

U.S.–EU SECOND STAGE AIR TRANSPORT AGREEMENT:
TOWARD AN OPEN AVIATION AREA

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I. INTRODUCTION

With the passing of Dean Gabriel M. Wilner, the University of Georgia School of Law, the American Society of International Law, and the international law community at large lost a great scholar and friend. I worked with Dean Wilner over the years on many issues involving various aspects of international law, none, however, as special as the conference we held in 2003 for the Dean Rusk Center. This conference, *The Trans-Atlantic Relationship – Aviation Policy: Clearing the Way to a More Open Market*,¹ was a remarkable gathering of leading experts in the field of aviation from the private, public, and academic sectors. We spent three exciting days discussing aviation liberalization. Realizing the importance of the transatlantic relationship to both the United States and Europe, the conference strove to move the argument of aviation liberalization forward. In large part due to Dean Wilner's efforts, I think the conference was a great success.

Several years later, some of the same experts in attendance at the conference were successful in reaching the historic U.S.–EU Air Transport Agreement on April 30, 2007 (the 2007 Agreement).² This Agreement, which culminated four years of sometimes contentious negotiations between the two parties, reduced restrictions on flights between the United States and the European Union, promoted the efficiency of European operators by permitting mergers among them, and overrode all existing bilateral aviation treaties between individual members of the European Union and the United States. The 2007 Agreement was a monumental step toward eventual worldwide open skies, although next steps remained to be resolved. Merely three years later, in March 2010, the same parties signed a Memorandum of Consultation, further advancing liberalization in the trans-Atlantic aviation market.³

¹ GABRIEL WILNER ET AL., *THE TRANS-ATLANTIC RELATIONSHIP—AVIATION POLICY: CLEARING THE WAY TO A MORE OPEN MARKET* (2003), available at http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1002&context=rusk_oc.

² Air Transport Agreement, U.S.–EU, Apr. 30, 2007, 46 I.L.M. 470 [hereinafter 2007 Agreement]. A copy of the U.S.–EU Agreement, along with other significant documents concerning negotiations, is available at *Air Transport Agreements, E*, U.S. DEP'T OF STATE, <http://www.state.gov/e/eeb/rls/othr/ata/e/> (last visited Aug. 20, 2011).

³ Memorandum of Consultations on a Protocol to Amend the Air Transp. Agreement Between the U.S. and the European Cmty. and Its Member States (Mar. 25, 2010) [hereinafter 2010 Agreement], available at <http://www.state.gov/documents/organization/139411.pdf>.

Dean Wilner was proud of the part the Dean Rusk Center played in helping to advance the cause of international aviation liberalization. This Article is dedicated to my mentor, colleague, and good friend, Gabriel Wilner.

In this Article I will show that international air transport systems play a key role in modern economies, and the U.S.–EU trans-Atlantic market has always been a market leader. To this end I will: provide a brief historical background of the aviation industry; discuss how bilateral agreements for air transport came about and the industry's move toward open skies agreements; discuss the United States' open skies history; explain the U.S.–EU Open Skies Agreement, its two phases, and the role of the Joint Committee; discuss the U.S. foreign ownership and control rules for air carriers and the impediments to an open aviation area; review the current status of the foreign ownership and control issue; and review some of the industry's commentators' solutions for obstacles to deeper liberalization, including a discussion of labor and security issues.

II. HISTORICAL BACKGROUND

Despite the relatively rapid commercial and technological development of aviation, most officials, scholars, and practitioners will acknowledge that the governance of international air commerce remains stuck in the past, operating under rules established in the aftermath of World War II when trans-oceanic flight became commercially viable. This paradox has led to much frustration over the past two decades and has often stymied air service liberalization. This frustration is perhaps best summarized in a 2006 study of the economic impact of air service liberalization:

Despite today's trend toward global markets, free trade, the Internet, and the economic integration of entire continents, one of the most globalized, technology-intensive industries remains encumbered by rules that stifle competition and prevent airlines, communities, passengers, and shippers from benefiting to the fullest. The "bilateral air service agreements" (ASAs) that continue to govern much of world trade in aviation define the terms under which airlines will link their two home territories.

These ASAs often frustrate market growth, force users to pay a price premium, and create a series of vested interests.⁴

In the early years of aviation's history under government regulation, many in the aviation industry believed that federal regulation was necessary for the safety of air transportation and to develop and maintain economic standards (i.e., fair competition). After World War II, commercial air travel rapidly increased and, accordingly, the U.S. and European governments organized regulatory agencies to manage and oversee a growing aviation industry. On the U.S. side of the Atlantic, there was a more developed commercial air carrier industry while European air carriers tended to be government-owned and focused. Also, at the time, the United States took the fairly unique position that the nascent civil air transportation system was a matter of public interest. Even though the U.S. Civil Aeronautics Board (CAB), predecessor to the Federal Aviation Administration (FAA), was primarily concerned with economic regulation during this era, "there was equal official concern that the system provide safe, affordable and broadly available services to the American public."⁵

In 1944, the United States and its European allies began planning for post-war civil aviation. International regulation of air transport began with the establishment of the 1944 Convention on International Civil Aviation.⁶ That convention, known as the Chicago Convention, established a specialized agency of the United Nations, the International Civil Aviation Organization (ICAO), to promote the orderly growth and development of international air transport. The Chicago Convention established a multilateral framework for creating global procedural, technical, and safety standards. However, with many nations struggling to rebuild their post-Depression and post-war economies, language subject to broad interpretation and protectionist elements were incorporated into the Chicago Convention.

⁴ INTERVISTAS-GA² CONSULTING, INC., THE ECONOMIC IMPACT OF AIR SERVICE LIBERALIZATION ES-3 (2006) [hereinafter INTERVISTAS-GA²], available at http://www.intervistas.com/downloads/reports/20060607_EconomicImpactOfAirServiceLiberalization_FinalReport.pdf.

⁵ BOOZ ET AL., THE ECONOMIC IMPACTS OF AN OPEN AVIATION AREA BETWEEN THE EU AND THE US 8 (2007), available at http://ec.europa.eu/transport/air/international_aviation/country_index/doc/final_report_us_bah.pdf.

⁶ Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention], available at http://www.icao.int/icaonet/arch/doc/7300/7300_orig.pdf.

For example, while the United States argued for liberal aviation rights (which ultimately were not agreed to by other states), U.S. negotiators continued to insist on strict ownership and control laws for U.S. air carriers. The Air Commerce Act of 1926 required that all aircraft registered in the United States be owned and controlled by a citizen of the United States.⁷ In 1938, Congress passed the Civil Aeronautics Act that further restricted foreign ownership of U.S. air carriers.⁸ Since this time U.S. ownership and control restrictions evolved little and continue to be a source of friction between the United States and EU. While the United States has aggressively pursued Open Skies agreements worldwide, a major focus of this Article will be the debate over foreign ownership and control of air carriers as a remaining major roadblock toward a trans-Atlantic Open Aviation Area.

A. The 1944 Chicago Convention and Emergence of Bilateral Agreements

Overall, the Chicago Convention contemplated that governments would exchange scheduled international air transport rights through ASAs. In other words, the Chicago Convention held that no scheduled international air service may be operated over or into the territory of another contracting state without their express permission.⁹ Based on this legal framework, government-to-government ASAs proliferated, regulating everything from routes and frequencies to fares and ownership. These agreements most often required the two governments to agree on terms such as routes serviced between the two countries, approvals for pricing by the air carriers, any fifth freedom rights,¹⁰ and ownership and control nationality requirements.

The Bermuda I bilateral, signed by the United States and the United Kingdom in 1946, was the historical model for bilateral agreements.¹¹ It established a precedent for the signing of approximately 3,000 other ASAs worldwide. Under Bermuda I, delegates from the United States and Great Britain—at the time the two largest carriers of civilian air traffic—attempted

⁷ Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568.

⁸ Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973.

⁹ Chicago Convention, *supra* note 6, art. 6.

¹⁰ Fifth freedom rights allow an air carrier to transport passengers from a country other than the air carrier's home country to a third country on routes originating or ending in the home country. For a brief description of what are generally described as aviation "freedom rights" see *Freedom Rights*, OFFICE OF THE ASSISTANT SEC'Y FOR AVIATION AND INT'L AFFAIRS, <http://ostpxweb.dot.gov/aviation/Data/freedoms.htm> (last visited Aug. 20, 2011).

¹¹ Air Services Agreement, U.S.-U.K., Feb. 11, 1946, 60 Stat. 1499.

to resolve issues remaining from the 1944 Chicago meeting where the parties only agreed upon the first two “freedoms” of civil air transport.¹² Under Bermuda I, the parties agreed to accept the third, fourth, and fifth freedom rights, which had not been agreed to by the parties to the Chicago Convention.¹³

The agreement specified the routes between the United States and Great Britain that the carriers of both countries and fifth freedom rights could serve. Carriers were free to set capacities and determine flight frequencies within the limits of the agreement. Finally, carrier prices were set through the International Air Transport Association (IATA), subject to the approval of both governments.

Great Britain unilaterally terminated the Berlin I agreement in 1976, replacing it with the Bermuda II agreement in 1977, which had more restrictive provisions.¹⁴ Instead of allowing airlines to determine capacities and flight frequencies on permitted routes, the Bermuda II agreement returned to a much less liberal arrangement where the two governments determined capacities for the carriers. It also restricted the number of airport gateways in the United States to be served directly from London Heathrow airport. At the same time, it permitted non-scheduled airlines to operate between the two countries, using other airports, particularly the relatively new airport at Gatwick.¹⁵ Finally, fifth freedom rights were substantially more restricted under Bermuda II.

¹² See International Air Transport Agreement, *opened for signature* Dec. 7, 1944, 59 Stat. 1701, 171 U.N.T.S. 387, available at <http://www.mcgill.ca/files/iasl/chicago1944b.pdf>. First freedom is the right to fly over the territory of another country. Second freedom is the right to land for essential repairs, refueling, or to escape adverse weather conditions in another country. These rights, along with fifth freedom rights, are often referred to as “transit” rights. *Freedoms of the Air*, INT’L CIVIL AVIATION ORG., http://legacy.icao.int/icao/en/trivia/freedom_s_air.htm (last visited Aug. 20, 2011).

¹³ Third freedom right allows an air carrier to transport passengers and cargo from the airline’s home country to discharge them at another country. Fourth freedom right allows an air carrier to transport passengers from another country to the airline’s home country. These rights are often referred to as “traffic” rights, and are typically simultaneously granted. *Freedoms of the Air*, *supra* note 12.

¹⁴ Agreement Concerning Air Services, U.S.-U.K., July 23, 1977, 28 U.S.T. 5367.

¹⁵ *Id.*

B. The Movement Toward "Open Skies" Agreements

With deregulation of the airline industry in the United States in 1978,¹⁶ the U.S. government and U.S. air carriers entered into a period of often-uneasy efforts to liberalize access to international markets by way of ASAs. While the Belgium,¹⁷ Netherlands,¹⁸ and Germany¹⁹ protocols were quickly adopted in 1978, removing many restrictions with these two European partners, further negotiating efforts were limited. These early post-deregulation bilateral agreements differed from the Bermuda I and Bermuda II agreements in several significant areas:

First, they undermined the price-fixing authority of IATA by allowing individual carriers to set prices with minimal government oversight. Second, they specified a much wider system of routes permitted between the two signatory countries, typically allowing any possible third or fourth freedom route. Third, they permitted carriers to fly extensive fifth freedom routes, subject to third country approval (i.e., fifth freedom routes begin or end in a third country and this third country's approval is required for the route to be operated).²⁰

These early bilateral agreements are viewed as the precursor to the Open Skies agreements that the United States began to negotiate in the 1990s.²¹ Air transportation plays a vital role in supporting and growing the economies of nations, and never more so than in the last decade of the twentieth century where technological advancements extended the range of aircraft, and air travel became more readily available worldwide. Aviation helped lead the

¹⁶ Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered section of 18, 26, and 49 U.S.C.).

¹⁷ Protocol Between the Government of the United States of America and the Government of Belgium Relating to Air Transport, U.S.-Belg., Dec. 12-14, 1978, 30 U.S.T. 617.

¹⁸ Protocol Relating to the United States-Netherlands Air Transport Agreement of 1957, U.S.-Neth., Mar. 31, 1978, 29 U.S.T. 3088.

¹⁹ Protocol Relating to the United States of America—Federal Republic of Germany Air Transport Agreement of 1955, U.S.-Ger., Nov. 1, 1978, 30 U.S.T. 7323.

²⁰ Christian Hofer & Martin Dresner, *The United States-European Union Open Aviation Area: The American Perspective*, 46 J. TRANSP. RES. F., 129, 130 (2007), available at <http://journals.oregondigital.org/trforum/article/download/1001/896>.

²¹ Dep't of Transp., Defining "Open Skies," DOT Order 92-8-13, Docket No. 48130 (Aug. 5, 1992).

way to the “globalization” of world trade, travel, and economic development, and the globalized world economy now depends to a large degree on an increasingly efficient and available international air transportation system. The United States’ Open Skies policy has gone hand in hand with airline and air transportation globalization.

Open Skies agreements establish liberal rules and regulations for international aviation markets and focus government intervention on areas that require regulations, such as safety, security, environment, and consumer protection. Typically, provisions in these agreements apply to passenger and cargo transportation and cover both scheduled and charter air services. Key provisions in an Open Skies agreement include:

- (1) *Free Market Competition*—No restrictions on international route rights; number of designated airlines; capacity; frequencies; or types of aircraft.
- (2) *Pricing Determined by Market Forces*—A fare can be disallowed only if both governments concur (“double-disapproval pricing”) and only for certain, specified reasons intended to ensure competition.
- (3) *Doing Business Protections*—For example:
 - All carriers of both countries may establish sales offices in the other country, and convert earnings and remit them promptly and without restrictions.
 - Carriers are free to provide their own ground-handling services (“self-handling”) or choose among competing providers. Airlines and cargo consolidators may arrange ground transport of air cargo and are guaranteed access to customs services.
 - User charges are non-discriminatory and based on costs.
- (4) *Cooperative Marketing Arrangements*—Airlines may enter into code-sharing or leasing arrangements with airlines of either country, or with those of third countries. An optional provision authorizes code-sharing between airlines and surface transportation companies.
- (5) *Provisions for Consultation and Arbitration*—Model text includes procedures for resolving differences that arise under the agreement.

- (6) *Liberal Charter Arrangements*—Carriers may choose to operate under the charter regulations of either country.
- (7) *Safety and Security*—Each government agrees to observe high standards of aviation safety and security, and to render assistance to the other in certain circumstances.
- (8) *Optional 7th Freedom All-Cargo Rights*—Provides authority for an airline of one country to operate all-cargo services between the other country and a third country, via flights that are not linked to its homeland.²²

In order to advance its international aviation policy, the U.S. Department of Transportation (DOT or Department) announced in 1995 that it would seek liberalized aviation agreements with European countries and other partners to provide for open entry on all air routes, unrestricted capacity and frequency on all such routes, open rights to introduce air service between any point in the United States and any point in the partner country, the rights of airlines to price their products and services without government restrictions, code-sharing arrangements, as well as liberal cargo and charter rights.²³

The United States currently has Open Skies agreements with over 100 countries.²⁴

It is the policy of the United States that fully open airline markets will provide the most competitive and price-sensitive service for consumers. As a result, it is the Department's policy in international negotiations to seek agreements that do not limit the number of carriers that may serve, the capacity that they offer, or the prices that they charge.²⁵

²² *Open Skies Agreement Highlights*, U.S. DEP'T OF STATE (Jan. 30, 2009), <http://www.state.gov/e/eeb/rls/fs/2009/119760.htm>.

