LAW AND POLICY OF SUBSTANTIAL OWNERSHIP AND EFFECTIVE CONTROL OF AIRLINES: Prospects for Change

By
Isabelle Lelieur

Faculty of Law
Institute of Air and Space Law
McGill University, Montréal

January 2002

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements of the degree of Masters of Laws (LL.M.)

ACKNOWLEDGEMENTS

I would like to express my sincere thanks to the people who contributed to the accomplishment of the present thesis by providing me with advice, help and support.

First and foremost, I am indebted to my supervisor, Professor Michael Milde (Institute of Air and Space Law, McGill University), for his constant encouragement and guidance in supervising this thesis. I also wish to extend my gratitude to Doctor Tissa Abeyratne (Air Transport Bureau, International Civil Aviation Organization), Professors Richard Janda and Peter van Fenema (Faculty of Law, McGill University), who gave me access to innumerable documents and sources, and who generously shared their expertise and experience in the air transport sector.

I would also like to acknowledge M. Y. Wang (Economic Policy Section, International Civil Aviation Organization), M. L. van Hasselt (Directorate General for Energy and Transport, European Commission), M. W. Hubner (Head of the Division of Transport, Organization of Economic Cooperation and Development), M. P. Latrille (economic affairs officer, World Trade Organization), M. D. David (Deputy Director of the International Affairs, Directorate General for Civil Aviation, France), Mrs. E. Lacaze (Representative of Multilateral Affairs outside Europe, Directorate General for Civil Aviation, France), M. M. Gorog (Director of the International Relations, Air France Cargo), M. Gagey (Financial Director, Air France) and M. A. Camus (Direction of International Affairs, Air France), who sacrificed their time to give me invaluable first-hand information.

I deeply appreciate the time and effort which Melanie Mortensen and Christopher Petras spent in editing this thesis. Thanks to Christopher D. Jenkins for helping me with translating the abstract.

I would like to thank my wonderful classmates, whose liveliness and camaraderie made this year in Montreal an unforgettable experience. A special thanks to Shervin Majlessi for his encouragement, assistance and patience throughout these past months.

Finally, I acknowledge my parents, Geneviève and Christophe Lelieur, for their unfailing emotional and financial support. This thesis is dedicated to them.

ABSTRACT

Should the lack of confidence in the airline industry, lead by the September 2001 terrorist attack, stop the liberalization process of the airline ownership and control? Following this dreadful event, even though the rationale of the ownership and control restrictions comes back now to the original concept of national identity, States should pursue the liberalization of cross-border investments, which will undoubtedly contribute to the growth and expansion of the airline industry.

Indeed, the principle of airline substantial ownership and effective control is one of the biggest impediments to the air transport industry growth. Legitimately included in the bilateral agreements since 1946 for national security reasons, States have maintained the principle over the years and used it as a protectionist tool, as well as a bargaining chip. Today, considering that liberalization and globalization concepts are already well-established in the biggest industrial sectors, and a large number of cross-border investments occurs in most of the service sectors through mergers and acquisitions, the time is ripe to remove national restrictions on foreign investments from the airline industry. A number of States have already liberalized their ownership system, but the reluctance of the United States to open their airlines' capital to foreign investments, slows down considerably the worldwide liberalization process.

After describing the current national policies regarding the ownership and control of airlines and examining their rationale, this thesis will discuss the consequences of the recommended liberal system. Advocating a total liberalization of cross-border investments, this thesis will then consider the steps to be taken towards achieving that goal, as well as the role of the international organizations in this process.

RÉSUMÉ

La perte de confiance envers l'industrie des compagnies aériennes, provoquée par l'attaque terroriste de septembre 2001, devrait-elle entrainer l'arrêt du processus de libéralisation de la propriété et du contrôle des compagnies? Même si la justification des restrictions de propriété et de contrôle des transporteurs aérien est de nouveau liée au critère de l'identité nationale, les Etats doivent continuer à libéraliser les investissements trans-frontaliers, ce qui va, sans nul doute, contribuer à la croissance et à l'expansion de l'industrie des compagnies aériennes.

En effet, le principe de la propriété substantielle et du contrôle effectif des compagnies aériennes représente l'un des plus grands obstacles à la croissance de l'industrie du transport aérien. Inclus à juste titre dans les accords bilatéraux, depuis 1946, pour des raisons de sécurité nationale, le principe a été maintenu depuis par les Etats et utilisé comme outil protectionniste, de même que comme outil de négociation. Aujourd'hui, considérant les concepts de libéralisation et de globalisation déjà bien établis dans les plus grands secteurs industriels, et considérant le nombre important d'investissements trans-frontaliers, par le biais de fusions-acquisitions, dans la plupart des secteurs de services, il est maintenant temps de supprimer, de l'industrie des compagnies aériennes, les restrictions nationales en matière d'investissements étrangers. Un nombre d'Etats a déjà libéralisé leur système de propriété, mais la réticence des Etats-Unis à ouvrir le capital de leurs compagnies aériennes aux étrangers, ralentit considérablement le processus mondial de libéralisation.

