AVOIDING DEADSTICK: A CONSTRUCTION OF ARTICLE 17 *BIS* OF THE ATA TO PROMOTE LABOR-MANAGEMENT RELATIONS

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I. INTRODUCTION

In order to compensate for growing labor costs, U.S. air carriers have recently increased airfares on flights.[1] However, the emergence of lost-cost carriers (LCCs), who bypass these labor costs, threaten the market dominance U.S. carriers have exercised over the last decade. Deregulation and increased liberalization has created a small profit margin that is threatened by LCCs who do not face the same labor and operating expenses. Foreign carriers are challenging large U.S. carriers, offering dramatically lower airfares on transatlantic flights.[2] Facing more stringent domestic labor standards, U.S. carriers have petitioned the U.S. Department of Transportation (USDOT) to reevaluate granting permits for foreign carriers with suspect labor practices, generating heightened foreign criticism.[3]

On July 25, 2016, this criticism came to a head when the European Union (EU) Commissioner for Transport, Violeta Bulc, formally demanded arbitration because the USDOT refused to grant Norwegian Air International's (NAI) foreign air carrier permit.[4] Though the USDOT has since granted the application, the three-year denial raised significant concerns about the meaning of Article 17 *bis* of the U.S.-EU Air Transport Agreement (ATA or the Agreement), which is the "core labor protection provisions of the agreement."[5] Whether the USDOT should have granted NAI a foreign air carrier permit was vigorously contested. U.S. carriers, labor organizations, and several U.S. politicians argue that NAI violates express labor standards, which is prohibited under Article 17 *bis* of the ATA. Though Article 17 *bis* may not provide an explicit basis for denying foreign carrier permits, NAI's application for a foreign air carrier permit should have been denied under a proper construction of the article and the USDOT permit-granting provisions.[6]

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[1] Reuters, *Your Plane Ticket Just Got More Expensive*, FORTUNE (Jan. 6, 2016), http://fortune.com/2016/01/06/airfares-airlines-prices/.

[2] Josh Lew, *Norwegian To Launch Sub-$200 Flights from US to Paris*, TRAVEL PULSE (Feb. 24, 2016), http://www.travelpulse.com/news/airlines/norwegian-to-launch-sub-200-flights-from-us-to-paris.html.

[3] *See, e.g.*, Joint Answer of Delta Air Lines, Inc., United Airlines, Inc., and American Airlines, Inc., Application of Norwegian Air International Limited, Docket DOT-OST-2013-0204-0027 (Jan. 13, 2014), http://www.regulations.gov.

[4] Letter from Violeta Bulc, EU Comm'r Transp., to Anthony Foxx, Sec'y Transp., U.S. Dep't Transp. (July 25, 2016), https://ialpa.net/wordpress/wp-content/uploads/2016/08/Commissioner-Bulc-letter-to-Secretary-Foxx.pdf.

[5] John D. Porcari, *Setting The Record Straight On Norwegian Air And The US-EU Open Skies Agreement*, HUFFINGTON POST: THE BLOG (Aug. 27, 2016), http://www.huffingtonpost.com/john-d-porcari/setting-the-record-straig_b_10704160.html.

[6] *See infra* Part III.

Part II of this Note canvases the trend from closed skies to bilateral agreements to present day open skies agreements, specifically examining how the airline industry's move towards liberalization has undermined organized labor requiring the creation of Article 17 *bis* of the ATA. Next, Part III addresses the respective international labor laws that regulate airline employees and their collective relationship with management. Part IV analyzes whether Article 17 *bis* of the ATA includes the granting of air carrier certificates, and whether intentional violation of labor standards can be a basis for denying certification under the ATA. From that analysis, this Note will argue that the USDOT inappropriately granted NAI's foreign carrier permit under Article 17 *bis*. Finally, in Part V, the Note concludes with a look towards future considerations for the third phase of the ATA and the pending U.S. legislation to limit foreign air carrier permits.

II. HISTORICAL BACKGROUND: OPENING THE SKIES

While commercial aviation has become routine, the standards and practices governing the skies remain "stuck in the past."[7] This remains largely true because much of the foundation for present day air transport agreements were made in the aftermath of World War II. During the war the United States began to look ahead "with the hope of using its military aircraft for civilian purposes."[8] This hope prompted a convention to address these desires and opened negotiations for air travel cooperation. Nations simultaneously attempted to open flight routes while limiting foreign ownership of their air carriers—an issue that remains unsettled today. Invariably, every move toward open skies between the United States and Europe correspondingly affected airline workers and their ability to protect themselves in the changing landscape.

A. Early Moves Towards Bilateral Agreements

In 1944, the United States hosted the Convention on International Civil Aviation (Chicago Convention), bringing together fifty-four other nations.[9] At that time, the United States had "a more developed commercial air carrier industry while European air carriers tended to be government-owned and

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[7] Charles A. Hunnicutt, *U.S.-EU Second Stage Air Transport Agreement: Toward an Open Aviation Area*, 39 GA. J. INT'L & COMP. L. 663, 666 (2011).

[8] E. Rebecca Kreis, *A Comparative Analysis of the Aviation Network Within the European Community and the Ad-Hoc Network Between the U.S. and Central America*, 24 TRANSP. L.J. 303, 307 (1997).

[9] *Id.*

focused."[10] This difference became important when recovering nations rebuked the United States' push for more liberal aviation rights. In the end, fifty-two nations agreed to the 1944 Chicago Convention, creating the International Civil Aviation Organization (ICAO)[11] under the auspices of the U.N.

Additionally, the Chicago Convention established the first five "freedoms of the air."[12] The first two freedoms were universally accepted: the right to pass over a nation's territory without landing and the right to land in that nation for non-traffic purposes.[13] Whereas, the latter three freedoms were not as widely accepted.[14] Still, the Chicago Convention provided the necessary first step for nations to cooperate on subsequent bilateral air transport agreements, expanding the latter three freedoms and liberalization going forward.[15]

The first notable bilateral agreement was between the United Kingdom and the United States in 1946—Bermuda I. Bermuda I was a bilateral agreement that reaffirmed first and second freedom rights to its signatories and extended third, fourth, and fifth freedom rights (a drastic step beyond the agreement at the Chicago Convention).[16] Furthering the push for liberalization, nations could determine capacity limits for flights so long as they related to "traffic requirements" on the individual routes and "airline operation."[17] Rates were tied to the "rate conference machinery" of the International Air Transport Association (IATA).[18] Consequently, Bermuda I became a template for subsequent bilateral agreements.[19]

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[10] Hunnicutt, *supra* note 7, at 667.

[11] *Id.*

[12] Kreis, *supra* note 8, at 308.

[13] Air Services Agreement, U.S.-U.K., Feb. 11, 1946, 60 Stat. 1499 [hereinafter Bermuda I]; *Manual on the Regulation of International Air Transport, Doc 9626, Part 4*, INT'L CIV. AVIATION ORG., http://www.icao.int/Pages/freedomsAir.aspx.

[14] The third freedom of the air is the right to land in the granting nation's territory for traffic purposes. A nation granting fourth freedom of the air rights allows a country's air carriers to pick up passengers in the foreign nation for purposes of transporting them back to their home country. Finally, the fifth freedom rights permit a nation to use the granting nation as an intermediary stop in passage to a third-party nation, allowing the pick-up and drop-off of passengers along the way. *Manual on the Regulation of International Air Transport, Doc 9626, Part 4*, *supra* note 13.

[15] Hunnicutt, *supra* note 7, at 668.

[16] *Id.* at 669.

[17] Bermuda I, *supra* note 13, at Annex VI (a)–(c).

[18] *Id.* at Annex II(b). Due to the desire to manage international rates and fares but impracticability in doing so, governments turned to the IATA (an independent agency) to determine appropriate rates and fares that would "not involve cut-throat competition, while ensuring that they could be set as low as possible, in the interests of consumers." *Early Days,*

However, the U.K. decided to unilaterally end Bermuda I in 1976, forcing the United States to agree to stricter measures under Bermuda II just a year later.[20] Bermuda II was hailed as "a successful attempt by the British to remove some of the excess capacity of United States' carriers in the United Kingdom."[21] Under Bermuda II, air carriers were limited to a few gateways in the opposing country's airports and had their capacities subject to review by one another.[22] Bermuda II was a protectionist effort to push against the U.S. airline industry deregulation in the 1970s and 1980s.[23] Ultimately, Bermuda II remained in effect until the signing of the ATA in 2007.[24]

While bilateral agreements, like Bermuda II, evidenced a global trend towards protectionism, U.S. policy makers were domestically deregulating the airline industry. By the 1970s, the civil aviation industry continued to rely on an antique framework established by the Civil Aeronautics Act of 1938[25] and the Federal Aviation Act of 1958.[26] These acts created a bloated bureaucracy that sheltered the airline industry from traditional market forces with elaborate political protections. Under this system, the Civil Aeronautics Board (CAB) was responsible for determining: which airlines could provide long-haul service, what routes carriers were allowed to fly, and what fares each carrier could charge for those routes.[27] For example, CAB required elaborate hearings when fare changes were requested to determine whether the recommended change would be adopted.[28] These restrictions were so stringent that in the forty years since the Civil Aeronautics Act "CAB did not allow the entry of a *single* new trunk airline."[29] By 1975, the airline industry could best be described as "a forty-year old still living at home with his parents," explained then CAB Chairman John Robson.[30] The airline industry had outgrown these regulations.

INT'L AIR TRANSP. ASSOC., http://www.iata.org/about/Pages/history-early-days.aspx (last visited Oct. 6, 2017).

[19] Hunnicutt, *supra* note 7, at 668–90.

[20] *See id.* at 669.

[21] Kreis, *supra* note 8, at 312.

[22] Hunnicutt, *supra* note 7, at 669.

[23] *See infra* Part II.*B.*

[24] *See infra* Part II.*D.*

[25] Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973 (1938).

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

[27] ERIC M. PATASHNIK, REFORMS AT RISK: WHAT HAPPENS *AFTER* MAJOR POLICY CHANGES ARE ENACTED 111 (Princeton Univ. Press 2008).

[28] *Id.* at 112.

[29] *Id.* at 111. Trunk airline is the name given to commercial airlines certified to fly long-haul service. *Id.*

[30] John Robson, *Airline Deregulation: Twenty Years of Success and Counting*, REGULATION, Oct. 1998, at 17, 18.

