

[Print Page](#)

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Sovereignty Over Airspace: International Law, Current Challenges, and Future Developments for Global Aviation

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The issue of sovereignty lies at the very heart of international aviation because all aviation relations are built upon it. The purpose of this paper is to discuss the spectacular evolution of the concept of sovereignty in the air by adopting a multifaceted approach to this issue. In the first part the concept of sovereignty under general international law is briefly explained, before defining it in the more specific framework of public international air law. This discussion is followed by an analysis of the way states open their airspace for the purpose of entering into commercial agreements and conducting air transport activities. Overall, a selection of accidents that were directly linked to the notion of national security sovereignty are examined. Special reference is made to Cyprus and Gibraltar, both countries having territorial conflicts that directly affect their ability to exercise complete and exclusive sovereignty above their airspace. Particular attention is granted to some more recent commercial, technical, legal and environmental developments in the European Union that touch upon the concept of sovereignty such as the delegation of air navigation services from one state to another, the delimitation between airspace and outer space, the introduction of a European Emission Trading Scheme, insurance requirements, and the frequently updated list of airlines banned in the European Union.

The Concept of Sovereignty Under Public International Law

The Montevideo Convention 1933¹ codified largely accepted principles of customary international law and defines a State as an entity having a permanent population, a defined territory, a government and enjoying the capacity to enter into relations with other States. The existence of a State appears to be a question of fact because article 3 of the Montevideo Convention provides that "the political existence of the state is independent of recognition by the other states". The modern concept of State sovereignty is often traced back to the Treaty of Westphalia which laid down the basic principles for the recognition of a State as being a sovereign State: territorial integrity, border inviolability, the supremacy of the State and a supreme law making body within the territory.^[2] The concept of sovereignty lies at the heart of the existence of all States. It is a reflection of their "exclusive, supreme and inalienable legal authority to exercise power within their area of governance".^[3] A sovereign State possesses legal, executive and judicial powers and has authority over its subjects within its territory, to the exclusion of all other States. Sovereignty is the basis for the doctrines of responsibility, nationality and jurisdiction.⁴ Article 2(2) of the Charter of the United Nations recognizes that all States are equal and sovereign because they are all politically independent.^[5] The United Nations Convention on the Law of the Sea⁶ provides that the sovereignty of States extends over 12 nautical miles, called the territorial sea (article 3). Following the theory laid down by Hugo Grotius in his *Mare Liberum*^[7], it was established under international customary law that the high seas cannot be appropriated by any State. In other words, no State can claim sovereign rights above these regions. The right of innocent passage was recognized for all civil and military ships of all States. Moreover States must not infringe upon the rights of the coastal State or disrupt the peace or represent a security threat for this State (Convention on the law of the Sea, articles 17 and 19).

The Concept of Sovereignty Under Public International Air Law

Cuius est solum, eius est usque ad caelum et ad inferos ("for whoever owns the soil, it is theirs up to Heaven and down to Hell."), This eloquent Latin proverb was first used in the 13th century by the Roman commentator Accursius and was subsequently introduced into English law by William Blackstone in his *Commentaries on the Law of England* (1766).⁸ Under this doctrine, the owner of the land was the owner of the whole airspace above it without any limits. Obviously such conception is no valid anymore because it is incompatible with the modern needs of the air transport industry but is worth mentioning because it was largely accepted until the birth of the civil aviation.

