Sustainable governance of aviation: changing tailwinds: from shareholding to stakeholders?

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Part B – Ownership & Control of Airlines

B1. "The Unique Link Between an Airline and a State"
Published in the Aviation and Space Journal, Issue 1(2023), pp 4-16.

B2. "Navigating Airline Nationality: European Perspectives on Airline Shareholding and Corporate Governance"
Published in Air & Space Law 49, Issue 6 (2024), pp 609-636.

B3. "Securing Strategic Autonomy for EU Airlines: An Assessment of Foreign Investment Exposure in the Air Transport Industry"
Published in the Aviation and Space Journal, Issue 3(2024), pp 4-17.

The Unique Link Between an Airline and a State

Published in the *Aviation and Space Journal*, Issue 1(2023), pp. 4-16.

Abstract

This article analyses the legal nature of the link between an airline and a State in international law. Building on general principles of nationality in the jurisprudence of the International Court of Justice, it examines how corporate nationality is attributed to juridical persons and assesses its relevance to airlines. It argues that, although the Chicago Convention does not expressly define airline nationality, a functional legal nexus is constructed through bilateral Air Services Agreements and domestic licensing regimes. This nexus is primarily articulated through the criteria of substantial ownership and effective control, complemented in practice by the notion of principal place of business for purposes of safety oversight and regulatory jurisdiction. At the same time, airlines remain independent undertakings under private international air law and competition law, bearing liability separate from the State. The article contends that this reflects a unique legal configuration, in which a special link between an airline and a State remains a decisive condition for market access, distinguishing aviation from broader developments in international economic law.

Keywords: corporate nationality, ownership & control, principal place of business, air services agreements, market access, safety oversight, regulatory control, licensing conditions

1. Introduction

In February 2023, the Organisation for Economic Cooperation and Development (OECD) released technical guidance to assist governments to implement a global minimum corporate tax rate of 15%.[1] In 2021, after years of preparations and negotiations, the G7 and G20, reached this breakthrough in the global effort to address tax challenges arising from globalisation and the digitalisation of the world economy. The landmark accord, backed by over 130 States, aims to put a hold on tax evasion by multinational companies by proposing a global minimum tax rate and creating a new taxing right for the largest multinational companies, where the nexus is no longer exclusively determined by reference to a *physical presence* in a country and regardless of where headquarters are located. This shift constitutes a monumental break with the historical 'race to the bottom' whereby governments attract multinational companies to establish in their country with favourable tax regimes or other enticements such as lower labour standards. In turn, multinational undertakings would orchestrate their company structure using tax havens, with parent companies and subsidiaries, by setting up headquarters and other physical establishments, or even just letterboxes, all with the objective to pay fewer taxes.

For certain companies, it is less relevant what place they run their business from, on paper or in real, or which corporate nationality or structure they must assume to make use of tax or other legal loopholes. Companies like Google, Facebook and Amazon are 'home' to the United States, but run their European operations from headquarters in tax friendly countries such as Ireland and Switzerland. Nationality is not always based on a so-called home country or whether a company has an anchor or genuine link with the country it is located in. Neither do we necessarily identify companies with their corporate nationality; even if a company is closely linked or associated with a nationality like IKEA is to Sweden, its headquarters may very well be located elsewhere, in this case in the Netherlands.

Air services, like digital services, in essence, do not require one fixed location to operate or offer services from; an aircraft can fly to and from a country regardless of the airline having an establishment there, and passengers can buy and 'consume' tickets from any airline and fly from any -or at least most- points in the world. However, that is where the analogy ends. Air transport does not fall under the

1. OECD (2023), Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two), OECD/G20 Inclusive Framework on BEPS, OECD, Paris. www.oecd.org/tax/beps/administrative-guidance-global-anti-base-erosion-rules-pillar- two.pdf. (last visited 20 March 2023).

regime of the World Trade Organization, nor are tax regimes so much a decisive factor for airlines' establishment. The new tax accord will not change the practice of airline nationality, as to which see section 5.

So why does airlines' nationality retain its relevance? This article will explore the origins of airlines 'of' a State from the Chicago Convention and will analyse the rationale and current status of this link with the State, and the subsequent allocation of nationality.

2. International Law on the Link between a State and its Nationals

Much has been written about the relationship between an airline and a State in practice;[2] from the economical need of State-funding that was - and turns out still is - necessary, to the policy involvement of the State when negotiating transit and traffic rights with other States, required by the airline to operate international services.[3] This section takes a step back for a different approach, by concentrating on the formal legal status of the link between a State and its nationals, that is legal entities, both natural and juridical, under international law.

2.1 Nationality under International Law

For natural persons, *citizenship* denotes the legal link between an individual and a political community, such as a city, State or territory, conferring both rights and obligations onto the citizen and the institutions.[4] Within the context of State citizenship, it is often used interchangeably with *nationality*, stemming from being a citizen of a nation. On the premise that this article focusses on the link with a State, nationality will be the leading concept.