B. Deregulation: Unshackling the Airline Industry

Faced with barriers from a non-responsive bureaucratic agency, CAB, and mounting foreign protectionism, the U.S. Congress passed—and President Jimmy Carter signed—the Airline Deregulation Act of 1978.[31] The act made substantive revisions to the Civil Aeronautics Act of 1938 and the Federal Aviation Act of 1958 by reducing CAB's control over interstate and foreign routes. Specifically, CAB was disallowed from approving agreements that "limit[ed] the level of capacity among air carriers in markets in which they compete[d], that fixe[d] rates, fares, or charges between or among air carriers."[32] Additionally, it reemphasized that competition was paramount, prohibiting approval of agreements that would "reduce[ ] or elimintate[ ] competition."[33] Moreover, CAB was endowed with the authority to immunize carriers from antitrust violations.[34] The law tried to reduce barriers carriers faced and "open the industry to competition and thereby increase economic efficiency and service."[35]

Deregulation was met with skepticism and outright opposition from existing carriers and labor unions.[36] Without government protection, many financially vulnerable carriers feared deregulation would lead to their collapse.[37] Indeed, deregulation had such an effect. Legacy carriers—Braniff, Eastern, and TWA—were forced out of the market; whereas, small intrastate carriers expanded into the national market.[38] By 1985, approximately 120 airlines went bankrupt or closed their doors.[39] Surviving carriers were forced to "reinvent themselves."[40] Carriers began offering loyalty programs and computerized reservation systems to encourage consumer interest.[41] They restructured routes along a hub-and-spoke system, allowing maximum flight capacity with linked ticket prices for those

[31] Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 18, 26, and 49 U.S.C.).
[32] *Id.*
[33] *Id.*
[34] *Id.* Though typically viewed as an anticompetitive practice, it was meant to allow further competition by allowing carriers to freely merge generating more efficient and cost-conscious moves. The net result being a more competitive market.
[35] Kreis, *supra* note 8, at 312.
[36] PATASHNIK, *supra* note 27, at 113.
[37] *Id.*
[38] *Id.* at 115.
[39] Charles G. Moerdler, *Deregulation – The United States Experience*, 6 HOFSTRA LAB. L.J. 177, 183 (1989).
[40] PATASHNIK, *supra* note 27, at 115.
[41] *Id.*

routes.[42] During deregulation, ticket fares dropped because legacy carriers were forced to compete with new market entrants offering simple operations with " 'no frills' service."[43]

One of the biggest market effects was the cannibalization of smaller airlines by the larger carriers. Prior to deregulation, mergers were scarcely used, except in situations where a carrier was declaring bankruptcy.[44] In the years following deregulation, mergers were permitted for commercial and local carriers as well as the creation of marketing alliances.[45] This consolidation of carriers and subsequent alliance structure has survived to the present day, including foreign carriers. Consolidation was sanctioned by the government, granting *de facto* antitrust exemption for alliance compliance, in the name of economic efficiency.[46]

Moreover, these bankruptcies and mergers had massive implications for labor relations. The pre-deregulation regime afforded stability to the airline industry and organized labor, allowing carriers to afford high labor contracts by passing the costs on to the consumers through steady fare increases.[47] When deregulation finally set in, the industry's stability was upset, which caused shockwaves for all stakeholders.[48] The industry suffered "[m]assive lay offs [sic], significant reductions in salaries, two-tiered salary structures, unprecedented work rule changes, a plethora of labor disputes, and even 'union busting.' "[49] No longer amicable negotiating partners, management and organized labor clashed as both tried to recover from the industry shock.

Former collegiality was abandoned. Organized labor, like the Air Line Pilots Association (ALPA), instituted strikes to combat new reforms.[50] For example, in 1985, ALPA conducted a twenty-nine-day strike against United Air Lines when the airline attempted to create a new tiered pay structure.[51] The structure would have paid new hires less than present airline employees.[52] When the strike ended and employees went back to work, the damage had been done. ALPA continued their active opposition when they tried to secure ownership in the corporation for greater leverage over

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[42] *Id.*
[43] *Id.*
[44] *Id.* at 118.
[45] *Id.* at 118–19.
[46] *See generally id.*
[47] *See* Moerdler, *supra* note 39, at 183.
[48] *Id.*
[49] *Id.* at 179.
[50] *Id.* at 184.
[51] *Id.*
[52] *Id.*

management.[53] This never completely materialized.[54] This combative takeover approach was a radical move for a labor organization, which showed the heightened pressure on both sides.

Concurrently, deregulation allowed some airlines to begin a process of "union busting." Many nonunion airlines thrived after deregulation while some unionized airlines used the industry financial crisis to cut out labor altogether.[55] Frank Lorenzo, the man behind Texas Air Corp., gobbled up bankrupting carriers—Eastern, Continental, Peoples, and Frontier—merging them into Texas International.[56] Through the bankruptcy process, he was able to eliminate collective bargaining agreements and reduce intensive labor costs, which allowed him to offer consistently lower prices.[57] This policy of using bankruptcy to bust up unions was made possible by the Supreme Court's interpretation of the Railway Labor Act.

Employees of the airline industry are governed by the Railway Labor Act (RLA).[58] After 1978 the judiciary addressed substantive issues of distressed airlines and unions facing a potential loss of bargaining power. Before deregulation airline operating costs had risen, accounting for a substantial portion of airline's expenses.[59] Deregulation dissolved CAB's power fix prices, forcing airlines to offer competitive pricing.[60] Competitive pricing and increased operating expenses that could not be passed along to consumers caused several air carriers to breakdown.[61] Airlines tried to restructure collective bargaining agreements to avoid collapse. Generally, labor unions opposed restructuring and would not compromise in order to reach an agreement, which forced the judiciary to take a more active role.[62]

Courts were unwilling to force financially compromised air carriers to become beholden to labor demands at the cost of insolvency. As

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[53] COREY ROSEN, JOHN CASE & MARTIN STAUBUS, EQUITY: WHY EMPLOYEE OWNERSHIP IS GOOD FOR BUSINESS (Harvard Bus. Sch. Press 2005).

[54] In 1994 an Employee Stock Ownership Plan (ESOP) was created, whereby employees surrendered approximately $4.8 billion in potential wages and benefits in exchange for 55% (ALPA held this stock alongside the International Association of Machinists and nonunionized workers) of United's stock and the power to select three directors on the corporate board. James P. Miller, *United ESOP not Flying High*, CHI. TRIB. (Dec. 2, 2001).

[55] Moerdler, *supra* note 39, at 180–81.

[56] *Id.*

[57] *Id.* at 183.

[58] 45 U.S.C. §§ 151–188 (1996). A more detailed explanation of the RLA is included below. *See infra* Part II.

[59] Moerdler, *supra* note 39, at 188.

[60] Beth S. Adler, *Deregulation in the Airline Industry: Toward a New Judicial Interpretation of the Railway Labor Act*, 80 NW. U. L. REV. 1003, 1015 (1986).

[61] *Id.* at 1010.

[62] *Id.*

bankruptcies surged, the courts were forced to adopt rules governing the abandonment of collective bargaining agreements.[63] In cases of insolvency, courts permitted carriers to reject preexisting collective bargains.

An alternative to bankruptcy was merger. Courts handled mergers and other attempts at airline survival differently. The court refrained from adjudicating those matters, deferring to the authority of the National Mediation Board (NMB) and adjustment boards to make decisions.[64] Regardless, the court was sympathetic to carriers on the brink of collapse; they would prevent labor agreements from stealing the company's last gasp. Whereas, in cases involving financially sound airlines, the court consistently refused to intervene in labor disputes, deferring decisions to the RLA framework.[65]

After the dust settled from deregulation, the airline industry normalized. The shock to the system had caused a massive industry consolidation and drove perennial carriers into insolvency. Simultaneously, deregulation strained relations between management and organized labor, creating an uneasiness and skepticism that still permeates present negotiations between the parties. In the years following, labor and management continued to struggle to reach compromises in the face of impending liberalization efforts. Many industry watchers fear that increased airline liberalization, like deregulation, will cause reductions in labor protections.

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[63] In *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513 (1984), the U.S. Supreme Court unanimously held that a debtor in a bankruptcy proceeding could reject a collective bargaining agreement, but the Court splintered over when the debtor could properly exercise that power. *Id.* at 1017–18. While the decision explicitly excepted Parties covered by the RLA, labor unions that remained considered that the decision would be extended to them in due time. *Id.* at n.116.

[64] In the post-deregulation period, the court regularly denied injunctive requests from labor organizations trying to impede mergers, self-help remedies, and other attempts to circumvent collective bargaining agreements. Instead, the court continually reiterated that the proper authority to address the issues were those outlined in the RLA. *See id.* at 1021–26; *accord* Ass'n of Flight Attendants, AFL-CIO v. USAir, Inc., 807 F. Supp. 827 (D.D.C. 1992) (denying injunctive relief to AFA after merger airlines rejected application of preexisting collective bargaining agreement pre-merger); Ass'n of Flight Attendants v. Republic Airlines, Inc., 534 F. Supp. 783 (D. Minn. 1982) (refusing to grant an injunction to the manager's imposition of "self-help" remedies when negotiations stalled on a new post-merger collective bargaining agreement); Air Line Pilots Ass'n v. Texas Int'l Airlines, 502 F. Supp. 423 (E.D.N.Y. 1980), *aff'd*, 656 F.2d 16 (2d Cir. 1981) (denying to grant an injunction, the District Court found that the NMD was the appropriate authority to determine union certification of the employees in the litigation).

[65] Adler, *supra* note 60, at 1026–27.

C. "Open Skies" Ahead

Deregulation opened the U.S. domestic airline market, but it did not give air carriers increased access to international markets. In the wake of Bermuda II, the United States signed several bilateral air transport agreements with European nations.[66] The new wave of bilateral agreements was far more liberal, departing from the protectionist structure of Bermuda II.[67] These agreements were the predecessors to the "open skies" agreements of the 1990s.[68] In just five years, the United States had signed twenty-three new "liberal" bilateral agreements with foreign nations.[69]

In 1992, the USDOT formally adopted an initiative for negotiating open skies agreements to increase the liberalization efforts created by the preexisting bilateral agreements.[70] The USDOT solicited input from various stakeholders, including labor unions.[71] From these responses, the department developed a comprehensive definition of open skies to inform future agreements. That same year, the United States signed its first bilateral open skies agreement with the Netherlands.[72] The deal represented a crucial step toward greater liberalization and forced other European nations to the negotiating table. KLM, a Dutch 'flagbearer' carrier, immediately had a "competitive advantage" under the agreement because it had access to the entire U.S. market without any gateway restrictions.[73] This competitive advantage had a domino effect; European nations became more willing to sign open skies agreements, which provided the U.S. carriers with "quasi-

[66] In 1978, the U.S. entered three separate bilateral air transport agreements with Belgium, Netherlands, and Germany. Hunnicutt, *supra* note 7, at 670; Protocol Between the Government of the United States and the Government of Belgium Relating to Air Transport, U.S.-Belg., Dec. 12–14, 1978, 30 U.S.T. 617; Protocol Relating to the United States of America – Netherlands Air Transport Agreement of 1957, U.S.-Neth., Mar. 31, 1978, 29 U.S.T. 3088; 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.

[67] Christian Hofer & Martin Dresner, *The United States - European Union Open Aviation Area: The American Perspective*, 46 J. TRANSP. RES. F. 129, 130 (2007), http://journals.Oregondigital.org/trforum/article/download/1001/896.

[68] *Id.*

[69] *Id.*

[70] Defining "Open Skies"; Order Requesting Comments, 57 Fed. Reg. 19323-01 (Aug. 5, 1992).

[71] *Id.*

[72] Jacob A. Warden, *"Open Skies" at a Crossroads: How the United States and European Union Should Use the ECJ Transport Cases to Reconstruct the Transatlantic Aviation Regime*, 24 NW. J. INT'L L. & BUS. 227, 236 (2003).

[73] *Id.* Gateway restrictions are limitations placed on foreign carriers to access certain locations. *Id.*

cabotage"[74] across Europe.[75] In the years following, the United States negotiated a total of sixteen additional bilateral open skies agreements.[76]

However, the European bilateral agreements conflicted with the "Single European Aviation market"[77] Derived from the Single European Act of 1987 (SEA), the model integrated all member states of the European Commission (EC or Commission) into a "common market."[78] Under the SEA, barriers to trade were lifted and voting mechanisms were restructured, making deregulation of the European internal aviation market possible.[79] This resulted in the adoption of a string of reforms known as the "three packages."[80] While the first regulation had little effect, the second package granted carriers of Member States greater autonomy in setting fares and gave them third, fourth, and some fifth freedom rights.[81] The third package brought even greater liberalization to the European market by removing any "remaining barriers to a free aviation market," providing Member State carriers "full cabotage . . . within the collective European Union."[82]

When Member States continued to broker individual bilateral open skies agreements with the United States, the EC feared these agreements were detrimental to the larger European community. Even the U.K. continued to negotiate separately with the United States, revising the Bermuda II agreement four additional times[83] after its inception in order to adjust for airport growth, the exit of TWA and Pan Am from the market,[84] and the advent of code-sharing[85] programs.[86] Finally, in 1998, the EC challenged

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[74] Cabotage (also cabotage rights or privileges) is the permission from one country to a foreign entity, a state or carrier, to transport persons or items through destinations within the nation. George Firican, *The Chicago Conference Documents: Pamphlet on Freedom Rights and Cabotage*, INT'L CIV. AVIATION ORG., http://www.icao.int/Search/pages/results.aspx?k=cabotage (last visited Oct. 2, 2016).

