

**CHINA’S TWO-DIMENSIONAL SKIES: THE  
“CHINESENESS” OF AVIATION LAW IN CHINA AND HOW  
IT HELPS US UNDERSTAND CHINESE LAW**

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I.	A BRIEF HISTORY OF AVIATION REGULATION IN CHINA	254
II.	LOOKING WITHOUT.....	259
	A. <i>Treaties’ Transformation in the Law-Drafting Process</i> .....	260
	B. <i>Stimulating Foreign Investment</i> .....	267
	C. <i>International Terrorism</i> .....	268
III.	LOOKING WITHIN.....	269
	A. <i>Civil Aviation Law Article 16 as a Reflection of Socialist Norms</i> .....	269
	B. <i>Remnants of Heavy Regulation and Marketplace Involvement</i> .....	270
IV.	WHY AVIATION LAW IS A USEFUL TOOL FOR UNDERSTANDING CHINA.....	273

When the China Airlines Airbus A330 touched down at Beijing’s Capital Airport on January 29, 2005, it had flown a circuitous two-thousand-mile routing nonstop from Taipei that ended in something of a watershed: the first landing of a Taiwanese airliner on Chinese soil<sup>1</sup> since Chiang Kai-shek’s desperate crossing of the strait more than a half-century earlier.<sup>2</sup> The meandering route of China Airlines Flight 581—southwest toward Hong Kong, then northwest into an air corridor to Beijing that added nearly one thousand miles to its flight path—was symbolic in many respects: it was the first direct scheduled air link since 1950 between the estranged island nation and the mainland,<sup>3</sup> a unification of families long split apart by the Communist revolution, a message from

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1. Unless otherwise stated, this Note will refer to the People’s Republic of China as “the PRC” or “China,” and to Taiwan as “Taiwan,” where appropriate. China Airlines is the flag carrier of Taiwan, not to be confused with Air China, the flag carrier of the PRC.

2. Ted Wang, *Flight CI581 Creates History in the Year of the Rooster*, AIRWAYS, June 2005, at 10. The flight was not technically China Airlines’ first foray across the strait, however; the company already served Hong Kong.

3. *Id.*

the Beijing government that economic sensibilities might finally trump the political pride which heretofore prevented an air-bridge between the two nations.<sup>4</sup> But it was chiefly reflective, particularly in its wandering indirectness, of the broad strokes with which China's civil aviation sector is responding to decentralizing reforms, opening the country's air corridors to more international flights and the country's airlines to foreign investors, and meandering toward a more robust liberalization.<sup>5</sup>

Party policies for the aviation sector in the last decade have been generally consistent with the overall themes of decentralization and liberalization that have generally colored much of the Party's decision-making during that period.<sup>6</sup> Laws and regulations governing airlines, airports, and other participants in the Chinese aviation industry either directly track the language of international aviation treaties or hauntingly mimic the texts of European and American regulations.<sup>7</sup> But behind the Western façade of aviation laws is a deep gray space with a distinctly socialist dimension. Party policymakers have engineered a complex consolidation scheme designed solely within the framework of China's unique laws on mergers and acquisitions, and predicated entirely on the socialist proposition that the State, and hence the population at large, owns the airline enterprises involved.<sup>8</sup> Other statutory enactments echo the central socialist premise of the legal superiority of the collective.<sup>9</sup> I contend that aviation law in China supports the country's magnificently growing airline industry because of its duality: its philosophical flexibility and its unapologetic selection of both leftist-socialist and capitalist principles to achieve a primary instrumental end—economic growth.

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4. To be sure, the flight wasn't an exercise in complete openness and cultural exchange: Passengers' Taiwanese magazines and newspapers were confiscated on arrival. *Id.* at 11.

5. See generally Wolfgang Schürer, *A Geopolitical and Geo-economic Overview: On the Rise of China and India as Two Asian Giants*, 29 FLETCHER F. WORLD AFF. 145 (2005). Schürer's research focuses on the policy dimension of China's economic liberalization and retreat from staunch communist doctrine in favor of expanding international trade.

6. Wu Jianduan and Xu Lining, *Corporate Takeovers: Legal Aspects of Takeovers Among Chinese Airlines*, 68 J. AIR L. & COM. 583, 583 (2003). See also Wu Jianduan, *A Milestone of Air Legislation in China – Some Thoughts on the Civil Aviation Law of the People's Republic of China*, 62 J. AIR L. & COM. 823 (1996).

7. Wu, *supra* note 6, at 824.

8. Wu & Xu, *supra* note 6.

9. See, e.g., Civil Aviation Law of the People's Republic of China, available at [http://www.ec.com.cn/pubnews/2004\\_03\\_29/200861/1005160.jsp](http://www.ec.com.cn/pubnews/2004_03_29/200861/1005160.jsp) (last visited May 1, 2006) [hereinafter Civil Aviation Law]. The Civil Aviation Law was enacted in 1995 by the National People's Congress. Wu, *supra* note 6, at 826. But as is the case with many legislative enactments, its official text in English is inaccessible to the Western researcher. The electronic source cited above is a translation by the Ministry of Commerce, published electronically by the Ministry's economic information arm, and is consistent with depictions of the statutory text in the various journal and law review articles cited herein.

Two curious questions, then, arise. First, are the two dimensions of China's aviation law—one Western, the other socialist—necessarily inconsistent? Second, perhaps more pointedly, can we learn something from that tension about China's larger system of laws and norms?

This Note will seek to deconstruct that duality, to show that the quintessence of aviation law in China is its "Chineseness": that remarkable and unique signature of a system of laws exploring the frontier between socialism and free-market capitalism. To explain how the free-market façade of the country's civil aviation industry can coexist with the deeply socialist philosophy in which it is rooted, this Note will advance the theory that aviation law in China is an expression of the country's status as an experiment in free-market socialism. Major airline companies are State-owned and subject to extensive market regulations; the same law applying those regulations recognize—explicitly in some cases, implicitly in others—the airlines' collective status as a public utility, as opposed to Western airlines' freedom from domestic regulation and general freedom from substantial international limitations.<sup>10</sup>

This Note will show that law in China works for the country's civil aviation network. Part I will place the industry in historical context through the 1990s, showing how law respecting civil aviation has responded to both China's changing economic climate and the Party's evolving policies of liberalization. Part II will describe the extent to which China has modeled certain components of its aviation law regime on foreign examples, and it will explain the reasons why China has looked outward to reform those laws. Part III will describe the quintessentially Chinese socialist components of aviation law in the country. The Note concludes in Part IV by offering one theory on why the Party-state has successfully managed two diametrically opposite administrative philosophies—one wholly ensconced in the socialist ideal of state ownership of enterprises, the other an acknowledgement that liberalization of trade is necessary to the country's continuing economic health—in its aviation law regime. Part IV also makes observations about the usefulness of an understanding of the curious duality of Chinese aviation law to our understanding of the Chinese system in its entirety. Aviation law in China is distinctly "Chinese," wavering at varying amplitudes on either side of the baseline socialist doctrine.