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2. See H.P van Fenema, *Substantial Ownership and Effective Control*, in: T.L. Masson-Zwaan, and P.M.J. Mendes de Leon (ed.s in chief), *Air and Space Law:* De Lege Ferenda: Essays in Honour of Henri A. Wassenbergh 27-42 (1992); P.P.C. Haanappel, *Airline Ownership and Control, and Some Relates Matters*, 26(2) Air & Space Law 90-103 (2001); P.M.J. Mendes de Leon, The Future of Ownership and Control Clauses in Bilateral Air Transport Agreements: Current Proposals and Legal Obligations, S. Hobe et al. (ed.s), Consequences of air transport globalization 19-36 (2003).
3. Transit rights grant airlines the right to fly through the airspace of another State, without making a stop, unless for emergency reasons. Traffic rights concern rights of the designated carriers under an Air Services Agreement (ASA) to carry traffic between States on the points and terms agreed upon in the ASA, see also section 3.2.
4. See, for instance, P.J. Spiro. *The rights and obligations of citizenship*, 21(3) The William and Mary Bill of Rights Journal, p.899 (2013).

Nationality for individuals can be determined on the place of one's birth, through descent or inheritance from parents, on the basis of residency or via a process of naturalization. While it is within each State's jurisdiction to set criteria in its own laws on who are its nationals, international law and principles must be respected.[5] This practice was first codified in The Hague Convention on Nationality of 1930,[6] and further expanded into a right to a nationality by the Universal Declaration of Human Rights of 1948.[7] Issues regarding individual's nationality have been brought before the International Court of Justice (**ICJ** or **the Court**) under the doctrine of diplomatic protection. In the famous *Nottebohm* case of 1955, Mr Nottebohm, a German national living in Guatemala, had obtained the 'neutral' Liechtenstein nationality while on a trip to Europe, the Court ruled that:

> "According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a *genuine connection of existence*, interest and sentiments, together with the *existence of reciprocal rights and duties*."[8] *(italics added)*

States must thus recognise nationality awarded by another State to a natural person, only insofar there is a *genuine and effective link* between the State and that individual. This raises the question whether the same genuine and effective link with the State also extends to legal personality for juridical entities, such as companies. In the *Interhandel* case of 1959,[9] the subject of German control over Interhandel, a company registered in Basel holding the majority of shares of a company incorporated in the United States, was at the core of the issue in 1942. At the time of proceedings, however, neither of the parties questioned Interhandel's Swiss nationality or referred to this connection with the State. The Court ultimately dismissed the case and did not deal with the companies' nationality.[10]

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5. See PCIJ Advisory Opinion on *the Tunis and Morocco Nationality Decrees* of 1923.
6. The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of 1930, Art. 1: "*It is for each State to determine under its own law who are its nationals. […]*" 179 LNTS 89.
7. Universal Declaration of Human Rights of 1948, Art. 15.
8. *Nottebohm Case (Liechtenstein v. Guatemala); Second Phase*, ICJ, 6 April 1955.
9. *Interhandel Case (Switzerland v. United States of America)*, ICJ, 21 March 1959.
10. David Harris, "*The Protection of Companies in International Law in the Light of the Nottebohm Case*", The International and Comparative Law Quarterly Vol. 18(2), 1969, at p. 286.

2.2 Corporate Nationality

The differentiation between corporate nationality and the nationality of shareholders was at the heart of the case leading to the ICJ's *Barcelona Traction* judgement of 1970.[11] In short, Belgian shareholders predominantly owned Barcelona Traction, Light & Power Co., Ltd., a company incorporated in Canada, conducting all its activities in Spain. Following bankruptcy proceedings in Spain, Belgium brought a claim before the ICJ to protect the Belgium shareholders. Amongst other things, the case concerned whether Belgium had *jus standi* to bring a claim protecting a Canadian corporation. A small majority of the Court considered that the 'genuine connection' test for corporations could not be equated with the nationality of its shareholders and take precedence over that of the State of incorporation. The Court stated:

> "In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments."[12]

Concurrently, the Court continuous to put forward that States adopt different practices, and some State require a company to have "its seat *(siège social)* or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the State concerned."[13] Indeed, States can apply two different concepts; the first, the Real Seat Doctrine (*siège réel*), referred to above, links the legal capacity to the company's main business location, i.e., where the majority of the tasks are performed or where the management and administration are located, whereas the Incorporation Theory determines the legal capacity of a company by the State in which it is incorporated; where it conducts or coordinates its business is irrelevant.[14] Variations between these two concepts are also possible. Via the latter, companies can 'choose' to

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11. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ, 5 February 1970
12. Barcelona Traction, para 43.
13. Ibid.
14. See, for instance, J. Wouters, *European Company Law: Quo Vadis*?, 37(2), Common Market Law Review, pp. 257-307 (2000), and J. Wouters, *Private International Law and Companies' Freedom of Establishment*." European Business Organization Law Review 2(1) pp. 101–39 (2001).

establish themselves in a country for its favorable corporate and tax law regimes or less stringent labour and environmental rules.[15]