[75] Warden, *supra* note 72, at 236.

[76] Hunnicutt, *supra* note 7, at 673.

[77] Single European Act (1987) created common market and common transport policies that allowed stringent regulations against member states and a deregulation of the EC internal market, including aviation. *Id.*

[78] Warden, *supra* note 72, at 233.

[79] *Id.*

[80] *Id.*

[81] *Id.* at 234.

[82] *Id.*

[83] Bermuda II was revised in 1981, 1991, 1995, and then again in 1997 to capture growing demands in air travel and changes on the U.S. carriers who could access Heathrow airport. *Open Skies Agreement Highlights*, U.S. DEP'T OF STATE (Jan. 30, 2009), https://2009-2017.state.gov/e/eb/rls/fs/2009/119760.htm.

[84] Both TWA and Pan Am declared bankruptcy, with the latter being bought out by American Airlines. PATASHNIK, *supra* note 27.

[85] Code sharing is a system by which two or more airlines share a flight number and will advertise it under both carriers. *Id.*

these bilateral open skies agreements in the European Court of Justice (ECJ) as being inherently discriminatory.[87] The EC filed actions against seven Member States: Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany, and the U.K.[88] The EC argued that the agreements brokered between these nations and the United States infringed on (1) "the external competence of the Community" and (2) "the provisions of the [EC] Treaty concerning the right of establishment."[89] The ECJ found that in all the cases, except that involving the U.K. who had a preexisting agreement, the Member States were not permitted to enter into a commitment that has already been determined to be within the discretion of the community.[90] Additionally, the court found the United States' express refusal rights (for permit grants to carriers that do not have "substantial ownership" and "effective control" by the contracting nation) was discriminatory to carriers owned and operated by Member States in the contracting country.[91]

In their ruling, the ECJ effectively invalidated the agreements of these nations. With the rejection of the agreements, a new agreement had to be struck between the United States and the entire EU.[92] The new deal would replace preexisting bilateral open skies agreements. The EC would then be able to promote the overall community's goals, remove possible discrimination among EU carriers, and ensure the proper exchange of information.[93] This mandate for negotiations between the United States and the EU became the groundwork for the next stage of open skies agreements—the U.S.-EU Air Transport Agreement.

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[86] *See* BRIAN F. HAVEL, BEYOND OPEN SKIES: A NEW REGIME FOR INTERNATIONAL AVIATION 309 (Wolters Kluwer 2009).

[87] Cumulatively 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 [hereinafter Open Skies Judgment].

[88] European Commission Press Release No. 89/02, The Court of Justice Explains, By These Judgments, The Distribution of Competence as Regards the Conclusion of International Air Transport Agreements (Nov. 5, 2002).

[89] *Id.*

[90] *Id.*

[91] Open Skies Judgment, *supra* note 87.

[92] European Commission Press Release IP/03/281, Open Skies: Commission sets out its international air transport policy (Feb. 26, 2003). Bermuda II remained operational but was soon replaced by the ATA.

[93] *Id.*

D. U.S.-EU Air Transport Agreement

From the remnants of the fractured bilateral agreements, the United States and EU sought to craft a new compromise that would incorporate the entirety of the European community. On April 30, 2007, the U.S.-EU Air Transport Agreement (ATA) was ratified and became effective a year later.[94] The negotiations began five years prior to completion. Initially, the U.S. Congress opposed early drafts of the agreement, citing concerns over ownership control, labor, and aviation security.[95] From the European perspective, "[t]he desire . . . 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."[96] Despite this impasse, the 2007 Agreement was eventually passed, but it left many issues unresolved.

1. 2007 Agreement: First Stage Negotiations

Notwithstanding the remaining issues, the 2007 Agreement was groundbreaking in scope and effect. The Agreement finally recognized a single European market.[97] EU member nations' carriers were considered "Community Airlines" who could freely fly to any city in the United States. Likewise, U.S. carriers were able to fly to and from any city in the EU and every city in the United States, including EU inauguration flights with intermediate destinations in the EU before ending in the United States.[98] Furthermore, the agreement allowed: prices to be established freely;[99] frequency and capacity of flights to adjust with the market;[100] sales and operation offices to be established in the other Party's territories;[101] computer reservation systems (CRS) to be shared among carriers;[102] and competitive agreements to be established between carriers without fear of losing routes.[103]

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[94] 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 https://www.state.gov/e/eb/rls/othr/ata/e/eu/114768.htm (last visited Oct. 7, 2017).

[95] Christian Westra, *The April 2007 U.S.-EU "Open Skies" Agreement: A Dream of Liberalization Deferred*, 32 B.C. INT'L & COMP. L. REV. 161, 170–71 (2009).

[96] Hunnicutt, *supra* note 7, at 676.

[97] *Id.*

[98] 2007 Agreement, *supra* note 94, art. 3(1)–(2).

[99] *Id.* art. 13.

[100] *Id.* art. 3(4).

[101] *Id.* art. 10.

[102] *Id.* art. 17.

[103] Hunnicutt, *supra* note 7, at 677.

On the other hand, two important issues remained unsolved from the 2007 Agreement: cabotage rights and carrier ownership rights. First, the United States was given authority to fly between European cities en route to and from a U.S. city, but EU nations were not able to equally fly between U.S. cities.[104] This meant that EU carriers were still reliant on the alliance structure to generate multi-city flights passing through the United States. Second, substantial ownership and control rights of U.S. carriers were still denied to EU member states and nationals.[105] Pursuant to the 2007 Agreement, Annex 4, foreign ownership of equity in a U.S. carrier was limited to no more than twenty-five percent of a corporation's voting shares.[106] Additionally, "actual control" of any U.S. carrier was strictly prohibited for foreigners.[107] The Agreement even went so far as to state that neither 25% of the voting equity nor 49.9% of the total equity was sufficient to be deemed control of a U.S. carrier.[108] Due to these restrictions, the EU similarly placed limitations on the amount of ownership and control U.S. nationals could exert on community carriers.[109]

The concern over reducing foreign ownership restrictions is a concern largely pushed by U.S. labor organizations. These organizations fear increased foreign ownership will lead to U.S. labor being replaced with "cheap, unqualified labor from third countries."[110] In response, liberalization proponents argue that allowing increased foreign ownership will increase investment in U.S. airlines and open foreign markets to allow the carriers to become more competitive worldwide, preventing job loss.[111] Due to these growing concerns from U.S. and European labor organizations, two aviation forums on liberalization and labor were held before second stage negotiations could begin.[112]

The European Commission held the first labor forum on liberalization and labor in Washington, D.C. in 2008 to discuss the 2007 Agreement and address its "social effects."[113] The forum included airline labor organization representatives, U.S. and EU officials, academics, arbitrators, and legal

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[104] 2007 Agreement, *supra* note 94, art. 3.
[105] Hunnicutt, *supra* note 7, at 678.
[106] 2007 Agreement, *supra* note 94, at Annex 4, art. 1.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] Hunnicutt, *supra* note 7, at 711.
[111] *Id.* at 711–12.
[112] *Id.* at 713.
[113] European Cockpit Association, *First Trans-Atlantic Aviation Labour Forum*, https://www.eurocockpit.be/stories/20081211/first-trans-atlantic-aviation-labour-forum (last visited Oct. 7, 2017).

experts.[114] The opening remarks outlined the present struggle to simultaneously understand the ramifications of the 2007 Agreement on labor while generating appropriate protections in the upcoming second stage negotiations.[115] The forum focused on unresolved labor issues associated with the 2007 Agreement: flooding of cheap labor into higher-priced markets, growth of "flags of convenience,"[116] loss in market share, extensive industry consolidation, and increased labor forum shopping.[117] These issues remained unaddressed, prompting the parties to meet again less than a year later in the second labor forum.

In June 2009, organized labor organizations from the United States and Europe came together again with policy makers and other stakeholders to further develop solutions for the protection of airline industry employees with increased liberalization under the forthcoming second stage of the U.S.-EU Open Skies agreement.[118] A keynote speaker from the International Labour Organization (ILO) explained that international employee representation is a "core challenge" that presently lacks a uniform standard for proper enforcement mechanisms.[119] In addressing this critical issue, the forum put forth several approaches: trans-national agreements with trans-national companies, European works councils, multinational conventions, common labor standards across companies' operations in multinational jurisdictions, and the convergence of labor laws of the treaty parties.[120]

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[114] John Bruton, Ambassador, Head of Delegation of the European Commission in Washington, Opening Speech to the Labour Forum (Dec. 3, 2008).

[115] *Id.*

[116] Originally applied to the maritime industry, "Flags of Convenience" is a term coined by the International Transport Workers' Federation that denotes an air carrier that registers itself and its aircrafts ("plants its flag") in a different nation to capture a more advantageous law. *Flags of Convenience*, INT'L TRANSP. WORKERS' FEDERATION, http://www.itfglobal.org/en/transport-sectors/civil-aviation/in-focus/focs-in-aviation/ (last visited Oct. 7, 2017). Generally, the carrier will have reduced fees and taxes and can sometimes enjoy laxer labor standards than what might exist in its natural home country. *Id.*

[117] Douglas Lavin, Reg'l Vice Pres. N. Am. IATA, The Need for Change, EU-US Aviation Forum on Liberalisation and Labour: Past, Present and Future (Dec. 4, 2008), summary available at https://ec.europa.eu/transport/sites/transport/files/modes/air/events/doc/douglas_lavin_iata.pdf

[118] THE EUROPEAN COMMISSION, EU-U.S. SECOND AVIATION FORUM ON LIBERALISATION AND LABOUR: EXECUTIVE SUMMARY (June 22–23 2009), https://ec.europa.eu/transport/sites/transport/files/modes/air/events/doc/2009_06_22_executive_summary.pdf [hereinafter SECOND AVIATION FORUM].

[119] *Id.* at 2.

[120] *Id.* at 3–6.

The first approach, voluntary trans-national agreements, like international framework agreements[121] and European Framework Agreements, allow trans-national companies to make independent contracts with employees without relying on national governments.[122] Airlines KLM and EasyJet have both used these in the past. The former used an agreement to maintain preexisting labor arrangements when they merged with Air France; the latter relied on these agreements to create jurisdiction-specific agreements to accommodate local labor conditions.[123] However, these agreements are limited in their use because they lack a formal enforcement mechanism that is accepted globally.[124]

The second recommended approach was to expand the present use of European Works Councils (EWCs) even further.[125] While the EWCs cannot substitute for formal union and management negotiations platforms, these employee bodies allow a clear dialogue, so employees are kept informed of formal negotiations procedures.[126] They are particularly helpful when used alongside other approaches like the aforementioned trans-national agreements.[127]

Next, a multinational convention was recommended to solve the concern over international labor representation. Like the Chicago Convention, nations could agree to certain standards for the regulation of airline workers across the board. During the forum, commentators primarily relied on the Maritime Labour Convention as an exemplar to be followed.[128] Under a similar convention, minimum standards for employment conditions, health and safety protections, wages and hours, and various other issues could be established.[129] Yet, creation of a convention would require the ILO to begin extensive debates, spanning several years, and would require a two-thirds vote from the members to establish, making it an unlikely approach.[130]

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[121] International framework agreements (IFAs) are bargains struck between a multinational enterprise and a Global Union Federation (GUF), establishing the same standards for how the company will conduct itself in all the countries it operates. Dominique Michel, *International Framework Agreements: A Global Tool for Supporting Rights at Work*, INT'L LABOUR ORG. (Jan. 31, 2007), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_080723/lang--en/index.htm.

