



Robert Schuman

***INTERNATIONAL AIR TRANSPORT AGREEMENTS AND
REGIONALISM: THE IMPACT OF THE EUROPEAN UNION
UPON THE DEVELOPMENT OF INTERNATIONAL AIR LAW***

– A.L.C. de MESTRAL and H. BASHOR



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Miami European Union Center
University of Miami
1000 Memorial Drive
101 Ferré Building
Coral Gables, FL 33124-2231
Phone: 305-284-3266
Fax: (305) 284 4406
E-Mail: jroy@miami.edu
Web: www.miami.edu/eucenter

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INTERNATIONAL AIR LAW**

A.L.C. de MESTRAL and H. BASHOR*

**The Jean Monnet Chair
University of Miami
Miami, Florida
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* A.L.C. de MESTRAL is Jean Monnet Professor of Law, McGill University. Harold Bashor is a Ph.D. Candidate, Institute of Air and Space Law, McGill University. He holds a Diploma in Air and Space Law. The authors acknowledge the financial support of the Social Sciences and Humanities Research Council, Ottawa, Canada and the EU Jean Monnet Programme, Brussels.

INTERNATIONAL AIR TRANSPORT AGREEMENTS AND REGIONALISM: THE IMPACT OF THE EUROPEAN UNION UPON THE DEVELOPMENT OF INTERNATIONAL AIR LAW

Introduction

INTERNATIONAL RELATIONSHIPS AND CONTEXTS

“The problem -- the most significant problem that consumers of international air transportation face today is the fact that still too many of our international markets -- and, in particular, too many of our largest international aviation markets -- remain distorted by government regulation.”

Karan K. Bhatia¹

There is currently a strong trend in the international market towards increased liberalization of the air transport sector. This trend is gaining momentum worldwide; Dempsey and Gesell explain: “Although nationalism remains an issue with most countries, global market forces, aided by U.S. policy, are moving the industry closer to an open skies policy.”² In addition to U.S. policy, the European Union’s (EU) wide-reaching developments in the industry are also a driving force that must be recognized; arguably, in recent years, pressure from the EU has taken over from the United States as the driving force for change. Globalization, integration, and regionalization of international economies are thus challenging the traditional approach to regulation of this vital sector, a sector which is experiencing rapid transformation and reform:

- At the request of the EU the United States and the EU are currently in the midst of negotiations for an expanded “open skies” agreement which promises to remove governmental constraints on two of the most important international aviation markets. Also, the negotiations may potentially create a new template for international air service agreements.
- International global alliances continue to grow and expand air service networks. For example, Air Canada, along with Lufthansa and United, is one of the founding partners of the Star Alliance. Recently, LOT Polish Airlines, Asiana Airlines and US Airways have become members, and TAP Portuguese Airlines will soon join. The Star Alliance now consists of 15 airlines serving

¹ Karan K. Bhatia, Asst. Sect. of Transportation for Aviation and International Affairs. “U.S. International Aviation Policy in 2004 and Beyond.” Washington, DC: International Aviation Club, 12 May 2004.

² Paul S. Dempsey and Lawrence E. Gesell. *Airline Management: Strategies for the 21st Century*. Chandler, AZ: Coast Aire Publications, 1997, at 411.

over 700 destinations in 132 countries worldwide with a 25 percent share of global air revenues.³

- Increasing consolidation of the airline industry is evidenced by recent mergers such as Air France/KLM (2004), JAS (Japan Air System)/Japan Airlines (2004), American Airlines/TWA (2001), and most recently Lufthansa and Swiss International. This trend cannot be overlooked; Maldutis predicts, for example, that the European airline industry alone “will consolidate into four, perhaps five, large systems to achieve economies of scale and to successfully compete against other global airline combines.”⁴
- In a competitive environment, the air service industry must respond not only to the needs of passengers, but also to the interests of shippers, couriers, tourism and trade, airports, and communities as well. These stakeholders are calling for further liberalization of air service agreements in order to facilitate and promote the efficient operation of market forces. International organizations such as the International Civil Aviation Organization (ICAO), the International Air Transport Association (IATA), and the International Chamber of Commerce (ICC) also realize the need for more user-oriented policies to allow air service demand to flourish and to take advantage of global opportunities.

Due to recent developments in air transport services such as “open skies” agreements between governments, commercial alliances between international carriers, and increased attention to the promotion of free competition, the world appears to be evolving into one global air traffic market. In many important ways the driving force behind this change is the EU. The impact of the pressure from the EU is not only felt by its major partners such as the United States but arguably this pressure from the most important regional grouping in the world is having an impact on other regional arrangements. This pressure from the EU is also making itself felt in the world of international air transport law. Ultimately it will also be felt in the multilateral trade law arena.

THE NEW LEGAL ORDER IN AIR TRANSPORT

Although the United States has the most well-developed and regulated air service industry in the world, it is dependent upon a myriad of bilateral air service agreements

³ Air Canada. *En Route*. February 2005, at 101. The major competitors of the Star Alliance are SkyTeam and Oneworld, which hold a 19 percent and a 14 percent share of global revenues, respectively.

⁴ Julius Maldutis. “Industry Investment Requirements. Looking Beyond 2000.” 6-7 Sept. 1993. Quoted in: Paul S. Dempsey and Lawrence E. Gesell. *Airline Management: Strategies for the 21st Century*.

with other governments for international air services.⁵ While bilateral relationships remain the norm, Dempsey notes however that: “Seldom has the bilateral system been the means to meet actual market demands, or to prepare markets for growth.”⁶

This system of reciprocal benefit is, however, facing fundamental reform. Liberalized multilateral and plurilateral air service agreements are being negotiated in Europe, Southeast Asia, Latin American, and the Middle East. Moreover, current negotiations between the United States and the EU to adopt a new open skies agreement to govern air transport services across the North Atlantic may have far-reaching effects on the future of air transport services.

The Impact of the European Union

A recent landmark decision by the European Court of Justice (ECJ) on November 5, 2002 could ultimately initiate an extensive metamorphosis of international air service agreements.⁷ Over the years the European Commission (EC) has incrementally acquired jurisdiction over many aspects of air transportation from its member states, but an historical examination of these legal developments deserves attention to realize the far-reaching impact of the EC’s new legal order on future international air services.

As early as 1971 the ECJ focused on the balance of competence between the EC and the member states in the AETR ruling in which the EC’s capacity to establish contractual links with third countries was affirmed.⁸ This authority arose not only from an express conferral by the EC Treaty, but from any subsequent measures adopted by EC institutions as well. In other words, each time that the EC adopts new rules, member states can no longer affect those rules or alter their scope. More specifically, the ruling by the ECJ establishes the principle that where the EC has exercised an explicit internal competence, it also has a parallel external competence and that in such circumstances member states cannot act independently of the EC in entering into international agreements. In other words, its internal competence is projected externally:

⁵ The U.S. lists over 100 air service agreements of which approximately 60 are “open skies” agreements. A complete list is available from the U.S. Dept. of Transportation. <<http://ostpxweb.dot.gov/aviation/>> (visited 12/12/04).

⁶ Paul S. Dempsey and Lawrence E. Gesell. *Airline Management: Strategies for the 21st Century*. Chandler, AZ: Coast Aire Publications, 1997, at 409.

⁷ Judgments of the European Court of Justice. 5 Nov. 2002. Whether air traffic agreements between Member States and non-member countries are contrary to Community law (EC Treaty, art. 52). Nrs. C-466/98 Commission vs. UK, C-467/98 Commission vs. Denmark, C-468/98 Commission vs. Sweden, C-469/98 Commission vs. Finland, C-471/98 Commission vs. Belgium, C-472/98 Commission vs. Luxembourg, C-475/98 Commission vs. Austria, and C-476/98 Commission vs. Germany. Annotation at <<http://www.lawreports.co.uk/ecjnovc0.2.htm>> (visited 10/12/04).

⁸ Case 22/70. “European Agreement on Road Transport” (AETR Judgment). 31 March 1971. ECR 263. EC Commission v. EC Council. Fifth General Report, point 604. *Decisions by the Court of Justice and the Court of First Instance*. <<http://europa.eu.int/abc/doc/off/rg/en/2002/pt1070.htm>> (visited 12/14/04).

[17] In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.⁹

This early ruling has demonstrated that certain powers, which had not been conferred exclusively upon the European Community at the outset, may become so progressively through the exercise of those powers by the Community. As for implied powers, the Court pointed out, however, that the Community's exclusive external competence does not flow solely from its power to lay down rules at the internal level; the Community has only acquired exclusive competence insofar as matters covered were the subject of internal legislation:

[18] As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.¹⁰

Thus, once the Community has exercised any power on the domestic plane or through international agreements, the member states lose their power to enter into agreements that would affect any common rules or alter their scope. However, this is somewhat mitigated if read together with the court's more precise statement in the WTO accession Opinion 1/94:

[77] However, in the field of transport, the Community's exclusive external competence does not automatically flow from its powers to lay down rules at internal level. As the Court pointed out in the AETR judgment (paras. 17, 18), the Member States, whether acting individually or collectively, only lose their right to assume obligations with non-member countries as and when common rules which could be affected by those obligations come into being. Only in so far as common rules have been established at internal level does the external competence of the Community become exclusive. However, not all transport matters are already covered by common rules.¹¹

⁹ Case 22/70, para. 17. AETR Judgment (Text). 31 March 1971, available at <http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61970J0022> (visited 14/12/04).