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10. This statement is true with respect to the U.S. airline industry after the Airline Deregulation Act of 1978, which eliminated the U.S. government's tight control over U.S. airlines' route networks and management. See Richard D. Cudahy, *The Airlines: Destined to Fail?*, 71 J. AIR L. & COM. 3 (2006), for an illuminating, if pessimistic, appraisal of the effects of deregulation on the U.S. airline industry.

It is appropriate here to set out a preliminary assumption upon which this Note is based: To work in China, law need not have a capitalist flavor. Indeed, it need not have any Western dimension at all. This analysis will avoid many scholars' common practice of using Western systems as a benchmark for legal progress in the East.<sup>11</sup> Much of the Western scholarship on Chinese law offers exhaustive analyses of statutes, regulations, and Party policies that do not meet normative Western standards of rule of law.<sup>12</sup> They inspire "to-do" lists, of sorts: things to fix in order to fix China. Aviation law is perhaps a convenient discipline in which to make the assumption described above, and to avoid writing such a Western prescription, because it regulates a public utility whose necessity is manifest and whose objectives are clear.<sup>13</sup> Persons and entities who participate in the aviation industry might fairly be said to serve the public—the collective—rather than groups of investors or the economic system in a broader context. Therefore, when we ask the question of whether or not law is working for civil aviation in China, we need not consider the economic efficiencies that otherwise would be implicated in an analysis within the capitalist framework. As a result, this Note will offer no "to-do" list or recipe for a better China in ten laws or less.

#### I. A BRIEF HISTORY OF AVIATION REGULATION IN CHINA

An understanding of the legal history of the Chinese airline industry is essential to an apprehension of the current regulatory posture. Until a few years ago, the term "civil aviation" was entirely oxymoronic in China. For the better part of the Communist era, there was nothing "civil" about the nation's dense framework of state-owned and state-run air transport. Among the first strokes of the Maoist pen was an order creating the Civil Aviation Administration of China (CAAC),<sup>14</sup> charged with the dual mandates of both operating airlines and regulating them.<sup>15</sup> In 1952

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11. See, e.g., RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002); STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO (1999). Each source was invaluable to the author during his study of Chinese law, but each applies the Western rule-of-law method of analysis to Chinese legal fixtures—and each reaches a different conclusion.

12. Examples abound. Lubman's work, for instance, offers a detailed chapter-by-chapter appraisal of the extent to which legal reform has worked in certain contexts.

13. See generally Wu, *supra* note 6, at 824 (analyzing the goals and objectives of aviation law in China).

14. At various times in its history, and today, the CAAC is referred to alternatively in English texts as the General Administration of Civil Aviation of China. This Note will use the former appellation. See, e.g., CAAC Online, [http://www.caac.gov.cn/E\\_PubWebApp/index.aspx](http://www.caac.gov.cn/E_PubWebApp/index.aspx) (Mandarin Chinese text only) (last visited May 1, 2006).

15. Wu & Xu, *supra* note 6, at 606.

the CAAC established China's first state-owned enterprise, the short-lived People's Airline, but disbanded the operation and folded it into the Administration's general operations eleven months later, prosecuting its bifurcated role as provider and regulator of air services in China for the next thirty years while ultimately forming up to ten individual airlines.<sup>16</sup>

Although the sources describing the early regulatory environment are sparse, due principally to numerous barriers to access among foreign researchers to period administrative regulations, it appears there were substantial gaps in aviation regulations during the years of the CAAC's dual functions as airlines operator and regulator. Indeed, before the 1980s, meaningful regulations were sporadic and inconsistent.<sup>17</sup> For example, there were no airworthiness regulations for newly manufactured civil aircraft; the CAAC did not draft or promulgate regulations governing original airworthiness until 1985.<sup>18</sup> Wu briefly refers to the Civil Aviation Law of 1995, the first clear and comprehensive iteration of aviation regulations in China, as a "summary of the civil aviation *practices* that developed in the People's Republic over [the forty-six years preceding the Civil Aviation Law]."<sup>19</sup> During those forty-six years, "the People's Republic of China enacted no national legislation concerning [international or domestic civil aviation]."<sup>20</sup> Wu does not clarify precisely the meaning of the curious reference to "practices" which evolved during that time, but multitudinous other sources suggest that law in communist China, like that of all legal systems, is discernible not only in the rote of statutes and regulations but also in the informal habits and customs of interpretation which, over time, arise in a system whose codified enactments are often inaccessible by the public in general and by lawyers in particular.<sup>21</sup> The sorts of gap-filling "practices" that emerged in the absence of positive CAAC regulations before 1980 likely involved adherence to the language of multilateral treaties, chiefly the Warsaw Convention of 1929, which governs air carriers' liability for loss of life or property, and the Chicago Convention of 1944, which provides the framework for the legal nationalities of transnational air carriers.<sup>22</sup> In that sense, participants in the Chinese

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16. *Id.* at 606-07.

17. Wu, *supra* note 6, at 832-33.

18. *Id.* at 833.

19. *Id.* at 824 (citing Chen Guanyi, Director of the General Civil Aviation Administration of China (CAAC), Address at the First National Conference of Legal System of CAAC (1995))(emphasis provided).

20. *Id.*

21. See, e.g., LUBMAN, *supra* note 11.

22. Wu, *supra* note 6, at 824. Wu is a particularly helpful authority because of his experience as a practitioner and lawyer for China Eastern Airlines. *Id.* at 823.

aviation industry and their legal advisers gained early experience in looking beyond China for guidance on how to structure their activities, and in the process developed an informal regulatory approach defined largely by unpublished directives and foreign influences. It was a practice that would prove useful later.<sup>23</sup>

By the 1980s, however, partially as a result of the government's progressive move to decentralize the Party bureaucracy and its 1979 decision to permit foreign direct investment,<sup>24</sup> the CAAC's legal authority was revised during several waves of decentralizing legal reforms. The agency entered into lease agreements with American aircraft manufacturer Boeing for a fleet of Boeing 747SPs,<sup>25</sup> long-range aircraft that permitted Air China, by then the national carrier, to serve destinations some six thousands miles distant. During the reforms of the 1980s, the CAAC had become institutionally separate from the airlines which it operated, including Air China, and had become a regulatory organ largely removed from day-to-day management responsibilities.<sup>26</sup> The commercial operations which the CAAC had heretofore managed were divided among ten airlines, with virtually one carrier for each point on the compass rose: China Northern Airlines, China Northwest Airlines, China Southern Airlines, China Southwest Airlines, China Eastern Airlines, Air China, XinJiang Airlines, Yunnan Airlines, China Airlines,<sup>27</sup> and China General Airlines.<sup>28</sup>

The ten companies (nine after the China Eastern-China General merger) were entirely state-owned and operated, as many of their brand names imply, in discrete operating regions with little overlap.<sup>29</sup> After the first wave of decentralizing reforms, the CAAC retained its legal status as both guardian of the state-owned assets used by the airlines and investment organ responsible for increasing their value.<sup>30</sup>

Subsequent reforms would see the CAAC rewrite, in broad strokes, its role altogether.<sup>31</sup> Perhaps the most remarkable structural change in the Chinese aviation sector is the Party's 2002 Scheme of Restructure, mandating consolidation among the nine

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23. See *infra* Part II.

