RESTORING GLOBAL AVIATION'S "COSMOPOLITAN *MENTALITÉ*"

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Abstract

For over six decades, the central juristic premise of the global regulatory regime for international civil aviation has been that citizenship defines ownership; the *mentalité*—the determinative category of thought—has been that nationality organizes air commerce. Through this conflation of commercial and national affiliation, there are *American* carriers, *British* carriers, *Canadian* carriers—but not a single authentically transnational carrier. Because nationality supervenes, there is no *international airline* as such; the concept of a mul-

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tinational enterprise remains unknown in air transport, even in the 21st century.

In this article, we generate a fresh context within which to reevaluate the issue of airline nationality by first illuminating the implicit cosmopolitanism of the international aviation industry and of its (potential) global regulatory structure by recollecting the origins of the current order and by positioning the industry within the conceptual development of the notion of cosmopolitanism itself. To accomplish this, we use the recently-signed air services agreement between Canada and the European Union to project what we will call a "cosmopolitan *mentalité*" that can radically transform air transport law and regulation for the future. In particular, we will explore how a doctrine of "citizenship purity" has had a stranglehold on the natural cosmopolitanism of the aviation industry virtually since its establishment, and how the Canada/EU agreement, which contains features (or at least prospective features) excluded from all prior bilateral air services agreements through which countries exchange air route permissions, models a way past the industry's inheritance of regulatory chauvinism.

I. Introduction: Aviation's Regulatory Chauvinism

In his most illustrious work, *Considerations on France*, the famed eighteenth- century diplomat and counterrevolutionary writer Joseph de Maistre observed that, "[i]n my lifetime I have seen Frenchmen, Italians, Russians, etc.; thanks to Montesquieu, I even know that *one can be Persian*. But as for *man*, I declare that I have never in my life met him; if he exists, he is unknown to me."[1] This uncompromising observation, directed against the Enlightenment's "cosmopolitan" conception of a universal humanity, a single genus of "man," could be readily adapted and applied today, centuries later, to the nationality-obsessed commercial and regulatory environment that governs international civil aviation. This industry's central juristic premise over the past six decades has been that citizenship defines ownership; the *mentalité*—the determinative category of thought—has been that nationality organizes air commerce. One need only glance at the tails of the aircrafts in line at the gates of any major international airport to see how the flags and symbols of their home states inform their commercial identity. The very names of the oldest airlines in the world—Air Canada, Air France, American Airlines, British Airways—conflate a commercial and national affiliation. There are, it would seem, *American* carriers, *British* carriers, and *Canadian* carriers, but not a single authentically transnational carrier. Given that nationality supervenes, there is no *international airline* as such; the concept of a mul-

[1] Joseph de Maistre, Considerations on France 53 (Richard A. Lebrun ed. & trans., Cambridge Univ. Press 1994) (1797).

tinational enterprise remains unknown in air transport, even in the twenty-first century.

This may all seem familiar and the perspectives perfectly accessible. What is familiar, however, can sometimes be provocative in an unfamiliar context, and it is our intention in this article to generate a fresh context within which to reevaluate the issue of airline nationality. Striking against the nationalistic order that grips civil aviation, we use the recently-signed air services agreement between Canada and the European Union (EU)[2] to project what we will call a "cosmopolitan *mentalité*" that can radically transform air transport law and regulation in the future. In particular, we will explore how a doctrine of "citizenship purity" has had a stranglehold on the natural cosmopolitanism of the aviation industry virtually since its establishment, and how the Canada/EU agreement, which contains features (or at least prospective features) excluded from all prior bilateral air services agreements through which countries exchange air route permissions, models a way past the industry's inheritance of regulatory chauvinism.

In Part II, we illuminate the implicit cosmopolitanism of the international aviation industry and of its (potential) global regulatory structure, by recollecting the origins of the current order and by positioning the industry within the conceptual development of the notion of cosmopolitanism itself.[3] We then juxtapose this latent cosmopolitanism with the nationalistic legal order for civil aviation which evolved in its stead. In Part III, we expose some of the consequences of this nationalistic order for the commercial operations of international civil aviation.[4] In Part IV, we trace a discernible progression in Canada's international air transport policy from a traditional reflexive nationalism to an emerging cosmopolitanism—in effect, a cosmopolitan *mentalité*—that is starting to inform how the Canadian aviation establishment imagines the future regulation of international aviation.[5] We note the irony that it is Canada, not the United States—in recent years the architect of a somewhat more liberal policy for international air transport (better known under the sobriquet

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[2] While some scholars have labored in the past to keep the European Union conceptually separate from the European Community, with the former referring to a geographic and political territory and the latter designating a source of law and policy, *see, e.g.*, Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT'L L.J. 173, 189 n.47 (2005), the December 1, 2009 implementation of the Treaty of Lisbon, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon], abolished this distinction by giving single legal personality to the EU. *See generally* Consolidated Version of the Treaty on the Functioning of the European Union, Sep. 5, 2008, 2008 O.J. (C 115) 47 (replacing the Treaty Establishing the European Community).

[3] *See infra* notes 7-70 and accompanying text.

[4] *See infra* notes 72-105 and accompanying text.

[5] *See infra* notes 106-139 and accompanying text.

"open skies")—which has unexpectedly seized a pioneering role in eliminating the nationalistic biases that have hampered the authentic globalization of the airline industry. Finally, in Part V, we look to Canada's landmark aviation agreement with the European Union as a model for a new cosmopolitan ethos in international aviation regulation, displacing nationality as the ordering principle for the industry's commercial identity.[6] At the same time, we show how a rising epistemic community of aviation industry stakeholders is informing and shaping this bold initiative in law reform.

II. International Civil Aviation's Implicit Cosmopolitanism

When United States President Franklin Delano Roosevelt convened the International Civil Aviation Conference on November 1, 1944, much of the world remained at war. Almost all air carriers serving international routes were state-owned, air travel was perceived as a luxury, passenger jets had not yet been invented, and most transoceanic travel was by ship.[7] Yet despite what we in the twenty-first century may see in hindsight as insurmountable limits to a vision of what international civil aviation would eventually become, namely, one of the most visible service industries in the world and the great "enabler" of globalization, the drafters of the Convention on International Civil Aviation (Chicago Convention)[8] embedded a boldly cosmopolitan *telos* within the Convention's Preamble:

> WHEREAS the future development of international civil aviation can greatly help to create *and preserve friendship and understanding* among the nations and peoples of the world, yet its abuse can become a threat to the general security; and
>
> WHEREAS it is *desirable to avoid friction* and to *promote that cooperation between nations and peoples* upon which the peace of the world depends;
>
> THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that

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[6] *See infra* notes 140-195 and accompanying text.

[7] The authors wish to thank Paul Fitzgerald, Adjunct Professor at the Institute of Air and Space Law of McGill University Faculty of Law, for these insights.

[8] Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (entered into force Apr. 4, 1947) [hereinafter Chicago Convention] (emphasis added). The ninth and latest edition of the quadrilingual text (English, French, Spanish, and Russian), with amendments and annexes, is available from the International Civil Aviation Organization (ICAO). *See* Int'l Civil Aviation Org. [ICAO], *Convention on International Civil Aviation*, ICAO Doc. 7300/9 (9th ed. 2006). As of February 2010, ICAO reported 190 contracting states. *See Status List on Chicago Convention,* ICAO, *available at* http://www.icao.int/icao/en/leb/chicago.pdf.

> international *air transport services may be established on the basis of equality of opportunity and operated soundly and economically*; Have accordingly concluded this Convention to that end.[9]

Yet how much of this codified ethos, this *mentalité*—"that untranslatable French word meaning the way people regard the cosmos, themselves, and one another, and the values according to which they model their behavior toward each other"[10]—is reflected in the contemporary regulatory structure of the world's most cosmopolitan transnational commercial activity, the supply and consumption of international air transport services? Before turning to that question, the answer to which we have clearly signaled in the Introduction, we pause to clarify what we mean when we speak of the Chicago Convention, and civil aviation as a whole, as cosmopolitan. What, in fact, does that word signify?

A. *Clarifying Cosmopolitanism*

It may seem surprising that the term "cosmopolitan" requires any clarification at all, given how commonplace the word is today. A racy "hip" magazine[11] and a sophisticated and seductive cocktail[12] are, for some, just two popular meanings of the word today. For others, the word describes an intangible atmosphere of "world-mindedness," of a liberation from the local, provincial, or even national bias that supposedly characterizes

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[9] Chicago Convention, *supra* note 8, pmbl. (emphasis added).

[10] LAWRENCE STONE, THE PAST AND THE PRESENT REVISITED 383 (2d ed. 1987). Though the term is closely associated with the *Annales* school of historiography, *see* Patrick H. Hutton, *The History of Mentalities: The New Map of Cultural History*, 20 HIST. & THEORY 237, 237-38 (1981), it has found a home in the social sciences as well, being closely associated with the concept of *habitas*, Erkki Kilpinen, *The Habitual Conception of Action and Social Theory*, 173 SEMIOTICA 99, 101 (2009), that is, the "system of lasting, transposable dispositions which, integrating past experiences, functions at every moment as a *matrix of perceptions, appreciations, and actions* and makes possible the achievement of infinitely diversified tasks," PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 82-83 (Richard Nice trans., Cambridge Univ. Press 1977) (1972). Other conceptual analogues include the oft-appropriated German words *weltanschauung* ("worldview") and *zeitgeist* ("spirit of the age"), Susan Reynolds, *Social Mentalities and the Case of Medieval Scepticism*, 1 TRANS. ROYAL HIST. SOC. 21, 21 (6th ser. 1991), though *mentalités* can also mean "the totality of those implicit assumptions which are imposed on us by our environment and which rule our judgments," *id.* (quoting JEAN GUITTON, LE TEMPS ET L'ÉTERNITÉCHEZ PLOTIN ET SAINT AUGUSTIN xii (1933)) (internal quotation marks omitted).

[11] *See generally Cosmopolitan*, *in* BOWLING, BEATNIKS, AND BELL-BOTTOMS: POP CULTURE OF 20TH-CENTURY AMERICA 867, 867 (Sara Pendergast & Tom Pendergast eds., 2002).

[12] *See generally* GARTH FULLER, *The Cosmopolitan*, *in* THE CHICK MAGNET COOKBOOK 154, 154 (2004).

metropolises like New York, Los Angeles, or London.[13] For some, to be a cosmopolitan means to be one "who 'has no national attachments or prejudices,'"[14] and we might very well take that exalted idea of the "cosmopolite" as world citizen to be a good thing, without further inquiry. Yet this overtly positive view of a cosmopolitan actually reveals how far we have travelled from the origins of this concept and even how far we are already removed from its commonplace usage in the early part of the last century. Cosmopolitanism, as a term, in fact has a volatile and (for contemporary observers) rather counterintuitive history.

Before the Chicago Convention was even ratified, the word "cosmopolitan" was experiencing a half-life as part of the lexicon of the Stalinist Soviet Union. The word was used to describe primarily the Jews, a people with no homeland for nearly two millennia and who were branded as *bezrodniy kosmopolit*, or "rootless cosmopolitans"—profiteers with no roots and no conscience who would poison and stench the Soviet proletarian culture.[15] Stepping away from any facile disparagement of Soviet dogma, we can see glimmerings in this usage, however dimly, of the epistemological origins of cosmopolitanism in the accounts of the fourth-century B.C. Cynic, Diogenes of Sinope. If the stories are true, Diogenes eschewed the laws (*nomos*) of the Greeks from Athens to Corinth, choosing to live in a tub, to relieve himself in public, and to perform any number of lewd public gestures at will. His railings against the ways of the people in the cities where he lived allegedly brought him to say that he was a "citizen of the world" (*kosmopolites*). By making such an astounding claim, he was defending himself against the ways of the city (*polis*) and its laws—laws that were held by their promulgators to be beautiful,[16]

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[13] *See generally* JOHN RENNIE SHORT, GLOBAL METROPOLITAN: GLOBALIZING CITIES IN A CAPITALIST WORLD 68-85 (2004) (formulating criteria for determining cosmopolitan cities based on their demographics, culture, and commerce).

[14] *See* Hektor K.T. Yan, *Cosmopolitanism and What It Means To Be Human: Rethinking Ancient and Modern Views on Discerning Humanity*, 38 PHILOSOPHIA 107, 108 (2010) (quoting the *Oxford English Dictionary*).

[15] *See* GLEB STRUVE, SOVIET RUSSIAN LITERATURE: 1917-50, at 338-46 (1951).

[16] The importance of one's own law, i.e., the law of one's own *polis*, is illustrated in the tragic tale of Candaules, King of Lydia, and his bodyguard Gyges, in HERODOTUS, THE HISTORIES 6 (Robin Waterfield trans., 1998). As the late classicist Seth Benardete explains, the attempt by Candaules to appeal to Greek (foreign) law to persuade Gyges to violate Lydian law by looking upon Candules' wife was itself prohibited by the law. "The unlawful thing was for Gyges to see what was not his own—to see what the law says was not his own. The law not only establishes what is one's own, but it itself is one's own: it establishes that one may look only at one's own laws." SETH BENARDETE, HERODOTEAN INQUIRIES 12 (1969); SETH BENARDETE, ET AL., ENCOUNTERS AND REFLECTIONS: CONVERSATIONS WITH SETH BENARDETE 98-99 (Ronna Burger ed., 2002) (unpacking further the philosophical meaning of the story and what it says of Herodotus' own inquiries into what is not his own); *see also*

if not sacred.[17] Such gross acts of defiance would have struck his Greek contemporaries as base, if not dangerous.[18]

Despite these various inauspicious precedents, there is an alternative classical understanding of "cosmopolitan" that brings us conceptually closer to the Preamble of the Chicago Convention. The twentieth-century philosopher Eric Voegelin posited an alternative thesis that *kosmopolites* is a neologism attributable to the Hellenic Jew Philo of Alexandria, not Diogenes of Sinope.[19] Philo, a contemporary of Christ and St. Paul,[20] deployed the term positively in his work *De Opficis*

Michael Davis, *The Tragedy of Law: Gyges in Herodotus and Plato*, 53 REV. METAPHYSICS 635, 637-45 (2000).