In *Barcelona Traction*, the Court concluded that, for corporate entities, "no absolute test of the 'genuine connection' [with a State] has found general acceptance,"[16] seemingly referring to the *Nottebohm* case, but it then proceeded with an analysis of factors indicating a 'close and permanent connection' with the State of incorporation, in this case, the length of incorporation in Canada, the maintenance of its registered office and board meetings held there, and the listing in the records of local tax authorities.[17] Although the case dealt primarily with the question of which State could exercise diplomatic protection, it confirms corporate nationality based on the incorporation theory, thus leaving such requirements to national law. At the same time the ICJ acknowledges that in certain cases, the 'link' with a State requires a more 'close and permanent connection' than only bearing the State's corporate nationality. Obviously, this position of general international law can be further specified in Treaties or other special agreements, as is the case under international air law as further discussed in Section 3, below.[18]

Under international trade law, the General Agreement on Trade in Services (**GATS**) of the World Trade Organization, takes a broad view, considering juridical persons, or legal entities, 'duly constituted or otherwise organized under applicable law,' and 'engaged in substantive business operations' in the territory of that Member State, as well as having a 'commercial presence' in the State's territory, which includes 'any type of business or professional establishment.'[19] However, further analysis of these requirements is not relevant to this article, as the GATS does not apply to the operation of air services.[20]

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15. Mendes de Leon P.M.J. & Maarsen-Neumann E. (2009), Ausländische Luftfahrtunternehmen mit Hauptsitz in der EU/EWR. In: Hobe S., von Ruckteschell N. (Eds.) *Kölner Kompendium des Luftrechts. Bd.2: Luftverkehr.* Köln: Carl Heymanns Verlag. 708-740.
16. Barcelona Traction, para 43.
17. Ibid.
18. Rodley, Nigel S. "*Corporate Nationality and the Diplomatic Protection of Multinational Enterprises: The Barcelona Traction Case*," Indiana Law Journal: Vol. 47: Iss. 1 (1971).
19. General Agreement on Trade in Services, Art 1.2(c) and (d), jo. Art 28(d), (l) and (m).
20. See, General Agreement on Trade in Services, Annex on Air Transport Services, Art. 1.3.

3. The Link between an Airline and a State under International Air Law

International civil aviation is governed by the Convention on International Civil Aviation of 1944 (the **Chicago Convention** or **the Convention**). This convention primarily lays down the safety and security provisions for international air transport. Within this context, a State requires a link with an airline and its aircraft to perform safety oversight, as further explained in Section 3.2. However, the link, between a State and 'its' airline also serves an important purpose in the economic regulation of air transport. In that area, such a link is used to designate airlines as the economic beneficiaries of a State's transit and traffic rights under the Convention and international agreements, which the State concludes with other States.

3.1 Nationality of Airlines under International Aviation Conventions

The original text of the predecessor of the Chicago Convention, the *Convention Relating to the Regulation of Aerial Navigation* of 1919 (the **Paris Convention**), explicitly linked corporate ownership of an airline to nationality, that is, the same nationality of its aircraft:

> "No incorporated company can be registered as the owner of an aircraft *unless it possesses the nationality of the State in which the aircraft is registered*, unless the President or chairman of the company and at least two-thirds of the directors possess such nationality, and unless the company fulfills all other conditions which may be prescribed by the laws of the said State."[21] *(italics added)*

Thus, an airline company shall be considered a national of the State under the laws of which it is created. In addition, the text imposed what has come to be known as nationality requirements, here specifically aimed at the control of the company exercised by the chairman and its directors. The importance States at that time attached to the nationality of an airline, specifically concerned with accepting foreign airlines in their airspace, is apparent in the drafting discussions; the United States did not sign the Convention, insisting on more strict requirements, namely two-thirds of the company's stock to be owned by nationals of the State and all their directors to be nationals of such State.[22]

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21. Article 7 of the Paris Convention (before amendment).
22. John C. Cooper, *United States Participation in Drafting Paris Convention 1919*, 18 J. AIR L. & COM. 266 (1951), page 278.

The Chicago Convention is silent on the 'nationality' of an airline. In various instances, the Convention refers to "airline *of* a contracting State" or "the airline *of* any other State" *(italics added)*.[23] Hence, the authors of both Conventions proceeded from the point of view that there should be a link between an airline and the State, but the Chicago Convention leaves the establishment of such a link to its Member States.

3.2 Designation of Airlines under Air Services Agreements

Economic regulation of air transport, as such, is not drawn up in the Chicago Convention (1944). However, pursuant to Article 6, States must engage into agreements on the operation of international air services. Such Air Services Agreements (**ASA**s), form the exclusive basis for the operation of cross-border air services from one State to another. Each State designates an airline(s) for the operation of international air services under the Air Services Agreement. This procedure is a special, if not unique one in the world of economic activities. This designation *externally* serves to balance the beneficiaries of the exchanged traffic rights between the States and ensures that airlines of third countries cannot make use of said traffic rights. *Internally,* it is designed to ensure that the rights continue to be used by an airline of the States' nationality.[24]

