1953

Theories of Trade in International Law and Their Influence on Air Commerce

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Recommended Citation
Ann Van Thomas Wynen, et al., Theories of Trade in International Law and Their Influence on Air Commerce, 7 Sw L.J. 219 (1953)
https://scholar.smu.edu/smulr/vol7/iss2/4

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I. INTRODUCTION

DOES there exist under International Law an obligation on the part of nations to permit commercial intercourse, or, conversely, is there a right of commercial communication between nations? If International Law recognizes such a right or obligation, is it a fundamental right or duty, and what are the bounds thereof? If no such obligation or right exists, what is the legal raison d'etre of international trade? There are at least five distinct approaches to these questions, but prior to discussing them it might be well to define and review briefly the historical evolution of commercial intercourse.

Trade is a relation between men who have not a common purpose except that of each serving his own purpose more effectively. The parties involved in an exchange of goods need not be acting selfishly, for their wants, which each gets the other to serve, may be of a most unselfish character. From the development of exchange and trade there arises an economic system in which men are predominantly concerned with satisfying other people's wants in return for power to get their own satisfied. Primitive men, as yet without a state or any other organized form of community, lived without any exchange of goods. The development of the

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1 HORN, INTERNATIONAL TRADE PRINCIPLES AND PRACTICE (1935) 12; STALEY, WORLD ECONOMY IN TRANSITION (1939) 8; WHALE, INTERNATIONAL TRADE (1934) 22.

2 HARROD, INTERNATIONAL ECONOMICS (1933) 20.
human race into a group of civilized societies took place only through the increase of intercourse and association, for civilization begins when an habitual exchange of products begins because commerce brings people together and implies the existence of a certain surplus of wealth and a certain provision for communication.

In the earliest stages, all exchange of products is marked by three features: the transaction is barter; it is itinerant; and the producer is his own distributor. Very soon a common medium of exchange is formed, some sort of money appears, and elementary barter develops into regular selling trade. The itinerant peddler is gradually replaced by fixed places of trade, and finally trade is conducted through factors and brokers and a complicated system of credit is evolved.  

One of the early institutions of trade was the market-fair, where producer, trader, and consumer all met to make possible the desired exchange of goods. The market place usually was open only on festive days; thus trade and religion early found a common meeting point. For going to the market and attending religious festivals led to the formation of caravans consisting of pilgrims and merchants, and this in turn led to a system of regular transportation, eventually leading to the development of permanent roads, and the growth of towns along and near the world’s principal market places.  

On the sea, a similar procedure took place. Sea carriage and traffic starting with fishing, developed on the rivers, the coasts, and finally risked the hazards of the open sea. Herodotus opens his superlative history of the Greek world by graphic description of the importance of sea commerce:

The sea is a road which unites the peoples of the earth to each other. He who dwells inland is as one shut off from the facilities and attrac-

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3 See DURANT, THE LIFE OF GREECE (1939) 30, 47, 562.
4 Id. at 575.
tions of human intercourse and unacquainted with the progressive
growth of the race.\(^5\)

It was through sea commerce in antiquity that the greatest
impetus was given to the defeat of local industrial seclusion, for
the sea traders went ever farther afield seeking new products and
new areas with which to trade.

The most recent major influence on the history of trading was
born of the Twentieth Century when man at last perfected the
Daedalian experiment. Air transport, with its ability to disregard
surface obstacles, made possible the opening for trade of many
theretofore inaccessible portions of the globe and negatived the
distances between the most outlying nations.

II. The Universalistic Approach

In the classical writings of the ancient Greeks and Romans is
to be found the doctrine that differences in natural conditions in
various countries made trade between them mutually profitable.\(^5\)
The early Christian philosophers took over this doctrine and gave
it a theological twist: God had endowed different regions with
limited but varied products in order to give mankind incentive to
trade so that through the building up of an interdependent world
economy they would become united in a world society, and, as
children of one God, learn to love each other.\(^7\) Early writers on
International Law, having been reared in theological traditions,
developed the commercial law of the nations upon this religious
basis. Hence, Vitoria’s theory of International Law contained an

\(^5\) Herodotus, *History* (Rawlinson transl., 1862) 4.
phrased it thus: “The various products of different soils and countries is an indication
that Providence intended they should be helpful to each other, and mutually supply
implicit tenet that there was a God-given right to trade with every nation.\textsuperscript{8} Textor wrote:

There is no doubt that commerce originates in the Law of Nations properly so called. For it is common saying, not every land produces everything. . . . Accordingly, commerce must be held permissible . . . because it is so necessary to the preservation of mankind that speaking absolutely, it cannot be forbidden.\textsuperscript{9}

And Suarez declared:

\ldots it has been established by the Jus Gentium that commercial intercourse shall be free.\textsuperscript{10}

But the foremost of all the great students of International Law to advocate this universalistic approach that there existed a fundamental right of intercourse between nations was Grotius.

Towards the end of the Fifteenth Century, the great voyages of discovery gave a new importance to the customs of the sea, which through centuries of usage had become an important part of the principles of commercial law. There arose for the first time the question of whether or not there could be a national jurisdiction over the high seas, that is, whether or not the oceans were the exclusive property of a particular state or states. In the year 1493, Pope Alexander IV, as spiritual leader of the world seeking to maintain peace among the leading sea-faring nations of that day and age, published his famous bulls which divided the then undiscovered world between Spain and Portugal, and purported to prohibit all commerce in the oceans except by license of the Spanish and Portuguese sovereigns.\textsuperscript{11}

\textsuperscript{8}Nussbaum, A Concise History of the Law of Nations (1947) 62. Davenant states: "Trade is in its nature free, finds its own channel, and best directeth its own course; and all laws to give it rules and directions, and to limit and circumscribe it may serve the particular ends of private men, but are seldom advantageous to the public." 1 The Political and Commercial Works of Charles Davenant (Whitworth ed. 1771) 98.

\textsuperscript{9}Textor, Synopsis of the Law of Nations (1680), Ch. 13, I I, Bates transl. in Classics of International Law (1916).

\textsuperscript{10}Suarez, De Legibus (1612) in 2 Classics of International Law (Scott's ed. 1944) 347.

\textsuperscript{11}Smith, Airways Abroad (1950) 123.
At the time, this sweeping claim seems to have passed unchallenged, and it was Queen Elizabeth I who made the original assertion of the freedom of the oceans as a principle of the Law of Nations. The immediate cause was occasioned by Drake’s voyage in the Golden Hind, which provoked strong Spanish protest in 1580. In her reply to the Spanish ambassador, the Virgin Queen declared that the use of the sea and the air was free to all mankind, and that no exclusive right in either could be claimed by particular nations or individuals.\(^1\)

By 1600 the Dutch had determined to divert some of the wealth of the Indies to northern Europe, although, under the papal bull of 1493, this was the sphere of the Portuguese, and the Dutch were, from the Portuguese point of view, trespassers. Naturally disputes arose, and Grotius was called upon to prepare a defense of the Dutch trade with the East. The result was his famous dissertation on freedom of the seas or the right which he contended belonged to the Dutch—or any other nation so desiring—to take part in the East Indian trade.