24. See LUBMAN, *supra* note 11, at 192.

25. Wu, *supra* note 6, at 832.

26. Wu & Xu, *supra* note 6, at 607.

27. To be distinguished from China Airlines, the flag carrier of Taiwan. See *supra* note 1.

28. Wu & Xu, *supra* note 6, at 607 n.119. China General and China Eastern merged shortly after the CAAC's withdrawal from tight commercial management. *Id.*

29. *Id.* at 607.

30. *Id.* at 612.

31. See *id.*

airlines listed above into three holding companies.<sup>32</sup> Scholars' interpretation of the Scheme's requirements signals a fundamental shift in aviation policy:

It was said that the CAAC's duty would be transformed into maintaining a fair market environment and protecting consumer's fundamental interests. In other words, the CAAC will not be responsible for managing the assets of those airlines after the take-overs because the structure of the combined role of assets-owner and industry regulator no longer suits China's fast developing market economy.<sup>33</sup>

The three holding companies, rather, "will be separated financially [from] the CAAC and will act as airline enterprises, State authorized investment institutions, and share holding companies."<sup>34</sup> This change is significant chiefly in that it fundamentally changes the regulatory philosophy in a country in which state-owned companies, such as airlines, are owned by the people and managed by government agencies.<sup>35</sup> The Scheme of Restructure sees the CAAC retreating from its role as manager of China's air carriers.<sup>36</sup>

The consolidation process today is not without legal curiosities. It is ongoing and is expected to produce numerous cost savings among the nine individual carriers as they become integrated into their respective holding companies and fully realize the synergies of cooperation.<sup>37</sup> But the Scheme of Restructure effectively assigns upon the three holding companies, which are state-owned enterprises, the traditional functions of asset management and investment organs: functions historically reserved to the CAAC. The CAAC, in turn, begins to resemble proto-Western regulatory agencies such as the U.S. Federal Aviation Administration (FAA) and the European Union's Joint Aviation Authorities (JAA) as its function becomes increasingly limited to one of restricted oversight and impartial regulation.

The diminution of the CAAC's marketplace involvement is consistent with the theme of liberalization elsewhere in the Beijing government's policy pronouncements. Wu's and Xu's research suggests it is also consistent with the themes of other national enactments. For example, laws governing mergers and acquisitions

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32. *Id.* at 609.

33. *Id.* at 610 (citations omitted) (describing the CAAC's ever-changing status).

34. *Id.* at 612 (citing *Abstract of the Scheme of Restructure*, CAAC J. (Oct. 11, 2002)).

35. *Id.* at 614.

36. *See id.*

37. *See id.* at 609.

reflect an explicit policy preference for the formation of mammoth companies to counter the threats posed by foreign competitors wielding newfound access to the Chinese market since China's 2001 accession to the World Trade Organization (WTO).<sup>38</sup> China's Company Law permits three types of business entities: joint stock limited companies, limited liability companies, and wholly state-owned enterprises.<sup>39</sup> For each type, mergers, acquisitions, and takeovers are illegal without an intensive consultation process with the appropriate government ministry and its approval.<sup>40</sup> The regulatory scheme, nonetheless, provides a fertile ground upon which to orchestrate mega-mergers such as those proposed by the Scheme of Restructure, largely in deference to the government's policy preference of encouraging home-based competition to foreign competitive threats.<sup>41</sup> The management arrangement within the three holding companies will similarly be reflective of communist leadership doctrine, which emphasizes decisive, top-down decision-making.<sup>42</sup> General managers will be the companies' legal representatives, giving them "far reaching powers" with potential system-induced "biased incentives toward short-term accounting profits."<sup>43</sup> The impartiality with which CAAC apparatchiks managed the country's dense network of carriers has thus been replaced by a set of incentives motivating powerful general managers to exaggerate fiscal success while exerting a considerable, although yet unspecified in the scholarship or empirical data, amount of control.

Of course, one cannot understand fully the implications of these changes in the civil aviation sector without understanding the economic context in which reforms, complete with their attendant challenges, are taking place. The rate of growth in China's aviation sector is staggering. President Hu Jintao told an assembly of Boeing employees gathered at the planemaker's Seattle headquarters in April 2006 that China would require up to two thousand Boeing jets before 2020, six hundred of them in the next five years.<sup>44</sup> That news came one week after China Aviation Supplies Import & Export Group, the state arm responsible for pur-

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38. *Id.* at 599.

39. *Id.* (citing Company Law of the People's Republic of China (Dec. 29, 1993), available at [http://www.chinaonline.com/refer/legal/laws\\_regs/pdf/pdf\\_e/c9100371e.pdf](http://www.chinaonline.com/refer/legal/laws_regs/pdf/pdf_e/c9100371e.pdf))

40. *See id.* at 599-600.

41. *See id.* at 609. Wu and Xu estimate that the three holding companies, among them, will amass assets totaling more than 147 billion yuan. *Id.* at 609.

42. *Id.* at 614.

43. *Id.*

44. *China Needs 2,000 Aircraft Over Next 15 Years, President Hu Jintao Tells Boeing*, FLIGHT INTERNATIONAL, April 20, 2006, available at <http://www.flightglobal.com/Articles/2006/04/20/-Navigation/177/206065/China+needs+2%2c000+aircraft+over+next+15+years%2c+President+Hu+Jintao+tells.html>.

chasing and disbursing aircraft and equipment to state-owned airlines, announced the purchase of eighty Boeing 737s,<sup>45</sup> and it echoed a similar government initiative to stimulate growth in the business aviation sector by rewriting regulations on small business aircraft operations to mirror their counterparts in the United States' Federal Aviation Regulations.<sup>46</sup> In short, the industry restructuring and consolidation come at a time of unprecedented growth in the Chinese civil aviation sector, and reforms such as the Scheme of Restructure of 2002 have occurred roughly contemporaneously to the industry's substantial growth.

This is the structural situation of China's civil aviation industry, in very broad terms. Its history of strict regulation, juxtaposed to its recent and ongoing structural reconfiguration, provides the backdrop for the balance of this Note's analysis of the effectiveness of specific components of Chinese aviation law, and its account of China's bifocal vision both toward Western regulatory fixtures and back into its own socialist past.