²³ Statement of United States International Air Transportation Policy, 60 Fed. Reg. 21,841-01 (May 3, 1995).

²⁴ *Open Skies Partners*, U.S. DEP'T OF STATE (Apr. 18, 2011), <http://www.state.gov/e/eeb/rls/othr/ata/114805.htm>.

²⁵ *International Issues*, U.S. DEP'T OF TRANSP., <http://ostpxweb.dot.gov/aviation/intlaffairs.htm> (last visited Aug. 20, 2011); see also Hofer & Dresner, *supra* note 20 ("As a result of the open skies agreements, United States airlines enjoy largely unrestricted access to most transatlantic aviation markets.").

C. Development of U.S.–EU Open Skies Agreements

Included among existing Open Skies agreements negotiated in the 1990s were sixteen agreements between the United States and individual European governments, thus distinguishing the importance of an open transatlantic aviation market.²⁶ Clearly, the United States' relationship with our European allies has historically been significant. Over the years it has evolved into a close commercial and political relationship, and the United States and EU have become each other's largest trade and investment partners.²⁷ Aviation is key to the success of these transatlantic relationships.

Since the easing of the restrictive Bermuda II agreement in 1995, with the opening of routes between the U.S. and U.K. regional airports, air carriers from both the United States and Great Britain have seen an expansion of air services and traffic; consequently, the economic benefits have been significant.²⁸ Furthermore, the 1992 EU Regulation that in essence finalized the Single European Aviation market,²⁹ significantly increased intra-European air traffic and encouraged investment in new services and low-cost air carriers.³⁰ The U.S. and EU air transport markets represent the two largest air transport markets in the world. The U.S. air transport market is the largest in the world, with the EU representing the second largest market.

²⁶ See *Air Transport Agreements*, U.S. DEP'T OF STATE, <http://www.state.gov/e/eeb/rls/othr/ata/index.htm> (last visited Aug. 20, 2011) (listing individual agreements). As of 2007 and the signing of the 2007 Agreement, ten member states still had no Open Skies agreements with the United States. These ten member states were: Cyprus, Estonia, Greece, Hungary, Ireland, Latvia, Lithuania, Slovenia, Spain, and the United Kingdom.

²⁷ *European Union*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/countries-regions/Europe-middle-east/Europe/European-union> (last visited Aug. 20, 2011).

²⁸ See INTERVISTAS-GA², *supra* note 4, at 14 (noting a “strong causal relationship between liberalization, air service improvement, and international traffic”).

²⁹ Council Regulation 2409/92, 1992 O.J. (L 240) (EC) (noting that aviation liberalization and the creation of one market occurred over a period of years and that “Council Decision 87/601/EEC of 14 December 1987 on fares for scheduled air services between Member States(4) and Council Regulation (EEC) No 2342/90 of 24 July 1990 on fares for scheduled air services(5) constitute the first steps towards achieving the internal market in respect of air fares”). While these documents directly led to the creation of the Single Aviation Market, preceding them is the Single European Act which committed Member states to the establishment of a single internal market comprising “an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured” by December 31, 1992. *Id.*

³⁰ See INTERVISTAS-GA², *supra* note 4, at 15–16 (noting the regional impact and value added).

In 2010, the U.S. market carried over 787 million passengers,³¹ and the EU market carried over 796 million passengers,³² and, the traffic between the two markets is around 57 million passengers and forecast to continue to grow.³³ Furthermore, IATA forecasts that the North America market will make up 25% of all scheduled air services and the EU market 24% in 2011.³⁴

In addition to passenger services, the U.S.–EU aviation market encompasses the most advanced air cargo network in the world. Combined, the U.S. and EU freight fleets account for more than 71% of the world total.³⁵ The commodities traded via the U.S.–EU aviation market reveal a diverse trade of pharmaceuticals, technical equipment, aerospace products, semiconductors, and computer equipment.³⁶ In addition, code sharing³⁷ partnerships and airline alliances³⁸ between U.S. and EU air carriers have further strengthened this transatlantic aviation relationship.

Despite the positive effects of this piecemeal approach (i.e., individual bilateral agreements) with EU countries, liberalization efforts were hindered in December 1998 when the European Commission (EC or Commission) sued some of these countries before the European Court of Justice (ECJ), claiming that their Open Skies agreements improperly infringed on the European Community's (Community) jurisdiction. In particular, the Commission contended, and the ECJ agreed, that the bilateral treaties violate

³¹ *Passengers: All Carriers – All Airports*, RESEARCH AND INNOVATIVE TECH. ADMIN., BUREAU OF TRANSP. STATISTICS, http://www.transtats.bts.gov/Data_Elements.aspx?Data=1 (last visited Aug. 20, 2011).

³² *Air Transport of Passengers*, EUROSTAT, <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=ttr00012&plugin=1> (last visited Aug. 20, 2011).

³³ FED. AVIATION ADMIN., FAA AEROSPACE FORECAST FISCAL YEARS 2009–2025, at 71 (2011), available at http://www.faa.gov/data_research/aviation/aerospace_forecasts/2009-2025/media/Forecast%20Tables.pdf.

³⁴ INT'L AIR TRANSP. ASS'N, IATA ECONOMIC BRIEFING: PASSENGER AND FREIGHT FORECASTS 2007 TO 2011, at 2 (2007), available at http://www.iata.org/whatwedo/Documents/economics/traffic_forecast_2007_2011.pdf.

³⁵ BOOZ ET AL., *supra* note 5, at 41.

³⁶ *Id.* at 43.

³⁷ “Code sharing” is a term for the practice of multiple airlines selling space on the same flights, where a seat can be purchased on one airline but may actually be operated by a cooperating airline under a different flight number or airline code. 14 C.F.R. § 257.3 (2011).

³⁸ An “airline alliance” is an agreement between two or more airlines to cooperate on a substantial level where typically cost savings are realized by the air carriers, and air travelers benefit from lower costs and more choices. See Dep't of Transp., Joint Application of Northwest Airlines, Inc. and KLM Royal Dutch Airlines, DOT Order 93-1-11, Docket 48342 (Jan. 11, 1993) (example of airline alliance); see also 49 U.S.C. §§ 41308, 41309.

EC transport regulations.³⁹ The EC transport regulations created a complete set of Community rules for the internal air transportation market, including regulations on licensing of air carriers,⁴⁰ access to intra-Community air routes,⁴¹ and fares and rates for air services.⁴² The ECJ found that nationality clauses, which created exclusive market rights for treaty member countries, led to illegal discrimination by precluding airlines from other EU nations to enter the transatlantic market.⁴³

As a result of this decision, the European Council issued a mandate to the Commission to negotiate an agreement with the United States which covered all of the EU members (often referred to by the EU as an “Open Aviation Area”), and in October 2003, the United States and the EU opened what would eventually be successful but lengthy and often contentious negotiations to liberalize the transatlantic aviation market.

III. U.S.–EU OPEN SKIES AGREEMENT

Upon opening negotiations, John Byerly, the lead negotiator for the United States and Deputy Assistant Secretary for Transportation for the Department of State, stated that “a U.S.–EU agreement has the potential to alter fundamentally the framework for transatlantic and global aviation and provide the benefits of a market-oriented approach.”⁴⁴ When negotiations briefly broke down in 2004, the lead EU negotiator and Director of Air Transport Directorate for the European Commission, Daniel Calleja, agreed that any agreement would have global significance. He added:

³⁹ Taken together, the following cases are considered the “Open Skies Judgment”: Case C-466/98, *Comm’n v. United Kingdom*, 2002 E.C.R. I-09427; Case C-467/98, *Comm’n v. Denmark*, 2002 E.C.R. I-09519; Case C-468/98, *Comm’n v. Sweden*, 2002 E.C.R. I-09575; Case C-469/98, *Comm’n v. Finland*, 2002 E.C.R. I-09627; Case C-471/98, *Comm’n v. Belgium*, 2002 E.C.R. I-09681; Case C-472/98, *Comm’n v. Luxembourg*, 2002 E.C.R. I-09741; Case C-475/98, *Comm’n v. Austria*, 2002 E.C.R. I-09797; Case C-476/98, *Comm’n v. Germany*, 2002 E.C.R. I-09855.

⁴⁰ Council Regulation 2407/92, 1992 O.J. (L 240) 1.

⁴¹ Council Regulation 2408/92, 1992 O.J. (L 240) 8.

⁴² Council Regulation 2409/92, 1992 O.J. (L 240) 15.

⁴³ *See, e.g.*, *Comm’n v. United Kingdom*, 2002 E.C.R. I-09427; *Comm’n v. Denmark*, 2002 E.C.R. I-09519; *see also* U.S. GEN. ACCOUNTABILITY OFFICE, TRANSATLANTIC AVIATION: EFFECTS OF EASING RESTRICTIONS ON U.S.–EUROPEAN MARKETS (2004), available at <http://www.gao.gov/new.items/d04835.pdf>.

⁴⁴ *US & EU Hold Talks on Transatlantic Air Services Agreement*, AMCHAM NOR. (Oct. 7, 2010), <http://www.amcham.no/us--eu-hold-talks-on-transatlantic-air-services-agreement/678>.

Our negotiations are being followed with keen interest by other nations around the world because whatever we agree has the potential to set the benchmark for the future regulation of the international air transport industry. That is quite a responsibility. And that is why we must consider not only the level of, and conditions for, market opening that we wish to achieve between us, but also the level of market opening that we aim for worldwide.⁴⁵

Unfortunately, it would take over four years to reach any agreement. The desire of European carriers to have ownership and control rights in the United States, and the U.S. government's inability to grant that access, delayed and nearly derailed a final accord. Furthermore, the issue of foreign ownership and control of air carriers remained an unresolved and sensitive issue. The agreement was finally reached in 2007.

A. *First Stage Open Skies Agreement*⁴⁶

As approved on April 30, 2007, the 2007 Agreement replaced all existing bilateral agreements between the United States and EU Members.⁴⁷ The new agreement recognized one large European market and provided for every U.S. and every EU air carrier to:

- Fly between every city in the European Union and every city in the United States;⁴⁸
- Operate without restrictions on flights, routes, and aircraft;⁴⁹
- Set prices based on the market and without government interference,⁵⁰ and

⁴⁵ Daniel Calleja, Dir., Air Transp. European Comm'n, Address at the International Aviation Club (Nov. 16, 2004), available at <http://www.eurunion.org/News/speeches/2004/041116dc.htm>.

⁴⁶ In 2007, the author prepared a Note on this historic development for the American Society of International Law: Charles A. Hunnicutt, *Introductory Note on US-EU Open Skies Agreement*, 46 I.L.M. 467 (2007).

⁴⁷ While approved in 2007, the agreement has only been applied since March 30, 2008. 2007 Agreement, *supra* note 2, art. 25.

⁴⁸ *Id.* art. 3, para. 1(a).

⁴⁹ *Id.* para. 1(b).

- Enter into cooperative agreements between airlines, regardless of country of operation.⁵¹

The new provisions were expected to have several key effects on the trans-Atlantic aviation environment. By doing away with traditional bilateral agreements, for the first time every European airline would be able to fly from any city in Europe to any city in the United States—irrespective of that airline’s country of origin. These rights have provided consumers with more price and service options.⁵²

The 2007 Agreement has also facilitated needed consolidation in the European airline industry by allowing European airlines to merge or acquire other airlines without compromising their U.S. routes. Additionally, the 2007 Agreement established a Joint Committee to meet at least once per year to ensure its implementation, resolve any disputes arising from the 2007 Agreement, and recommend areas for further development or amendment thereto.⁵³ To date, the Joint Committee has met eight times and discussed specific or technical issues covered by the 2007 Agreement, including safety, security, and legal issues (e.g., discussion of aviation security measures in light of the December 25, 2009, attempted passenger bomb, updates of court decisions and regulatory rule-makings, and review of reports by working groups of the Committee, most notably the Legal Working Group regarding the conditions and procedures for “accession” by Iceland and Norway to the Agreement). A more detailed discussion of the Joint Committee is set forth in Part IV.

Finally, the 2007 Agreement opened London Heathrow Airport to all airlines; this was potentially the most important and lucrative effect of the negotiations. In doing so, the United States finally achieved an end to the restrictive provisions of the Bermuda II Agreement by opening Heathrow Airport to all U.S. air carriers from any U.S. city. In return, the EU succeeded in obtaining U.S. recognition of European air carriers as

⁵⁰ *Id.* art. 13, para. 1.

⁵¹ *Id.* art. 10, para. 1.

⁵² *See, e.g.*, U.S. Dep’t of Transp., Office of the Sec’y, Notice of United Air Lines, Inc. and Aer Lingus Limited of Additional Code-Share Service, Docket 2008-0176 (Feb. 17, 2009). Aer Lingus received approval to offer daily service between Washington Dulles Airport and Madrid, Spain, beginning March 28, 2010. Aer Lingus, United Airlines Code Share Agreement (Jan. 7, 2010), available at http://www.aerlingus.com/aboutus/investorrelations/pressreleases/2010pressreleases/UA_070109_FINAL.pdf.

⁵³ U.S. Dep’t of Transp., *supra* note 52, art. 18.

“Community Airlines” owned by Europeans with the right to fly from any European city to any U.S. city.

Despite these positive effects, this initial agreement did not address some important issues for the trans-Atlantic relationship and for aviation agreements more broadly. Although the EU Commission pressed hard for greater liberalization of the U.S. domestic market throughout the negotiations, the United States was unable to address those concerns. Specifically, the United States rejected any attempt to reduce U.S. ownership and control laws pertaining to the ownership of U.S. air carriers. In the United States, foreign entities cannot control a U.S. carrier, nor can they own more than 25% of voting, or, pursuant to case law, 49% of total, shares in a U.S. carrier. EU restrictions limit foreign entities to owning no more than 49% of any shares in an EU carrier as long as a European company maintains effective control. This increasingly contentious issue is discussed in further detail in Part V.

Despite the historic significance of the 2007 Agreement, those key issues remained unresolved. Thus, as finalized, it called for the parties to initiate further meetings by May 2008 to negotiate a second stage agreement and further liberalize the aviation industry. If a second accord was not reached by 2010, the first stage agreement allowed either party to “suspend rights specified in [the 2007] Agreement.”⁵⁴

1. Joint Report on Trans-Atlantic Alliance Progress

On November 16, 2010, the Commission and the DOT issued a joint report titled, “Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches,”⁵⁵ which examined the competitive structures of the airline industries in Europe and the United States. The report finds that

the competitive structures of the airline industries are similar. Despite important differences in legal regimes, the report finds that there is scope for the Commission and DOT to work towards the promotion of compatible regulatory approaches, as

⁵⁴ 2007 Agreement, *supra* note 2, art. 21.

⁵⁵ U.S. DEP'T OF TRANSP., TRANSATLANTIC AIRLINE ALLIANCES: COMPETITIVE ISSUES AND REGULATORY APPROACHES (2010), *available at* http://ostpxweb.dot.gov/aviation/X-50Role_files/JointAllianceReport.pdf.

specified in Annex 2 to the [2007] Agreement, to achieve pro-competitive outcomes for consumers and the airline industry.⁵⁶

Among its conclusions, the report found that the 2007 Agreement has increased competition in the transatlantic market:

The most immediate effect of the EU–U.S. Air Transport Agreement was to introduce more competition in transatlantic markets. The provisional implementation of the Agreement as of end of March 2008 led to capacity and structural changes. While overall capacity has decreased in the U.S.–EU market since 2007 likely due to economic conditions, there has been a diversification of services. On the U.S.–London Heathrow routes, departures are up 15.3% versus 2007 and overall seats have increased by 8.7%. Given the economy, new services on the U.S.–London Heathrow routes account for much of the changed landscape. Carriers now provide more frequencies and serve more destinations in the United States from London Heathrow.⁵⁷

The report also cites progress under the European nationality clause in the Agreement, which allows all EU airlines the right to operate from any point in the EU (i.e., even outside their home country) to the United States. It notes that both British Airways and, briefly, Air France, have operated routes to the United States from outside their home territories.⁵⁸

The report acknowledges that the formalization of cooperation on competition matters between the EU and the U.S. on aviation matters is another significant result of the 2007 Agreement:

Annex 2 to the Agreement allows for general exchange of views and experience between the two authorities and aims at *inter alia* reducing the potential conflicts in the application of

⁵⁶ Press Release, European Comm'n, Competition: European Commission and U.S. Department of Transportation Publish Report on Transatlantic Alliances (Nov. 16, 2010), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1511&format=PDF&aged=1&language=EN&guiLanguage=en>.