¹⁰ *Id.*, para. 18.

Therefore, there must be complete internal harmonization in any sector of air transport services before the external competence of the Community becomes exclusive. However, the number of sectors where harmonization is complete in air transport services is limited to such areas as air fares, slot allocation and airline reservation systems, to name a few.¹² It should also be noted that, until the early 1990s, bilateral air service agreements had never been addressed by the EC.

Air Fares

The European Union has incrementally liberalized its air transport sector in three successive stages or “packages”. In 1987 the “first package” was designed to relax the rules with respect to tariff consultations by adopting and implementing block exemptions.¹³ In June 1990 the “second package” opened up the EU market further by allowing greater flexibility over the setting of fares and capacity-sharing as well as extending fifth freedom rights. This freedom is also sometimes referred to as 'beyond rights'. It is the right of an airline from one country to land in a second country, and pick up passengers and continue to a third country. Dempsey explains that the “second package” considerably advanced the EC air transport system towards the goal of a more competitive market in the area of air fare approval; however, many obstacles remained to free competition, especially for new entrants.¹⁴

The last stage of the liberalization of air transport in the EU was addressed in the “third package” of 1992 which introduced the freedom of cabotage, the right for an airline of one member state to operate routes within another member State, and relaxation of regulations with respect to airfares. While the “third package” aimed to create a level playing field through a gradual approach to liberalization, it is argued that the EU was basing its construction on the American model.¹⁵ The “third package” included the following three important Regulations:

¹¹ Opinion 1/94, para. 77. [1994] ECR I-5267

¹² The Community has competence with respect to other matters such as safety (Reg. 1593/2002), ground handling (Dir. 96/97), taxes and duties (Dir. 92/12), noise reduction (Dir. 92/14), denied-boarding compensation (Reg. 295/91), air carrier liability (Reg. 2027/97), data protection (Dir. 95/46) and security (Reg. 2320/2002).

¹³ Commission Regulation 2671/88 of 26 July 1988 on the application of Article 85 (3) of the Treaty to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices concerning joint planning and coordination of capacity, sharing of revenue and consultations on tariffs on scheduled air services and slot allocation at airports. *Official Journal*, L. 239, (30/08/1988), at 0009. The package also includes Commission Regulations 2672/88 and 2673/88 on computer reservations systems and ground handling services respectively.

¹⁴ Paul Stephen Dempsey. *European Aviation Law*. The Hague: Kluwer Law International, 2004, at 55.

¹⁵ Francois Balletero. “Liberalization: Time to Reconsider.” *Transport International*. 13 (Oct. 2004) at 15-16. Balletero admits that the EU has “tried to avoid the American-style “big bang.”

- Regulation (EEC) 2407/92 –*The Community Licence* which opened up the EU market to all airlines which held a Community air carrier’s license,¹⁶
- Regulation (EEC) 2408/92 – *Freedom of Access to the EU Market* which opened up all international air routes in the EU to all companies which held a Community licence without any restrictions as of 1 January 1993,¹⁷ and
- Regulation (EEC) 2409/92 - *Regulation on Fares and Rates for Air Services* which stipulated that airlines were no longer required to submit their fares to the national authorities for approval. Freedom with regard to fares and rates was an essential part of freedom of access to the Community market with very few limitations.¹⁸

Regulation 2409/92 for the uniform regulation of pricing is broad in scope. It applies to all EC carriers and all routes; however, it is limited to flights originating and terminating within the EU, and to those routes not under any public service obligation.¹⁹ The Regulation constitutes the first step towards achieving an internal Community market with respect to air fares. Article 3 provides that “rates charged by Community air carriers shall be set by free agreement between the parties to the contract of carriage.”

Slot Allocation

EC Regulation 95/93 *on Common Rules for the Allocation of Slots at Community Airports*²⁰ was adopted to ensure that where airport capacity is scarce, the available capacity would be used efficiently and distributed in a fair, non-discriminatory and

¹⁶ Council Regulation 2407/92. *Official Journal*, L.240 (23-Jul-1992). For a company to obtain this licence, most of its capital must be held by member states or nationals of the EU. The latter must also exercise effective control over the company. The technical capabilities and financial capacity of the companies concerned are sanctioned by means of national certificates. See Dempsey (2004), at 64-67.

¹⁷ Council Regulation 2408/92. *Official Journal*, L. 240 (23-Jul-1992). This regulation addressed the issue of access to intra-Community routes for Community air carriers, particularly 5th Freedom rights.

¹⁸ Council Regulation 2409/92. *Official Journal*, L. 240 (24-Aug-1992). Generally, a fare increase cannot be objected to if there is a high level of competition on the route concerned or if the arrival of new competitors is not hampered by legal provisions or practical contingencies, e.g. saturation at an airport. See Dempsey (2004), at 59-62.

¹⁹ *Id.* Dempsey, 2004, at 59.

²⁰ Council Regulation (EEC) 95/93 of 18 January 1993 on common rules for the allocation of slots at community airports, *Official Journal*, L. 14, 22 January 1993, at 1.

transparent manner.²¹ In 1995 the Commission mandated a consultant to report on the application of the Regulation²² which led the Commission to propose an amendment to the Regulation on 20 June 2001.²³ Although the procedures were clear, and reasonably consistent, there has been widespread agreement that they could have been improved. In fact, Regulation 95/93 was amended in April 2004 to introduce clarifications, innovations and solutions for application problems.²⁴ However, the revised regulation “basically remains faithful to the previous system adopted in 1993.”²⁵ The main aspects of the amendment address:

- the legal nature of slots,
- slot allocation,
- slot mobility,
- enhancement of competition between incumbents and new entrants, and
- alliances.

Presently, the allocation of slots in member states is governed by the IATA scheduling procedures and EC Regulations 1617/93 and 95/ 93.²⁶ Slots are allocated to airlines without cost, but there is a secondary market in slots at congested airports. Commission Regulation 1617/93 provided, subject to certain conditions, for an exemption from the prohibition of Article 81(1) on joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air

²¹ Pierre Frühling and Werner Eyskens. “Current and Future Issues Relating to Slot Management and Mobility in the European Union.” 22 *Air & Space Law* (2004), at 79-81.

²²International Air Transport Association. Minutes of the 106th Schedules Conference for Northern Winter 2000, Singapore, June 8-14, 2000. Price Waterhouse Coopers: “Study of certain aspects of Council Regulation 95/93 on common rules for the allocation of slots at community airports.” Final Report, 20 May 2000.

²³ Proposal of 22 June 2001 for a Regulation of the European Parliament and of the Council amending Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at community airports, COM(2001) 335, *Official Journal*, C. 270 E/131, of 25 September 2001; Economic and Social Committee opinion, of 20/21 March 2002, *Official Journal*, C125, of 27 May 2002, at 8; European Parliament Report, of 24 May 2002, Doc A5 0186/2002 final.

²⁴ Regulation (EC) No 793/2004 of the European Parliament and of the Council of 21 April 2004 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community Airports. *Official Journal*, L. 138/50 (30 April 2004).

²⁵ Dr. P.P.C. Haanappel. “Slot Allocation at Community Airports: A Revised Council Regulation and a Commission Working Document of the Year 2004.” Lecture Notes. McGill University, Institute of Air and Space Law. 14 Feb. 2005.

²⁶ Dr. P.P.C. Haanappel. “Slot Allocation at Community Airports: A Revised Council Regulation and a Commission Working Document of the Year 2004.” Lecture Notes. McGill University, Institute of Air and Space Law. 14 Feb. 2005. “The IATA Schedules Conferences –also sometimes informally called Scheduling Procedures Conferences or Slot Allocation Conferences- are a voluntary activity in which all airlines, whether members of IATA or not, can participate.”

services, and slot allocation at airports;²⁷ whereas, Regulation 95/93 was an attempt to promote competition by giving new entrants priority allocation of pooled slots.²⁸

Airline Reservation Systems

The Commission's first regulations with respect to Computer Reservations Systems (CRS) were adopted in 1988.²⁹ Initially, Commission Regulation 2672//88 required that CRS must:

- neutrally display the flights of all airlines seeking access,
- make available their services to all participating airlines, and
- may not discriminate in the fees charged or services provided.³⁰

One year later, Council Regulation 2299/89 provided for a code of conduct for computerized reservation systems.³¹ This Regulation was applicable to all systems and distribution facilities offered for use in the Community to ensure that they were being used in a non-discriminatory and transparent manner.³² The Regulation also aimed to protect the interests of Community consumers with safeguards against misuse by reinforcing undistorted competition between air carriers and between computerized reservations systems.³³

²⁷ Commission Regulation (EEC) 1617/93 of 25 June 1993 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports. *Official Journal*, L. 155.