[122] SECOND AVIATION FORUM, *supra* note 118, at 3.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 4.

[126] *Id.*

[127] *Id.*

[128] *Id.* at 4–5.

[129] *Id.* at 5.

[130] *Id.* at 2.

The last two approaches looked generally at how common labor standards could be generated or present standards converged into a universally binding set of rules.[131] Like trans-national agreements, the common labor standards approach creates uniform standards within a single company regardless of the jurisdiction in which it's operating.[132] Nations can create this uniformity through declarations, treaties, or trans-national agreements; whereas, a convergence of laws binds companies carrying the flags of the participating nations.[133]

Most of the focus in the forum was on the forthcoming second stage negotiations.[134] The concern was whether the agreement could be amended to include a "recognition of existing arrangements," while simultaneously providing protection for the four fundamental labor rights—the ability to organize, negotiate, agree, and enforce collectively—under a clear negotiations framework.[135] A single European labor law, akin to the U.S. Railway Labor Act,[136] would be the best framework for ensuring these fundamentals, according to ALPA representatives.[137] If this was possible, then progress might be viable in creating a substantive protection for employee representation.

Like foreign ownership rights and extended cabotage, these issues were left unresolved, but the parties agreed to return to them during "second stage negotiations."[138] The parties followed up these labor forums and began working on the second stage negotiations almost immediately.[139] Ultimately, the 2010 Agreement failed to include any decisive protection for the fundamental labor rights laid out during the Labor Forum, and the Agreement did not create any new framework for controlling labor representation abroad.[140] The Agreement, however, did create social protections never before included in any air transport agreement, including Article 17 *bis* labor protections.[141]

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[131] *Id.* at 5.
[132] *Id.*
[133] *Id.*
[134] *Id.* at 5–6.
[135] *Id.* at 6.
[136] *See infra* Part II.
[137] Hunnicutt, *supra* note 7, at 716.
[138] 2007 Agreement, *supra* note 94, art. 21. In fact, under the provisions of the agreement future negotiations were required to begin within eighteen months and conclude a second stage agreement within twelve months from then; otherwise, either Party could unilaterally suspend the rights conferred in the agreement. *Id.*
[139] Hunnicutt, *supra* note 7, at 680.
[140] *Id.* at 717–18.
[141] *Id.* at 718.

2. 2010 Agreement: Second Stage Negotiations

The 2007 Agreement went into effect on March 30, 2008.[142] The agreement was met with warm reception. Jacques Barrot, Vice-President of the European Commission of Transports, stated, "[t]his marks the start of a new era in transatlantic aviation. This agreement will bring more competition and cheaper flights to the US."[143] Despite this reception, the parties remained resolved to further liberalize the transatlantic airline markets. The United States wanted to continue to create competitive structures for U.S. carriers; whereas, the EU continued to advance their objective of creating a "transatlantic Open Aviation Area."[144] By 2010, the parties sought to make strides in these areas in passing the second stage agreement (2010 Agreement).

On June 24, 2010, the 2010 Agreement was provisionally put into effect.[145] Using the foundation of the 2007 Agreement, the revisions created more opportunities for investment and access to the airline market.[146] In approving the 2010 Agreement, the parties made the ATA permanent. Additionally, the 2010 Agreement made substantive revisions for cooperating on safety, security, the environment, and labor.[147] The last of these measures, labor, was captured as the "social dimension" of the agreement in Article 17:

> 1. The Parties recognise the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards. The opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties' respective laws.
> 2. The principles in paragraph 1 shall guide the Parties as they implement the Agreement, including regular consideration by the Joint Committee, pursuant to

[142] European Commission Press Release IP/08/474, EU-US Open Skies: A New Era in Transatlantic Aviation Starts on 30 March (Mar. 28, 2008).
[143] *Id.*
[144] *Id.* The transatlantic Open Aviation Area is understood to mean "a single air transport market between the EU and the US with free flows of investment and no restrictions on air services, including access to the domestic markets of both parties." *Id.*
[145] *International Aviation: United States*, EUROPEAN COMM'N, http://ec.europa.eu/transport/modes/air/international_aviation/country_index/united_states_en.htm.
[146] *Id.*
[147] *Id.*

> Article 18, of the social effects of the Agreement and the development of appropriate responses to concerns found to be legitimate.[148]

This provision represented a "historic breakthrough" because of its "explicit commitment to high labor standards," and the obligations it placed on parties to not intentionally undermine labor standards, which had never been previously done.[149]

The 2010 Agreement made large strides in the continued liberalization of the airline market. However, the same issues that remained unaddressed after the 2007 Agreement were still left open again: U.S. restrictions on foreign ownership and control rights and EU rights to fly between the United States and non-EU nations.[150] These considerations were largely left up to the parties to address through the Joint Committee. Therefore, the commitment to a "shared goal of continuing to remove market barriers to maximize benefits for consumers, airlines, *labour*, and communities" would have to be realized through the subsequent interpretation of Article 17 *bis*.[151] Such an opportunity arose when the USDOT rescinded its initial approval of NAI's foreign carrier permit.

III. LABOR STANDARDS OF THE ATA SIGNATORIES

Under Article 17 *bis* of the ATA, both parties are obligated to not intentionally undermine "labour standards or the labour-related rights and principles contained in the Parties' respective laws."[152] To understand the breadth of Article 17 *bis*, the standards, rights, and principles of the Parties' laws must be ascertained. There are substantive similarities among the parties' labor standards, including rights for collective bargaining. Procedurally the parties create and enforce labor standards very differently. One critical difference between the parties is the clarity of labor principals as they pertain to relations among employers and employees.

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[148] 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], http:// www.state.gov/documents/organization/139411.pdf.

[149] Hunnicutt, *supra* note 7, at 681.

[150] *Id.* at 682.

[151] European Commission Press Release IP/03/281, *supra* note 92.

[152] 2010 Agreement, *supra* note 148.

A. U.S. Controlling Law: Railway Labor Act

The paramount law governing labor standards—specifically collective bargaining—for U.S. air carriers is the RLA.[153] Originally passed in 1926 to address national railways, the RLA was extended to cover the emerging airline industry in 1936.[154] Like the nation's railroads, the airline industry represented a delicate market that needed room to grow without harsh regulatory barriers, while simultaneously supporting massive numbers of workers with unique and demanding working hours and conditions.[155] Hence, the aim of the RLA is to "promote collective bargaining and to prevent major slowdowns in [the airline industry] integral to the smooth functioning of national commerce."[156] The NMB was created to minimize industry-wide slowdowns that might cripple the national economy.[157]

Under the RLA, the NMB handles clashes between labor organizations and employers.[158] Typically, the Board acts as an arbitrator settling "minor" disputes, while acting in a "non-binding mediation role in major [ ] disputes."[159] Courts generally defer to the NMD on minor disputes, making the Board's authority in these cases essentially compulsory.[160] Whereas, the Board's role in major disputes—when negotiations stall between labor organizations and management and there is a potential for strike—is to mediate between the parties.[161] If the parties cannot reach a resolution after the required cooling period, then both parties can take appropriate measures, including employees striking and management locking-out employees or imposing new rules.[162] However, where a strike might cause costly deprivations of necessary services, an emergency ad hoc board can be appointed to investigate and make recommendations to the President, during

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[153] 45 U.S.C. §§ 151–188 (1982).
[154] Adler, *supra* note 60, at 1005.
[155] Lawrence J. Kelly, *Is that "Whoosh" You Hear a New Whispher-Jet Whisking Across U.S. Skies, or the Perotvian "Sucking-Sound" of Jobs Leaving the Country?*, 14 LAW & BUS. REV. AM. 699, 708 (2008).
[156] Adler, *supra* note 60, at 1005.
[157] Kelly, *supra* note 155.
[158] *Id.*
[159] *Id.* Under the RLA "minor disputes" involve "interpretation or application of an existing agreement." Adler, *supra* note 60, at 1008. Whereas, "major disputes" concern negotiating new or amending existing collective bargain agreements. *Id.* at 1005. Neither of these terms are explicitly stated in the RLA statutory language; however, the U.S. Supreme Court, interpreting the RLA in *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945), relied on these distinctions in defining the scope of the Board's authority. *Id.* at n.20.
[160] Kelly, *supra* note 155, at 708.
[161] *Id.*
[162] *Id.*

which time the parties must maintain the status quo.[163] If after all this the parties cannot reach a satisfactory resolution, then the President or Congress may be able to intervene to direct the "outcome of the impasse."[164]

B. European Union Labor Law

Like the United States, individual EU nations (with one exception[165]) maintain their own labor laws codified in various statutes. As members of the EU, each nation must meet certain minimum standards under the Treaty on the EU.[166] The Treaty allows the EU's minimum standards to be adopted through "directives," and individual member states can enhance these labor provisions as they deem fit.[167] Once directives have been incorporated in the national laws of the member states, national courts are obligated to "interpret law as consistent with European law," considering both the law's wording and purpose.[168] The European Commission ensures these directives are incorporated into the member states' national laws, and they continuously monitor the implementation of these rules.[169] If a country is deemed to have "lacking or incorrect implementation of regulations," then the Commission may seek redress in the ECJ.[170]

The directives promulgated by the Commission have generally focused on creating minimum standards in a few critical areas. The Commission's directives typically aim to preserve freedom of contract, minimum standards for employee protections and working conditions, equal treatment and non-discrimination policies, and free collective bargaining and collective action.[171] Standards of minimum wage, however, are generally held to be within the purview of collective bargain agreements between employee unions and management.[172] These standards seek to "promote social

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[163] *Id.* at 709.
[164] *Id.*
[165] France contains a unified Code of Labor Law. Manfred Löwisch, *Labor Law in Europe*, 20 RITSUMEIKAN L. REV. 102 (2003).
[166] The Treaty on European Union, commonly referred to as the Maastricht Treaty, did not explicitly create any new labor standards; however, it did recognize existing European Community law from the Treaty establishing the European Economic Community and the Single European Act. *Id.* Additional revisions to the Maastricht Treaty added more relevant labor standards. *See* Amsterdam Treaty, Nice Treaty, and Lisbon Treaty.
[167] *Labour Law*, EUROPEAN COMM'N, http://ec.europa.eu/social/main.jsp?catId=157 (last visited Oct. 7, 2017).
[168] Löwisch, *supra* note 165, at 104.
[169] *Labour Law*, *supra* note 167.
[170] Löwisch, *supra* note 165, at 103.
[171] *Id.* at 104–05.
[172] *Id.* at 105.

progress and improve the living and working conditions of the people of Europe,"[173] while preserving some national autonomy. Unlike the United States, this belief permeates throughout EU labor law at all levels.

Furthermore, EU member states have adopted certain labor standards by multilateral agreements or as required for membership in certain organizations. For example, under the ILO, which all EU members have ratified, employees' right to collectively bargain is recognized and incorporated into those nations' domestic laws.[174] Additionally, in the EU Charter of Fundamental Rights Member States recognize employees' rights to freely associate and workers' rights to be informed and consult one another in that association.[175] Lastly, the EU Charter itself creates a strong recognition on the necessity for social dialogue under Article 138.[176] These various authorities have created both an internal and community-wide set of labor standards that Member States generally recognize and are expected to adhere to when negotiating with labor.

C. Preemption of Treaties and Other Joint Measures Affecting Labor Standards

In addition to the labor laws of the United States and the EU, there are other bodies that provide a general framework for labor relations in the airline industry. The Organization for Economic Co-Operation and Development (OECD) allows nations around the globe to collaborate on standards for business conduct worldwide.[177] The goal of the OECD is not singular advancement of labor above all other interests; instead, it strives for the "highest sustainable economic growth and employment" to contribute to the world economy at large.[178]

OECD establishes guidelines for conducting labor relations and proper employment practices.[179] Like most national laws, the guidelines recommend recognition of employees' rights to collectively bargain and

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[173] *Labour Law*, *supra* note 167.

