

2008

# The U.S./EU Open Aviation Area: The Demise of a Unilateral Americanist Policy in International Air Transport

Brian F Havel

# HEINONLINE

Citation:

Brian F. Havel, The U.S./EU Open Aviation Area: The  
Demise of a Unilateral Americanist Policy in  
International Air Transport, 2004 Issues Aviation L. &  
Pol'y 13051 (2004-2008)

Provided by:

Rinn Law Library

Content downloaded/printed from [HeinOnline](https://heinonline.org/HOL/License)

Tue Apr 9 13:36:40 2019

-- Your use of this HeinOnline PDF indicates your  
acceptance of HeinOnline's Terms and Conditions  
of the license agreement available at  
<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from  
uncorrected OCR text.

-- To obtain permission to use this article beyond the scope  
of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF  
to your smartphone or tablet device

[¶ 25,311]

# **The U.S./EU Open Aviation Area: The Demise of a Unilateral Americanist Policy in International Air Transport**

by Brian F. Havel

October 2004

## **I. Introduction**

Despite the “perfect economic storm” that struck the global air transport industry after September 11, 2001,<sup>1</sup> despair about the future of international aviation services is not only uncalled-for but blinkered. With ambitious global brands like Virgin Airways agitating for long-denied access to the huge U.S. domestic aviation market (directly or by acquiring one of the rising number of ailing U.S. carriers),<sup>2</sup> while European airlines circle each other warily in anticipation of consolidations and a new hierarchy of air service providers, the industry on both sides of the Atlantic will inevitably generate new paradigms of competitive market behavior. In that context fresh thinking is already needed on an appropriate legal and policy architecture to govern the industry in the decades ahead.<sup>3</sup> This Article analyzes how the United States and the European Union have arrived at a benchmark moment in their international aviation relationship, and how their present, still inchoate efforts to launch a transatlantic common aviation union could become the archetype for the future governance of the global air transport industry. The most surprising aspect of these recent developments

has been the penetration of EU public and private actors into what had been primarily a U.S.-dominated laboratory of reform. As this Article demonstrates, the era of unilateral Americanist policy in air transport is clearly over.

## II. Setting the Stage: The Bilateral System and Its Reform

While the international air transport industry has been described (with some hyperbole) as "probably the most complicated field of endeavor ever attempted by man,"<sup>4</sup> the legal regime which governs it is reducible to a very simple axiom: "all commercial international air passenger transport services are forbidden except to the extent that they are permitted."<sup>5</sup> Government barter, not the entrepreneurial acumen of airline managements, has been the sole instrument of new transnational market development in this most technologically precocious industry. Typically, each government engages in bilateral trading of the specialized rights of airspace access, known (with no little irony) as the "freedoms of the air," which are elaborated in treaties concluded at Chicago in the mid-1940s.<sup>6</sup> These so-called freedoms are, in reality, a protectionist artifice to imprint government control on every conceivable means of access to national airspace (directly, from the other negotiating country, or indirectly, through third countries<sup>7</sup>).

Despite the ambition of the United States at the Chicago conference for an open multilateral exchange of rights, trading of the "freedoms" has been conducted in a resolutely bilateral fashion, with each side committed to a kind of "aeropolitics" of restriction and artful compromise, classic zero-sum diplomacy, in defense of the market shares of one or more domestic carriers. Governments favoring heavy protection of national airlines adopted a "closed" system, choosing to restrict foreign airlines to specific cities, or even specific airports, to narrow—or even to deny—opportunities for third country traffic rights, and to swaddle the flag carrier in route systems that were true duopolies, served by one national carrier and one foreign carrier, with capacity subject to a rigid 50/50 split and the price structure constrained by government approval (at both ends) of all proposed tariffs. With some specific bilateral exceptions (notably the U.K./Netherlands air pact of 1984), the EU's air transport industry prior to 1987 was a prototypical closed system of dueling air sovereignties.

While bilateralism is by no means a spent force (indeed, in 2004 bilateral agreements remain the predominant approach used by states in expanding international air transport services<sup>8</sup>), both the U.S. and EU air transport paradigms have undergone significant conceptual shifts in the past decade. Today, within the European

Union's borders, supranational legislation has toppled the entire bilateral treaty network, gradually converting Union airspace, through a sequence of multilateral liberalization "packages," into a juridical union that (with the disappearance of the prohibition on intra-state services by non-national airlines in 1997) mirrors the unitary airspace of the U.S. federal system. Subject to certain rarely-deployed "safeguard" devices, EU airlines have open access to all intra-Union international and domestic markets, without capacity or pricing restraints, without national ownership restrictions, and without the intruding presence of government aerodiplomacy.

Meanwhile, U.S. officials, their deregulatory zeal thwarted outside U.S. borders by the persistence of bilateralism, in the early 1990s invented a quasi-deregulatory doctrine called "open skies." This liberalizing concept was designed to temper the mercantilism (and hence the *raison d'être*) of the original restrictive bilateral model by giving the airlines of each contracting party unlimited access to operate services to and from any point in each other's territory, creating a virtually untrammelled pricing regime, and eliminating prescribed curbs on airline capacity (*i.e.*, frequency of flights).<sup>9</sup> Despite all of this ratcheting up of rights and privileges, however, even for the United States two of the key protectionist planks in the so-called Chicago system have been resolutely *non-negotiable*. Cabotage, originally a creature of the medieval law of maritime transport, prohibits foreign-owned airlines from supplying domestic transport services (specifically, point-to-point flights within national territory);<sup>10</sup> while the nationality rule (incorporated in "nationality" clauses in bilateral agreements) ensures that airlines which provide a state's "cabotage" services, or that are designated by the state to provide international services, remain owned *and* controlled by its own nationals (and, concomitantly, that any other state's airlines remain similarly owned and controlled by *its* nationals).<sup>11</sup>

### III. Recent Convergences in U.S. and EU International Aviation Policy

For just over a decade, therefore, both the EU and U.S. aviation establishments have been seeking to frame new policies to supersede the archaic bilateral structures that have persisted for 50 years. The European Union has rebuilt its aviation regulatory system from the inside, but the effect (as noted above) has been to forge a union of sovereign airspaces that now mirrors the federally-integrated airspace of the United States. The United States, meanwhile, has endeavored to export a replica (or, more correctly, a simula-

crum) of its deregulated domestic market. As a result of these concurrent initiatives, a powerful template for reform of the bilateral system has been created. Indeed, the European Union has developed—within its own jurisdiction—precisely the multilateral, multi-sovereign regulatory model that the United States might ultimately embrace for the global aviation system.

But a significant caveat still remains. Although U.S. open skies policy is rhetorically conditioned by the notion of globalization, the most current iteration of the policy, the U.S. Department of Transportation's 1995 *International Air Transportation Policy Statement*,<sup>12</sup> shrinks from any reference, explicit or implicit, to elimination of cabotage or the nationality rule, the pillars of the prevailing Chicago system of protective bilaterals. Until these pillars crumble, in the United States *and* among its aviation trading partners, no authentic globalization of the international aviation system will be possible.<sup>13</sup>

In fact, the limitations of the U.S. open skies policy have not been as important as the existence of the policy itself, and its role as a conceptual bridge to multilateralism. In 1993, virtually at the outset of these efforts, the 15 voting members of President Clinton's National Commission to Ensure a Strong Competitive Airline Industry endorsed a *multilateral* "open skies" replacement for the patchwork of bilateral agreements developed under the Chicago system.<sup>14</sup> The U.S. Commission's treatment of international issues, and in particular its unexpected embrace of the goal of multilateralism, evidently struck a strong chord with EU and U.S. government and industry planners. In the succeeding decade, the metronomes of progress in deepening the search for open skies have been the cumulative legal and policy initiatives of various state and non-state actors, most notably including the American and European aviation administrations, the European Court of Justice, the public and private international air transport organizations, the non-governmental U.S. and EU airline representative organizations, and the private endeavors of analysts and academics. As these actors interact with and reinforce one another, "webs of influence" are evolving, and will continue to evolve in density,<sup>15</sup> that will establish the new infrastructural principles of air transport regulation and lead ultimately to the specific mechanisms of that regulation.<sup>16</sup> The influence of some of the most significant of these actors—demonstrating how the "global epistemic community"<sup>17</sup> of aviation law and policy is rising—are considered in the next section of this Article.

#### IV. Tracing the Webs of Influence in U.S./EU Aviation Relations

##### A. *The European Union Accepts the Challenge of Change*

In September 1999, the non-governmental Association of European Airlines (AEA) published a 17-page "Policy Statement," captioned *Towards a Transatlantic Common Aviation Area*,<sup>18</sup> calling for a "unified system" (including strong regulatory convergence)<sup>19</sup> that would give airlines operating in a new EU/U.S. aviation union "full commercial opportunities on an equal basis" under the dominion of a "common body of aviation rules."<sup>20</sup> The TCAA proposal created a bridgehead for continuing EU/U.S. contacts, albeit one punctuated by low-intensity skepticism about each side's motives and readiness to make concessions. Although lately progress appears stalled by economic and strategic uncertainty affecting the air transport industries on both sides of the Atlantic, the TCAA proposal reflects a growing commitment by the EU private sector to extra-territorial expansion of the EU single aviation market.