As early as 1901, the French legal scholar Paul Fauchille wrote an article entitled '*Le domain aerien et le regime juridique des aerostats*' in which he referred to, inter alia, the freedom of the air.⁹ Some years later, John Westlake, a British lawyer, took an opposite view. He was in favour of recognising the principle of sovereignty in the air as the primary principle of public international air law and attempted to put an end to the transit rights of balloons and to the use of particular equipment such as wireless telegraph.¹⁰

States and the aviation industry have always been connected by a particular link. The Paris Convention¹¹ and the Chicago Convention¹² have been enacted after two destructive world wars. Wars reinforce nationalism and give to the respectable principle of State sovereignty a defensive character.¹³ Numerous airlines were created by National Defence authorities of States and constituted strategic national reserves for the military forces in cases of war or armed conflict. In the same way, an important part of the airspace used to be and is still reserved for military activities. This separation of the airspace between civil and military users is a reflection of the national security priority lying behind the concept of sovereignty.¹⁴

Article 1 of the Paris Convention 1919 provided that each contracting party recognized that every Power had complete and exclusive sovereignty over the airspace above their territory. Article 1 of the Chicago Convention reproduces this formula in an identical way. Article 2 defines territory as "the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State". Some of these terms are nowadays outdated or obsolete. Indeed, protectorates and mandates ceased to exist even before the entry into force of the Chicago Convention.¹⁵

A minority of authors, such as Nicolas Matte, argue that the airspace belongs to the "physical space" in which the world community interacts and therefore no parts of it can be made subject to sovereignty claims from any nation, even for a limited period of time. Matte believes that the airspace is a common good that must be used in a peaceful way by humanity. Hence such a conception must be predominant over "egoistic" claims of individual States that seek their own interests and immediate economic benefits.¹⁶

The International Air Services Transit Agreement was signed in 1944¹⁷ and since then greatly contributed to the development of the legal framework regulating international civil aviation. It was signed by 122 countries and gives to the airlines of the signatories overflight rights and the right to land in the territory of other contracting States for non-traffic purposes such as refuelling. Its provisions are in accord with the provisions of the Chicago Convention on sovereignty over the airspace (the drafters of this legal instrument being the same as the drafters of the Chicago Convention).

Sovereignty in the Air and the Exchange of Traffic Rights

Nowadays, States cannot seek their own profit without having regard for the interests of the other States because any political action of one State has political and economic repercussions at a regional or world scale. Smaller nations can hardly survive without interacting with more developed countries. In the same way, powerful countries need to trade with developing countries. Aviation was a crucial tool that led to the globalisation of economy and trade liberalisation.¹⁸

Article 6 of the Chicago Convention provides that "no scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or authorisation of that State, and in accordance with the terms of such permission or authorisation". In other words, this provision means that the airspace of all contracting States is closed *de iure*, until States decide to open it *de facto*. Until recently, bilateral air service agreements remained the traditional and preferred mode for States to open their airspace to other States, for the purposes of entering into international air transport operations and regulating the economic aspect of these exchanges.¹⁹ The most famous model bilateral air service agreement was signed between the United States and the United Kingdom in 1944 and is commonly referred to as the Bermuda I agreement. This agreement was a compromise between the opposing views of the parties and gave birth to a regime based on fair and equal opportunities to compete, a double approval of tariffs and capacity possibilities based upon the needs of the public for air transport operations.²⁰ It can be said that at the time of the signature of this agreement, States were still strongly intervening into the regulation of air transport and thus still attached to the concept of sovereignty. Naveau argues that the principle of sovereignty in the air explains why the air industry is one of the very few areas of trade where bilateralism survived.²¹

As written by Naveau in his articles, in developed countries the economic sovereignty of States on the economic regulation of air transport is now fading away in the wake of the liberalisation of the aviation market. This trend that started in the USA in 1978 and that was gradually introduced into the EU altered the institutional framework of air operations. Before 1987, national markets within the EU were fragmented and bilateral agreements were still governing the exchange of traffic rights between EU countries.²² With the full liberalisation of the internal market of the European Union in 1997, any EU carrier can operate on any EU route, including purely domestic routes. Full cabotage rights within the EU are an astonishing development and a great step away from the traditional conception of sovereignty. There are now more international routes, new airlines and many airports are on the way to privatisation. The EU and the US signed Open Skies agreements under which airlines in the EU are able to fly to the US, from any airport in the EU, without having regard to their nationality. These changes involve renouncing to the nationalistic conceptions that inspired the drafters of the major legal instruments public international air law after the Second World War.²³

Sovereignty is however still expressed by the need to comply with the requirements of national ownership and effective control. Under article 6 of the Chicago Convention, a State granting an authorisation to the airline of another contracting State to operate flights to and from this country, must be convinced that the relevant airline is substantially owned and controlled by the State and / or the citizens of the other party. If this condition is not satisfied, the agreement in force between the two countries may be suspended.