He denied the right of any nation to claim sovereignty over the high seas or the exclusive right of their navigation, and based his reasoning on the underlying premise of all International Law that every nation is free to travel to every other nation and to trade with it. To uphold his first principle, “the right to travel,” Grotius demonstrated the inequality if not impossibility of national sovereignty over any part of the high seas, and the consequent freedom of navigation open to all.\(^2\)

In support of his second proposition, “the right to trade,” he claimed first that the Portuguese had no sovereignty over the Indies, and that as third parties they had no right to interfere with the trade between the Dutch and the Indies; and, secondly, that under the Law of Nations no state or ruler can debar foreigners

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\(^1\) Oppenheim, International Law (7th ed. Lauterpacht, 1948) 535.

from having access to its subjects and trading with them. Grotius thus spelled out what he believed to be the three basic fundamentals of international commercial law:

1. The high seas were not within the sovereignty of any state and therefore their navigation was open to the ships of all nations;
2. No third state had the right to interfere in the trade between two other sovereign nations;
3. No state had the right to limit or control the transports of another state from entering into its territory for peaceful trading purposes.

International jurists adhering to the universalistic approach to international trade have, since Grotius' day onward, proclaimed the theory that the international exchange of goods, services, and capital is a right and a duty of states resulting from the interdependence and solidarity of the intellectual, social and economic interests of modern people. The various nations, under this view, are component parts of a social universe, and the conception of the unity of world trade is to be confirmed by the wide distribution of important natural resources all over the earth. Prior to the ascendancy of the positivist theories, many international legal experts forecast that a world economic order was about to emerge radiantly in which mankind was destined to be united by the strongest bonds of economic well-being, which promised not only universal prosperity but eventually universal harmony and peace.

III. The Universalistic Approach and Air Commerce

With the progress of science and the conquest of the air by man, air transport has become an important economic factor in the development of world trade. Before air transport became a reality, actually before flight itself, international lawyers contemplated and discussed freedom of the air, and there was much sentiment in favor of the universalistic approach, which was epitomized in the proposition that any nation equipped to do so should be free

14 Id. at 125.
15 See Finch, Sources of Modern International Law (1937) 15.
to fly at will in the international air; that commercial aircraft, regardless of nationality, should be allowed to call and trade at airports anywhere without prior notice and subject only to non-discriminatory local regulations.

It was early advocated:

On the earth we are to such a high degree victims of laws and regulations, let us by all means take care not to spoil the air in the same way. Law must not be the enemy of progress.\(^\text{17}\)

However, this desire to be free of regulation was not the only basis of the air-freedom doctrine, for its advocates turned to Grotius and other earlier analogies and precedents upon which such a theory could be predicated. Freedom of the air was substantiated by Roman law as stated in Corpus Juris Civilis:

The following things are by natural law common to all: the air, running water, the sea.\(^\text{18}\)

Furthermore, it was reasoned that all property is based upon occupancy, which necessitates the seizure of movables and the enclosure of immovables. Since Grotius had aptly pointed out that as the sea can neither be seized nor enclosed, it was incapable of being made a subject of property, hence by analogy, the air could be likened to the sea, as a great mass of fluid atmosphere, enveloping the earth, shifting and drifting, diminishing in intensity at higher altitudes, seldom remaining over a particular area for any length of time, and not possessed of characteristics of sovereignty and ownership.\(^\text{19}\) Thus, as the air was like the sea which cannot be enclosed and which denies the efforts to possess it, it was logical that there must be absolute freedom of the air, open to all nations, belonging to all.

Therefore, at a meeting of the Institut de Droit International,

\(^{17}\) Nys, Report to Institute of International Law, 19 Annuaire de l'Institut de Droit International 108 (1902).

\(^{18}\) CORPUS JURIS CIVILIS, I. 2, 1, 1.

at Brussels in 1906, there was introduced a resolution incorporating the famous principle which subsequently became known as the doctrine of air freedom:

The air is free. The States have no authority over it in time of peace or in time of war other than that which is necessary for their own preservation. 20

Such a resolution has no binding effect in International Law until adopted by the official action of nations, but the fact that the Institut is composed of eminent lawyers from many different nations gives a great deal of authority to its deliberations. This principle might have become the rule of International Law governing the air had not World War I demonstrated the importance of the airplane as a military instrument, causing nations to repudiate such a broad principle. 21 Nevertheless, although freedom of the air is recognized as existing only above the high seas, men with the universalistic point of view have throughout the Twentieth Century advocated various theories which would make the air free. Internationalization of commercial aircraft was a favorite pre-World War II thesis of the French, who put up a stiff fight for it at the Disarmament Conference of 1932. 22 It was rejected, but gave birth to various other proposals based on a universalistic approach, such as the placing of all international air transport operations within an international corporation modelled on the Suez Canal organization in which all governments would hold shares; a plan whereby all European airlines might be internationally controlled; and a scheme under which a United Nations Committee would be the sole commercial airline of the world. 23

Because the conception of the air is inextricable from the conception of a more unified world, universalistic theorists are convinced that air power makes total internationalism inevitable. No matter what form the commercial air lines of the world take —

21 CORBETT, LAW AND SOCIETY IN THE RELATION OF STATES (1951) 158.
22 TOMBS, INTERNATIONAL ORGANIZATION IN EUROPEAN AIR TRANSPORT (1936) 14.
23 SMITH, AIRWAYS ABROAD (1950) 130.
whether they be competitive or unified — those approaching the problem from the universalistic philosophy state unhesitatingly that every nation is entitled to trade in the air, subject to a few minor conditions to guard national security, which perhaps can best be taken care of by setting aside certain free landing areas on the logical international routes criss-crossing the globe.

Complete freedom of the air, as conceived under a universalistic approach, has then within its connotations five separate aspects:

1. Freedom of transit through foreign air space;
2. Freedom to land on foreign soil for refueling and repairs;
3. Freedom to put off on foreign territory goods and persons originating in home territory;
4. Freedom to take on goods and passengers destined for home territory; and
5. Freedom to take on or put off goods and passengers at intermediate points on routes beginning or ending in home territories.24

The technical progress of the Twentieth Century threw the issue of freedom of trade by aircraft squarely before the governments of the world. But air law, being the last born of juridical notions, was to be subjected to the major pragmatic trends of the era of its birth, and as soon as air transport moved from incredible experiment to living reality, the license to enter national territory for trading purposes, claimed by Grotius and historically developed for merchant sea-shipping, was denied to air transport.25 In the case of sea shipping, the country of the flag of the ship alone decides what foreign ports its ships will enter, and what rates the public at such ports must pay.26 In the case of air transport, the

24 These five freedoms were advocated by the United States at the International Conference on Civil Aviation at Chicago in 1944 as the basis for a multilateral treaty designed to open the skyways of all nations adhering thereto. Had they been accepted multilaterally on an extensive scale, they would have eliminated many legal obstacles placed in the path of transit and operational privileges of international air service. Unfortunately, few nations of the world were willing to go this far, and even the United States backed away from opening its own air to the transport of other nations. See THOMAS, ECONOMIC REGULATION OF SCHEDULED AIR TRANSPORT: NATIONAL AND INTERNATIONAL (1951) 186.
25 Id. at 187, 188.
26 Cooper, Air Transport and World Organization, 55 Yale L. J. 1191 (1946).
country where the aircraft wishes to trade, not the country of the flag of the aircraft, has the right under present International Law to decide whether foreign aircraft may fly over its territory, or may land to refuel or to trade, and, in the latter case, under what conditions.\(^27\)

The two great international means of transport used in world commerce today have very different trading access to foreign territory. The economic development of international air transport has been conditioned by the fact that air transport is regarded and used as an instrument for the promotion of national interests of sovereign states. The convenience and needs of the travelling and shipping public are given only secondary consideration as national aviation rivalries in both commercial and military spheres provide an index to national power rivalries.