The AEA member carriers perceive that the bilateral system, encrusted with discriminatory and restrictive regulation, has evolved into an inefficient exercise in zero-sum market division that is incapable of producing the network growth demanded by a global trade environment. Air service treaties need to be recast to cede control over pricing and market access—the chief indicia of a deregulated system—to airline managements. This shift in attitude by leading European airlines, which now see their international growth potential stifled by the peculiar legal restrictions of the bilateral system, reflects the well-recognized consequentialist paradigm of policy shaped by economics, and law shaped by policy. Ironically, in 1993, the U.S. Airline Commission had described a retrenchment in the positions of European governments whose nationally-controlled airlines were facing strong competition from U.S. fleets.<sup>21</sup> As EU carriers shed costs and strengthened their performances, however, U.S. carriers gradually lost a transatlantic market share dominance that had seemed virtually structural.<sup>22</sup> European attitudes shifted accordingly.

The most powerful catalyst in re-shaping the landscape of reform, however, emerged (again, in ironic counterpoint) from U.S. open skies overtures to EU member states during the 1990s. The EU deregulation process applied only to inter-state aviation relations within the European Union, leaving the external aviation relations of each member state (the traditional province of bilaterals) entirely unaffected. In this context, the European Commission's motivating premise was that variations in bilateral agreements with non-member states must inevitably distort the functioning of

the EU's internal single market in aviation. For international purposes, the merger of the Union's (currently 25) airspace sovereignties means that all point-to-point international routes within the Union have become, in legal effect, cabotage (*i.e.*, domestic) points comparable to the network of cabotage points inside the huge U.S. market, from which European carriers have been historically excluded under the Chicago system.<sup>23</sup> By combining rights separately negotiated under different bilaterals, U.S. negotiators have won rights for American carriers to enplane passengers at destination cities in Europe for onward transit to other points in Europe. These so-called "fifth freedom" rights, for example, permit United Airlines to pick up new passengers at London as an extension of its New York/London transatlantic service and to carry them onward to other EU destination cities such as Frankfurt or Rome. The bilateral system places a premium on forceful diplomacy by making the exercise of these additional rights dependent on separate negotiations with the governments of both the granting state (the United Kingdom) and the receiving state (here, Germany or Italy).<sup>24</sup> A British Airways flight from London to New York, in contrast, is excluded by cabotage from boarding new passengers in New York for continuing service to Los Angeles.<sup>25</sup> Thus, as both the European Commission and European Parliament have observed, the unitary legal structure of the U.S. aviation market, bolted tight by the federal cabotage and national ownership rules, has prevented the development of authentic network rights by EU carriers operating to and from gateway points in the United States.<sup>26</sup> The Commission believes that intra-EU inter-state privileges should be a "Community asset" that could be explicitly traded for similar rights of access to the huge domestic U.S. market (which still represents over 40 percent of all global air traffic).<sup>27</sup> Accordingly, access to the New York/Los Angeles air market, for example, would be treated in collective Union aviation talks with the United States as a legal replica of the EU's London/Frankfurt market, from which U.S. carriers now would potentially be excluded.

The Commission's existential appreciation that U.S. airlines already have commercially adequate access to the internal EU market through alliance-building with their larger EU confreres (and if anything have been pulling out of intra-EU fifth freedom routes operated as extensions of their transatlantic services<sup>28</sup>), moved it to articulate a revamped position focused on the external effects of open skies agreements. In this understanding, the bilateral New York/Frankfurt market, for example, was reserved to German-owned carriers, and a potential rival like British Airways would be unable to exploit U.S./U.K. traffic rights. This inbuilt



rigidity stood in contradiction to the core tenets of national non-discrimination animating the EU single market enterprise. In the absence of coordinated EU action, however, member states have historically bargained individually with the United States and other foreign air powers. Securing a common negotiating mandate would enable the European Commission to attack this discriminatory artifice, while also encouraging a consolidation of EU airlines no longer bound to their domestic hubs.<sup>29</sup> As to the intra-U.S. cabotage argument, EU carriers are reportedly not directly interested in this privilege (fearing the costs of competition with US carriers on the choicest routes), but the liberalization of inward investment opportunities would certainly be a desirable alternative means of market access.<sup>30</sup>

### ***B. A Transformational European Court of Justice Ruling***

In 1998, therefore, the European Commission launched a forensic assault on separately-concluded member state bilateral air services agreements with the United States.<sup>31</sup> The Commission started proceedings in the European Court of Justice for a declaration that seven states had concluded full "open skies" bilaterals with Washington that violated cardinal non-discrimination and freedom of movement principles of the EU commercial order.<sup>32</sup> Those proceedings, which reprised an abandoned earlier strategy conceived by former Transport Commissioner Neil Kinnock,<sup>33</sup> produced a jurisprudentially contentious but politically astute final opinion in November 2002,<sup>34</sup> which spurred the Commission to press for appointment as the sole negotiator for all EU external aviation relations. The Court rejected the Commission's primary argument seeking *exclusive* EU competence to negotiate bilateral air services agreements with third countries.<sup>35</sup> Technically, therefore, member states are at liberty to continue to negotiate third country bilaterals provided they respect the areas identified by the Court where the Commission has acquired *s exclusive* competence (with respect to computer reservations systems, aspects of intra-EU fares, and take-off and landing slots<sup>36</sup>), and honor the Court's ruling striking down the incumbent nationality clauses.<sup>37</sup>

The propulsive element of the ruling is its conclusion that the bilateral nationality restrictions in the open skies agreements prevent full exercise (by "Community air carriers") of the freedom (or "right") of establishment which is embedded in the Rome Treaty.<sup>38</sup> The concept of the "Community air carrier" appeared in a 1992 Community regulation, which provides that airlines licensed in any member state have the right to operate without discrimination as though licensed in any other member state, and can be owned and

controlled by any member state or by the nationals of any member state.<sup>39</sup> Since 1997, "Community air carriers" have the right to unrestricted market access to all intra-EU air routes, including domestic (cabotage) routes within member states. In the opinion of the European Court of Justice, the nationality clause in a bilateral agreement between one of the defendant member states and a third country (*in situ*, the United States) meant that Community air carriers from other member states would always be excluded from the benefit of that agreement, while that benefit was assured to air carriers of the member state which negotiated the agreement. Accordingly, Community airlines would suffer discrimination preventing them from benefiting from the treatment which the negotiating member state accords to its own nationals.

Interestingly, this finding potentially blocks not only the nationality provisions of "open skies" bilaterals, but of *all* member state bilaterals that include a nationality proviso.<sup>40</sup> Thus, the most questionable jurisprudential aspect of the Court's decision is how a relatively innocuous anti-discrimination provision, which previously had been applied in mundane matters of mutual recognition of qualifications and diploma equivalency,<sup>41</sup> could become the open sesame for bestowing third country air traffic rights from each member state on all EU-licensed air carriers.<sup>42</sup> Moreover, invocation of the establishment provision presupposes a pre-existing "subsidiary, branch, or agency" in the state from which third country traffic rights will be exercised.<sup>43</sup> If an airline has only a ticketing office in the country concerned, would it nevertheless be entitled (again on grounds of non-discrimination) to participate in the preparation and conduct of negotiations with respect to that member state's air services agreements with third countries?<sup>44</sup> Moreover, the interplay of the right of establishment (which appears to trigger national treatment rights on a mere modicum of business presence) with the EU rules on operator and aircraft operator licenses, which have significantly more onerous requirements, has not yet been resolved.<sup>45</sup> The European Commission itself has acknowledged the need for coherence as it approaches the hydra-headed task of consolidating negotiation of all of the bilateral air services agreements of all the member states.<sup>46</sup>

### ***C. Aftermath of the Court's Pronouncements: The Commission Ascendant***

Despite the Court's implicit finding that the crown jewels of bilateral negotiation—the award of traffic rights—continue to reside within member state competence,<sup>47</sup> the Commission has managed the fallout from the Court's attack on nationality clauses to its

own distinct advantage. Initially, the Commission caused deep disgruntlement (not just in the United States) when it imperiously summoned all member states to denounce their existing bilateral agreements with the United States.<sup>48</sup> Although the Commission took its cue in this respect from the earlier opinion of the Advocate-General,<sup>49</sup> it clearly appreciated that, as a matter of international law, the agreements continued to bind the United States despite the post-ruling "domestic" irregularity.<sup>50</sup> The Commission did this, it seems, in order to discourage states from treating the opinion as merely an abstract inconvenience that could be checked by the need to preserve international air commerce.<sup>51</sup> When sovereign states are the object of supranational legal rulings, there is almost always an immediate issue of delayed compliance.<sup>52</sup> The Commission needed a dramatic gesture to impress upon member states the juristic inescapability of the ruling by the European Union's highest court that their bilateral aviation agreements now violated EU law.<sup>53</sup> Moreover, the ruling implied that the main reason for bilateral deals—protection of the national carriers on international routes—would no longer be legally viable.<sup>54</sup>

---

***Although this first set of negotiations did not produce even the "first stage" agreement proposed by the United States, it did spark the beginning of a fundamental re-view by U.S. aviation policy-makers of the limitations of existing open skies policies.***

—Brian F. Havel

---

The denunciation gambit, offensive as it appeared to many, did achieve its minacious purpose. Spurred by an activist Transport Commissioner, former Spanish cabinet minister Loyola di Palacio, in February 2003 the Commission had presented its most recent draft "mandate" proposals to the European Council of Ministers.<sup>55</sup> The proposals, written primarily by European Commission aviation chief Ludolf van Hasselt, sought to capitalize on the momentum of the landmark European Court of Justice judgment in November 2002.<sup>56</sup> Ultimately, despite some political reservations, the European Council of Ministers adopted two decisions in May 2003, in effect granting the Commission a dual negotiation mandate.<sup>57</sup> The first, and most radical, moves negotiation of bilaterals with the United States from the separate autonomy of each member state to the collective responsibility of the European Commission. The Council's award of this first mandate truly represents a much

broader grant of authority than necessitated by the European Court of Justice ruling. Pursuant to this mandate, in fact, EU negotiators conducted a series of discussions with U.S. counterparts in 2003 and 2004 to explore the contours of an eventual "Open Aviation Area" joining the airspaces of the United States and the European Union. Although this first set of negotiations did not produce even the "first stage" agreement proposed by the United States,<sup>58</sup> it did spark the beginning of a fundamental review by U.S. aviation policy-makers of the limitations of existing open skies policies. Moreover, the European Commission reportedly anticipates a resumption of negotiations, building upon the *acquis* of the first negotiations, after the installation of a new U.S. presidential administration in 2005.