Sovereignty in the Air and the Provision of Air Navigation Services

Under Article 28 (a) of the Chicago Convention, ‘‘ Each contracting State undertakes, so far as it may find practicable, to: provide, in its territory, airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention’’.

Under Article 28 the provision of air navigation services is clearly a State responsibility deriving from the concept of sovereignty in the air. However the State can fulfil its obligation directly or decide to delegate this task to a private body that may be established within its territory or in a neighbouring state. Delegation of these services is possible and even encouraged by ICAO because international cooperation has always been one of the main objectives of the drafters of the Chicago Convention.²⁴ The government then retains a supervisory authority. Delegations between countries are necessary for technical and operational reasons. This happens regularly for airports close to national boundaries such as Geneva, Zurich or Lugarno in Switzerland or located in the vicinity of congested areas.²⁵ In the case of an international conflict between States emanating from the provisions of air navigation services, solutions must be found in national law. This delegation can be done by States only and in the view of Kost, does not mean loss of sovereignty.²⁶

On the contrary, Naveau is of the opinion that such delegation inevitably implies to some extent a loss of sovereignty over the airspace by the delegating State to the benefit of the providing State. He elaborated his argument by arguing that the Chicago Convention itself, while recognising the concept of sovereignty over the airspace, at the same time, laid down the legal basis for such ‘‘abandonment’’; of sovereignty by creating the International Civil Aviation Authority, which is working towards a maximum uniformity of rules and norms governing international civil aviation worldwide and thus restraining the freedom of States to enact their own set of rules concerning air operations in their airspace.²⁷

National Security

The protection of national security was one of the major reasons for the establishment of the concept on complete and exclusive sovereignty over the airspace. During World War I and World War II, balloons and aircrafts were used to drop bombs into enemy territories. The following examples involve cases where aircrafts were shot down because they were considered as representing a threat for the national security of sovereign States.

On 27 July 1955, a civilian aircraft was flying from Vienna to Israel through Istanbul, when it strayed into Bulgarian airspace because of false radio compass indication. Bulgarian fighter jets were ordered to shoot down the plane. As a result all passengers and crew lost their life.²⁸ At that time, the diplomatic relations between the West and the East bloc were tensed. The accident took place during the Cold War and the results of the official investigation carried out by the Bulgarian authorities were contested by the Israeli government. At first Bulgaria did not recognize its responsibility but eventually officially apologized and offered compensation the relatives of the victims of the shot down.²⁹

On 20 April 1978, Korean Airlines Flight 902 was en route from Paris to Seoul when it accidentally violated the Soviet airspace because its navigation equipment malfunctioned. Two Sukhoi jets were sent to intercept the intruder. Even if the pilots of the military aircrafts informed their superiors that the intruder was a civilian Boeing 747, rather than an enemy military airplane, they were nevertheless ordered to shoot it down. Two passengers died and the pilots succeeded to make an emergency landing on a frozen lake, before all the surviving passengers and crew members were rescued by Soviet helicopters.³⁰

On 1 September 1983, Korean Air Lines Flight 007 was a civilian aircraft that was shot down by the Soviet Union when it intruded the Soviet airspace. When the aircraft started deviating from its intended path, Soviet military jets were sent to intercept the Boeing 747. The Soviet authorities may have feared that the civilian airplane was an American intelligence aircraft that was overflying the peninsula of Kamchatka at the same time on a reconnaissance mission.³¹ The fights jets launched two air to air missiles that completely destroyed their target. All 269 passengers and crew on board were killed. This shot down provoked a wave of indignation in the international community and led to the adoption of article 3 bis of the Chicago Convention that prevents States from using force against civilian aircrafts.