In principle, the nationality of an airline is restricted. The requirements that the carrier's 'substantial ownership' and 'effective control' (O&C requirements) reside with the designating State, its nationals, or a combination thereof, are found in the Agreements attached to the Chicago Convention,[25] and the mentioned ASAs between States. The scope and meaning of these terms 'substantial ownership' and 'effective control' are usually discussed in policy discussions rather than legally defined or refined. Over the years, States have given different interpretations to nationality conditions, either involving a test of 'substantial ownership', one of 'effective control', or a combination of the two.[26] The first requirement, that of substantial, or sometimes even majority, ownership is tested through ownership of shares of an airline or holding company.[27] The United States caps foreign ownership

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23. See Art 7, 81 en 82, 89 of Chicago Convention (1944).
24. H.P. van Fenema, *Ownership Restrictions: Consequences and Steps to be Taken*, 23(2) Air & Space Law, 63-66 (1998).
25. See, for instance, Article I(5) of the International Air Services Transit Agreement (IASTA) and Article I(6) of the International Air Transport Agreement.
26. J. Walulik, *At the core of airline foreign investment restrictions: A study of 121 countries*, 49 Transport Policy, 234–251 (2014).
27. See Pablo Mendes de Leon*, A New Phase in Alliance Building: the Air France/KLM Venture as a Case Study*, 53 Zeitschrift für Luft- und Weltraumrecht 359-385 (2004).

of *voting* shares in an airline at 25%.[28] In the EU, "community air carriers" must be *majority-owned* by EU-nationals.[29] The 'effective control' test leaves more room for interpretation, an example being the *Daetwyler* case where an airline, despite satisfying the ownership percentage, could not establish actual control to reside with US nationals.[30] A successful example, is the acquisition of up to 49% equity interest, but only 20% of the voting stock in the holding company of Northwest, a US airline, by KLM Royal Dutch Airlines (KLM) in the 1990s.[31]

In the *Swissair/Sabena* merger,[32] the EU Commission set out elements to assess effective control, being "the power, direct or indirect, actual or legal, to exercise decisive influence on an airline."[33] This addresses the real questions of who, ultimately, has the decision-making power, final say in the daily management or on key issues such as business planning or annual budgets.

The ownership and control structure of an airline is an internal matter. Hence, this structure, including the requirements for complying with ownership and control conditions, is determined by provisions of national law, including corporate law, and the Articles of Association of the airline, including rights of shareholders and their influence on management decisions. Consequently, when determining nationality, one must look up the corporate tree and at the factual circumstances to assess who really owns the airline and can exercise effective control under the mentioned regulations. However, since this article focusses on the legal connection between an airline and a State, an analysis of airline's internal structures falls outside its scope.

3.3 Safety Oversight and Regulatory Control under the Chicago Convention (1944)

Regarding the connection between an airline and a State for safety oversight, specifically through the certification of the airworthiness of the aircraft and licensing of personnel operating said aircraft,[34] the Chicago Convention (1944) initially exclusively looked at the State *in which the aircraft is registered*. Accordingly, aircraft have the nationality of the State in which they are registered, and aircraft

28. Title 49 U.S.C. § 40102(a)(15)(C) as amended.
29. Regulation (EC) No.1008/2008, Art. 2, 4(a) and (f).
30. Willey Daetwyler, D.B.A. Interamerican Airfreight (CAB Docket 2214 (1971)).
31. P.P. Fitzgerald, *A level playing field for "Open Skies"* (2016), 76-77.
32. 95/404/EC: Commission Decision of 19 July 1995 on a procedure relating to the application of Council Regulation (EEC) No 2407/92 (Swissair/Sabena).
33. Ibid. section XI.
34. See Chicago Convention (1944), Articles 31 and 32, respectively.

can only be registered in one State.[35] As a corollary, the State of registry carries out 'functions and duties' as to the responsibility for safety oversight of the aircraft in its registry.

While in the early days of international civil aviation, aircraft were registered in the same State as the airline, by 1980, the sector's growth required more opportunities for airlines to finance aircraft and alternatives to owning such aircraft directly. To maintain a single State's responsibility for safety oversight, Article 83 bis, and the term 'principal place of business' therein, were introduced in the Chicago Convention to allow arrangements for the transfer of functions and duties of the State of registry of an aircraft to the State in which the operator of the aircraft, the airline, has its principal place of business or permanent residence:

> " [..] when an aircraft registered in a contracting State is operated pursuant to an agreement for the lease, charter or interchange of the aircraft or any similar arrangement by an operator who has his principal place of business or, if he has no such place of business, his permanent residence in another contracting State, the State of registry may, by agreement with such other State, transfer to it all or part of its functions and duties as State of registry in respect of that aircraft […]"[36]

The term 'principal place of business' (**PPoB**) is not defined in the Chicago Convention (1944). However, it has been addressed extensively in guidance material of the International Civil Aviation Organization (**ICAO**) as an alternate and more liberal criterion for designation and authorization, as to which see the previous section.[37] In this context, it is used in conjunction with a requirement of 'effective regulatory control,' not to be confused with 'effective control' of the airline company pursuant to the O&C requirements. The requirement of 'effective regulatory control' for safety purposes establishes a 'genuine' link between the airline and the State responsible for the airline's safety oversight so that the competent authorities of the State concerned can exercise and maintain their control functions effectively. As concisely explained in section 3.3, regulatory control in safety management is manifested through certification, licensing and monitoring compliance with the conditions of the granted certification and licenses.