Après la présentation des politiques nationales actuelles en matière de propriété et de contrôle des compagnies aériennes et le réexamen des justifications du système restrictif actuel, une attention particulière sera accordée à l'étude du nouveau système libéral préconisé. Prônant la libéralisation totale des investissements trans-frontaliers, ce mémoire étudiera ensuite les mesures nécessaires pour réaliser cette libéralisation, ainsi que le rôle des organisations internationales dans ce processus.

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

ABA	American Bar Association
A.A.S.L.	Annals of Air and Space Law
AEA	Association of the European Airlines
Air & Space L.	Air and Space Law
Air & Space Law.	Air and Space Lawyer
Airline Bus.	Airline Business
Airline Fin. News	Airline Finance News
ALPA	Airline Pilot's Association
Am. U. L. Rev.	American University Law Review
APEC	Asia Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
ATRP	Air Transport Regulation Panel
BA	British Airways
BWIA	British West Indies Airways
CAAC	Civil Aviation Administration of China
CAB	Civil Aeronautics Board
CARICOM	Caribbean Economic Community
Case W. Res. J. Int'l L.	Case Western Reserve Journal of International Law
CRAF	Civil Reserve Air Fleet
CTC	Canadian Transport Commission
DOD	Department Of Defense
DOJ	Department Of Justice
DOT	Department Of Transportation
Duke L.J.	Duke Law Journal
EASA	European Aviation Safety Agency
ECAC	European Civil Aviation Conference
EEA	European Economic Area
Emory Int'l L. Rev.	Emory International Law Review
FAA	Federal Aviation Authority
FDI	Foreign Direct Investment
FFP	Frequent-Flier Programs
Fordham Int'l L. J.	Fordham International Law Journal
GAO	General Accounting Office
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
Geo. Wash. J. Int'l L. & Econ.	George Washington Journal of International Law and Economics
Harv. J. on Legis.	Harvard Journal on Legislation
IAEAA	International Antitrust Enforcement Act

IASTA	International Air Services Transit Agreement
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
ICAO J.	ICAO Journal
IFFAS	International Financial Facility for Aviation Safety
Inv. Dealers' Dig.	Investment Dealers Digest
JAA	Joint Aviation Authorities
J. Air L. & Com.	Journal of Air Law and Commerce
J. L. & Com.	Journal of Law and Commerce
J. Rec. (Okla. City)	Journal Record of Oklahoma City
L. & Econ. R.	Law and Economic Review
M&A	Merger and Acquisition
MFN	Most Favored Nation
NAFTA	North American Free Trade Agreement.
NTA	National Transportation Agency
OECD	Organization for Economic Co-operation and Development
Orange County Reg.	Orange County Register
Public Contract L. J.	Public Contract Law Journal
SARPs	Standards And Recommended Practices
SAS	Scandinavian Airlines System
SIA	Singapore International Airlines
Suffolk Transnat'l L. Rev.	Suffolk Transnational Law Review
Syracuse L. R.	Syracuse Law Review
TCAA	Transatlantic Common Aviation Area
Transp. L. J.	Transportation Law Journal
TWA	Trans World Airlines
U. Bus. Miami L. J.	University of Miami Business Law Journal
USOAP	Universal Security Oversight Audit Programme
U. Haw. L. Rev.	University of Hawaii Law Review
US J. Com.	US Journal of Commerce
Wall St. J.	Wall Street Journal
WTO	World Trade Organization

INTRODUCTION

Civil aviation is a commercial activity and, as such, is embroiled in the process of globalization currently affecting business pursuits worldwide. International air transport is already one of the world's largest industries; nevertheless, for the industry to flourish in the twenty-first century, it will require a more liberalized legal and economic framework tailored to the global marketplace. At present, the main impediment to establishing this framework is the traditional requirement that airlines must be *substantially owned* and *effectively controlled* by nationals of the State to which such airlines are linked through the flags of the State concerned. This notion of the "flag carrier" has been the norm in the worldwide aviation policy for more than fifty years,[1] and it is firmly entrenched in national laws, as well as most bilateral and multilateral agreements. Thus, this thesis argues the total abolishment of the national ownership and control restrictions in order to allow air carriers to evolve in a more liberal environment and criticizes the traditional justifications of these legal restrictions.

a. Is the "ownership and control requirement" part of international law?