[174] *See* ILO, Right to Organise and Collective Bargaining Convention, ILO Convention No. 98 (July 1, 1949), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312243:NO.

[175] Charter of Fundamental Rights of the European Union art. 27, 2012 O.J. C 326/02, at 401; *id.* art. 28.

[176] Consolidated Version of the Treaty of the Functioning of the European Union art. 138, May 9, 2008, 2008 O.J. (C 115) 47.

[177] Kelly, *supra* note 155, at 713.

[178] *Id.*

[179] *Id.* at 713–14.

unionize.[180] More importantly though, the guidelines spell out that employers should employ standards that are "not less favourable [sic] than those observed by comparable employers in the host country."[181] While these guidelines are helpful to its member nations, they are limited in value. OECD guidelines cannot supersede a nation's duly enacted labor or employment laws nor does the OECD possess an enforcement body to check whether the policies are being properly administered.[182] Instead, OECD can rely on nothing more than moral suasion. While the OECD does not have any enforcement power, Article 17 *bis* empowers nations to implement the ATA in accordance with those labor laws and principals, including OECD guidelines ascribed to by the signatory nations.

IV. ARTICLE 17 *BIS* PRACTICAL CONSTRUCTION

Under Article 17 *bis*, the parties must not implement the ATA in such a way that would undermine labor standards or the other parties' labor laws.[183] The language of Article 17 *bis* has been arguably unclear about the provision's scope of obligation and effect on the remainder of the Agreement, which raises three separate issues. The first issue is whether Article 17 *bis* imposes a legal obligation on parties to consider one another's labor standards, rights, and principles while carrying out their duties under the Agreement. Second, assuming that obligation exists, does it extend to the authorization of foreign air carrier permits under Article 4? For instance, would authorization of a carrier permit to an airline violating a Party's labor standards, rights, or principles be tantamount to intentionally implementing the agreement to undermine those standards (thereby violating Article 17 *bis* proscriptions)? Finally, if the first two are answered affirmatively, then the issue is whether the USDOT's authorization of NAI's foreign carrier permit was a violation of Articles 4 and 17 *bis*, considering their external hiring practices.

A. The Plain Meaning of the Text of Article 17 bis Creates a Legal Obligation

Article 17 *bis* is more than a hortatory recognition of the value of high labor standards. Instead, it imposes an obligation on all parties to the Agreement to carry out their duties without intentionally undermining one

[180] *Id.* at 713.
[181] *Id.* at 714.
[182] *Id.* at 713.
[183] 2010 Agreement, *supra* note 148.

another's preexisting labor standards, rights, and principles. Under the plain meaning of Article 17 *bis*, the text in paragraph one establishes the labor principles both parties recognize; whereas, the second paragraph imposes obligations on the parties. The provision's two paragraphs must be read in harmony as a single directive that binds all signatories to the Agreement. That directive is a legal obligation on all parties to carry out their duties under the ATA without intentionally undermining preexisting labor standards. This construction is buttressed with the parties' clear statements of intention and purpose, the surrounding negotiations, and the positive policy rationales.

An interpretation of a treaty "begins with its text."[184] Words are to be given their plain and ordinary meaning, unless the treaty text provides a clear definition or the drafter's contrary intent is shown.[185] The context of the words may provide additional meaning to the terms.[186] Treaties should be liberally construed and not limited to constrained meanings.[187] If the text remains ambiguous despite the language's clear meaning, then the parties may look outside the four corners of the document, including previous drafts of the provision, negotiation history, and the construction adopted by the parties.[188] Moreover, it may be necessary to consider the entire context of

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[184] Abbott v. Abbott, 560 U.S. 1, 10 (2010) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text." (quoting Medellín v. Texas, 552 U.S. 491, 506 (2008))); *accord* Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, 340 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 325(1) (AM. LAW INST. 1987) ("An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.").

[185] Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 180 (1982) ("The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.' " (quoting Maximov v. United States, 373 U.S. 49, 54 (1963))).

[186] Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 534–35 (1991) ("When interpreting a treaty, [this Court begins] 'with the text of the treaty and the context in which the written words are used.' " (quoting Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988))).

[187] Air France v. Saks, 470 U.S. 392, 396 (1985) ("[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." (citing Choctaw Nation of Indians v. United States, 318 U.S. 423, 431–32 (1943))).

[188] *Id.*; Zicherman v. Korean Airlines, 516 U.S. 217, 226 (1996) ("[W]e have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties.").

the agreement when construing the language to properly effectuate the overall purpose of the agreement.[189]

The plain meaning of the Article 17 *bis* text must be ascertained by reading the two paragraphs in context. In the first sentence of paragraph one of Article 17 *bis*, the drafters explicitly recognize the complementary value of high labor standards with opening markets.[190] In the second sentence, the drafters elaborate on this correlation: the opportunities produced from the airline industry liberalization are "not intended to undermine labour standards or the labour-related rights and principles contained in the Parties' respective laws."[191] Read alone, paragraph one neither creates nor imposes any obligation on the parties whatsoever. At most, paragraph one appears to state plainly the parties' intentions and purposes. However, paragraph one cannot be read in isolation.

Under traditional maxims of treaty construction, the entire provision should be read together to derive its meaning.[192] In fact, paragraph two directly references the principles stated in paragraph one.[193] The second paragraph's meaning is, therefore, inherently tied to the first paragraph's text. The plain text of the second paragraph states, "The *principles* in paragraph [one] *shall guide* the Parties as they *implement* the Agreement."[194] There is no clear definition of the "principles" in paragraph one, which are to animate the parties' actions. Similarly, it is unclear how these "principles" specifically affect the practices of the parties as they implement the ATA. While "shall" generally has a legal definition, there is no express definition for either "guide" or "implement" in the Agreement. However, the meaning of this sentence is clarified when it is read within the context of Article 17 *bis* and the ATA as a whole.

The "principles" encapsulated in paragraph one refer to the breadth of preexisting labor standards, rights, and principles of the signatories. In the first instance, the statement is vague about which "principles" in paragraph one it denotes. There are at least three possible options. The most tangible meaning would be the express "labour standards or the labour-related rights and principles contained in the Parties' respective laws."[195] In other words,

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[189] Nat'l Westminster Bank, PLC v. United States, 512 F.3d 1347, 1353 (Fed. Cir. 2008) ("[W]e must 'examine not only the language, but the entire context of agreement.' " (quoting Great-West Life Assur. Co. v. United States, 678 F.2d 180, 183 (1982))).

[190] 2010 Agreement, *supra* note 148, art. 4.

[191] *Id.*

[192] United States v. Alvarez-Machain, 504 U.S. 655, 666 (1992) (deriving meaning of an article for extradition enforcement from the surrounding articles language and meaning).

[193] 2010 Agreement, *supra* note 148, art. 4.

[194] *Id.* (emphasis added).

[195] *Id.*

principles include those standards that have been codified into positive law by any of the parties. Whereas, the more abstract view might be that "principles" refer to high labor standards in general. A third and final view might assume that "principles" means the conjunction of high labor standards and open markets stated in the opening sentence of the provision. According to the *Oxford English Dictionary*, "principle" can be defined as "[a] fundamental truth or proposition on which others depend"; "a general statement or tenet forming the (or a) basis of a system of belief"; or "[a] primary assumption forming the basis of a chain of reasoning."[196] Either of these three views could conform to the plain meaning of principles under at least one of these three definitions, so the ambiguity remains.

Nevertheless, this ambiguity can be easily reconciled. The two sentences of paragraph one parallel one another. The drafters make a clear statement of intention in the first sentence, recognizing the conjunction of "open markets" and "high labor standards."[197] The second sentence makes a similar dichotomy between "opportunities" (a byproduct of open markets) and the parties' preexisting labor standards and labor-related rights and principles.[198] The parallel structure indicates that the parties believe their preexisting standards and laws are "high labor standards." So, a Party can uphold high labor standards by complying with one another's preexisting labor laws. Assuming "principles" refer to only the Parties' preexisting labor laws provides a tangible basis for evaluating compliance. Assessing the more abstract view, labor standards would equally require a barometer for compliance, which would be assessed under the Parties' preexisting labor laws anyway. Finally, the third interpretation cannot properly be denoted a principle since it merely describes the relative benefits of a relationship rather than a foundation of belief like a law provides. Hence, "principles" in paragraph two refers to the whole body of preexisting labor standards, rights, and principles of the signatory nations.

Turning to the next issue, the word "shall" has traditionally been understood to impose a duty on a Party.[199] Like a contract, a treaty may impose obligations, binding each nation to the treaty.[200] "Shall" can in some contexts obfuscate the meaning of whether a duty is discretionary or

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[196] OXFORD ENGLISH DICTIONARY (3d ed. 2017).
[197] 2010 Agreement, *supra* note 148, art. 4.
[198] *Id.*
[199] BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 939–41 (2d ed. Oxford U. Press 1995).
[200] BG Group, PLC v. Republic of Argentina, 134 S. Ct. 1198, 1208 (2014) ("As a general matter, a treaty is a contract, though between nations.").

mandatory;[201] however, the meaning here must be deemed mandatory because of the context in which it is used. The first paragraph one explicitly states that the Parties' intention is to not actively undermine labor standards, rights, and principles encapsulated in the Parties' laws.[202] When read together with paragraph two, the second paragraph's meaning becomes clearer. Treating the language as discretionary would make the provision, at a minimum, devoid of effect—an interpretation that should be avoided.[203] Under a traditional canon of treaty construction, the text should be construed to avoid making provisions meaningless or superfluous.[204] At worst, such an interpretation would produce absurd results. If the Parties were permitted to intentionally undermine the labor laws of the other nations, then the Parties are permitted to act contrary to the clear statement of their own intention. This interpretation would hollow out the whole spirit of the Agreement and make Article 17 *bis* useless. The plain meaning of "shall" must be construed as mandatory to avoid such irrational results.

Unlike "shall," there is no clear legal meaning for "guide" or "implement." "Guide" is defined as "to direct the course of [an instrument or action]"; "[t]o lead or direct in a course of action, in formation of opinions . . ."; or "to determine the course or direct of [events]."[205] "Implement" means "[t]o complete, perform, carry into effect [an agreement]" or "to fulfill (an engagement or promise)."[206] Considering these definitions, paragraph two states that the principles in paragraph one (preexisting labor standards, rights, and principles) must direct or lead the behavior of the Parties as they perform or complete the Agreement. This interpretation necessarily raises two possible results: the provision is either an obligatory directive or a passive influencer. Depending on which result controls, the provision may create an uncertain level of obligation on the Parties. The remaining language of the provision clarifies this ambiguity.

The context surrounding the inclusion of Article 17 *bis* shows the drafter's intention and purpose was to create an obligatory directive not to intentionally undermine the Parties' labor standards. The explicit language

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[201] The term has generally fallen out of favor in many legal circles, being replaced by words like "must" or "may," as appropriate. *See* REGISTER DOCUMENT DRAFTING HANDBOOK, OFFICE OF THE FED. REG., NAT'L ARCHIVES AND RECORDS ADMIN., FEDERAL, at iii (Oct. 1998) ("[W]e use 'must' instead of 'shall' because 'must' imposes a legal obligation.").

[202] 2010 Agreement, *supra* note 148, art. 4.

[203] Pielage v. McConnell, 516 F.3d 1282, 1288 (11th Cir. 2008) ("We have said, however, that [t]reaties, like statutes, should be construed so that no words are treated as being meaningless, redundant, or mere surplusage." (internal quotations omitted)).

[204] *Id.*

[205] OXFORD ENGLISH DICTIONARY, *supra* note 196.