²⁸ Council Regulation 95/93 of 22 Jan. 1993. *Official Journal*, L. 14. This regulation required member states to "ensure the appointment of a natural or legal person" to act as airport coordinator, after consultations with the air carriers regularly using the airport facilities. *Id.*, art. 4(1). The coordinator is then responsible for the allocation of slots. *Id.*, art. 4(5). The regulations further provide that the member state "shall ensure that the coordinator carries out his duties . . . in an independent manner."

²⁹ Commission Regulation (EEC) No 2672/88 of 26 July 1988 on the application of Article 85 (3) of the Treaty to certain categories of agreements between undertakings relating to computer reservation systems for air transport services. *Official Journal*, L. 239, (30/08/88), at 0013.

³⁰ Paul Stephen Dempsey. *European Aviation Law*. The Hague: Kluwer Law International, 2004, at 90.

³¹ Council Regulation (EEC) 2299/89 of 24 July 1989 on a code of conduct for computerized reservation systems. *Official Journal*, L. 220 (29/07/1999).

³² *Id.* at Art. 1: "This regulation shall apply to any computerized reservation system [...] irrespective of the status or nationality of the vendor." Art. 3: "A system shall allow any air carrier the opportunity to participate, on an equal and non-discriminatory basis."

³³ *Id.* at Art. 3(a).

In fact, the Regulation applies to any computerized reservation system, insofar as it contains air-transport products which are incorporated in its principal display and offered for use irrespective of (a) the status or nationality of the system vendor, (b) the source of the information used or the location of the relevant central data processing unit, and (c) the geographical location of the airports between which air carriage takes place.³⁴

In sum, the dominant themes of the CRS regulations include nondiscrimination, accuracy, contractual freedom, system separation, and rights of privacy. Also, in addition to EU legislation, the European Civil Aviation Conference (ECAC), a private industry organization, also plays a direct role in the regulation of CRS.³⁵

Historic European Court of Justice Ruling – Nov. 5, 2002

The fact that the above regulations with respect to airfares, airport slots and computer reservation systems (CRS) are applicable to non-member countries gives the Community exclusive competence in these matters. In fact, on November 5, 2002 the ECJ pronounced its judgment in cases brought by the Commission against eight member states regarding their bilateral service agreements with the United States.³⁶ The court ruled that member states had made commitments in areas of airfares, airport slots and CRS where such competence had previously been transferred to the Community.

Before the EC judgment in 2002 against the eight member states, the United States had entered into “open skies” type bilateral agreements with these States in order to facilitate free access to all routes, the granting of unlimited traffic routes, and the possibility of code-sharing. Not only did the EC judgment rule that the eight States had infringed the external competence of the Community, but they also infringed the provisions of the EC Treaty concerning the right of establishment by permitting the United States to refuse traffic rights to air carriers designated by a member state if a substantial part of the ownership and effective control of the carrier is not vested in that member state. In other words, the United States could restrict Lufthansa, although established in France, from flying from Paris to New York. Accordingly, this amounts to discrimination by excluding air carriers of other member states from the benefit of national treatment in the host member state; such discrimination is forbidden by Community rules regarding the right of establishment.

³⁴ *Id.* at Art. 1.

³⁵ Paul Stephen Dempsey. *European Aviation Law*. The Hague: Kluwer Law International, 2004, at 98.

³⁶ Judgments of the European Court of Justice. 5 Nov. 2002. Nrs. C-466/98 Commission vs. UK, C-467/98 Commission vs. Denmark, C-468/98 Commission vs. Sweden, C-469/98 Commission vs. Finland, C-471/98 Commission vs. Belgium, C-472/98 Commission vs. Luxembourg, C-475/98 Commission vs. Austria, and C-476/98 Commission vs. Germany. *Official Journal*, C 71/8-15 (13 March 1999).

Insofar as the Community has adopted rules with respect to airfares, slots and CRS, commitments respecting these matters should no longer be made in bilateral air service agreements negotiated by member states. Therefore, on November 5, 2002, the ECJ decided that the open skies bilateral agreements recently negotiated by seven member states with the United States and the UK Bermuda II agreement all exceeded the authority of member states in this respect.. In the case against Belgium, for example, the ECJ ruled that:

Pursuant to the judgment in Case 22/70 ('AETR'), Member States can no longer assume obligations towards non-member countries, whether individually or collectively, if those obligations affect the rules of the internal Community market and result in discrimination or distort competition.³⁷

Although the Court denied the Commission exclusive external competence to negotiate bilateral air service agreements, it did hold that four types of provisions in the bilaterals were inconsistent with EU law: nationality clauses and "effective ownership and control", pricing, computer reservation systems, and slot allocation provisions. More significant and novel still, the court held that the exclusive national ownership and control clause, typical of all bilaterals and included in these new open skies agreements as a matter of course, violated a fundamental treaty principle of freedom of establishment of EU persons and companies, enshrined in Article 43.

The immediate result of the ECJ's judgments of November 5, 2002 was the obligation on Member States to bring the challenged bilateral agreements into line with EU law, although the judgments were silent on how the States could actually rectify the inconsistencies. These judgments in principle showed that the open skies policies of the EU adopted progressively since 1999 had a treaty basis. The judgments also placed member states and the EU itself in a position where they have to challenge at least one cornerstone of the roughly 5000 traditional air service bilateral agreements currently in force throughout the world, namely the exclusive national ownership and control clause. The judgments did not declare that the EU had exclusive jurisdiction over air services but they did show that jurisdiction was broadly shared and that the Commission could not be ignored by member states. In the same way, the judgments did not declare that the Commission should have exclusive authority to negotiate with foreign states on behalf of member states, but they did make it very difficult, if not virtually impossible, for member states to continue to exercise exclusive negotiating authority in the future without violating some provision of EU treaty law or legislation.

In February 2003, the Commission returned to the Council asking for (1) a mandate to negotiate with the United States and (2) a mandate to renegotiate the ownership and control clauses of bilaterals with all other third countries, referred to as

³⁷ Case C-471/98. Action brought on 18 December 1998 by the Commission of the European Communities against the Kingdom of Belgium. *Official Journal*, C 71/17, 13 March 1999.

the “horizontal mandate.”³⁸ Negotiating a new agreement with the United States is a complex task, renegotiating literally hundreds of bilaterals is even more daunting and consideration was given to authorizing member states to renegotiate these clauses bilaterally. In June 2003 the Council granted the Commission a mandate to negotiate with the United States,³⁹ and member states agreed to comply on a voluntary basis pending the entry into force of a regulation authorizing member states to renegotiate ownership and control clauses in their bilaterals.

EC Regulation 847/2004 on the negotiation of air service agreements established a framework within which member states could continue to negotiate and implement air service agreements while, at the same time, ensuring that they would respect EU law.⁴⁰ The Regulation makes it plain that all existing bilateral agreements between member states and third countries that contain provisions contrary to Community law needed to be amended or replaced by new agreements that would be wholly compatible with Community law. Important requirements of the Regulation include the duty that:

- Member States shall equally treat all Community air carriers with an establishment on their respective territories to which the Treaty applies.⁴¹
- Member States shall not enter into any new agreement with a third country which potentially reduces the number of Community air carriers.⁴²
- Member States shall notify the Commission of the outcome of bilateral negotiations where (1) agreements incorporate the relevant standard clauses and where (2) agreements do not incorporate the standard clauses but does not, however, harm the purpose of the Community common transport policy.

³⁸ Commission communication to European Parliament and Council. 26 Feb. 2003. COM(2003)94.

³⁹ “Why Do We Need a Community Air Transport Policy?” *Europa: Transport*. <http://europa.eu.int/comm/transport/air/international/dev_en.htm> (visited 28/3/05).

⁴⁰ EC Regulation 847/2004 of the European Parliament and the Council of April 21, 2004 the Negotiation and Implementation of Air Service Agreements. O.J.2004, L 195/3.

⁴¹ Regulation EC 847/2004, Preamble, para. 9. “If a Member State wishes to involve air carriers in the process of negotiation, all air carriers with an establishment in the territory of the Member State concerned should be treated equally.”

⁴² *Id.*, Art. 3: “Prohibition on Introducing More Restrictive Arrangements.” A Member State shall not enter into any new arrangement with a third country, which reduces the number of Community air carriers which may, in accordance with existing arrangements, be designated to provide services between its territory and that country, neither in respect of the entire air transport market between the two parties nor on the basis of specific city pairs.”

(The agreements may thus be applied provisionally until the Community has ruled on the procedure.)⁴³

- Member States shall distribute traffic rights among eligible Community air carriers on the basis of non-discrimination and transparency.⁴⁴

However, the Commission found that member states have been lax in taking action to remedy the problems found by the Court. Consequently, in a step to further implement the ECJ ruling of November 2002, the European Commission took legal action against Member States to force them to amend or terminate their bilateral agreements with the U.S. in July 2004:⁴⁵

- The eight Member States with “illegal” bilateral agreements with the U.S. were sent letters of formal notice to comply with the ECJ ruling;
- Four other Members (France, Italy, Portugal, and the Netherlands) were sent letters asking them to come into line with Community Law; and
- Five other Members that do not have a bilateral agreement with the U.S. (Cyprus, Estonia, Latvia, Lithuania and Slovenia) were sent letters asking them not to enter into any further negotiations.

