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NATIONALITY OF AIRCRAFT*

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Of the multitude of problems which, since long before the war,¹ have concerned the jurists and diplomats who dealt with the international aspects of aeronautical law, one may quite reasonably be regarded as settled—that of the so-called “Freedom of the Air.” The declaration in Article I of C. I. N. A.² that “. . . every Power has complete and exclusive sovereignty over the air space above its territory,” has been repeated in substance, and in most cases in literal text, in almost every subsequent treaty and national Air Navigation Act. With practically no dissent, it stands today as the fundamental basis of public air law.³

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1. For an illuminating discussion of the pre-war writings on the continent, consult: *Albert Roper*, *La Convention Internationale du 13 Octobre, 1919, portant Réglementation de la Navigation Aérienne* (Paris, Recueil Sirey, 1930), c. 1, pp. 7-12; consult, also: *McNair*, “The Beginnings and Growth of Aeronautical Law,” 1 JOURNAL OF AIR LAW 383 (1930).

2. Convention relating to the regulation of Aerial Navigation, dated at Paris, October 13, 1919. Texts of the Convention are to be found in a number of places; consult, among others: *Colegrove*, *International Control of Aviation*, 149; *Henry-Couannier*, *Examen de Principe de la Convention Internationale*, 31; *Roper*, *La Convention Internationale du 13 Octobre, 1919, portant Réglementation de la Navigation Aérienne*, 297; 17 *Am. Jour. Int. L.*, supp. 195 (1923); 6 *Revue Juridique Internationale de la Locomotion Aérienne* (hereinafter cited as *R. J. I. L. A.*) 19 (1922); 33 *Harv. L. Rev.* 23; 11 *League of Nations, Treaty Series*, 174 (1919).

3. Consult: *Fred D. Fagg, Jr.*, “The International Air Navigation Conventions and the Commercial Air Navigation Treaties,” 2 *So. Cal. L. Rev.* 430 (1929); *Clement L. Bouvé*, “The Development of International Rules of Conduct in Air Navigation,” 1 *Air L. Rev.* 1 (1930); *William M. Gibson*, “The Development of International Air Law to 1919,” 5 *Temple L. Quar.* 161 (1931), “Multi-Partite Aerial Agreements,” 5 *Temple L. Quar.* 404 (1931), “The International Commission for Air Navigation: Structure and Functions,” 5 *Temple L. Quar.* 562 (1931); *Roper*, “Recent Developments in International Aeronautical Law,” 1 JOURNAL OF AIR LAW 395 (1930); *Joseph H. English*, “Air Freedom: The Second Battle of the Books,” 2 JOURNAL OF AIR LAW 356 (1931). For a recent suggestion that the doctrine of freedom of the air may in time be abandoned, consult: *Fernand de Visscher* “Le Régime Juridique de l'Espace Atmospherique et la Question de la Nationalité des Aéronefs,” 2 *Zeitschrift für das gesamte Luftrecht* (hereinafter cited as *Z. L. R.*) 4, 23 (1928).

But the acceptance of this doctrine has brought in its train⁴ a group of other problems which, in part at least, grow out of this very rule that each national State may control absolutely the navigation of the over-lying airspace. One problem still very much alive is that of "nationality" of aircraft.

States, although willing (and in some cases eager) to permit a generally free use of their air for navigation purposes, have manifested a quite understandable desire that this navigation should inure as much as possible to the benefit of their own citizens (and thus to themselves as corporate entities) and that it should operate as little as possible to the detriment of their citizens (and/or of themselves). This has meant that States have desired the formulation of rules which would accomplish, specifically, these things:⁵

- (1) A reservation of commercial air traffic between points in the same State for nationals of that State—the principle of *cabotage*, which has long been familiar in coast-wise shipping laws;⁶
- (2) A protection of the public interest of the State itself against the possibility that its secrets of national defense might be violated by the prying eyes of an observer from the air;⁷
- (3) A means whereby the State might protect its citizens against injuries resulting from improper or careless activities of aviators and/or enable its citizens to secure adequate redress if such injuries should occur—that is:
 - a. Some provision against unsafe craft and incompetent pilots taking to the air, and

4. "Ce critère de nationalité est en fonction direct du principe de la souveraineté complète et exclusive des États sur l'air." *Visscher*, "Le Régime Juridique de l'Espace Atmospherique et la Question de la Nationalité des Aéronefs," 2 Z. L. R. 4, 18 (1928).

5. For a statement of some of the purposes of a nationality rule, consult: *Henry-Couannier*, "De la Nationalité et du Domicile des Aéronefs," 1 R. J. I. L. A. 165 (1910); consult, also: *Visscher* "Le Régime Juridique de l'Espace Atmospherique et la Question de la Nationalité des Aéronefs," 2 Z. L. R. 4, 18-25 (1928); *Hugo Divald*, "La Nationalité et la Port d'Attache des Aéronefs," 6 R. J. I. L. A. 501 (1922); *Henry-Fabry*, "De la Nationalité des Aéronefs," 6 R. J. I. L. A. 357 (1922).