[206] *Id.*

of paragraph one recognizes the benefit of high labor standards, stating "The opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties' respective laws."[207] This statement clearly confirms the purpose of Article 17 *bis* was to ensure that neither Party would intentionally act to undermine labor standards. While the word choice seems to permit unintentional undermining of labor standards, the overall language shows a definitive purpose to try and control intentional Party acts. Besides, where a Party ratifies an international agreement, it is demonstrating formal consent to be bound by the language of the document.[208] Thus, by ratifying the Agreement language, the Parties are presumed to approve and consent to being bound by said intention. Moreover, a Party intentionally undermining a co-Party's labor standards would rebuke the very explicit statement of intention ascribed by both Parties in paragraph one,[209] which if permitted yields an illogical outcome. Under the plain meaning of the text and surrounding context, Parties to the ATA have an affirmative duty to implement the agreement without intentionally undermining labor standards, rights, and principles of the Parties.

Furthermore, even if there was not a clear statement of intention confirming an interpretation of obligation on the Parties, it is a rule of treaty construction that they should be construed liberally.[210] Article 17 *bis* can be interpreted broadly to either create a right or not. If the language of Article 17 *bis* is viewed as merely a hortatory statement of support for high labor standards, then Parties are denied a right of enforcement when those standards are diminished. Instead, a more liberal construction would interpret the article to create a separate right of enforcement; whereby, a Party can act when another nation to the Agreement intentionally undermines labor standards. On the other hand, paragraph two does contemplate "regular consideration . . . of the societal effects of the Agreement" by the Joint Commission.[211]

Nevertheless, this should not be construed as a limit on the remedial powers of the Parties nor should it be viewed as reducing the obligation on the Parties to refrain from intentionally undermining labor standards. The

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[207] 2010 Agreement, *supra* note 148, art. 4.

[208] Avero Belgium Ins. v. Am. Airlines, Inc., 423 F.3d 73, 79 (2d Cir. 2005) ("Although a State's consent to be bound by an international agreement can take many forms, including formal accession to the treaty's provisions after the treaty has already entered into force, ratification remains the most common form . . . by which a state becomes bound by an international agreement." (internal citation omitted)).

[209] 2010 Agreement, *supra* note 148, art. 4.

[210] Air France v. Saks, 470 U.S. 392, 396 (1985).

[211] 2010 Agreement, *supra* note 148, art. 4.

Joint Commission (JC or the Commission) is the primary mechanism for resolving conflicts arising from the Agreement and creating cooperation and evaluating implementation of the Agreement.[212] The Commission is not responsible for implementing the Agreement; instead, the Commission facilitates the Parties' cooperation as each carries out the Agreement. The Commission can act as a method for remedying purported violations of the Agreement, but its authority is not exclusive. Therefore, under a liberal construction, Parties are obligated to implement the Agreement without intentionally violating Article 17 *bis*, but if a Party does violate it, then the opposing Party may enforce its rights through the Commission.

Under the U.S. judicial approach to treaty interpretation, extrinsic evidence may additionally be considered to discern the meaning of a treaty, including the treaty's history, prior negotiations, and practical construction by the Parties themselves.[213] The first round of negotiations began with Daniel Calleja, Director of Air Transport for the European Commission, noting that providing protection for labor standards was one of three large concerns left over from the first stage of the ATA.[214] Later that year he would echo the same concerns about labor in a speech to the International Aviation Club.[215] These concerns permeated through each round of the negotiations with special attention being given to the views espoused by labor stakeholders in the second labor forum.[216] In fact, labor concerns were one of the only issues that were addressed so vigorously in the interim between the 2007 Agreement and the 2010 amendments. Drafters and other stakeholders involved in the two forums were unified in their insistence for tangible labor protections abroad, fearing that liberalization would reduce preexisting standards.[217] The ATA negotiation history reinforces an interpretation of Article 17 *bis* that favors imposing an obligation on Parties to not act intentionally to undermine preexisting labor standards.

On the other hand, there is no practical construction to Article 17 *bis*. Through the conflict over NAI's permit application, the Parties have their first opportunity to interpret the language of Article 17 *bis*. Both Parties largely maintained opposing views of Article 17 *bis* enforcement power.

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[212] 2007 Agreement, *supra* note 94, art. 18.

[213] *See* Eastern Airlines, Inc. v. Floyd, 499 U.S. 530 (1991).

[214] Daniel Calleja, Dir. Air Transp., Directorate-Gen. for Energy and Transport, Euro. Comm. Presentation EU-US Second Stage: The Future of Transatlantic Aviation (May 15, 2008).

[215] Daniel Calleja, Dir. Air. Transp., Eur. Comm'n, Speech to the International Aviation Club: EU-US Aviation: Rising to the Challenges (Sept. 23, 2008).

[216] Negotiations on a Second Stage EU-U.S. Air Transport Agreement, Joint Statement from the European and U.S. Delegations.

[217] SECOND AVIATION FORUM, *supra* note 118.

Despite this conflict, the plain language and clear intent of the Parties show Article 17 *bis* was not meant to be a meager nod to the concerns of labor, but, instead, was meant to be a controlling principle in the Parties' actions under the Agreement.

Nonetheless, general counsel for the USDOT argues that paragraph two of Article 17 *bis* is "essentially hortatory" and should not be understood to impose any legal obligation on the Parties.[218] Likewise, counsel for the Department of State argues, "[Article 17 *bis*] does not authorize actions that would run counter to express legal obligations of the Parties under other provisions of the Agreement—such as the obligation . . . to grant a permit where Article 4's requirements are satisfied."[219] Yet, each of these fails to accept the plain language of the provision and clearly stated objective to take no intentional action to undermine labor standards of the respective nations. As noted above, the USDOT argument that the language was meant as only a general observance of the value of high labor standards would make the entire Article merely superfluous, which is contrary to maxims of treaty interpretation. Additionally, the State Department's argument fails to appreciate that, taken in its plain and ordinary meaning, the requirements of Article 4 could not be properly satisfied without passing Article 17 *bis* explicit prohibition against intentionally conflicting labor decisions. The drafters of Article 17 *bis* are clear that their intention was to protect labor standards, and the Parties have a duty to do nothing that would intentionally undermine that protection.

B. The Legal Obligation Under Article 17 bis Extends to Article 4 Authorizations

Since Article 17 *bis* imposes a duty on the Parties to not intentionally undermine labor standards through the Agreement processes, the USDOT is not permitted to grant a foreign air carrier permit under Article 4 if Article 17 *bis* is violated. The criteria for authorizing foreign air carrier permits includes national standards for review, which in the United States means a holistic and public examination of the public interest in authorizing the permit. This approach, at least with regards to the U.S. domestic law, arguably compels the USDOT to deny a foreign air carrier permit for an airline shirking preexisting labor standards.

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[218] Letter from Kathryn B. Thompson, Gen. Counsel, Dep't of Transp. to Karl R. Thompson, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, *Re: DOT Legal Analysis of Article 17* bis *of the U.S.-EU Aviation Agreement* (Mar. 17, 2016).

[219] Letter from Brian J. Egan, Legal Advisor, Dep't of State to Karl Thompson, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel (Apr. 13, 2016).

Article 17 *bis* applies to the entire ATA. The drafters put no limitations on the provision's applicability, and the Article clearly states that the duty applies throughout the entirety of the Agreement's implementation.[220] Comparably, other amended provisions are limited in their scope by express language to a referenced article or annex, but Article 17 *bis* makes no such limitation.[221] For example, Article 6 *bis* is made "pursuant to Article 4," and Article 15 must be read "in accordance with Article 2 and 3(4)."[222] No limiting principle for its application is provided in the text of Article 17 *bis*, so it would apply to authorizations under Article 4. Additionally, Article 17 *bis* can be read in harmony with the entirety of the other provisions of the Agreement. Nothing in either the 2007 Agreement or the 2010 Amendment makes explicit reference to Article 17 *bis* or rejects its broad application.[223] Thus, it presumably applies to all provisions of the ATA.

Under Article 4, Parties must grant certificates to foreign air carriers seeking authorization who meet the requisite standards. The Party must grant authorization if the airline demonstrates: (1) it is owned and controlled by the appropriate state; (2) it is "qualified to meet the conditions prescribed under the laws and regulations" normally considered by the granting authority; and (3) it meets the provisions of Article 8 (safety) and Article 9 (security).[224] The first standard is defined in Annex 4 to the ATA, explaining ownership and control requirements generally under the Agreement. Likewise, the third element's requirements, safety and security standards, are provided in Articles 8 and 9 respectively. The second standard is not defined in the Agreement because its content derives from the laws and regulations of the nation authorizing the foreign air carrier permit. Accordingly, Article 17 *bis* is most applicable in element two—the Parties' preexisting qualifications and conditions for authorization.

Specifically, an airline applying to the USDOT for a foreign air carrier permit to fly routes into the United States would be evaluated on an overall standard—"a public interest test."[225] For authorization to be granted, the airline must demonstrate citizenship and fitness. An airline can prove citizenship by demonstrating it is substantially owned and effectively controlled by an appropriate state or a national of that state. Fitness includes

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[220] 2010 Agreement, *supra* note 148, art. 4.

[221] *See id.* art. 5 ("provided for in Article 3" and "with respect to application of paragraph 6 of Article 11").

[222] *Id.*

[223] 2007 Agreement, *supra* note 94; 2010 Agreement, *supra* note 148.

[224] 2010 Agreement, *supra* note 148, art. 4.

[225] Office of Int'l Aviation Foreign Air Carrier Licensing Div., *Foreign Air Carrier Information Packet*, U.S. DEP'T OF TRANSP. (Sept. 2000), https://www.transportation.gov/sites/dot.dev/files/docs/Foreign_Carrier_Information_Packet.pdf.

both operational and financial fitness as well as a disposition to "comply with the laws, regulations, and requirements which govern the operation of such services."[226] Nonetheless, these determinations are not dispositive of whether a foreign air carrier permit is granted because the USDOT will consider additional factors. For example, when an airline applies for authorization, the application is made public, and interested Parties may comment on the proposed authorization.[227] This commentary—responsive pleadings filed by external Parties—may be considered in the overall weighing of whether to grant a carrier an authorization.[228]

When weighed together for the public interest test, the USDOT must deny authorization to an airline that demonstrates labor practices that undermine the standards approved by either the United States, EU, or the member states. Expressly, the "merits of any responsive pleadings . . . filed to the application" may be properly considered in evaluating the public interest.[229] In cases where the pleadings show an airline has consciously subverted labor standards, Article 17 *bis* bars authorization because granting the application would intentionally undermine those standards. Arguably, granting such an application may only reflect a decision that, at most, knowingly undermined standards or just consciously disregarded them, failing to rise to the level of intentionality. Yet, the purpose of Article 17 *bis* is to prevent flagrant circumvention of labor standards, so intentionality should be read to include these lessor culpabilities.[230] Hence, under the public interest analysis, the USDOT is compelled to deny those applications where improper labor practices are found to exist.

However, in the 2010 Amendment the Joint Committee approved procedures to provide reciprocal recognition of the opposite Parties' regulatory determinations, including citizenship and fitness.[231] Whereby, the USDOT should "not inquire further" except where there is a "specific reason for concern" that the standards of Article 4 have not been met.[232] This

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[226] Office of the Sec'y of Transp., Office of Int'l Aviation, *Procedures for the Reciprocal Recognition of Regulatory Determinations with Regard to Airline Fitness and Citizenship*, U.S. DEP'T OF TRANSP. (Feb. 19, 2009).

[227] 49 U.S.C. § 41305(a)(2) ("When an application is filed, the Secretary shall post a notice of the application . . . An interested person may file a response with the Secretary opposing or supporting the issuance of the permit.").

[228] Office of the Sec'y of Transp., *supra* note 226.

[229] Office of Int'l Aviation Foreign Air Carrier Licensing Div., *supra* note 225.