Although these letters of formal notice do not officially require the member states to denounce their bilaterals with the United States, they do initiate a legal procedure by asking the members how they intend to comply, requiring a response within two months. If the Commission is not satisfied with the Members’ plans of action, the Commission may bring the matter again before the ECJ in 2005.

Finland, Italy, Germany and Portugal have more recently received a formal letter of notice warning them to cancel all bilateral agreements struck since November 2002. The letters stated that the members had breached European competition rules by negotiating additional bilaterals since the keystone November 2002 ECJ ruling which found their nationality clauses illegal.⁴⁶

⁴³ *Id.*, Art. 4: “Conclusion of Agreements.”

⁴⁴ *Id.*, Art. 5: “Distribution of Traffic Rights.”

⁴⁵ “European Commission in Legal Action against EU Member States.” *Aeronews*. IATA Ref. GOVAF 869. 26 July 2004. <http://www.iata.org/WHIP/_Files/WgId_0216/GOVAF869.pdf> (visited 12/01/05).

The fact that the EU could possibly issue more severe warnings to members with “open skies” or bilateral agreements with the United States cannot be ruled out. In an attempt to speed up talks in the currently stalemated EU-U.S. negotiations for a new open aviation area, the EU could require members to denounce their current bilateral agreements with the United States. Such antagonistic tactics would force the bilaterals to terminate one year after the date of receipt of such notice, as provided for in the deadline clause of most bilaterals.⁴⁷ Most of the defendant member states have not expressed their views nor responded to the Commission’s request regarding denunciation of the ‘open skies’ agreements. However, their attitude will become clear if, and when, the Commission eventually initiates external relations with third countries in the international air transport sector.⁴⁸ On March 16, 2005 the Commission called upon eleven member states to denounce their existing bilateral agreements with the United States.⁴⁹

IATA reported that, as of July 2004, member states had taken no action to remedy the problems identified by the Court, and that it was likely that some meptance of the Commission’s requirements.⁵⁰ The practical problems are daunting and some member states may have been tempted to ignore or avoid the impact of the historic ECJ ruling. For example, France has negotiated a bilateral agreement wherein China insisted that France retain the “ownership and control” clause; such action infringes EU law.⁵¹ The question therefore remains whether the ECJ ruling will be strictly adhered to, or subject to further challenge and delay.

A towering figure of the past, Henri Wassenbergh, put the dilemma facing member states and the international air transport community in the following terms:

⁴⁶ “EC Warns Four Nations to Terminate Bilaterals.” 167 *Flight International* 167 (4-10 Jan. 2005) at 9.

⁴⁷ An air service agreement customarily provides arrangements to be followed for its termination. Either Party may give notice in writing at any time through diplomatic channels to the other Party of its decision to terminate the agreement. The Agreement shall then terminate one year after the date of receipt of the notice by the other Party.

⁴⁸ Frederik Sørensen, Wilko van Weert and Angela Cheng-Jui Lu. “ECJ Ruling on Open Skies Agreements v. Future International Air Transport.” 28 *Air & Space Law* (February 2003) at 5.

⁴⁹ “The European Commission Orders Seven European Countries to Renounce Their Treaties with the USA. “ *Cocardes*. Press Revue. “The action taken by Brussels includes Ireland, Spain, Czech Republic, Hungary, Poland, Slovakia and Malta.” (March 25, 2005). <<http://www.cocardes.com/articles.php?lng=fr&pg=317>> (visited 05/05/05).

⁵⁰ Richard Smithies, Policy Director of IATA. “European Commission in Legal Action against EU Member States.” *Aeronews*. IATA Ref. GOVAF 869. 26 July 2004. <http://www.iata.org/WHIP/Files/WgId_0216/GOVAF869.pdf> (visited 12/01/05).

⁵¹ Paul Stephen Dempsey. *European Aviation Law*. The Hague: Kluwer Law International, 2004, at 89.

It [the decision] disregards the principles of public international (air) law, the integrity of national sovereignty, of existing international agreements and the political views of non-EU third countries. Legally, therefore, the judgment is completely ‘incorrect’.⁵²

This argument, based on the Chicago Convention, does not answer the practical problem for all states, including Canada, resulting from the fact that the EU has adopted open skies principles for itself and that the ECJ appears to have imposed such principles at least on the ownership and control clause of all EU member states bilateral agreements.

EU-U.S. Negotiations

In September 1999, the Association of European Airlines (AEA) proposed the “Transatlantic Common Aviation Area” (TCAA) with the United States.⁵³ The TCAA proposal followed the 1998 decision of the EC to file a case with the European Court of Justice (ECJ) in order to obtain a mandate for the EC to renegotiate Member States’ bilateral service agreements with the United States and other third countries discussed above. The traditional system of air transport bilateral agreements creates a number of problems for European carriers. As Paul Dempsey explains:

A particularly negative consequence of the bilateral system is that European airlines normally cannot fly to non-member countries from any point in the EU but only from the territory of their home Member State. This creates an asymmetry that clearly disadvantages European airlines in comparison with their competitors.⁵⁴

Furthermore, it appears to the EC that U.S. carriers have been the main beneficiaries of “open skies” agreements with member states. Fifth freedom rights granted by the bilateral agreements give U.S. carriers access to most destinations within Europe. On the other hand, EU carriers’ traffic rights are limited; they can only fly to the U.S. from their designated home country; moreover, United States domestic

⁵² Henri Wassenbergh. “The Decision of the ECJ of 5 November 2002 in the ‘Open Skies’ Agreements Cases.” 28 *Air & Space Law* (February 2003) at 19.

⁵³ Yu-Chun Chang and George Williams. “Prospects for Changing Airline Ownership Rules.” 67 *Journal of Air Law and Commerce* (2002) at 240.

⁵⁴ Paul Stephen Dempsey. *European Aviation Law*. The Hague: Kluwer Law International, 2004, at 205.

services are prohibited. For the United Kingdom, the Bermuda II agreement is even more restrictive than U.S. “open skies” agreements; it restricts access to London Heathrow to only four carriers, two from the UK in exchange for two from the U.S.

The European Commission also considers that nationality clauses restrict competition between European airlines, and prevent consolidation through mergers and acquisitions within the industry. National flag carriers run the risk of losing traffic rights in the case of an acquisition by an airline of another country since they would no longer be majority-owned and controlled by investors of their home country.⁵⁵ It should be noted that the EU was the first region in the world to remove the nationality clauses in its air service agreements. At that time, however, the U.S. was reluctant to change its ownership rules, or address the right of cabotage in order to develop an open aviation area on the basis suggested by the EU.

The ultimate result is that current EU bilaterals will be folded into a single EU – US bilateral agreement, and to do this, EU-U.S. negotiators will have to resolve three urgent issues:

1. United States acceptance of EU member state carriers that are owned by EU citizens but not necessarily by the citizens of the state which designated the carrier,
2. U.S. acceptance to allow some form of seventh freedom rights by all EU carriers. In other words, a carrier such as Lufthansa could establish itself in any EU state and operate services within the U.S. from any city in the EU, and
3. “Cabotage” rights in which European carriers could carry U.S. domestic traffic and U.S. carriers could carry European domestic traffic.⁵⁶

In June 2004, the Council of EU transport ministers had rejected the latest version of the EU-US draft air transport agreement, and it asked the Commission to continue negotiations in order to obtain a more balanced deal.⁵⁷ Between October 2003 and June 2004 there were six negotiation rounds which eventually resulted in a draft agreement. However, this agreement has been rejected by the Council of Ministers and further negotiations were postponed due to the 2004 U.S. presidential elections and the change in EU Commissioners. The negotiations for an “open skies” agreement between the two

⁵⁵ Trevor Soames, Geert Goeteyn and Peter D. Camesasca. “European Aviation Law: New Wings Unfolding.” 24 *Air & Space Law* (April 2004) at 125.

⁵⁶ Allan I. Mendelsohn. “The USA and the EU—Aviation Relations: An Impasse or an Opportunity.” 24 *Air & Space Law* (2004) at 269.

⁵⁷ “EU Transport Council decision on EU-US Open Aviation Area.” *Aeronews*. IATA Ref. GOVAF 863. 16 June 2004.

markets stalled on the key issue of cabotage; the United States refuses to allow EU carriers to fly between U.S. cities, claiming that this issue is "non negotiable".⁵⁸ However, it should be noted that progress has been made on issues of security, safety and the environment.