An associated, more circumscribed mandate, authorizes the Commission to negotiate the removal from all third country bilaterals (including the United States) of the traditional ownership and control clauses, and their replacement by a clause that gives all "Community air carriers" non-discriminatory access to traffic rights to third countries from each EU member state. This parallel and more circumscribed mandate, which authorizes the formidable task of bringing all EU member state bilaterals with third countries into compliance with the Court of Justice ruling,<sup>59</sup> is already being put into effect through the formation of teams of Commission negotiators. Left for the future, of course, is the issue of providing for the non-discriminatory distribution of the traffic rights that might result from third country negotiations (with the United States and with other countries).<sup>60</sup> Also, it seems likely that the fruits of any Commission-led negotiation would have to be approved by the Council of the European Union.<sup>61</sup> Finally, the negotiation needs to be seen in the context of the general recasting of the structure of the EU airline industry, including the social and economic consequences of a new EU external aviation policy.<sup>62</sup>

The new mandates reflect a much cleaner grant of authority from the Council than Commissioner di Palacio's predecessor, Neil Kinnock, achieved in 1995.<sup>63</sup> At that time, the Council (focusing only on U.S. agreements) sanctioned what might be called a "split mandate" for the Commission: to open multilateral aviation talks with the United States, but to conduct the negotiations in two discrete but mutually dependent cycles.<sup>64</sup> In the first stage, which began in autumn 1996, the Commission was authorized to negotiate so-called "soft" regulatory issues such as competition policy and inward investment opportunities.<sup>65</sup> Only if "significant results" were obtained in this first stage would the Council approve a "specific mandate for a second negotiating stage" that would fea-

ture the more divisive—and hence economically significant—“hard” issues of traffic rights (including direct market access, without artificial devices like code-sharing, to internal U.S. city-pair markets).<sup>66</sup> It was in response to this initiative, in fact, that the Commission suspended its pending legal action against the original open skies insurgents.<sup>67</sup> Despite the pitfalls of the Kinnock mandate proposal,<sup>68</sup> the immediate success for the Commission was not so much the piecemeal donation of authority that this mandate imposed, but rather that the Council had dropped its resistance to the *principle* that traffic rights could be collectively negotiated.<sup>69</sup> Indeed, despite the conditionality of the mandate, the Council’s press announcement spoke rhetorically and positively of the eventual achievement of a “Common Aviation Area where air carriers of both sides could freely provide their services in the [European Union] and in the [United States],” an agreement that would be “without any precedent in the aeronautical sector.”<sup>70</sup> Whether such an outcome is now achieved by piecemeal stages or through a negotiating donnybrook (or “Armageddon,” as one U.S. official has put it, though not for attribution), an agreement is now appreciably within prospect (*i.e.*, in a matter of years) as a result of the Commission dual mandates of 2003.

While the European Court of Justice ruling has been the marquee event of the past decade, other initiatives (including those of private and public international aviation organizations such as the International Air Transport Association and the International Civil Aviation Organization<sup>71</sup>) foretell the coming changes in international aviation.<sup>72</sup> The common thread in these discourses is an increasing awareness that any new paradigm should transcend the Chicago Convention’s most pervasive (and commercially pernicious) legacy, the restrictions on foreign ownership that are keyed into all bilateral air services agreements. This issue had been flagged, albeit indirectly and incompletely, by the U.S. Airline Commission in 1993. The Commissioners endorsed a multilateral focus,<sup>73</sup> but felt unable to visualize precisely how it should be achieved. Thus, while their most general recommendation—that the long-range goal of an open multilateral system should shape immediate U.S. international aviation policy—plainly influenced the language of the subsequent 1995 policy statement of the U.S. Department of Transportation,<sup>74</sup> their only *specific* nostrum was to endorse raising the ceiling on foreign investment in U.S. air carriers closer to the new EU standard of just below 50 percent,<sup>75</sup> in the context of bilateral agreements “which are reciprocal and enhance the prospects of securing the ultimate goal of pro-competitive, multi-national agreements.”<sup>76</sup>

A higher order of pro-competitive bilaterals, therefore, would become the spur to a future multilateral settlement.

The post-1995 bilateral open skies strategy, however, did not seek to modify U.S. policy on foreign ownership. Only the launch of formal U.S./EU negotiations in 2003 (propelled, in turn, by the European Court of Justice ruling), finally prompted U.S. aviation negotiators to contemplate a possible shift in the foreign ownership rules (and, ultimately, their complete abolition).<sup>77</sup> In turn, the U.S. open skies policy had the unintended (but ultimately condign) effect of sparking the European Commission's intense drive to secure a mandate to negotiate the Union's external air transport relations on behalf of all member states collectively,<sup>78</sup> deploying the real international treaty-making authority the "European Community"<sup>79</sup> has garnered through a combination of explicit Treaty powers and predominantly favorable judicial rulings (most recently, as noted above, in November 2002).

### Conclusion:

#### Forecasting the Shape of a New Aviation Union

Some years ago, I wrote of a "grand aerodiplomatic chess game" between Europe and the United States that was just beginning in 1997.<sup>80</sup> That metaphor was almost certainly naive. Competitive chess presumes that one of the players has an informational, conceptual, and cognitive advantage over an opponent. The U.S. and EU negotiators (and their advisers and cohorts) will not confront that kind of asymmetry. In my background discussions with both U.S. and EU officials, I have encountered a much more pragmatic readiness to reorganize international aviation relations at a multilateral level, with fewer specific preconditions, than sometimes appears from the public rhetoric. But aeropolitical forces, including the declared resistance of U.S. and EU labor unions, as well as the conservative impulses of political leadership (and particularly of the U.S. Congress), are inherent in the Chicago system and will frequently compress the scope for flexibility. And, as the failed 2003-2004 negotiations made apparent, the U.S. and EU airline industries, consumed by their daily battles for economic viability, have yet to develop a cohesive policy approach to the implications (and legal processes) of an authentic U.S./EU liberalization. Switching metaphorical fields, therefore, I now anticipate the beginning of a grand aeropolitical *Agora*.

This Article has focused on how two aviation superpowers have arrived at this moment of impending transformation. It does not attempt to predict the outcome of their search for a new *modus vivendi* to maximize the reciprocal benefits of abandoning the

Chicago system, a task I have attempted elsewhere.<sup>81</sup> A number of principles can be expected to be included in an eventual common transatlantic aviation union, although these principles will probably be achieved incrementally rather than in a single "big bang" settlement: complete freedom of access to markets, including cabotage markets; a comprehensive right of establishment and the end of nationality restrictions on airline ownership; complete tariff liberalization; cooperative competition surveillance (and perhaps even specialized joint institutional mechanisms); elimination of all forms of public subsidy; and common principles for the allocation of scarce resources (notably slots and gates) at congested airports.

In concluding this analysis, what is important to note is that these facially opposite air transport systems, a unitary federal airspace in the United States and a confederation of competing sovereign air powers in Europe, have evolved to a point of legal and policy symmetry that now enables them jointly to anchor a new kind of multilateral agreement that will potentially change the future of international aviation. It is toward such an agreement that the search for open skies now proceeds.

---

*Brian F. Havel is a Professor of Law, Vice President, International Human Rights Law Institute, Director, International Aviation Law Institute, DePaul University College of Law, Chicago, Illinois.*

[The next page is 13,065.]





## Endnotes

<sup>1</sup> AIR TRANSPORT ASSOCIATION, AIRLINES IN CRISIS: THE PERFECT ECONOMIC STORM (Submission to the Bush Administration, February 2003), at 1.

<sup>2</sup> Richard Branson, *Fair Competition: A True Revolution in Flight*, AVIATION WEEK & SPACE TECHNOLOGY, Dec. 2, 2002 (calling for opening up the U.S. domestic aviation market to foreign competition by removing restrictive rules that have "stopped me" [sic] from setting up a U.S.-based airline, Virgin America, and predicting a "breakthrough" in the international air transport regulatory system following recent rulings by the European Court of Justice (discussed in this Article)).

<sup>3</sup> Or, to borrow a suspect bureaucratic coinage of the U.S. Department of Transportation, there is a need for an extended "Visioning Session" on the future of air transportation. U.S. DEPARTMENT OF TRANSPORTATION, CONFERENCE REPORT, AVIATION IN THE 21<sup>ST</sup> CENTURY—BEYOND OPEN SKIES MINISTERIAL (1999), at i.