[230] Porcari, *supra* note 5 ("[A] decision whether or not to grant operating authority based on compliance with Article 17 is at the heart of implementation of the ATA.").

[231] 2010 Agreement, *supra* note 148, art. 2 (amending Article 6 of the 2007 Agreement); Office of the Sec'y Transp., *Application Procedures for Foreign Air Carriers of the European Union*, U.S. DEP'T OF TRANSP. (Feb. 19, 2009).

[232] 2010 Agreement, *supra* note 148, art. 2 (amending Article 6 of the 2007 Agreement).

agreement simply creates a fast-lane for approving foreign air carrier permits by reducing the evidentiary burden on the applicant.[233] The purpose of the agreement is to encourage greater cooperation in setting standards and comity in implementing the ATA. The drafters clearly state that it does not reduce or modify the conditions required by granting nations to properly authorize a permit.[234] Thus, a foreign air carrier must still meet the requisite standards of the USDOT to be granted an authorization, even under reciprocal recognition.

Conversely, the Department of Justice's (DOJ) Office of Legal Counsel argues that the USDOT could not deny an air carrier permit to an ATA member state under Article 17 *bis*.[235] The DOJ attempts to diminish the article's power by merely examining it on an independent basis, separate and distinct from the rest of the authorization process, for revoking a carrier permit from an airline otherwise qualified to receive it. This misses the point entirely. Under a proper reading of the Agreement, an airline would never be qualified to receive Article 4 authorization unless it preliminarily satisfied Article 17 *bis*. The provision imposes an Agreement-wide duty on the Parties to act in a certain way, and it should not be read as an after-the-fact consideration merely because it comes later in the Agreement. Accordingly, the DOJ's argument fails because the starting premise misconstrues the proper process of evaluating an air carrier authorization application under the USDOT rules and the ATA.

Parties are proscribed from intentionally undermining labor standards per Article 17 *bis* in their actions under the ATA. The USDOT examines a host of factors in evaluating whether to grant a foreign air carrier authorization, including the public commentary on applications. If these pleadings reveal sufficient evidence of poor labor practices by the applicant, then the USDOT must deny authorization under Article 4 and 17 *bis*. Considering this

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[233] Office of the Sec'y of Transp., Office of Int'l Aviation, *Application Procedures for Foreign Air Carriers of the European Union*, U.S. DEP'T OF TRANSP. ("Under this arrangement, the U.S. Department of Transportation uses determinations made by aeronautical authorities of Member States on the fitness and citizenship of their air carriers, rather than basing these findings on detailed evidentiary submissions. . . .").

[234] 2010 Agreement, *supra* note 148, Memorandum of Consultations, para. 5 ("The delegations affirmed that the procedures for reciprocal recognition of regulatory determinations with regard to airline fitness and citizenship in the new Article 6 *bis* are not intended to modify the conditions prescribed under the laws and regulations normally applied by the Parties. . . .").

[235] Karl R. Thompson, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, *Memorandum Opinion for the General Counsel: Interpretation of Article 17* Bis *of the U.S.-EU Air Transport Agreement*, U.S. DEP'T OF TRANSP. (Apr. 14, 2016).

framework, the question remains whether the USDOT should have granted NAI's authorization application.

C. NAI Arbitration: Violations of Labor Standards Under the ATA

On December 2, 2016, the USDOT impermissibly approved NAI's application for a foreign air carrier permit.[236] NAI labor practices arguably undermine labor standards in the United States and parts of the EU. In examining the extensive application docket of NAI, it's clear NAI operates to the detriment of labor.[237] These filings (over three hundred) triggered the USDOT to suspend its normal granting permission, resulting in the case being brought to arbitration under Article 19 of the ATA.[238] As explained below, NAI uses atypical employment practices, which circumvent the Parties' respective labor laws altogether. This circumvention defies the purpose of Article 17 *bis* and constitutes a clear violation of the prohibition against intentionally undermining labor standards.

1. Relevant Background to NAI Application

Following the passage of the ATA, EU carriers began taking advantage of the expansive airline market and new access it created. NAI, a wholly owned subsidiary of Norwegian Air Shuttle (NAS), was created under an Irish Air Operator Certificate (AOC) in 2013.[239] Later that year it applied for a foreign carrier permit, as permitted for Irish carriers under the ATA,[240] to begin operating a transatlantic route but was met with staunch opposition.[241] Just thirteen days after NAI filed its application, Delta Air Lines, Inc., United Airlines, Inc., and American Airlines, Inc. filed a joint response to NAI's

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[236] Hugo Martin, *Norwegian Air International Gets Final Approval for Flights to U.S., Despite Opposition*, L.A. TIMES (Dec. 2, 2016), http://www.latimes.com/business/la-fi-norwegian-air-20161202-story.html.

[237] See complete docket of all filings regarding NAI application for a foreign air carrier permit at https://www.regulations.gov/docket?D=DOT-OST-2013-0204.

[238] 2007 Agreement, *supra* note 94.

[239] Valerie Silva, *From Inauguration to Arbitration: Norwegian Air International's Brief, Entangled History*, APEX (Aug. 9, 2016), http://apex.aero/2016/08/09/inauguration-arbitration-norwegian-air-international-history.

[240] This is also granted to Norwegian air carriers as Norway was admitted under the 2011 amendment to the ATA.

[241] From the time of the application filing for a foreign air carrier permit with the USDOT until the department finally issued a show cause order, over 300 pleadings, motions, letters, and comments were directed at the department with varying degrees of support. See the complete docket of all filings regarding NAI application for a foreign air carrier permit (DOT-OST-2013-0204), https://www.regulations.gov/docketBrowser?rpp=25&so=ASC&sb=commentDueDate&po=25&dct=N%2BFR%2BPR%2BO&D=DOT-OST-2013-0204.

application calling into question its Irish AOC as a deliberate attempt to circumvent Norwegian tax and labor laws.[242] This claim was echoed by various labor unions and organizations, similarly filing documents with the court challenging NAI's employment record and motives for inaugurating in Ireland, stating that Ireland merely operated as a "flag of convenience" for NAI.[243]

This opposition forced the USDOT to withhold granting NAI a foreign carrier permit. Finally, on April 25, 2016, the USDOT issued a "show cause order."[244] In the order the USDOT explained that the situation was "novel and complex," such that additional review was necessary.[245] Though the USDOT did stipulate that legal counsel had concluded Article 17 *bis* did not create an independent basis for denying authorization where the carrier otherwise met all the required standards of Article 4, it still refrained from giving such authorization.[246] The USDOT construction of Article 17 *bis* incorrectly interprets the plain meaning of the text and the purpose behind the article. Considering the aforementioned construction of Article 17 *bis* and 4, the USDOT incorrectly granted NAI's authorization since its employment practices undermine labor. An examination of their labor practices shows they contravene the principles and laws of the United States and EU nations.

2. Evidentiary Analysis

The responsive pleadings to NAI's application for authorization reveal labor practices that undermine labor principles and high standards. Examining the USDOT record, the Joint Answer of the three large U.S. carriers (Delta, United, and American) accuses NAI of operating under an Irish flag merely as a "flag of convenience" in order to avoid certain taxes and continue to use suspect employment practices, which might otherwise violate Norwegian law.[247] Focusing primarily on the accusation of suspect

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[242] Joint Answer, *supra* note 3.

[243] The Air Line Pilots Association (ALPA), Transportation Trades Department (TTD), AFL-CIO, European Cockpit Association (ECA), Association of Flight Attendants-CWA, International Association of Machinists and Aerospace Workers, and Transport Workers Union of America all jointly and separately filed motions with the court challenging NAI's application as contrary to the "public interest" due to their labor practices.

[244] *U.S. DOT Issues Proposed Order on Norwegian Order International*, U.S. DEP'T OF TRANSP. (Apr. 15, 2016), https://www.transportation.gov/briefing-room/us-dot-issues-proposed-order-norwegian-order-international.

[245] *Id.*

[246] Silva, *supra* note 239.

[247] Joint Answer, *supra* note 3.

labor practices, the docket folder reveals a litany of organizations and stakeholders who similarly argue that NAI's labor practices are violations of existing U.S. and EU law. For example, Peter DeFazio, Ranking Member of the U.S. House of Representatives Committee on Transportation and Infrastructure, challenged NAI's authorization specifically because of its use of "outsourced crews" contracted under Singapore law,[248] believing that such actions are "anathema to the strong labor protections" of Europe and the United States.[249] Defazio and the three U.S. carriers are not alone in voicing these specific concerns.

During the initial response period for NAI's application, labor organizations raised concerns about NAI's labor practices. They specifically identified two critical questions regarding labor that the USDOT needed to further inspect: (1) NAI's proposed labor and staffing models and (2) the terms and conditions of employment governing NAI's flight crews.[250] The answers to these two questions reveal the reasonable concerns labor organizations have surrounding a USDOT authorization's effect on existing labor standards.

First, NAI employs cabin crews and pilots through a decentralized, atypical model. NAI an Irish carrier wholly owned by its Norwegian parent company, NAS, has moved most of its business away from Norway, establishing bases in Sweden, Denmark, Finland, the U.K., Spain, Bangkok, and the United States.[251] At these foreign bases, NAI uses temporary work agencies to recruit both general employees and cabin crews, resulting in "less than half of the total cabin crew" of NAI being permanently employed.[252]

Second, NAI pilots are employed through one of three methods: (1) permanently employed, (2) hired through temporary work agencies, or (3) self-employed who generally hire themselves out to a temporary work agency.[253] Under methods two and three, NAI is not always contracting with

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[248] Singapore offers protections for domestic labor but does not have the same comprehensive scheme for foreign nationals independently contracted under their domestic laws.

[249] Letter from Peter DeFazio, Rep. House Comm. Transp. & Infrastructure, to Violeta Bulc, EU Comm'n for Transp. (July 28, 2016), https://www.regulations.gov/document?D=DOT-OST-2013-0204-15116.

[250] Answer of Allied Pilots Association to Summary of Information Provided by the European Delegation Regarding Application of Norwegian Air International Limited for an Exemption and Foreign Air Carrier Permit, Application of Norwegian Air International Limited, No. OST-2013-0204 (Feb. 18, 2014) [hereinafter Answer of Allied Pilots Association].

[251] Y. JORENS, D. GILLIS, L. VALCKE & J. DE CONINCK, ATYPICAL FORMS OF EMPLOYMENT IN THE AVIATION SECTOR 56 (European Comm'n ed., 2015).

[252] *Id.*

[253] *Id.* at 68.

the individual employee; instead, the pilot usually contracts with the temporary work agency under a self-employed status or as an employee of the agency.[254] NAI then negotiates with the hiring agency to determine flight assignments between the pilot and the airline.[255]

In comparison, SAS and Widerøe, the other two largest Norwegian air carriers, use a more traditional employment model.[256] These companies largely employ both cabin crews and pilots through permanent contracts.[257] They do not rely on third parties to hire personnel, and they generally prefer to handle most employment decisions within the confines of the company.[258] Under this centralized employment model, the employment contracts of both cabin crews and pilots are controlled by Norwegian contract and labor law.