⁵⁷ U.S. DEP'T OF TRANSP., *supra* note 55, at 12 (footnote omitted).

⁵⁸ *Id.*

the competition regimes in the EU and U.S. and promoting compatible regulatory approaches through a better understanding of the methodologies, analytical techniques and remedies used in the respective competition reviews of the Commission and DOT.⁵⁹

The report concludes that cooperation on competitive matters is “fruitful.”⁶⁰

Given the significance of changes and new opportunities under the 2007 Agreement, its full effects still cannot be evaluated and it will likely take several more years for the market to fully adjust. With the positive progress cataloged in this report, the parties moved forward with the second stage negotiations for further liberalization of the market.

B. Second Stage Open Skies Agreement

Almost immediately after the United States and the European Union signed the 2007 Open Skies Agreement, negotiations began on further “second stage” liberalization efforts.⁶¹ On March 25, 2010, after eight rounds of negotiation, negotiators reached a second stage Agreement (2010 Agreement). The most immediate effect of this Agreement is that the parties agreed to make permanent the 2007 Agreement. Prior to this concession, Great Britain insisted on inserting a clause in the 2007 Agreement that would allow either party to suspend the terms of the Agreement unless certain issues (i.e., U.S. restrictions on foreign ownership) were addressed in the second stage negotiations.⁶² This “suspension clause” was removed from the 2010 Agreement; thus the rights agreed to in 2007 have become established.⁶³

As approved, the 2010 Agreement provides for further liberalization and cooperation in aviation security, safety, competition, and ease of travel. This agreement improves regulatory cooperation in the following areas:

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Second stage negotiations began in May 2008, less than sixty days after the first stage agreement came into effect. This timetable was foreseen in the first stage agreement, which established a detailed framework for the second stage negotiations, including a list of priority topics for discussion. 2007 Agreement, *supra* note 2, art. 21.

⁶² *Id.*

⁶³ 2010 Agreement, *supra* note 3, attachment B, art. 6 (replacing Article 21 of the 2007 Agreement).

- *Environmental*—Cooperation to address the local and global environmental challenges by fostering compatibility, consistency and avoiding duplication between their respective emission trading schemes. In addition, the parties have stated their commitment to cooperation on green technologies, fuels, and air traffic management innovation and to joint efforts in ICAO to address the climate change impact of international air services.⁶⁴
- *Security*—Further cooperation on aviation security via the Joint Committee with a goal of achieving maximum reliance on each party’s security measures and avoiding duplication. The cooperation will include coordinated responses to new threats and consultations prior to introducing additional measures, as well as a “reciprocal recognition of regulatory decisions.”⁶⁵
- *Fitness and Citizenship*—Under the 2010 Agreement, there will be reciprocal recognition of regulatory determinations with regards to air carrier fitness and citizenship. Thus, U.S. authorities will rely on EU Member states’ regulatory decisions that an EU air carrier is financially fit and European-owned when dealing with applications from EU air carriers.⁶⁶
- *U.S. Government Transportation*—Under the 2010 Agreement, EU air carriers will have the right previously restricted under the “Fly America” program, to sell tickets to contractors of the U.S. government and partial ability to transport U.S. government officials.⁶⁷

One historic breakthrough is an article in which both parties agree to be guided in the implementation of the full agreement in a manner that does not undermine labor rights. This is the first time that an air transport agreement includes an explicit commitment to high labor standards.⁶⁸ “The Parties

⁶⁴ *Id.* art. 3 (replacing Article 15 of the 2007 Agreement).

⁶⁵ *Id.* art. 5.

⁶⁶ *Id.* art. 2 (inserting a new Article 6 *bis* into the 2007 Agreement).

⁶⁷ *Id.* art. 7.

⁶⁸ *Id.* art. 4.

recognise the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards” and that any opportunities provided by the Agreement should not undermine labor standards, rights, or principles under each party’s laws.⁶⁹

Finally, the 2010 Agreement further extends the role of the U.S.–EU Joint Committee to include matters of aviation safety, air traffic management, passenger facilitation, and the mutual recognition of regulatory decisions.⁷⁰ The Joint Committee is also tasked with considering, as appropriate, “the conditions and procedures, including any necessary amendments to this Agreement, that would be required for additional third countries to accede to this Agreement.”⁷¹

The most controversial aspects of the 2010 Agreement are, arguably, the two issues that are the subject of legislative review and change. First, the issue of lessening restrictions in the United States on foreign ownership and control of U.S. air carriers remains unresolved. Upon legislative change in the United States, the EU will reciprocally allow majority ownership of EU air carriers by U.S. nationals.⁷² Second, the right for EU air carriers to fly between the United States and a number of non-European countries (i.e., seventh freedom rights), as well as the removal of obstacles for European majority investment in third country-airlines by facilitating access to the U.S. market, have not been resolved. The United States will grant these rights once changes occur in the EU that provide a balanced approach, enforceable at the EU level for noise operating restrictions at airports.⁷³ Both sides have committed to continuing to work on these issues,⁷⁴ but have also acknowledged that there was no “timetable” or “deadlines” for resolving these outstanding matters.⁷⁵

⁶⁹ *Id.* (amending Article 17 of the 2007 Agreement).

⁷⁰ *Id.* art. 5 (amending or replacing certain paragraphs of Article 18 of the 2007 Agreement).

⁷¹ *Id.* Notably, the Joint Committee is already reviewing the process and procedures for accession by Iceland and Norway. Eventually, the Committee will likely have to address the issue of accession to the Agreement of Canada and Mexico, partners to the North American Free Trade Agreement with the United States. There have been other movements toward establishing and maintaining common aviation markets. *See, e.g.*, Single Aviation Market Arrangements, Austl.-N.Z., Sept. 19, 1996, http://www.dfat.gov.au/geo/new_zealand/sam.pdf.

⁷² 2010 Agreement, *supra* note 3, attachment B, art. 6.

⁷³ *Id.*

⁷⁴ *Id.* art. 5.

⁷⁵ James Kanter & Nicola Clark, *U.S. and E.U. Agree to Expand Open Skies Accord*, N.Y. TIMES, Mar. 25, 2010, at B3.

While the 2010 Agreement is another positive development in the important trans-Atlantic aviation relationship between the United States and the European Union, the issues of foreign ownership and airport noise and other operating restrictions are perhaps the most difficult issues preventing a full and open aviation market.⁷⁶ These issues will not be readily or easily resolved. From the EU perspective, continuing restrictions on foreign ownership of U.S. air carriers is viewed as an outdated regulatory constraint that is preventing a full opening of the market. From the U.S. perspective, the EU must obtain jurisdiction over and establish a balanced approach methodology for airport noise regulations and lift certain night restrictions. At the conclusion of the Agreement negotiations, lead negotiators for both the United States and the European Union acknowledged that they kept butting up against existing laws that limited how much could be achieved on these issues.⁷⁷ However, success in these areas depends on both sides of the Atlantic addressing these issues. Even with the already visible positive results of the 2010 Agreement, such advancements do not appear to be sufficient for either the EU Parliament or the U.S. Congress to further advance trans-Atlantic air transport liberalization at this time. What must occur first is the building of a broader consensus among the policymakers.

The members of the EU Parliament are already asking the EU Commission to begin a third stage of negotiations with the hopes of a further liberalizing agreement no later than December 31, 2013.⁷⁸ While laudable, the remaining issues to negotiate may prove more difficult to resolve, and unfortunately require more time to change longstanding opposition of legislators in both the United States and the European Union. Before we turn to the issue of U.S. foreign ownership and control, we will focus on the U.S.–EU Joint Committee that may lay the ground work for the cooperation needed to solve these larger issues. This Committee, formed under the 2007 Agreement, was given further authority under the 2010 Agreement,⁷⁹ and is responsible for resolving questions related to the interpretation or application of the 2007 Agreement, reviewing the implementation of the 2007

⁷⁶ It should be noted that cabotage restriction is another area of disagreement, but is omitted from discussion in this Article.

⁷⁷ See 2007 Agreement, *supra* note 2, art. 21.

⁷⁸ *European Parliament Calls for EU–US Open Skies Progress*, CAPA CTR. FOR AVIATION (June 18, 2010), <http://www.centreforaviation.com/news/european-parliament-calls-for-eu-us-open-skies-progress-53193>.

⁷⁹ 2010 Agreement, *supra* note 3, attachment B, art. 5.

Agreement, and facilitating greater co-operation between the parties. Its charter and its functioning to date deserve greater attention.

IV. U.S.–EU JOINT COMMITTEE

The Joint Committee, which was created by the 2007 Agreement,⁸⁰ is unique in the sense that none of the Open Skies bilateral agreements signed by the United States to date provide for the creation of such a committee.⁸¹ Not even the other multilateral open skies accord signed by the United States, the 2001 Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT) with New Zealand, Singapore, Brunei, and Chile, later joined by Samoa, Tonga, Cook Islands, and Mongolia,⁸² provides for such a committee.⁸³ However, given the complexities of dealing with multiple partners, i.e., the European Community and its twenty-seven Member States, the EU requested that the Committee be instituted to improve communication, discussions, and decisions between the United States on one side, and the EU members on the other side. The 2010 Agreement further extends the role of the Committee, and the industry has viewed the 2010 Agreement as a positive step toward achieving the goals of the 2007 Agreement.

The Committee is a body consisting of representatives of the signatory parties that monitors the implementation of the 2007 Agreement and coordinates the various work streams of regulatory cooperation.⁸⁴ It is chaired jointly by a representative of the European Community and its Member States and by a representative of the United States.⁸⁵ The U.S. delegation consists of multi-agency representation, chaired by the Department of State.⁸⁶ The EU delegation consists of the European Community and its Member States.⁸⁷

⁸⁰ 2007 Agreement, *supra* note 2, art. 18.

⁸¹ See *Air Transport Agreements*, *supra* note 26 (containing links to the texts of the Open Skies Agreements and Air Transport Agreements signed by the United States).

⁸² MALIAT, <http://www.maliat.govt.nz/country/matrix.shtml> (last visited Aug. 20, 2011). Peru joined in 2002 but withdrew in 2005. *Id.*

⁸³ Multilateral Agreement on the Liberalization of International Air Transportation, May 1, 2001, 2001 U.S.T. LEXIS 69 [hereinafter MALIAT].

⁸⁴ 2010 Agreement, *supra* note 3, attachment B, art. 5.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Memorandum of Consultations, U.S.–EU (Mar. 2, 2007), para. 37, available at <http://>

Since its inception, the Committee has met at least once a year, and has developed methodologies to address specific or technical issues covered by the 2007 Agreement, including, safety, security, and legal issues. The Committee's new extended roles implemented by the 2010 Agreement will increase compatibility of regulatory regimes between the United States and the Member States of the European Union. These roles will streamline the work of the Committee and further improve exchange of information, discussions, and resolutions among the multiple parties, and, accordingly, deepen air service freedoms.

The 2010 Agreement created four important new roles for the Committee and clarified one important regulatory responsibility, in addition to the roles created by the 2007 Agreement.⁸⁸ First, the Committee is now in charge of “fostering cooperation between the respective authorities of the Parties in efforts to develop their respective air traffic management systems with a view toward optimising the interoperability and compatibility of those systems, reducing costs, and enhancing their safety, capacity, and environmental performance.”⁸⁹ Second, the Committee will promote the “development of proposals for joint projects and initiatives in the field of aviation safety, including with third countries.”⁹⁰ Third, it will be the Committee's responsibility to encourage “continued close cooperation among the relevant aviation security authorities of the Parties, including initiatives to develop security procedures that enhance passenger and cargo facilitation without compromising security.”⁹¹ Fourth, the Committee will consider “whether the Parties' respective laws, regulations, and practices in areas covered by Annex 9 of the [1944 Chicago] Convention (Facilitation) may affect the exercise of rights under this [2007] Agreement.”⁹² Additionally, the Committee is now tasked with “developing, where requested by the Parties, arrangements for the reciprocal recognition of regulatory determinations.”⁹³

www.state.gov/documents/organization/114892.pdf

⁸⁸ See 2010 Agreement, *supra* note 3, attachment B, art. 5 (replacing art. 18 of the 2007 Agreement).

⁸⁹ *Id.* art. 5, para. 4(f).

⁹⁰ *Id.* para. 4(g).

⁹¹ *Id.* para. 4(h).

⁹² *Id.* para. 4(i).

⁹³ *Id.* para. 4(e) (amending art. 18, para. 4(e) of the 2007 Agreement).

Further, the Committee will continue to review the overall implementation of the 2007 Agreement, including any effects of aviation infrastructure constraints on the exercise of traffic rights, the effects of security measures taken pursuant to the terms of Article 9 of the 2007 Agreement, the effects on the conditions of competition, including in the field of global distribution systems, and any social effects (i.e., labor standards and rights) of the implementation of the 2007 Agreement. As an additional and important feature the 2010 Agreement introduced, which will reduce the red tape regarding the implementation of the 2007 Agreement, the Committee will now consider “individual issues or proposals that either Party identifies as affecting, or having the potential to affect, operations under the [2007] Agreement, such as conflicting regulatory requirements.”⁹⁴

The creation of the Committee has allowed a seamless exchange of information among the parties and has functioned successfully to implement the goals of the 2007 Agreement. For instance, the parties to the Committee have fostered positive security measures that will benefit the U.S. and EU aviation markets and the entire industry, which resulted from the continued cooperation among the parties involved.⁹⁵ Also, the Committee serves as a forum for each party to discuss its questions and concerns over the other party’s local proposals that may adversely affect the 2007 Agreement or the aviation industry, to understand the other party’s position regarding specific issues, and to cooperate with each other to reach a decision that will strike a balance between the terms of the 2007 Agreement and the parties’ laws and regulations.⁹⁶ Areas that the Committee is likely to consider in some manner in the future include: aviation security, air cargo, cargo security, explosive detection, competition, consumer protection, U.S. regulation of foreign repair stations, ground handling, slot regulation, the U.S.–EU Aviation Safety Agreement, third-country air carrier assessment, and the impact of FAA Reauthorization legislation.

Since its inception, the Committee has addressed several issues, including security and environmental concerns, which tend to delay the aviation

⁹⁴ *Id.* para. 3 (amending art. 18, para. 3 of the 2007 Agreement).

⁹⁵ *See, e.g.*, U.S.–EU Joint Committee Record of Meeting, Jan. 14, 2010, *available at* <http://www.state.gov/documents/organization/137493.pdf>.

⁹⁶ 2010 Agreement, *supra* note 3, para. 23; *see also* Record of Seventh Meeting of the EU–U.S. Joint Committee (May 19, 2010), *available at* <http://www.state.gov/documents/organization/144199.pdf>; Record of Eighth Meeting of the EU–U.S. Joint Committee (Nov. 17, 2010), *available at* <http://www.state.gov/documents/organization/151670.pdf>.

industry from moving to further market liberalization. The Committee could serve as a model for future multilateral agreements, especially when the aviation industry moves from bilateral agreements to a broader market/region reach (e.g., Latin America, Asia, etc.). Of course, the success of future committees depends on each party's willingness to work together to reach the goals of air service freedoms while allowing for secure, safe air operations that are also as environmentally friendly as possible.