In only one minor instance have the advocates of the universalistic approach been at all successful, and that is in a field of very limited expression dealing with technological improvements in navigation and universal provisions for safety of life.\(^28\)

**IV. THE POSITIVIST APPROACH**

Although writers of the universalistic school had wide appeal, there was, nevertheless, a very potent opposition to their deliberations, many legal scholars denying the basic premise of their reasoning, \(i.e.,\) that there was inherent in the Law of Nations a fundamental right to trade. The positivists examined the problem of commerce from a completely different angle.

They noted that beginning with primitive men, the granting of permission to trade was vested in the tribal chief. It was hence a purely personal matter strictly in the hands of the ruler. State monopolies of trade existed in ancient Egypt and ancient Persia, and during the period of Greek ascendency over the Mediterranean, the regulation of trade remained in the hands of each of the rulers of the Greek city-states. In the feudal period the control

\(^27\) *Id.* at 1198.

of trade rested with provincial lords, and trade itself was often regarded as forbidden except for a limited period at regional fairs. These fairs rapidly developed in popularity as sources of profit for the traders and revenue for the feudal rulers, who were quick to take advantage of the monetary remuneration involved in granting fair franchises.29

Gradually, the right to trade granted by the feudal lord was superseded by the permission of the king. Increasingly liberal grants of safe-conduct and trading franchises were granted to individual foreign merchants. The mutual interests of kings in foreign trade secured, as a rule, de facto reciprocity in the grant and scope of such safe conducts and permissions to trade. It was then found to be more convenient to secure the right to trade for each other's merchants on a treaty basis, and in this manner to establish a de jure reciprocity of treatment in this field.

The slow emergence of nation-states in Western Europe from the Fifteenth Century onward, saw a shift in the control of trade from the rulers of the towns and the feudal lords to the national states. This shift in control involved also a change in the objectives of control. Control of trade by feudal lords had aimed at lining the pockets of the controllers; control by the town authorities at protecting the local craftsmen and merchants from the encroachment of new competition. As economic control passed from the lords and local units to national monarchs and legislatures, however, it was turned to quite a different end — the building up of the wealth, the economic power, and the political power of the state.30

Hence the positivist approach to the question of the right to trade highlighted the importance of the ruler, making him all powerful by placing on him no legal restraints whatsoever in permitting or withholding the right of strangers to trade with his subjects. There is implicit in this philosophy the theory of state

sovereignty which has proved a great obstacle to the development of international order.\textsuperscript{81}

The general acceptance of state sovereignty by many legal theorists brought forth the glorification of the state, as directly opposed to the individual, and indirectly opposed to a united world. Although the uprisings of popular sentiment leading to the democratic movements of the Nineteenth Century retarded the advance of the theory of the "all conquering, all powerful" state, the resurgence of the doctrine in the Twentieth Century was given further impetus with the creation of the fascist and communist experiments.\textsuperscript{82}

German writers in this field have been particularly influential. They viewed the world not as a unitary whole with each part complementing the other but rather as a combination of mutually antagonistic nations, and they considered each national economy as an organism striving to develop its productive forces to the highest possible degree and to exploit foreign markets to its own greatest possible advantage. Such a positivist philosophy became the logical basis for a fundamentally autocratic commercial policy intended to assure each nation's economic strength and readiness for war.\textsuperscript{83}

Protection was demanded for practically all industries considered essential for the military power of the country. Governmental monopolies were created for the regulation of purchases and sales

\textsuperscript{81} "Commerce and war are obviously antithetic: the one, mutually friendly intercourse; the other, unfriendly murderous clashing. The one, an everworking instrument for building up, for softening rancor, for spreading civilization and bringing nations together; the other, an instrument of destruction engendering race hatred, retarding the progress of humanity." Seligman, \textit{International Banking and its Important Influence on International Unity}, 1912 Int. Conciliation 20. See also Butler and MacCoby, \textit{Development of International Law} (1928) 211.

\textsuperscript{82} Jones, \textit{The National Socialist Concept of Law} (1940) 10. See also Armstrong, \textit{The Soviet Approach to International Trade}, 63 Pol. Sci. Q. 368 (1948).

\textsuperscript{83} "Another reason for the weakness of Liberal ideas in Germany as compared with England was the comparative unimportance of commerce.... Liberalism is essentially an offspring of commerce.... Fichte, as we have seen, wished Germany to have no foreign commerce, and his modern followers retain this view as far as times permit." Russell, \textit{Freedom Versus Organization}, 1814-1914 (1934) 366.
abroad. A bilateral trading pattern began to develop based on the idea that exchange transactions between any two countries should exactly balance each other. This meant a complete desertion of the view of the world as an international trading community in favor of the theory that each national economy must struggle against all others for strategic position. Naturally, and inevitably, this led to the transformation of foreign trade into an important instrument of national power policies to coerce political rivals and to squeeze economic competitors. The end result of the positivist doctrine was economic nationalism with international interdependence being thrown overboard, and trade across frontiers controlled with the view only to national political advantage in mind. Raw materials helpful to the foreign competitor or potential enemy must be withheld. Protective tariffs must be raised to encourage production at home of as many products as possible, despite the increase in cost or the inferiority of the product. Cartels must be created on an international scale, transforming competition in international markets into power struggles between groups of nations. Price systems become isolated from all other systems through strict exchange control in which the principles of cost accounting are completely ignored. Such policies automatically produce friction and hostility throughout the field of international economic life, for citizens of other nations are thought of less as customers than as members of a competing economic unit.34

Unfortunately, the disease of sovereign control of trade is progressive and expanding. If a few important states can seriously challenge the international trading community, other nations must follow suit to survive.35 Accordingly, each country begins to resort to emergency measures in strict isolation from all others, regardless of the international repercussions of these measures, and the end result can only be a system of monopolistic state trading

34 Ross, A Textbook on International Law (1947) 277.
through barter agreements, a retrogression to the most primitive means of carrying on commerce.

The followers of the positivist approach then deny that there is a right of intercourse between nations, and frustrate attempts to develop a proper consciousness of international society, for the concept of state sovereignty symbolizes the doctrine that a state is entirely free and independent in all its actions, accountable to no one, the ultimate arbiter of all its decisions.

V. THE EFFECT OF THE POSITIVIST APPROACH ON COMMERCIAL AIR TRANSPORT

A. SOVEREIGNTY IN THE AIRSPACE

The First World War put an abrupt end to the universalist attempts to introduce into the Law of Nations an unqualified freedom of the air. International air transport had become regarded and used as an instrument for the promotion of national interests of sovereign states, and even though peace had descended, freedom of the air was not a possible reality in a system of contending states. The international air conference convened by the victors in Paris in 1919 tossed aside the speculations of the universalists and started anew. Beginning with the acknowledgment that air is an element not susceptible to sovereignty, they pointed out that the object of discussion was not the moving element, air, but rather the airspace, which was compared to the banks of a river or the shores of an ocean which are permanent and to a degree capable of being possessed. Admitting that a state cannot control the air, they nevertheless argued that it can dominate the space in which the air is located, and that, then, was the sphere or domain in which sovereignty could be exercised, and it was of no importance that the domain was filled with a moving element.

