines, where management and majority shareholdings were local, whereas operations and marketing were largely integrated with the foreign investor."[31]

AirAsia has pioneered a new low-cost model with local airline 'branches' in different States in a region otherwise dominated by State-owned airlines.

Around the world, airlines have devised strategic cross-border alliances to strengthen their business positions including overcoming barriers to foreign markets.[32] Cooperative manoeuvring between airlines has led to code-sharing and block space agreements, as well as global airline alliances such as the 28-member-strong Star Alliance.

The modern-day realities facing the global civil aviation sector challenge 'sovereignty' as recognized in the Chicago Convention. The realities are manifested in the evolution of airlines in an increasingly globalized and highly competitive market environment. The present realities stand in stark contrast to the commercial situation in 1944.

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[30] Austrian Airlines was loss-making but not insolvent.
[31] Jan Walulik, 'At the core of airline foreign investment restrictions: A study of 121 countries', 49 *Transport Policy* (2016) 234, 240.
[32] *See* Truxal, *supra* n. 29, Ch. 5.

However, not all has changed since the 1940s. Newly independent States have emerged and have placed great importance on the 'need' quickly to establish national flag carriers, e.g. Croatia (Croatia Airlines) and Serbia (Air Serbia). Thus, some States still do feel it necessary to have a national flag carrier serving as a symbol of State sovereignty. History has shown that profitability does not always appear to be the main objective of State-owned flag carriers. Nonetheless, the economic realities explained above (privatisations, mergers and/or bankruptcies) may soon face these new States as their national airlines compete in the highly competitive, global market for air services.

Other States have taken the business decision to establish and expand State-owned airlines for commercial reasons, e.g. Qatar Airways, Emirates, Etihad Airways and Turkish Airlines. Time will tell if Qatar, the UAE and Turkey will at any cost continue to protect, even save these airlines from economic challenges due to the perceived importance of the airlines as symbols of State sovereignty.

3.3 Liberalisation of ASAs

The second reality is that States liberalize ASAs and implement new 'open skies' agreements (OSAs). States, which are parties to the Chicago Convention, "are 'sovereign' in air transport matters."[33] But over time, States have responded to the demands of national airlines, particularly those in cross-border airline alliances, to relax restrictive ASAs. Economic consequences increasingly affect States' decision-making. States have evolved as they become more interconnected, and as they integrate in the global economy. Exchanging traffic rights translates to sharing aviation markets and jurisdiction. Thus, States exercise a different, modernized form of sovereignty today that is based on joint authority. State sovereignty, in the context of international civil aviation, has developed as States have liberalized ASAs.

Once the Chicago Regime was established, States agreed initial Bermuda I-style ASAs to grant authorisations necessary for national carriers to operate scheduled international air services. What followed were two waves of ASAs, which are characterized by the approaches taken by States: (1) protective (conventional ASAs), (2) and liberal (less restrictive ASAs and OSAs).[34] An OECD study published in 2014 found that

> "restrictive bilateral air service agreements between countries stifle air travel, tourism and business and, consequently, economic growth and job creation."[35]

OSAs aim to achieve opposite results.

Protectionism dominated the first wave of ASAs. Conventional bilateral ASAs

> "tended to be lengthy documents which regulated every aspect of international air service, including number of carriers, seat capacity, routes, fares and in a few cases, city ticket offices and even aspects of service quality such as sandwich size."[36]

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[33] Mendes de Leon, *supra* n. 2, at 488.
[34] *See* P.P.C. Haanappel, *The Law and Policy of Air Space and Outer Space – A Comparative Approach* (The Hague: Kluwer Law International, 2003) 114.
[35] OECD, *supra* n. 25, at 11.
[36] *Ibid*, at 13.

For instance, in 1977, with a view to levelling the playing field on the transatlantic market, the UK unilaterally terminated the Bermuda I Agreement with the US. The UK subsequently led negotiations for a new agreement with the US, which resulted in the Bermuda II Agreement. In its original form, Bermuda II was far more restrictive in regulating traffic between London (Heathrow and Gatwick airports) and US 'gateway cities.'

Deregulation of the US air transport market in 1978, and the US International Air Service and Competition Act, paved the way for the next wave of liberalized ASAs: so-called 'open skies' agreements (OSA). The very first OSA, between the US and The Netherlands, granted reciprocal, unlimited first through sixth freedoms. This was a major development not least in pioneering a new type of agreement, but also to the extent that it provided a cooperative yet competitive inter-State milieu in which a close joint venture between Northwest Airlines and KLM could flourish. Guided by the intent of the OSA, and in spite of resistance from other US carriers, the US Department of Transportation granted antitrust immunity to the airlines.