[17] *Cf.* MICHAEL GAGARIN, EARLY GREEK LAW 133 (1986) (arguing that although the Greeks considered their laws to have divine origins, "their laws were in the first place authorized and sanctioned by the polis").

[18] It was, after all, only a few years before the activities and sayings attributed to Diogenes that Socrates had been sentenced to death for his own willingness to question the convention of Athens. *See* Plato, *Apology of Socrates*, *in* PLATO AND XENOPHON: APOLOGIES 1, 1-28 (Mark Kremer trans., 2006); Mark Kremer, *Interpretive Essay: Plato and Xenophon*, *in* PLATO AND XENOPHON: APOLOGIES, *supra*, at 40-41 (discussing the charge of impiety). The comic poet Aristophanes had warned Socrates of this in his satirical play, *The Clouds*, where a Socrates quite distinct—yet not wholly detached—from the Socrates found in the works of Plato and Xenophon questioned the convention of the city to the point where it might justify a young man beating up his own father. *See* Aristophanes, *The Clouds*, *in* FOUR TEXTS ON SOCRATES 115, 115-77 (Thomas G. West & Grace Starry West trans., Cornell Univ. Press rev. ed. 1998). For further reflection on the meaning of Aristophanes' play for the philosophic life, see LEO STRAUSS, SOCRATES AND ARISTOPHANES 9-55 (Univ. of Chicago Press 1980) (1966); *see also* Heinrich Meier, *Why Political Philosophy?*, 56 REV. METAPHYSICS 385, 385-93 (2002).

[19] *See* ERIC VOEGELIN, THE COLLECTED WORKS OF ERIC VOEGELIN VOLUME 17: ORDER AND HISTORY & VOLUME IV: THE ECUMENIC AGE 77 (Michael Franz ed., Univ. of Mo. Press 2000) (1987). In making this judgment, Voegelin notes the historic distance between Diogenes of Sinope and Diogenes Laërtius and the fact that the word does not appear in the extant works of the Stoics whose teachings would have preceded Philo's. *Id.* As interpreted by Voegelin, Philo's *kosmopolites* symbolizes "[t]he man who obeys the [Law of Moses] [as] a citizen of the cosmos, because he regulates his conduct by the will of nature (*physis*) that pervades the whole cosmos." *Id.* On the distinction between *nomos* and *physis* in premodern philosophy, see LEO STRAUSS, NATURAL RIGHT AND HISTORY 9-12 (1953).

[20] *See generally* JEAN DANIÉLOU, PHILON D'ALEXANDRIE (Wipf & Stock 2009) (1958); ERWIN R. GOODENOUGH, AN INTRODUCTION TO PHILO JUDAEUS (2d ed. 1962); HARRY AUSTRYN WOLFSON, PHILO: FOUNDATIONS OF RELIGIOUS PHILOSOPHY IN JUDAISM, CHRISTIANITY, AND ISLAM, VOLUMES I & II (rev. ed. 1948). Though Philo found little favor with the Jews of his time, his writings became an important source of inspiration for pre-Nicene Christian theologians like Origen of Alexandria. *See* Annewies van den Hoek, *Philo and Origen: A Descriptive Catalogue of Their Relationship*, 12 STUDIA PHILONICA ANN. 44 (2000).

Mundi[21]—one of his numerous attempts to demonstrate the harmony between God's revelation to the Jews in the Five Books of Moses (Pentateuch)[22] and the "alien wisdom"[23] of the Greeks. For Philo, the cosmopolitan moves beyond the conventional order he or she first experiences towards that which is universally right. Though Philo found little favor with the Jews of his time,[24] his writings became an important source of inspiration for pre-Nicene Christian theologians like Origen of Alexandria.[25] Philo's ecumenical thinking breaks with the understanding of a *particular* revelation or a *particular* law for a *particular* people; what is right, is right for the Jew no less or more than for the Greek. The ways and means of convention, thought to create an unbridgeable divide between peoples, are, in fact, just a starting point to understanding humanity as a whole.

Though this organic view was kept dimly alive (in a theological sense) through the medieval Church,[26] the rise of the nation-state reaffirmed that one's place, outlook, and culture is *particular*[27] and subject to the will of the sovereign. Think only of Hobbes's Leviathan-state, "that *Mortall god*,"[28] which was the final arbiter of right. In exchange for being rid of the *summum malum*—fear of a violent death—men would unite them-

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[21] *See* PHILO OF ALEXANDRIA, *On the Account of the World's Creation Given by Moses*, *in* PHILO: VOLUME 1 6-7 (F.H. Colson & G.H. Whitaker trans., 1929). For more on Philo's allegoresis and use of Greek philosophy, see Roberto Radice, *Philo's Theology and Theory of Creation*, *in* THE CAMBRIDGE COMPANION TO PHILO 124-45 (Adam Kamesar ed., 2009).

[22] *See generally* THE FIVE BOOKS OF MOSES: A TRANSLATION WITH COMMENTARY (Robert Alter ed. & trans., 2004).

[23] ARNALDO MOMIGLIANO, ALIEN WISDOM: THE LIMITS OF HELLENIZATION (1975) (making use of this description, albeit to discuss the interaction of Jewish, Roman, Persian, and Celtic thought and culture with the Greeks during the Hellenistic period).

[24] *See* David Winston, *Philo and Rabbinic Literature*, *in* THE CAMBRIDGE COMPANION TO PHILO, *supra* note 21, at 231-32 (arguing that Philo's absence in Rabbinic Jewish literature was likely due to his writing in Greek and his dependence on the Greek translation of the Scriptures known as the Septuagint or LXX).

[25] *See* van den Hoek, *supra* note 20; *see also* David T. Runia, *Philo and the Early Christian Fathers*, *in* THE CAMBRIDGE COMPANION TO PHILO, *supra* note 21, at 210-30.

[26] This can be seen in St. Augustine's monumental work, *The City of God*, which argues for a fundamental distinction between the particular, earthly city and the universal, Heavenly city toward which all humans strive. *See generally* AUGUSTINE, THE CITY OF GOD AGAINST THE PAGANS (R.W. Dyson ed. & trans., 1998).

[27] This notion has lost none of its force in the contemporary world and, indeed, remains a source of conflict. *See generally* SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996).

[28] THOMAS HOBBES, LEVIATHAN 227 (C.B. Macpherson ed., Penguin Books 1985) (1651).

selves under the Leviathan, the one who would decree and secure right.[29] The inscription to the 1651 edition, taken from the Latin Vulgate translation of the Book of Job,[30] says it all: *non est terram quae comparetur ei* ("upon earth there is not his like").[31] In the centuries which followed, the particularity of states took precedence and, with the injection of pernicious beliefs about *Volk*[32] and race,[33] cosmopolitanism in a Philonic key no longer had resonance.

The positive or open understanding of "cosmopolitan" resurfaced during the Enlightenment in the works of Immanuel Kant, which brought the concept back into focus as a positive orientation away from the particular toward the universal.[34] Kant's dedication to the belief that all humanity is part of a single moral community whose right law is self-legislated through the exercise of reason alone became the most persistently referenced,[35] albeit perhaps not the most intellectually secure,[36] basis upon

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[29] Leo Strauss, *Notes on Carl Schmitt: The Concept of the Political*, *in* HEINRICH MEIER, CARL SCHMITT & LEO STRAUSS: THE HIDDEN DIALOGUE 91, 100-02 (J. Harvey Lomax trans., 1995) (tying "the securing of life [as] the ultimate basis of the state" to a perception of "death [as] the greatest evil" in the thought of Hobbes); *see also* LEO STRAUSS, THE POLITICAL PHILOSOPHY OF HOBBES: ITS BASIS AND ITS GENESIS 6-29 (Elsa M. Sinclair trans., Univ. of Chi. Press 1952) (1936) (discussing "fear of violent death" as the moral basis of Hobbes' political philosophy).

[30] *See generally* BIBLIA SACRA IUXTA VULGATAM VERSIONEM (Roger Gryson et al. eds., 5th ed. 2007).

[31] CARL SCHMITT, THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBES 17-18 (George Schwab & Erna Hilfstein trans., Univ. of Chi. Press 2008) (1938) (translation modified by the authors).

[32] ERIC VOEGELIN, *The Political Religions*, *in* THE COLLECTED WORKS OF ERIC VOEGELIN VOLUME 5: MODERNITY WITHOUT RESTRAINT 19, 64-67 (Manfred Henningsen ed., 2000); *see also* Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1692 (1998) (quoting Carl Schmitt's "slogan" that "[a]ll right is the right of a particular *Volk*").

[33] *See generally* ERIC VOEGELIN, THE COLLECTED WORKS OF ERIC VOEGELIN VOLUME 2: RACE AND STATE (Klaus Vondung ed., Ruth Hein trans., La. State Univ. Press 1997) (1933); ERIC VOEGELIN, THE COLLECTED WORKS OF ERIC VOEGELIN VOLUME 3: THE HISTORY OF THE RACE IDEA (Klaus Vondung ed., Ruth Hein trans., La. State Univ. Press 1998) (1933).

[34] *See* IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS (Ted Humphrey trans., Hackett Pub. Co. 1983) (containing two of Kant's oft-cited cosmopolitan works, *Idea for a Universal History with a Cosmopolitan Intent* (1784) and *To Perpetual Peace: A Philosophical Sketch* (1795)).

[35] *See, e.g.*, PERPETUAL PEACE: ESSAYS ON KANT'S COSMOPOLITAN IDEAL (James Bohman & Matthias Lutz-Bachmann eds., 1997); Ross Abbinnett, *Politics and Enlightenment: Kant and Derrida on Cosmopolitan Responsibility*, 2 CITIZENSHIP STUD. 197 (1998); Garrett W. Brown, *Kantian Cosmopolitan Law and the Idea of a Cosmopolitan Constitution*, 27 HIST. POL. THOUGHT 661 (2006); Martha C. Nussbaum, *Kant and Stoic Cosmopolitanism*, 5 J. POL. PHIL. 1 (1997).

which contemporary notions of cosmopolitanism were erected.[37] Though there remains a broad typology of cosmopolitanism,[38] the concept stabilized after the Second World War. During this time, intellectual trends in foreign relations, which imagined humanity as a single moral community, were perceived to be better, safer, and more enlightened than traditional tribalist and nationalist understandings.[39] Additionally, currents in modern economic thought,[40] beginning with Adam Smith and continuing through the heterodox thinking of the so-called "Austrian School,"[41] opposed state intervention in domestic and international economies. In place of national protection of industry as part of a "zero-sum" contest with foreign countries in the economic arena, cosmopolitan free trade principles of nondiscrimination and mutual benefit were championed. In a world far from uniform in its theological outlook or philosophical self-understanding,[42] these conceptions of cosmopolitanism arguably enjoyed

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[36] *See, e.g.*, Robert Fine, *Kant's Theory of Cosmopolitanism and Hegel's Critique*, 29 PHIL. & SOC. CRITICISM 609 (2003); Mary P. Nichols, *Kant's Teaching of Historical Progress & Its Cosmopolitan Goal*, 19 POLITY 194 (1986); *see also* Michael Mack, *Law and Charity: Walter Benjamin, Leo Strauss, Georg Simmel, Franz Baermann Steiner*, 5 L. TEXT CULTURE 97, 114-22 (2000) (summarizing the German sociologist Georg Simmel's critique of Kantian moral philosophy).

[37] This hardly means that the reception, interpretation, and reformulation of Kant's (and other Enlightenment thinkers') cosmopolitan ideals were uniform. *See, e.g.*, Pauline Kleingeld, *Six Varieties of Cosmopolitanism in Late Eighteenth-Century Germany*, 60 J. HIST. IDEAS 505 (1999); John Pizer, *The German Response to Kant's Essay on Perpetual Peace: Herder Contra the Romantics*, 82 GERMANIC REV. 343 (2007); William Smith & Robert Fine, *Kantian Cosmopolitanism Today: John Rawls and Jürgen Habermas on Immanuel Kant's* Foedus Pacificum, 15 KING'S C. L.J. 5 (2004). For some other typologies of cosmopolitanism, see DEREK HEATER, WORLD CITIZENSHIP AND GOVERNMENT: COSMOPOLITAN IDEAS IN THE HISTORY OF WESTERN POLITICAL THOUGHT (1996); FRIEDRICH MEINECKE, COSMOPOLITANISM AND THE NATIONAL STATE (Princeton Univ. Press trans., Princeton Univ. Press 1970) (1963); THOMAS J. SCHLERETH, THE COSMOPOLITAN IDEAL IN ENLIGHTENMENT THOUGHT (1977).

[38] *See generally* HEATER, *supra* note 37; MEINECKE, *supra* note 37; SCHLERETH, *supra* note 37.

[39] *See generally* PATRICK HAYDEN, COSMOPOLITAN GLOBAL POLITICS 97-105 (2005).

[40] *See generally* JAGDISH N. BHAGWATI ET AL., LECTURES ON INTERNATIONAL TRADE (2d ed. 1998).

[41] *See, e.g.*, GOTTFRIED VON HABERLER, THE THEORY OF INTERNATIONAL TRADE: WITH ITS APPLICATIONS TO COMMERCIAL POLICY (Alfred Stonier & Frederic Benham trans.) (1968). For further history, commentary, and criticism on modern developments in economics, see MURRAY N. ROTHBARD, CLASSICAL ECONOMICS: AN AUSTRIAN PERSPECTIVE ON THE HISTORY OF ECONOMIC THOUGHT (1995).

[42] *See generally* CHARLES TAYLOR, A SECULAR AGE (2007); VARIETIES OF SECULARISM IN A SECULAR AGE (Michael Warner et al. eds., 2010).

more secure metaphysical moorings than the intellectual antecedents of Hellenic thought.

Cosmopolitanism, in this freshened sense, can be tied closely to the goals of twentieth-century international collaborative organizations like the United Nations, the Bretton Woods institutions, the European Economic Community, and the International Civil Aviation Organization (ICAO)[43] that was itself a creation of the Chicago Convention.[44] Though clearly distinguishable in their respective scope and mandates, these institutions provide fora to facilitate cooperation, legal harmonization, and—at least in principle—mutual understanding at the international level.[45] They intend to accomplish what civil aviation does in a practical way: bringing people across the globe into closer communion. While a broad swath of political and logistical criticisms continues to be levied against the aforementioned institutions and against civil aviation itself,[46] it is their shared transnational character that invites us to see them as being cosmopolitan.