<sup>4</sup> M.J. Lester, 8 EUR. L. REV. 212 (1983) (reviewing C. CODRAL, EUROPEAN AIR FARES AND TRANSPORT SERVICES (1982)). "It is a field that employs more science and techniques, more supporting services and more personal attention than any other commercial enterprise. It produces interconnecting air transport services throughout the world on a scale that makes Mr. Bradshaw's railway timetable look like a pamphlet on the London Underground system. It has been largely achieved in the 35 years since the Second World War not by politicians, not by regulators but by airline men negotiating through the medium of their trade association, IATA [the International Air Transport Association], the essential compromises in the technical, financial, legal and operational fields needed to make the system work." Mr. Lester, as might be gathered from this bouquet to the prevailing order described in this section of the Article, is not an advocate of what he disparages as "the Nirvana of cut-throat competition." *Id.*

<sup>5</sup> Colin Thaine, *The Way Ahead from Memo 2: The Need for More Competition A Better Deal for Europe*, 10 AIR L. 90, 91 (1985). This restrictive principle rests in turn on an elemental principle of airspace sovereignty. The customary international law principle of exclusive sovereignty of states over the use of their airspace was enshrined in Article 1 of the Convention on International Civil Aviation (the Chicago Convention). Article 6 perfects the logic of this restrictive proposition (which was inspired by defence considerations) by ordaining that "[n]o scheduled international air service may be operated over or into the territory of a contracting [state], except with the special permission or other authorization of that [state], and in accordance with the terms of such permission or authorization." The Convention entered into force in 1947. See 15 U.N.T.S. 295 for the text of the Chicago Convention.

<sup>6</sup> The International Air Services Transit Agreement (entered into force 1945), 84 U.N.T.S. 389, and the International Air Transport Agreement (entered into force 1945), 171 U.N.T.S. 387. The freedoms are formulated in an ascending order of

liberality of market access. The first and second freedoms are transit rights which involve passing over the granting state's territory (overflight) or non-commercial landing (refueling). The third, fourth, and fifth freedoms are called "traffic" rights, because they grant permission to pick up and discharge passengers: in the case of the United States and United Kingdom, for example, third and fourth freedoms gives each country's airlines the right (or rather the privilege) to carry passengers to and from the other country, and fifth freedom allows each country's airlines to enplane passengers in the other country for onward transit to third states. Other freedoms, with varying degrees of technicality, are variants of these basic privileges.

<sup>7</sup> See *supra* note 6 (explaining the technical nature of the freedoms).

<sup>8</sup> The Secretariat of the International Civil Aviation Organization (ICAO) has identified over 650 bilateral air service agreements (including amendments or memoranda of understanding) that were concluded between 1995 and 2002. Over 70 percent of these agreements and amendments contained some form of liberalized arrangements.

<sup>9</sup> See *In the Matter of Defining "Open Skies,"* [1989-1992 Transfer Binder] Av. L. REP. (CCH) ¶ 22,810, final order issued by Jeffrey N. Shane, Assistant Secretary for Policy and International Affairs (establishing DOT definition of "open skies"). On route selection, the United States pursues an unrestricted "gateway" policy, allowing foreign airlines to serve all cities (and airports) in U.S. territory, in return for reciprocal unlimited access in the other state. Routing flexibility is also featured, so that foreign carriers, again on condition of reciprocity, can (without capacity restrictions) board passengers at intermediate (third country) points for onward transit to the United States, or board passengers in the United States for onward transit to third countries (the so-called fifth freedom right, see *supra* note 6). *Id.* at 15,891. As to airline identity, each side receives unlimited designation opportunities on each route. *Id.* at 15,890. Capacity (flight frequency) is also unrestricted on every route. *Id.* On pricing structure, all airlines are free independently to set their own fares on each route they serve.

<sup>10</sup> The principle of "cabotage," excluding foreign carriers from domestic transport services, has a long history in international commerce. For a comprehensive study of the origins and development of air transport cabotage, see PABLO M. J. MENDES DE LEON, *CABOTAGE IN AIR TRANSPORT REGULATION* (1992).

<sup>11</sup> For a recent critique of the nationality system, see Brian F. Havel, *A New Approach to Foreign Ownership of National Airlines*, in *ISSUES IN AVIATION LAW AND POLICY* 13,201-13,225 (CCH 2003). The source of the nationality restriction is a common provision of the International Air Services Transit Agreement and the International Air Transport Agreement (see *supra* note 6), which provides that "each Contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a Contracting State." The nationality restriction, incidentally, is only partly the product of these international agreements. The bilateral treaty

network, and the unbending reliance on nationality (and cabotage) rules, evolved through subsequent state practice. Incidentally, as a matter of international treaty classification, a bilateral air transport agreement can be considered a *traité-contrat*, accomplishing a series of reciprocal commercial exchanges or concessions. In contrast, the product of the EU/U.S. negotiations considered in this Article, like the original Chicago Convention itself, will have the attributes of a rarer species, the *traité-loi*, which establishes broad patterns of "regular behavior" among states. MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 13-14 (4<sup>th</sup> ed. 2003).

<sup>12</sup> U.S. DEPARTMENT OF TRANSPORTATION, U.S. INTERNATIONAL AIR TRANSPORT POLICY STATEMENT (April 1995), AV. L. REP. (CCH) ¶ 23,902. This was (and remains) the first formal statement of U.S. international aviation policy since 1978.

<sup>13</sup> See Branson, *supra* note 2 (provocatively calling US "open skies" agreements "the last gasps of the old, archaic bilateral system"). Abolition of the nationality rule, and its restrictions on inward foreign investment, would be the most commercially (and juridically) attractive option for reform. If the nationality rule were abolished in the United States, for example, an EU airline could either buy an existing U.S. carrier (gaining access to the carrier's domestic route system) or "establish" a subsidiary to serve U.S. domestic routes (as Virgin plans to do, see *supra* text accompanying note 2). Cabotage services, in contrast, assume that the EU carrier simply operates *qua* foreign carrier, but extends its network to serve U.S. domestic routes. Lifting the cabotage exclusion would be hard for a government to do (in addition to labor union objections), because under international treaty law (the Chicago Convention) foreign airlines which serve cabotage routes are still regulated by their home countries. See Havel, *supra* note 11, at 13,203.

<sup>14</sup> See CHANGE, CHALLENGE AND COMPETITION, THE NATIONAL COMMISSION TO ENSURE A STRONG COMPETITIVE AIRLINE INDUSTRY: A REPORT TO PRESIDENT AND CONGRESS, Aug. 1993 [hereinafter U.S. AIRLINE COMMISSION REPORT]. The Commission's mandate, in broad brush, was to uncover the structural causes of the parlous financial condition of the U.S. airline industry in 1992. Under the rubric of international aviation policy, the establishing legislation required the Commissioners to examine "the desirability of multilateral rather than bilateral negotiations." Calls for a new presidential commission to be formed (made in 2002 and after) have thus far gone unheeded, partly because so much of the 1993 Commission's work remains undone, and partly because much of the initiative in multilateral aviation has since slipped from the United States to the European Union.

<sup>15</sup> "Webs of influence" is a useful epistemological expression that undergirds a recent important study of the evolution of regulatory schemes for international business. JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 13 (2000).

<sup>16</sup> See BRAITHWAITE & DRAHOS, *supra* note 13, at 9.

<sup>17</sup> The phrase "global epistemic community" is adapted from Gunter Teubner, "Global Bukowina: Legal Pluralism in the World Society, in GUNTER TEUBNER (ED.), GLOBAL LAW WITHOUT A STATE 7 (1997).

<sup>18</sup> ASSOCIATION OF EUROPEAN AIRLINES, TOWARDS A TRANSATLANTIC COMMON AVIATION AREA: AEA POLICY STATEMENT (Sept. 1999).

<sup>19</sup> *Id.* at 1.

<sup>20</sup> *Ibid.*

<sup>21</sup> As examples, France had "denounced" (unilaterally terminated) its bilateral treaty with the United States, citing capture by US airlines of 70 percent of traffic on U.S./France routes. Chancellor Helmut Kohl of Germany had written a letter to President Clinton threatening denunciation of the U.S./Germany aviation pact as a "post-war relic," and noting the 60 percent share of bilateral traffic held by U.S. carriers. U.S. AIRLINE COMMISSION REPORT, *supra* note 14, at 20-21. U.S. aviation bilaterals typically provide for denunciation by written notification, to take effect one year following the date of receipt of notification.

<sup>22</sup> Thus, according to computer reservations systems data for the 12 months ending January 2004, U.S. airlines' overall share of the U.S./France and U.S./Germany markets had fallen to 51 percent and 46 percent, respectively. Their overall share of capacity offered on transatlantic routes had fallen to 41 percent. Most EU national flag carriers are now the strongest transatlantic operator to and from their home markets. However, U.S. carriers operate a higher number of frequencies over a higher number of transatlantic routes, reflecting the way that they have each developed several hubs across the United States that they feed with traffic from a range of international destinations. See European Commission, Press Release, *European Commission Requests the Denunciation of the Bilateral Open Sky Agreements*, Brussels, Nov. 20, 2002, IP/02/1713, at 3 [hereinafter European Commission, Press Release, *Denunciation*].

<sup>23</sup> The European Commission's view was that fifth freedom rights, while of relatively little value on the American side of the Atlantic (where there are few viable onward destinations for EU carriers to exploit), become much more important in the European Union, with many international markets in close proximity. The American carriers thereby gain a network purchase on what the Commission calls "Europe's domestic market." Communication from the Commission on the Consequences of the Court Judgments of 5 November 2002 for European Air Transport Policy, COM (2002) 649 final, Nov. 19, 2002, at 4 [hereinafter European Commission Communication]. The main users of intra-EU fifth freedom rights, in fact, are U.S. cargo companies providing intra-EU parcel services. See *id.* at 4. But U.S. airlines prefer to use code-share arrangements with EU carriers for onward connections, rather than providing the services themselves. For example, under the liberal U.S./Netherlands bilateral, Northwest Airlines links into KLM's intra-EU network at Amsterdam, thereby offering services to Paris and Frankfurt even though Northwest lacks international route authority to those cities; similarly, Northwest uses KLM's intra-EU strength to funnel European traffic to its transatlantic services ex-Amsterdam. Arguably,

therefore, competing French and German carriers forfeit traffic share to Northwest/KLM both to and from U.S. points.