35. Ibid. Articles 17 and 18.
36. Ibid. Article 83 bis.
37. See, ICAO, *Policy and Guidance Material on the Economic Regulation of International Air Transport* (Doc 9587, 3rd edn, 2008), its Annex 5 ICAO Template Air Services Agreement, and *Manual on the Regulation of International Air Transport* (Doc 9626, 3rd edn, 2018), Part IV.

For authorities to exercise regulatory control effectively, there must be a permanent, stable, and effective link with the air carrier and the location of its core operational control and financial functions, i.e. the PPoB, so that these activities are visible, 'capable of physical inspection' and of being overseen and monitored by said authorities.[38] The EU Court of Justice recognized that the special provisions on safety management, through licensing, regulatory control and monitoring create "reciprocal regulatory obligations between airlines and these authorities and thus a specific, stable link between them."[39] While a distinction should be made between the nationality of an airline based on designation pursuant to ASAs, and that for safety oversight through licensing, the two are often intertwined in domestic licensing conditions; an airline can only be designated under an ASA when it has received an (operating) license from the designating State.

3.4 Licensing Conditions

The requirements that enable a State to exercise regulatory control, and *de facto* establish a jurisdictional link between an airline and the national authority or authorities of the State concerned, are laid down in domestic licensing conditions.

In the EU, the conditions for obtaining an operating license are found in Regulation 1008/2008 on common rules for the operation of air services in the Community. The conditions cover several financial-economical aspects but also require an 'Air Operator Certificate' (AOC) containing technical, safety and environmental standards, as well as ownership and control requirements. Indeed, national licensing conditions can, on the one hand, internalize the requirement for carriers to meet the requisite safety standards and for authorities to exercise control thereof, and on the other, include nationality requirements on ownership and control for the purpose of economic regulation of air transport. In other words, although States must agree on the designation criteria on both sides in an ASA, they are, in principle, free to establish their own criteria for airlines' designation as laid down in national licensing provisions or, in the case of the EU, in Community legislation, requiring, for instance, a principal place of business in the EU, on top of O&C requirements.[40]

In the EU's internal air transport market, the PPoB is defined as "[…] the head office or registered office of the undertaking within which the principal financial

38. UK Civil Aviation Authority CAP1539, UK CAA Interpretation of Principal Place of Business, March 2017. Available at: https://www.caa.co.uk/cap1539 (last visited 31 March 2023).

39. EU Court of Justice, Case T-259/20, Ryanair DAC v European Commission, judgement of 17 February 2021, para 39.

40. Reg. EU 1008/2008, *on common rules for the operation of air services in the Community, A*rt 4(a).

functions and operational control of the activities referred to in this Regulation are exercised."[41] This definition is closer to the Real Seat Doctrine than it is to that of the Incorporation Theory, as discussed in section 2.2. Such a distinction is understandable to determine whose authorities are to perform safety oversight. Corporate law, on the other hand, is not harmonized at the EU level, and an undertaking's connection with a State is based on national law. It is, therefore, questionable whether EU Regulation 1008/2008 should make reference to such a definition of PPoB, as to which see section 3.2.

For safety oversight, where the beforementioned definition is insufficient, the following factors can be used to identify an airline's PPoB and to prevent airlines from "authority shopping" in which they create firms and subsidiaries in different countries to set up a favorable supervision regime:[42]

- Where the carrier's headquarters is located;
- Where it is registered and pays corporate taxes;
- Where its main administrative and financial functions are performed;
- Where the principal operational control of its activities is located;
- Where its key personnel controls and coordinates daily operational activities;
- where it employs a significant number of nationals in managerial, technical and operational positions;
- Where records regarding the operational and financial decisions affecting the direction, control, planning and coordination of finances of its activities are kept;
- Where it has a substantial amount of its operations and capital investments in physical facilities and where its aircraft are registered and based.

This is not a complete list. International companies can be constituted in a variety of ways, and each organizational structure should be evaluated individually, taking into account the different factors to determine an airline's PPoB. This should guarantee that an airline's oversight and control be given to the competent national authority that is best suited for it. As remarked in Section 2.2 above, there are indeed variations between the 'real seat' and 'incorporation' concepts as tests for defining the PPoB.

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41. See, EU Regulation 1321/2014 *on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks*, Art. 2(m), and similar definition in EU Reg. 1008/2008 2(26).
42. See, EASA and EU Commission Information Letter on Principal Place of Business, published by Icelandic Transport Authority, FOI003, 06 October 2022.

Finally, the 'EU air carrier clause' laid down in EU Regulation 1008/2008 has been 'exported' to third States, and other regional organizations such as ASEAN[43] and WAEMU[44] in order to permit designation by the EU and its Member States of airlines under ASAs, including Horizontal and Vertical Air Transport Agreements with such third States and other regional organizations for the operation of the agreed international air services. Therefore, an EU airline may operate its air services from a point outside of its PPoB under such agreements. For instance, Air France is entitled to operate a service between Frankfort (Germany) and Boston (US) under the EU – US Agreement on air transport of 2007, as amended in 2010. However, relatively little use has been made of these opportunities.