On 21/22/23 September 1983, Abkhazian rebel separatist forces shot down three civilian Tupolev aircrafts in Georgia. A total of 136 people lost their lives as a result of those terrorist acts.

In 1988, an Iranian civilian aircraft was en route from Dubai to Iran when it was shot down by the USS Vincennes of the American navy in the Persian Gulf. All 290 passengers and crew members on board died. At that time Iran and Iraq were engaged into a war. The US officers mistakenly believed that the aircraft was an enemy military aircraft. Subsequently the US never recognized their fault and offered compensation ex gratia to the relatives of the victims.³² This drama was a gross violation of the provisions of article 3 bis of the Chicago Convention.

On 4 October 2001, Siberia Airlines flight 1802 was en route from Tel Aviv to Novosibirsk when it was shot down by a surface to air missile launched by the Ukrainian Air Defence Forces that were carried out military exercises in the Crimea region at the same time. Due to the fact that this accident occurred less than a month after the 9/11 terrorist attacks in the United States, the airport of Tel Aviv was closed for several hours because the Israeli authorities feared that this crash might have been caused by a terrorist act.³³ In 2003 and 2004 the Ukrainian government signed two separate agreements with the

Israeli and the Russian governments whereby it accepted to pay compensation to the relatives of the victims but without admitting its legal liability.³⁴

On 14 August 2005 an aircraft of Helios airways, en route from Larnaka to Athens when it crashed in the mountains of Grammatikos, outside Athens. The official investigation established that a serious problem with the cabin pressure in the aircraft seriously affected the crew's ability to properly respond to the emergency. Both pilots became unconscious and the auto-pilot continued flying the plane. Because the air traffic controllers in Athens were not able to contact the crew, two F16 were sent to intercept the intruder. Due to the fact that no pilot was controlling the airplane, it ran out of fuel and crashed.³⁵ It can be argued that the Greek authorities could not have been able to order the pilots of the fighter jets to shoot down the uncontrolled aircraft.

Outer Space

Nowadays technological advances enable aircrafts to fly higher and higher, the maximum limit of aerodynamic lift being constantly challenged. Article 28 of the Chicago Convention imposes obligation on states to provide air navigation services in the airspace above their territory as previously seen. However this obligation does not extend to the outer space. This question was neither dealt with by the Outer Space Treaty of 1967.³⁶ Furthermore it is still undefined where the airspace ends and where the outer space begins because the international legal community could not agree on a fixed boundary between these contiguous zones until now. States were only able to concur on the fact that the outer space is the common heritage of mankind and no sovereignty claims can be made in respect of it.³⁷ Naveau states that the movements within the sovereign airspace above the territory of a State is largely controlled by satellites located in the outer space which is not subject to the sovereignty of any State, as previously mentioned. Furthermore, these modern equipments located in the outer space are able to photograph infrastructures and buildings in any country without asking for the permission of the relevant State.³⁸ Naveau continues by saying that the flights operated by the hybrid category of spaceships also challenge the traditional concept of sovereignty in the air. According to him, the landing rights of such crafts remain subject to the provision of the Chicago Convention and international air law in general whereas overflight rights do not fall within the scope of such legal instruments (because the overflight takes place within the outer space). For him, it is urgent to redefine the concept of sovereignty in order to efficiently address the legal, economic and security issues deriving from such new activities. As a result, the author is of the opinion that the concept of sovereignty in the air is, over the years, becoming archaic, absurd and inadequate to the present reality.³⁹