B. *Aviation's Arc: From Cosmopolitan Intent to Nationalistic Order*

If cosmopolitanism and nationalism are conceptual and semantic antonyms, which their philosophical and historical evolutions certainly suggest, for over sixty years a nationalistic *mentalité* has provided a kind of first-order conceptual structure whereby the international aviation system comprises only airlines that are owned and controlled by the state (or, in recent decades, by the citizens of the state) which designates them to fly international routes. As we will see below, domestic point-to-point services are likewise restricted to home carriers with the requisite ownership

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[43] *See generally* LUDWIG WEBER, INTERNATIONAL CIVIL AVIATION ORGANIZATION: AN INTRODUCTION (2007).

[44] *See* Chicago Convention, *supra* note 8, pt. II, ch. VII (establishing and delineating the administration and duties of ICAO); *see also* I.H. PH. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 10, 45-50 (8th rev. ed. 2006) (discussing the purpose and history of ICAO).

[45] *See, e.g.*, Steve Charnovitz, *The WTO and Cosmopolitics*, 7 J. INT'L ECON. L. 675 (2004) (discussing the WTO's cosmopolitan inclusion of a plurality of voices from across the globe in its decision making); Paul Taylor, *The United Nations in the 1990s: Proactive Cosmopolitanism and the Issue of Sovereignty*, 47 POL. STUD. 538 (1999). *But see* Frank J. Garcia, *Global Justice and the Bretton Woods Institutions*, 10 J. INT'L ECON. L. 461 (2007) (advocating a more cosmopolitan approach for the Bretton Woods Institutions).

[46] *See, e.g.*, Symposium, *UN Reform*, 6 CHI. J. INT'L L. 597–724 (2006) (criticizing and suggesting substantive reforms for the U.N.); Bretton Woods Project, *available at* http://www.brettonwoodsproject.org/ (attacking the Bretton Woods institutions, the International Monetary Fund, and the World Bank); Gabriel S. Sanchez, *The Impotence of the Chicago Convention's Dispute Settlement Provisions*, 10 ISSUES AVIATION L. & POL'Y 27 (2010) (questioning the efficacy and legitimacy of ICAO's role in aviation dispute settlement).

profile. This conceptual structure is maintained through a complex web of bilateral treaties known as "air services agreements,"[47] where government barter, and not the entrepreneurial acumen of the airlines, is the principal catalyst for civil aviation's transnational market developments.[48] While this state-based structure is ingrained,[49] it is nonetheless a false necessity—and like many such first-order structures, as this article demonstrates, it is contingent and can be superseded.

Why a false necessity? Because the citizenship-based system of international aviation that we know of today deviated not only from the cosmopolitan ethos of the Chicago Convention, but was actually developed *outside* the substantive scope of that instrument. Although the Convention is concededly premised on an anterior state sovereignty over airspace[50] and borrows the language of the 1919 Paris Convention on the Regulation of Air Navigation[51] to declaim that *cuis est solum, eius est usque ad caelum et ad inferos* ("for whomsoever owns the soil, it is theirs up to the sky and down to the depths"),[52] it nonetheless sets forth no *a priori* restraints on how the airspace of the world should be distributed among its 180 signatories or under what conditions their airlines should

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[47] *See* David J. Bederman, Note, *Prospects for European Air Deregulation*, 21 INT'L L. 561, 563 (1987).

[48] *See* L. Gilles Sion, *Multilateral Air Transport Agreements Reconsidered: The Possibility of a Regional Agreement Among North Atlantic States*, 22 VA. J. INT'L L. 155, 159 (1981) (describing bilateral agreements as the "prime source of norms for the economic regulation of international civil aviation"). Attendant to the bilateral system is a general principle of non-freedom for commercial route access rights to foreign carriers that is only modified in order to accommodate a bundle of narrowly-defined access rights (incongruously dubbed "freedoms of the air"). The result, a massive case-by-case negotiation and exchange of literally thousands of international air routes, has been picturesquely described as a "labyrinthine legal grotto." BIN CHENG, THE LAW OF INTERNATIONAL AIR TRANSPORT 491 (1962).

[49] *See* Cornelia Woll, *The Road to External Representation: The European Commission's Activism in International Air Transport*, 13 J. EUR. PUB. POL'Y 52, 56 (2006) (stating that if one takes into account all informal exchanges, additions, and writings, the global number of extant bilateral air services agreements may be as high as 10,000).

[50] *See* Chicago Convention, *supra* note 8, art. 1 ("The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.").

[51] Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, art. 1, 11 L.N.T.S. 173 ("The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space [*sic*] above its territory.").

[52] *See* DIEDERIKS-VERSCHOOR, *supra* note 44, at 5. Though Diederiks-Verschoor's assertion that the phrase dates back to the Roman Empire has gained wide acceptance among aviation law scholars and practitioners, its origins are, in fact, medieval. *See* J.W. HARRIS, PROPERTY & JUSTICE 76 (1996); Herbert David Klein, *Cujus Est Solum Ejus Est . . . Quousque Tandem?*, 26 J. AIR L. & COM. 237, 238-43 (1959).

have access to it.[53] This task was initially left to two subsidiary accords[54] that attempted to multilateralize the rights of states to designate their airlines to operate international services to points in and beyond the respective territory of other signatory states.[55] Of the two accords, the so-called "Two Freedoms Agreement"—which multilateralized flyover and noncommercial traffic rights (such as landing for refueling purposes)[56]—found greater success than the far more ambitious "Five Freedoms Agreement."[57] The Chicago Conference's participants viewed the latter, which would have opened up a transnational network of traffic rights allowing carriers to move passengers, cargo, and mail freely across the globe without recourse to separate bilateral treaties, with skepticism. Following the withdrawal of the United States from the Five Freedoms Agreement,[58] states abandoned multilateralism in favor of a mercantilist program of managed bilateral trade where highly circumscribed traffic rights (coupled with restrictions on routes, pricing, and capacity) became the norm for the air transport industry.[59]

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[53] *Cf.* P.C. Haanappel, *The External Aviation Relations of the European Economic Community and the EEC Member States into the Twenty-First Century, Part II*, 14 AIR L. 122, 141 (1989) (asserting that states, not the Chicago Convention, created the bilateral system).

[54] *See* International Air Services Transit Agreement, *opened for signature* Dec. 7, 1944, 59 Stat. 1693, 84 U.N.T.S. 389 [hereinafter Two Freedoms Agreement]; International Air Transport Agreement, *opened for signature* Dec. 7, 1944, 59 Stat. 1701, 171 U.N.T.S. 387 [hereinafter Five Freedoms Agreement].

[55] These restricted route access privileges, ironically dubbed the "freedoms of the air" and commonly referred to in air services agreements as "traffic rights," are formulated in ascending order of liberality of market access, beginning with a basic right to fly over the territory of another state without landing and concluding with the right to operate point-to-point service within the territory of a foreign state. *See FAQ: Freedoms of the Air,* ICAO, *available at* http://www.icao.int/icao/en/trivia/freedoms_air.htm.

[56] In aviation parlance these categories of rights are referred to as the first and second freedoms, respectively.

[57] The three additional freedoms contained in the Five Freedoms Agreement include the privilege of an airline to carry traffic to a point in another state (third freedom); the privilege of an airline to pick up traffic in the territory of another state for transit back to the carrier's home state (fourth freedom); and the privilege of an airline to pick up or put down traffic in another state which is coming from or destined for the territory of a third state (fifth freedom). Five Freedoms Agreement, *supra* note 54.

[58] *See* Withdrawal of the United States of America, [U.S.] Dept. of State Press Release No. 510 (Jul. 25, 1946), *reprinted in* [Oct. 1998] 3 Av. L. Rep. (CCH) ¶ 26,016, at 21,117.

[59] *See infra* notes 72-92 and accompanying text.

Despite being largely a failed effort,[60] the Two Freedoms and Five Freedoms Agreements left an indelible mark on international aviation regulation by making their respective grants of traffic rights contingent on the citizenship "purity" of the airlines that would use them. Both Agreements stated that "[e]ach contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that *substantial ownership and effective control* are vested in the nationals of a contracting State."[61] This iconic language, which is contained in virtually all post-Chicago bilateral agreements,[62] established a double-pronged nationality test, both quantitative ("substantial ownership")[63] and qualitative ("effective control"),[64] thereby prescribing that only cross-border investments of a limited size and nature are permitted under penalty of forced revocation of traffic rights by the granting state.

The ostensible justification driving the requirement for citizenship purity was to ensure that an exchange of rights between state-designated carriers would not allow third party airlines, representing states that were

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[60] Support for a liberal system of free competition to determine fares, frequencies, schedules, and capacity with a multilateral exchange of traffic rights was primarily championed by the United States at the Chicago Conference. *See* BETSY GIDWITZ, THE POLITICS OF INTERNATIONAL AIR TRANSPORT 49-50 (1980); *see also* Stephen M. Shrewsbury, *September 11th and the Single European Sky: Developing Concepts of Airspace Sovereignty*, 68 J. AIR L. & COM. 115, 132 (2003). The Europeans, in contrast, were concerned that a competitive market would decimate their infant aviation industry. *See* Gloria Jean Garland, *The American Deregulation Experience and the Use of Article 90 to Expedite EEC Air Transport Liberalisation*, 7 EUR. COMPETITION. L. REV. 193, 194 (1986).

[61] Two Freedoms Agreement, *supra* note 54, art. I, § 5 (emphasis added); *see also* Five Freedoms Agreement, *supra* note 54, art. I, § 6 (emphasis added).

[62] *See* Council for Trade in Services, *Quantitative Air Services Agreements Review (QUASAR): Part B: Preliminary Results,* para. 61, S/C/W/270/Add.1 (Nov. 30, 2006) (finding "substantial ownership and effective control" clauses in 90% of all bilateral air services agreements).

[63] No specific numerical benchmarks are provided in the treaties. As we will discuss further in part II, national iterations of the citizenship purity test typically require 75% national ownership, though some jurisdictions, such as the European Union and Australia, have allowed a lower threshold of 49-49.9% without jeopardizing their carriers' international traffic rights.

[64] The meaning of this qualitative assessment is, at best, ambiguous. Typically, it requires what may be a highly impressionistic analysis of an airline's ownership structure, contractual commitments, branding and licensing arrangements, and management. For an excellent discussion of the interpretation and application of this provision in U.S. regulatory law, see DHL Airways, Inc. (ASTAR), Dkt. No. DOT-OST-2002-13089 35-36 (Dep't of Transp. eResolution Dec. 19, 2003), *available at* http://www.regulations.gov (recommended decision of A.L.J.). *But see* Council Regulation 1008/2008, art. 2(9), 2008 O.J. (L 293) 3 (containing one of the rare instances where "effective control" is explicitly defined).

strangers to the air services agreements under which they were conceded, to gain control of these operations. The fear during the mid-twentieth century was that route privileges could slip into the hands of foreign airlines controlled by enemy (or ex-enemy) states or their nationals.[65] This national security justification is as understandable in its historical context as it is inapposite to the vastly changed geopolitical and commercial circumstances of the globalized world of the succeeding century. Through instruments such as investment treaties,[66] free trade agreements, and domestic laws regulating foreign investment in sensitive industries such as airlines,[67] states have the capacity to globalize their industries without compromising their defense considerations.[68] Also, since the Chicago Convention does not speak to the issue of air carrier citizenship,[69] the perpetuation of a nationalistic *mentalité* for airline ownership still rests with the states. In no sense, therefore, is the ownership/control dyad a matter of Hegelian inevitability.[70]

III. International Civil Aviation in a Nationalistic Order

Thus, we encounter a first great irony of the subject canvassed in this article. Despite a latent cosmopolitan ideology within the Chicago Con-

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[65] In the portentous language of the U.S. State Department: "Rights and permits are conceded by a country or countries to another country or countries as part of friendly relations and not for the purpose of being peddled." 2 U.S. Dep't. of State, Proceedings of the International Civil Aviation Conference 1283 (1948).

[66] *See* Andrew Newcombe & Lluís Paradell, Law and Practice of Investment Treaties: Standard of Treatment 488-500 (2009) (discussing security exceptions and defenses to investment treaties).

[67] For example, the Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 2(b)(2), 121 Stat. 246, 248-49 (2007) (codified as amended at 50 U.S.C.A. § 2170 (2010)), allows a cross-departmental consortium of federal agencies dubbed the Committee on Foreign Investment in the United States (CFIUS) to investigate any foreign acquisition of a U.S. carrier and impose conditions mitigating any potential security risks. *See* Joseph Mamounas, *Controlling Foreign Ownership of U.S. Strategic Assets: The Challenge of Maintaining National Security in a Globalized and Oil Dependent World*, 13 L. & Bus. Rev. Ams. 381, 395-96 (2007) (discussing the potential application of FINSA to the airline industry).

[68] *See generally* U.S. Gov't Accountability Office, Foreign Investment: Laws and Policies Regulating Foreign Investment in 10 Countries, GAO-08-320 (2008), *available at* http://www.gao.gov/new.items/d08320.pdf.

[69] The requirement under the Chicago Convention, *supra* note 8, arts. 17-21 for aircraft to be "flagged" (i.e., registered) in a particular state does not constitute a requirement for state ownership of airlines, nor does it per se bar carriers from being owned or controlled by foreign nationals. *See* Diederiks-Verschoor, *supra* note 52, at 27-31 (discussing the need for aircraft to be "flagged" in particular states for purposes of civil jurisdiction and safety regulation, but not for economic control or foreign policy goals).