## II. LOOKING WITHOUT

Giovanni Bisignani, director general and chief executive of the International Air Transport Association (IATA), glowingly summarized the international perspective on China's airline industry in a 2005 speech to journalists in Japan: "In China we see a plan and action. Open skies were declared for Hainan. Liberal bilateral agreements are being signed. And China's airline industry is growing and generating profits."<sup>47</sup>

There is no doubt that Bisignani's and other officials' optimism stems at least in part from China's recent willingness to engage in the international multilateral process with respect to aviation regulation. That willingness, however promising, is the sum of several phenomena in the evolution of China's own domestic aviation laws. This Part will outline China's increasing reliance on

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45. *China Confirms Deal for 80 More Boeing 737s*, FLIGHT INTERNATIONAL, April 12, 2006, available at <http://www.flightglobal.com/Articles/2006/04/12/Navigation/177/205953/-China+confirms+deal+for+80+more+Boeing+737s.html>.

46. *China Seeks to Encourage Growth*, FLIGHT INTERNATIONAL, March 21, 2006, available at <http://www.flightglobal.com/Articles/2006/03/21/205548/China+seeks+to+encourage+growth.html>. See *infra* Part II(A) for a discussion of the significance of the new regulations and the role of their U.S. counterparts in the drafting process.

47. Giovanni Bisignani, Speech to the Foreign Correspondents Club of Japan (April 12, 2005) (transcript available at <http://www.iata.org/pressroom/speeches/2005-04-12-01.htm>).

foreign influences as it creates a working jurisprudence of aviation regulation.<sup>48</sup>

*A. Treaties' Transformation in the Law-Drafting Process*

The keystone of China's modern aviation law is the Civil Aviation Law of 1995, a comprehensive set of regulations providing a framework of rules within a wide range of subject matters, from nationality of aircraft to rights of operators to pilot certification to operational safety.<sup>49</sup> The Civil Aviation Law is by definition a Party product, the result of a sixteen-year consultative effort by the State Council, the CAAC, and the Central Politics and Law Group to draft a body of consistent aviation regulations.<sup>50</sup> That process, which began in earnest in 1979,<sup>51</sup> antedated by some fifteen years the explosive growth in China's airline industry. Ostensibly, therefore, its product, the Civil Aviation Law, is colored less by the economic exigencies which compelled the Scheme of Re-structure<sup>52</sup> and more by deliberative and slowly adopted policy judgments which have largely embraced Western regulatory solutions to the industry's inherent universal problems.

Before the promulgation of the Civil Aviation Law, substantial gaps in aviation regulations and other legislative enactments existed which were filled largely by resort to the provisions of international conventions on air travel.<sup>53</sup> The Law's enactment did not immediately fill those gaps, though; airline tickets issued as late as 1997, for example, admonished passengers of the Warsaw Convention's liability limits instead of similar rules contained in the new law, which by then had been in effect for one year.<sup>54</sup>

The influential role of multilateral, largely West-driven treaties in the drafting process of the Civil Aviation Law is extensive and textually obvious. Shan's research respecting Chinese in-

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48. Because of this Note's rather formalistic focus on the framework of rules and norms at the heart of Chinese aviation law, I reluctantly pass over the tempting fodder of daily breakthroughs in the China aviation market, including significant manufacturing boosts at Chinese factories in the supplier networks of competing aircraft manufacturers Boeing and Airbus. See William Mellor and Andrea Rothman, *Boeing-Airbus Fight Boosts China*, SEATTLE POST-INTELLIGENCER, March 7, 2007, available at [http://seattlepi.nwsource.com/business/306778\\_boeingchina09.html](http://seattlepi.nwsource.com/business/306778_boeingchina09.html). There is no doubt that for airplane manufacturers, business is booming in China.

49. Civil Aviation Law, *supra* note 9.

50. Wu, *supra* note 6, at 826.

51. *Id.*

52. See *supra* Part I for a brief discussion of the use of international treaties and other interpretive habits and customs as gap-fillers where existing regulations left off.

53. See generally Wu, *supra* note 6. See also *infra* Part I, for a contextual examination of the role of multilateral treaties and international conventions as interpretive tools to fill in gaps left by sparse and inconsistent regulations.

54. *Id.* at 838.

vestment law helpfully describes the phenomena by which international treaties take root in legal systems:

A survey of different countries' practices on the reception of international law reveals two basic approaches to give effect to international treaties within a given legal system: incorporation or transformation. "Incorporation" implies a process of integration whereby international treaties become a part of the domestic legal system and as such can be directly applicable. This process may be achieved via enactment or amendment of constitutional provisions, the ratification and publication of treaties or via judicial means. "Transformation" implies that an international treaty will not be binding and applicable until domestic legislation is adopted to accept or absorb the contents of the treaty within national law.<sup>55</sup>

The Civil Aviation Law, Shan concludes, is a reflection of the latter method:<sup>56</sup> "transformation" of the terms of the Geneva Convention<sup>57</sup> into a domestic legislative enactment whose cardinal provisions borrow heavily from international liberal thinking and legal philosophy. The Supreme People's Court has used the same approach in decreeing, somewhat formalistically, that trade accords are enforceable in Chinese courts only when their provisions are introduced into Chinese law through legislative enactments.<sup>58</sup> The transformative approach, then, is common in other legal disciplines, and the SPC's edict respecting trade agreements might one day apply to other types of bilateral and multilateral agreements to which China is a party. At the least, one certainly sees evidence

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55. Shan Wenhua, *The International Law of EU Investment in China*, 1 CHINESE J. INT'L L. 555, 562 (2002) (hypothesizing that the Civil Aviation Law was enacted as a "preparatory step" toward acceding to the terms of the Geneva Convention, whose language in key provisions is similar and based on fundamental notions of rights in aircraft) (citations omitted).

56. *Id.* at 563.

57. Convention on the International Recognition of Rights in Aircraft, art. I, June 19, 1948, 4 U.S.T. 1830, 310 U.N.T.S. 151 [hereinafter Geneva Convention]. China acceded to the Geneva Convention in 1999.

58. Shan, *supra* note 55, at 563 (citing Provisions on Some Issues on the Adjudication of Administrative Cases Concerning International Trade (The Trade Cases Provisions), promulgated by the Supreme People's Court, Aug. 29, 2002).

of that formalism in the Civil Aviation Law's remarkable use of treaty provisions.