<sup>24</sup> As observed in note 23, *supra*, although fifth freedom connections have been put in place by U.S. carriers throughout EU territory, enabling them to build route networks connecting multiple points in different member states, in fact U.S. carriers have chosen to operate to internal EU points using code-share arrangements with their major EU alliance partners. Thus, although Delta accumulated fifth freedom rights under the U.S./Germany bilateral and other bilaterals with European countries, and at one time operated a successful European hub operation at Frankfurt, it later shifted strategies to cooperate with Air France (through an immunized alliance).

<sup>25</sup> EU carriers do have so-called "coterminal" rights in the United States, which merely allow British Airways' continuing service to Los Angeles from New York, but only for passengers who boarded originally in London. The practice of code-sharing, where an EU carrier feeds its transatlantic services into the domestic network of a U.S. carrier, has arguably caused some dilution of the pure cabotage exclusion in the United States.

<sup>26</sup> See the Resolution of the European Parliament adopted in plenary session on April 7, 1995, noting that "bilateral agreements between the United States and certain member states could give American companies access to intra-European routes without giving European operators the right of cabotage between American cities." *Air Transport: Do Europeans Need Cabotage Rights in the U.S.?*, EUROPEAN REPORT, no. 2032, Apr. 12, 1995, at 6.

<sup>27</sup> But see Allan I. Mendelsohn, *Myths of International Aviation*, 68 J. AIR L. & COM. 519 (2003) (disputing European Commission's view that EU inter-state air routes—which, from the U.S. perspective, are fifth freedom routes—are a mirror image of the U.S. domestic cabotage market).

<sup>28</sup> See *supra* notes 23 and 24. The plain fact is that U.S. carriers no longer use intra-EU traffic rights, having switched to code-shared connections with alliance partners. See Address by U.S. Deputy Secretary of Transportation Jeffrey N. Shane, *Open Skies Agreements and the European Court of Justice*, Before the American Bar Association Forum on Air and Space Law, Hollywood, Florida, Nov. 8, 2002, at 4 [hereinafter Shane Address].

<sup>29</sup> In this process the Commission would also face the risk that third countries would not accord traffic rights to an airline operating from an EU state which was owned and controlled by nationals of other EU states. This structural resistance of the bilateral system will probably have to be overcome by the sheer aeropolitical power of the European Union. See *infra* note 46.

<sup>30</sup> On the commercial and legal attraction of abolishing the nationality restriction rather than cabotage, see *supra* note 13.

<sup>31</sup> Article 226 (ex-Article 169) of the Treaty Establishing the European Community [the EC Treaty] provides a mechanism for the Commission to bring an action before the European Court of Justice against a member state that, in the Commission's consideration, "has failed to fulfill an obligation under the [EC]

Treaty." As a procedural prerequisite, the article obliges the Commission to first deliver a "reasoned opinion" on the matter (under Article 249 (ex-Article 189) of the Treaty, "opinions" are not considered legally binding acts of the European Community).

<sup>32</sup> Cases C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98, and C-476/98, against Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, and Germany. An eighth defendant, the United Kingdom, was named although the U.S./U.K. relationship has never produced an open skies arrangement. Case C-466/98 against the United Kingdom. The U.S./U.K. agreement, popularly called "Bermuda II," contains similar provisions to the open skies agreements on nationality, but is much more restrictive in its grant of traffic rights. See European Commission Communication, *supra* note 23, at 6-7.

<sup>33</sup> Commissioner Kinnock commenced enforcement proceedings under the Treaty of Rome against six apostate states (Austria, Belgium, Denmark, Luxembourg, Finland, and Sweden) that had originally subscribed to the new open skies policy announced by U.S. Secretary of Transportation Federico Pena in 1995. The Commission had been confident of its legal position in that jurisdictional tussle, placing reliance on the 1994 opinion of the European Court of Justice on the division of competence between EU institutions and member states concerning negotiation and signature of certain instruments of the new World Trade Organization regime, including the General Agreement on Trade in Services. See WTO Case, Opinion 1/94, [1994] ECR I-5267.

<sup>34</sup> The Judgment of the Court is available online at <http://curia.eu.int>. Richard Branson's comment following publication of the judgment was typically pithy (and unsettling to authors of aviation law articles): "Never mind the detailed legal arguments, this decision is a major political statement." Branson, *supra* note 2, at 2.

<sup>35</sup> In summary, the Commission had argued that EU aviation law has developed so substantially that the Commission should, in accordance with existing Court jurisprudence, most notably the so-called "AETR" principle, be granted exclusive competence over external aviation relations. The AETR principle provides that "whenever the [EU] has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries, it acquires an exclusive external competence in the spheres covered by those acts." European Commission Communication, *supra* note 23, at 7. The Court, however, found that the EU legislative packages on aviation did not completely govern the situation of air carriers from non-member countries which operate within the European Union.

<sup>36</sup> An illuminating speech by U.S. Deputy Secretary of Transportation Jeffrey N. Shane questioned the bilateral pertinence of these areas of competence. See Shane Address, *supra* note 28, at 4. On intra-EU prices, for example, Shane commented that the European Union no longer regulates prices for intra-EU air services, and that, in any case, most U.S./EU open skies agreements "already recognize that EU law does not entitle U.S. airlines to be price leaders on intra-EU routes." *Id.*

at 4. On computer reservations systems, Shane emphasized that no U.S. airline any longer owns a system in its own right and therefore the historic need to combat EU exclusivity and bias has been eliminated. Moreover, while U.S. and EU rules continue to show differences, they both exist to promote "fair competition" and he saw little purpose to maintaining computer reservations systems provisions in open skies agreements. *Id.* at 5. The Commission, reviewing the directory of EU legislation, has subsequently added several further issues to this category of exclusion, including safety, commercial opportunities (ground-handling and consumer protection), customs duties (for aircraft supplies and aviation fuel), and environmental (including noise reduction) rules. European Commission Communication, *supra* note 23, at 7-8. Other issues covered by EU legislation in the Commission's view "shape the trading environment" even though not directly addressed in international agreements—denied boarding compensation, air carrier liability, package travel, and data protection. European Commission Communication, *supra*, at 8; see also European Commission, Press Release, *Denunciation*, *supra* note 22.

<sup>37</sup> See Shane Address, *supra* note 28, at 4 (comparing notion of EU "competence" to U.S. doctrine of pre-emption of state governments by federal supremacy); see generally Rene Fennes, *The European Court of Justice Decision on Bilateral Agreements: The Future of Relations*, 17 AIR & SPACE LAW. 14, 17 (2003).

<sup>38</sup> Article 43 (ex-Article 52) of the EC Treaty provides that the freedom of establishment includes the right to set up and manage undertakings under the conditions laid down for its own nationals by the legislation of the member state in which establishment is effected.

<sup>39</sup> Council Regulation 2407/92, 1992 O.J.(L 240) 1.

<sup>40</sup> See European Commission, Communication from the Commission on relations between the Community and third countries in the field of air transport, COM (2003) 94 final (Feb. 26, 2003), at 9 [hereinafter Commission Communication 2003]; see also Fennes, *supra* note 37, at 16.

<sup>41</sup> See generally PAUL B. STEPHAN ET AL., *THE LAW AND ECONOMICS OF THE EUROPEAN UNION* 629 *et seq.* (2003) (considering cases).

<sup>42</sup> Since the adoption of the third package of airline liberalization reforms in 1992, the requirements for the licensing of air carriers have been harmonized throughout the Union. Accordingly, an operating license issued in any EU member state must be recognized in all of the others, creating the concept of a "Community air carrier." See *supra* text accompanying note 39. Rene Fennes posits the following hypothetical, which arises from the simple premise of the Court's ruling on the nationality clauses:

*Olympic Airways could go to the French Government and apply for a permit to operate Paris to Lima just like a French carrier could. Should there be enough room in the applicable bilateral to accommodate Olympic, then France would have to allow the operation. Should there not be enough or no sufficient room, then the authorities in France would have to ensure that Olympic would be eligible for such operation, similar [to] French*

*carriers, once it became possible, or to the extent the operational room allowed, under non-discriminatory, consistent and transparent administrative rules. The only ones that would be able to stop the operation would be the Peruvians! But France would be under obligation to amend the bilateral agreement concerned to allow for all carrier established in France under Community rules.*

Fennes, *supra* note 37, at 18.

<sup>43</sup> Article 43 (ex-Article 52) of the EC Treaty.

<sup>44</sup> See European Commission Communication 2003, *supra* note 40, at 5.

<sup>45</sup> It is difficult to imagine that EU law would permit an airline seeking to operate a member state's extra-Union routes to do so on the basis of merely having a business office in the state. In light of the bilateral nature of the relationship (with a third country), it would seem appropriate to require that the airline would also obtain an operating license and aircraft operator certificate from the granting state, so that mere place of business would be coupled with a condition of regulatory oversight. See Fennes, *supra* note 37, at 8, who also notes that "it would be difficult to refuse carriers that have an [operating license] and [aircraft operator certificate] from another [member state] and thus are perfectly safe to operate on [intra-EU] routes and allowed to do so under [EU] law." But, as Fennes also notes, the applicable EU legislation restricts the grant of a license to airlines which have their "principal place of business" and "registered office" in the licensing member state. *Id.* at 18. Accordingly, it may be necessary to set up a full-fledged subsidiary, rather than merely a branch or agency. See generally Michael F. Goldman, *Saving Open Skies Agreements In Light of The European Court's Recent Ground-Breaking Decision* (unpublished paper, on file with author, Feb. 2003), at 10 (noting that some EU law experts believe that to exploit the right of establishment principle, a Dutch carrier like KLM would have to set up a subsidiary in France, obtain a French air operator's certificate, and operate French-registered aircraft; in other words, France would not be obliged to designate KLM under the U.S./France bilateral, but would be obliged to designate KLM(FR), a French airline company owned by KLM).