[70] Karl Löwith, Meaning in History 52-59 (1949) (summarizing Hegel's progressive conception of history).

vention, and certainly within the conclaves that designed it, international aviation since 1944 has been governed not by the multilateral free exchange of traffic rights, but instead by a regime of bilateral air services trade treaties.[71] These treaties were negotiated after the Convention and have been structured by mercantilism, zero-sum diplomacy, and the quest for a balance of opportunities. Within this regime, as noted above, the citizenship purity test (more commonly known to aviation lawyers as the "nationality rule") restricts the identity of who may own and control the airlines that fly into and out of each state. This requires that only citizen-owned airlines provide domestic air transport services in each state (a concept known in aviation law parlance as "cabotage")[72] and are designated to provide international air services on behalf of their home state.[73] Air Canada, for example, must be 75% owned and "controlled in fact" by Canadian citizens in order to operate within Canada on purely domestic routes (*e.g.*, Montreal/Toronto)[74] and must be designated by Canadian

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[71] *See generally* WTO, Air Services Agreements Projector, *available at* http://www.wto.org/asap/index.html (containing comprehensive data on the thousands of bilateral air services trade treaties in force worldwide).

[72] Under the doctrine of cabotage, intra-state air routes are reserved exclusively for nationally owned and controlled air carriers. Air France, for example, cannot provide air service between New York and Chicago, except as an extension of an existing international service to New York from Europe. Air France also cannot, in providing that service, pick up any new U.S. domestic passengers in New York. A phenomenon of the history of trade, cabotage was invented with the deliberate mercantilist purpose of protecting domestic commerce from foreign competition. In the international aviation milieu, it has been defined descriptively as the carriage of passengers between two points within the territory of the same state for compensation or hire, s*ee* W.M. Sheehan, Comment, *Air Cabotage and the Chicago Convention*, 63 HARV. L. REV. 1157 (1950), but also peremptorily as a sovereign right that has traditionally been reserved to the exclusive use of that state's national carriers, *see* U.S. GEN. ACCOUNTING OFFICE, INTERNATIONAL AVIATION: MEASURES BY EUROPEAN COMMUNITY COULD LIMIT U.S. AIRLINES' ABILITY TO COMPETE ABROAD 54 (1993). It is the peremptory connotation of cabotage that we will use throughout this article.

[73] The limitation imposed on states to designate only airlines which are substantially owned by their nationals has historically served the same function as rules of origin in preferential trade agreements, namely, to prevent third countries, including potentially enemy or ex-enemy states, from obtaining the negotiated privileges through the back door. *See generally* Rupa Duttagupta & Arvind Panagariya, *Free Trade Areas and Rules of Origin: Economics and Politics*, 19 ECON. & POL. 169 (2007); Rod Falvey & Geoff Reed, *Rules of Origin as Commercial Policy Instruments*, 43 INT'L ECON. REV. 393 (2002); Anne O. Krueger, *Free Trade Agreements as Protectionist Devices: Rules of Origin* (Nat'l Bureau of Econ. Research, Working Paper No. 4352, 1993).

[74] Transportation Act, S.C. 1996, c. 10, §§ 55, 61(a)(i) (Can.), *available at* http://laws.justice.gc.ca/PDF/Statute/C/C-10.4.pdf [hereinafter CTA] (expressly limiting licenses for domestic service to airlines which are "controlled in fact by Canadians

authorities to serve the international air routes[75] that Canada has negotiated bilaterally with the European Union and other jurisdictions (*e.g.*, Toronto/London). Similarly, Canada will not accept the designation of airlines from the member states of the European Union or other countries, unless a similar citizenship purity test is first applied to those airlines by their designating states.[76] The European Union imposes a similar battery of quantity and quality prohibitions that apply to all non-EU countries,[77] but it has become more generous in applying the nationality rule to permit inward foreign ownership of up to 49.9% of EU air carriers.[78]

The matrix of ownership and control rules can be expressed metaphorically as a dual bolting system, where an internal statutory bolt (for example, the Canada Transportation Act,[79] the Air Canada Public Participation Act,[80] or EU Regulation 1008/2008[81]) limits foreign share participation in, and foreign investor control of, domestic air carriers, and an external treaty bolt (integrated into each State's bilateral air services treaties) mandates reciprocally that only airlines owned and controlled by citizens of each contracting state can be "designated" to serve international routes to the other state. Smashing only the external bolt, there-

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and of which at least seventy-five per cent . . . of the voting interests are owned and controlled by Canadians").

[75] *Id.* § 69(1)-(2).

[76] *See, e.g.*, Air Transport Agreement, U.S.-Can., art. 3(2)(a), Mar. 12, 2007, 3 Aviation L. Rep. (CCH) ¶ 26,246a [hereinafter U.S./Canada Air Transport Agreement].

[77] To break the canonical bond between each member state's airspace sovereignty and the award of access rights to its markets, the EU established the legal construct of a "community air carrier" whereby any airline registered under the EU's common licensing regime can freely provide services (including cabotage) between any two airports within the national territories of the member states. *See* Council Regulation 1008/2008, *supra* note 64, art. 4; *see also* MARTIN STANILAND, A EUROPE OF THE AIR? THE AIRLINE INDUSTRY AND EUROPEAN INTEGRATION 87-106 (2008) (providing a thorough explication of the development and legal implementation of the EU single aviation market). Following the December 2009 ratification of the Treaty of Lisbon, *see* Treaty of Lisbon, *supra* note 2, it is appropriate to refer to airlines licensed under the common regime as "EU air carriers," *see* E-mail from Daniel Calleja, Director for Air Transport, European Commission, to Brian F. Havel (Mar. 18, 2010, 17:49:00 CST) (on file with authors). Accordingly, that convention has been adopted throughout this article.

[78] Council Regulation 1008/2008, *supra* note 64, art. 4(f) (requiring that EU "Member States and/or nationals of Member States own more than 50% of [an airline] and effectively control it" in order for it to be licensed to operate as part of the single EU aviation market).

[79] CTA, *supra* note 74, §§ 55, 61(a)(i).

[80] Air Canada Public Participation Act, R.S.C. 1985, c. 35 (4th Supp.), § 6(1)(b) (Can.), *available at* http://laws.justice.gc.ca/PDF/Statute/A/A-10.1.pdf.

[81] Council Regulation 1008/2008, *supra* note 64, art. 4(f).

fore, will not by itself disable the nationality rule in international air transport law.[82] Internal statutory changes by each state—the disabling of the internal bolt—will also be required.[83] The double bolting system has metastasized all over the world in the texts of thousands of bilateral air services agreements.[84] It is easy to read the practical, legal, and economic consequences of the nationality paradigm in international aviation: the world's most global industry lacks even a single global competitor, because the interoperability of the external and internal bolts makes the conclusion of transnational mergers and acquisitions or the domestic establishment of foreign subsidiaries impossible. As former KLM Chief Executive Officer Leo van Wijk remarked a few years ago, if the movie industry were regulated like the aviation industry, we would all still be watching silent movies.[85] .

It is important to pay heed to the normative words used to create these systems of numerical and control criteria, which deny the citizens of other states the right to own or to control a state's airlines, and to exclude comparable rights of ownership and control from those other states' airlines. Under one of the tenets of the so-called expressive theories of law[86] (which "tell actors—whether individuals, associations, or the State—to act in ways that express appropriate attitudes to various substantive values"[87]), the treaties linguistically signal through the formula of "substantial ownership and effective control" a disposition to view airlines as talismans of nationality identity rather than as component enterprises in a globally-oriented commercial industry. These words express a fear of "[t]he shadow of substantial foreign influence"[88] and an acquiescence to a sovereignty-saturated international economic order. By using an unfriendly statutory formula repeated over and over in a directory of

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[82] A simple example may help. If the United States removed only its own internal statutory bolt on foreign ownership, thus allowing United Airlines, for example, to be purchased by Japan's All Nippon Airways, United Airlines would still risk forfeiture of the right to serve points between the United States and Canada (e.g., Chicago/Toronto) under the Canada/U.S. air services agreement. That would place United Airlines at a competitive disadvantage vis-à-vis those U.S. carriers that were not owned by foreign nationals and would likely dissuade it from consummating a cross-border merger. For more on two initiatives to remove the internal bolt at the global level, see IATA, *infra* note 168.

[83] *See supra* note 82.

[84] *See* Council for Trade in Services, *supra* note 62.

[85] *See* BRIAN F. HAVEL, BEYOND OPEN SKIES: A NEW REGIME FOR INTERNATIONAL AVIATION 4 n.12 (2009).

[86] *See* Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 44-55 (2002) (succinctly summarizing the variants of this theory and their respective limits).

[87] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theory of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000).

[88] Uraba, Medellin & Cent. Airways, Inc., 2 C.A.B. 334, 337 (1940).

4000 or more bilateral air services treaties,[89] states justify an institutionalized anti-foreigner discrimination in an industry in which contact with other countries and peoples reflects its very ontology. In sum, to the extent that cosmopolitanism may still carry its original negative semantic value, that value holds sway in international aviation. The question of who can perform air transport services most efficiently is secondary; what matters is whether that person is a foreigner or a national.[90] The cabotage and nationality rules reflect what current Justice of the Quebec Court of Appeals, Nicholas Kasirer, has called the "ambient legal culture"[91] or the dominant legal "toponymy"[92] of the contemporary international air transport industry.

Thus, airlines have been treated almost as arms of the state rather than as a viable and dynamic part of the economy, one with significant multiplier effects for economic growth.[93] The overriding motivation in aviation policy among both developed and developing nations, according to the United Nations Conference on Trade and Development (UNCTAD), has been to ensure the continued existence of the so-called "flag carrier."[94] This bifurcation, where airlines serve as both economic operators and as agents for the projection of national image and prestige, created a history of extraordinary market dysfunctionality. The economic topography of the international aviation marketplace, even in an age of deregulation and privatization, has largely remained that of the street that has a hundred bakeries, or even more absurdly, that of the "right" of every urban conglomerate with 100,000 residents to have its own proprietary

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[89] *See* Worldwide Air Transport Conference, Montreal, Can., Mar. 24-29, 2003, *Transparency in International Air Transport Regulation*, at 3, para. 3.3, Int'l Civil Aviation Org. Doc. ATConf/5-WP/16 (Sept. 2, 2002). *But see* Woll, *supra* note 49, at 56 (placing the total number of bilaterals—including informal exchanges, additions, and writings—closer to 10,000).

[90] Jürgen Basedow, *Verkehrsrecht und Verkehrspolitik als Europäische Aufgabe*, *in* EUROPÄISCHE VERKEHRSPOLITIK 1, 7 (Gerd Aberle ed., 1987).

[91] Nicholas Kasirer, *The Common Core of European Private Law in Boxes and Bundles*, 2 GLOBAL JURIST FRONTIERS 1, 16 (2002), *available at* http://www.bepress.com/gj/frontiers/vol2/iss1/art2.

[92] *Id.* at 27.

[93] As the historian Walter Laquer observed, according to the United Nations Educational, Scientific and Cultural Organization, a viable modern state must have four attributes: operation of a television system, a police force of at least 100 men, a budget sufficient to maintain at least one delegate at the U.N., and a national airline. WALTER LAQUER, *Six Scenarios for 1980*, *in* THE POLITICAL PSYCHOLOGY OF APPEASEMENT: FINLANDIZATION AND OTHER UNPOPULAR ESSAYS 65, 70 (1980).

[94] *See* United Nations Conference on Trade & Development, Geneva, Switz., June 21-23, 1999, Air Transport Services: The Positive Agenda for Developing Countries, para. 32, U.N. Doc. TD/B/COM.1/EM.9/2 (Apr. 16, 1999). On "flagging" under the Chicago Convention, see Chicago Convention, *supra* note 8.

airline.[95] A superfluity of unviable national carriers has led to unsustainable levels of competition in the transatlantic market. Instead of a global air transport market where cross-border mergers are consummated, and the industry consolidates into the requisite number of transcontinental carriers to meet the demand for air services, "national champions"[96] (a quixotic epithet in this context given their poor competitive records) are artificially kept aloft through bankruptcy protections, state subsidies, and market shares tightly maintained through government oversight. The Australian Chamber of Commerce noted the incongruity that national governments have liberalized trade in goods and services—most recently pursuing a neoliberalist trade agenda bookended in the 1990s by the North American Free Trade Agreement (NAFTA)[97] and the institutional complex of the World Trade Organization (WTO),[98] which included the General Agreement on Tariffs and Trade (GATT)[99] and General Agreement on Trade in Services (GATS)[100] agreements—without delivering

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[95] It is important to distinguish this phenomenon of excessive competition—which, due to the commercial constraints imposed by international aviation's regulatory regime, artificially sustains more carriers than the market requires—from the general concept of cut-throat or ruinous competition where industry-wide revenues are insufficient to cover costs. The latter concept, which has historically accompanied arguments calling for comprehensive governmental regulation of industry, *see* 1 ALFRED E. KAHN, THE ECONOMICS OF REGULATION: ECONOMIC PRINCIPLES 9-10 (1970), has largely been shown to be spurious when applied to the airline industry, *see, e.g.*, 2 ALFRED E. KAHN, THE ECONOMICS OF REGULATION: INSTITUTIONAL ISSUES 209-20 (1971); Bruce Keplinger, *An Examination of Traditional Arguments on Regulation of Domestic Air Transport*, 42 J. AIR L. & COM. 187, 193-94 (1976); Michael E. Levine, *Is Regulation Necessary? California Air Transportation and National Policy*, 74 YALE L.J. 1416 (1965). Under the present bilateral system, states are dissuaded from allowing (and legally cannot permit) their failing national carriers to be acquired by more efficient foreign competitors because the airline (and hence the state's citizenry) may have to surrender valuable traffic rights to foreign markets.

[96] *See generally* Org. for Econ. Co-operation & Dev., Industrial Policy, Competition Policy and National Champions: Background Note, para. 3, Doc. DAF/COMP/GF(2009) (Jan. 29 2009), *available at* http://www.olis.oecd.org/olis/2009doc.nsf/ENGDAT CORPLOOK/NT00000A8A/$FILE/JT03258931.pdf (reviewing and criticizing state industrial policies that attempt to construct global competitors through subsidies and protectionism).

[97] North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (1993), 32 I.L.M. 605 (1993).

[98] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 3.