The Law's threshold provisions pertain to aircraft nationality, a foundational concept of global aviation law tracked directly from the Chicago Convention of 1944, whose Article 17 provides that "[a]ircraft have the nationality of the State in which they are registered;"<sup>59</sup> Article 6 of the Civil Aviation Law provides that a civil aircraft registered in China "has the nationality of the People's Republic of China."<sup>60</sup> The principle of nationality is a significant concept in international law because it gives rise to claims that "embrace economic, political, and financial considerations of the highest importance" and describes the relationship between the legal person and the state.<sup>61</sup>

Article 6, whose text requires a quasi-Western understanding of the concept of nationality, raises several compelling issues. Its full text provides that "[a] civil aircraft that has performed its nationality registration with the competent civil aviation authority under the State Council of the People's Republic of China according to law" receives Chinese nationality.<sup>62</sup> But how does the *aircraft* "perform its nationality registration," as the text of Article 6 requires? An "aircraft" certainly cannot complete those formalities. The key to understanding the import of Article 6, Wu suggests, is its reference to the concept of nationality, which cements a "fixed legal connection between a single person and a state, with the state obligated to protect its citizen."<sup>63</sup> a legal recognition of the relationship between the person and the state. The Law's reflection of the concept of nationality parallels, in key respects, the Party's slow recognition of the sovereignty of the legal person, a notion eminently familiar to Western legal thought. Lubman notes approvingly the extent to which China's 1986 General Principles of Civil Law, one of the government's first explicit contemplations of the rights of the legal person, "reflects the intellectual debt that Chinese law and legal theory owe to continental European law."<sup>64</sup> The GPCL, he writes, creates the foundation for the contract by embracing the notion of the legal person and a set of attached rights: chiefly the rights to contract and to enjoy specific privileges

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59. Convention on International Civil Aviation, art. 17, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

60. Civil Aviation Law, *supra* note 9, at art. 6.

61. Wu, *supra* note 6, at 828 (citing R. Y. Jennings, *International Civil Aviation and the Law*, 22 BRITISH Y.B. INT'L LAW 207 (1945)).

62. Civil Aviation Law, *supra* note 9, at art. 6.

63. Wu, *supra* note 6, at 828.

64. LUBMAN, *supra* note 11, at 178 (citing Anthony Dicks, *The Chinese Legal System: Reforms in the Balance*, 119 CHINA QUARTERLY 540-76 (1989)).

in state-owned property.<sup>65</sup> The notion of nationality of aircraft is rooted in the same state-person relationship because it is reflective of the maxim that “[a] citizen ‘belongs’ to the state and must be loyal to the state while the state is obligated to protect its citizens.”<sup>66</sup> That the GPCL’s articulation of the legal rights of the legal person emerged just as Party policymakers began to apprehend the significance of that concept, and just as they began drafting early versions of the Civil Aviation Law and its guarantee of nationality, is telling of the determinative weight which Western legal philosophy has been accorded in the lawmaking process.

Other provisions of the Civil Aviation Law are tracked equally directly from sister provisions of the Chicago Convention and other multilateral agreements and treaties, albeit with less philosophical force. Article 18 of the Chicago Convention prohibits dual nationality of an aircraft;<sup>67</sup> so does Article 9 of the Civil Aviation Law, prohibiting the registration elsewhere of an aircraft registered in the PRC with Chinese nationality.<sup>68</sup> Wu found that other provisions “mirror those of the Geneva Convention almost exactly,”<sup>69</sup> primarily those respecting property rights in aircraft. Article 11 of the Civil Aviation Law, for example, requires “[t]he person entitled to the rights of a civil aircraft” to register four of those rights in particular with the CAAC:

- (1) The ownership of the civil aircraft;
- (2) The right for the acquisition and possession of the civil aircraft through an act of purchase;
- (3) The right to possess the civil aircraft in accordance with a lease contract covering a lease term of six months or over; and
- (4) Mortgage of the civil aircraft.<sup>70</sup>

The identification in Article 11 of those four particular rights is tracked directly<sup>71</sup> from Article I of the Geneva Convention, which requires the state to give full effect to “(a) rights of property in aircraft; (b) rights to acquire aircraft by purchase coupled with possession of the aircraft; (c) rights to possession of aircraft under leases of six months or more; (d) mortgages, hypothèques and similar rights in aircraft which are contractually created as security for

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65. *Id.*

66. Wu, *supra* note 6, at 828 (citing WU JIANDUAN, A DICTIONARY OF INTERNATIONAL LAW 207 (1945)).

67. Chicago Convention, *supra* note 59, at art. 18.

68. Civil Aviation Law, *supra* note 9, at arts. 6, 9.

69. Wu, *supra* note 6, at 830.

70. Civil Aviation Law, *supra* note 9, at art. 11.

71. Wu, *supra* note 6, at 830-31.

payment of an indebtedness . . .”<sup>72</sup> The legal recognition of mortgages in civil aircraft is important primarily because it gives rise to specific rules governing secured transactions in those assets, increasing the confidence with which creditors can finance aircraft acquisitions and their certainty interest in adhering to a predictable set of transactional rules. The Geneva Convention recognized the value of such definite rules; its Article I protects the rights of creditors with security interests in aircraft as long as those rights “(i) have been constituted in accordance with the law of the Contracting State in which the aircraft was registered as to nationality at the time of their constitution, and (ii) are regularly recorded in a public record of the Contracting State in which the aircraft is registered as to nationality.”<sup>73</sup> Article 16 of the Civil Aviation Law advances a substantially similar registration rule, albeit simplified slightly: “The mortgage of a civil aircraft shall be established by registering the mortgage of the civil aircraft with the competent civil aviation authority under the State Council jointly by the mortgagee and the mortgagor; no mortgage may act against a third party unless registered.”<sup>74</sup> The registration rule of Article 16 functionally provides notice to other potential creditors that aircraft are encumbered by security interests. The article’s effect is much broader, though, textually making registration of the encumbrance a condition precedent to “establishment” of the mortgage.<sup>75</sup> Article 16 reflects the drafters’ recognition of the utility of a system of definitive and clear transactional rules governing security interests in aircraft, complementary to other statutory rules on secured transactions.<sup>76</sup>

These articles together turn to the international system to create a well-defined scheme of rights conferred upon individual legal persons. They chiefly “protect creditors and . . . guarantee their rights under the law,” Wu observes.<sup>77</sup> But they do more: They confer a variety of types of property interests in aircraft—security interests, possessory interests, ownership interests—which create patterns of self-interest in the behavior of participants in the system. Endowed with these specific (admittedly narrow) rights, the participants—airlines, financiers, and other creditors—can create something of a marketplace, entering into security agreements and mortgages and transferring certain rights, but they are of course

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72. Geneva Convention, *supra* note 57, art. I.

73. *Id.* at art. I(1)(d).

74. Civil Aviation Law, *supra* note 9, at art. 16.

75. *Id.*

76. For a discussion of another dimension of Article 16, see *infra* Part III.

77. Wu, *supra* note 6, at 831.

limited by the reality that the state is ultimately the owner of assets and controls their disbursements.<sup>78</sup>

Still other provisions of the Civil Aviation Law are reminiscent of the language of multilateral treaties. Article 13, which prohibits the transfer to foreign jurisdictions of PRC-nationalized aircraft before the extinguishment of all creditors' rights in those aircraft, except in the case of a sale or auction mandated by law,<sup>79</sup> parallels neatly the Geneva Convention's Article IX, which imposes the same restriction in approximately the same language.<sup>80</sup> Airlines are subject to particular certification rules<sup>81</sup> just as they are in the United States and European Union.<sup>82</sup> The Warsaw Convention, which sets the limits of airlines' liability to passengers, caps damages awards to passengers at 125,000 francs<sup>83</sup> and provides that carriers may absolutely defend their liability by showing they took all available measures to prevent damages or loss.<sup>84</sup> The Civil Aviation Law imposes a similar liability cap,<sup>85</sup> but stops short of adopting the Warsaw Convention's absolute defense to liability, instead advancing a sophisticated comparative-negligence scheme by which carriers can avoid some or all liability by pointing to the fault of the claimant.<sup>86</sup>

The Civil Aviation Law copies in some places, parallels in others, the language and legal concepts articulated in some of the foundational components of international jurisprudence on civil aviation. In instances in which the provisions of treaties to which

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78. See generally Wu & Xu, *supra* note 6. Indeed, the China Aviation Supplies Import & Export Group Corp. (CASC) is the state arm which purchases aircraft on behalf of China's state-owned airlines and allocates those acquisitions among the carriers. See *Company Briefing, CASC*, available at <http://www.casc.com.cn/english/corporation/company-Briefing.htm> (last visited May 1, 2006), for a self-written account of the CASC's most recent activities, noticeably minimizing its state ownership and structural linkage with the PRC government and the Party.