The 1944 *Convention on International Civil Aviation*,[2] which is arguably the basis for the entire international aviation legal system, does not expressly affirm national ownership requirements for airlines. Still, some authors maintain that the Convention gives implicit approval to these restrictions through its recognition of certain principles,[3] such as State sovereignty over the airspace above its territory (Article 1),[4] preferential treatment by a State *vis-à-vis* its national carrier (Article 7),[5] and bilateral negotiation of

---

[1] P.P.C. Haanappel, "Airline Ownership and Control and Some Related Matters" (2001) 26-2 Air & Space L. 90 at 90.

[2] *Convention on International Civil Aviation*, 7 December 1944, 15 U.N.T.S. 295, ICAO Doc. 7300/6 [hereinafter the *Chicago Convention*].

[3] K. Bohmann, "The Ownership and Control Requirement in U.S. and European Union Air Law and U.S. Maritime Law – Policy; Consideration; Comparison" (2001) 66 J. Air L. & Com. 689 at 692.

[4] Article 1 of the *Chicago Convention* states that "[t]he contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory".

[5] Article 7 of the *Chicago Convention* states that "[e]ach Contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory…".

overflight rights between States (Article 6).[6] However, taken as a whole, the *Chicago Convention* is, at best, neutral with regard to ownership restrictions, since it also expressly permits operations involving joint and coordinated efforts among airlines to provide international service (Article 77).

Indeed, the only international agreement that actually addresses the issue of airline ownership restrictions is the *International Air Services Transit Agreement.*[7] Article 1, Section 5, provides that

> [e]ach Contracting States reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a Contracting State, or in case of failure of such air transport enterprise to comply with the laws of the State over which it operates, or to perform its obligations under this Agreement.[8]

In the period since the 1950s, however, as international civil aviation grew in breadth and scope, States increasingly used the right to withhold or revoke a foreign airline's certificate or permit to operate in their *national* airspace, as a means of regulating *international* air transport. Specifically, States limited foreign investment in their "flag carriers" by requiring a "nationality clause" based on Article 1(5) of the IASTA in each of their bilateral agreements on air traffic rights. In this way, States prevented airlines from non-contracting countries from benefitting from a bilateral exchange of traffic rights,[9] since only the carriers designated by the contracting parties (and that met the bilateral agreement's nationality requirements) acquired traffic rights and, *ergo*, had access to the international routes covered by the agreement. The first such agreement was signed between the United States and the United Kingdom in 1946 (*Bermuda I*);[10] it

---

[6] Article 6 of the *Chicago Convention* states that "[n]o scheduled international air service may be operated over or into the territory of a contracting State, except with a special permission or other authorization of that State, and in accordance with the terms of such a permission or authorization".

[7] *International Air Services Transit Agreement*, 7 December 1944, 84 U.N.T.S. 389, 394, ICAO Doc. 7500, also reproduced in ICAO Doc. 9587. The *International Air Services Transit Agreement* has been ratified, as of 4 October 2000, by 118 States, 17 of which have ratified during the last five years [hereinafter *IASTA*]. The *International Air transport Agreement* (7 December 1944, 171 U.N.T.S. 387), in its Article 1 § 6, addresses the same issue; however, as only a very few number of States has signed the Agreement (12 States), it is not entered into force.

[8] *IASTA*, *ibid.* Art. 1, Sect. 5.

[9] Bohmann, *supra* note 3 at 694.

[10] *Agreement Between the Government of the United States of America and the Government of the United Kingdom Related to Air Services Between their Respective Territories*, 11 February 1946, U.S.-U.K., 60 Stat. 1499 [hereinafter *Bermuda I*]. The nationality clause is stated in Article 6 of the Appendix to Bermuda 1.

thereafter became the model upon which virtually all other bilateral agreements between States were based. As airline ownership restrictions became more pervasive in the negotiation of air traffic rights, they also increasingly found their way into States' domestic laws.[11] Thus, the requirement for "national ownership and control" of airlines in exchange with traffic rights is not mandated by international law, but rather was born out of State practice over the last fifty years.

b. What does "substantial ownership" and "effective control" of airline mean?

None of the international treaties related to international air activity (*Chicago Convention, IASTA, and Air Transport Agreement*) defines the terms "substantial ownership" and "effective control," and there are no universally accepted definitions for these terms.