[99] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

[100] General Agreement on Trade in Services, 1869 U.N.T.S. 183, 33 I.L.M. 1125, 1167. (1993) [hereinafter GATS]. In further proof of aviation's exceptionalism in an era of free trade, in contrast to other service sectors, which are not *a priori* blocked from GATS coverage, most aspects of the aviation industry—including ownership and

comparable outcomes in the liberalization of one of the principal means by which global trade and exchange take place.[101] As one American commentator observed, "[i]f we had tried to build the interstate highway system by letting each two communities negotiate a bilateral [treaty] between them, there would have been [so many equity issues] that each city would have with the other city that we would never have gotten an interstate highway system that has created wealth."[102]

It might be argued that, in the setting of a suffocating state embrace of the industry, a legal system that cosseted the airlines, domestically and internationally, was perfectly created. But as legal theorist Neil McCormick has elaborated in a series of finely reasoned essays, claims of law's "essence" are contestable. McCormick argues that "legal systems are not solid and sensible entities."[103] Rather, "[t]hey are thought-objects, products of particular discourses rather than presuppositions of them."[104] What should or could happen then, to the prevailing discourse of nationality as the profile of the state-owned "flag carrier" is eroded?[105] Can a cosmopolitan *mentalité*, perceptible so briefly in 1944, return to supersede this discourse?

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air traffic rights—are explicitly excluded under the GATS Annex on Air Transport Services. *See* ICAO, *Regulation of International Air Transport Services*, at 2, A33-WP/7 (June 5, 2001).

[101] AUSTL. CHAMBER OF COMMERCE & INDUS., AUSTRALIA'S RELATIONSHIP WITH THE WORLD TRADE ORGANIZATION 13 (2000), *available at* http://aph.gov.au/HOUSE/committee/jsct/wto/sub184.pdf.

[102] Charles M. Barclay, President, American Assoc. of Airport Executives, Remarks to the Commission to Ensure a Strong Competitive Airline Industry, Washington, D.C. (May 24, 1993) (on file with author).

[103] NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH 113 (1999).

[104] *Id.* A far more radical, though not wholly incongruent, theory of law can be located in Eric Voegelin's unpublished lectures at the University of Louisiana Law School where he links humanity's experience in the cosmos with the articulation of that experience in the order of society—including its laws. *See* 27 ERIC VOEGELIN, *The Nature of the Law*, *in* THE COLLECTED WORKS OF ERIC VOEGELIN: THE NATURE OF THE LAW AND RELATED WRITINGS 1, 1-69 (Robert Anthony Pascal et al. eds., 1991). A less elegant but more startling formulation has been provided by the theologian David Bentley Hart: "all human law is a fiction." DAVID BENTLEY HART, IN THE AFTERMATH: PROVOCATIONS AND LAMENTS 85 (2009).

[105] Between 1985 and 2002, 90 of approximately 190 state-owned airlines were fully or partially privatized. *See* PAT HANION, GLOBAL AIRLINES: COMPETITION IN A TRANSNATIONAL INDUSTRY 15 (3d ed. 2007). Additionally, of the top 100 airlines in the world in 2007, 60 are in private hands and an additional 15 are partially privatized. *Id.* at 16.

IV. Cosmopolitanism Obscured, But Not Lost

A. *An Aeropolitical Irony*

The mid-century cosmopolitan spirit is still discernible within a few of the sites of negotiation in which air services treaties take place. In this article, we draw attention to a specific bilateral air services agreement—epitomizing, but also surpassing, a long series of so-called "open skies" bilateral agreements that have chipped away at the mercantilism of traditional agreements[106]—concluded in December 2008 between Canada[107] and the European Union.[108] If the glimmerings of a restored cosmopolitan *mentalité* in the international air transport industry are perceptible anywhere, it is here.

Selecting Canada and the European Union as jurisdictions that may model a revived cosmopolitanism is also replete with irony. It was not these jurisdictions, but the United States, that promoted an internationalist ethos at Chicago.[109] It was the United States, which four decades after the Chicago Convention, invented and proselytized a reformist "open

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[106] Though the label "open skies" is now applied broadly to any bilateral agreement that liberalizes traditional state controls over international air services' rates, capacity, and routes (albeit excluding ownership restrictions and cabotage), the term originated with the U.S. policy initiative to "export" its domestic deregulatory ethos for civil aviation to the international market. *See* Defining "Open Skies," 3 Aviation L. Rep. (CCH) ¶ 26,960 (Dep't of Transp. Aug. 5, 1992) (final order); Statement of United States International Air Transportation Policy, 60 Fed. Reg. 21,841, 21,844 (Dep't of Transp. May 3, 1995) (notice) (reaffirming the United States' "longstanding policy of seeking an open, liberal operating environment to facilitate the establishment and expansion of efficient, innovative and competitive air cargo services"). The U.S.-backed open skies policy upholds both cabotage and the citizenship purity test. *See* [Model] Air Transport Agreement, U.S.-[country], arts. 2-3, Jan. 10, 2008, *available at* http://www.state.gov/documents/organization/114970.pdf.

[107] Until the 1950s, Canada was commonly referred to as the "Dominion of Canada." The change in monikers reflects the country's independence from oversight by the United Kingdom. The Canada Act of 1982, which shook off the last vestiges of British authority, refers to the State throughout as simply "Canada." *See* Canada Act, 1982, c. 11 (U.K.), *available at* http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1268538.

[108] *See* Agreement on Air Transport Between Canada and the European Community and its Member States, Dec. 17, 2009, 2010 O.J. (L 207) 32 (EC) [hereinafter Canada/EU Air Transport Agreement], *available at* http://ec.europa.eu/transport/air/international_aviation/country_index/doc/canada_final_text_agreement.pdf. At the time of this writing, an officially approved version of the text has not been published in the *Official Journal of the European Union*. All citations are to the version which appears on the European Commission's website.

[109] *See* Diederiks-Verschoor, *supra* note 44, at 13 (stating that the U.S. "advocat[ed] complete freedom of competition in air transport" at the Chicago Conference in distinction from the U.K. proposal of "creat[ing] an international [o]rganisation to coordinate air transport and to assume the duties of apportioning

skies" template for bilateral air services treaties.[110] The U.S. template, however, never contemplated—and still does not contemplate—an assault on the twin redoubts of the Chicago "system" of cabotage and the nationality rule.[111] Indeed, the U.S. Congress is currently considering legislation that will retrench the nationality rule by adding to existing proscriptions on non-citizen board membership of U.S. air carriers, a further set of disqualifications that could deny U.S. airline managerial and executive posts to foreigners.[112] Though remaining in thrall to the illiberality of the nationality and cabotage rules, Canada and the European Union have concluded an agreement that, for the first time in an interregional bilateral air services agreement, *explicitly* contemplates the eventual demise of the cabotage and nationality rules.

B. *Canada's Rising Cosmopolitanism*

In the airline industry, one does not lightly dismiss the question of sovereignty, even when states are devolving airline ownership to private citizens, because the rules of nationality—themselves emanations of sovereignty—remain deeply implicated in how states perceive their airlines. The sovereignty question also has a powerful political, if not also populist, resonance. Before the election of the minority Conservative Government led by Stephen Harper in 2006, the Liberal Party held power for an unbroken stretch of over 12 years in Canada. One might have imagined that a party bearing that name would be associated with, or at least countenance, the post-war neoliberal free trade agenda and its implied limitations on sovereign latitude. Yet at an airline liberalization conference convened by the Greater Toronto Airports Authority in 2003, the then Liberal party Minister of Transport David Collenette made the

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the world's air routes and making decisions on frequencies and tariffs"); *see also* sources cited, *supra* note 60.

[110] *See* Defining "Open Skies," *supra* note 106.

[111] *See id.*; *see also* Susan Kurland, Assistant Sec'y Aviation & Int'l Affairs, Dep't of Transp., Remarks to the American Bar Association Forum on Air and Space Law (Jan. 27, 2010), *available at* http://ostpxweb.dot.gov/aviation/Speeches/FinalKurland ABA.pdf (stating that providing deeper foreign investment opportunities in U.S. airlines would require congressional action); Kevin Done, *Doubt Cast on Big Cut in Fares from Open Skies*, FIN. TIMES (London), Mar. 24, 2007, at 8 (stating that "leading U.S. congressmen are ruling out" that additional U.S./EU air transport negotiations will "include removing limits on foreign ownership and control of airlines and on foreign carriers gaining cabotage in the U.S. market").

[112] *See* FAA Reauthorization Act of 2009, H.R. 915, 111th Cong. § 801 (2009) (stipulating that "an air carrier shall not be deemed to be under the actual control of citizens of the United States unless [they] control all matters pertaining to the business and structure of the air carrier, including operational matters such as marketing, branding, fleet composition, route selection, pricing, and labor relations"). As of the time of this writing, the Act has passed the House but remains stalled in the Senate.

valedictory declaration that "I am an old-time Canadian nationalist, we are a sovereign nation, we will decide for ourselves what happens with respect to our national airline industry, and we will not be pushed into any liberalization by the actions of other countries."[113] Collenette's nationalistic *mentalité*, however, was already being tempered by other, less strident voices in Canada's aeropolitical discourse.

In the same year, and in fact on the same day as the Toronto conference, the Ottawa-based Institute for Research on Public Policy published a discussion paper, *New Destinations in International Air Policy*,[114] which excoriated Canada's strong temptation to "cling, limpet-like, to old [aviation] policies"[115] and to refuse, for example, to enter into or associate with the dialogue that would produce a new transcontinental U.S./EU air transport agreement in 2007.[116] Chillingly for a Canadian *amour-propre*, the Institute's paper described "followership [as] a sacred principle of Canadian aviation policy."[117] The taunt was not subtle: in protecting its flag carrier Air Canada,[118] and in clinging unswervingly to the post-Chi-

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[113] This quote is taken from author Brian Havel's notes of the Conference. A summary of Collenette's remarks, including his self-referential "nationalist" epithet, is available in *Government Won't Change Air Canada Ownership Curbs*, USA TODAY, Apr. 3, 2003, *available at* http://www.usatoday.com/travel/news/2003/2003-04-03-canada-owner.htm.

[114] William A. Dymond & Armand de Mestral, New Destinations in International Air Policy, POL'Y MATTERS, Oct. 2003, at 1.

[115] *Id.* at 3.

[116] *See* Air Transport Agreement, U.S.-EU, Apr. 30, 2007, 46 I.L.M. 467 [hereinafter U.S./EU Agreement]. The Agreement entered into provisional force on March 30, 2008 and was subsequently modified by the Protocol to Amendment the Air Transport Agreement Between the United States of America and the European Community and Its Member States, June 24, 2010, *available at* http://ec.europa.eu/transport/air/international_aviation/country_index/doc/2010_03_25_us_protocol_attach_b.pdf. As of November 2010, the amending protocol awaits final approval from the European Parliament.

[117] Dymond & de Mestral, *supra* note 114, at 13. *Cf. 30 Rock: Rosemary's Baby* (NBC television broadcast Oct. 25, 2007) (containing a humorous depiction of "follow[er]ship"). Further evidence for this claim can be found in the fact that like the United States, Canada's air transport industry was tightly regulated in its infancy and remained so until the 1980s. *See* Edward Iacobucci et al., *The Political Economy of Deregulation in Canada*, *in* CREATING COMPETITIVE MARKETS: THE POLITICS OF REGULATORY REFORM 290, 307 (Mark K. Landy et al. eds., 2007). Unlike the United States, however, Canada's airline deregulation project largely revolved around a single carrier—Air Canada—and remains in flux as regulators continue to adjust the tempo of national competition policy vis-à-vis the airlines. *See id.* at 308-11. For more on Canadian airline deregulation, including the privatization of Air Canada, see David W. Gillen et al., *Privatization of Air Canada: Why it is Necessary in a Deregulated Environment*, 15 CAN. PUB. POL'Y 285 (1989).

[118] Michael E. Levine, Essay, *Why Weren't the Airlines Reregulated?*, 23 YALE J. ON REG. 269, 294-95 (2006) (discussing the ability of Air Canada to wield its

cago nationality and cabotage rules,[119] Canada had been practicing an identical mercantilist aviation policy as that of the United States. Moreover, Canada maintained its fidelity to a nationalist *mentalité* even during a time when the spirit of "continental thinking" immanent to NAFTA might have urged otherwise,[120] and although neither NAFTA nor its Canada/U.S.[121] predecessor paid the slightest regulatory attention to the world's busiest bilateral air transport corridor.[122]

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concentrated dominance in the Canadian air transport market to induce favorable regulation from national authorities).

[119] *See* Sheehan, *supra* note 72 and accompanying text.

[120] It was not until 2005 that Canada finalized an open skies agreement with the U.S. *See* U.S./Canada Air Transport Agreement, *supra* note 76. A prior 1995 "open transborder" agreement left important restrictions in place with respect to Canada's international market. *See* TRANSPORT CANADA, STRAIGHT AHEAD—A VISION FOR TRANSPORTATION IN CANADA (2003), *available at* http://www.tc.gc.ca/eng/mediaroom/backgrounders-b03-mm003e-1665.htm (noting that the 1995 agreement did not allow for unlimited rights to carry beyond traffic to third states from the other country's territory, prohibited all-cargo carriers from coterminalizing (i.e., linking) points in the other country, and prevented price leadership by the other carrier's airlines in some international markets).

[121] *See* Free-Trade Agreement, U.S.-Can., Jan. 2, 1988, 27 I.L.M. 281 [hereinafter CUSTA].