In a speech given after the last round of talks, U.S. Secretary of Transportation Norman Mineta highlighted major concessions that the United States would be willing to make. First, the United States may be ready to allow airlines based in one European country to fly to the United States from any another European country. Second, the United States is willing to ask Congress to bring U.S. policy in line with EU rules and regulations by allowing foreigners to own up to 49 percent of U.S. airlines, up from the current 25 percent requirement.⁵⁹ Therefore, the Commission must consider how it will realize the objective of a North-Atlantic "open aviation area" since this will require the United States to amend its legislation with respect to:

- the 'nationality' of U.S. air carriers to enable internationalization of U.S. air carriers without loss of their U.S. citizenship (U.S. labor may be an obstacle here),
- the possibility of opening up cabotage for access to the U.S. domestic market by Community air carriers,
- ending the U.S. Fly America policy and wet-lease rules, and
- participation by EU carriers in the Civil Reserve Air Fleet (CRAF) program which is restricted to U.S. carriers.⁶⁰

The U.S. aviation industry, along with its workers represented by the AFL-CIO, is concerned with the issue of "nationality" wherein EU airlines holding a license in one member state could be "designated" as a European carrier in another country.⁶¹ The lobby fears such an agreement would create a "flag of convenience" carrier, whereby a carrier could choose to receive its licence from a particular member state with low labor

⁵⁸ "US Market Access Grounds EU-US Air Traffic Talks." *EurActiv*. 8 April 2004. <<http://www.euractiv.com/Article?tcmuri=tcm:29-112758-16&type=News>> (visited 01/10/05).

⁵⁹ *Id.*

⁶⁰ Henri Wassenbergh. "5 June 2003, A Historic Decision by the EU Council of Transport Ministers." 28 *Air & Space Law*. (September 2003) at 215.

⁶¹ AFL-CIO. "A Sound Course For U.S. International Aviation Policy." 11 March 2004. <<http://www.aflcio.org/aboutaflcio/ecouncil/ec03112004a.cfm>> (visited 10/03/05).

and regulatory costs, yet operate services out of, and enjoy the benefits of, operating as an airline from another member state. The AFL-CIO explains:

While some harmonization of EU laws have occurred, we would note that dramatic differences remain between various EU nations regarding, for example, the selection of collective bargaining representatives, the formation of collective bargaining agreements, and the enforcement of those agreements. The type of forum shopping that these differences encourage could result in a “race to the bottom” in labor standards as foreign carriers seek out countries with the labor laws most beneficial to their financial interests. Not only would this jeopardize the rights of EU carrier employees, but it would place U.S. workers and carriers at an unfair competitive disadvantage.

A major opponent to allowing cabotage rights is the U.S. Coalition of Airline Pilots Association (CAPA) which actively lobbies the U.S. Congress on the issue.⁶² The AFL-CIO, another strong U.S. lobby, opposes changes to U.S. “wet lease” rules that the EC wishes to abolish in order to circumvent the U.S. workforce and their collective bargaining agreement protections. Wet-leasing requires U.S. carriers to use U.S. crews when leasing foreign aircraft.⁶³ The EC also seeks changes to the “Fly America Act” which stipulates that only U.S. airlines may provide transportation paid for by the U.S. government. The U.S. Dept. of Transportation claims that national defense considerations play a central role in the evaluation of EC proposals with respect to the “Fly America Act” which is tied to the Civil Reserve Air Fleet (CRAF) program.⁶⁴ Airlines that participate CRAF voluntarily commit to provide aircraft, crews, fuel, maintenance, and ground-support equipment in support of U.S. military operations in times of national emergency or conflict. In return, participating carriers are eligible to receive peacetime government business, a market totaling \$2 billion annually. This program has been restricted to U.S. carriers.⁶⁵

⁶² Coalition of Airline Pilots Association (CAPA). “Cabotage is Unacceptable.” 21-April-2004. <http://www.capapilots.org/cabotage_04-21-04.htm> (visited on 25/02/05).

⁶³ *Id.* AFL-CIO. “A Sound Course For U.S. International Aviation Policy.” 11 March 2004.

⁶⁴ John R. Byerly, Deputy Assistant Secretary for Transportation Affairs, U.S. Dept. of State. Speaking Notes. Canadian Airports Council Air Policy Forum. Ottawa, 20 Oct. 2003. <http://www.cacairports.ca/Eng/Air%20Policy%20Forum%202003/John%20Byerly%20USDoS%20Oct%2030%202003.pdf> (visited on 26/02/05).

⁶⁵ Charles Hunnicut. “US and EU: New Era, New Agreement? Robbins, Kaplan, Miller & Ceresi Newsletter. 27 Feb. 2005. <<http://www.rkmc.com/article.asp?articleId=259>> (visited on 26/03/05). “The United States has expressed three concerns about foreign ownership and this program: (1) U.S. carriers are more dependable than foreign airlines; (2) if a foreign entity purchased a U.S. carrier, it would operate as a

Since the rejection of the Draft Agreement by the Council of Ministers in June 2004, there have been several technical meetings, but it is too early to ascertain any tangible consensus on the context of new or revised bilateral air service agreements.⁶⁶ EU-U.S. negotiations will thus need to tackle many serious issues including competition rules and policy. Considering the previous discussion of the Commission's step-by-step, orchestrated attempt to regulate the EU air transport sector, it is probable that any future "open skies" agreement with the United States (and other third states) will be concluded by both the EU and its member states, a process referred to as "mixity." Although the EU-U.S. negotiations appear to be stalemated at this time, the impetus of the Commission's efforts will be far-reaching, and it is anticipated that the outcome will most likely have a significant effect on the global aviation industry.

The fact remains that the exact scope of the forthcoming EU-U.S. air service agreement is difficult to predict. Furthermore, the enlargement of the EU aviation area with neighboring countries may become a complicating factor in the negotiations. Soames, Goeteyn and Camesasca (2004) have drafted several possible scenarios.⁶⁷ The least desirable from the EU perspective would be an "open skies-type" arrangement, granting EU-controlled and U.S. controlled carriers the right to offer air transport services between the two areas but leaving current limitations on the provision of domestic U.S. services and foreign investment untouched. This would allow consolidation to take place between EU carriers, but would not permit EU-U.S. mergers or acquisitions of control. At the other end of the spectrum, a more liberal EU-U.S. agreement could create a single open aviation market encompassing the provision of both domestic and international air transport services, as well as the abolition of restrictions on investments by EU and U.S. investors in each other's airlines. This would eliminate the regulatory barriers that currently impede consolidation between EU and U.S. carriers, and it would enable significant re-structuring to take place within the aviation industry.⁶⁸

Many concede that a potential agreement between the EU and the United States may become the international template for air service agreements. From an American perspective, what is at stake is a potentially interesting attempt to negotiate a common aviation area between the EU and the United States. For the European Commission, it means much more. External negotiations with the United States not only provide the basis for more flexible business operations in transatlantic aviation, but they also imply

foreign airline; and (3) any changes to the regulations to allow foreign ownership and control of U.S. carriers would lead to problems in the CRAF program."

⁶⁶ For example, on 18 February 2003, the Commission and the U.S. administration issued a joint statement outlining the first undertakings that U.S. Customs had given regarding data protection, and seeking to bring the way the U.S. use and protect PNR data closer to EU standards. <http://www.db.europarl.eu.int/oeil/oeil_viewdnl.ProcedureView?lang=2&procid=2958> (visited on 25/02/05).

⁶⁷ Trevor Soames, Geert Goeteyn and Peter D. Camesasca. "European Aviation Law: New Wings Unfolding," 29 *Air & Space Law* (May 2004) at 115.

⁶⁸ *Id.* at 118.

the completion of the internal European aviation market and, more important, increased policy competence in air transport services for the Commission itself.⁶⁹

Current EU Negotiations with Third Countries

As noted above, on February 2003, the Commission asked the Council to grant it a mandate to negotiate air service agreements with all third countries.⁷⁰ This so-called "horizontal mandate" provides for the revision of clauses relating to the ownership and control of airline companies and all other matters coming under the exclusive external competence of the Community.⁷¹ In June 2003, the Council granted the Commission the abovementioned mandate, and member states undertook to comply with the agreement on a voluntary basis pending the entry into force of what became Regulation (EC) 847/2004.⁷²

The new Regulation, (EC) 847/2004, aims to put an end to the uncertainty that prevailed in the air transport sector following the historic ECJ judgment of November 2002 which declared that the bilateral agreements between the United States and eight member states were incompatible with EU law.⁷³ The Regulation provides:

- Member States may enter into negotiations with a third country concerning new air service agreements or the modification of an existing air service agreement, its annexes or any other related bilateral or multilateral arrangement provided that any relevant standard clauses, developed and laid down jointly between Member States and the Commission, are included in such negotiations.⁷⁴
- In so far as air carriers and other interested parties are to be involved in the negotiations, Member States shall equally treat all Community air carriers which have an establishment on their respective territories.⁷⁵

⁶⁹ Cornelia Woll. "Transatlantic Relations as a Catalyst to European Integration: The Activism of the European Commission in the Case of International Aviation." Max Planck Institute for the Study of Societies. AICGS/DAAD Working Paper Series, 2003.

⁷⁰ Commission communication to European Parliament and Council. 26 Feb. 2003. COM(2003)94.

⁷¹ COM (2003) 94. 26 February 2003. <<http://www.publications.parliament.uk/pa/ld199798/ldselect/ldcom/156/15609.htm>> (visited 02/02/05).

⁷² The EU must revise the elements in existing bilateral agreements that infringe EU law. However, given the large number of bilateral agreements, member states are authorised to negotiate with third countries to conclude a new agreement or modify an existing one, provided that no EU negotiations have been entered into.

⁷³ Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004..

⁷⁴ *Id.* at Article 1.