Cyprus

The island of Cyprus has been divided in two since 1974 when the Turkish army invaded the island and military occupied one third of its territory. In 1983, the Turkish Cypriot entity proclaimed its independence. This declaration was condemned by the international community and Turkey is currently the only State recognizing the independence and legitimacy of the said "Turkish Republic of Northern Cyprus".⁴⁰ In the case *R (on the application of Kibris Turk Hava Yollari & CTA Holidays) v Secretary of State for Transport (republic of Cyprus)*⁴¹, the Court of Appeal of England and Wales held that no direct flights can be operated between the United Kingdom and Ercan airport in the north part of Cyprus because this would amount to a violation of the Chicago Convention. This airport was never designated by the Republic of Cyprus, under the terms of article 15. The court held that the island had not lost its territorial sovereignty under the north part of the island (article 1).

Gibraltar

Between 1462 and 1704 the strait of Gibraltar that is lying at the southern tip of Spain was under the sovereignty of Spain. Under the Treaty of Utrecht of 1713, Spain has ceded Gibraltar to the United Kingdom and in 1830 it was designed as a Crown Colony. However this agreement stipulates that Spain retains a constitutional right in the event that the United Kingdom opts to abandon its sovereignty.⁴² Because of the strategic geographical position of Gibraltar which lies at the southern tip of Spain and gives entrance to the western part of the Mediterranean. This accord engendered numerous frictions between Madrid and London because the Spanish authorities argue that the Detroit should be returned to Spain.⁴³ Spain contests the sovereignty of the United Kingdom over the entire Crown Colony and in particular the exercise of British jurisdiction over part of Gibraltar where an international airport is located.⁴⁴

In June 2010, a British spokesman reported that Spain has denied British air forces the right to conduct military exercises in the airspace near Gibraltar.⁴⁵ This refusal to use the airspace of Gibraltar was connected to the lasting tensions between Britain and Spain concerning the territorial waters of Gibraltar. Nevertheless, the government of Morocco that is controlling half of the airspace of the Alboran training zone used by the British troops allowed the latter to use the part of the airspace under their control.⁴⁶ In an interview given in April 2011, the British Minister for Europe, David Lidington affirmed that the UK is not ready to give away its sovereignty rights over Gibraltar and is in favour of a closer cooperation with Spanish authorities in the area of air traffic control and aviation safety.⁴⁷

Charter Flights

A more flexible and less stringent regime governs the operation of non-scheduled flights. Indeed, article 5 of the Chicago Convention provides that “Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights. Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable”.

This article suggests that the implications of the concept of State sovereignty over its airspace are more readily lifted for the operation of charter flights than for scheduled flights. Charter flights are often excluded from the scope of bilateral air service agreements and are governed by a more open regime of separate or ad hoc agreements.⁴⁸

State Aircraft Flights

The sovereignty of States over their airspace is still strongly expressed for flights carried out by State aircrafts that are subject to a special regime. Indeed, in its article 3 (a), the Chicago Convention expressly excludes from its scope the operation of State aircrafts flights such as aircrafts used by the custom, the police forces or the military. The same article goes on by requiring State aircrafts to obtain a special authorisation before being allowed to overfly or land in the territory of another contracting State. States aircrafts are regulated by, inter alia, the Warsaw Convention 1929⁴⁹, the Montreal Convention 1999⁵⁰, the Eurocontrol Convention⁵¹, rules enacted by NATO, the Red Cross, the European Union, national legislation a number of ad hoc agreements.⁵² For damages caused by State aircrafts, the responsible State may escape liability by claiming sovereign immunity if it was acting *acta iure imperi* (the defence of sovereign immunity is not available if the State was acting on the same footing as private individuals).⁵³ As a conclusion, it can be said that the contracting States of the Chicago Convention did not open their airspace for the free operation of States aircrafts by signing bilateral or multilateral agreements and appear to give a certain priority to the operational needs of civil aviation.⁵⁴