V. FOREIGN OWNERSHIP AND CONTROL OF AIR CARRIERS

In addition to the issues outlined above, the United States and the European Union confronted another major issue when negotiating the 2010 Agreement. Leading up to the second stage negotiations, the EU called for an Open Aviation Area with unlimited rights for U.S. and EU citizens to own and control airlines organized in the other's territory.⁹⁷ As discussed below, airline ownership and control was as difficult for the United States and the European Union throughout the second stage negotiations as it had been in the first stage.

A. *Restrictions on Foreign Ownership in the United States*

The United States maintains a longstanding policy that U.S. citizens own U.S. air carriers.⁹⁸ The first citizenship requirements date back to the post-World War I era, when Congress was concerned that foreign ownership of U.S. carriers would threaten national security. In 1926, Congress passed the Air Commerce Act, which set forth aircraft registration requirements and stated that the owner of registered aircraft had to be a "citizen of the United States."⁹⁹ At that time, the term "citizen of the United States" was defined as either a U.S. citizen, a U.S. partnership in which all partners were U.S. citizens, or a U.S. corporation for which both the president and at least two-

⁹⁷ John R. Byerly, Deputy Asst. Sec'y for Transp. Affairs, Dep't of State, Remarks at the ACI-NA International Aviation Issues Seminar: U.S. International Aviation Policy and Challenges (Dec. 4, 2008), available at <http://www.aci-na.org/static/entransit/iacbyerly1.pdf>.

⁹⁸ Josh Cavinato, Note, *Turbulence in the Airline Industry: Rethinking America's Foreign Ownership Restrictions*, 81 S. CAL. L. REV. 311, 315 (2008).

⁹⁹ Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568 (1926).

thirds of the board of directors were U.S. citizens and where at least 51% of the voting shares were controlled by U.S. citizens.¹⁰⁰

During the Great Depression, Congress strengthened restrictions on foreign ownership of U.S. carriers even further by requiring that at least 75% of all voting shares be “owned or controlled by persons who are citizens of the United States.”¹⁰¹ The purpose behind the stricter ownership requirement was to ensure that U.S. airmail contracts would only be awarded to U.S. citizens and to prevent hostile foreign citizens or their governments from owning U.S. carriers.¹⁰²

These restrictions were retained in 1958 when Congress adopted the Federal Aviation Act.¹⁰³ During this period, Congress was concerned with developing the domestic air transportation system. Moreover, since the United States was in the middle of the Cold War, the U.S. Government was interested in developing a system that was designed to protect the country and defend national security.¹⁰⁴

More recently, in 2003, Congress amended the ownership requirement again.¹⁰⁵ This latest amendment reflected the longstanding practice of granting certificates only to those air carriers owned and controlled by U.S. citizens.¹⁰⁶ Currently, in order to provide air transportation under the U.S. flag, a carrier must hold a certificate of public convenience and necessity issued by the DOT.¹⁰⁷ The Department will only grant such certificates to citizens of the United States.¹⁰⁸ The term “citizen of the United States” is defined as:

- (A) an individual who is a citizen of the United States;
- (B) a partnership each of whose partners is an individual who is a citizen of the United States; or
- (C) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a

¹⁰⁰ *Id.* § 9(a).

¹⁰¹ Civil Aeronautics Act of 1938, Pub. L. No. 75-706, § 13, 52 Stat. 973, 978 (1938).

¹⁰² Sheri Linzell, *Ownership and Control Restrictions in U.S. Aviation Law*, 35 AIR & SPACE L. 379, 382 (2010).

¹⁰³ Federal Aviation Act of 1958, Pub. L. No. 85-726, § 101, 72 Stat. 731, 737–38 (1958).

¹⁰⁴ Linzell, *supra* note 102, at 382.

¹⁰⁵ Cavinato, *supra* note 98, at 315.

¹⁰⁶ Vision 100-Century of Aviation Reauthorization Act, Pub. L. No. 108-76, § 807, 117 Stat. 2490, 2588 (2003).

¹⁰⁷ 49 U.S.C. § 41.101(a)(1).

¹⁰⁸ *Id.* § 41.102(a).

territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.¹⁰⁹

Consequently, if a corporation seeks a certificate of public convenience and necessity to operate as a U.S. air carrier, it must be formed and organized in one of the States, or a U.S. possession or territory, its president, and no less than two thirds of the members sitting on the board of directors, as well as its managing officers, must be U.S. citizens, the corporation must be under the control of U.S. citizens, and no less than 75% of its voting interest must be owned or controlled by U.S. citizens. Each of these criteria must be met at all times in order to maintain eligibility to hold a certificate and operate as a U.S. carrier.

In regard to the “actual control” aspect of the restriction, the DOT applied a test pursuant to which meeting only the requisite ownership percentages was not sufficient for an airline to qualify as a U.S. citizen.¹¹⁰ For example, in a couple of earlier cases, the DOT’s predecessor, the Civil Aeronautics Board (CAB), found that (1) an applicant did not qualify as a U.S. carrier where the applicant only met the bare minimum ownership requirements and did not fulfill its burden of establishing that its governance was in accordance with the actual control policy;¹¹¹ (2) an applicant was under foreign control where the applicant’s founder used a \$2.5 million loan from his Saudi Arabian employer to fund the carrier;¹¹² and (3) an applicant’s foreign, nonvoting stockholders could influence the applicant’s crucial decisions because they had the power to block any of the voting stockholders’ proposals by choosing to dissolve the company.¹¹³ In other words, “if persons other than U.S. citizens, individually or collectively, can

¹⁰⁹ *Id.* § 40.102(a)(15).

¹¹⁰ Bimal Patel, *A Flight Plan Towards Financial Stability—The History and Future of Foreign Ownership Restrictions in the United States Aviation Industry*, 73 J. AIR L. & COM. 487, 490 (2008).

¹¹¹ *Willye Peter Daetwyler*, 58 C.A.B. 118 (1971).

¹¹² *Premiere Airlines*, 95 C.A.B. 101 (1982).

¹¹³ *Page Avjet*, 102 C.A.B. 488, 2–3 (1983); *see also* Patel, *supra* note 110, at 490–91 (explaining that nonvoting stockholders have the right to influence many of the decisions of the company as they have the power to dissolve the company and liquidate its assets).

significantly influence the affairs of the [applicant], it is not a U.S. citizen."¹¹⁴

The late 1980s and early 1990s witnessed a shift in the DOT's focus. National security, while still a primary concern, became only part of the analysis. The DOT also became concerned with permitting economic partnerships.¹¹⁵ The Northwest/KLM and Continental/Air Canada matters illustrate this shift in focus.¹¹⁶ In each matter, a foreign airline sought to invest in a U.S. airline. KLM was ultimately permitted to hold a 49% equity stake in Northwest, provided it was non-voting, and KLM could maintain three members on Northwest's board since the other twelve members would offset any potential adverse effects.¹¹⁷ Acceptance of this arrangement helped pave the way for the United States and the Netherlands to enter into the first open skies agreement.¹¹⁸ In the Continental matter, the DOT approved a financing plan under which Air Canada would invest \$235 million and receive 27.5% equity and 24% of Continental's voting stock.¹¹⁹ Further, Air Canada could select six of Continental's eighteen board members.¹²⁰ Some believe that the arrangement was approved, in part, because Air Canada's partner was a major U.S. investment group.¹²¹

DOT decisions issued in the aftermath of the events of September 11, 2001, cast some doubt on the more current trend in actual control according to some commentators.¹²² In the DHL/ASTAR matter, the U.S. DOT stated that the ability to exercise actual control over an airline implies having "a substantial ability to influence the carrier's activities."¹²³ In addition, the DOT applied a totality-of-the-circumstances test when conducting the actual

¹¹⁴ Dep't of Transp., In the matter of Intera Artic Services, Inc., DOT Order 87-8-43, Docket No. 44723 (Aug. 8, 1987); Patel, *supra* note 110, at 491.

¹¹⁵ Patel, *supra* note 110, at 492-93; ISABELLE LELIEUR, LAW AND POLICY OF SUBSTANTIAL OWNERSHIP AND EFFECTIVE CONTROL OF AIRLINES 37 (2003).

¹¹⁶ Patel, *supra* note 110, at 492.

¹¹⁷ Dep't of Transp., In the matter of Northwest Airlines, Inc., DOT Order 91-1-41, Docket No. 46371 (Jan. 23, 1991); Patel, *supra* note 110, at 492-93. In addition, Northwest's Chairman had to be a U.S. citizen and the Department would continue to scrutinize carefully the committee composition.

¹¹⁸ Patel, *supra* note 110, at 493.

¹¹⁹ *Id.* at 494.

¹²⁰ *Id.*

¹²¹ *Id.* (citing LELIEUR, *supra* note 115, at 38).

¹²² *Id.* at 494-95.

¹²³ Dep't of Transp., In the matter of DHL Airways, Inc., DOT Order 2004-5-10, Docket No. OST-2002-13089 (May 13, 2004); Patel, *supra* note 110, at 495.

control analysis.¹²⁴ The DOT ultimately held that ASTAR's dependence on DHL's extensive network for the majority of its business would not give DHL substantial influence over ASTAR.¹²⁵ Some have questioned this decision in terms of whether DHL passed the control test because of DHL's and its advisors' political influence.¹²⁶ In the Virgin America case, a U.S. limited liability company held 75% of the applicant's voting equity.¹²⁷ More than 49% of the limited liability company's equity was held by Cayman Island entities or foreign limited partnerships, i.e., by Sir Richard Branson and the Virgin Group.¹²⁸ Hedge funds, involving foreign investors, also owned a large share of the limited liability company.¹²⁹ After the DOT initially denied the application, Virgin America assured the DOT that the foreign investors in the hedge funds would be completely excluded from investing in Virgin America.¹³⁰ The DOT later approved the transaction because Virgin America agreed to place the equity held by the Virgin Group into an irrevocable voting trust that was subject to strict conditions,¹³¹ and it walled off foreign investors within the hedge funds.¹³² Virgin America was further constrained to remove Virgin Group's veto power over material contracts and capital expenditures, which the DOT found to have provided a degree of influence over the applicant.¹³³ It also agreed to replace Fred Reid as CEO within six months of commencing operations, since the DOT suspected him of having close ties to the foreign principals within the Virgin Group.¹³⁴ Changes were also made to Virgin America's bylaws and board of directors in order to remove voting powers resting with some non-U.S. entities.¹³⁵

¹²⁴ Patel, *supra* note 110, at 495.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Dep't of Transp., Application of Virgin America, Inc., DOT Order 2007-5-11, Docket No. OST-2005-23307 (May 18, 2007) [hereinafter Virgin America]; Patel, *supra* note 110, at 495.

¹²⁸ Virgin America, *supra* note 127.

¹²⁹ Patel, *supra* note 110, at 496.

¹³⁰ Virgin America, *supra* note 127.

¹³¹ Patel, *supra* note 110, at 496.

¹³² Virgin America, *supra* note 127.

¹³³ Patel, *supra* note 110, at 496.

¹³⁴ *Id.* at 497; Virgin America, *supra* note 127.

¹³⁵ Patel, *supra* note 110, at 497; Virgin America, *supra* note 127.

According to some observers, the DHL and Virgin America matters indicate that, while slow, the DOT may be pursuing a progressively liberal interpretation of the statutory ownership and control requirements.¹³⁶

B. More Liberal Ownership Rights in the European Union

Given its unique nature as a group of Member States, the EU ownership requirements developed quite differently from those in the United States. The European Commission adopted an initial air transport memorandum in July 1979 that set forth the overall issues facing the European airline industry and outlined new policies, including the liberalization of bilateral restrictions on ownership.¹³⁷ In March 1984, the Commission adopted a second memorandum on the airline industry in which it rejected the type of deregulation that had recently occurred in the United States on the grounds that the European Community (EC) involved a different type of market.¹³⁸ The Commission proposed instead that the long-term objective for the EC was the creation of a common air transport market.¹³⁹

The next set of aviation initiatives, known as the Third Package, was adopted in 1992 and became effective on January 1, 1993. It contained the last step in developing a single European aviation market. The Third Package included Council Regulation 2407/92, which set forth requirements concerning the issuance of operating licenses by Member States to air carriers that were established and operating in the EC. The adoption of Council Regulation 2407/92 entitled Community citizens and organizations to operate air carriers throughout the EC without discrimination on the grounds of nationality if Community citizens owned and controlled the majority of the organization.¹⁴⁰

Due to a number of changes to Council Regulation 2407/92 and other regulations relating to airline operations in the European Union, the common rules for the operation of air services were recast during 2008 and a new regulation, Council Regulation 1008/2008, was issued. It remains in force

¹³⁶ Patel, *supra* note 110, at 498.

¹³⁷ Chia-Jui Hsu & Yu-Chun Chang, *The Influences of Airline Ownership Rules on Aviation Policies and Carriers' Strategies*, 5 PROCEEDINGS E. ASIA SOC'Y FOR TRANSP. STUDIES 557, 562 (2005).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 562–63.

today. Currently, an entity must meet the following conditions, among others, in order to obtain an operating license from a Member State:

(a) its principal place of business is located in that Member State;

(b) it holds a valid AOC [Air Operator’s Certificate] issued by a national authority of the same Member State whose competent licensing authority is responsible for granting, refusing, revoking or suspending the operating license of the Community air carrier; . . .

(f) Member States and/or nationals of Member States own more than 50% of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings, except as provided for in an agreement with a third country to which the Community is a party¹⁴¹

Council Regulation 1008/2008 defines the term “effective control” as:

a relationship constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by:

(a) the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking.¹⁴²

¹⁴¹ Council Regulation 1008/2008, art. 4, 2008 O.J. (L 293) 3 (EC). It should be noted that a few airlines, which did not meet the Community’s ownership requirements, were granted special Community status. These were SAS, before Sweden became an EU member and when Danish interests were far below the 50% requirement, Britannia, and Monarch, both of which were majority owned by Canadian interests. See Kirsten Böhmman, *The Ownership and Control Requirement in U.S. and European Union Air Law and U.S. Maritime Law—Policy; Consideration; Comparison*, 66 J. AIR L. & COM. 689, 720 n.130 (2001).

¹⁴² Council Regulation 1008/2008, *supra* note 141, art. 2(9).

The EU's airline ownership and control restrictions are not as stringent as the U.S. restrictions *de facto*.¹⁴³ An organization complies with the EU's ownership requirements if its principal place of business is located in a Member State, nationals of the Member States own more than 50% of the entity, and nationals of the Member State control the entity by possessing the right to exercise influence over the entity directly or indirectly (e.g., use all or some of its assets or having influence over voting or decisions of the bodies of the entity or managing the entity's business). This standard may actually be more stringent than the U.S. standard from a purely *de jure* review.

While the term "ownership" is not specifically defined in the regulation, a European Commission decision from July 19, 1995, in proceedings relating to the Swissair/Sabena matter explained that the notion of ownership of an entity

is essentially based on the notion of equity capital. Holders of such capital normally have the right to participate in decisions affecting the management of the undertaking as well as to share in the residual profits or, in the event of liquidation, in the residual assets of the undertaking after all other obligations have been met If, however, capital does not confer upon its holders any of the two abovementioned rights to an appreciable extent, it must generally be disregarded in determining the ownership situation of an undertaking.¹⁴⁴

Although ownership and control requirements will be assessed on a case-by-case basis, the majority ownership requirement is met, for example, if 51% of the shares or equity capital of an air carrier is in EU-member hands at all times.¹⁴⁵ Consequently, non-EU parties may hold 49% of an entity's voting shares or equity capital, and the entity can still meet the EU

¹⁴³ Patel, *supra* note 110, at 502.