[122] *See* Press Release, Transport Canada, Open Skies Agreement with the U.S. (Mar. 2007), *available at* http://www.tc.gc.ca/eng/mediaroom/backgrounders-open skies-5281.htm ("estimat[ing] that the Canada-U.S. air transportation market generated approximately 19.8 million passengers in 2005, making it the largest international air transportation market in the world"). The pusillanimity reflected in earlier Canadian aviation policymaking seemed far removed from former Prime Minister Brian Mulroney's assertive diplomacy on behalf of the 1988 CUSTA, CUSTA, *supra* note 121, against a crescendo of U.S. protectionism, *see* Harold Hongju Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States–Canada Free Trade Agreement*, 12 YALE J. INT'L L. 193, 245-46 (1987) (describing the shift in U.S. trade policy toward protectionism during the late 1980s). Speaking to a national television audience on the night of June 16, 1986, Mulroney portrayed Canada as a trading nation, regretted years of failed trade diplomacy to secure a free trade agreement with the United States, and insisted that pursuing commercial transactions without the deadweight of sovereignty would enhance as opposed to constrict Canadian sovereignty. BRIAN MULRONEY, MEMOIRS: 1939–1993, at 453-54 (2007). Ultimately, Mulroney successfully prodded the Reagan Administration into accepting an unprecedented, and (for the Americans) potentially unconstitutional, independent binational dispute mechanism, *see generally* Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455 (1992); David P. Cluchey, *Dispute Resolution Provisions of the Canada-United States Free Trade Agreement*, 40 ME. L. REV. 335 (1988), which became the template for the dispute settlement infrastructure of the WTO, *see generally* William A. Kerr, *Trade Dispute Settlement Mechanisms: the NAFTA Versus the WTO*, *in* THE WTO AND THE REGULATION OF INTERNATIONAL TRADE: RECENT TRADE DISPUTES

In 2007, following a consultation process that included input from McGill University aviation law scholars like Armand de Mestral and Paul Stephen Dempsey,[123] the Canadian Ministry of Transport unveiled a new international aviation policy, dubbed *Blue Sky*,[124] to ensure at least a facial distinction from its "open skies" U.S. predecessor.[125] Despite the prominence of those consulted, *Blue Sky* pays plagiaristic homage to the 1995 U.S. International Air Transport Policy Statement[126] promulgated by the Clinton Administration.[127] That U.S. policy reiterates, again in fealty to a "canalized" preference for open skies as a pathway to liberalization, that bilateralism will remain the cornerstone of U.S. air transport negotiations and that the citizenship purity test—and its associated cabotage rule—will countenance no deviation.[128]

On first acquaintance, then, our selection of Canada as a marquee example of air transport cosmopolitanism might appear underwhelming. But this would not be a fair conclusion. Formal adherence to the U.S. open skies model should not obscure adventurous trends in Canadian aeropolicy—atypical, although not entirely unique in the prevailing bilateral system[129]—toward reanimating the cosmopolitan promise of the Chicago Convention. Though Canada opted to watch from the sidelines as U.S./EU aviation negotiations made their tortuous progress, cosmopolites within the powerful watchdog agency, Competition Canada, encouraged the Canadian Minister of Transport to open talks with the

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BETWEEN THE EUROPEAN UNION AND THE UNITED STATES 49, 50 (Nicholas Perdikis & Robert Read eds., 2005) (noting that "[t]he revised dispute resolution mechanism which was incorporated in the WTO had many aspects modeled on the CUSTA [dispute settlement] provisions").

[123] *See generally* THE MCGILL/CONCORDIA REPORT ON INTERNATIONAL AVIATION POLICY FOR CANADA (Paul Stephen Dempsey et al. eds., 2005).

[124] *See* TRANSPORT CANADA, BLUE SKY: CANADA'S NEW INTERNATIONAL AIR POLICY (2006) [hereinafter BLUE SKY], *available at* http://www.tc.gc.ca/media/documents/policy/bluesky.pdf.

[125] *See supra* note 106. The title of the U.S. policy is sometimes inaccurately rendered as "open sky." *See, e.g.*, PETER FORSYTH ET AL., PREPARING ASEAN FOR OPEN SKY (2004).

[126] *See generally* Statement of United States International Air Transportation Policy, *supra* note 106.

[127] *See* BLUE SKY, *supra* note 124, at 3 (stating that it is Canada's "primary objective . . . to negotiate reciprocal 'Open Skies'-type agreements, similar to the one negotiated with the U.S. in November 2005").

[128] *See supra* note 106.

[129] Australia and New Zealand, for example, allow 100% foreign ownership for airlines serving domestic (cabotage) routes only. *See* Yu-Chun Chang et al., *The Evolution of Ownership and Control Provisions*, 10 J. AIR TRANSP. MGMT. 161, 162 tbl.1 (2004). More progressive still is the 2007 U.K./Singapore air services agreement, which offers reciprocal cabotage rights to the parties' airlines. *See* Alan Khee-Jin Tan, *Singapore's New Air Services Agreements with the EU and the U.K.: Implications for Liberalization in Asia*, 73 J. AIR L. & COM. 351, 362-64 (2008).

European Union[130] that could lead to what EU aeropolicy understands as an "open aviation area" (OAA).[131] An OAA would be much more than the amplified "open skies" relationship established in the 2007 U.S./EU air services agreement.[132] Tearing down the nationality and cabotage rules, the OAA would create a common "single market" airspace for the separate and sovereign airspaces of the contracting jurisdictions. And, even before the Canada/EU negotiations were launched in 2007,[133] former Canadian Competition Bureau Director Sheridan Scott presaged the eventual conclusion of a Canada/EU transcontinental agreement in testimony before the House of Commons Standing Committee on Transport, arguing that Canada's domestic air transport market (i.e., the cabotage market) should be opened to foreign carriers[134] and that its foreign investment cap (of 25% on foreign investment in airlines) should be raised to 49%.[135] Just three years later, in its major 2008 report entitled

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[130] For more on the background to the negotiations and the new agreement itself, see *infra* notes 150-172 and accompanying text.

[131] The "open aviation area" (OAA) concept is derived conceptually from the "Transatlantic Common Aviation Area" (TCAA) initiative proposed by the Association of European Airlines (AEA) in 1999. *See* AEA, TOWARDS A TRANSATLANTIC COMMON AVIATION AREA (1999). While it is sometimes compared to the U.S. open skies policy, the OAA concept (like the TCAA concept before it) embodies a more robust agenda for air transport liberalization—one which includes unrestricted traffic rights, cross-border investment in airlines, and comprehensive regulatory harmonization.

[132] Liberalization of cabotage and the nationality rule is not addressed by the U.S./EU agreement, but instead was postponed to become part of the negotiations for a "second stage" treaty between the two parties. *See* U.S./EU Agreement, *supra* note 116, art. 21(2)(a)-(b).

[133] *See* Press Release, European Comm'n, Commission Proposes to Open Aviation Negotiations with Canada (Jan. 9, 2007).

[134] Scott did not argue, however, that the citizenship purity test be abolished in its entirety, probably because of the potential adverse reactions of Canada's bilateral air transport partners. Unilateral cabotage disarmament had already been conceded by Australia, allowing the U.K.-based Virgin Group to create an all-domestic Australian airline, Virgin Blue, with the critical caveat that the carrier cannot be designated to serve international routes under Australia's bilaterals. Only Australia's longtime flag carrier, Qantas Airways, is afforded that privilege, and for good reason. A late 2008 overture by British Airways to take a substantial stake in the airline raised fears that Qantas would forfeit valuable traffic rights under Australia's bilaterals. *See* Mark Bendeich & John Bowker, *Qantas, British Airways Merger Talks Grounded*, REUTERS, Dec. 18, 2008, *available at* http://in.reuters.com/article/basicIndustries/idINLI68392720081218.

[135] *See* Sheridan Scott, Canadian Comm'r of Competition, Remarks to the House of Commons Standing Committee on Transport: Air Liberalization and the Canadian Airports System (May 4, 2005). Scott's bold public advocacy of air transport liberalization for Canada can be traced back to an equally remarkable 2001 paper which recommended that the Government eliminate all foreign ownership restrictions

Compete to Win, Canada's Competition Policy Review Panel—a policy review body created by the Canadian Government in 2007[136]—urged the Government to open Canadian airlines to increased foreign ownership in order to spur much-needed consolidation in the international aviation market and to provide consumers with service by truly global carriers.[137] The Review Panel further urged Canada to complete a new air services agreement with the European Union "as quickly as possible."[138]

As we will discuss in the final part, it is precisely because of the unconventional air services agreement that Canada concluded with the European Union in late 2008 that we can contemplate a refiring of cosmopolitanism in the arena of airline ownership and control. In radical opposition to how "open skies" is reconciled with citizenship purity and the denial of domestic market access to foreign carriers as the *conditio sine qua non* to securing international traffic rights, the Canada/EU agreement explicitly contemplates a phased program of liberalization that would fully liberalize cross-border investment rights, grant a right (or freedom) of establishment for foreign-owned airlines in each sides' respective territories, and finally eradicate the antiquated notion of cabotage.[139]

V. A Rising Cosmopolitanism in International Aviation

A. *The New "Interactive" Sovereignty*

It is worth reflecting that national sovereignty, which has held its place as the cynosure of all public international law throughout the existence of the Chicago Convention, has undergone a subtle mutation of meaning,

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for airlines, dismantle its cabotage restrictions, and provide a right of establishment for foreign carriers. *See* Peter P.C. Haanappel, International Aviation Framework and Implications for Canadian Policy (2001).

[136] *See* Competition Policy Review Panel, Gov't of Can., Sharpening Canada's Competitive Edge (2007).

[137] *See* Competition Policy Review Panel, Gov't of Can., Compete to Win 41-42 (2008). To bolster its arguments, the report highlighted the aviation industry's standing concern that inefficient state regulation of airline investment had artificially increased costs for carriers. *Id.* at 42. In the Review Panel's opinion, "[u]ltimately, the benefits of lower industry costs could be passed on to the public in lower fares and better service in a competitive environment. Improving productivity in the industry is important for Canada's economic future." *Id.* Though the report recommended raising the cap to only 49% in its conspectus of policy recommendations, it noted that increasing the cap beyond the 49% level would "provide further impetus for consolidation among international air carriers." *Id.* at 41.

[138] *Id.* at 42. *See also* Org. for Econ. Cooperation & Dev. (OECD), Competition Policy, Industrial Policy and National Champions: Contribution from Canada 8-9, paras. 19-25 (2009), *available at* http://www.oecd.org/dataoecd/60/33/42174422.pdf (reiterating the Review Panel's commitment to air transport liberalization and a comprehensive air services agreement with the EU).

[139] *See supra* note 72 (discussing cabotage).

particularly in the post-Communist decade since 1989. Formerly freighted with the notion of excluding all others, the newest version of the doctrine of sovereignty rests on a paradigm of interaction. The globalization and concomitant privatization of markets and industries are two of the keystones of the new paradigm, so that sovereignty is not only a claim of freedom from external interference, but also the liberty to *permit* some kinds of external interference. In other words, we have a perfectly rational paradox: the existence of sovereignty is in part defined by its capacity to be given away.[140] The trade value of sovereignty moves away from its old association with the consensual statecraft, the zero-sum game of Metternichian diplomacy, to a reinterpretation where sovereignty is no longer history's defiant *noli me tangere*.[141] Rather, in utilitarian terms, sovereignty is meant *for* something.

These epistemological shifts in the understanding of sovereignty have gone largely unnoticed within international civil aviation law. The one conspicuous exception has been the EU common market for civil aviation,[142] and the subsequent "exportation" of the internal legal construct of an "EU air carrier" (formerly "Community air carrier"[143]) through aeropolitically-driven modifications of EU member states' bilateral air services agreements with third countries.[144] It is now possible, in a circumscribed way, for the EU single aviation market to sanction less-than-

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[140] *See* Brian F. Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C. L. REV. 257, 276-77 (2000).

[141] *John* 20:17 (Vulgate). The phrase, which is found St. Jerome's translation of the Greek New Testament into Latin in the late fourth century, can be literally translated as "do not touch me." Contemporary translations of the Bible, such as the English Standard Version, render the phrase "do not cling to me" to better accord with the Greek original. *Cf. John* 20:17, *in* NOVUM TESTAMENTUM GRAECE ET LATINE (Kurt Aland & Eberhard Nestle eds.,1994).

[142] *See generally* STANILAND, *supra* note 77.

[143] *See id.* (discussing the construct and change in nomenclature).

[144] Following a series of European Court of Justice (ECJ) rulings (the so-called "open skies cases"), which found the nationality clauses in all member states' bilaterals to be incompatible with EU law, *see* Cases C-467-69, 471-72, & 475-76/98, Comm'n v. Denmark et al., 2002 E.C.R. I-9519 *et seq.*, the European Commission was given a mandate to "horizontally" amend all member state bilaterals with third party states in order to bring them into conformity with Community law. *See* European Commission, Information Note: EU External Aviation Policy 1 (2003), *available at* http://ec.europa.eu/transport/air/international_aviation/doc/2005_10_12_info_note_faq_en.pdf. Third-party states which accept these amendments must recognize the EU carrier construct, *see supra* note 77, whereby any airline licensed under the European Union's common licensing regime is eligible for designation under any member state's third State bilaterals (subject to these agreements' respective limitations on capacity, frequencies, and traffic rights). *See* Commission Decision 29/03/2005, 2005 O.J. (C 943) 1, 4-8.

complete mergers such as Air France/KLM[145] as well as ownership by one member state's citizens of the airline of another (as, for example, Lufthansa's acquisition of Austrian Airlines[146]). These localized rewrites of the nationality rule, however, are applicable only to the extent of the EU's own supranational authority and aeropolitical bravado.[147] Foreign, or non-EU, acquisition or establishment of an EU air carrier remains impermissible, and not all foreign states have willingly consented to recognize intra-EU mergers and acquisitions that deviate from the conventions of bilateralism.[148] Thus, while the EU single aviation market prefigures what a fully liberalized system of airline ownership might look like and of how it might operate, the intra-EU elimination of the nationality and cabotage rules was not motivated so much by cosmopolitanism as by a technocratic need to eliminate discriminatory obstacles within what had become, in effect, a single airspace jurisdiction.[149] To find a

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[145] This "merger-in-waiting," whereby Air France acquires Dutch carrier KLM, is maintained through an Air France-KLM "holding company" which owns 100% of Air France's capital and voting rights, and 97.3% of the economic rights (including dividend rights) in KLM—but only 49% of its voting rights. *See* AIR FRANCE-KLM, 2004-05 REFERENCE DOCUMENT 20 & 30-34 (2005). In order to protect KLM's traffic rights from being revoked by third-party states under the Netherlands' bilaterals, a safeguard provision negotiated between Air France-KLM and the Dutch State allows the Netherlands to exercise a renewable option to subscribe for KLM preferential shares that will automatically increase the Dutch State's stake to 50.1% of the capital and voting rights of KLM. *Id.* at 215.