The conference adopted the maxim, "Cujus est solum ejus est usque ad coelum et ad inferos," as the rule upon which international air law should be developed. This absolute sovereignty doctrine was made necessary, it was rationalized by the positivists, so that a state could be possessed of authority over the airspace in order to take all measures which might be needed to protect it from the flight of aircraft above it both in peace and war. The doctrine of sovereignty over the airspace entails three main propositions:

1. Each state has a right to open or close its airspace, including that above its territorial waters, to foreign or domestic aircraft as it sees fit;

2. Aircraft can be made subject to regulations and prohibitions for the protection of the state against smuggling, the introduction of disease, and espionage; and

3. Airspace over the high seas and other parts of the earth's surface not subject to any state's jurisdiction is free to the aircraft of all states.

Therefore, the only actual freedom remaining in the air was the right to fly over the open sea — a right of little value if an aircraft is not permitted to land and trade. Furthermore, the sovereignty granted to a state over the airspace above its territorial waters was immediately made far more sweeping than its sovereignty over the surface of the territorial waters themselves, since no right of innocent passage was given in the airspace above territorial waters. For example, an ocean vessel may pass through the territorial waters of a state without seeking that state's permission; but an aircraft, flying exactly the same route, must have express authorization from the government claiming sovereign rights over territorial waters.

Article 1 of the Paris Convention of 1919 provided:

The high contracting parties recognize that every power has complete

\[\text{88 Freely translated this maxim stands for the proposition that he who owns the surface of the ground owns all which is above it or beneath it.}\]

\[\text{89 Bellot, The Sovereignty of the Air, 3 Int. L. Notes 133 (1918).}\]

\[\text{40 Hazeltine, Law of the Air (1911) 24.}\]
and exclusive sovereignty over the airspace above its territory. For the purpose of the present convention the territory of a state shall be understood as including the national territory, both that of the mother country, and of the colonies, and the territorial waters adjacent thereto.\footnote{CooPER, \textit{THE RIGHT TO FLY} (1947) 291.}

A quarter of a century later, the political and military aspects of air transport still overshadowed its commercial significance, and, therefore, the same principle was re-affirmed by the signing of the Chicago Convention of 1944, the first article of which states:

The contracting states recognize that every state has complete and exclusive sovereignty over the airspace above its territory.\footnote{\textit{ld.} at 331.}

And the second article declares:

For the purpose of this convention, the territory of a state shall be deemed to be land areas and territorial waters adjacent thereto under the sovereignty, suzerainty or mandate of such state.\footnote{\textit{ld.} at 332.}

Although these two conventions have crystallized the international thinking on the status of national sovereignty over airspace, nevertheless, there are still some phases of sovereignty in airspace that remain obscure, and which may, in coming years, force nations to review the matter of freedom of the air.

\section*{B. \textsc{The Twilight Zone of Sovereignty}}

One of the difficult questions of asserting sovereignty over the airspace above a state becomes quickly obvious even to the most non-scientific mind. Assuming two contiguous nations claim vertical rights above their adjoining countries, outer space, being greater than the earth it contains, must be a greater arc than national land surface, or else, there is in the higher reaches a wedge of airspace between the two states which must be \textit{res communis omnium}. If states claim the greater arc, then the airspace above a nation, being similar to a three dimensional trapezoid, gives
more extensive space rights than surface rights without legal justification.\textsuperscript{44}

The positivist argument for state sovereignty in space always goes back to the proposition that it is both the right and the duty of the state to protect itself, and that on no other basis can such protection be considered adequate except that it have the right to control, as part of its territory, those regions above it which, if used by other states, may bring damage and loss to persons and property below. Therefore, Westlake stated:

In the air, the higher one ascends, the more damage the fall of objects will cause on the earth.\textsuperscript{45}

Under such a theory, states claim the right to airspace in which falling objects will drop upon their surface, even if such an airspace arc is greater than surface area. But then, what of space beyond the pull of gravity?

Cooper would say that sovereignty can only extend through those regions which can roughly be defined as space containing air, that there must be an upper boundary in space to the territory of the subjacent state.\textsuperscript{46} In other words, the outer boundary of the state's sovereignty cannot be farther than the point where the earth's attraction will govern the movement of an object in space so that such object will "fall" onto the earth. Beyond this region, the rights of the state below must cease to exist as against other states.

With the advance of technical science, it may well be that the future will see man able to suspend "islands" far beyond the pull of earth's gravity, and, if the contention is true that no state has sovereignty in the farther reaches of space, this freedom of high altitude may be a step toward general freedom of commerce of

\textsuperscript{44} See Hoyle, \textit{The Nature of the Universe} (1950) 50 and Whitrow, \textit{The Structure of the Universe} (1949) 32.

\textsuperscript{45} As quoted by Cooper in \textit{High Altitude Flight and National Sovereignty}, 4 Int. L. Q. 411 (1951).

\textsuperscript{46} Ibid.
international air transport — at least such trade as will take place on these islands in outer space. But for the present, with the acceptance of the positivist view as the Law of Nations, each state retains complete control over its air trade and communications with other nations.

C. SOVEREIGNTY AND TRADE

When a foreign aircraft of one nation lands in the territory of a second nation and picks up a cargo of passengers and goods for flight abroad, the foreign aircraft is selling, in the market of the second nation, its load capacity. This is essentially a foreign exportable commodity sold in the local market in competition with a similar local commodity, namely, the aircraft load capacity of the second state available on similar or reciprocal routes in foreign commerce.

As has been pointed out, it was the dream of the universalist group of legal philosophers that when the sky was made available to man through means of science, the aircraft would be treated at least as liberally as maritime shipping, if not more so. For example, a state retains sovereignty over its ports, but under International Law there exists a general license under which maritime commercial shipping may pass freely through territorial waters, enter ports to refuel, and pick up or discharge cargo and passengers. Unfortunately, the development of international air transport was immediately restricted by the major philosophical trends of the time of its birth, and instead of being more free than, or

47 "If a rocket or other controlled missile can take off from the earth with a speed of approximately 17,500 miles an hour, it will be able to proceed upward for several hundred miles and could then be deflected off its course so as to be aimed somewhat parallel to the surface of the earth, the power could be turned off, and the rocket would continue on a course around the earth as its momentum would approximately balance the earth's attraction. It would become an artificial satellite. There are scientists who believe that such a satellite can and will be constructed before many years have passed." Id. at 416.


as free as, maritime shipping, air transport became the object of the rule of complete and absolute sovereignty, and therefore fell under the rule of complete exclusion at the will of each nation.\textsuperscript{60}

An excellent example of how far the positivist doctrines have permeated this field can be seen in the case of cabotage. The laws of most nations reserve cabotage, or coasting trade, to national vessels. The term “cabotage” means the transportation for remuneration of cargo or passengers from one port to another within the territory of the same state.\textsuperscript{51} Historically, the right of a state to reserve its coasting trade to the national ships was based on its jurisdiction over territorial waters, and was thus limited to ports which could be reached without sailing on the high seas.\textsuperscript{52} Gradually, the concept was extended to include traffic between ports under the same political jurisdiction on the same land mass, even though ships had to traverse the high seas to reach the second port (e.g., traffic between San Francisco and New York). Many attempts were made to enlarge the term “maritime cabotage” to include ports under the same political jurisdiction. This would permit a very wide extension of trade reserved to national vessels, for it would include not only traffic between ports on the same land mass, but also ports separated by oceans, such as ports of colonies or protectorates. These attempts met with such widespread threats of reprisal and retaliation that such extensions of definition were never accepted as a part of the maritime Law of Nations.\textsuperscript{63}

But where the positivists had failed in sea law, they succeeded in air law. When the question of cabotage arose in the first major aeronautical conference in Paris in 1919, cabotage was extended when applied to aviation to include all land areas and territorial