> "The Dutch treaty had broken down opposition to open skies and had served as a 'laboratory' for the world to see how open skies, and for that matter, antitrust immunity would work."[37]

Cooperative manoeuvring between United and Lufthansa prompted the US and Germany to liberalize their ASA to provide first through sixth freedoms in 1996. An alliance between Delta and Air France in 1999 delivered the an OSA between the US and France in 2001. US antitrust immunities were granted in both cases.

Liberalisation of ASAs, including replacing existing agreements with OSAs, is thus a result of increased airline cooperation through joint ventures. Cross-Border alliances, formed to get around the restrictions of nationality, ownership and control clauses, provoked States to open up their sovereign airspace to foreign carriers. The speed with which liberalization has progressed since the very first OSA in 1992, can also be attributed to autonomous actions of air carriers.

It is noted that most OSAs in force today have retained provisions on airline authorisations. Walulik explains,

> "International activity of an air transport enterprise is subject not only to its certification and licensing in the home state, but also to its designation by the home state for international services, and its authorization by the accepting state."[38]

OSAs still contain express nationality requirements for airlines, or refer to domestic rules on ownership and control. Yet there is uncertainty over 'nationality' as it lacks universal definition in international civil aviation; domestic law may for instance decide that a resident is a 'national.'[39]And ownership and control are subject to different interpretations by States. While some States have relaxed their rules, reform of ownership and control restrictions has been slow and patchy, the main justification for which may be the fear that national carriers will not survive liberalisation of ownership rules.[40] Or, as Chang et al. argue:

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[37] OECD, *supra* n.25, at 24.
[38] Walulik, *supra* n. 31, at 235.
[39] *Ibid,* at 238.
[40] *See* Isabelle Lelieur, *Law and Policy of Substantial Ownership and Effective Control of Airlines* (Routledge, 2003).

> "Governments may hold the view that they cannot change their ownership rules because they could not be sure that an airline in foreign hands would serve the important purposes and interests normally associated with a flag carrier."[41]

In the end, as Walulik puts it:

> "For almost four decades economic liberalization has proliferated across aviation policies worldwide, although with uneven results. The reform encompassed deregulation of airline services in the national forum and later in the international market. Yet, studies show, that at the same time the deregulation of airline ownership and control conditions in international relations was rather modest."[42]

There has also been a rise of plurilateral and multilateral agreements in air transport, which "may also require a more liberalised approach to cross-border investment and the relaxation of certain national constraints on international competition."[43] The plurilateral US–EU Air Transport Agreement was signed in 2007, and amended in 2010. The agreement liberalized the US–EU transatlantic market insofar as it provides both US and EU carriers with third, fourth and fifth freedoms for passenger services and seventh freedom rights for all–cargo services. However, it does not fully liberalize the market as the agreement retains 'substantial ownership and effective control' provisions in Article 4.[44] The Canada–EU Air Transport Agreement, signed in 2009, removes ownership and control restrictions altogether to create a fully 'Open Aviation Area'. At the time, the European Commission heralded it as "the most ambitious air transport agreement between the EU and a major partner in the world."[45] The aviation agreement between the EU and Qatar, which was initialled in 2019, goes beyond traffic rights to establish a robust set of rules and high standards and greater transparency. When it enters into force, the EU–Qatar Aviation Agreement will establish a "new global benchmark by committing to strong, fair competition mechanisms, and including provisions not normally covered by bilateral air transport agreements, such as social or environmental matters."[46] It is anticipated that this new type of agreement could constitute the model for future generations of ASAs.

In terms of multilateral OSAs, a group of countries including the US, Brunei Darussalam, Chile, New Zealand and Singapore are parties to the Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT) agreement, which entered into force in 2001.[47]

In sum, the major shift away from formerly restrictive arrangements between States towards more liberalized ASAs and 'open skies' agreements, further evidences that States have evolved in their exercise of sovereignty. The relaxation of restrictions on market access,