NAI's hiring methods have triggered concerns about poorer working conditions, lower compensation, and general job insecurity—or "social dumping."[259] Under these contracts, pilots are held to be employees of the hiring agency, not the airline; therefore, the contract law of the nation where the hiring agency is domiciled would control.[260] For example, NAS and NAI use OSM Aviation Ltd., a NAS-majority owned employment agency, for some of its hiring but multi-sources a lot of its temporary hiring through regional agencies.[261] One such regional temporary hiring agency, Global Crew Asia Pte. Ltd. (Global Crew),[262] allegedly is an attempt by NAI to circumvent standard labor protections of Norway and the EU.[263] As employees of Singaporean Global Crew, NAI's pilots and crews are generally paid local salaries, which can be lower than their European counterparts.[264] Additionally, these hiring agencies are permitted to charge recruitment fees (headhunting fees), which are carried by the hired workers

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[254] *Id.* at 69.
[255] *Id.*
[256] *Id.* at 68.
[257] *Id.*
[258] *Id.* at 56.
[259] Philip von Schöppenthau, European Cockpit Ass'n, *Answer of European Cockpit Association to Application of Norwegian Air International Limited for an Exemption and Foreign Air Carrier Permit*, U.S. DEP'T OF TRANSP. (Dec. 17, 2013).
[260] JORENS, GILLIS, VALCKE & DE CONINCK, *supra* note 251, at 69.
[261] Commission Decision (EC) No. 139/2004 of 31 May 2016, art. 6(1)(b), 2016 O.J. (C 248) 2, http://ec.europa.eu/competition/mergers/cases/decisions/m7949_400_3.pdf.
[262] The U.K. company registrar, Companies House, lists Global Crew Asia Pte. Ltd. as an airline pilot employment company, operating out of Gatwick Airport but based in Singapore. More information can be obtained at https://beta.companieshouse.gov.uk/company/BR017415.
[263] *See* Comments of Southwest Airlines Pilots Association Opposing Approval of Norwegian Air International Limited for a Foreign Air Carrier Permit, No. OST-2013-0204 (Dec. 23, 2013).
[264] *See generally* JORENS, GILLIS, VALCKE & DE CONINCK, *supra* note 251, at 69.

themselves not the air carriers.[265] These "migration loans" can provide leverage against workers wanting to speak out.[266] Additionally, Singapore law does not provide for unemployment benefits for either domestic or foreign workers.[267] Thus, workers hired under this framework will face substantial limitations to their ability to collectively bargain because of the fractured nature of their employment and the little leverage they hold against management.

Labor organizations who opposed NAI's application pointed to this employment structure as evidence that they undermine Western labor standards. They argue that NAI obtained an Irish AOC in order to intentionally circumvent stricter Norwegian labor laws on collective bargaining, allowing them to create a competitive advantage by offering lower fares because they are not paying normal labor costs.[268] In response, NAI asserted that they would rely primarily on flight crews based in Europe and the United States, generally placing the most employees in the areas servicing the most routes.[269] If a crewmember is asked to fly a transatlantic or long haul flight, it is due to "extraordinary and unforeseen operations reasons" rather than intentional circumvention.[270] Moreover, NAI rebutted accusations of 'social dumping,' citing competitive compensation levels across all of its bases.[271] And while many contracts are controlled by Thai or Singaporean law, Kjos stressed that use of employment agencies was a transitional strategy, and employees purportedly have always been given an option to have employment contracts governed under the Norwegian law.[272]

NAI's atypical employment method undermines U.S. and EU labor protections for employees meant to be effectuated by Article 17 *bis.* In the complex world of international corporate laws governing civil aviation, airlines must remain competitive to stay above the global competition. Reducing labor costs is an effective means for doing this; however, those reductions cannot come at the cost of providing essential protections. The

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[265] Yap Mui Teng, *Singapore's System for Managing Foreign Manpower*, *in* MANAGING INTERNATIONAL MIGRATION FOR DEVELOPMENT IN EAST ASIA 238 (R.H. Adams, Jr. & A. Ahsan eds., 2014).

[266] *Id.*

[267] U.S. DEP'T OF LABOR, FOREIGN LABOR TRENDS: SINGAPORE (2003).

[268] Answer of Allied Pilots Association, *supra* note 250.

[269] Letter from Bjørn Kjos, CEO Norwegian Grp., to Anthony Foxx, Sec'y of Transp., Dep't of Transp. (June 1, 2015), http://3rxg9qea18zhtl6s2u8jammft-wpengine.netdna-ssl.com/wp-content/uploads/2015/06/20150601160858-3.pdf.

[270] *Id.*

[271] *Id.*

[272] *Id.*

employment practices of NAI harm both individual employees and labor practices more generally.

First, NAI's use of third-party hiring through temporary work agencies harm the individual employees by denying them both labor protections and social benefits. A European pilot hired through a work agency like Global Crew is not employed by NAI. When issues on flights arise or concerns over work conditions occur, the employee will not be able to resolve these with NAI. The employee must address said concerns with Global Crew, which could mean his unilateral termination or removal from those routes. Under the model there is no formal mechanism for improving working conditions or advancing oneself in NAI since the employee does not actually work for NAI. As an employee of the Singaporean company, employee public health benefits typically provided through an employer will not be required. For example, the employee will lose out on essential insurance and unemployment benefits. These concerns certainly threaten to undermine an individual's ability to protect himself from potential harms created from an imbalance in bargaining power.

Second, at a macro level, labor standards will be undermined because permitting NAI to continue to exercise under this model will either encourage other air carriers to follow suit or compel them in order to reduce labor costs to remain competitive in the market. This decentralized employment model would impede most collective bargaining arrangements. Considering the different approaches advanced at the second labor forum, none of them are viable if these systems can proliferate.[273] Transnational agreements require an organized labor body to function as the corporate body, but these temporary hiring agencies can refuse to hire pilots or crews affiliated with such groups, effectively eliminating them. Whereas, European Works Councils, transnational conventions, and common standards would be incapable of advancing labor protections because those agreements bind nations' conduct and companies working within those legal parameters. As seen from NAI, those standards are a small impediment to a company that completely circumvents those laws and standards.

Indeed, under this model there is little to no protection afforded to labor individually or collectively. The USDOT should have given greater weight to the public interest test to determine whether granting an authorization would intentionally undermine labor standards of the United States or the EU, which would have likely led to a denial of a foreign air carrier permit for NAI. It is apparent that their third-party hiring strategies undermine labor by

[273] As mentioned in Section II, part *D*, pp. 527–33, note the different models for collective bargaining.

attempting to avoid high standards. Though the issue has been settled, the USDOT should, nevertheless, remain adamant in the future to avoid approving suspect labor practices for subsequent carriers.

V. LOOKING FORWARD

The USDOT has explicitly stated Article 17 *bis* cannot be an independent ground for denying authorization to an otherwise qualified carrier, and it has granted NAI's application despite genuine labor concerns. In response to NAI's application and the subsequent arbitration, representatives in Congress drafted a resolution, H.R. 2997, that would empower the Secretary of Transportation to act on labor violations under Article 17 *bis.* However, if passed this resolution might impede ongoing cooperation from the EU or even risk dissolution of the entire open skies framework. At the same time, the third stage of the open skies agreement may provide a more effective and balanced approach to these issues, without risking the entirety of the agreement.

A. Impending U.S. Resolutions

On June 22, 2017, Representative Bill Shuster (Pennsylvania), along with Representatives LoBiondo, Graves, Mitchell, Hanabusa, and Sinema introduced H.R. 2997, cited as the "21st Century Aviation Innovation, Reform, and Reauthorization Act" or "21st Century AIRR Act."[274] Though the AIRR Act would primarily privatize U.S. air traffic control, as amended, it would also bar the Secretary of Transportation from issuing permits or exceptions for foreign air carriers when an "interested party" has raised the "applicability of Article 17 *bis*" of the ATA.[275] Nevertheless, the Secretary could grant a permit if she (1) "finds that issuing the permit or exception would be consistent with the intent [of Article 17 *bis*]" and "imposes . . . such conditions as may be necessary to ensure that the person complies with the intent of Article 17 *bis*."[276] Under subsection (b), the AIRR Act would fundamentally amend the "public interest test" used by the USDOT in granting foreign air carrier permits to include "preventing

[274] 21st Century Aviation Innovation, Reform, and Reauthorization Act, H.R. 2997, 115th Cong. (2017) [hereinafter AIRR Act].

[275] *Id.* § 631(a). Section 631 is an amendment proposed by New Jersey Rep. LoBiondo to undue the NAI decision by incorporating H.R. 5090, a bill that died in committee last term. *See* H.R. 5090, 114th Cong. (2016) (prohibiting the Secretary of Transp. from approving foreign air carrier permits, unless doing so would be consistent with Article 17 *bis* of the ATA, including empowering the Secretary to impose conditions to meet that standard).

[276] AIRR Act, *supra* note 274, § 631(a)(1)–(2).

entry . . . by flag of convenience carriers."[277] As of this writing in 2017, the resolution only has twenty-two cosponsors and has not left committee.

Section 631 of the bill does exactly what the general counsel argued Article 17 *bis* was unable to do—act as an independent means for denying an air carrier permit. Though, the AIRR Act does not require evidence of Article 17 *bis* violation only its "applicability," which is a lower threshold.[278] Under traditional canons of interpretation, the AIRR Act would abrogate the ATA because it would be 'last in time' and has a clear Congressional purpose to override the ATA.[279] Undoubtedly, approval of the bill would trigger an immediate response from the EU. The EU has been outspoken about their desire to liberalize the international airline industry and create a single aviation market, so this will likely appear as a threat to that goal.

However, the EU cannot act as easily as the United States to curb this threat. Since the EU has no singular law-making ability, it would be restricted to adopting a directive encompassing similar restrictions that Member States would be free to individually accept. Otherwise, the EU could unilaterally reject the ATA altogether. Although, this latter choice would appear drastic and would threaten the entire international airline industry. Nonetheless, the EU may be able to leverage this power to encourage Congress or President Trump to either reject H.R. 2997 or create more cooperative measures at a third stage of negotiations. Either way H.R. 2997 threatens the stability of open skies agreements between the United States and the EU.

B. Multinational Options

Absent a willingness to reach a bipartisan understanding of Article 17 *bis* by both the United States and the EU, the issue should be addressed through a third stage of negotiations on the ATA. Both the parties and external commentators noted the vast amount of work that still is required before the single aviation market can be reached, but by continuing to encourage

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[277] *Id.* § 631(b). According to the AIRR Act, a "flag of convenience carrier" would include a "foreign air carrier that is established in a country other than the home country of its majority owner or owners in order to avoid regulations of the home country." *Id.* § 631(c).

[278] *Id.* § 631(a).

[279] Whitney v. Robertson, 124 U.S. 190, 194 (1888) (explaining that treaties and Congressional acts should be construed to give both effect; however, if in conflict then "the one last in date will control the other . . ."); *accord* Cook v. United States, 288 U.S. 102, 120 (1933) (explaining that treaty abrogation by subsequent statute is only appropriate if Congressional intent is clearly expressed).

liberalization the goal can be reached.[280] During those negotiations, labor must remain at the forefront of the parties' agendas.

The EU is far more concerned with opening ownership rights for carriers in the U.S. market, but the United States has rebuked these attempts because of the fear that the domestic industry will be eliminated. Labor organizations similarly fear an opening of ownership rights because it may mean a "race to the bottom" where little protection is afforded. If the parties can constructively outline a plan to make some concessions to ownership rights, the United States may be able to bargain for greater labor protections going forward.

However, considering President Trump's proposed plan to re-negotiate bad deals and bring jobs back to the nation, this goal may be less achievable than previously believed. While still very unknown, some initial indications show that President Trump may advance more protectionist arguments in negotiating deals. This will likely limit any further progress on increased liberalization, and it may have a negative impact by creating increased limitations on the existing agreement.

Whatever the next steps taken, the stakeholders on both sides of the Atlantic should consider the lessons of the 1980s airline deregulation. Labor and management are both necessary to the progress of the airline industry, and opening markets can equally advance the interests of both if done through a cooperative framework. That framework may be limited if strict protectionist measures are advanced by either Party. Instead, competition should be promoted, and it can be advanced alongside proper standards for contracting employees and requisite schemes in certain jurisdictions. Airlines in the market must remain flexible and competitive to respond to changing demands, but they must equally remain considerate of the vast array of stakeholders who are codependent on them for their livelihood.

[280] In light of Brexit, third stage negotiations are a foregone conclusion to occur; however, the manner in which Brexit plays into the negotiations is beyond the purview of this Note.