\textsuperscript{51}\textsuperscript{THOMAS, ECONOMIC REGULATION OF SCHEDULED AIR TRANSPORT: NATIONAL AND INTERNATIONAL (1951) 181.}

\textsuperscript{52}\textsuperscript{STARKE, AN INTRODUCTION TO INTERNATIONAL LAW (2d ed. 1950) 147.}

\textsuperscript{53}\textsuperscript{MEYER, LE CABOTAGE AERIEN (1948) 32-35.
waters under the same political jurisdiction, which meant air traffic of mandates, colonies, and protectorates was reserved to national aircraft.\textsuperscript{54}

It was argued in Paris, and again in Chicago in 1944, that this was absolutely necessary, for no nation desires to be dependent on a foreign air line for its internal transportation. To be commercially profitable, air transport must cover the longest possible distance, for under basic laws of economics, the carrying business is more successful over long distances because every means of transportation requires a certain amount of unproductive work (\textit{i.e.}, loading, unloading, and reloading). The ratio such unproductive work bears to the total work done in the course of a given transportation decreases proportionately as the distance over which the goods are carried increases.\textsuperscript{55} Hence, civil air transport being, because of its very nature, an instrument of national policy, the military and political advantage of a national air transport network which connects all portions of the globe under the same flag is obvious. Furthermore, each nation wishes to make its air service pay a portion of its own way. By permitting other nations to participate in trade between the mother country and other territories under the jurisdiction of the mother country, national air transport, which is in rare instances a paying proposition without governmental subsidy, would demand more financial assistance, and in some cases this would result in the mother country abandoning air routes to the flag ships of other nations, a thought which is anathema to nationalistic doctrines.\textsuperscript{56} Accordingly, it came about that the reservation to national flagships of air cabotage is much more extensive than that reserved to surface vessels.

\textsuperscript{54} Sheehan, \textit{Air Cabotage and the Chicago Convention}, 63 Harv. L. Rev. 1157, 1158 (1950).
\textsuperscript{56} For a brilliant dissection of nationalism see Kohn, \textit{The Idea of Nationalism} (1944).
As a matter of fact, it has been carried to its ultimate extreme. Article 7 of the Chicago Convention reads:

Each contracting state shall have the right to refuse permission to the aircraft of other contracting states to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory....

Article 2 defines the territory of a state as:

...the land areas and territorial waters adjacent thereto under the sovereignty, protection, or mandate of such state.

Under these two articles, an airline offering for sale a round trip ticket on an international run would not fall within the limitations of cabotage, for the passenger is returning to the same field from which he left, not to "another point within the territory." But, if a ticket is sold in Dallas to Rio de Janeiro, Brazil, with return to Miami, this clearly falls within the definition of Article 7, for the final point of destination is Miami, and therefore such traffic has been held to be reserved to the national carrier. This is known as "open-jaw cabotage," for there is a gap in the traffic pattern. And even though there are numerous stop-overs in foreign lands, the fact that the journey ends at another point in the country of origin places that traffic in the trade reserved for nationals only, adding another impediment on the right to trade by international air carriers.

VI. THE INFLUENCES OF CUSTOM

The question of whether or not there exists under International Law a right to trade can be approached from yet another angle. One of the most important sources of International Law is customary practice. The practice of nations in a particular field becomes reasonably uniform, and, through usage, that which is an

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57 Cooper, op. cit. supra note 41, at 33.
58 Id. at 332.
59 Sheehan, supra note 54, at 1161.
established rule of practice eventually becomes an established rule of law.\textsuperscript{60}

At first each wayfarer pursues his own course; gradually by reason either of its directness or on some other ground of apparent utility, some particular route is followed by the majority. This route next assumes the character of a track, discernible, but not yet well-defined, from which deviations, however, now become more rare; whilst in the final stage the route assumes the shape of a well-defined path, habitually followed by all who pass that way, and yet it would be difficult to point out at what precise moment this route acquired the character of an acknowledged path.\textsuperscript{61}

Commercial treaties, that is, agreements setting forth conditions of trade between two signatory countries, are of great antiquity.\textsuperscript{62} In the ancient state systems, and in the medieval period of the western nations, these treaties were contracts affecting only the states directly participating in the negotiations. As trade expanded, the resulting confusion of bilateral favors and discriminations became increasingly burdensome. All the states gradually recognized that this situation was advantageous to none, and began to incorporate into their commercial treaties reciprocal pledges whereby each signatory state agreed to afford the commerce of the other as favorable terms as it granted to any “most favored” third state.\textsuperscript{63} The purpose of the most-favored-nation clause was to minimize special bargains and favors and to eliminate discrimination. To the degree to which states were bound by such clauses, general equality of commercial treatment was assured. Each state was bound to accord equal treatment in tariff duties and commercial regulations to the trade of all other states with which it had concluded such treaties.\textsuperscript{64}

Therefore, questions of freedom of commerce, although not completely without regulation, were, through commercial treaties,

\textsuperscript{60} Starke, op. cit. supra note 52, at 29.
\textsuperscript{61} 1 Cobbett, Cases and Opinions on International Law, (3rd ed. 1909) 5.
\textsuperscript{64} Ibid.
at least subject to a certain amount of similar treatment. It is
argued that this long course of treaty making is evidence of the
growth and embodiment into general international customary law
of a right to trade, or at least of the fact that there is a limit to
a state's freedom in regard to prohibiting trade. For, while it is
to be presumed that a treaty is intended to modify the general
rule of International Law in the relations of the parties, and that
one or two treaties varying from a norm cannot alter the Law of
Nations, yet a series of re-occurrence of treaties establishing a
particular course of action will go far toward proving what the
International Law on a disputed point is. Treaties may not only go
to show the existence of a general rule which the parties wish to
record, but may also be used as evidence of the absence of any
settled custom antecedent to the use of treaties. The operation of
treaties in the creation of rules of International Law is generally
the foundation upon which usages and practices grow into custom,
and because of the singular authority of treaties, the growth is
vested with additional weight and value.

In early commercial treaties, for example, there were enumerated
in detail, guarantees protecting the person, liberty and property of foreign merchants and their free access to local courts.
These rights found general acceptance in the course of centuries
of constant treaty practice, and are now an accepted part of the
customary Law of Nations. It is quite logical, therefore, to point
out that the persistence with which commercial treaties throughout
the last centuries have called for equality of treatment in the
right to trade is strong evidence that there exists a general rule
against discrimination in the exercise of the power of commercial
regulation. That is, it is within a nation's power totally to prohibit
foreign trade, but if it permits trade with one foreign nation, it
must grant equal opportunities to all other members of the family
of nations.

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65 Pollock, The Sources of International Law, 2 Col. L. Rev. 511, 512 (1902).
67 Stowell, International Law (1931) 84.
Had it not been for World War I, the development of commercial air law would have been much slower and along different, and probably more wholesome, lines. But the whole course of Twentieth Century air law bears unmistakably the positivistic imprint of purely national considerations. Having determined that the subjacent state had complete control over the airspace above it, the nations of the world, and particularly Europe, were faced with the dilemma of how to permit at least a minimum of trade with foreign countries, for the cessation of each flight at the boundary of a state did little to encourage a dynamic air transport system.

During the period between the first two World Wars, this problem was handled in two ways. Those nations which still had not been completely won over by the positivist theories of nationalism, permitted their private operators to make special ad hoc or unilateral agreements with the governments of various countries along a proposed route. Where air transportation was a necessity, such agreements were easy to obtain. These private agreements, furthermore, relieved the parent state of the air line company from any obligation to grant reciprocal privileges. This procedure had manifest disadvantages. In the first place, when two private companies attempted to win concessions from a foreign government, they could be played off against each other, to the great profit of the nation seeking to be included in the air route. To gain a franchise one operator would have to outbid the other, and in the end he might have to be rescued by a subsidy from his home government.