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[41] Yu-Chun Chang, George Williams & Chia-Jui Hsu, 'The evolution of airline ownership and control provisions' 10 Journal of Air Transport Management (2004) 161, 169
[42] Walulik, *supra* n. 31, at 240.
[43] Chang et al., *supra* n. 41, at 170.
[44] *See* U.S. Department of State, 'Air Transport Agreements Between the U.S. and the European Union', www.state.gov/e/eb/rls/othr/ata/e/eu/.
[45] European Commission, 'International Aviation: Canada', http://ec.europa.eu/transport/modes/air/international_aviation/country_index/canada_en.htm.
[46] European Commission, 'EU and Qatar reach aviation agreement', https://ec.europa.eu/transport/modes/air/news/2019-03-04-eu-and-qatar-reach-aviation-agreement_en.
[47] U.S. Department of Transportation, 'Multilateral Agreement on the Liberalization of International Air Transport', https://www.transportation.gov/policy/aviation-policy/multilateral-agreement-liberalization-international-air-transport

particularly to the extent that OSAs allow, shows the present reality is economics-driven. It also shows that States now exercise a different form of sovereignty as they converge on more liberal positions, while they "exercise of joint but at the same time fragmented authority."[48]

Jayasuriya suggests that the notion of sovereignty should be

> "unbundled from its link with territory [because] models of sovereignty are embedded in specific social and economic structures and as these structures change, so does the form of sovereignty."[49]

Van Staden and Vollaard put forward that territorial sovereignty can be transformed into functional sovereignty.[50]

While it is true that in times of peace and economic growth States have pooled national competencies, airspace is in principle – and ultimately – 'tethered' to a State's territory and therefore forms part of its territorial sovereignty, thanks to the Paris and Chicago Conventions.[51] Ultimately, States retain right to withhold, revoke, or suspend air service authorisations, and impose conditions on carriers that are not owned and controlled by the designating State or nationals of that State. In reality, however, as global economics have modernized and evolved, so too has the form of sovereignty States exercise with respect to international civil aviation.

4. Conclusions

Airlines have evolved. In spite of their historical roots, they are no longer just extensions of States. Start-up airlines have also been established, independently of States. Actions which were inconceivable in 1944 are now everyday realities. Formerly State-owned air carriers have been privatized; they have evolved to become non-State, global actors. The net sum of this 'denationalisation' is increased autonomy for airlines.

While the Chicago Convention was based on the Westphalian notion of sovereignty, in reality States exercise a modernized form of sovereignty that is qualified by liberalisation. Owing to deepened economic integration in today's globalized economy, States are steered by economic consequences and now tend to take a more liberal approach to exchanging traffic rights. This is evidenced by widespread abandonment of formerly restrictive ASAs. In their place, States have agreed to liberalized arrangements such as OSAs. Thus, States use sovereignty as a tool to open up their aviation markets. The cooperative spirit of States, leading in some instances to what would have been considered as 'unholy alliances' in 1944, is predominantly driven by airlines as they establish cross-border alliances to overcome a

[48] Alfred Van Staden and Hans Vollaard, 'The Erosion of State Sovereignty: Towards a Post–Territorial World?', in *State, Sovereignty, and International Governance,* ed. Gerard Kreijen (OUP, 2002) 180. EU-US agreement; open skies generally? *See also* World Bank, 'Open Skies for Africa – Implementing the Yamoussoukro Decision', www.worldbank.org/en/topic/transport/publication/open-skies-for-africa.
[49] Kanishka Jayasuriya, 'Globalization, Law and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance' 6(2) *Indiana Journal of Global Legal Studies* (1999) 431–432.
[50] Van Staden and Vollaard, *supra* n. 47, at 180.
[51] Steven Truxal, *Economic and Environmental Regulation of International Aviation* (Routledge, 2017) 142.

difficult regulatory climate that generally prohibits cross-border mergers, and restricts foreign ownership and cabotage.

In light of these conclusions the question arises: is the Chicago Convention still fit for purpose?

First, while it is true that the Chicago Convention was written in a different era of 'sovereignty,' on the basis of the realities presented in this article – reflecting on the evolution of airlines and the practice of States as they exercise sovereignty with respect to ASAs – it should be concluded that the Convention has not been an obstacle to the development of international civil aviation.

Second, is it desirable to amend the Chicago Convention to more explicitly reflect present realities? Possibly, in the quest for legal clarity. But opening the Convention for re-negotiation might open a Pandora's Box of troubles when countless States begin tabling all sorts of proposals, for 'clarifications.' And again, the resilient 75-year old Convention has not been a hinderance. So, if it isn't broken, don't fix it.

Third, is it at all desirable let alone possible to remove the overarching principle of State sovereignty from the Chicago Convention? No. At the end of the day, States remain the accountable actors in the world order, not global economic actors.