4. Airlines are Undertakings under International Air Law

The previous sections have shown that a special link exists between an airline and the State; however, it is equally important to establish the boundaries of this connection with the State and to distinguish between the rights and obligations of each. This section will consider the airline as an undertaking under private international air law and competition law, and whether an airline can be considered a part of or an agent of the State.

4.1 Private International Air Law

The Chicago Convention (1944) and the 19 safety, security and environmental Annexes attached to it clearly distinguish between the rights and obligations of States, on the one hand, and the operating airlines, on the other hand. States are responsible for safety regulation and supervision, whereas airlines are liable when they cause an accident.

The Convention defines an airline as "any air transport *enterprise* offering or operating an international air service."[45] *(italics added).* Airlines, not States, must compensate the damages which they cause to passengers, their luggage and cargo they carry on their services. The liability conditions are laid down in the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air (1929), as variously amended, and the Montreal Convention (1999), bearing a nearly identical title. Indeed, the Warsaw Convention of 1929 was drawn up because of the rather close link between States and 'their' airlines. At that time, these were

43. ASEAN refers to Association of Southeast Asian Nations.
44. WAEMU stands for West African Economic and Monetary Union.
45. See, Art. 96 (c) of the Chicago Convention (1944).

mandated to carry cargo, mail, and government officials to the colonies of European States. This convention was designed to de-link State and airline: airlines were not allowed to shield behind the diplomatic protection of governments to avoid liability for the compensation of damages pursuant to reliance on, for instance, the defence of 'sovereign immunity' from such claims. The Warsaw and Montreal Conventions attach liability to the "carrier" which is not defined, but the first article explicitly refers to carriage performed for reward by an air transport *undertaking*:

> "This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft *for reward*. It applies equally to gratuitous carriage by aircraft performed by an air transport *undertaking*."[46] *(italics added)*

The two Conventions clearly detach the State from any liability regarding the international carriage performed by carriers, whether they have their nationality or not; hence, airlines are sued in court. As to the courts competent to hear and decide on cases falling within their scope, a link between the carrier and a State is among the general principles for establishing jurisdiction.[47] In the Montreal Convention (1999), for instance, these include the court of the 'domicile' of the carrier, referring to the carrier's headquarters (see section 2.2) and the 'principal place of business' of the carrier (see section 3.2), which is normally where the carrier is incorporated.[48]

It is not within the scope of this article to fathom out the case law that exists on the interpretation of the court's jurisdiction, but it is undeniable that across different legislation, similar terms are used to describe the necessary link between an airline and the State; the Warsaw Convention (1929) identifies the courts competent where the carrier is 'ordinarily resident,'[49] which for companies seems to coincide with the PPoB. In the EU, Regulation 593/2008 on the law applicable to contractual obligations (the former Rome I Convention), under contracts of carriage, lists the courts of carrier's 'habitual residence' or 'place of central administration' competent.[50] Despite the different names, each implies that a *genuine connection* with a State must exist to prevent passengers from forum shopping.

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46. Article 1 — *Scope of Application* 1. Montreal Convention.
47. Article 28(1) Warsaw, Article 33(1) Montreal.
48. Article 33(1), Montreal Convention, as to which see Aikpitanhi v. Iberia, 553 F.Supp. 2d 872, 876 (E.D. Mich. 2008).
49. Article 28(1) Warsaw Convention.
50. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Article 5.2(a) and (b).

4.2 Air Transport Competition Law

Under EU Regulation 1008/2008, airlines are defined as "*an undertaking* with a valid operating licence or equivalent"[51] *(italics added)*. The qualification of "undertaking" means airlines, like any other business, are subject to EU competition law:

> "The following shall be prohibited as incompatible with the internal market: all agreements *between undertakings,* decisions by *associations of undertakings* and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market"[52] *(italics added)*

This provision applies to the conduct of undertakings, excluding the State or State bodies from its scope, as to which see also the next section. Airlines are also liable for collusive actions and the abuse of dominant positions under US antitrust law,[53] and the competition laws of other jurisdictions.

The liability of airlines for engagement in collusive action in air transport has been manifested in a recent and important decision of the Court of Justice of the EU.[54] While airlines have attempted to argue that their collusive behaviour in these proceedings was governed by mandates of 'their' States as derived from Air Services Agreements, the Court of Justice of the EU concluded that these airlines act independently from their governments and cannot hide behind them. The concerned airlines were based in all parts of the world, but the EU and US antitrust/competition laws operate irrespective of the nationality of these airlines or of the special link they have with their State.