The Compatibility of the European ETS with Sovereignty Rights in Airspace

In July 2008, the European Parliament and the European Council agreed to include the aviation activities into the European ETS. This change means that from 2012, all Community operators and Non-EU carriers flying to, from and within the EU will have to acquire an emission allowance that is equal to the total CO₂ emissions produced by the air carrier.⁵⁵ This highly controversial decision that extends to portions of flight that are carried out outside the European Union raised strong protests among air carriers that brought the issue before the Court of Justice of the European Union, arguing that this modification of the original European ETS, amounts to a violation of articles 15 and 15 of the Chicago Convention because the ETS allegedly amounts to a charge or tax that is prohibited by international agreements.⁵⁶ A number of US airlines advocated that the inclusion of aviation into the ETS is a violation of the Kyoto Protocol 1997, the EU-US Open Skies agreement and customary international law.⁵⁷ The advocate general of the Court rendered its opinion on 6 October 2011 and held that Directive 2003/86 “does not contain any extraterritorial provisions and does not infringe the sovereign rights of third parties” (opinion, para 165).⁵⁸ She pursued her reasoning by saying that “if the Parties to the Kyoto Protocol had wished the ICAO to have exclusive competence they could have been expected to express this with the requisite degree of clarity...” (opinion, para 177). The opinion of the advocate general is not binding and until a final decision is rendered on this subject matter is rendered, legal uncertainty remains as to the issues raised by the claimants.

The Relationship Between Article 1 and Article 9 of the Chicago Convention

Article 9 of the Chicago Convention provides that “(a) Each contracting State may, for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of other States from flying over certain areas of its territory, provided that no distinction in this respect is made between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other contracting States likewise engaged. Such prohibited areas shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation. Descriptions of such prohibited areas in the territory of a contracting State, as well as any subsequent alterations therein, shall be communicated as soon as possible to the other contracting States and to the International Civil Aviation Organization”.

After the Icelandic volcanic eruption of 2010, several European States decide to close their airspace for safety reasons. For instance, Iceland decided to temporarily suspend all flights to and from its biggest international airport, Keflavik airport, because a plume of ash and smoke rendered visibility in the sky too low. Icelandic authorities estimated that the ash cloud could possibly damage the aircrafts’ engines and thus endanger the lives of passengers and crew members as well as the aircrafts.⁵⁹ With 12000 passengers affected, the closure of the European airspace in 2010 was the most massive disruption of traffic and the largest closure of airspace since the Second World War and States relied upon article 9 previously mentioned as a legal basis for their actions.⁶⁰ Nevertheless, relying on the fact that the Chicago Convention applies exclusively to civil aircrafts, to the exclusion of State aircrafts (article 3), a number of military and NATO flights were

allowed. On 15 April 2010, Finnish air forces conducted military exercises over the European airspace despite its closure for civil aviation.⁶¹

On 11 September 2011, the United States decided to close their airspace after two civilian aircrafts hit the twin towers of the World Trade Centre. Nearly 3000 people died in these attacks. No aircrafts could fly to, or take off from any airport in the USA for an unprecedented 96 hours for national security reasons. The US government feared that other aircrafts may be used as weapons of mass destruction by terrorist groups.⁶²

The European Single Sky Project

According to Naveau referred to above, the concept of national sovereignty in relation to air law invaded the political and economic aspects of the air transportation industry. An illustration of this theory can be given by mentioning for instance, the very ambitious European Single European Sky project that aims to integrate resources in Europe and to radically restructure the structure and management of the European airspace. In my opinion, while carrying out this project European States do not give away their sovereignty but rather confer part of this sovereignty to a higher instance, namely the European Union, in the exercise of their sovereign rights. The member states of the European Union joined their efforts in order to achieve a Single European Sky. Under this project, the provision of air navigation services in the airspace of the 27 European Union countries will be harmonised. Realising that the airspace is a scarce good, airways in Europe will be used to their maximum capacity according to the needs of the aviation industry and not according to national boundaries.⁶³