- A Member State shall not enter into any new arrangement with a third country which reduces the number of Community air carriers which may, in accordance with existing arrangements, be designated to provide services between its territory and that country, neither in respect of the entire air transport market between the two parties nor on the basis of specific city pairs.⁷⁶

In sum, the Regulation lays down a set of principles providing for an adequate exchange of information within the EU to ensure that member states do not risk infringing EU law in their bilateral relations with third countries in the air service sector. As discussed earlier, the ECJ has confirmed the exclusive competence of the EU to negotiate, sign and conclude such agreements when they deal with matters within its own area of competence. It has also confirmed the right of EU air carriers to benefit from the right of establishment within the EU, including their right to non-discriminatory market access to routes between all member states and third countries.

The new Regulation also establishes a procedure for notifying and authorizing the bilateral negotiations conducted by member states to ensure the introduction of the standard clauses of the “horizontal mandate”, thus bringing existing agreements into compliance with EU law. With regard to the horizontal clauses for the EU bilateral air service agreement, five third countries have thus far adopted the Community “designation clause: Bulgaria, Chile, Croatia, Georgia and Lebanon.”⁷⁷ Provisions of the clause include:

- On receipt of a designation by a Member State, [*name of the third country*] shall grant the appropriate authorizations and permissions with minimum procedural delay, provided that: (1) the air carrier is established in the territory of the designating Member State under the Treaty establishing the European Community and has a valid Operating Licence in accordance with European Community law; (2) effective regulatory control of the air carrier is exercised and maintained by the Member State responsible for issuing its Air Operators Certificate and the relevant aeronautical authority is clearly identified in the designation; and (3) the air carrier is owned and shall continue to be owned directly or through majority ownership by Member States and/or nationals of Member States, and/or by other states listed in Annex 3 and/or nationals of such other states, and shall at all times be effectively controlled by such states and/or such nationals.
- [*Name of the third country*] may refuse, revoke, suspend or limit the authorisations or permissions of an air carrier designated by a Member State

⁷⁵ *Id.* at Article 2.

⁷⁶ *Id.* at Article 3.

⁷⁷ “Standard Community Designation Clause.” ICAO Case Study on Designation and Authorization, 2 Feb. 2004. <<http://www.icao.int/icao/en/atb/ecp/CaseStudies/Replies/Portugal.pdf>> (visited on 04/02/05).

where: (1) the air carrier is not established in the territory of the designating Member State under the Treaty establishing the European Community or does not have a valid Operating Licence in accordance with European Community law; (2) effective regulatory control of the air carrier is not exercised or not maintained by the Member State responsible for issuing its Air Operators Certificate, or the relevant aeronautical authority is not clearly identified in the designation; or (3) the air carrier is not owned, directly or through majority ownership, or it is not effectively controlled by Member States and/or nationals of Member States, and/or by other states listed in Annex 3 and/or nationals of such other states.

- In exercising its right under this paragraph, [*name of the third country*] shall not discriminate between Community air carriers on the grounds of nationality.

To reassure third countries that these standards will be maintained, member states have made a unanimous declaration that they will respond fully and expeditiously to any concerns raised by third countries.⁷⁸ Regulation (EC) 847/2004 also imposes certain obligations on member states to ensure that non-discriminatory procedures are established for the consultation of stakeholders and for the distribution of traffic rights during negotiations.⁷⁹

Under international law, the sections of the existing bilateral agreements which have been held to be contrary to Community law are not automatically invalid. However, the member states must accept the consequences of these judgments; for example, they can no longer negotiate on matters which are within the Community's exclusive external competence, and must in any event rectify any incompatibilities arising out of the agreements even if this makes it necessary to denounce the agreements. It is interesting to note *en passant* that the EC regulations do not apply to the airport of Gibraltar due to the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to the dispute over sovereignty of the territory in which the airport is situated.⁸⁰

Also, France has recently signed a bilateral air transport agreement with the People's Republic of China that retained the "illegal" substantial ownership and effective

⁷⁸ U.K. Department of Transport. "Implications of the ECJ Case on Designation." <http://www.dft.gov.uk/stellent/groups/dft_aviation/documents/page/dft_aviation_025894.hcsp> (visited 22/01/05).

⁷⁹ *Id.* at Article 5.

⁸⁰ Regulation EC 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements. *Official Journal*, L. 195/3, (2/6/2004), Art. 9. Application of this Regulation to Gibraltar airport shall be suspended until the arrangements included in the Joint Declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987 enter into operation. The Governments of Spain and the United Kingdom will inform the Council of such date of entry into operation.

control clause. General consensus at ICAO suggests that EU member states may thus continue to conduct “business as usual” awaiting the conclusion of EU-U.S. negotiations which may produce a template for future air service agreements; more importantly, such an agreement may confirm the Community’s external competence with respect to bilateral air service agreements.

Consolidation and Cooperation

The Commission’s proposals for increased control of third country agreements have been aimed at providing a coherent European policy for international air transport and, in particular, removing the uncertainty resulting from the ECJ’s November 2002 ruling on members’ bilateral agreements. The task of renegotiating many hundreds of bilateral agreements between member states and third countries would be immense.⁸¹ Therefore, for practical reasons, member states will most likely continue to negotiate with third countries on an individual basis in the short-term, and will continue to manage their existing arrangements. Only time will tell whether member states’ negotiations will be conducted in accordance with the EC regulations on the basis of standard clauses of the “horizontal mandate” agreed upon at the Community level. At the time of this writing, only (six) third countries have initialed the Community clause and are waiting on ratification.⁸² It should be noted that, although the clause establishes the right of establishment and non-discriminatory access to air routes between Member States and third countries, capacity and frequencies are not affected.

The impact of current regulations is enhanced, however, by the EU’s position in terms of its ability to advise, assist and build relations with third countries and other regional organizations. EU Transport Commissioner Loyola de Palacio explains:

Through the European Union's various trade and cooperation agreements, there is already scope to exchange information with other regional groups about the development and regulation of air transport. Using experience gained in the liberalization process and its extensive trade relationships with other regional groupings (notably in Asia, Africa and Latin America), the Commission is considering initiating a more active and substantial dialogue with some of these regions. This

⁸¹ “EU External Aviation Relations.” *Aeronews*. IATA Ref. GOVAF 853. 15 April 2004. “After enlargement in May 2004, an estimated 1,500 to 2,000 BASAs must be amended to conform with the ECJ ruling.”

⁸² Daniel Calleja. Director Air Transport, European Commission. “The EU-US Negotiations—Global Implications.” The six countries are Chile, Georgia, Azerbaijan, Lebanon, Croatia and Bulgaria. Institute of European Affairs. 8 Feb. 2005. <<http://www.iiea.com/files/Speeches080205.pdf>> (visited 05/18/05).

process could also lead to the simplification and regionalization of certain aviation agreements that are currently of a bilateral nature.⁸³

The fact that the EU is stepping up aviation relations with its neighbors cannot be overlooked; most of the countries neighboring the enlarged Community are important trading partners. Ten countries from central, eastern and southern Europe have already joined the EU, thus building towards a European Common Aviation Area (ECAA) of 25 states along with three associated states: Norway, Iceland and Switzerland.⁸⁴ Consequently, the Commission has proposed a framework for negotiations with a view to stepping up aviation relations with all countries neighboring the enlarged EU, further to the south as well as to the east.⁸⁵ The aim of this framework is to organize a coherent and flexible method of liberalizing aviation relations within a wider Europe. Flexibility is essential in order to accommodate the differing political, legal and administrative aviation environment of all the neighboring countries concerned.

The EU has been seeking new agreements with the Western Balkan States “based on acceptance of Community legislation in air transport.”⁸⁶ Furthermore, the ECAA provides a basis for developing closer ties with other close trading partners around the Mediterranean and to the East.⁸⁷ Focusing on Morocco, Lebanon and Jordan, the Euro-Mediterranean Aviation agreements will be based on the traditional approach to open aviation areas which will cover a wide range of issues aimed at the reciprocal opening of markets and the removal of economic barriers to trade and investment; such agreements would include a “most favorite nation” clause.⁸⁸ The EU also has plans to negotiate a comprehensive agreement with Turkey “bringing all its agreements with Member States into line with Community law.”⁸⁹

The EU is also directing even more attention to its main partners to the east. Among these, the Russian Federation plays an essential role in the field of aviation. It

⁸³ “New Era for Air Transport: Loyola de Palacio Welcomes the Mandate Given to the European Commission for Negotiation an Open Aviation Area with the U.S.” *EU Newsweb*. Press Release No. 37/03. 5 June 2003. <<http://eurunion.org/News/press/2003/2003037.htm>> (visited on 29/12/04).

⁸⁴ The ten new states are: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

⁸⁵ Communication from the European Commission "A Community Aviation Policy Towards Its Neighbors." [Http://europa.eu.int/comm/transport/air/international/doc/com_2004_0074_en.pdf](http://europa.eu.int/comm/transport/air/international/doc/com_2004_0074_en.pdf).

⁸⁶ “EU External Aviation Relations.” *Aeronews*. IATA Ref. GOVAF 853. 15 April 2004. The Balkan States include Albania, Bosnia-Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Serbia and Montenegro.