79. Civil Aviation Law, *supra* note 9, at art. 13.

80. Geneva Convention, *supra* note 57, art. IX.

81. Civil Aviation Law, *supra* note 9, at art. 93.

82. See 14 C.F.R. 121 for U.S. rules on the certification of air carriers. Article 93 of the Civil Aviation Law differs somewhat from its American and European counterparts, however, requiring Chinese airlines to maintain a minimum amount of capital and to register that capital with the State Council. Civil Aviation Law, *supra* note 9, at art. 93.

83. Convention for the Unification of Certain Rules Relating to International Transportation by Air, art. 22, Oct. 29, 1934, 49 Stat. 3000 [hereinafter Warsaw Convention].

84. *Id.* at art. 20.

85. Civil Aviation Law, *supra* note 9, at art. 129. Liability is limited to 16,600 "units of account," which varies according to exchange rate, but it may be more generous than the Warsaw Convention's 125,000-franc limitation. See Wu, *supra* note 6, at 838 n.66.

86. Civil Aviation Law, *supra* note 9, at art. 127. Article 127 is significant because it expands upon the general liability limits that are part and parcel of the Warsaw Convention's provisions defining carrier liability and limiting it. The article provides, in relevant part, that "if the carrier proves that the damage was caused by or contributed to by the fault of the claimant, the carrier may be wholly or partly exonerated from his liability in accordance with the extent of the fault that caused or contributed to such damage." *Id.*

China is a party conflict with statutory enactments, the treaties prevail “unless . . . China has announced reservations” with respect to those conflicting treaty provisions.<sup>87</sup> Numerous other laws give the same controlling effect to treaty provisions.<sup>88</sup> Shan concluded that, at the very least, China’s legislative enactments of provisions similar or identical to treaty provisions often precede accession to those treaties because those enactments effectively bring the treaty provisions through the back door of validity in China.<sup>89</sup> However, if one accepts that theory as a workable explanation of why China has given such prominent play to the language of multilateral treaties in its own law-drafting practices, it falls short of explaining China’s willingness, for example, to track key provisions from the U.S. Federal Aviation Regulations when writing its own new regulations on business aircraft operations.<sup>90</sup> Recent media reports indicate that the CAAC has already drafted regulations tightly based on U.S. operating standards for business aircraft (a category of operations which include small business jets and fractional-ownership companies)<sup>91</sup> and that adoption of the proto-American regulations in China will stimulate “operating efficiencies” while encouraging growth.<sup>92</sup> The government’s willingness to use a proto-Western system of rules as a model for its own drafting process indicates more than a signal in the language of international law that it will bring in a treaty provision on point through the back door; rather, it indicates a philosophical concurrence with the marketplace-friendly approach of Western regulations: an inclination to consult the regulatory attitudes of other, liberal legal systems in the pursuit of its own regulatory enactments.

The government’s general willingness to consult not only the texts of international treaties but also the legal principles which underpin them is cardinal evidence of its willingness to look outside the boundaries of the People’s Republic for answers to the regulatory dilemmas of an increasingly market-based aviation sector.

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87. Wu, *supra* note 6, at 839 (citing General Principles of Civil Law of the People’s Republic of China, art. 142, and 1 LAWS AND REGULATIONS OF THE PEOPLE’S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS 347 (Bureau of Legislative Affairs of the State Council of the People’s Republic of China ed., 1991)).

88. Shan, *supra* note 55, at 562.

89. *Id.* at 563.

90. *China Seeks to Encourage Growth*, *supra* note 46.

91. *See* 14 C.F.R. 135.

92. *China Seeks to Encourage Growth*, *supra* note 46.

### B. Stimulating Foreign Investment

As early as 1979, the Party resolved as a matter of policy to promote foreign direct investment (FDI) into Chinese enterprises.<sup>93</sup> In the years since, numerous legislative enactments have created sophisticated regulatory schemes governing Sino-foreign enterprises, taxation on capital gains, intellectual property, lending and guarantees, and labor.<sup>94</sup> Those legislative enactments have produced a remarkable rate of FDI activity, with the European Union rising above the United States and Japan as the single-largest source of FDI in Chinese enterprises.<sup>95</sup>

While foreign investment treaties and trade agreements are not directly applicable in Chinese courts without some transformative or incorporative process,<sup>96</sup> national laws have echoed the Party policy of encouraging FDI as a means of ensuring economic growth.

Since 1994, the government has permitted foreign investors to hold up to thirty-five percent of privately held airlines in China.<sup>97</sup> Chinese securities law is particularly relevant to this analysis because of the Party's general willingness to invite more foreign ownership of participants in the country's airline industry, particularly air carriers. To be sure, Chinese law lacks certain legal principles common in other jurisdictions, particularly the European Union and the United States, which legally empower shareholders to take an active role in corporate management.<sup>98</sup> But the mere fact that the Chinese marketplace includes some seventy-two million securities trading accounts<sup>99</sup> is evidence of a burgeoning marketplace of potential investors in the country's privately held aviation infrastructure, notwithstanding the limits of its corporate-accountability laws. Airlines partially owned by foreign shareholders enjoy the same legal status as their state-owned competitors and are subject to the same CAAC regulatory regime.<sup>100</sup>

Progress in attracting significant amounts of FDI in the aviation industry has been slow, however, due perhaps in large part to China's reluctance to sign an open-skies agreement with the

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93. See LUBMAN, *supra* note 11, at 192.

94. *Id.* at 192-93.

95. See Shan, *supra* note 55, at 555.

96. See Part II(A), *infra*; Shan, *supra* note 55, at 564.

97. Wu, *supra* note 6, at 835.

98. There are limits, however. See Jiong Deng, Note, *Building an Investor-Friendly Shareholder Derivative Lawsuit System in China*, 46 HARV. INT'L L.J. 347 (2005), for a discussion of one gaping hole in the legal regime of shareholder-accountability law.

99. *Id.* at 348.