¹⁴⁴ Commission Decision 95/404, of 19 July 1995 on a Procedure Relating to the Application of Council Regulation (EEC) No 2407/92 (Swissair/Sabena), 1995 O.J. (L 239) 18 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995D0404:EN:HTML>.

¹⁴⁵ *Id.*

ownership requirements.¹⁴⁶ This is far more than the 25% limit on voting shares set forth in the U.S. ownership and control restrictions.¹⁴⁷

C. Point of Contention Between the United States and the European Union

The second stage of the U.S.–EU Open Skies negotiations dealt with difficult issues, making that stage of negotiations particularly important.¹⁴⁸ From the EU’s perspective, the foreign ownership and control issue had to be addressed. As it had done before during the first stage, the EU continued to demand “unlimited cabotage, unlimited rights for each side’s citizens to own and control airlines of the other parties, [and] extensive regulatory convergence.”¹⁴⁹

The European Union has long pressed for such reform. Its position is “based on the positive experience [from integrating] the EU internal market.”¹⁵⁰ During negotiations, the EU asserted that ownership and control reform “would represent a key step towards liberating the airline industry from the outdated regulatory constraints in the area of foreign investment that prevent [the airline industry] from acting like any other industry.”¹⁵¹

U.S. negotiators, however, knew these goals could not be accomplished by the deadline looming over the process.¹⁵² The changes considered necessary to address the demands of the European Union would require an amendment to the U.S. statute limiting foreign ownership and control of U.S.-flagged airlines.¹⁵³ The United States decided to use the second stage

¹⁴⁶ *Id.*

¹⁴⁷ 2007 Agreement, *supra* note 2, Annex 4.

¹⁴⁸ See Byerly, *supra* note 97 (discussing importance of negotiations); see also Allan I. Mendelsohn, *The United States and the European Union in International Aviation*, 55 FED. LAW. 36, 39 (2008) (discussing negotiation points).

¹⁴⁹ Byerly, *supra* note 97, at 5.

¹⁵⁰ Press Release, European Comm’n, Breakthrough in EU–US Second–Stage Open Skies Negotiations: Vice-President Kallas Welcomes Draft Agreement (Mar. 25, 2010), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/371>.

¹⁵¹ *Id.*

¹⁵² Alan P. Dobson & Joseph A. McKinney, *Sovereignty, Politics, and U.S. International Airline Policy*, 74 J. AIR L. & COM. 527, 549 (2009) (“Significant changes in U.S. foreign ownership-and-control rules [were] extremely difficult to effectuate in the foreseeable future for political reasons.”).

¹⁵³ Hubert Horan, “Double Marginalization” and the Counter-Revolution Against Liberal Airline Competition, 37 TRANSP. L.J. 251, 284 n.147 (2010).

of the negotiations to explore the issue of foreign ownership and control.¹⁵⁴ This led to an “examination of the traditional nationality clause in bilateral air services agreements.”¹⁵⁵

VI. CURRENT STATE OF PLAY REGARDING FOREIGN OWNERSHIP AND CONTROL

Rather than directly address the key issue of reforming airline ownership and control rules, the 2010 Agreement included a commitment to engage in a process toward removing market access barriers and enhancing airlines' access to global capital markets.¹⁵⁶ In the end, the EU recognized that changes in investment and control must come from the U.S. Congress, and if any reform is to be adopted, it will take time.¹⁵⁷ Consequently, the 2010 Agreement sets out incentives that will encourage reform. For example, when the United States changes its legislation to allow EU investors majority ownership of U.S. airlines, the EU will reciprocally allow majority ownership of U.S. airlines.¹⁵⁸ If reform is achieved, U.S. airlines will also benefit from additional market access rights to and from the EU.¹⁵⁹ The parties have also agreed to review progress toward this goal regularly.¹⁶⁰ If either side fails to make progress on its promises, the other can freeze new market access.¹⁶¹ It is unlikely that these incentives alone are sufficient to bring about changes to the U.S. ownership and control restrictions. Moreover, as discussed below, many issues, including national security,

¹⁵⁴ Byerly, *supra* note 97, at 5.

¹⁵⁵ *Id.* Bilateral air transport agreements typically contain an article addressing airline nationality, and state that in order for an airline to avail itself of the rights available under the bilateral agreement, it must be majority owned and controlled by the designated party's citizens. Stephen Dolan, *Reform of Air Cargo Transport Regulation Through the WTO and GATS*, 29 *TRANSP. L.J.* 189, 214 n.69 (2002).

¹⁵⁶ 2010 Agreement, *supra* note 3, attachment B, art. 6 (amending art. 21 of the 2007 Agreement); *see also* Press Release, *supra* note 150.

¹⁵⁷ Madhu Unnikrishnan, *U.S.–EU Second-Stage Open-Skies Deal*, *AVIATION WEEK* (Mar. 26, 2010), http://www.aviationweek.com/aw/generic/story.jsp?id=news/awx/2010/03/25/awx_03_25_2010_p0-215346.xml&channel=comm (quoting a spokeswoman for the EC Transport Directorate).

¹⁵⁸ 2010 Agreement, *supra* note 3, attachment B, art. 6, para. 2.

¹⁵⁹ *Id.* para. 3(b).

¹⁶⁰ *Id.*; *see also* Press Release, *supra* note 150.

¹⁶¹ 2007 Agreement (as amended by the 2010 Agreement, *supra* note 3), *supra* note 2, art. 21.

labor, and how to gain congressional support, must be addressed before any such reforms will be adopted.

Article 21 of the 2007 Agreement, as amended by the 2010 Agreement, states

[t]he Parties commit to the shared goal of continuing to remove market access barriers in order to maximize benefits for consumers, airlines, labour, and communities on both sides of the Atlantic, including enhancing the access of their airlines to global capital markets, so as better to reflect the realities of a global aviation industry, the strengthening of the transatlantic air transportation system, and the establishment of a framework that will encourage other countries to open up their own air service markets The Joint Committee shall develop a process of cooperation in this regard including appropriate recommendations to the Parties.¹⁶²

The overall outcome of the second-stage negotiations is generally viewed as positive.¹⁶³ The U.S. considers the regime to be a significant step forward for the liberalization of aviation access and it provides a solid example of a multilateral agreement that opens markets.¹⁶⁴ Many remain disappointed, however, with the result of the second-stage negotiations and the lack of concrete ownership liberalization.¹⁶⁵ Stage one critics such as British Airways (BA) predicted that the United States would keep the best parts of the open skies agreement intact, such as greater access for U.S. airlines to BA's hub at Heathrow, and refute efforts to amend foreign ownership rules that the U.S. Congress would have never approved.¹⁶⁶ At the end of the second-stage negotiations, BA called on the parties to honor their commitments and to redouble efforts on the ownership issue going

¹⁶² 2010 Agreement, *supra* note 3, art. 6, paras. 1–2.

¹⁶³ Unnikrishnan, *supra* note 157.

¹⁶⁴ *Reaction to the US–EU Open Skies Expansion: Warm in the US, Cool Elsewhere*, CENTER FOR ASIA PACIFIC AVIATION (Mar. 26, 2010), <http://www.centreforaviation.com/news/2010/03/26/reaction-to-the-us-cu-open-skies-expansion-warm-in-the-us-cool-elsewhere/page1>.

¹⁶⁵ *Id.*

¹⁶⁶ Pilita Clark, *Washington Wins Battle of Open Skies*, FIN. TIMES (U.K.), Mar. 26, 2010, at 10, available at <http://www.ft.com/cms/s/0/5821cbb2-3876-11df-aabd-00144feabdc0.html#axzz1CaUTQOTA>.

forward.¹⁶⁷ IATA, through its former director-general and chief executive, Giovanni Bisignani, responded to the second-stage announcement with a grim description of the agreement. Mr. Bisignani noted that IATA was disappointed by the parties' failure to make significant progress on the ownership issue and that long-term financial sustainability of the industry is dependent on normal commercial freedoms such as those allowing foreign investment.¹⁶⁸ He also urged the parties to keep the issue on their radar screen for urgent follow-up.¹⁶⁹

The EU continues to stress the need for reform of the ownership and control restrictions. In preparation for the ICAO's Assembly in early October 2010, the EU's Transport Commissioner, Siim Kallas, met with top U.S. transportation officials to coordinate on security, environmental, and other issues. When visiting Washington, D.C. for these meetings, the Commissioner stated that the EU would continue to push for dismantling the investment restrictions that make the aviation sector a global anomaly.¹⁷⁰

A. *U.S. Airlines Denied Access to Foreign Capital*

Not all critics of the U.S. ownership restrictions are European. Many U.S. scholars and entities are critical of the U.S. ownership and control restrictions as well. In fact, even the DOT at one time attempted to modify the interpretation of the foreign ownership laws in order to allow foreign citizens to control certain aspects of an airline's operations.¹⁷¹ The purpose of the new policy was to encourage new avenues for investment and relieve unnecessary constraints on access to capital.¹⁷² Many leaders within the executive branch and the aviation industry voiced their support for the proposal. Jeffrey Shane, Under Secretary for Policy at the Department, defended the proposal when explaining to Congress that "we felt an absolute obligation, given the amount of change that has taken place in the airline industry, both here and abroad, to reexamine that interpretation and see

¹⁶⁷ *Reaction to the US-EU Open Skies Expansion: Warm in the US, Cool Elsewhere*, *supra* note 164.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Daniel Michaels, *EU Transport Commissioner Backs Looser Airline Rules*, *WALL ST. J.*, Sept. 28, 2010, at A17.

¹⁷¹ Actual Control of U.S. Air Carriers, 70 Fed. Reg. 67,389, 67,394 (Nov. 7, 2005) (notice of proposed rulemaking).

¹⁷² *Id.* at 67,393; *see also* Cavinato, *supra* note 98, at 312, 320-21.

whether or not, in fact, it continued to have relevance to today's circumstances."¹⁷³ John Byerly, Deputy Assistant Secretary for Transportation Affairs at the U.S. Department of State, underscored the importance of the U.S.–EU Open Skies Agreement and noted that the two parties could “send a message to all the world that the days of protectionist bilateral agreements are drawing to a close, and that open markets and airline competition represent the future.”¹⁷⁴ FedEx's Rush O'Keefe, Jr., Senior Vice President and General Counsel, also testified before Congress in support of the new policy, stating that “[t]o withdraw the policy carrot of the NPRM would . . . signal an acquiescence to protectionism at a time when U.S. carriers want more and not less international opportunities.”¹⁷⁵ The Vice President of United Airlines, Michael Whitaker explained that U.S. airlines “are looking for opportunities to compete more effectively in that world market, not for regulatory protection against foreign competition or foreign investment.”¹⁷⁶

The DOT's efforts were not well received by Congress. It became clear during the course of the proceedings that Congress at that time was not prepared to amend the foreign ownership statute in order to allow a change in Department policy. The Department ultimately withdrew its proposal.¹⁷⁷

The main argument that opponents of the U.S. ownership regime rely on is that the U.S. rules prevent the airline industry from gaining access to capital the airlines desperately need for continued operations and to expand and modernize their fleets and systems in order to compete with foreign airlines in the global market. As is often pointed out, air carriers require significant capital because of their business structures, which involve high fixed costs, intensive competition, and highly cyclical demands.¹⁷⁸ Even though U.S. airlines require significant amounts of capital, U.S. ownership and control requirements essentially limit them to depending mostly on the

¹⁷³ *U.S.–E.U. Open Skies Agreement: With a Focus on the DOT's Notice of Proposed Rulemaking (NPRM) Regarding Actual Control of U.S. Air Carriers: Hearing Before the Subcomm. on Aviation of the H. Comm. on Transp. & Infrastructure, 109th Cong. 16, 16 (2006) [hereinafter NPRM House Hearing]; see also Cavinato, supra note 98, at 322.*

¹⁷⁴ *NPRM House Hearing, supra note 173, at 20–21; see also Cavinato, supra note 98, at 322–23.*

¹⁷⁵ *NPRM House Hearing, supra note 173, at 46; see also Cavinato, supra note 98, at 323.*

¹⁷⁶ *NPRM House Hearing, supra note 173, at 47; see also Cavinato, supra note 98, at 323.*

¹⁷⁷ Actual Control of U.S. Air Carriers, 71 Fed. Reg. 71,106 (Dec. 8, 2006) (withdrawal of certain proposed amendments).

¹⁷⁸ *See, e.g., Patel, supra note 110, at 507; LELIEUR, supra note 115, at 69.*

U.S. capital market.¹⁷⁹ Since U.S. airlines cannot access foreign capital, they struggle to compete with foreign airlines that have greater access to global capital markets.¹⁸⁰ Given this disadvantage, it is often argued that foreign investment would furnish U.S. airlines with the capital they desperately require to become financially stable and avoid layoffs of American employees.¹⁸¹

Access to capital is especially important during a downturn in the economy, such as the recent recession, when capital is particularly scarce. Opponents to the U.S. regime maintain that no other industry in the United States is subjected to a similar restriction on foreign investment. They argue that there is no need to submit the U.S. aviation industry to a restraint on cross-border investments and that the industry is treated unfairly. Even before this issue came to the foreground in the U.S.–EU Open Skies negotiations, some argued that U.S. airlines were going bankrupt as a result of not being able to find investment partners that had both sufficient capital and the ability to meet the U.S. citizenship requirements.¹⁸² Indeed, it was estimated in 2005 that approximately one-half of all seats on U.S. airlines were on bankrupt air carriers.¹⁸³

B. Airlines Pursue Alternatives to Compete Globally

1. Alliances Requiring Antitrust Immunity

Given the restrictions on foreign investment at this time, U.S. airlines continue to rely on alliances for access to global networks. However, these alliances can be costly to an airline to join and maintain. Similarly, in the EU, some observers speculate that one reason the EU allowed the postponement of the ownership liberalization issue is that anti-trust immunities may currently satisfy immediate EU concerns about market

¹⁷⁹ Linzell, *supra* note 102, at 379, 392 (citing *Working Group Position Statement on Relaxing Foreign Ownership Restriction*, 19 AIR & SPACE L. 1, 20 (2005)).

¹⁸⁰ *Id.* at 392; LELIEUR, *supra* note 115, at 74.

¹⁸¹ Linzell, *supra* note 102, at 392; Seth M. Warner, Commentary, *Liberalize Open Skies: Foreign Investment and Cabotage Restrictions Keep Noncitizens in Second Class*, 43 AM. U. L. REV. 277, 313 (1993).

¹⁸² Hsu & Chang, *supra* note 137, at 562.

¹⁸³ See Cavinato, *supra* note 98, at 311 (citing Micheline Maynard, *2 Major Airlines Seen Near Bankruptcy Filings*, N.Y. TIMES, Sept. 14, 2005, at A1).

access.¹⁸⁴ In fact, strategic alliances requiring antitrust immunity have long been utilized as a less-than-perfect substitute for mergers that foreign ownership laws prohibit.¹⁸⁵ It appears that such alliances will continue to fill in as a substitute for access to foreign investment, whether in the form of consolidation, the infusion of capital, or both. As stated in a joint report issued by the Department and the Commission, “Since ownership and control restrictions will remain to limit the freedom of carriers to merge and given that alliances result in significant benefits for carriers, global alliances and immunized [Joint Ventures] seem likely to continue to play an important role in transatlantic markets.”¹⁸⁶

Alliances requiring antitrust immunity are not the ultimate answer to airlines’ woes caused by the inefficient access to capital. While they can provide some benefits for U.S. airlines, such as immediate access to global networks, they can be costly to an airline to join and maintain, especially if the airline is obligated to update or modify its systems in order to become compatible with its alliance partners. Alliance members can be marginalized by other members which seek to retain lucrative, long-haul routes for themselves. In this way, becoming a member of an alliance can actually result in limiting the potential for an airline to grow and expand its network. Furthermore, only so many U.S. airlines can be in the same alliance before fears of anticompetitive domestic effects will prevent other U.S. airlines from joining an alliance. Alliance members may also experience difficulty achieving efficiencies otherwise available under a merger such as common management, economies of scale/scope, and a combined network.