<sup>46</sup> See European Commission Communication 2003, *supra* note 40, at 6. Indeed, the Commission took the view that the Court's opinion had instantly invalidated *all* existing bilateral agreements (not just the open skies agreement in issue) to the extent they enforced a nationality-based exclusion on access to third country routes. See *id.* But the Commission also accepted that the complexity of the situation, as well as the existence of incumbent access rights, should not be jeopardized by a legal imbroglio within the Union. The Commission pledged to "limit . . . the changes needed to the balance of rights that has been achieved under the existing framework of bilateral agreements," while maintaining that "changes must be made to the current regime in order to bring existing relations with third countries into line with the Court's rulings of 5 November 2000[2]." *Id.* at 7. And the Commission went further, promising to "add value" to the existing situation and not just to fill the legal vacuum forced by the Court's opinion. *Id.*



In this regard, as a tactical matter, the Commission has correctly intuited that only a unified approach—in other words, deployment of the aeropolitical power of the European Union—will coax third countries into compliance with the non-discrimination standards imposed by the Court of Justice. See *id.* at 9.

<sup>47</sup> A finding that prompted U.S. Deputy Secretary of Transportation Jeffrey N. Shane to comment that the European Court had not rejected the “central features” of the open skies agreements. Shane Address, *supra* note 28, at 3-4 (“traffic rights, in a real sense, are the *whole point* of an air services agreement” (emphasis in original)); see also Goldman, *supra* note 45, at 5.

<sup>48</sup> See European Commission, Press Release, *Denunciation*, *supra* note 22; see also European Commission Communication, *supra* note 23, at 15. Procedurally, the Commission used the form of a blunt letter to EU member states bearing the signature of the Commission’s Director General for Energy and Transport, Francois Lamoureux. The letter noted “a series of diplomatic demarches by the United States” promoting bilateral adjustment of the problematic nationality clauses. “I am writing to caution your government against entertaining any such approach from the United States,” M. Lamoureux declared. He insisted that, in the Commission’s view, “the only acceptable response to the [ECJ ruling] is for member states to give notice of denunciation of the existing agreements with the United States and to proceed with the adoption of a mandate for a Community negotiation with the United States forthwith.” Forecasting legal action against member states which did not comply with this “only acceptable response,” M. Lamoureux closed by remarking that “bilateral discussions on the basis of a foreign government’s partial interpretation of our internal European legal system would be unlikely to result in a satisfactory final outcome for European countries.” A copy of the letter circulated widely at the time. It was described by one U.S. industry leader (somewhat hyperbolically) as “not merely blunt . . . [but also] nasty.” Interestingly, the so-called demarches *did* exist, coordinated through the U.S. carriers’ trade association, the Air Transport Association; the proposed changes would have included deleting the computer reservations system annex from each bilateral, removing intra-EU prices from coverage by the pricing article, and amending the designation article to allow the other party to designate airlines established in its territory (through incorporation and principal place of business) but owned and controlled by any EU nationals. For a foreshadowing of this strategy, see also Shane Address, *supra* note 28. According to U.S. government sources, the EU member states (and accession states) were also puzzled by the Commission’s denunciation strategy, and considered the existing bilateral agreements to remain in force.

<sup>49</sup> With respect to the nationality clauses, the Advocate-General appeared to believe that the member state defendants had a responsibility to renounce their U.S. bilaterals. Opinion of Advocate General Tizzano, Jan. 31, 2002, paras. 143, 144. See Joan M. Feldman, *Transatlantic two-step*, AIR TRANSPORT WORLD, Apr. 2002, at 43.

<sup>50</sup> See European Commission Communication, *supra* note 23, at 8 (noting that the Court "could not have invalidated the agreements under international law"). The principle of *pacta sunt servanda* guides both EU and member state law. See Fennes, *supra* note 37, at 17. See also ASSOCIATION OF EUROPEAN AIRLINES, POLICY STATEMENT ON EXTERNAL RELATIONS (2003) (recognizing importance "for political reasons that the Community as a whole and the Member States individually are seen to remain credible and reliable international partners"). Indeed, the initial U.S. reaction to the ECJ ruling, expressed by Deputy Secretary of Transportation Jeffrey N. Shane, was that the nationality clause problem was "all about Europe, not about the [United States]." Shane Address, *supra* note 28, at 5. Shane also noted the essentially permissive nature of the nationality clauses and that the United States has on occasion waived its rights under such provisions. *Id.* at 6 (recalling US accommodation of multinational ownership for aviation partners from Scandinavia, Africa, and the Caribbean); see also Havel, *supra* note 11, at 13,208-09 (discussing examples of U.S. waiver policy).

<sup>51</sup> EU aviation industry leaders were unsettled by the Commission's apparent *l'èse majesté*. The AEA warned that "strong statements made by the [EU institutions] in this internal discussion may carry an unintended and possibly negative message to our foreign partners and the public." AEA POLICY STATEMENT, *supra* note 51. The AEA was particularly concerned to preserve the stability of "the body of rights agreed between [member] states and third countries." *Id.*

<sup>52</sup> This has already been the historical experience with the post-1995 World Trade Organization panel and Appellate Body rulings. See, e.g., United States—Section 211 of Omnibus Appropriations Act of 1998, Report of the Appellate Body, WT/DS176/AB/R (WTO Appellate Body 2002) (finding United States in violation of TRIPS); United States—Section 211 of Omnibus Appropriations Act of 1998, Communication to the Chairman of the Dispute Settlement Body in accordance with Article 21(3)(b) of the Dispute Settlement Understanding, WT/DS176/14 (Dec. 24, 2003) (reporting agreement by United States and European Union to extend the time for implementation of the rulings of the Dispute Settlement Body).

<sup>53</sup> The Commission's instruction to activate the typical one-year denunciation period was applied to all 15 member states. See European Commission, Press Release, *Denunciation*, *supra* note 22, at 3. The Commission's strong position, in fairness, was legally correct as a matter of internal EU law. Article 10 (ex-Article 5) of the EC Treaty is crystalline in its requirement that member states "shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of the Treaty or resulting from action taken by institutions of the Community." The Court did hold that, in the case of an infringement stemming from an international agreement, member states cannot contract new international commitments and cannot maintain in force any infringing commitments. See European Commission, Press Release, *Denunciation*, *supra*; note but see Dow Jones Business News, *France's Air Pact With China Tests New EU Aviation Laws*, Feb. 27, 2003 (noting that, despite the new

dispensation, in January 2003 France signed a new bilateral "trade accord" granting exclusive routes for Air France into Canton, China); see also Dow Jones Business News, *European Airlines Want Common Line on International Air Pacts*, Mar. 11, 2003 (reporting U.K. reluctance to sign an agreement with China that was not open to all EU members). Indeed, since the commencement of the action, France, Italy, and Portugal had all entered new "open skies" agreements with the United States. The Commission did not exclude the possibility of further legal action against these countries. See European Commission, Press Release, *Denunciation*, *supra*.

<sup>54</sup> "The ownership and control clause is there precisely because of the nature of these agreements: they are bilateral." Fennes, *supra* note 37, at 17. Naturally, this realization helped persuade member states that common negotiations were the only way to preserve negotiating power with third countries.

<sup>55</sup> See *supra* in the main text for an analysis of the Commission's strategies and tactics in obtaining the new mandates. The Commission anticipated the Court judgment and the new mandate request by authorizing an economic analysis of an EU agreement with the United States that might supersede the existing regime of bilaterals. THE BRATTLE GROUP, *THE ECONOMIC IMPACT OF AN EU-U.S. OPEN AVIATION AREA* (Dec. 2002). But an economic forecast of this kind cannot reveal the dynamic network consequences of the multilateral solution that may ultimately emerge from the EU/U.S. talks.

<sup>56</sup> The proposals had been heralded by a Commission Communication dated November 19, 2002, which comprised a stocktaking of the EU's external aviation relations after the Court's judgment. See European Commission Communication, *supra* note 23.

<sup>57</sup> The decisions were adopted based on submissions to the Council by the European Commission. See European Commission Communication 2003, *supra* note 40 (urging Council to take decisions to authorize Community negotiations on the creation of an Open Aviation Area with the United States, and on the designation of Community carriers on international routes to and from third countries and on matters within Community exclusive competence).