In the second place, with the ever growing emphasis on nationalism, states began to make airlines an agency of government, demanding equal rights for every concession granted. This meant that eventually dealings had to take place on a government to gov-

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or at least that there had to be some sort of international cooperation leading to an exchange of privileges and a modification of air sovereignty to permit the establishment of prescribed routes, ports of call, and uniform flying regulations for all principal airlines of the world.

This necessity of bargaining for landing rights has exercised a retarding effect on the development of world air commerce, for many routes that are technically feasible and commercially promising have remained unopened. Small but favorably situated countries have been able to exact in return for the granting of landing and trading rights conditions that are financially burdensome to the foreign carrier involved. Over and above this, air transport relations between nations usually followed the trend of their general political relations. The admission of a foreign airline to a nation's soil was proof of confidence and friendship that had much greater political significance than the permission to trade granted to ocean merchant vessels.

The situation today is that states in their legislation and treaties have explicitly recognized the complete sovereignty of each in the airspace above its own territory, permitting transit and trading privileges to others only on the basis of specific bilateral or multilateral agreements. These agreements may, in due time, establish a customary right of transit through the airspace of a state, or landing and trading rights in favor of one or more foreign states, but usually all international conventions for the regulation of aerial navigation expressly stipulate that there is a denial of any universal right of innocent passage or right to trade, and that those rights given in any particular treaty rest upon contract only, thus being terminable under the same conditions as any ordinary treaty arrangement.

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70 Tombs, op. cit. supra note 22, at 100.
71 Thomas, op. cit. supra note 51, at 188.
72 For methods of suspension and termination of treaties see Thomas and Thomas, op. cit. supra note 66, at 40.
In spite of such declarations, one can begin to discern a uniform path evolving in the air agreements between nations. The first "wayfarer" to cover the ground was a bilateral agreement between the United Kingdom and the United States, drawn up and signed at Bermuda in 1946. This agreement provided that each nation grant to the air carriers of the other national transit privileges to operate through the airspace of the other and to land for non-traffic purposes on routes anywhere in the world, including the right of the nation flown over to designate the transit route to be followed within its territory and the airports to be used. Each nation also granted to the other, commercial privileges of entry and departure to discharge and pick up traffic; but these commercial privileges are valid, in contrast with the transit privileges, only at airports specifically named in the agreement and on routes generally indicated therein, and in accord with certain general traffic principles and limitations. Rates to be charged between points in the territory of the two nations are subject to approval of the governments within their respective powers. As to frequencies and capacities, each nation, or its designated air carrier, was free at the outset to determine for itself the traffic offered to the public on the designated commercial routes, but operations had to relate to traffic demands and be conducted according to the agreed principles affecting frequency and capacity.

It was felt that the Bermuda Agreement would meet the requirements of world commercial aviation without unduly limiting the activity of a growing industry, which had to be kept sufficiently fluid to meet the changing conditions of international trade. And as between the two nations involved, it proved to be so successful that it has become the form most used today as a basis of negotiation between other nations for commercial air privileges.

Over and above this single trend, there is only one instance on record today where freedom of air transit has been developed into

customary law by means of treaty. In the first Straits Convention of July 24, 1923, freedom of navigation by air was guaranteed in precisely the same terms as that by sea: a permanent right of transit over the Dardenelles, the Sea of Marmora, and the Bosphorus is thereby accorded to all nations without distinction of flag. Up to the outbreak of the first World War, Turkey, as the littoral state, exercised complete sovereignty over the surface of the Straits, and no foreign shipping could pass into the Black Sea without her permission. In the same way, flight over the Straits was prohibited to foreign states. But the Straits Convention of 1923, and Article 23 of the Montreux Convention gave a right—not a mere privilege—of free passage to all foreign aircraft, whether or not the nations were parties to the Conventions. Turkey itself has recognized that these conventions contain within them something more than ordinary treaty arrangement, "... that is to say as purely contractual arrangement between a number of states giving and receiving consideration. Rather it was to be regarded ... as a species of general act or statute. Its nature was less that of a contract than a piece of statute law, which once 'passed,' so to speak, became law universally and not merely for those who laid it down."

These conventions granted right of innocent passage to all aircraft over Turkish waters, and this is the only air transit right not legally subject to denunciation by the sovereign of the subjacent territory, and hence is the only place where true freedom of the air has been granted by unrenounceable treaties. Although it is applicable to but a small area of the earth’s surface, it is, nevertheless, of great importance to air commerce, for it lies on the important globe-circling routes, and permits flight over this space

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without further red-tape. It may establish a precedent for further concessions by nations lying athwart the major routes of the world.

We have then, at the moment, an almost universal extension, by bilateral and multilateral arrangements, a regime involving explicit recognition of national sovereignty over the air space vertically above each state, and according rights of transit and trade on a reciprocal treaty basis, terminable by withdrawal from the agreement concerned. It may be that years of treaty practice will create rights of a permanent nature which custom may transform into true general reciprocal rights of trade and transit as between contracting parties. Time alone can tell.

VIII. COMMERCIAL INTERCOURSE AS A SECONDARY RIGHT

There is yet another path in seeking an answer to the question of whether or not there exists in International Law a right of commercial intercourse. Beginning with the hypothesis that only sovereign states can be members of the family of nations, it is said that a state which is sovereign is not subject to the will of any other state, and therefore it exists as an independent entity coequal with other sovereignties and with exclusive jurisdiction over its territory.77 From this theory the proposition is deduced that every state possesses certain fundamental rights and obligations with respect to every other state. Among these fundamental rights and duties are the right of existence or self-preservation, and the obligation to recognize that other states enjoy the same right. Each state possesses a right of independence and an obligation to respect the independence of other nations. It possesses a right of legal equality with other states, and a right of jurisdiction, that is, of enforcing its legislation and exercising its powers within its frontiers.78

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77 "The sovereign State does not acknowledge a central executive authority above itself; it does not recognize a legislator above itself; it owes no obedience to a judge above itself." LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (1933) 166.

78 1 OPPENHEIM, INTERNATIONAL LAW (7th ed., Lauterpacht, 1948) 234.
It is reasoned, therefore, that a state which enters into the family of nations retains the natural liberty of action due to it in consequence of its sovereignty, but at the same time takes over the obligation to exercise self-restraint and to restrict its liberty of action in the interests of the community of nations as a whole, and these interests of the community of nations per se are secondary rights.79 One of the fundamental assumptions of International Law is that as the international society develops and becomes more advanced, certain social interests of the whole community will have to intrude on what was previously individual interests or rights of sovereign states, for the operation of any society depends on the integration and working together of all its parts. Accordingly, as international society progresses, emphasis must of necessity be shifted from the fundamental rights of individual states to the secondary rights of the international community.