100. Wu, *supra* note 6, at 835 (citing Wu Jianduan, *Investments in China Civil Air Transportation—Some Legal Aspects*, 20 AIR & SPACE L. 201, 201-05 (1995)).

United States which would open the door to more voluminous trans-Pacific air traffic between the two countries,<sup>101</sup> and would boost investor confidence in the proposition of investment in Chinese carriers. The slow progress also might be explained by the dearth of remedies available to aggrieved shareholders, such as the lack of shareholder-derivative lawsuits empowering them to hold recalcitrant airline management responsible for injuries to investors,<sup>102</sup> and foreign companies' lack of confidence in Chinese courts' ability to produce consistent outcomes.<sup>103</sup>

The absence of legal remedies for perceived injuries to shareholders and the West's perception that Chinese law generally is opaque rather than transparent to outsiders increase Western investors' perception of risk in Chinese airlines investment, and may have chilled some FDI activity in China. It does not, however, seem to have discouraged major Western aircraft manufacturers from entering the market: Both Boeing and Airbus participate intensely in the Chinese market. Airbus, for example, has maintained a physical presence in China since 1990, operating a support and training center there,<sup>104</sup> and relying on Chinese suppliers to build portions of passenger jets whose final assembly takes place in Europe.<sup>105</sup> Indeed, one Airbus executive unabashedly summarized the company's relationship with China as follows: "The Chinese have said to us, 'Give us some of your technology, and we guarantee we will purchase some of your aircraft.' We have to get our share of the cake."<sup>106</sup>

### C. International Terrorism

It is worth mentioning briefly that China's cooperation with foreign jurisdictions has not been limited to modeling statutory texts after their global counterparts and reaching out for foreign investment. With global aviation come its many problems, chief among them the issue of global terrorism, which in recent years has slammed the worldwide aviation network into a new reality. By 2002, China had joined every global anti-terrorism convention

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101. Steven Lott, *China, U.S. Share Proposals; Chinese Frustrated By U.S. Visas*, AVIATION WEEK, Apr. 24, 2006, available at [http://www.aviationnow.com/avnow/search/autosuggest.jsp?docid=3045&url=http%3A%2F%2Fwww.aviationnow.com%2Favnow%2Fnews%2Fchannel\\_comm\\_story.jsp%3Fview%3Dstory%26id%3Dnews%2FUSBC04246.xml](http://www.aviationnow.com/avnow/search/autosuggest.jsp?docid=3045&url=http%3A%2F%2Fwww.aviationnow.com%2Favnow%2Fnews%2Fchannel_comm_story.jsp%3Fview%3Dstory%26id%3Dnews%2FUSBC04246.xml).

102. See, e.g., Deng, *supra* note 98.

103. Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 B.C. INT'L & COMP. L. REV. 59, 59 (2002).

104. *Airbus in China*, Airbus S.A.S., available at [http://www.airbus.com/en/worldwide/airbus\\_in\\_china.html](http://www.airbus.com/en/worldwide/airbus_in_china.html).

105. See Mellor & Rothman, *supra* note 48.

106. *Id.*

then in effect<sup>107</sup> and had incorporated into the Civil Aviation Law specific prohibitions of aircraft hijackings and other terrorist acts.<sup>108</sup>

### III. LOOKING WITHIN

If China's close attention to foreign sources of law is evidence of flexibility and openness to reform, then its adherence to socialist principles at the law- and policymaking levels is telling of its determination to steep liberal reform in socialist doctrine. Notwithstanding their apparent reflection on numerous foreign models and agreements to which China is a party, those who draft Chinese law within the halls of the State Council and government agencies are at once Chinese, products of a nearly sixty-year-old socialist society which emphasizes, at all levels, the legal superiority of the collective. The collective and its interests are present in every instance of the Chinese legal calculus; aviation law is no exception.

#### A. *Civil Aviation Law Article 16 as a Reflection of Socialist Norms*

Part II(A) discussed at some length the relevance of Article 16 of the Civil Aviation Law and its registration rules with respect to mortgages of aircraft.<sup>109</sup> Article 16 provides a clear transactional rule that protects the rights of creditors in aircraft, and the interests of potential creditors, by imposing upon the parties to an aircraft mortgage a duty to register the mortgage with the CAAC as a condition of its "establishment."<sup>110</sup> The rule is on one level a pragmatic rule of notice common among all legal systems which contemplate secured transactions as a method of collateral acquisition and disposition. More significantly, though, Article 16 adapts the Geneva Convention's recognition of specific concerns respecting aircraft security interests<sup>111</sup> to China's broader philosophical sensibility. The totality of Chinese rules reflects, at some level, the consciousness of the collective, the notion that valid rules advance the state's interest and increase the wellbeing of all the participants in the socialist society. Elegant rules, at all levels of the Party-state, impose duties upon the individual of responsibility to the collective. At all times are the presence and interests of the collective apparent in rules of the system. One might consider the

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107. Chen Qiang & Hu Qian, *Chinese Practice in International Law: 2001*, 1 CHINESE J. INT'L L. 328, 332 (2002).

108. Civil Aviation Law, *supra* note 9, at arts. 191-95.

109. *See supra* Part II; Civil Aviation Law, *supra* note 9, at art. 16.

110. Civil Aviation Law, *supra* note 9, at art. 6.

111 *See* Geneva Convention, *supra* note 57, at art. I.

famous line by model government mediator Aunty Wu, “If I didn’t depend on everyone, nothing could be solved,”<sup>112</sup> as a reflection of the presence of the collective even in the most private and arm’s length transactions.

Article 16’s registration rule is symbolic in many respects of the tension which this Note seeks to describe between Chinese law’s accession to Western liberal norms on one hand and its repeating emphasis on socialist norms, traditions, and legal canons on the other. It requires state registration of aircraft mortgages as a condition of their establishment:<sup>113</sup> a communication and publication of the private creditor-debtor transaction to the collective, an appeal to the state—and hence to the people—for formal approval of the transaction.

### *B. Remnants of Heavy Regulation and Marketplace Involvement*

Despite the liberalization heralded by the Civil Aviation Law, airlines in China remain heavily regulated. Carriers governed by Article 91 must apply for and receive the CAAC’s approval both to operate new routes and to cease service on existing routes.<sup>114</sup> The government’s top-down involvement in airlines’ strategic network planning decisions reflects a regulatory mentality in which the central government, rather than the marketplace of travelers and shippers, performs the essential resource-allocation function, the classic philosophy behind airline regulation seen even in the United States prior to deregulation in the 1970s.

The aggressive tenor of such marketplace regulation is rooted chiefly in the law’s institutional classification of airlines as “public utility enterprises” (PUEs).<sup>115</sup> Heavy regulation of PUEs during the major part of the communist years has abated as the Chinese marketplace has liberalized.<sup>116</sup> The focus since 2000 has largely shifted from protectionist policies favoring PUEs to optimistic anti-monopoly laws seeking to limit their naturally chilling effect on market-based economics.<sup>117</sup> Such reforms have come in the form of both sweeping anti-monopoly laws and industry-specific laws such as the Civil Aviation Law,<sup>118</sup> which falteringly tailors economic

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112. LUBMAN, *supra* note 11, at 40.