<sup>58</sup> Thus, these negotiations are in hiatus following a rejection by the EU Council of Ministers on June 11, 2004, of a so-called "first stage agreement" put forward by the United States. The sticking-point for EU carriers, apparently, is the absence of access to domestic U.S. (cabotage) routes, through either a right of acquisition or a direct right of establishment. The European Commission is reportedly vexed that EU carriers have not been prepared to back its effort to obtain a more modest set of initial concessions, and in particular to respond positively to U.S. proposals to accept "Community carrier" designations of non-national airlines on U.S./EU routes by any "open skies" member state, and to seek amendment of U.S. legislation enforcing the nationality restriction (by raising the ceiling on foreign ownership of U.S. airlines from 25 percent to 49 percent of voting stock). (Other proposed U.S. concessions included expanded open skies access for 10 additional member states, increased cooperation in

competition and code-sharing, lifting of restrictions against international wet-leasing, convergence on government subsidies, convergence on security issues, a dispute-settlement mechanism, and prospects for future regulatory convergence.) While intra-EU interchanges on this matter remain confidential, it is clear to observers that the Commission believes that the EU airline industry has used political muscle to stymie what the Commission regards as its lawful role in integrating a single non-discriminatory market in aviation. Whatever the motivation (and it is surely driven in part by current economic difficulties), the EU airlines are correct in their assessment that even a 49 percent ceiling will not facilitate EU access to the U.S. domestic market. But it has been widely assumed that EU carriers have limited interest in exercising rights inside the United States. See John R. Byerly, U.S. Deputy Assistant Secretary for Transportation Affairs, *U.S.-EU Aviation Relations—Charting the Course for Success*, Remarks to the International Aviation Club, Washington D.C., July 13, 2004, available at <http://www.state.gov/e/cb/rls/rm/34327.htm> (last visited October 4, 2004) (noting that "no EU carrier has approached [U.S. authorities] in recent years with a serious request to operate cabotage flights," although apparently conceding some higher level of interest in the right of establishment of subsidiaries, which Byerly nevertheless regards as a "red herring" in an era of extensive code-sharing). On the other hand, U.S. acceptance of transborder Community designations would dismantle a great part of the discriminatory structure of the existing bilateral system and remove a major legal and policy obstacle to consolidation of the EU industry. See generally Byerly, *supra* (extensively discussing the suspected political reasons for EU rejection of the first stage agreement, including the vested interests of some EU carriers in maintaining their protected international routes); Richard Fahy, *U.S.-EU Talks on Open Skies Fail to Produce Agreement*, WALL ST. J., Feb. 23, 2004, at 3. The Commission, incidentally, uses the term "Open Aviation Area," no doubt provisionally, in preference to the AEA's "Transatlantic Common Aviation Area." European Commission Communication 2003, *supra* note 40, at 15. Outgoing European Commissioner for Transport Loyola di Palacio had described the suspended EU/U.S. negotiations as the Commission's "uppermost priority" in international aviation relations. European Commission, Press Release, *Open Skies: Commission Sets Out its International Aviation Policy*, Brussels, Feb. 26, 2003, IP/03/281. See AEA POLICY STATEMENT, *supra* note 51, describing a EU/U.S. concordat as "the priority issue that by far outweighs all others," and proposing that harmonized EU/U.S. policies should include "security, information exchange and privacy protection, insurance and financial assistance", as well as "investment, open market access and [a] level playing field, and—with particular emphasis—convergence of competition policy").

<sup>59</sup> Notice that member states will retain authority to negotiate with third countries on "matters of national competence" (but presumably outside the framework of EU/U.S. negotiations) pending a mandate for a full negotiation on a Community agreement. European Commission Communication 2003, *supra*

note 40, at 10. In this connection, the Commission is also seeking the adoption of a draft Regulation that provides a framework for ensuring that information about negotiations and agreements "flows freely within the Community and establishes clear rules for the implementation of agreements in order to guarantee Community carriers fair and equal opportunities." European Commission Communication 2003, *supra*, at 19. The draft Regulation (which, at the time of writing, is before the European Parliament) is an effort to transform the mind-sets of national authorities into a "Community" interest mind-set. Accordingly, member states will have to provide information to the Commission on all planned aviation negotiations with non-EU member states. See *id.* at 21. In addition, each member state must request "expressions of interest" from all "Community carriers" with an establishment in its territory to ensure that those interests are taken into account in negotiations. *Ibid.*

<sup>60</sup> See European Commission Communication 2003, *supra* note 40, at 13 ("securing a non-discriminatory outcome and providing for a non-discriminatory distribution of the traffic rights that might result from a negotiation may prove to be one of the most difficult aspects of the transition from a bilateral agreements [*sic*] to a Community international air transport policy"); see also European Commission Communication, *supra* note 23, at 12 (noting that the non-discriminatory allocation of traffic rights will be highly problematical in non-open skies agreement contexts where the applicable bilateral insists on a reciprocal division of limited traffic rights between the airlines of the parties). As a result of the Court's ruling, also, the Commission boosted its chances to have its competition enforcement powers, hitherto confined to intra-EU air services, extended to include air transport routes between the European Union and third countries. (The Commission has, however, carried out competition assessments of business arrangements that affect extra-EU services, including, for example, transatlantic alliances such as United Airlines/Lufthansa/SAS and KLM/Northwest, but it has had to rely on the cooperation of national enforcement authorities; see also European Commission Communication, *supra* note 23, at 6 (regretting insufficient legal certainty because the Commission "does not have the same effective competition enforcement powers in the field of international traffic to and from the EU as it has for internal EU air transport").

<sup>61</sup> See Henri Wassenbergh, *June 5, 2003, A Historic Decision by the EU Council of Transport Ministers* [unpublished paper, on file with author], at 1 (noting that the European Union is not a sovereign state and the Commission is not its government). Because the Court's ruling portrays areas of shared EU competence as well as exclusive EU competence, Wassenbergh expects member states to join with EU representatives in creating so-called "mixed" agreements. See *id.* at 1-2. For Wassenbergh, "'exclusive competence' only means that only the [EU] can regulate the subject concerned, i.e. the [EU] has to approve the result of negotiations by a [member state] on such subject; it does not mean that only the [EU] may negotiate the subject." *Id.* at 4 (emphasis in original). "Mixed competence," on the other hand, "means that the [EU] and the [member state] together may

regulate, and therefore also together negotiate on the subject(s) of the mixed competence," and here the European Union "has to co-approve the result of negotiations," "while all the [member states] have to ratify the result." *Id.* at Wassenbergh takes the view that there will be two steps to bring third country agreements into effect: Council approval followed by "ratification in conformity with the national legislations [*sic*] of the [m]ember [s]tates." *Id.* at 5.

<sup>62</sup> See EUROPEAN COCKPIT ASSOCIATION, A CONTRIBUTION BY THE EUROPEAN COCKPIT ASSOCIATION [TO THE EUROPEAN COMMISSION COMMUNICATION OF 5 NOVEMBER 2002] (Dec. 19, 2002), at 3-4 (calling for a "social dialogue" on the potentially disruptive social and economic sequences of an EU external aviation policy, including bankruptcies following the loss of the protection afforded by the nationality clauses). The European Cockpit Association, which represents EU airline pilots, also criticizes a lack of harmonization in the social, fiscal, and safety fields, which has created obstacles to the smooth functioning of the internal single aviation market. *Id.* at 5. Some "transnational" airlines, the Association argues, have been able to reduce operating costs by being registered and establishing employment contracts in a country other than their place of permanent operations. "Given the existing differences in relation to fiscal and social costs, but also certain operational requirements across European Union countries, there are clearly possible disruptions to competition between airlines." *Id.* at 5. Thus, "two operators registered in two different countries can operate today from the same European airport under different flight and duty time limitation schemes for aircrews." *Ibid.*

<sup>63</sup> The European Council of Ministers evidently feared in 1995 that emerging transatlantic collaborations of would-be competitors might allow a select group of EU and U.S. carriers, cannibalizing each other's airline codes, to oligopolize international competition across the Atlantic. And, within the European Union's single aviation market itself, similar strategies could enable U.S. carriers to enhance their existing fifth freedom penetration (*but see supra* notes 23 and 24). See generally European Commission, Airline Agreements, Background File for the Press, July 3, 1996, at 3 (copy on file with the Library of the EU Delegation, Washington DC).

<sup>64</sup> Despite the resistance of the U.K. government to *any* grant of supranational negotiating competence to the Commission, the EU's transport ministers approved a compromise in June 1996 that attracted the support of (at that time) other entrenched large-state bilateralists such as France and Spain. The United Kingdom was the only dissenting vote. *European Union Approves Commission Mandate To Negotiate A Common Aviation Area With The United States*, EUROPEAN UNION NEWS, No. 35/96, June 17, 1996. The positive French vote, in contrast, was unexpected, but was reportedly linked to pending Commission approval of a final tranche of public capital aid for Air France. *Transport Ministers Near Agreement On Multilateral Talks With U.S.*, 6 AVIATION EUROPE, June 6, 1996, at 1. See generally Council of Ministers Press Release, *ref: pres/96/172*, June 17-18, 1996 [hereinafter Council of Ministers Press Release]. It

should be noted that the actual *content* of the approved mandate was never made public. Any assessment of its substance had to be drawn from the opaque diplomatic language of EU press statements, and from secondary news sources. Moreover, despite the phased nature of negotiations suggested by the first stage/second stage timetable, it is understood that the talks which did take place had no *a priori* restriction of the issues that were canvassed.

<sup>65</sup> In particular, the mandate would examine the benefits that might flow from a harmonization of EU and U.S. regulations dealing with airline ownership, computer reservations systems, slot allocation, code-sharing, competition, ground-handling services, safety and security. The issue of public capital assistance to EU national airlines would also be considered. There was no indication, however, that the mandate contemplated a complete liberalization of ownership restrictions, only an elevation of the permitted quantum of foreign ownership of U.S. airlines to the prevailing EU standard of 49.9 percent. See *Commission's Multilateralism Mandate Comes In Phases, May Be Too Late*, 6 AVIATION EUROPE, June 20, 1996.

<sup>66</sup> See Council of Ministers Press Release, *supra* note 65. The second cycle was never formally reached.