6. Consult: *Divald*, "La Nationalité et la Port d'Attache des Aéronefs," 6 R. J. I. L. A. 501 (1928); and compare the American Shipping Act U. S. C., title 46, §§ 11-17. Consult, also: *Bowvé* "The Development of International Rules of Conduct in Air Navigation," 1 Air L. Rev. 1, 22 (1930); *Gibson*, "Multi-partite Aerial Agreements," 5 Temple L. Quar. 404, 416 (1931).

7. Consult: *Bowvé*, "The Development of International Rules of Conduct in Air Navigation," 1 Air L. Rev. 1, 20 & 23-24 (1930).

- b. Some facility for identifying the persons responsible for any injuries which might occur;
- (4) Some mode of determining what law governed, and what tribunal had jurisdiction over, the redress for, or punishment of, conduct in air-craft.

Influenced, largely at least, by the analogy of maritime commerce,⁸ jurists sought to accomplish this group of purposes by the device of assigning to each air-craft a "nationality," and using that nationality as a test to fix privileges of flight and power to control.

Various rules have been suggested,⁹ from time to time, as a means of determining such nationality. Briefly stated, the more important of these rules are:

- (1) The nationality of the craft to be that of its owner—with special rules for determining the nationality of a corporate owner, or of a craft owned jointly by two or more individuals of different nationalities;
- (2) The nationality of the craft to be that of the State of the domicile of the owner;
- (3) The nationality of the craft to be that of the State wherein it is usually kept (the *Port d'Attache*);
- (4) The nationality of the craft to be that of its pilot;
- (5) The nationality of the craft to be that of the State "registering" it—the power to register being determined by one of the above rules; and
- (6) The nationality of the craft to be that of the State of registry—each State being left entirely free to determine for itself what craft it will register.

It should be noted at the outset that, in most instances, the application of any of these rules will lead to the same result. Ordinarily, an air-craft will have its permanent base in the country of its owner's domicile, will be owned and flown by nationals of the country wherein it is kept, and no State is at all likely to refuse registration to such a craft. But variations of this normal situation will occur, and it is those variations which both make a rule necessary and produce more or less serious disadvantages in any of the rules above set forth.

One of these suggested rules may be dismissed briefly. The suggestion that nationality of the craft should follow that of its

8. Consult the authorities cited, *supra*, in footnote No. 6.

9. For one list of theories, consult: *Gibson*, "Multi-Partite Aerial Agreements," 5 *Temple L. Quar.* 404, 407-409 (1931); consult, also, the articles cited in footnote No. 5, *supra*.

pilot is based, primarily, on a desire to protect points of military importance against espionage by one who may become, in the future, an enemy alien, and to a less degree by the desires to keep all the chances of gain resulting from aviation for the State's own people and to insure that the pilot will be readily accessible for the purposes of redressing any wrongs committed by him.¹⁰

But this rule is not necessary to accomplish these ends; Liability, at least civil liability, has, by most national laws, been attached to the owner,¹¹ either in lieu of or jointly with the pilot, and some protection against espionage may be assured through the patriotism of the owner, also "prohibited zones" are closed to national as well as to foreign aircraft;¹² while the practical difficulties of application make the *pilot* test almost impossible. The confusion unavoidably incident to having nationality—with its attendant powers and duties—shift, with the perhaps accidental substitution of John for Jules at the controls, has been so apparent that no international agreement ever has adopted this test.

The test most urged by pre-war publicists was that of the nationality of the owner. *Basically* this was the test first adopted by the C. I. N. A. That convention adopted the rule whereby nationality was dependent upon registration,¹³ only one State could register,¹⁴ and registerability was made to depend on the nationality of the owner:

"No aircraft shall be entered on the register of one of the contracting states unless it belongs wholly to nationals of such states.

"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 ful-

10. Possibly a third reason might be added, namely, to control the licensing of pilots. But the overflowed State may limit the pilotage of any craft, whether it have its nationality or not, to persons whose competency it is willing to recognize. For the existing rules on the subject of licenses, see: C. I. N. A., Art. 12; C. I. A. N. A., Art. 12, P. A. C., Arts. 13 & 14; consult, *Fagg*, "The International Air Navigation Conventions and The Commercial Air Navigation Treaties," 2 So. Cal. L. Rev. 430, 447-448 (1929); *Bouvé*, "The Development of International Rules of Conduct in Air Navigation," 1 Air L. Rev. 1, 21-22 (1930); *Gibson*, "Multi-Partite Aerial Agreements," 5 Temple L. Quar. 404, 415 (1931).