4.3 An Airline Undertaking as an Agent of the State

When an airline is considered an undertaking, but maintains close ties with its government, this can raise questions as to the relation between the State and the

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51. See, Art. 2(10) of EU Regulation 1008/2008.
52. Article 101 of the Treaty on the Functioning of the EU (TFEU).
53. See, for instance, Sherman Act, 15 U.S.C. §§ 1–7 (2018).
54. See EU Court of Justice of the European Union, Cases T-323/17 *Martinair Holland* v *Commission*, T-324/17, *SAS Cargo Group and Others* v *Commission*, T-325/17 *Koninklijke Luchtvaart Maatschappij* v *Commission*, T-326/17, *Air Canada* v *Commission*, T-334/17, *Cargolux Airlines* v *Commission*, T-337/17, *Air France-KLM* v *Commission*, T-338/17, *Air France* v *Commission*, T-340/17, *Japan Airlines* v *Commission*, T-341/17, *British Airways* v *Commission*, T-342/17, *Deutsche Lufthansa and Others* v *Commission*, T-343/17, *Cathay Pacific Airways* v *Commission*, T-344/17 *Latam Airlines Group and Lan Cargo* v *Commission*, T-350/17, *Singapore Airlines and Singapore Airlines Cargo* v *Commission*.

airline and the independence of the latter. This was the case in court proceedings in Canada, where Air India was accused of being an 'alter ego' of the Indian State.[55] The term 'alter ego' is unknown under international law. Either an entity is a State, or it is not. The Montevideo Convention (1933) is often used as a benchmark for the 'definition' of a State, which, as a person of international law, must possess: 1) a permanent population, 2) a defined territory, 3) a government, and 4) the capacity to enter into relations with other States.[56] Obviously, this is not the case for an airline. Alternatively, an airline could be considered as an *organ of the State* under Articles 4, 5 and 8 of the Articles of the International Law Commission (**ILC**) containing the applicable principles of attribution. These principles are quoted in the Arbitral Sentence of the Permanent Court of Arbitration (**PCA**) in the case of *Devas and other companies* v. *the State of India* of 2016 ('the Devas case').[57] The PCA found that:

> "The acts of such a company can only be attributed en bloc to the State when it is considered a governmental body *under domestic law*.[58] *(italics added)*

Furthermore, in a case decided by the International Court of Justice, the Court stated that: "In determining whether a company possesses independent and distinct legal personality, international law looks to *the rules of the relevant domestic law*."[59] In the Devas case, the PCA concluded that the Indian company in question (Antrix), acting in the described circumstances, was a "private company limited by shares" within the meaning of the Indian Companies Act,[60] and did not act as an organ of the State of India.[61] This case confirms that, under international law, States ultimately decide on who it considers its nationals, and that domestic law prevails when it comes to the determining criteria for corporate nationality. For airlines specifically, this practice is further amplified by the nationality conditions contained in ASA as explained in Section 3 above.

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55. Court of Appeal Québec, Canada, *Devas and other companies* v. *Air India Ltd.* of 2022.
56. See, the Montevideo *Convention on the Rights and Duties of States* (1933), Article 1.
57. PCA Case No. 2013-09, Award on Jurisdiction and Merits, Decision of 25 July, 2016, (PCA Decision (2016).
58. Ibid, Section 270.
59. See, Ahmadou Sadio Diallo (*Republic of Guinea* v. *Democratic Republic of the Congo*), Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582, para. 61. Statement of Defence, para. 147.
60. See, section 272 of the PCA Decision (2016), referring to the Indian Companies Act, Section 3(I)(iii) (Ex. R-105).
61. See, section 281 of the PCA Decision (2016).

5. Changing Nationality Conceptions

Now that it is clear than an airline must have a nationality link with the State in order to be entitled to operate the agreed air services, this last section touches upon the question if an airline could change its corporate nationality and seek a more advantageous 'link' with another State, which practice the new tax accord referred to in the introduction is attempting to change. We have seen such moves in other sectors, like in the Netherlands, where Unilever and Shell relocated their headquarters to London, to shake of their dual nationality, for various reasons, in the wake of Brexit. More often, these relocations take place within the context of mergers; where two foreign companies merge and choose one of the originating States as the residence State for the parent company. In the US, inversions, where the headquarters of the parent company is moved to the State of the smaller foreign company that it is merging with, often for tax evasive purposes, have been made more difficult in 2016.[62]

Again, aviation provides a stark contrast; even where airlines merge, are subjected to a takeover, or otherwise consolidate or enhance their cooperation, great attention is paid to maintaining the original nationality of the individual airline(s) through protective schemes; the Air France – KLM merger,[63] the AirAsia Joint Ventures and subsidiaries,[64] and the acquisition attempts of Air Berlin by Etihad and Alitalia by Qatar Airways, demonstrate that nationality, based on 'substantive ownership' and 'effective control' remains important to safeguard the exercise of traffic rights of the home State. Similarly, the relevance of maintaining the PPoB of an EU air carrier for the operation of traffic rights, was recognized by the EU Court of Justice; the Portuguese government was allowed to draw up measures preventing the relocation of the PPoB of TAP, following its privatisation, because it "follows from those bilateral agreements that TAP would *lose its traffic rights* on routes *to or from those third countries* if it were to transfer its principal place of business outside of Portugal."[65] (*italics added*)