2. Airlines Create New Arrangements

Since immunized alliances are a less-than-perfect solution for U.S. carriers to gain access to additional sources of capital and expand their network, airlines have resorted to creating other types of arrangements. A

¹⁸⁴ See, e.g., Unnikrishnan, *supra* note 157.

¹⁸⁵ Charles Hunnicutt, *Competition Policy and International Airline Alliances*, XXIX ANNALS OF AIR & SPACE L. 175, 175 (2004); see also Warren L. Dean, Jr. & Jeffrey N. Shane, *Alliances, Immunity, and the Future of Aviation*, 22 AIR & SPACE L. 1, 18 (2010) (stating that alliances have helped airlines address nationality based impediments to performance and that alliances have resulted in competitive benefits of rationalization otherwise available in a more conventional legal environment by facilitating the sharing of resources, including capital and equity, without a change in control).

¹⁸⁶ U.S. DEP’T OF TRANSP., *supra* note 55, at 13, para. 49.

prime example is the arrangement between Aer Lingus and United Airlines (United) pursuant to which these two airlines share costs and revenues in regard to one of the city pairs, Washington, D.C.-Madrid, operated under their codeshare agreement. This arrangement has enabled United to offer service to its passengers on an Aer Lingus-operated flight carrying the United code without either United or Aer Lingus separately incurring all of the start-up costs associated with commencing such service in this previously underdeveloped market. Without such an arrangement, neither carrier would have commenced service to Madrid on its own. Under this unique arrangement, United has expanded its network while saving costs and limiting risks.¹⁸⁷

Joint ventures outside the United States have also been used as a way to work around the limitations on foreign investment. Mesa Airlines, a U.S. domestic regional airline, formed a joint venture with Shenzhen Airlines to start a new regional airline in the Chinese market.¹⁸⁸ By teaming up with Shenzhen Airlines on a project outside the United States, Mesa Airlines has extended its reach without relying on direct foreign investment in its U.S. entity.¹⁸⁹

Consolidation among U.S. domestic carriers has become a substitute for greater access to foreign capital. Most recently, the industry has witnessed the Northwest/Delta merger together with the United/Continental merger. These mergers occurred not long after the US Airways/America West merger. Unable to expand networks on their own in order to compete with other airlines, U.S. air carriers have resorted to mergers with other U.S. carriers in order to obtain economies of scale and benefit from a combined network.

At one point, air carriers also used a methodology where ownership interests held by a foreign investment entity were “multiplied out” to represent the total beneficial foreign ownership of a domestic airline.¹⁹⁰ If

¹⁸⁷ David Kaminski-Morrow, *United, Aer Lingus to Tie up on Washington-Madrid Route*, FLIGHTGLOBAL.COM (Jan. 22, 2009), <http://www.flightglobal.com/articles/2009/01/22/321495/united-aer-lingus-to-tie-up-on-washington-madrid-route.html>.

¹⁸⁸ David Grossman, *Airlines Get Creative to Skirt Foreign Ownership Rules*, USA TODAY (Oct. 6, 2009), http://www.usatoday.com/travel/columnist/grossman/2009-10-06-multinational-airlines_N.htm.

¹⁸⁹ *Id.*

¹⁹⁰ BRUCE KEINER, JR. ET AL., AIRLINE ALLIANCES, ANTITRUST IMMUNITY AND MERGERS IN THE UNITED STATES 12 (2009), available at <http://www.crowell.com/documents/airline-alliances-antitrust-immunity-and-mergers-in-the-us.pdf>.

the foreign investors' interests were genuinely passive, and highly dispersed, a U.S. LLC could be inserted between the air carrier and each foreign investment entity.¹⁹¹ This structure was used in connection with Hawaiian Airline's emergence from bankruptcy because the reorganized airline involved an ownership structure that included foreign investment entities, and under the Department's traditional application of the citizenship requirements, Hawaiian would not have passed the U.S. citizen test.¹⁹²

Under what became known as the "Hawaiian approach" or "Hawaiian structure," the new LLC owns and controls the voting stock in the air carrier (or its parent), and independent U.S. managers who have a genuine financial interest must hold all the voting interest in the new LLC.¹⁹³ If foreign investors hold any remaining interest, it must be non-voting.¹⁹⁴ The DOT accepted this approach in recognition of the fact that the foreign ownership restrictions "imposed harmful burdens on U.S. carrier access to investment capital."¹⁹⁵ The approach was acceptable if "the U.S. managers are in fact independent decision makers and are not obliged to follow the dictates of the offshore entities that they manage with respect to [the air carrier], whether because of fiduciary duty or any other reason."¹⁹⁶

The Department's application of the Hawaiian approach is not often seen in public documents.¹⁹⁷ It did appear, however, in Virgin America's application for a certificate of public convenience and necessity, where the Department initially found that Virgin America could not use the Hawaiian approach, but later decided to apply that standard and determined that Virgin America was owned and controlled by U.S. citizens once Virgin America altered its ownership and management structure.¹⁹⁸ Both the Hawaiian and Virgin America matters demonstrate that U.S. carriers will resort to the "multiplying-out approach" in order to obtain access to foreign capital.

Minority ownership probably will also continue to be a substitute for increased access to the global capital markets.¹⁹⁹ Lufthansa's 19%

¹⁹¹ *Id.* at 12–13.

¹⁹² *Id.* at 12 n.70.

¹⁹³ *Id.* at 13.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 12.

¹⁹⁶ *Id.* at 13 (quoting Letter from Karan K. Bhatia, Asst. Sec'y of Aviation and Int'l Affairs, U.S. Dep't of Transp., to Jonathan Hill (Mar. 7, 2005)).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ See Grossman, *supra* note 188 (explaining the innovative ways that airlines currently use

investment in jetBlue provides access to capital for jetBlue and allows Lufthansa to expand its U.S. route network by connecting with jetBlue's flights at jetBlue's New York Kennedy Airport hub.²⁰⁰ As long as access to foreign capital remains restricted, U.S. carriers will be constrained to work around the U.S. citizenship requirements.

VII. WHAT'S NEXT FOR OWNERSHIP AND CONTROL

A. *Broader Liberalization*

1. *Potential Benefits*

The United States has agreements with more than 100 Open Skies partners, all of which contain citizenship requirements in the form of nationality clauses.²⁰¹ While the United States continues to move forward with efforts to conclude more open skies agreements with additional trading partners, including China, Mexico, and South Africa, some believe it is time to seek broader liberalization under existing and future bilaterals.²⁰² Proponents of further liberalization would relax or eliminate altogether restrictions in the nationality clause, ownership and control restrictions, and cabotage prohibitions, allowing all freedoms of the air.²⁰³ They envision a completely free global market, such as exists in many other industries.²⁰⁴ Proponents cite to the great potential for all stakeholders, including passengers, shippers, airlines, labor, and airports.²⁰⁵ Relaxing nationality clauses, ownership and control restrictions, and allowing cabotage, for example, could result in expanded networks and greater competition among airlines.²⁰⁶ The effect would be better service, lower fares for passengers, cheaper rates for shippers, and, of course, access to the global capital

to circumvent ownership restriction laws).

²⁰⁰ *Id.*

²⁰¹ *Open Skies Partners*, *supra* note 24.

²⁰² See Patel, *supra* note 110, at 507–11 (discussing liberalization of ownership and control on airlines).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 507.

²⁰⁶ *Id.*

market.²⁰⁷ Air transport services could increase in general, benefitting airports and creating more jobs in all aspects of the aviation industry.²⁰⁸

2. *Potential Risks*

However, many opponents to greater liberalization fear the opposite will occur.²⁰⁹ They are concerned that eliminating restrictions will result in shrinking networks with fewer service options available to passengers and shippers. They predict that competition among airlines would only remain in high-demand markets and that service to markets where there is less demand would be reduced or eliminated. Opponents also argue that if ownership and control restrictions are relaxed, foreign airlines will gain greater ownership rights in U.S. airlines and consolidate them with foreign airlines.²¹⁰ They claim that more consolidation will also result in less service and less competition since there will be fewer carriers.²¹¹ With increased foreign involvement, these carriers would not necessarily have U.S. interests in mind. There is also apprehension that American employees in U.S. aviation markets would be replaced with foreign employees who will accept lower wages and are not as well trained or experienced compared to their American counterparts. The quality and safety in air transport services would suffer. Security issues would also arise, since the U.S. government relies on service from airlines in national security emergencies through the Civil Reserve Air Fleet (CRAF) program. There is a concern that U.S. airlines owned and controlled by foreign nationals would not support the United States during a national emergency.

B. *Solutions for Obstacles to Deeper Liberalization*

While many obstacles must be overcome before embarking on efforts to increase liberalization, commentators have offered potential solutions. The

²⁰⁷ *Id.* at 507–17.

²⁰⁸ *Id.* at 517.

²⁰⁹ Certain commentators further believe that reregulation of the airline industry should be considered. See Paul Stephen Dempsey, *The Cyclical Crisis in Commercial Aviation: Causes and Potential Cures*, 28 ANNALS OF AIR & SPACE L. 1, 15–17 (2003); see also Brian F. Havel, *Beyond Open Skies: A New Regime for International Aviation*, 34 AIR & SPACE L. 368, 368–79 (2009).

²¹⁰ Havel, *supra* note 209, at 378.

²¹¹ *Id.*

following sets forth some of those solutions. In addition to foreign ownership and control and labor issues, other items demanding the United States' and the European Union's attention are lurking on the horizon, including streamlined visa/facilitation provisions, enhanced and harmonized aviation security measures and capacity limits resulting from airport/air traffic constraints, and greenhouse gas rules.²¹²

1. Legislation

Undoubtedly, the main obstacle to increased liberalization on the U.S. side is the current U.S. statute restricting foreign ownership and control of U.S. airlines.²¹³ When the Department first announced its intent in late 2005 to change U.S. policy in order to allow foreign citizens to control certain aspects of a U.S. airline's operations,²¹⁴ some Members of Congress strongly opposed the initiative, arguing that Congress first had to act to amend the statute before the Department could change any policy.²¹⁵

The political climate at that time would not allow any room for foreign influence over domestic air carrier operations. At roughly the same time that the debate on increased foreign involvement in airline operations was taking place on Capitol Hill, a perceived scandal involving the sale of U.S. port facilities to Dubai Port World, a United Arab Emirates entity, was also playing out in Congress.²¹⁶ At a time when the United States was debating how to protect its ports and prevent containers with dirty bombs from entering its territory, legislators were troubled to learn that the Bush Administration approved a transaction they thought would put U.S. national security interests at U.S. ports in the hands of foreign nationals. When members of Congress also learned that the Bush Administration was attempting to allow foreign nationals to control certain aspects of U.S. airlines' operations, they were equally concerned. During hearings held by the House of Representatives Aviation Subcommittee, many Representatives,

²¹² Michael Goldman, *Beyond Open Skies: After Its 100th Open Skies Agreement, Where Does the U.S. Go from Here?*, TRANSP. COMM. Q. 9 (2011) ("If U.S. international aviation is to expand — which after all is the initial *raison d'être* for Open Skies — we should explore some other areas that should become part of a new U.S. Open Skies model for the 21st century.").

²¹³ Vision 100-Century of Aviation Reauthorization Act, *supra* note 106.

²¹⁴ Actual Control of U.S. Air Carriers, 70 Fed. Reg. 67,389, 67,394 (Nov. 7, 2005).

²¹⁵ Cavinato, *supra* note 98, at 321–22.

²¹⁶ *Id.* at 323.

including Representative Oberstar, opposed the Department's proposal and argued that the Department lacked authority to modify its policy on control without Congressional action.²¹⁷ Many Representatives took a harsh stance on national security as midterm elections were approaching.²¹⁸ As the State Department's John Byerly, the lead negotiator at the time for the United States for its air transport agreements, later explained, the Department's attempt to change its policy

ran into a firestorm of opposition in the United States, based on national security concerns and homeland security concerns. It was eventually melded into the huge battle over the Dubai Ports controversy in the United States. And after a full year and plenty of battle scars to show for it, the Administration has decided this simply is not going to work It's not politically possible at this time.²¹⁹

It had become clear that any change in approach concerning foreign ownership and control matters would have to be accepted by Congress.²²⁰

Liberalization proponents have long advocated that Congress should relax the U.S. law that restricts ownership and control of U.S. airlines.²²¹ Some argue that such Congressional action is necessary to fully implement the open skies program, facilitate investment in U.S. air carriers, help ensure the long-term financial health of the U.S. aviation industry, and guarantee that U.S. carriers remain competitive.²²² While proponents of full liberalization offer various approaches for relaxing ownership restrictions, most seem to agree that certain conditions should be met before foreign investors enjoy increased involvement with U.S. airlines.²²³ For example, they would favor legislation that permits unlimited foreign voting and nonvoting equity

²¹⁷ *Id.* at 326.

²¹⁸ *NPRM House Hearing*, *supra* note 173, at 3, 5, 8 (testimony of Reps. Costello, Oberstar, and Poe, respectively); Cavinato, *supra* note 98, at 323 (citing Joyce Purnick, *A Tempest in a Seaport, and Politics*, N.Y. TIMES, Feb. 23, 2006, at B1).

²¹⁹ *U.S.'s Byerly Reaffirms Commitment to Finalizing Transatlantic Air Services Accord*, U.S. DEP'T OF STATE (Jan. 9, 2007), http://useu.usmission.gov/dossiers_open_skies_jan1109_byerly_roundtable.html.

²²⁰ Cavinato, *supra* note 98, at 326.

²²¹ Warner, *supra* note 181, at 320; Cavinato, *supra* note 98, at 337.

²²² Cavinato, *supra* note 98, at 337.

²²³ *Id.*; Warner, *supra* note 181, at 321.

investment in U.S. airlines by citizens of countries that afford reciprocal investment opportunities for U.S. citizens in their air carriers.²²⁴ This would provide an incentive for protectionist countries to relax their foreign ownership restrictions.²²⁵ They suggest suspending foreign ownership and control restrictions on a nation-by-nation basis through bilateral or multilateral air transport agreements once legislation is adopted.²²⁶

Another condition would be to relax U.S. ownership and control restrictions only as part of the open skies program.²²⁷ Foreign nations would be required to adopt the key elements of the open skies program and incorporate them into the country's air transport agreement with the United States.²²⁸ This condition would encourage more nations to liberalize their overall air transport policies and bring them in line with the open skies approach.²²⁹

A third condition would be to allow only those trusted individuals or entities that are not owned, controlled, or subsidized by foreign governments to invest in and help manage U.S. airlines.²³⁰ This would ensure that foreign, government-influenced, and government-subsidized air carriers would not operate in the U.S. market and obtain an unfair competitive advantage.²³¹

While Congressional action is viewed as the primary obstacle to deeper liberalization within the aviation industry, it is uncertain whether Congress is ready to amend U.S. law.²³² As occurred during the Department's attempt to change its policy on foreign nationals controlling some aspects of U.S. airline's operations, Members of Congress may remain concerned about political backlash from their constituents, especially those who are union members or who fear that service to small communities will be cancelled if foreign nationals are involved in management decisions.²³³ Members of

²²⁴ Warner, *supra* note 181, at 321.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 322.