11. Consult: Uniform State Law of Aeronautics, §§ 5 & 6; and consult: *Rudolf Hirschberg*, "Liability of the Aviator to Third Persons," 2 So. Cal. L. Rev. 405 (1929); *Arthur L. Newman II*, "Damage Liability in Aircraft Cases," 29 Col. L. Rev. 1039 (1929).

12. C. I. N. A., Art. 3; C. I. A. N. A., Art. 3; P. A. C., Art. 5.

13. Art. 6.

14. Art. 8.

fills all other conditions which may be prescribed by the laws of the said state."¹⁵

This test has been the subject of a number of criticisms. In the first place it has been suggested that it is deficient in that it makes no provision for co-ownership by two or more individuals, nationals of different states¹⁶—a difficulty, however, which is probably not of great moment since a provision for registration by the State whose nationals owned the greater share (or by either State at the option of the owners if the shares were equal) would probably not meet with opposition and, in any event, compulsory incorporation for ownership purposes in this situation would probably not be unduly burdensome.

A second objection has had to do with the restrictions on the national character of a corporate owner—a restriction based, very likely, on maritime analogies.¹⁷ Dr. Wegerdt, in voicing the objections of the German government to the original text of the C. I. N. A. made this one of his points¹⁸—urging that it conflicted with the rules of the German law relating to corporations. This objection has been raised by writers of other nationalities,¹⁹ and merits some consideration. The normal rules of corporate entity make no such distinction, and there seems to exist no special necessity for varying them here. All the purposes of identification and inspection may be served without going behind the corporate veil to examine the status of the officers. Obviously it is the problems of cabotage and espionage which are in mind. But a State may, without international agreement, by its own national law, limit the eligibility of aliens to directorship and/or officership in its own corporations (or even go beyond the requirements of the C. I. N. A. and limit stock ownership).²⁰ If the nationality of the company governs that of the craft, there would seem to be no need to *impose* on a State any further safe-guards for its own protection. Consequently most writers have favored a modification which would permit the registration of any craft owned by a company having the nationality of the registering State.

15. Art. 7.

16. *Henry-Fabry*, "De la Nationalité des Aéronefs," 6 R. J. I. L. A. 357 (1922).

17. Consult, *supra*, footnotes Nos. 6 & 8.

18. *Alfred Wegerdt*, "Germany and the Aerial Navigation Convention at Paris, Oct. 13, 1919," 1 JOURNAL OF AIR LAW 1, 20 (1930) reprinted from 2 Z. L. R. 25, 40 (1928).

19. Consult, for example: *Henry-Fabry*, "De la Nationalité des Aéronefs," 6 R. J. I. L. A. 357 (1922).

20. Consult, for example, the Belgian decree on registration of aircraft. Decree of May 11, 1931, 15 Droit Aérien 382-385 (1931).

A third objection is concerned directly with the theory that registration should follow the nationality of the owner. Registration, as we have seen, involves an inspection to determine the fitness of the craft for flight—with periodic re-inspections and inspections incident to repairs. Obvious difficulties present themselves if an owner domiciled and keeping his plane in a country other than that of which he is a national must send his plane back to the latter country for inspection (including the almost insurmountable one that, until it is inspected, the craft cannot be flown). Equally obvious is the inexpediency of having each nation maintain a staff of expert inspectors (and a non-expert inspection would be worthless) in every other State in which one of its nationals may desire to keep a plane. The inevitable result would be that the inspection would, *in fact*, be made by the agency of the country wherein the plane was kept, acting at the request of, and reporting to, the country of the owner's nationality. But this leaves only a formal shell of control in the hands of the latter country.²¹

These and some minor objections led the C. I. N. A. in 1929 to propose a substitute for Article 7, to read as follows:

"The registration of aircraft referred to in the last preceding article shall be made in accordance with the laws and special provisions of each contracting state."²²

This provision, while making it possible to avoid the objections to the old provision,²³ adds a new one. Double registration is expressly provided against,²⁴ but there is no assurance that the owner of a plane may not, because of a lack of uniformity of the national rules thus authorized, find himself unable to register his plane in *any* country—a difficulty far more serious, it is submitted, than any argued against the older rule.

Recently two distinguished continental jurists have urged a third rule—that of making registration and nationality depend upon the *Port d'Attache* of the craft.²⁵ In the main, the arguments

21. For the principal exposition of this view, consult: *Divald*, "La Nationalité et la Port d'Attache des Aéronefs," 6 R. J. I. L. A. 501 (1922).

22. Consult: *Colegrove*, *International Control of Aviation*, 83-86, 167-170. This protocol is not yet effective for lack of ratification.