[146] This circumvention of international aviation's historic nationality restriction is not without impediments. The ability of EU member state airlines to still avail themselves of the traffic rights contained in member state bilaterals remains subject to the willingness of third country partners to recognize the EU air carrier construct. There remain notable holdouts. Russia, for example, recently threatened to retract Austrian Airlines' traffic rights following the carrier's acquisition by Germany's Lufthansa. *See* Pilita Clark, *Russia Threatens Ban on Austrian Airlines*, FIN. TIMES, Mar. 1, 2010, *available at* http://www.ft.com/cms/s/0/0e9a6fd2-24d3-11df-8be0-00144feab49a.html.

[147] Important aviation markets such as China, Hong Kong, Japan, Russia, and Saudi Arabia have not fully accepted the EU air carrier construct. *See* European Commission, *Bilateral ASA Brought Into Legal Conformity Since ECJ Judgments on 5 November 2002* (Sept. 23, 2009), *available at* http://ec.europa.eu/transport/air/international_aviation/doc/status_table.pdf.

[148] *Id.*

[149] The ECJ open skies rulings, *see supra* note 144, crowned the European Union's decade-long shift to a common aviation market by striking down provisions contained in member state bilaterals with third countries which discriminated against carriers from other member states. Though the Court rejected the European Commission's argument that it should be awarded sole competence to (re)negotiate bilateral air services agreements with non-EU States, the Commission has used the rulings to leverage grants from the member states to not only "horizontally" amend their bilaterals with third countries to bring them into compliance with EU law, *see supra*

transformative site for revival of a cosmopolitan *mentalité* for airline ownership, therefore, we need to lift our gaze beyond the European Union's internal technical machinery and to examine how EU and Canadian negotiators agreed bilaterally in 2008 to contemplate the eventual demise of the nationality and cabotage rules. To that agreement we now finally turn.

B. *A Cosmopolitan Air Services Agreement*

The decision of Canada and the European Union to enter into comprehensive negotiations for a liberalized air services agreement was not at all surprising; more puzzling was that they waited quite so long to do so. As early as 1976, the two jurisdictions signed a Framework Agreement on Economic Cooperation.[150] In the intervening decades, Canada consummated bilateral air services agreements with most (though not all)[151] EU member states. As might be expected, these agreements were inconsistent and uneven in their liberality of market access, their pricing protocols, and their treatment of route capacity.[152] All included standard nationality clauses which foreclosed recognition of the EU air carrier construct, and none of them offered expansive inward investment or cabotage rights to either party.[153] Nonetheless, the European Union remained Canada's second largest aviation trading partner and the European Commission continued to work closely with the Canadian Government to harmonize aviation safety standards,[154] to cooperate on air traffic management,[155] and to eliminate regulatory obstacles to general trade and investment.[156] A Commission economic study, often the predicate

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note 144, but also to enter into comprehensive negotiations on behalf of the member states with targeted third countries, *see Communication from the Commission on Relations Between the Community and Third Countries in the Field of Air Transport*, COM (2003) 94 final (Feb. 26, 2003). The result has been a regional expansion of the Chicago Convention's principle of airspace sovereignty to the supranational level, albeit an expansion that still imperfectly replicates the unitary airspace jurisdiction in federal systems such as Canada and the United States.

[150] *See* Framework Agreement for Commercial and Economic Cooperation Between the European Communities and Canada, 1976 O.J. (L 260) 2.

[151] Canada had no previous bilaterals with Cyprus, Estonia, Latvia, Lithuania, Luxembourg, Malta, the Slovak Republic, and Slovenia.

[152] *See Communication from the Commission on Developing a Community Civil Aviation Policy Towards Canada*, at 3, para. 2.1, COM (2006) 871 final (Jan. 9, 2007).

[153] *Id.*

[154] *Id.* at 5, para. 3.2. *See also* Agreement on Civil Aviation Safety Between the European Community and Canada, 2009 O.J. (L 153) 11.

[155] *See Communication from the Commission on Developing a Community Civil Aviation Policy Towards Canada*, *supra* note 152, at 5, para. 3.2.

[156] In 2009, both parties entered into negotiations for a broad free trade agreement. *See* Press Release, European Commission, EU-Canada Summit to Launch Negotiations for a New Economic and Free Trade Agreement (May 5, 2009).

for any EU aviation *démarche*,[157] forecasted that a liberalized Canada/EU aviation regime would generate new jobs, reduce fares, and substantially increase passenger movements.[158]

Leveraging their longstanding trade relations, Canada and the European Union created a mechanism that ultimately would allow them to overcome the blockade on foreign ownership and cabotage rights that remains embedded in the U.S./EU air services agreement.[159] Their ambitious (albeit contingent) agreement proposes a de facto merger of airspaces to create a truly free market for international air transport services.[160] Using a tiered structure of liberalization, the Canada/EU Air Transport Agreement contemplates four successive "phases" with specific triggering mechanisms.[161] The first phase, which is already in effect, requires that both parties allow each other's nationals to own up to 25% of the voting equity in their respective airlines.[162] In return, all capacity and frequency limitations for flights between Canada and the European Union are removed, although traffic rights for points beyond each party's respective territory remain circumscribed.[163] Once Canada and the

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[157] *See, e.g.*, BRATTLE GROUP, ECONOMIC IMPACT OF AN EU-US OPEN AVIATION AREA (2002) (assessing the commercial benefits of liberalizing U.S./EU aviation trade relations as a prelude to negotiations for their 2007 air services agreement).

[158] *See Communication from the Commission on Developing a Community Civil Aviation Policy Towards Canada*, *supra* note 152, at 6-7, paras. 4.5-4.8.

[159] *See* U.S./EU Agreement, *supra* note 116.

[160] *See* Press Release, European Commission, Breakthrough in EU-Canada Negotiations on Far-Reaching Aviation Agreement (Dec. 9, 2008).

[161] The four phases of the Agreement are not spelled out in the main text of the treaty, but are instead contained in an annex entitled, "Progressive Availability of Traffic Rights." *See* Canada/EU Air Transport Agreement, *supra* note 108, Annex 2, § 2. For an alternative summary of the phases, see Press Release, European Commission, The EU-Canada Aviation Agreements—Q&A (May 6, 2009).

[162] With Canada's foreign ownership limit already set at 25%, *see* CTA, *supra* note 74, §§ 55, 61, this provision of the agreement has the effect of a standstill provision with respect to the existing cap. Interestingly, the European Union, which already allows a higher non-Union ownership threshold of 49.9%, *see* Council Regulation 1008/2008, *supra* note 64, art. 4(f), did not reserve the right to reciprocally cap Canadian investment in EU air carriers at the level set by the more restrictive party as the Union had done in its air services agreement with the United States, *see* U.S./EU Agreement, *supra* note 116, Annex 4, art. 1(4).

[163] While the first phase of the Canada/EU Agreement does not expressly grant either party's carriers the right to use fifth or sixth freedom rights for passenger and combination (cargo and passenger) services, it does allow the terms of earlier Canada/member state bilaterals for passenger, combination, and all-cargo services to govern where these agreements are more liberal in their concession of rights than the regime of rights made available under the various phases of the Agreement. Canada/EU Air Transport Agreement, *supra* note 108, Annex 2, sec. 2(a)(iii); *see also id.* Annex 3, sec. 2 (detailing the more liberal rights contained in the bilaterals preceding the Canada/EU agreement). The range of liberality is considerable; earlier agreements with

European Union converge on resetting their foreign ownership caps to 49%,[164] the second phase begins and additional traffic rights are made available to both parties.[165] These opening two phases, however, are only staging posts on the journey to the agreement's full cosmopolitan promise.

The third phase of the agreement will activate when Canada and the European Union undertake reforms within their respective aerolegal regimes to provide a right (or freedom) of establishment to allow each other's citizens to incorporate new airlines in all of the national jurisdictions covered by their agreement.[166] At that point, British Airways (BA), for example, could establish a wholly-owned subsidiary in Canada, *sub nomine* "BA-Canada," to provide intra-Canadian low-cost service similar to WestJet, while also supplying feeder traffic to BA for its transatlantic services.[167] In principle, BA-Canada would also be eligible for designation under Canada's bilateral agreements to offer independent service

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Bulgaria, the Czech Republic, and Spain permitted only a small number of fifth freedom rights to Canadian carriers through select points within their respective territories, *see id.* Annex 3, sec. 2, with, on the opposite end, the preceding Canada/United Kingdom bilateral permitting unlimited reciprocal fifth freedom rights for all air services, *id.* In addition, the Canada/U.K. bilateral also provides each party's all-cargo airlines unrestricted rights to operate service between each other's territories and third countries without a requirement that the carriers serve a point in their home state (the so-called seventh freedom). *Id.* This gesture is constrained, however, by the willingness of third states to receive seventh freedom traffic from either Canada or the United Kingdom.

[164] As noted, *supra* note 162, the EU already satisfies this requirement (and, in fact, currently goes slightly further to 49.9%). For a discussion of calls for the Canadian government to reciprocate, see *supra* notes 132-138 and accompanying text.

[165] Specifically, Canadian airlines will be afforded intra-Union fifth freedom rights which would allow Air Canada, for example, to operate a Toronto/London/Paris service but not a Toronto/London/Moscow one. Both parties' all-cargo airlines would also gain the right to operate seventh freedom services between points in each other's territories to third countries. *See supra* note 163 and accompanying text.

[166] *See* Canada/EU Air Transport Agreement, *supra* note 108, Annex 2, sec. 2, para. 2(c). Once a right of establishment has been reciprocally created, both parties will also receive unlimited fifth freedom rights for passenger and combination cargo services.

[167] The right of an airline to establish a subsidiary in a foreign state's territory would likely make superfluous the apparent need for "pure" cabotage, that is, the privilege of a foreign carrier to serve points within another state's domestic territory without originating or terminating part of the service in its home country. *See supra* note 72. Arguably, the subsidiary would have a more visible brand identity and marketing presence in the foreign country's territory and, potentially, a lower cost structure than its larger parent carrier, thus making it a more efficient option to carry intra-State traffic.

between, say, Toronto/Chicago or Montreal/New York.[168] This progressive liberality ascends to the fully cosmopolitan in the agreement's fourth and final phase, in which the two sides permit 100% cross-border ownership of their airlines by the other's nationals[169] and close any remaining traffic right lacunae (including cabotage).[170] Under a fully operational fourth phase, BA would have the option of purchasing an existing Canadian airline such as WestJet or Air Canada as an alternative to establishing BA-Canada as BA's subsidiary.[171] As these investment rights would be accompanied by the removal of the cabotage proscription, BA, regardless of whether it pursued any stake in any Canadian airline, could independently serve points within Canada (the so-called "ninth freedom cabotage") or attach Canadian domestic routes to its international services (using "eighth freedom cabotage" to deplane and enplane passengers in Toronto on a flight that originates in London with a final

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[168] In practical terms, however, Canada would have to undertake measures—in cooperation with the EU—to use its aeropolitical influence to persuade third party states to accept this abrogation of the citizenship purity rule. Because the EU is already degrading nationality through exportation of the EU air carrier construct, there is a precedent for wielding aeropolitical power in this way. *See supra* note 144. A possible alternative to this discomfiting scenario is for states to "waive" the nationality clauses in their bilaterals. The International Air Transport Association (IATA)—the international airline industry's private trade body—and the U.S. State Department, in cooperation with the European Commission, are undertaking separate efforts to accomplish this salutary goal. *See* Brian F. Havel & Gabriel S. Sanchez, *The Emerging* Lex Aviatica, 42 Geo. J. Int'l L. (forthcoming 2011). Under the IATA proposal, dubbed "The Agenda for Freedom," States commit, in a non-legally binding document, to unilaterally waive the nationality clauses in their air services agreements on a *reciprocal* basis. *Id*. The State Department proposal, on the other hand, contemplates a legally binding multilateral agreement where the nationality clauses contained in all the states' bilaterals would be placed in an annex and formally waived. *Id.* For more information on both initiatives, see *Agenda for Freedom*, INTERNATIONAL AIR TRANSPORTATION ASSOCIATION, *available at* http://www.agenda-for-freedom.aero.

[169] *See* Canada/EU Air Transport Agreement, *supra* note 108, Annex 2, sec. 2, para. 2(d).

[170] Once both sides have adopted all the necessary legal reforms to introduce unrestricted crossborder ownership and to disarm cabotage, Annex 2 of the agreement ceases to operate and, instead, Annex 1—which contains the full menu of the parties' unrestricted market rights—comes into effect. *See id.* Annex 1, Annex 2, sec. 2, para. 2(d).

[171] It may well be asked why, given that the two rights complement each other, Canada and the EU decided to sunder the right of establishment from full crossborder investment rights in existing airlines in the third and fourth phases of their agreement. Perhaps Canada made the politically-savvy choice to place a higher premium on giving EU nationals a right of establishment rather than confronting (too early) labor's likely resistance to a foreign takeover of Air Canada or WestJet. For more on labor's sustained resistance to airline liberalization, see *infra* note 176.

destination in Vancouver).[172] In short, Canadian and EU air carriers could avail themselves of full market, commercial freedom and flexibility throughout their respective territories, as if their separate aviation markets were juridically fused.

Phases three and four conjointly envisage that the new notion of a corporate or regulatory affinity to the state of establishment will supersede the traditional adhesion factors of citizenship and sovereignty. This altered understanding of corporate citizenship offers a clear conceptual separation between the commercial and regulatory control of an airline. For a non-citizen private investor, control will mean a new, nondiscriminatory "commercial" citizenship that can claim a majority of the voting equity and a concomitant measure of managerial or strategic influence, while the airline remains under effective national regulatory control for compliance with safety and security standards. In effect, this understanding will produce a transformed "regulatory" citizenship that substitutes principal place of business for principal place of personal affiliation. And that regulatory "bindingness" would include all of the applicable taxation, labor, immigration, and environmental laws that govern any domestic corporation. In this altered conceptualization, what Professor Roderick Macdonald would characterize as the necessary "law reform,"[173] Canada would reciprocally allow EU airlines to fully integrate into its home market by establishing Canadian airlines or serving Canadian domestic routes while being fully licensed, in every legal and regulatory sense, as though they were themselves Canadian corporations.[174]

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[172] Echoing the scenario of an EU-owned subsidiary airline seeking designation under a Canadian bilateral, *see supra* note 168, if either WestJet or Air Canada were wholly or even "substantially" acquired by EU citizens, both would risk losing their international traffic rights unless Canada successfully amended its air services agreements with all non-EU States. In addition to the traditional nationality rule, many air services agreements also require carriers to have their principal place of business within the territory of the designating state. Even if the United States, for example, was willing to waive the nationality clause in its bilateral agreement with Canada to allow BA-Canada to serve Toronto/Chicago, the principal place of business requirement could foreclose a BA-owned WestJet, with its offices and incorporation transferred to London, from designation. This potential prohibition could be forestalled, however, if the degree and quality of WestJet's commercial presence within Canada remained untouched despite the foreign acquisition.