Foremost among these secondary rights is the right of commercial intercourse. For commerce is the cause of international legal relationships, as there can be no law between nations without a community of states knit together through common interests and the manifold intercourse which serves these interests.80 If a state desires to belong to the family of nations and be subject to the benefits of International Law, it is not entitled to destroy the cause of that law by refusing to entertain commercial transactions with other states. The entire refusal on the part of a nation to allow intercourse is a renunciation of the advantages of International Law and proclaims that nation as an "outlaw" because of self-isolation from the international community.81

But the right to trade, being but a secondary right of the international community, is still limited by the primary rights of states,

79 Stowell, op. cit. supra note 67, at 288.
80 Renault, Introduction à L'Etude du Droit International (1879) 2, 3.
which take precedence and restrict its application. Therefore, at present, each state may impose such restrictions on the entry into its territory of foreign commerce and persons as it thinks necessary to prevent the right of access and intercourse from being used to its injury. When a state promulgates a regulation interfering with intercourse, there exists a presumption in favor of the state that the regulation is reasonable and necessary in view of other essential rights and duties inherent in being a member of the society of nations. This presumption, that the regulation is reasonable, will prevail until the weight of evidence is such as to indicate beyond a doubt that the action is a misuse of sovereign power. When such occurs, International Law permits resort to diplomatic protest, retaliatory reciprocity of action, and, as a last resort, hostilities.

Therefore, although there does exist in International Law a right to trade, it is not a fundamental right, but rather a secondary or imperfect right, and being a secondary right, International Law can deny the privilege of a state absolutely to prohibit trade, but it must acknowledge that each state has a right to regulate trade, which is so extensive that it is difficult to define any limitation of positive law upon it. It is thus concluded that the right to trade, being a secondary right, is a liberty within a prescribed condition, although the boundaries within which the principle of the right of intercourse is to prevail are impossible of definition beyond saying that the concept of the right to trade is qualified by reasonable governmental control in the public interest.

IX. Air Commerce as a Secondary Right

Once the principle of sovereignty in air space had become definitely established as the rule of International Law, the only apparent method of developing international air commerce ap-

82 PILLET, LES DROITS FONDAMENTAUX DES ETATS (1899) 10.
peared to be by the process of hard-bargaining bilateral arrangements.\(^{84}\) Although this was in some measure successful, nevertheless, it so curbed the growth of universal air commerce, that air-minded nations sought methods of escaping from the net in which they had ensnared themselves.

In their search for a solution, some states, led by Great Britain, turned to the idea that commerce, being a secondary and not a primary right under International Law, could be expanded if certain international economic controls could be universally adopted in order to protect the economic position of each state's international air carriers.\(^{85}\) In other words, for reasons of national policy, states were too interested, had too much at stake in retaining their own air transport system, to risk jeopardizing of their positions by placing them in a perilous situation endangered by international rivalry and competition which might be the consequence of a grant of the five freedoms of air transport inherent in the universalistic approach to the open skies. However, if through treaties on a multilateral basis the right to trade by air should be established subject to reasonable governmental control in the public interest of each nation, a greater impetus would be given to air trade. That such controls could only be established along international lines was patently obvious due to the nature of air transport. And, furthermore, the secondary right, being a direct consequence of a society of nations, should be then directly controlled by that community.

Following this secondary right theory, it was argued that air commerce requires order in the air assuring to each nation a fair share of traffic. Economic regulation, under such an approach, would be an absolute necessity to protect the interests of nations granting freedom of air commerce in order to do away with wasteful competition, rate wars, and those monopolistic practices of

\(^{84}\) Tombs, \textit{op. cit. supra} note 22, at 100.

\(^{85}\) Thomas, \textit{op. cit. supra} note 51, at 194.
the airlines and of the nations themselves, which would tend to stifle competition. Sound economic regulation would call for the establishment of an international commission with powers to grant international routes only in the public convenience and necessity, to regulate airline rates and business practices, and to provide on international routes for the number of schedules, frequencies, or capacity to be operated over the various routes.\textsuperscript{86}

This theory would have secured a certain amount of balance between air transport capacity and traffic offered, as well as ensured equitable participation by the various countries engaged in international air transport. It was strongly advocated by the British at the Chicago Conference of 1944,\textsuperscript{87} but was rejected by the United States, which had become imbued with an all-out-for-freedom-of-the-air attitude and wanted no part of restrictions which might hamper global aviation growth in the coming decades. The United States demanded the right to fly anywhere and to trade anywhere, an attitude which was noxious to the British and to most of the remaining European nations, who pointed out, and with reason, that throughout the war, production of airplanes in the United States had outstripped all other nations, and the United States had, as far as equipment was concerned, become the leading nation in the air. In peace-time its internal airlines alone carried many times the traffic of its international runs; on the other hand, the European international air transport far outweighed European domestic air transport in commercial importance. This being the case, the English declared, there was no element of altruism in the United States' stand, for America had no desire to restrict its liberty of action in the interest of the community of nations to

\textsuperscript{86} "... [T]he economic difficulties of international air transport involve one or more of the following factors: Routes to be operated by the nations concerned (sometimes generally expressed and sometimes in detail); Privileges accorded to an air carrier of one nation in the airspace of the second...; Rates to be charged the public; Frequency of aircraft operation on each route by each nation; Capacity of aircraft (for example, number of passenger seats) offered the public in some unit of time such as the number per week; Powers of economic control (if any) accorded to an International Authority...." COOPER, THE RIGHT TO FLY (1947) 163.

\textsuperscript{87} \textit{Id.} at 161; Thomas, \textit{op. cit. supra} note 51, at 191.
reach an equilibrium among the leading aviation powers, but rather sought an indefinite expansion of American sovereignty by refusing to share the world's air commerce with others. It was rationalized that the United States, by advocating the five freedoms of the air, would stand to gain a great share of the international traffic, while under all historic cabotage rules could still retain complete control of its domestic trade without the necessity of permitting other nations to participate in its internal air traffic. As no major compromise between the two attitudes could be reached at Chicago, the convention turned out to be little more than a sounding board for the aspirations of the various national groups, and the theory of air commerce as a secondary right was tabled for consideration at some future conference dealing with air trade.

X. Abuse of Right Theory

There is yet a fifth point of view relating to theories of International Law concerning commercial intercourse. Beginning with the premise that there exists in International Law no right to trade, for all the consequences which are said to follow from the right of intercourse are not consequences of a right but rather consequences of a fact, namely, that intercourse between states is a condition without which a law of nations would not and could not exist, it is then declared that International Law confers on states not a legal right to trade, but rather a legal right to regulate trade, and, as such a legal right is bestowed by the international community, the latter cannot countenance its anti-social use by individual nations.

International Law is brought into being for the benefit of the international community and not for the advantage of an individual state. An individual state, as an isolated unit, cannot have any rights; so it is only as a member of the community of nations

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88 Smith, op. cit. supra note 11, at 169. See also Traxler, supra note 68, at 619-623.
89 Jennings, supra note 36, at 198.
that it is possible for it to acquire international legal rights.\textsuperscript{90} The extent of the exercise of a right must, therefore, be fixed not by reference to the benefit which is conferred on the individual state, but in its relation to the social complex as a whole.

However, in order for the exercise of a right to guarantee a complete and perfect immunity, it is essential that the one exercising it do so prudently, with ordinary precautions, without abusing it or without exceeding its equitable limits.\textsuperscript{91}

This is known as the abuse of right doctrine, and it follows therefrom that even though International Law confers upon nations the right to regulate intercourse, no state may exercise this right of regulation abusively to the injury of another state or the international community as a whole. The existence and wellbeing of international society requires that each state conduct itself consistently with the fact that it is a part of a greater body of states. Rights of individual states are not to be regarded as absolute, but rather are to be limited where the limitation results in a benefit to society in its totality.

The question arises, if a regulation of trade issued by one state is injurious to another, or to the community of nations, must there be actual malice, that is, a deliberate desire to injure another nation, before the charge “abuse of right to regulate” can be made?