<sup>67</sup> It is worth noting here that the split mandate ordained explicitly that existing—and even future—bilateral arrangements between EU member states and the United States would continue to be tolerated. "The present bilateral systems of relations between [member s]tates and the [United States] will be maintained and kept working until an agreement on a Common Aviation Area is in place. In the meantime, [member s]tates will be able to open or pursue negotiations and conclude bilateral agreements with the [United States]." Council of Ministers Press Release, *supra* note 65 (emphasis added). In other words, the Commission's task—even in the more plenary second stage, apparently—would have been to secure some undefined "added value" that lay beyond the grasp of bilateral negotiators. Commission Press Release *ref.* IP 96-520, June 18, 1996. Thus, even after the so-called "Common Aviation Area" had been put in place, and new bilateral negotiations were presumably halted, an existing bilateral agreement that varied from the joint negotiated position would prevail if its provisions were more "favorable." Council of Ministers Press Release, *supra* note 65. The 2003 mandates make no such assumptions.

<sup>68</sup> There was a glaring potential for acrimony in the proposed arrangements, at least under the prevailing Chicago system, that has been resolved in 2003 (apparently) by aeropolitical power rather than principle. If the Council intended to grant competence to the Commission to grant *all* extra-Union traffic rights, and to distribute these rights without discrimination to all EU carriers, this attribution of competence *would* necessarily be in conflict with existing U.S./member state bilateral treaties (and all other third country bilaterals), which restrict traffic rights to carriers that are nationals of the parties to the treaty—and which must be, in that specific sense, more "favorable" to each member state than any collective imposition of rights (see *supra* note 68). The Council's press

release did not identify any "favorable" provisions in bilateral agreements that would continue to apply despite a common U.S./EU accord. Council of Ministers Press Release, *supra* note 65. Arguably, for example, the European Commission might successfully negotiate "cabotage" access to the United States for all EU airlines, while retaining the existing bilateral system of traffic rights exchanged by each member state with the United States (which are awarded exclusively to each party's national airlines). Although certainly an example of "added value," see *supra* note 68, that outcome would offer U.S. airlines much more flexibility to access the EU market than EU carriers would have in providing services to the United States. EU carriers would still be restricted to direct services from their homelands, a competition-depleting arrangement that would appeal only to weaker EU carriers.

<sup>69</sup> What actually transpired after grant of the original mandate was a series of informal consultations between EU and U.S. aviation officials that lasted several years. See INTERNATIONAL AIR CARRIER ASSOCIATION, TOWARDS REGULATORY CONVERGENCE: AN IACA VIEW (June 2001) (noting U.S./EU aviation discussions held on October 30/31, 1996, April 3, 1997, and May 31, 2001). No formal agreements, however, were ever concluded. See generally European Commission Communication, *supra* note 23, at 5.

<sup>70</sup> Council of Ministers Press Release, *supra* note 65.

<sup>71</sup> See, e.g., International Air Transport Association, *Airline Views on Liberalizing Ownership and Control*, Paper Prepared for the March 2003 ICAO Worldwide Conference: Challenges and Opportunities of Liberalization, ATConf./5-WP26 (Dec. 16, 2002); International Civil Aviation Organization Secretariat, *Liberalizing Air Carrier Ownership and Control*, Paper Prepared for the March 2003 Worldwide Air Transport Conference: Challenges and Opportunities of Liberalization, ATConf./5-WP/7 (Oct. 21, 2002).

<sup>72</sup> In the waning days of the Clinton Administration, for example, the United States sponsored a new Multilateral Agreement on the Liberalization of Air Transportation which was announced at Bandar Seri Begawan, Brunei, on November 15, 2000, and signed at Washington, D.C., on May 1, 2001. Multilateral Agreement on the Liberalization of International Air Transportation, Nov. 15, 2000, 3 AV. L. REP. (CCH) ¶ 26,018, at 21,121 (2000); for the complete text of the Agreement, and of a Protocol also signed at Washington on May 1, 2001 (among Brunei Darussalam, New Zealand, and Singapore), see <http://www.maliat.govt.nz>. New Zealand is the depositary state for the Agreement and the Protocol. This agreement, which entered into force on December 21, 2001, was designed as an attempt to relaunch the open skies initiative multilaterally. The pact includes the United States and Asian-Pacific Economic Cooperation (APEC) partners Brunei, Chile, New Zealand, and Singapore. U.S. Department of Transportation, Press Release, *Transportation Secretary Slater on Open Skies Agreement*, DOT 222-00 (Nov. 15, 2000). Despite the exultant tone of U.S. Transportation Secretary Slater's accompanying press statement, the new agreement essentially stitches together the content of the individual bilateral open



skies agreements and applies it multilaterally. Thus, misleadingly the statement describes the new agreement as a "mirror" of the "enormously successful U.S. Open-Skies [*sic*] bilateral agreements," and expresses the hope that the new agreement "increases the odds that the U.S. Open-Skies [*sic*] approach will become the international standard." *Id* Nevertheless, although the cabotage restriction remains, the agreement does modify the traditional test of "substantial ownership" in favor of a more pliant standard of "effective control" by citizens of the designating party accompanied by incorporation and principal place of business in the state of the designating party. Multilateral Agreement on the Liberalization of International Air Transportation, art. 3.2(a), (b), 4.2(a), (b).2.a, c; see Shane Address, *supra* note 28, at 6.

<sup>73</sup> U.S. AIRLINE COMMISSION REPORT, *supra* note 14, at 21-23. The Report uses the term "multi-national" [*sic*], a word that resonates with the notion of global commercial enterprises, beginning with the huge American business corporations that dominated at midcentury. See ROBERT B. REICH, *THE WORK OF NATIONS* 65-66 (1992). The choice of word is intriguing; the Commission spoke positively in its deliberations, and in its final report, of the notion of ownership of airline carriers by nationals of one or more countries. That airline companies, too, will become "multinationals" would seem an inevitable consequence of true multilateralism.

<sup>74</sup> U.S. AIRLINE COMMISSION REPORT, *supra* note 14, at 22. For commentary on the U.S. Department of Transportation statement, see *supra* text accompanying note 12.

<sup>75</sup> *Id.* (recommending ceiling of 49 percent). Even the (second) Bush Administration, often portrayed as jingoistic and reactionary in these matters, has kept faith with earlier liberal initiatives by asking Congress in 2003 to follow Europe's lead by raising the foreign voting stock ownership cap to 49 percent from 25 percent. See Air Transport Association, News Release, *Statement on Foreign Ownership of U.S. Carriers*, June 13, 2003.

<sup>76</sup> U.S. AIRLINE COMMISSION REPORT, *supra* note 14, at 22. This proposal (like the Bush Administration proposal mentioned in note 76, *supra*) would require amendment of the U.S. Federal Aviation Act, which currently imposes a 25 percent cap on foreign ownership of the voting stock of U.S. airlines. Because only airlines that are owned and controlled by American citizens can legally offer domestic point-to-point service in the United States or be designated under U.S. bilateral agreements to provide international service from the United States, the practical effect of the ownership rule is to remove any incentive for a U.S. airline to sell itself to a foreign carrier and thereby forfeit its economic heritage. It appears that nothing in the federal aviation statutes would actually *prevent* such a sale; it is the citizenship consequences which constrain it. See F. Allen Bliss, *Rethinking Restrictions on Cabotage: Moving to Free Trade in Passenger Aviation*, 17 SUFFOLK TRANSNAT'L L. REV. 382, 399-401 (1994).

<sup>77</sup> Though not treated further in this Article, it is important to recognize that the European Commission already envisages, and has done much to implement, a

"European" Common Aviation Area comprising the member states, the current accession candidates, some future accession states, as well as the European Economic Area members and Switzerland. European Commission Communication, *supra* note 23, at 5. Switzerland and the European Union signed a sweeping free trade package, including provisions on air transport, that Swiss voters approved by referendum in May 2000. As explained by a Swiss government website, the new package "defines the terms by which Swiss airlines will be allowed access to the deregulated civil aviation market on a reciprocal basis. The gradual acquisition of transport rights and the prohibiting of discrimination will put Swiss airlines virtually on an equal footing with the [airline] companies of Europe, making it possible for them to become majority shareholders in other EU airlines." The agreement entered into force on June 1, 2002. Agreement between the European Community and the Swiss Confederation on Air Transport, 7810/00 FINAL, June 11 1999. Among other things, Article 4 of the Agreement provides that Swiss-owned airlines will have freedom of establishment in all EU member states, while Article 15, concerned with traffic rights, envisages the eventual abolition of cabotage restrictions as between Switzerland and the EU member states. (In April 2001, despite the momentum generated by the new package, the Swiss people, again using the device of popular referendum, overwhelmingly rejected the opening of talks leading to membership of the European Union, although the matter is likely to recur in national policy debates.)

<sup>78</sup> As of May 1, 2004, ten additional states have joined the European Union. Those states are the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia.

<sup>79</sup> Although in a strict legal and constitutional sense the Union is the overarching constitutional fusion of three separate "Communities," including the engine of the member states' *economic* integration, the European Community (EC, formerly the European Economic Community), constant alternation of the terms "EU" and "EC" seems to inspire confusion and annoyance rather than clarity. With few exceptions, I chose to use the term "EU" or "European Union" throughout the present text.

<sup>80</sup> BRIAN F. HAVEL, *IN SEARCH OF OPEN SKIES: LAW AND POLICY FOR A NEW ERA IN INTERNATIONAL AVIATION* 14 (1st ed., 1997).

<sup>81</sup> See generally HAVEL, *supra* note 81, at 399 *et seq.*

[The next page is 13,085.]