Functional airspace blocks (FABs) will be created to monitor air traffic. Currently there is already one FAB into operation in the Maastricht area. The role of Eurocontrol which is now the main air navigation service provider in Europe will be diminished. Eurocontrol is in charge of the Maastricht Upper Area Control on behalf of Germany (the north-west region of the country only), the Netherlands, Belgium and Luxembourg. It provides air traffic services for flights at an altitude between 7 and 10 km. The future functional airspace blocks will follow this exceptional model of international harmonisation of air traffic control.⁶⁴

The Relationship Between Sovereignty, Safety Concerns and Consumer Protection

Safety has always been a subject matter of primary importance for ICAO as highlighted in the Preamble which declares that the Convention will lay down "principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner" and Article 44 which states the International Civil Aviation Organization must "insure the safe and orderly growth of international civil aviation throughout the world".

Insurance Requirements

Under EC Regulation 785/2004⁶⁵ that was subsequently amended in 2010⁶⁶, all air carriers that operate flights to, from and within the European Union must subscribe specific insurance levels that are determined by their maximum take off weight mass, in order to cover any claims arising from their second party liability (passengers, baggage and cargo) and third party liability. In case of violation of the provisions of this regulation, EU States can take actions such as the withdrawal of the operational license of these air carriers, forbid them from overflying EU States or prevent them from taking off from an EU airport until evidence of proper insurance is given to the relevant authorities.⁶⁷ In my opinion, I believe that the existence and the severity of such sanctions is a clear example of the sovereign powers of States over their airspace. These measures are clearly consumer oriented but demonstrate that highly dissuasive measures can be taken by States to achieve a maximum level of passenger protection (and protection of third parties on the ground).

Banning of Airlines

Ensuring the highest levels of safety in the air has always been one of the priorities of the European Commission Mobility and Transport Department. In collaboration with EU Member States, the EU Commission enacted a list of airlines that are banned from operating within the European Union or whose operations are restricted because their safety records are alarming and are considered as unsafe according to European standards.⁶⁸ This list is regularly updated and airlines that can prove that they substantially improved their safety standards to a level accepted by the international aviation community can ask the European Commission to be removed from this list. For example, in November 2011, two aircrafts of the fleet of TAGG Angolan Airlines were added to the list of aircrafts authorised to operate into the EU, while on the other hand, part of the fleet of Jordan Aviation was banned due to safety deficiencies.⁶⁹ In the words of the Vice-President of the European Commission, Sim Kallas, "Safety comes first. We cannot afford any compromise in this area. Where we have evidence inside or outside the European Union that air carriers are not performing safe operations we must act to exclude any risks to safety."⁷⁰ This practise illustrates another aspect of the exercise of the sovereignty of States above their airspace.

Conclusion

As a conclusion, we can say that from the Latin maxim of property law granting the owner of the land, a right of complete ownership of the airspace above it to the opinion of the Advocate General concerning the inclusion of aviation into the

European ETS, the concept of sovereignty greatly evolved. In the economic field, the progressive move from bilateralism towards multilateralism and open skies agreement appears to suggest that the traditional conception of sovereignty may be archaic. With new developments such as States delegating part of their sovereign powers to supranational organisations such as the European Union for the purpose of entering into plurilateral aviation agreements that are intended to be more flexible and brings more benefits for airlines and passengers or the emergence of environmental concerns such as the inclusion of aviation into the European Emissions Trading Scheme, the original concept of sovereignty is being drastically challenged. Fortunately, attacks against civilian aircrafts remain rare but nevertheless, then years after the 9/11 terrorist attacks in the USA, issues relating to the protection of national security are still of prime importance. Because of its particular character –air transportation being truly international activitythe concept of sovereignty in the air will probably remain respectable principle that will continue to protect States against interferences from foreign governments but at the same time its definition may need to be reconsidered in order to meet contemporary realities and solve the issues that continue to divide countries with longstanding territorial conflicts.

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