The loss of nationality as a real threat for airlines, is also illustrated by other examples, such as when Virgin Nigeria was initially denied operations to New York

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62. See, James A. Doering, *New Temporary Regulations Restrain Inversions*, 42 INT'ITAX J. 5 (2016).
63. Pablo Mendes de Leon, *New Phase in Alliance Building: The Air France/KLM Venture as a Case Study, A / Die Allianz zwischen Air France und KLM / L'Alliance entre Air France et KLM*, 53 ZLW.
64. Michelle Dy, Jae Woon Lee, 'Mitigating 'Effective Control' Restriction on Joint Venture Airlines in Asia: Philippine AirAsia Case', (2015), 40, Air and Space Law, Issue 3, pp. 231-253.
65. See, Court of Justice of the EU, Case C-563/17, *Associação Peço a Palavra and Others* v *Conselho de Ministros*, decision of 27 February 2019.

because it was substantially owned by Virgin Atlantic and perceived as a British airline.[66] States have also threatened to ban airlines' flights over this issue, for instance, when Russia questioned the nationality of Austrian Airlines after the take-over by the Lufthansa Group.[67] It even has a preemptive effect when a US private equity firm, being its largest stakeholder, reduced its stake in the Wizz Air to comply with EU ownership rules after Brexit.[68]

6. Concluding remarks

Although the Chicago Convention (1944) does not explicitly mention the link between an airline and a State, it is clear from the text and general practice that a link must be established between the airline and ("of") a State. In regulating international air transport, this link between an airline and a State has a twofold purpose; first, to determine the State responsible for safety oversight, and second, to designate an airline a nationality for economic considerations. The link is established per agreement between States, referred to as Air Services Agreements (ASAs). For the purpose of economic regulation, licensed airlines are designated pursuant to nationality requirements such as 'substantial ownership' and 'effective control' and occasionally the requirement of a 'principal place of business' agreed upon in ASAs. In the context of safety management, the jurisdictional link between an airline and the national authorities of the State mandated to conduct of safety oversight, a stable and permanent link is often determined on the basis of the airline's PPoB.

In other industries, the legal capacity of a company, for instance for tax purposes or the application of domestic laws, is based on this principal place of business, either assessed pursuant to its corporate domicile, or based on the State in which it is incorporated. Air transport is one of the few industries, if not the only industry, where the nationality of the undertaking is relevant, if not essential, for the performance of its operations, and where such nationality is predominantly based on nationality criteria of ownership and control.

66. See Virgin Nigeria Airways Limited, Dockets DOT-OST-2005-23460/23461.
67. Financial Times, Russia threatens to ban Austrian flights, 28 February 2010 https://www.ft.com/content/e27168fa-24a2-11df-8be0-00144feab49a (last visited: 31 March 2023).
68. Reuters, Wizz Air's top shareholder cuts stake to comply with ownership rules, 4 February 2020 https://www.reuters.com/article/us-wizz-air-hldgs-investors/wizz-airs-top-shareholder-cuts-stake-to-comply-with-ownership-rules-idUSKBN1ZY18G (last visited: 31 March 2023).

Art. 83 bis of the Chicago Convention (1944) determines that an airline, as the operator of an aircraft, ought to have a 'principal place of busines' which is a is a fixed location. However, PPoB is not defined as such in international law. In practice, using the PPoB to establish the link with a State for safety oversight is more broadly accepted. For more economical and market-oriented regulation, its definition depends on a jurisdiction's policy. The concept of PPoB is increasingly presented as an alternative or additional nationality requirement covering both designation and safety oversight. However, even the most free-trade nations with an open-market oriented approach towards air transport, like the EU countries, US, and Canada, require that the designated airlines are substantially owned and effectively controlled by their nationals.[69]

Trade in air services, including traffic rights, is governed by a web of over 3,000, mostly bilateral (State to State) ASAs. These ASAs continue to establish the nationality of airlines through O&C requirements, and exceptionally, or as an extra requirement as to which see the EU air carrier clause, the PPoB of the operating airline, confirming the 'genuine link' between a State and/or its nationals on the one hand and an airline on the other.

While there exists both in law and in practice a very special link between an airline, in particular, the air carrier on the one hand, and the State that licenses and designates it to operate the agreed international air services on the other hand, international air law, including public air law (the Chicago Convention (1944)) and private air law (the Montreal Convention (1999)), as well as US and EU antitrust/competition law, identify airlines as undertakings which are liable for the implications of their conduct, independent of their governments. From that perspective, airlines are no different than other economic actors, that is, undertakings, in the marketplace.

Still, where in other industries it may be interesting for companies to move their principal place of business or headquarter to a different country, so as to enjoy more advantageous tax, social or environmental conditions, this is not the case for airlines. The very nature of the air transport business, through the exercise of traffic rights, of which the airlines is dependent on the State and its connection with it, make it unique one in the world of economic activities. The regime of trade in air services, including traffic rights between States is unlikely to change drastically any time soon.

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69. See, for instance, Agreement on Air Transport between Canada and the European Community and its Member States, Annex 2, section 1.