²³⁰ *Id.*

²³¹ *Id.*

²³² See generally *id.* at 280 (suggesting that without Congressional action many nations will reject liberalization).

²³³ See generally Cavinato, *supra* note 98, at 320–27 (detailing Congressional opposition to a proposed change in the DOT's policy on foreign investment).

Congress may also want to avoid appearing weak on national security issues and preventing foreign interests from becoming involved in U.S. business.

To overcome these challenges, some have suggested that the U.S. airline industry, executive agencies, non-governmental policy, and academic communities work more closely with Congress to educate legislators on investment issues affecting carriers, including the unique nature of the industry and the need for access to global capital.²³⁴ Many Members of Congress do not appreciate the effect that the U.S. ownership restriction has on the U.S. aviation industry or what the economic impact could be if the statute was amended. To do this, however, there must be greater consensus among airlines as to exactly how far Congress should go in relaxing the ownership and control restriction.

2. Security Issues

The widely accepted belief that relaxing foreign investment restrictions would result in an increased threat to national security is another significant obstacle to ownership reform.²³⁵ Recall that national security concerns stem primarily from the Defense Department's (DoD) fear that allowing foreign ownership and control of U.S. air carriers would result in an inability to rely on U.S. carriers for airlift service during military emergencies under the CRAF program,²³⁶ and that "international political developments could create conflicts of interest that undermine an airline's commitments to CRAF."²³⁷ For example, foreign owners may receive requests or orders from their foreign government that contradict DoD orders.

Proponents of deeper liberalization, however, have suggested several approaches for resolving this issue. First, they point out that, according to a study requested by the Assistant Deputy Under Secretary of Defense for Transportation Policy and conducted by the Institute for Defense Analyses, "[i]f strong risk-management safeguards were adopted, DoD could

²³⁴ See generally *id.* at 336 (discussing the need for greater information sharing with members of Congress).

²³⁵ See *id.* at 326 (discussing the derailment of DOT proposal to relax foreign ownership restrictions based on national security concerns).

²³⁶ Linzell, *supra* note 102, at 395.

²³⁷ *Id.* at 396 (quoting DAVID GRAHAM ET AL., SUSTAINING THE CIVIL RESERVE AIR FLEET (CRAF) PROGRAM 41 (2003), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ada431033&Location=U2&doc=GetTRDoc.pdf>).

effectively manage the CRAF program to meet national security requirements, even if the US government were to raise the current ceiling on foreign ownership and control.²³⁸ Further, liberalization proponents underscore DoD's current use of foreign flag air carriers for military transport, its explicit policy permitting reliance on such carriers, and extensive use of foreign-owned container lines for transport by sea, to undermine DoD's position regarding foreign ownership and control of U.S. air carriers.²³⁹ They also observe that U.S. air carriers owned or controlled by foreign nationals could be required to remain or become U.S.-flagged, rendering them subject to all U.S. laws, including those statutes that penalize airlines for failure to fulfill their CRAF obligations.²⁴⁰ Penalties could be severe enough to require performance even in the face of contradictory requirements from a foreign government. And, to mitigate any impact on diplomatic relations, DoD could rely on obligations contained in the contractual agreements to guarantee participation in the CRAF program, including termination in the event that the U.S. carrier did not comply with its CRAF obligations.²⁴¹ In addition, the Department could revoke the airline's operating certificate.

DoD could also require a foreign-owned airline to provide a standby letter of credit that would be payable to DoD if the airline does not meet its CRAF obligations.²⁴² Standby letters of credit are used to insure or guarantee performance of obligations on the part of a seller of a service or goods.²⁴³

Some have also suggested that foreign investment could only be permitted in accordance with a mutual protection pact.²⁴⁴ Foreign investment in U.S. airlines would only be allowed if the investor is from a country with which the United States has entered into an accord "in which the parties agree to render mutual aid in the event of armed attack on one of the parties."²⁴⁵ The North Atlantic Treaty Organization provides an example of such an accord.²⁴⁶ The ANZUS treaty with Australia is another

²³⁸ *Id.*

²³⁹ *Id.* at 397.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² Cavinato, *supra* note 98, at 344.

²⁴³ *Id.* Note that U.S. banking regulations may need to be amended to permit such a mechanism. *Id.*

²⁴⁴ *Id.* at 339–40.

²⁴⁵ *Id.* at 340.

²⁴⁶ *Id.* (citing North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243)

example.²⁴⁷ Other such treaties exist with Japan, South Korea, and the Philippines.²⁴⁸ Some countries from the western hemisphere are parties to the Inter-American Treaty of Reciprocal Assistance.²⁴⁹ Under a mutual protection regime, nationals from Australia, Japan, South Korea, the Philippines, many western hemisphere countries, and NATO countries—including Canada, Turkey, and much of Europe—would be eligible to invest in U.S. air carriers.²⁵⁰

3. Labor Issues

U.S. labor unions are generally opposed to relaxing foreign ownership restrictions. Opposition stems primarily from fear that foreign owners and managers of U.S. airlines would replace U.S. employees with employees from their home countries²⁵¹ or cheap, unqualified labor from third countries. Liberalization proponents argue that this concern is unwarranted. They look to similar U.S. industries that are not subject to foreign ownership restrictions and assert that foreign investment did not have a detrimental effect on American jobs.²⁵² Proponents further assert that liberalization of the ownership and control restrictions would permit additional investment in

(“The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self defense . . . will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.”).

²⁴⁷ *Id.* The ANZUS treaty provides that “the Parties separately and jointly by means of continuous and effective self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack” and “[e]ach Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.” *Id.* (quoting Security Treaty, art. II, art. IV, U.S.–Austl.–N.Z., Sept. 1, 1951, 3 U.S.T. 3420). The United States suspended its obligations under this treaty with New Zealand in 1986. U.S. DEP’T OF STATE, TREATIES IN FORCE 348 (2010), available at <http://www.state.gov/documents/organization/143863.pdf>.

²⁴⁸ Cavinato, *supra* note 98, at 340–41.

²⁴⁹ *Id.* at 341.

²⁵⁰ *Id.*

²⁵¹ Linzell, *supra* note 102, at 399.

²⁵² *Id.* (citing Peter Macara, *Foreign Ownership of Airlines: The End of Flying the Flag?*, 33 AIR & SPACE L. 13 (2006)).

U.S. airlines and prevent job losses.²⁵³ With access to foreign capital, U.S. airlines would become more competitive and gain better financial health. They would not have to resort to layoffs in order to save on costs. Liberalization supporters also assert that protectionist measures will only result in weakening U.S. companies and increase, rather than mitigate, the threat to U.S. jobs.²⁵⁴ They claim that access to foreign capital would help U.S. airlines grow and expand their domestic and international networks, help them compete with so-called “foreign super carriers,” and remain viable U.S. employers.²⁵⁵ By way of additional measures to ensure U.S. jobs are protected, liberalization proponents suggest that the government require that all or a certain portion of the airline crew of a foreign-owned, U.S.-flagged airline be composed of U.S. citizens.²⁵⁶

The Air Line Pilots Association (ALPA), in particular, is opposed to liberalization of the ownership restrictions on the grounds that its members would be negatively impacted because U.S. labor laws do not cover foreign airlines.²⁵⁷ ALPA also insists that there would be a “race to the bottom” in regard to treatment and protection of airline employees because airlines will attempt to evade strict labor laws by transforming themselves into foreign corporations.²⁵⁸ According to the U.S. Department of Transportation, however, U.S. laws and regulations applicable to U.S. carriers and collective bargaining agreements between employees and the airlines prevent foreign investors from evading requirements under U.S. labor laws.²⁵⁹ Further, even though U.S. airlines may become owned or controlled by foreign investors, they would be obligated to remain U.S.-flagged airlines in order to continue operating in the U.S. domestic market.²⁶⁰ Such U.S.-flag carriers are subject to U.S. labor laws.

²⁵³ *Id.*

²⁵⁴ *Id.* (citing Julie Oettinger, *The Path to Meaningful Liberalization*, 20 AIR & SPACE L. 1 (2006)).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* (citing *Foreign Investment in U.S. Air Carriers: Hearing Before the Subcomm. on Aviation of the H. Comm. on Transp. and Infrastructure*, 109th Cong. 10 (2006) (statement of Duane Woerth, President, Air Line Pilots Ass'n)).

²⁵⁸ *Id.* (citing Patel, *supra* note 110, at 516).

²⁵⁹ *Id.* (citing U.S. GEN. ACCOUNTING OFFICE, ISSUES RELATING TO FOREIGN INVESTMENT AND CONTROL OF U.S. AIRLINES 8 (2003)).

²⁶⁰ *Id.* (citing Patel, *supra* note 110, at 516).

ALPA has also argued that increased foreign investment in U.S. airlines could lead to consolidation and airlines operating long haul routes would use foreign crews.²⁶¹ This would force U.S. airlines to reduce international service, shrinking opportunities for U.S. crews to operate these coveted routes that provide an opportunity to earn higher wages.²⁶² Liberalization proponents respond that if the domestic market is opened up to allow free entry, airlines will expand international service because it represents the best opportunity for profit.²⁶³ They predict that international service would not decrease enough to cause job loss for U.S. crews.²⁶⁴

In addition, the American Bar Association (ABA) has proposed that a foreign carrier acquiring a U.S. carrier could be required to ensure that the U.S. airline will retain the same percentage of combined total available seat miles that it had as of a date six months prior to announcing the acquisition.²⁶⁵ The ABA has also suggested that the U.S. government and the relevant foreign governments establish a legal framework containing fair procedures to regulate labor representation and collective bargaining on multinational airline systems.²⁶⁶

Before Negotiations for the 2010 Agreement were underway, the European Commission held two aviation forums on liberalization and labor in order to facilitate discussions between stakeholders and decision makers on labor issues linked to the U.S.–EU agreement.²⁶⁷ These forums were organized through the support of labor organizations in both the United States and the European Union.²⁶⁸ Over seventy individuals from U.S. and EU Member State Governments, unions, European and U.S. airlines, academia, labor experts, and officials from the European Commission participated in the forums.²⁶⁹

During the forums, employee representatives voiced their concerns with the 2007 Agreement and efforts to negotiate and conclude the 2010

²⁶¹ Patel, *supra* note 110, at 514–15.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 515.

²⁶⁶ *Id.*

²⁶⁷ *International Aviation – EU–US Aviation Forum on Liberalisation and Labour*, EUROPEAN COMMISSION (Dec. 3–4, 2008), http://www.ec.europa.eu/transport/air/events/2008_12_03_int_us_en.htm.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

Agreement. The main concern held by pilot representatives, for example, related to the impact that ownership and control reforms would have on employee and union rights in trans-national operations.²⁷⁰ For labor, the problem was that operations under the multilateral agreement would affect rights airline employees at the national level traditionally enjoyed—that is—the right to collectively organize, negotiate, agree, and enforce agreements at the company level.²⁷¹ They questioned how these rights could be protected for workers employed in the United States and European airline companies based in more than one country.²⁷² According to European labor groups, this issue arose within Europe as commercial freedoms granted to airlines were not matched by developments in social protection, which, to complicate matters, are based in Europe on differing national regimes.²⁷³

A number of different approaches for ensuring employee representation in a trans-national environment were discussed. One approach was the use of trans-national agreements dealing with social matters in trans-national companies, such as agreements struck between airlines and their employees.²⁷⁴ It was noted that these voluntary agreements are common at the global and European level, but there lacks a clear international legal framework for their enforcement.²⁷⁵ Additionally, while they frame broad principles of the employee–employer relationship at the company level, national-level agreements between employees and their employers address the details.²⁷⁶ The scope of these agreements is narrow as well and many merely address consultation procedures during a company’s restructuring.²⁷⁷

Next, some of the forum attendees suggested that a multinational convention on the rights of airline workers could be a way forward.²⁷⁸ This approach would address the need for harmonized national labor standards for

²⁷⁰ *International Aviation-Second EU–US Aviation Forum on Liberalisation and Labour*, EUROPEAN COMM’N (June 22–23, 2009), http://ec.europa.eu/transport/air/events/2009_06_22_int_us_en.htm [hereinafter *Second Forum*] (follow “Executive Summary of the Discussions” hyperlink).

²⁷¹ *Id.* at 1; see also *First Trans-Atlantic Labour Forum*, EUROPEAN COCKPIT ASS’N (Dec. 11, 2008), <http://www.eurocockpit.be/stories/20081211/first-trans-atlantic-aviation-labour-forum>.

²⁷² *Second Forum*, *supra* note 270, at 1.

²⁷³ *Id.* at 2.

²⁷⁴ *Id.* at 3.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 4.

aviation workers.²⁷⁹ A multinational convention has addressed similar issues in the maritime industry and the forum examined that industry's experience in this area.²⁸⁰ Participants in the maritime industry reported on recent updates and revisions to the Maritime Labor Convention and the need to tackle the problem of inadequate standards. They explained that what became the Maritime Labor Convention of 2006 (MLC) established a new set of basic standards that all members of the International Labor Organisation (ILO) must apply.²⁸¹ According to the presenters, the MLC covers minimum requirements for seafarers to work on a vessel, conditions of employment, hours of work and rest, wages, leave, repatriation, accommodations, recreational facilities, food and catering, occupational safety and health protection, medical care, welfare, and social security protection.²⁸² For them, enforcement of the standards remains an issue and much of that responsibility is placed upon port authorities to inspect a vessel's certification.²⁸³ However, it was noted that, for the most part, the MLC is viewed as a positive step for those employed in the maritime industry. The presenters further explained that the MLC's implementation is still being closely monitored.²⁸⁴ While the MLC could be examined further when considering whether a multinational convention on airline workers' rights would be a viable solution, the maritime model may not be an exact fit. Many of labor's concerns, such as flags of convenience have not been adequately addressed in the maritime industry.

How to ensure common labor standards was further addressed. Approaches to establishing common standards can vary in form, including unenforceable policies or declarations, as well as treaties, which are enforceable.²⁸⁵ It was stressed that involvement of the relevant unions was essential to the process.²⁸⁶ Scandinavian Airlines' (S.A.S.) experience was examined as it was underscored as successful in securing common standards across the company since its creation in the 1950s. S.A.S. used a single contract that was enforceable under Swedish law and had been in operation

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 5.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

through three rounds of restructuring since the late 1970s.²⁸⁷ One commentator also pointed out during this discussion that the emphasis should be on the quality as well as the quantity of jobs when establishing common labor standards.²⁸⁸

A final approach examined during the forums was the convergence of labor law. In particular, participants examined the steps that would be required to ensure convergence in the labor laws of the parties to a treaty. Practical and political obstacles were addressed. A forum participant from the EC's Legal Service emphasized that the U.S.–EU Open Skies Agreement expressly excluded certain areas of social policy from action at the EU level, including pay, right of association, social security, and the right to strike.²⁸⁹ Consequently, the EC could not table proposals on any such issues unless jointly with the Member States.²⁹⁰

A representative from the European Cockpit Association (ECA) noted that the ECA is a strong supporter of regulatory convergence as a means of improving standards in the industry in the areas of security, safety, and economic regulation and that a similar approach could work for social matters.²⁹¹ The main issue, however, was ensuring recognition of existing arrangements such as negotiated collective bargaining agreements.²⁹² He stated that when combined with information sharing and a common set of labor standards, there should be a basis for an effective and sustainable dialogue between employees and employers.