23. For a discussion of the merits of this rule, which is based, in part at least, on the rules adopted by the Institute of International Law at Lausanne in 1927, consult: *Visscher*, "Le Régime Juridique de l'Espace Atmospherique et la Question de la Nationalité des Aéronefs," 2 Z. L. R. 4, 23-24 (1928).

24. Art. 8.

25. *Divald*, "La Nationalité et la Port d'Attache des Aéronefs," 6 R. J. I. L. A. 501 (1922); *Visscher*, "Le Régime Juridique de l'Espace At-

urged in favor of this device are those made against the rule which establishes the nationality of the owner as the criterion. It is argued that this test automatically would eliminate all the problems of corporate or joint ownership and that it would give to the craft the nationality of the State which had the greatest interest in its operation, whose law should, therefore, apply to it (and to conduct on board it) and whose inspecting officers could examine it most efficiently.

Apparently only two objections have been raised against this view by the theorists—to both of which its principal advocate has an answer. It is suggested that the rule might compel a State to give diplomatic protection to property owned by the nationals of another State and that there might be difficulties in case of a desire to sequester the craft in time of war. To the first of these M. Divald answers that such a situation is not unknown already in international law and to the second he replies that if the crafts have the nationality of the country in which they are usually kept, service in time of war will be aided rather than impeded.²⁶

Since no existing provision seems to be entirely satisfactory, it may not be too presumptuous to suggest my own ideas. At the outset, let me suggest what seems to me to be the basic reason for the difficulties previously encountered, *viz.*, that the various ends sought to be served by the nationality rule do not have a common juridical basis—hence a rule which fits one purpose does not suit the other.

In the first place, since the various conventions provide for a frequent interchange of registration information,²⁷ thus permitting the keeping of duplicate registers in every contracting State, it is really immaterial what country makes the original registration, *i. e.*, collects the information.

Second, for the same reasons and since the conventions determine in advance a uniform rule to be followed,²⁸ the assignment of identification symbols may conveniently be made by any country.

Third, inspection is a procedure of peculiar interest to the country of the *Port d'Attache* (since in that country normally will

mospherique et la Question de la Nationalité des Aéronefs," 2 Z. L. R. 4, 18-25 (1928).

26. Since the advocates of the *port d'attache* theory in fact couple with it a requirement that the domicile of the owner must be in the State of the port, the pure domicile theory may, for practical purposes, be regarded as being swallowed up in the former.

27. C. I. N. A., Art. 9; C. I. A. N. A., Art. 9; P. A. C., Arts. 9 & 11.

28. C. I. N. A., Art. 10 & Annex A; C. I. A. N. A., Art. 10 and Annex A; P. A. C., Art. 9.

occur the bulk of the flying) and, as we have seen, that country is the most convenient one to do the inspecting.

Fourth, the doctrine of cabotage and provisions for protection against espionage are peculiarly connected with the ownership of the craft, regardless of its *Port d'Attache*.

Fifth, the rules governing responsibility (civil or criminal) and establishing the jurisdiction to fix such responsibility are not necessarily dependent either on the nationality of the craft, or of its owner or pilot, nor on the *Port d'Attache*.²⁹

Accordingly, it is suggested that, by a subordinate agreement, the nations parties to the international conventions, could well provide:

(1) That all inspections of the craft should be made by the country of its *Port d'Attache*.

(2) That the registering authority should assign to each craft an identification mark, which would indicate (as do the present marks) the nationality of the owner.

(3) That the nationality of a corporate owner should be dependent on the local law of the State of incorporation and the nationality of a plane jointly owned should follow the nationality of the owners of the majority interest (equal co-owners being allowed to elect a nationality).

(4) That, in countries signatory to P. A. C.³⁰ (and C. I. N. A. if the 1929 protocol is adopted) the registration shall take place in the country of the *Port d'Attache*, in countries signatory to C. I. A. N. A.³¹ (and C. I. N. A. if the 1929 protocol is not adopted) registration shall take place in the country of the owner's nationality, such country being required to accept and act upon the statements of the inspecting country as to air-worthiness.

29. For a suggestion concerning these rules, apart from nationality, consult: *Visscher*, "Le Régime Juridique de l'Espace Atmospherique et la Question de la Nationalité des Aéronefs," 2 Z. L. R. 4, 20-21 (1928).

30. Pan American Convention on Commercial Aviation, signed at Habana, February 15, 1928. For texts of the Convention, consult: *Colgrove*, *International Control of Aviation*, 173; *Carnegie Endowment for International Peace*, *International Conference of American States, 1889-1928*, 385.

31. *Convenio Ibero Americano de Navegación Aérea*, signed at Madrid, November 1, 1926. For the text of this Convention, consult: 11 R. J. I. L. A. 95 (1927).