⁸⁷ Philip Butterworth-Hayes. “European Governments Hand over Airspace Regulation/Correspondence.” <http://www.iaa.org/aerospace/Article.cfm?issuetocid=300&ArchiveIssueID=35> (visited 02/02/05).

⁸⁸ “EU External Aviation Relations.” *Aeronews*. IATA Ref. GOVAF 853. 15 April 2004.

⁸⁹ *Id.*

will be necessary to strengthen cooperation between the Community as a whole and Russia, addressing all issues of common interest such as industrial cooperation, safety and certification, environment, airports and air traffic management. In the context of this broad dialogue, the Commission also aims to ensure that transit through Russia is normalized.⁹⁰

Further to the east, Japan is another essential aviation partner. The Commission will continue to push for fair access to Tokyo's airports, as current barriers are making it difficult to develop links with Japan. As in the case of Russia, the objective will be to go beyond specific issues and to build a long-term partnership for cooperation, including international policy coordination.⁹¹

In many developing countries, where land infrastructure is often insufficient and distances are great, air transport services are essential. For exporters, it provides the only fast and reliable route to the markets of Europe, while for the tourism industry, it often provides the only means of reaching many destinations. The Commission is therefore determined to provide assistance to a large number of developing countries, particularly with a view to giving these countries the means to apply safety standards which are constantly improving worldwide.⁹² The EU plans to work with developing countries to ensure that air transport is free to develop between Europe and these countries in a positive manner, expanding opportunities for both sides without compromising on standards.⁹³

The European Commission has negotiated an aviation agreement with Chile to liberalize the routes that European airlines can use to Latin American. The agreement, which has been submitted to EU governments for their approval, would enable EU airlines to fly to Chile from any of the EU member states and not just from their own territory. In return it would also allow non-Chilean airlines to fly from Chile to the EU.⁹⁴

⁹⁰ *Europa*: EU Transport. "Cooperation with Third Countries." Normalized transit would ensure that no additional payments would be imposed simply for transit. Discussions on this matter, in cooperation with the European Bank for Reconstruction and Development (EBRD) and European airlines, have already made good progress. <http://europa.eu.int/comm/transport/air/international/cooperation_en.htm (visited 28/02/05)>.

⁹¹ *Id.*

⁹² Commission Communication on World Aviation Safety Improvement. Communication from the Commission. COM/2001/0390. <http://europa.eu.int/comm/transport/air/international/cooperation_en.htm (visited 12/02/05)>.

⁹³ *Id.*

⁹⁴ "EU Executive Seeks Air Liberalization with Chile." *EU Business*. 23 Dec. 2004. The commission concluded talks on the new agreement with Chilean aviation authorities in September 2004. <http://www.eubusiness.com/afp/041223124824.k9zpz7ag> (visited 13/02/05).

In sum, the EU's efforts in air services liberalization are far-reaching. According to the International Air Transport Association (IATA), the EU represents an important group of "like-minded" states whose efforts must be viewed as a major catalyst for change.⁹⁵ EU aviation rules now apply to 28 countries and will gradually also apply to other adjacent and third countries to some degree as previously discussed.⁹⁶ As a prerequisite to membership, these third countries must commit themselves to apply EU regulations governing commercial and safety issues, although transitional periods will be negotiated with individual countries. As of March 2005 the EU was negotiating a comprehensive air transport agreement with Morocco.⁹⁷

The impact of the renegotiation of ownership and control clauses by member states in some 1,500 to 2,000 air service agreements with partners around the world will certainly prove to be a complicated process, and IATA proposes that this difficulty might best be overcome by unilateral declaration, or plurilateral (bloc-to-bloc) agreements.⁹⁸ The impact of this renegotiation on the spread of open skies principles and the breaking down of the old restrictive bilateral order is difficult to calculate at the present time but it would be unwise for any country, especially Canada, simply to ignore this potentially dynamic development.

EU Membership in International Organizations

The EU is a unique construct. The limited and specific conferral of powers under the EC Treaty defines the responsibilities between the Community and the member states. More specifically, the Community only has those powers which have been conferred upon it. However, from the previous discussion of the "open skies" cases brought by the EC against eight member states, this "power" perspective may be oversimplified. The ECJ ruling in 1998 against the Member States has demonstrated that it is not so much that Member States do not have "power" to conclude bilateral air service agreements, but rather they have failed to take into consideration certain rules formulated by the EC such as those concerning carrier nationality, air fares, CRS, and airport slots.

This brings up the legal justification of mixity. With respect to air service agreements, the Community has not been able to conclude such an agreement alone, because its competence does not cover the entire agreement. This dilemma is also reflected in Community participation in international organizations. For example, in the

⁹⁵ IATA. "Advancing the Liberalisation of Ownership and Control." Doc. A35-WP/64. 7 Aug. 2004.

⁹⁶ Detlev Fischer. "SEABIRD investigates the Future of Regional Aviation in the Baltic Sea Region." 13/07/00. [Http://www.bmt-ts.com/en/texts/00070001.html](http://www.bmt-ts.com/en/texts/00070001.html). The future of regional aviation in the Baltic Sea Region (BSR) is the focus of SEABIRD, an IIC-funded research project.

⁹⁷ "Air Transport: An Ambitious External Relations Agenda." *Europa*. 25 March 2005. <http://www.delrus.cec.eu.int/en/news_689.htm> (visited (05/05/05)).

⁹⁸ "EU External Aviation Relations." *Aeronews*. IATA Ref. GOVAF 853. 15 April 2004.

early 1970s the Community participated, together with the member states, in the negotiations leading to the U.N. Convention on the Law of the Sea. However, there were difficulties in reaching common positions; in fact, the only issue on which the group was united was that advocating the right of the Community to become a party to the Convention. The problem was solved by allowing Community signature, but there were “stringent” conditions laid down in Annex IX of the Convention.⁹⁹ For example, the annex enabled the Community to join the Convention, but only if a majority of the member states joined as well. Consequently, the Convention became a model for mixity when negotiating other multilateral treaties which commonly required a declaration of competences. For example, it was commonly necessary to indicate whether the rights and obligations created were binding on the Community, on its Member States, or both.

In the complex “mixed” negotiations of the GATT Uruguay Round which led to the establishment of the WTO, the preponderant role of the Community was generally accepted until the end of the negotiations. Opinion 1/94 finally decided that GATS comes within the joint competence of the Community and member states which enables each member state to insist upon agreeing with the detail of any GATS negotiation.¹⁰⁰

In contrast to its membership in the WTO, the Community is also a member of the U.N. Food and Agriculture Organization (FAO) alongside all of the member states; however, participation is governed by the principle of “alternative exercise of membership rights.”¹⁰¹ In other words, the Community or its member states are required to indicate which of them has competence with respect to any specific issue or question during any negotiations. If the Community has competence, it will cast a number of votes equal to the number of member states.

This brief discussion of EU membership in international organizations demonstrates that the relationship between Community and Member State competence is complex in external relations. Yet, as the Community becomes increasingly competent as an actor in the international air transport sector, the question of state sovereignty must be addressed. The principle of complete and exclusive sovereignty of a state over its territorial airspace was been confirmed by the Chicago Convention in 1944, and it has since been the legal standard in international civil aviation.¹⁰² The question therefore arises: “What will be the Community’s role in international aviation organizations which, due to security and other national issues, are particularly state-centered?”

⁹⁹ Piet Eeckhout. *External Relations of the European Union*. Oxford: Oxford University Press, 2004, at 196.

¹⁰⁰ *Id.* at 199-200.

¹⁰¹ Joni Heliskoski. “Internal Struggle for International Presence.” In *The General Law of E.C. External Relations*. Eds. Alan Dashwood and Christophe Hillion. London: Sweet & Maxwell, 2000, at 82-83.

¹⁰² Chicago Convention. Article I. *Annals of Air and Space Law*. Montreal: McGill University, 1993, at 5. “The contracting States recognize that every State has complete and exclusive sovereignty over the airspace of its territory.”

The Impact of the EU on ICAO

The importance of a unified European front for future air services liberalisation is evidenced not only by the EU's orchestrated series of aviation regulations, but also its increased participation in the international aviation forum. The International Civil Aviation Organization (ICAO) is an agency of the United Nations whose strategic objectives are to:

- enhance global civil aviation safety and security,
- minimize the adverse effect of global civil aviation on the environment,
- enhance the efficiency of aviation operations,
- maintain the continuity of aviation operations, and
- strengthen law governing international civil aviation.¹⁰³

Although the EU is not a sovereign state and has no formal status in the ICAO, the member states have been jointly represented in some circumstances.¹⁰⁴ For example, the EC defended its decision to ban “hush-kitted” aircraft from the EU, following complaints from the United States to ICAO that the measures discriminated against U.S. airlines. The ICAO ruled against the Community measures.¹⁰⁵ Also, in 2002 the Commission requested the ICAO Council to formally start negotiations on Community membership in ICAO with a view of ensuring a single representation of the EU.¹⁰⁶ It should be noted that in the area of air carrier liability, given the existence of a common EU regime, the Commission was able to negotiate and sign the 1999 Montreal Convention, which modernized the worldwide system of airline liability.¹⁰⁷ Article 53 of

¹⁰³ International Civil Aviation Organization (ICAO). “Strategic Objectives of ICAO for 2005-2010.” <http://www.icao.int/icao/en/strategic_objectives_2005_2010_en.pdf> (visited on 02/03/05).