113. Civil Aviation Law, *supra* note 9, at art. 16.

114. *Id.* at art. 96.

115. Zheng Shao Hua, *A Discourse on the Legal Framework of China’s Public Utility Enterprises*, 7 SING. J. INT’L & COMP. L. 86, 86 (2003).

116. *Id.*

117. *Id.*

118. *Id.*

regulation to the unique needs of the growing airline industry.<sup>119</sup> Professor Zheng Shao Hua's appraisal of the Civil Aviation Law's success in breaking up the natural monopolies of China's regionally segregated state-owned airlines is as pessimistic as Wu's: Laws such as the Civil Aviation law "are not only unable to protect consumers' rights and realize social justice but are also unable to increase economic efficiency."<sup>120</sup> Airlines and other PUEs are naturally monopolistic because of:

[T]he indispensable nature of the goods and services they provide, the huge amount of investment capital and sunk costs involved, the restrictions imposed by economies of scale and technical conditions, and the special requirement of efficiency in resource allocation. In addition, with the influence of a planned economy, PUEs are essentially state-owned and state-managed.<sup>121</sup>

The latter problem seems the most troubling. PUEs are often structurally subordinate to government regulatory agencies that are also the guardians of their assets and the recipients of their profits.<sup>122</sup> This is true in China's railroad industry today<sup>123</sup> but will be less applicable to the airline industry after the Scheme of Restructure completes industry consolidation and further removes the CAAC from its role as beneficiary of the industry.<sup>124</sup> Nonetheless, if the government is structurally configured as the beneficiary of air services—with a legitimate self-interest in maximizing its gains—it has less incentive to respond to concerns over consumers' rights and to afford consumers social protections,<sup>125</sup> particularly as air carriers expand and accommodate record numbers of travelers.

The government acknowledged as much in a 2003 filing with the Organisation for Economic Co-operation and Development, commenting in part on the monopolies of PUEs and other structural monopolies in the socialist system. The report stated:

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119. For a perspective on the Civil Aviation Law's weaknesses in this respect, see Wu, *supra* note 6, at 839-40.

120. Zheng, *supra* note 115, at 86, noting that, "China needs to consider the uniqueness of her monopoly phenomenon when formulating her anti-monopoly laws in [the] future so as to handle acts of unfair competition committed by naturally monopolistic PUEs, a product of natural and administrative monopolistic behaviour." *Id.* at 86-87.

121. *Id.* at 87.

122. *Id.* at 88.

123. *Id.*

124. See Part I, *supra*. The Scheme of Restructure should also insulate the CAAC as an administrative authority whose chief job is regulation.

125. Zheng, *supra* note 115, at 91.

[T]he unfair competition practices done by government or government agencies are still under the supervision and check of their superior authorities. In practice, we have found that the government or government agencies are seldom punished for their unfair practices, as the objectives such as regional development, the increase of the revenue of local government and employment generally prevail over the objective of competition protection in dealing with such cases. Therefore, it is evident that the unfair competition of government and government agencies is still rampant.<sup>126</sup>

Other scholars have noted other weaknesses in China's Unfair Competition Law, legislation ostensibly applicable to PUEs and other market participants, designed to curb monopolistic and abusive practices. Wu and Xu identified several "unaddressed concerns," including: "restriction of potential anti-competitive results of a takeover (a merger or acquisition) of a business or company; the restriction of the market share percentage by which a takeover can prevent, restrict, or distort competition in the market; or the abuse of the dominant position in the market."<sup>127</sup>

Regardless of the law's inability to combat effectively the monopolistic tendencies of PUEs, China has steadfastly adhered to the general scheme in place respecting PUEs and, aside from mandating consolidation in the airline sector, has done little to privatize or deregulate PUEs in a way that would reduce the likelihood of monopolistic and abusive behavior. The important point with respect to PUEs for the purpose of this analysis, however, is their distinctly socialist dimension. They are industries of immeasurable necessity to the national infrastructure and are the prototypical and natural subjects of stringent government regulation. In that respect China has adhered to the socialist premise of its desire to create a market-based socialist economy.

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126. *Objectives of the Competition Law of PRC and the Optimal Design of Competition Authorities*, Organisation for Economic Co-operation and Development, Global Forum on Competition 3, Jan. 9, 2003, available at <http://www.oecd.org/dataoecd/58/25/2485968.pdf> (last visited May 1, 2006).

127. Wu & Xu, *supra* note 6, at 597.

#### IV. WHY AVIATION LAW IS A USEFUL TOOL FOR UNDERSTANDING CHINA

Aviation law in China is occasionally inconsistent, but it is predictable. It is largely uniform and complete, but it has its share of gaps. It is altogether socialist with a gaze toward Western liberalism: it is at once uniquely Chinese, blending together all of the paradoxes of Chinese law—its predictable inconsistency, its occasional mysterious inaccessibility, its curious blend of socialism with free-market liberalism—which fascinate and confound legal thinkers of the Western tradition.

If they are to succeed in bringing sustainability to China's airline industry, China's aviation laws and policies must provide flexibility for the industry to capitalize on its recent exponential growth. Insofar as the Civil Aviation Law and other CAAC regulations and decisions have promoted liberalization, stimulated foreign direct investment in the sector, introduced stringent safety regulations, and removed the Party-state by several degrees from its pecuniary interest in aviation enterprises, those laws have generally worked.

When we consider aviation law in China, though, we must ask: What do we think about when we think about Chinese law? What can aviation law contribute to our understanding of how China's legal system works—indeed, *if* it works at all?

There are no doubt multiple answers to that question across the disciplines of law, political science, economics, and history, but the primary reason for aviation law's usefulness as a small window on the Chinese legal system in its entirety is aviation law's general effectiveness. Aviation law, to be sure, is a paradox: a distinctly Chinese blend of rigorous socialist doctrine with dashes of liberal policies, here and there, that seem wholly inconsistent with socialism's basic premise of collective ownership of productive assets. It is in that sense representative of a great many legal disciplines and areas of law in China, which recognize essentially liberal notions of personal rights and apply them to the socialist framework.

Aviation law has incubated a national industry whose growth is perhaps greater than that of any other airline sector since the Wright brothers first took flight. China's aviation law has adopted the texts of international treaties and U.S. regulations; it has incorporated, thematically, universal principles of personal rights into statutory and regulatory provisions; and it has preserved the socialist fixtures of the state-owned enterprise and the PUE, and above all else it has emphasized the supremacy of the collective. It has worked in those two dimensions, the Western and the Eastern,

to create a jurisprudence that largely sets out the framework for a fantastic story of growth and evolution. The next big test for aviation law in China will be whether the system can continue to negotiate successfully the craggy border between socialism and a free market as the national airline industry continues to grow.