[173] *See* Roderick Macdonald, *Unitary Law Re-form, Pluralistic Law Re-Substance: Illuminating Legal Change*, 67 LA. L. REV. 1113, 1159 (2007) (discussing his theory of law reform).

[174] This conclusion assumes that EU airlines, for example, would choose to acquire an established Canadian carrier or to start their own domestic Canadian airline with nationally-oriented branding, marketing, and workforces. It is conceivable, however, that under the abolition of cabotage restrictions in the fourth phase, BA may choose simply to offer, for example, a London/Toronto/Vancouver service (with Toronto/

C. *The Normativity of Cosmopolitan Law Reform: States and Their Entrepreneurs*

How would the airline industry receive the conceptual transformation presaged in the Canada/EU air services agreement?[175] While the governments, which apply the law, have been nationalistic in their *mentalité*, can we make the claim that the industry itself has been reliably cosmopolitan?[176] We believe so. An intriguing dynamic of the modern airline industry, after all, has been the capacity—and determination—of private entrepreneurial initiatives to develop international and global airline alliances that, to a limited but conspicuous extent, countervail the nationality rule's proscription on transnational mergers and acquisitions.[177] In this specific sense, a cosmopolitan *mentalité* is evident from its implantation in the sites of what Macdonald may identify as a "pluralistic normativity"[178] that operates beneath the citizenship purity paradigm mandated by states and that has worked to destabilize that paradigm. Pluralism, then, in our understanding, is the coexistence of multiple law-generating institutions other than the central state lawgiver. There are, in other words, alternative "sites" of legal activity that push toward a paradigm shift and eventually toward the legal system's displacement of a prevailing discourse.[179] This bottom-up normative destabilization and shift in *mentalité* may appear conceptually abstract but the aviation alliance phenomenon offers a compelling example that makes the process accessible. In the face of hard legislation that sets insurmountable boundaries to the reach of foreign ownership and control, airlines developed transnational alliances, "pseudo-mergers," constructed from a completely unregulated prac-

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Vancouver as cabotage points). In this scenario, BA would likely remain under the regulatory dominion of the United Kingdom. *See* HAVEL, *supra* note 85, at 167-71 (discussing the commercial and regulatory effects of providing a right of establishment for airlines).

[175] The agreement was welcomed by Air Canada as a means of "further develop[ing] Canada as a gateway to the world." Press Release, Air Canada, Air Canada Welcomes Canada-European Union Air Transport Agreement (Dec. 18, 2009), *available at* http://aircanada.mediaroom.com/index.php?s=43&item=17.

[176] Airline labor unions, it is true, are more likely to align with David Collonette's traditional nationalistic *mentalité* and an ingrained suspicion of foreigners and are focused more on tying success to employment rather than to production. Labor's agenda, in this view, protects existing jobs at the expense of future jobs and in defiance of a discernible global trend in comparable industries such as automobiles, steel, and textiles. *See generally* Daniel Griswold, *Unions, Protectionism, and U.S. Competitiveness*, 30 CATO J. 181 (2010).

[177] *See* ANGELA CHENG-JUI LU, INTERNATIONAL AIRLINE ALLIANCES: EC COMPETITION LAW/US ANTITRUST LAW AND INTERNATIONAL AIR TRANSPORT 56-57 (2003).

[178] Macdonald, *supra* note 173, at 1140.

[179] *See supra* notes 103-104 and accompanying text.

tice––the sharing of their International Air Transport Association (IATA) designator codes.[180]

Though regulators eventually caught up with code-sharing under the auspices of protecting consumers,[181] the alliances themselves have continued to evolve. Availing themselves of provisions in national and supranational laws that shield (or exempt) them from competition rules, the three major global alliances—SkyTeam, Star, and Oneworld—have been able to forge global brand identities, pool their frequent flyer and marketing programs, and move toward sophisticated revenue sharing arrangements.[182] The alliances have also shifted the rules of the game for bilateral air services negotiations. Today, in the U.S. international aviation policy context, antitrust immunity—a veritable prerequisite for any close alliance cooperation[183]—has become the "bait" with which the United States lures partners into open skies agreements: no open skies implies no immunity and no alliance access.[184] It is the airlines' ingenuity coupled with their commercial desire to operate as truly globalized entities—to, in effect, be cosmopolitan—which has helped to unsettle some of the fixed ideas of nationality and citizenship propagated by the *ancien régime* of managed trade in civil aviation. This sequence of events represents, as Macdonald might have it, an alternative account of legal change in a contemporary official normative regime.

Again, as Macdonald indicates in pursuit of an even broader point, "much law *reform* is based on the erroneous presumption that legal subjects are simply entities that law can apprehend, constitute, remake, or deny."[185] The correct assumption, and one that we believe founds a modern theory of the process of international economic development and

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[180] IATA assigns two-character codes to international airlines which are used to identify the carriers for commercial purposes, including reservations, scheduling, and ticketing. *See IATA Airline Codes,* IATA, *available at* http://www.iata.org/WHATWEDO/AIRCRAFT_OPERATIONS/Pages/codes.aspx.

[181] In the United States, the Department of Transportation closely monitors code-sharing and requires carriers which use it to file in advance for Department approval. *See* Disclosure of Code-Sharing and Long-Term Wet Leases, 14 C.F.R. § 257 (2009).

[182] *See* Rutger Jan toe Laer, *Kick Starting Cross-Border Alliances*, 32 AIR & SPACE L. 287 (2007) (comparing the U.S. and EU competition regimes as they relate to airline alliances).

[183] Under the prevailing alliance model, partner airlines endeavor to cooperate closely on prices, services, perquisites, and revenue sharing, all of which could give rise to federal antitrust claims. In determining whether to grant an alliance antitrust immunity under its statutory authority, *see* 49 U.S.C. § 41308 (2006), the Department of Transportation must first be satisfied that the joint venture "would not otherwise go forward without it." *See* Joint Application of American Airlines, Inc. et al., Show Cause Order, at 35-36, Dkt. No. DOT-OST-2008-0252 (Feb. 13, 2010).

[184] For more on the role of alliances and antitrust immunity in U.S. international aviation policy, see HAVEL, *supra* note 85, at 287-302.

[185] Macdonald, *supra* note 173, at 1121.

trade reform, is to insist on the converse proposition, "that it is legal subjects who apprehend, constitute, remake, and deny law."[186] This notion of a pluralistic law reform, therefore, extends to the so-called epistemic community[187]—the "webs of influence" described by Australian scholars John Braithwaite and Peter Drahos[188]—that are assembling to eradicate the nationality and cabotage rules trumpeted by David Collonnette in favor of a new paradigm of a universal commercial (cosmopolitan) citizenship. The stakeholders in building that community[189] include both present and former government officials, airlines, intergovernmental organizations like ICAO,[190] nongovernmental players like IATA,[191] the Association of European Airlines (AEA),[192] and academic institutes of aviation (such as the one to which the authors belong).[193]

The Canada/EU air services agreement, with its radical vision for cross-border ownership and control of airlines, places the modern notion of an interactive sovereignty in the service of the process of law reform considered in the previous paragraph. Here, the governments themselves have decided to rewire the regulatory paradigm, but once again in response to

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[186] *Id.*

[187] "The term . . . has been adapted for use in international relations to refer to a specific community of experts sharing a belief in a common set of cause-and-effect relationships as well as common values to which policies governing these relationships will be applied." Peter M. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control*, 43 INT'L ORG. 377, 384 n.20 (1989).

[188] JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 13 (2000).

[189] For a detailed discussion about the role of this epistemic community in the development of the 2007 U.S./EU air transport agreement, see HAVEL, *supra* note 85, at 40-52.

[190] Despite being long beholden to the bilateral system, *see, e.g.*, ICAO, *Report of the Conference on Air Transport*, at 53-54, ICAO Doc. 9644 (1994), ICAO has since adopted a "Declaration of Global Principles for the Liberalization of Air Transport" that calls for giving international aviation "as much economic freedom as possible while respecting its specific characteristics and in particular the need to ensure high standards of safety, security, and environmental protection." ICAO, *Consolidated Conclusions, Model Clauses, Recommendations and Declarations*, at 19, ICAO Doc. ATConf/5 (Mar. 31, 2005).

[191] *See supra* note 168 (discussing the IATA "Agenda for Freedom"); *see also* Brian F. Havel & Gabriel S. Sanchez, *International Air Transport Association*, *in* HANDBOOK OF TRANSNATIONAL ECONOMIC GOVERNANCE REGIMES 755, 755-64 (Christian Tietje & Alan Brouder eds., 2009) (discussing IATA's evolution from a trade cartel to a voice of leadership and advocacy for the global air transport industry).

[192] *See supra* note 131 (mentioning the AEA's role in providing the conceptual antecedent to the EU's liberalization agenda).

[193] *See* INTERNATIONAL AVIATION LAW INSTITUTE, *available at* http://law.depaul.edu/aviation; *see also Aviation Law Profs Blog*, LAW PROFESSORS BLOG NETWORK, *available at* http://lawprofessors.typepad.com/aviation.

the cosmopolitan *mentalité* exhibited by aviation entrepreneurs, when they subverted the nationality rule to shape their new transcontinental alliance networks.[194] Nonetheless, the achievement of the negotiators must not be discounted: despite these jurisdictions' formal adherence to Chicago-style bilateralism, they have now (as a matter of official policy and treaty obligation) placed the nationality and cabotage rules on the track to extinction. These aviation powers have, in other words, officially assimilated the cosmopolitan *mentalité* of a rising epistemic community. That is, to return to Macdonald's thought,[195] Canada and the European Union are participants in a dynamic process of law reform which indwells in the modes and sites of law that are now being shaped by that community.

VI. Conclusion: The Spirit of the Rideau Canal

In 2008, the Toronto-based *Globe and Mail* newspaper published a series of short essays in response to the question, "What is Canada's role in the world?" The contributors ranged from a rejection of "slavish adherence" to the United States in matters of foreign policy[196] to a demand for Canada to upgrade its relations with its neighbor to the south.[197] Another spoke of Canada's foreign policy as a means to advancing Canadian ideals of peace, good governance, and free trade.[198] None of the authors challenged the newspaper's implicit assumption that Canada *does* have a place in the world and that Canadian interests are global interests that ought to be promoted beyond the reach of its borders.

With respect to its engagement in trade in air services, where Canada has progressed from a middle power that genuflected before the norm of nationality to a model power ready to sponsor a complete reversal of that norm, Canada can claim to have kept faith with these aspirational and cosmopolitan goals. Canada does not need to accept the ingrained and

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[194] *See generally* Brian F. Havel, *In Praise of Law's Cosmos: Reflections on the Entrepreneurial Spirit in Aviation Law and Policy*, 8 Issues Aviation L. & Pol'y 127 (2009) (discussing the role of entrepreneurship in circumventing and reforming international aviation's restrictive operating environment).

[195] *Cf.* Macdonald, *supra* note 173, at 1159.

[196] *See* Lloyd Axworthy, *Finding Canada's Place in the World: We Need a New Map*, Globe & Mail, Feb. 16, 2008, *available at* http://www.theglobeandmail.com/news/opinions/article667534.ece.

[197] *See* J.L. Granastein, *Finding Canada's Place in the World: It's a Matter of Realizing Our National Interests*, Globe & Mail, Feb. 17, 2008, *available at* http://www.theglobeandmail.com/news/opinions/article667535.ece.

[198] *See* David Eaves, *Finding Canada's Place in the World: Unleash the Power of our Citizens*, Globe & Mail, Feb. 18, 2008, *available at* http://www.theglobeandmail.com/news/opinions/article667536.ece.

inflexible approaches of civil aviation's comprador class,[199] nor the essentially conservative and fearful compromises of the 2007 U.S./EC air transport agreement that venerates nationality in place of an authentically liberalizing, cosmopolitan spirit.[200] The new universal standard for free trade in aviation can start on the banks of the Rideau Canal.[201] If, as Richard Janda postulates, certain economic relations can be abstracted from territory in the pursuit of some kind of virtual citizenship,[202] and where the identity of airlines can be "deterritorialized" and "denationalized," then the Canadian commercial laboratory is where we can begin. To paraphrase and adapt Professor Janda's theory, the new corporate citizen participates in the distal realm of a deregulated legal culture rather than in the proximate realm of local exclusionary nationalism.[203] As Canada has shown in the past, great trading nations can shape the trajectory of world trade law. Canada's autochthonous legal traditions of free trade forced the United States to displace national, and possibly nationalistic, law in the two great Canada/U.S. free trade experiments. Now Canada has partnered with the European Union to attempt a no-less-revolutionary *bouleversement* in international air transport law: to set the stage for how aviation, which has played such a central role in globalization, can itself become globalized.

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[199] *See generally* Athanasios Gekas, *Compradors to Cosmopolitans? The Historiographical Fortunes of Merchants in Eastern Mediterranean Ports* (European University Institute Working Paper MWP 2008/29, 2008).

[200] *See generally* U.S./EU Agreement, *supra* note 116.

[201] For a description of the Rideau Canal, see *Rideau Canal National Historic Site of Canada*, PARKS CANADA, *available at* http://www.pc.gc.ca/eng/lhn-nhs/on/rideau/index.aspx.

[202] Daniel M. Downes & Richard Janda, *Virtual Citizenship*, 13 CAN. J.L. & SOC. 27 (1998).

[203] *Id.* at 60.