¹⁰⁴ In particular, the EC has participated during ICAO proceedings to settle disputes relating to hush-kits.

¹⁰⁵ U.S. Committee on Transportation and Infrastructure. Subcommittee on Aviation Hearing, 9 Sept. 1999. “The European Union's Efforts to Ban Hush-Kitted Aircraft.” ICAO sets and administers international certification standards for aircraft. Once an aircraft is certified as having met ICAO standards, it may be used in any ICAO member country. The European Union, however, proposed adopting a regulation that would severely restrict the use of hush-kitted and re-engined aircraft in Europe despite the fact that these aircraft met all ICAO requirements. <<http://www.house.gov/transportation/aviation/hearing/09-09-99/09-09-99memo.html>> (visited on 28/02/05).

¹⁰⁶ “Recommendation from the Commission to the Council of 9 April 2002 in order to authorize the Commission to open and conduct negotiations with the International Civil Aviation Organization.” SEC(2002)381 .

¹⁰⁷ Council Decision on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) of 5 April 2001. (2001/539/EC).

the Montreal Convention guaranteed that the Convention was open for signature by Regional Economic Integration Organizations such as the EU:

For the Purpose of this Convention, a “Regional Economic Integration Organization” means any organization which is constituted by sovereign States of a given region which has competence in respect of certain matters governed by this Convention and has been duly authorized to sign and to ratify, accept, approve or accede to this Convention.¹⁰⁸

Likewise, for all carriage to, from or within the EU, Regulation 889/2002 provided for the implementation of the Montreal Convention in the EU. The entry into force of the Montreal Convention automatically rendered effective the Convention regime to all intra EU transportation, whether between member states or within member states (Article 2).¹⁰⁹ Consequently, Weber (2004) explains: “The effect of Article 2 of the Regulation is compatible with the objective of a single aviation market within the EU, by providing operating conditions for competing air carrier ‘as if’ the EU was a domestic market.”¹¹⁰

While the EU’s acceptance of the Montreal Convention does not provide the Commission with a mandate to negotiate bilateral agreements with third countries on behalf of the member states, the Commission claims that it has the effect of increasing, at least *de facto*, the Commission's competence to act on such issues. Recently, the Commission has achieved rulemaking authority for the member states with the creation of the European Aviation Safety Authority (EASA).¹¹¹ The EU Joint Aviation Authorities (JAA) which had no direct regulatory authority was transformed into the EASA which now requires Member States to align with any EASA decisions, and to vote in unison on related issues before ICAO.¹¹²

¹⁰⁸ Montreal Convention (1999). *Private International Air Law*. Eds. Professors Michael Milde and Paul Dempsey. Institute of Air and Space Law. McGill University, 2004, at 417.

¹⁰⁹ *Id.* at Article 2.

¹¹⁰ Ludwig J. Weber. “Recent Developments in International Air Law.” 24 *Air & Space Law*. (November 2004) at 285.

¹¹¹ Parliament and Council Regulation 1592/2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (EASA). 15 July 2002. OJ No L 240/1, 7 September 02.

¹¹² The European Aviation Safety Agency (EASA) was established to set out common European rules and guidelines for aviation safety. The organization replaced the Joint Airworthiness Authorities, becoming a powerful EU aviation regulator. It has the staff and legal powers to regulate flight safety at the Community level, backed by the powers of the EC.

The Chicago Convention does not provide for any accession by regional organizations of states such as the European Community.¹¹³ Furthermore, any amendment of the Convention to permit accession by the Community would require the consent of two-thirds of the convention's Contracting States, a process which, considering earlier amendments, could take years to complete. Although the European Commission formally requested a seat on the ICAO Council, it was opposed by Member States on the grounds that the seats on the Council currently held by Member States would thereby be reduced; on the other hand, third states opposed an additional seat increasing the total of European votes. Therefore, the EC has since requested "permanent" observer status on ICAO's Council. Such status would allow participation without voting rights; it would also not require amendment of the Convention.

In support of its request, the Commission argues that member states do not always speak with one voice in international transport organizations, which diminishes the Community's influence in the international air services sector. The Commission also claims that a considerable body of law relating to air, and sea transport, has been adopted under the EC Treaty. The community therefore argues that it should play a stronger role within the ICAO and the International Maritime Organization (IMO) respectively, in order to better meet its obligations with respect to its external competence; the objective is to guarantee consistency between Community and international law.

The Commission also advances a legal justification for increased participation based on the AETR doctrine derived from the judgment of the European Court of Justice in 1971. The Commission asserts that as the Community increasingly develops more common internal rules, it also acquires authority over external negotiations which might affect those common rules. The Commission argues that if the Community has an internal competence to achieve a specific objective, it implicitly holds the exclusive competence on that subject as far as such an external exercise of competence is necessary to achieve that objective.¹¹⁴

It should, however, be noted that although general consensus in ICAO indicates that EU membership, and the necessary amendment of the Chicago Convention, would be a lengthy and painstaking process, "permanent" observer status on the ICAO Council appears to be the route that the EU and ICAO will undertake in the near future. Such status will only require minor changes in Council rules and procedures, thus bypassing any amendment of the Chicago Convention.¹¹⁵

¹¹³ Chicago Convention (Art. 92): This convention shall be open for adherence by members of the United Nations and States associated with them, and States which remained neutral during the present world conflict."

¹¹⁴ Commission asks for EC's accession to the ICAO and the IMO. "April 9, 2002: Strength through Unity: the Commission asks for the European Community's Accession to the ICAO and the IMO (Brussels). <http://europa-eu-un.org/articles/en/article_1278_en.htm> (visited 12/02/05).

¹¹⁵ Turkey is not a member of ICAO's Council but it has "unofficial" observer status. The Convention does allow contracting States to participate in the Council without a vote (Art. 53).

A New Legal Order in Air Transport?

Although the EU's new policies have not yet been completely transformed into revised bilateral/plurilateral air service agreements with the United States and third countries, other "like-minded" countries around the globe are playing a pivotal role in the continued development of regional agreements. The efforts of these countries along with the EU's developments in air transport must be viewed as a catalyst for change. In fact, the use of agreements between groups of "like-minded" economies, usually in the same region, is becoming more widely accepted, for example:

- Andean Open Skies Pact (1991)
- Yamoussokro II Ministerial Decision (1992)
- U.S. Canada "Open Skies" Agreement (1995)
- CARICOM Air Services Agreement (1996)
- Fortaleza Agreement (1997)
- Banjul Accord (1997)
- CLMV Agreement (1998)
- CEMAC (1999)
- COMESA (1999)
- MALIAT (2001)

Despite legally binding commitments to "open skies" policies, the pace of liberalization actually adopted by each country has varied considerably because of the differences in economic situations and the status of airline privatization. For example, in the Andean Pact, Columbia and Venezuela were willing to advance the liberalization process, yet Peru has sought to protect its airline from competition in the process to privatization.¹¹⁶

There are also moves to liberalize the air transport sector on an incremental basis. For example, moves to liberalize ownership and control are taking place on an *ad hoc* basis such as Australia's acceptance of the right of establishment. The Multilateral Agreement on the Liberalization of International Air Transport (MALIAT), which includes nine States in Asia, and North and South America, has sought to modify the standard ownership clause "with a view to providing new opportunities for investment in the airlines covered by the agreement."¹¹⁷

However, uneven development on a global basis only helps to perpetuate the more general unevenness of the world's economic system. For example, the rise of some

¹¹⁶ IATA. "Andean Open Skies Pact." (Submitted by the ICAO Secretariat). Feb. 2003. <http://www.icao.int/icao/en/atb/ecp/CaseStudies/AndeanPact_En.pdf> (visited 19/02/05).

¹¹⁷ IATA. "Advancing the Liberalization of Ownership and Control." Doc. A35-WP/64. 7 Aug. 2004.

Asian economies has been matched by the tilt of the world's airline networks toward that region. The region's improved prosperity has also been reflected in the success of its airlines (e.g., Singapore Airlines, Cathay Pacific), the colossal cost of its new airports (e.g., Chek Lap Kok in Hong Kong and Kansai near Osaka), and the higher share of international traffic accounted for by increased Pacific Rim routes. Conversely, in other parts of the world, the air transport sector has languished along with the local economies that support it; some places are favored by their centrality in those networks and others are disadvantaged by their comparative isolation.¹¹⁸

Conclusions

The EU is currently playing a dynamic role in international air transport. It is forcing change not only in its relationships with its primary partners but potentially it is seeking to promote its own open skies policies upon the rest of the world in a manner which will prove to be even more revolutionary than the example of the United States. In many ways, regionalism in air transport service agreements is becoming the model for future development of what has been a matter of bilateral agreement since 1944.

¹¹⁸ John Bowen. "Network Change, Deregulation, and Access in the Global Airline Industry." 78 *Economic Geography* (Oct 2002) at 425-440.