Campion, the leading exponent of this theory, declares that an abuse of right may result from three things:

1. A clear intent to harm;
2. An absence of legitimate interest;
3. An exercise of a right contrary to the economic and social trend of society as a whole.\textsuperscript{92}

\textsuperscript{90} Stowell, \textit{op. cit. supra} note 67, at 137.
\textsuperscript{91} \textsuperscript{5} Larombiere, \textit{Théorie et Pratique des Obligations} (1857) No. 11, p. 692. For a bibliography on “Abuse of Right” see Stone, \textit{The Province and Function of Law} (1950) 519, n. 66.
\textsuperscript{92} Campion, \textit{La Théorie de l'Abus des Droits} (1925) 303-310; see also Larombiere, \textit{op. cit. supra} note 91, at 692.
Accordingly, the doctrine of abuse of right does not necessarily contain within it an element of malice, for the use of a right may degenerate into a socially reprehensible abuse of right, not because of an evil intent of the nation exercising the right, but rather because of the fact that, as a result of social change unaccompanied by corresponding development in International Law, an assertion of a right grounded on formerly existing or presently existing law becomes unacceptable. Therefore, it is the duty of a state not to use its rights in all their severity when it is possible to protect the nation's interest without going to extreme. Few, if any, rights in International Law are recognized as absolute, and in attempting to prohibit the use of a right beyond its just limits, it is necessary to evaluate individual interests of each state and to secure the preponderance of those which are most important when judged by the criterion of the interests of the international community. Professor Hyde therefore contends that the society of nations may at any time conclude that acts which an individual state had previously deemed to possess the right to commit without external interference, are so injurious to the world at large as to justify the imposition of fresh restrictions upon their use.

The right to regulate intercourse grew up at a time when populations were largely supported by self-sufficient agriculture, and the capacity of states to utilize trade regulations as an instrument of political and military power was limited. Now that states have come habitually to abuse their economic power, the inadequacy of the rule of International Law permitting states unlimited power to regulate trade and commerce becomes apparent. The British jurist, Sir John Williams, points out:

A foreign state may, by the use of this liberty stretch out a hand into the territory of another state and reduce a section of its inhabitants

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94 HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* (1922) 118.
to beggary. Under any reasonable system of International Law such action would be prima facie a legal wrong, and the onus of justification would be on the... [regulating] state to show that some higher interest was served by its... [regulation].

While this argument has been accepted by international tribunals in a few cases, and is supported to some extent in diplomatic practice, it is of relatively recent origin, and, as yet, its potential depths have not been explored. It is conceivable that, given a specific set of circumstances involving the disregard of the obvious and important interests of one state, or of the community of nations *per se*, as the result of unnecessary and wanton acts on the part of another, the principle of the prohibition of an anti-social use of right to control intercourse may eventually play an important role in limiting the power of a state to regulate trade.

XI. ABUSE OF RIGHT AND AIR COMMERCE

The abuse of right theory, which is a relatively new doctrine in the Law of Nations, has not as yet been applied to air commerce, although some of the leading writers in the Twentieth Century on International Law have urged its acceptance on the ground that it would act as a deterrent to excessive state regulation in this field.

In most instances, air trade follows general political relations between nations. A state will grant concessions to friendly nations, and place numerous obstacles before the air trade of rivals or unfriendly nations. An element of malice is often detectable in air trade regulations, and whenever a clear intent to harm the commerce of another state can be shown, it can be maintained that a nation has abused its right to regulate air commerce. Furthermore, the field of air transport as at present regulated by states is an excellent example of the influence of a change in social condition unaccompanied by corresponding development in Inter-

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96 Lauterpacht, *op. cit.* supra note 77, at 286.
national Law. For when the theory *cujus est solum ejus est usque ad coelum* was first conceived, the air space above a nation's territory was for purposes of use not more than a few hundred feet high. When flight became a reality, the assertion of this right of control over airspace was an assertion of a right grounded on a theory which becomes in modern times unacceptable unless there are regulatory and just limitations placed upon the right.98

It cannot be denied that according to existing International Law a state has the right to prevent, at its own discretion, the passage of foreign aircraft over its territory, and the landing of commercial airplanes on its airports, for, beginning with the Air Navigation Convention of 1919, the principle of the state's complete and exclusive sovereignty over the air is expressed without limitation. But the thought is gaining momentum that any right, no matter how absolute it may appear on the surface, must be conditioned by the fact that it may not be used indiscriminately and anti-socially to the detriment of society as a whole.99 To date the advocates of the application of the abuse of right doctrine have made but little headway in obtaining its utilization in the field of state regulation of air commerce, but the fact that it has been seriously advocated may well be a portent of how the winds of legal thought are blowing.

XII. Conclusion

In the preceding discussion an attempt has been made to analyze some of the implications of the various International Law theories relative to trade, and the effect of these theories on world commercial air transport. A strong case can probably be made for certain aspects of each of these theories, for each approach has its strength and each its weakness. But it is not within the province of this article to advance a particular theory or to predict what should be

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98 Lauterpacht, Private Law Sources and Analogies of International Law (1927) 112-116.
99 Lauterpacht, op. cit. supra note 77, at 304.
the nature of legal philosophical changes which would be necessary to encompass adequately needed adjustments in the political and economic sphere of trade by air; but rather an effort has been made to highlight the fact that commercial aviation must be evaluated in the light of its whole environment in order to escape a false perspective.

The development of the law of international air commerce has been pinched by the struggle between two general world-wide tendencies, one looking toward international cooperation, and the other toward an ever intenser nationalism and national isolation, for air transport is, unfortunately, as important an element of international politics as it is of international economics. In a world divided by power politics air communications serve not only economic welfare, but also military security and striking power. Commercial air transport can only be appraised with these factors in mind. On the one hand, the institution of war demands an ever increasing amount of independent national effort in the air; on the other hand, the everyday needs of commercial nations demand organization of air trade on an efficient international scale. Therefore, air law today is faced with the necessity of implementing and harmonizing the major pressures of the Twentieth Century.

What then of the future of commercial air law? No precise answer is possible, for it is dangerous to predict where so many unknown quantities, both theoretical and factual, will play a tremendous role. Only two things are certain. Theorists will continue to struggle to formulate ideals and principles which are sound, systematic, and consistent, searching for methods by which society as

100 "Legal theory stands between philosophy and political theory. It therefore is dominated by the same antinomies. Legal theory takes its intellectual categories from philosophy, its ideas of justice from political theory. Its own specific contribution consists in formulating political ideas in terms of legal principles." FRIEDMANN, LEGAL THEORY (2d ed. 1951) 423.

101 "National defense is, and will long remain, the chief purpose of aviation.... No matter how important and even indispensable commercial aviation should become, it must never lose sight of the necessities of national defense." NISSLER, LA MASTRIZE DE L' AIR (1928) 173.
affected by international air transport can be induced to recognize and follow its best interests. These postulates will undergo a continual process of re-adjustment to meet the forces of a world which is in a rapid state of transformation, for although the basic theories underlying air transport must be to a degree consistent, they must also be sufficiently flexible to permit the dramatization of many types of mutually inconsistent ideals in order to progress. Secondly — and this can be categorically stated — the greater usefulness and effectiveness of peaceful air transport depends upon the solution of the problem of war, and, as recourse to hostilities has persisted so long in the world, it would require a great deal more evidence than at present exists to justify a statement that nations are on the verge of abandoning violence or of discovering a solution for its eradication, negating it as a major factor to be considered in the air trade between states.