An ALPA representative added that granting greater commercial freedom to airlines should not dilute the protections offered to workers.²⁹³ According to ALPA, the best way to approach this issue was to provide for a single labor law in Europe based on the provisions of the U.S. Railway Labor Act, which provides clear procedures for the selection of bargaining representatives, a clear negotiation framework, a dispute resolution procedure, and a clear enforcement mechanism.²⁹⁴ The bottom line for

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 6.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

ALPA was protecting four fundamental rights: the ability to organize, negotiate, agree, and enforce collectively.²⁹⁵

In terms of moving forward, a number of groups developed methodologies for incorporating social considerations into the second stage of the EU–U.S. negotiations.²⁹⁶ The formulas varied, but all suggested that the 2010 Agreement should include the four fundamental rights underscored by ALPA. The EC and other participants agreed to develop these and other ideas for inclusion in the 2010 Agreement.²⁹⁷

While the 2010 Agreement does not include precise terms guaranteeing the four fundamental rights suggested by certain attendees at the EC labor forums, it does include a new article pursuant to which parties agree to be guided by principles that do not undermine labor related rights.²⁹⁸ Further, the Joint Committee, on which both ECA and ALPA have a seat, is empowered to “develop appropriate responses to concerns found to be legitimate.”²⁹⁹ In addition, in the Memorandum of Consultations relating to the 2010 Agreement, the EC acknowledges challenges related to representation of cross-border mobility of workers and commits to informing the Joint Committee about initiatives to improve implementation, application, and enforcement in this area.³⁰⁰ In this way, the 2010 Agreement recognizes labor representatives’ concerns associated with liberalizing the aviation industry.³⁰¹ ECA noted that it knows of no other air transport agreement that includes such far-reaching social protections.

According to the ECA, the clauses ultimately incorporated into the 2010 Agreement ensure that growth flowing from the agreement’s benefits employees as well as consumers.³⁰² However, they argue that appropriate tools still do not exist to allow airlines to operate in accordance with a clear, unduplicated set of rules and to prevent airlines from playing one set of

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 6–7.

²⁹⁷ *Id.* at 7.

²⁹⁸ 2010 Agreement, *supra* note 3, attachment B, art. 4 (adopting a new article 17 *bis*); *see also Employee Concerns Recognised in Open Skies Deal*, EUROPEAN COCKPIT ASS’N (Apr. 22, 2010), <http://www.eurocockpit.be/stories/20100422/employee-concerns-recognised-in-open-skies-deal>.

²⁹⁹ 2010 Agreement, *supra* note 3, attachment B, art. 4.

³⁰⁰ 2010 Agreement, *supra* note 3, para. 18.

³⁰¹ *Employee Concerns Recognised in Open Skies Deal*, *supra* note 298.

³⁰² *Liberalising and Regulating Transatlantic Air Transport*, EUROPEAN COCKPIT ASS’N (Sept. 15, 2010), <http://www.eurocockpit.be/stories/20100915/liberalising-and-regulating-transatlantic-air-transport>.

standards against another, promoting a race to the bottom in regard to employment protection.³⁰³ As currently structured, the arrangement permits airlines to exploit differences in employment regulation.³⁰⁴ While ECA acknowledged that the 2007 Agreement and the 2010 Agreement are both successful and groundbreaking in many ways, “they are not complete and will eventually fail unless we follow up with complementary regulatory changes.”³⁰⁵

While ALPA appreciates the work that the U.S. and EU negotiators undertook in exploring and attempting to address labor’s concerns during the second stage negotiations, ALPA remains cautious as to how the clauses on labor rights will be applied.³⁰⁶ In the meantime, however, ALPA views these new provisions as a promising and meaningful development; the provisions should serve as a model for similar terms to be included in other air service agreements.³⁰⁷ ALPA also appreciated the fact that the 2010 Agreement amended Article 21 of the 2007 Agreement by setting up a process for addressing the possibility of removing market access barriers.³⁰⁸ ALPA approves of the new Article 21 allowing careful consideration of the implications of further removal of market access barriers and changes to labor and other laws.³⁰⁹

Any attempt to liberalize foreign ownership restrictions may have to include protective labor provisions to be politically viable. Some supporters of broader liberalization acknowledge that labor must be fully included in the liberalization process. By participating fully in negotiations, discussions, and the adoption of specific measures, labor may become supportive of certain aspects of liberalization, particularly if assurances concerning job preservation are included in the process. Providing access to capital and improving the financial health of U.S. airlines will have to be done in a way to ensure that all stakeholders, including U.S. labor, benefit from the result.

³⁰³ See Captain Martin Chalk, President, European Cockpit Ass’n, Speech Delivered Before the International Aviation Club of Washington, D.C. (Sept. 1, 2010), *available at* http://www.iacwashington.org/speeches/ChalkIACremarks_9-1-10.pdf.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ See Captain John Prater, President, Air Line Pilots Ass’n, Speech Delivered Before the International Aviation Club of Washington, D.C. (Sept. 1, 2010), *available at* http://www.iacwashington.org/speeches/PraterIACremarks_9-1-10.pdf.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ See 2010 Agreement, *supra* note 3, art. 6.

4. *Multilateral Approaches*

a. *The Multilateral Agreement on the Liberalization of International Air Transportation*

Some observers suggest that recent accomplishments in the form of the U.S.–EU Open Skies Agreement serve as a model for additional multilateral agreements involving broader liberalization. They also point to the Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT) and IATA’s Agenda for Freedom as evidence of other concerted efforts to advance liberalization.³¹⁰ The U.S. joined Brunei Darussalam, Chile, New Zealand, and Singapore in forming the MALIAT in 2001.³¹¹ MALIAT was among the first multilateral air transport agreements to include open skies provisions and appeared to deepen liberalization.³¹² One of MALIAT’s provisions states that the parties will grant authorizations to an airline designated by one of the other parties to provide international service, as long as it is incorporated and has its principal place of business in the territory of another party and “effective control of that airline is vested in the designating Party, its nationals, or both.”³¹³ Notably absent from MALIAT’s conditions for obtaining authorization to serve another party’s territory is the requirement that nationals of the designating party actually own the airline.³¹⁴ While MALIAT also sets forth a provision stating that nothing in the agreement will be deemed to affect a party’s ownership and control laws, thus preserving the U.S. ownership and control regime, it is significant that the United States executed an agreement that does not necessarily require an airline to be owned by a party’s nationals in order to operate under the agreement.³¹⁵ Like the U.S.–EU Open Skies Agreement, MALIAT serves as a model multilateral agreement that could be used for pursuing deeper liberalization.

³¹⁰ See, e.g., Linzell, *supra* note 102, at 404.

³¹¹ MALIAT, *supra* note 83, art. 20.

³¹² Linzell, *supra* note 102, at 404.

³¹³ MALIAT, *supra* note 83, art. 3; Linzell, *supra* note 102, at 404.

³¹⁴ See Linzell, *supra* note 102, at 404; see also MALIAT, *supra* note 83, art. 3.

³¹⁵ Linzell, *supra* note 102, at 404.

b. IATA's Statement of Policy Principles Regarding the Implementation of Bilateral Air Services Agreements

In 2008, IATA developed its Agenda for Freedom, which is a process focused on encouraging governments around the world to grant airlines the commercial freedom to operate like any other global business.³¹⁶ IATA's Director General and CEO at the time, Giovanni Bisignani, launched the initiative at IATA's Annual General Meeting held in Istanbul in June 2008.³¹⁷ At that meeting, attendees adopted what is known as the Istanbul Declaration, which calls for a change to rules that limit the foreign ownership of airlines.³¹⁸ Given the crisis in existence at that time in terms of fuel costs, limited access to capital, and the overall aviation industry's poor financial health, IATA determined it was incumbent upon it, as the industry's global association, to create a process to encourage governments to allow airlines to operate like any other business.³¹⁹ IATA found that an Agenda for Freedom was necessary because airlines are required to conduct business under a web of bilateral Government-to-Government treaties that are out of date with commercial realities.³²⁰ IATA found that the treaties severely restrict cross border consolidation through restrictive ownership and control clauses, which have a direct effect on the industry's poor financial performance over time.³²¹ According to IATA, if the airline industry was financially healthy, it would be in a much better position to fuel economic growth and job creation.³²²

Fifteen governments and the European Commission were invited to participate in what became the Istanbul Summit held later that year in October 2008.³²³ It was also open to any other country desiring to engage in the process of liberalizing ownership and control rules.³²⁴ Representatives from Australia, Brazil, Canada, Chile, the European Commission, India, Morocco, Panama, Peru, Singapore, Switzerland, Turkey, United Arab

³¹⁶ *Frequently Asked Questions*, AGENDA FOR FREEDOM, <http://www.agenda-for-freedom.aero/Pages/faq.aspx#4> (last visited Aug. 20, 2011).

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

Emirates, United States, and Vietnam attended the Summit.³²⁵ During the Summit, Mr. Bisignani circulated a paper proposing ways in which governments can provide airlines more commercial freedom to adapt to a rapidly changing business environment.³²⁶ One proposal was for countries to unilaterally waive, but not revoke, key clauses in the bilaterals that prevent airlines from enjoying commercial freedom, primarily in the area of ownership and control clauses and traffic rights clauses.³²⁷ Participating countries would only suspend the clauses they choose with the country or countries they choose either on a conditional and/or reciprocal basis.³²⁸ The proposal's goal was to create rapid progress on liberalization while at the same time providing assurances for countries that they would remain in control of their own liberalization efforts.³²⁹

Another proposal discussed at the Istanbul Summit was to create a multilateral treaty on waiving nationality clauses in existing bilateral agreements.³³⁰ While similar to the first proposal, it used a different legal instrument.³³¹ It also did not include mechanisms to eliminate limitations on market access.

A third proposal, to draft a multilateral statement of policy principles, also emerged.³³² The principles would commit signatory governments to apply existing and future bilateral agreements in a liberal manner in exchange for their bilateral partners doing the same.³³³ Certain summit participants preferred this approach to the waiver approach because it gave them more control over the degree of liberalization and their choice of partners.³³⁴ At the conclusion of the Istanbul Summit, the participants agreed that further liberalization would be desirable and that they should consider the three proposals.³³⁵

After the Istanbul Summit, IATA conducted economic studies on the impact of liberalization and researched best practices for liberalization from

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

around the world.³³⁶ It also prepared an initial draft of what became the Statement of Policy Principles regarding the Implementation of Bilateral Air Services Agreements (Statement of Policy Principles).³³⁷ According to IATA, the goal of the Statement of Policy Principles was to call on countries to apply the terms of the existing bilateral agreements, and negotiate new agreements, in a liberal manner. IATA coordinated with the Istanbul Summit participants on developing the draft Statement of Policy Principles so that it would be acceptable to the maximum number of countries committed to liberalization.³³⁸

Mr. Bisignani organized a second Agenda for Freedom summit, which was held in Montebello, Canada in November 2009.³³⁹ Those governments that indicated their willingness to endorse the Statement of Policy Principles were invited to attend the Montebello Summit. Chile, the European Commission, Malaysia, Panama, Singapore, Switzerland, United Arab Emirates, and the United States participated in this second summit, and all but the European Commission signed the final version of the Statement of Policy Principles. The European Commission endorsed it.³⁴⁰

The Statement of Policy Principles addresses four main areas. The first is freedom to access capital markets. Signatory countries agreed not to exercise bilateral rights to block international service from airlines with non-national ownership structures.³⁴¹ The second main area is the freedom to do business. Participating governments agreed to focus on reducing restrictions on market access and to expedite further opening of markets in future bilateral agreements.³⁴² The freedom to price services is also addressed. Under this freedom, signatory countries agreed to focus on allowing greater freedom for airlines to price services in line with market realities.³⁴³ The last main area addressed is the need for fair competition. Participating countries agreed that the parties could not be expected to implement the foregoing principles with governments that pursue policies designed to secure an unlevel playing field for their national carriers.³⁴⁴ According to IATA, the

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

Statement of Policy Principles is a significant document that can be effective because governments have adopted these principles in an official capacity, and it will form the basis for bilateral negotiations.³⁴⁵

The Statement of Policy Principles is open to the endorsement of any government interested in promoting liberalization.³⁴⁶ IATA and the signatory countries promote the Statement of Policy Principles around the world, and IATA has held regional workshops for such purposes and to seek additional endorsements.³⁴⁷ So far, Bahrain, Kuwait, Lebanon, and Qatar have joined the original Montebello Summit Participants by either signing or endorsing the Statement of Policy Principles.³⁴⁸

The IATA Agenda for Freedom provides another vehicle to move forward on a multilateral basis and broaden liberalization principles even further. However, as long as the participating countries' domestic laws restrict airline ownership and control, such as those of the United States, the multilateral approach for liberalization will remain limited or simply move forward and leave behind those countries unwilling to liberalize their regimes. It is possible that increased competition from, and success enjoyed by, more liberal countries' airlines will pressure legislators in the United States and similar countries to consider adopting modifications to the ownership and control restrictions in order to allow their airlines the same freedoms.

VIII. CONCLUSION

International air transport systems are critical to modern economies, and the U.S.–EU trans-Atlantic market has always been a market leader. The 2007 Agreement and 2010 Agreement were significant steps forward in providing a more efficient, more effective, and more stable air transport system. While moving forward on the remaining obstacles to a true open aviation area may be difficult, the required hard work and continuing negotiations are certainly worthwhile. U.S. aviation policy was during my time as Assistant Secretary for Aviation and International Affairs and

³⁴⁵ *Fact Sheet: Agenda for Freedom*, IATA, http://www.iata.org/pressroom/facts_figures/fact_sheets/Pages/agenda-freedom.aspx (last visited Aug. 20, 2011).

³⁴⁶ *Frequently Asked Questions*, *supra* note 316.

³⁴⁷ *Id.*

³⁴⁸ *2009 Agenda for Freedom Summit*, AGENDA FOR FREEDOM, <http://www.agenda-for-freedom.aero/Pages/default.aspx> (last visited Aug. 20, 2011).

continues to be based upon three main goals. First, to ensure in the short term that the system is able to function efficiently and meet the economic and security needs of the nation. Second, over the long term to promote open international markets, fair competition, and minimal government intervention in markets. And, third, to establish common international standards that will ensure a safe, efficient, and environmentally sound global transportation system. The pursuit of such goals has not come easy, and the U.S.–EU Open Skies Agreement is a remarkable achievement. With the approval of the Agreement these three goals have advanced.

Obviously, however, issues have and will continue to arise which hinder progress and challenge our resolve to achieve further liberalization. The U.S.–EU Open Skies Agreement has established fruitful efforts under the U.S.–EU Joint Committee, and perhaps defined a prudent manner in which to move forward toward convergence in areas such as safety, security, and interoperability and compatibility of air traffic systems. Genuine possibilities exist for advancing larger issues, such as foreign ownership and control of air carriers. Eventually, the market will demand that this issue be resolved. What I said at the opening of the Dean Rusk Center conference in 2003 on the Trans-Atlantic Relationship remains true today:

Industries of all kinds are moving toward more open and vigorous global competition as consumers demand new services and products. Participation in such a dynamic world economy can pose huge challenges as well as opportunities for both individuals and industries. The most promising way forward is to continue to rise to the challenge of competition in the international marketplace. North Americans and Europeans, like other peoples, can and must compete, not retreat, in the face of global competition. You cannot reap the benefits of free trade if you cannot move people and goods freely.³⁴⁹

In such an environment it is imperative that the aviation industry and governments continue to review and revise the trans-Atlantic air transport market. We have begun to replace the isolated bilateral aviation markets that were created under the existing system of the Chicago Convention. We must

³⁴⁹ WILNER ET AL., *supra* note 1.

now continue to work toward a true single, open, worldwide aviation market for the twenty-first century; and, in doing so, ensure that all stakeholders participate in the economic benefits of such a vibrant market.