"Substantial ownership." Within the international community at large, ownership of an airline is generally understood to mean ownership of voting shares of the airlines stock, and "substantial ownership" usually equates to owning more than 50% of the voting shares,[12] regardless of whether the shareholder is a public or a private entity. Thus, "majority ownership is substantial."[13] In the past, governments frequently held a majority stake in their national carriers and, therefore, foreign ownership was not a concern. Today, however, with the wave of privatization passing through the airline industry, the majority of voting shares in most airlines is now in private hands, with ownership oftentimes spread among national and alien shareholders. Under these circumstances, the percentage of the ownership of voting shares in an airline is not

---

[11] For instance, in the United States, the *Civil Aeronautics Act* of 1938 (*Civil Aeronautics Act*, Pub. L. No. 75-706, 52 Stat. 973 (1938)) required that 75% of a US carrier's voting equity remains in US hands, whereas the *Air Commerce Act* of 1926 (*Air Commerce Act*, Pub. L. No. 69-254, SS 1-14, 44 Stat. 568 (1926)) had only required 51% of US voting equity in US carrier. Notably, under current US law there is the additional requirement that a US carrier be a US citizen. For further analysis of the *Federal Aviation Act* of 1958, see Chapter 2, para. 1., at 25, below.

[12] The European Commission has interpreted the EC ownership of airlines in its decision on the Swissair/Sabena case, see EU, *Commission Decision No. 95/404/EC on a Procedure Relating to the Application of the Council Regulation 2407/92 (Swissair/Sabena)*, O.J. (1995) L 239/19.

[13] IATA, Government and Industry Affairs Department, *Report of the Ownership & Control Think Tank World Aviation Regulatory Monitor*, IATA doc. prepared by P. van Fenema (7 September 2000) at 13 [hereinafter IATA Doc.].

necessarily determinative in establishing "substantial ownership." For example, if 40% of an airline's voting shares are in foreign hands the airline is arguably *not* "substantially owned" by nationals, even though nationals hold the remaining 60% (*i.e.*, a clear numerical majority) of the outstanding voting shares.[14]

"Effective control." The question of "effective control" is subtler and requires a deeper analysis, since it has nothing to do with numbers but rather who actually controls the airline. Control over a corporation is commonly understood as the power to direct its internal and external policy. Such power is normally vested in the board of directors or executive officers of the corporation, as opposed to the shareholders. As P. van Fenema explains, "[t]o be the national majority shareholder is one thing, but the right to 'hire and fire', to set the corporate goals, to take major decisions effecting the future of the company, if such powers reside in other than national hands, will create serious doubts about the nationality of the airline".[15]

In the United States, the *Securities Exchange Act* of 1934 defines "control" as follows:

> The term "control" (including the terms "controlling," "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.[16]

Notwithstanding this general definition, US aviation law fails to clarify the notion of what constitutes "effective control" of airline. Moreover, aviation regulators in the United States, beginning with the US Civil Aeronautics Board (CAB), and thereafter with the US Department of Transportation (DOT), have time and again decided the issue of "effective control" without defining it. Consequently, the meaning of "effective control" has been clouded by its many different interpretations.

In practice, the US has established a "control test", which has been widely applied, first by the CAB and then by the DOT.[17] In its 1989 KLM/Northwest decision, the DOT

---

[14] *Ibid.* at 13-14.
[15] *Ibid.* at 15.
[16] The *Securities Exchange Act*, 17 C.F.R. § 240.12b-2 (1988 & Supp. 1995).
[17] A. Edwards, "Foreign Investment in the U.S. Airline Industry: Friend or Foe?" (1995) 9 Emory Int'l L.R. 595 at 627-628, note 205.

explained that its analysis of effective control "has always been on a case-by-case basis, as there are myriad potential avenues of control (...)."[18] Most recently, "the DOT has looked closely not only at how investment in the US airline industry allows foreign control, but also at how personal relationships between US citizens and foreign purchasers may provide a more subtle method of influence."[19] In this way, the DOT has made a distinction between two types of foreign control: financial control through equity ownership and control through personal relationships.[20] In essence, the "control test" is a subjective determination by the DOT of who is actually controlling the airline. Consequently, satisfaction of the US statutory requirements for "substantial ownership" is not sufficient indicia of whether an airline is a domestic (US) airline—the airline must also be deemed to be "effectively controlled" by US citizens.[21]

In contrast to the situation in the US, the European Union has established a definition of "effective control" in Council Regulation No. 2407/92 of 23 July 1992,[22] which is used to determine if a national carrier from any EU Member States can be considered as a community carrier. Article 2 (g) states:

> 'effective control' means a relationship constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by:
>
> (a) the right to use all or part of the assets of an undertaking;
>
> (b) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking.[23]

The European Commission applied this definition in its 1995 assessment of whether Swissair controlled the European carrier Sabena. The Commission analyzed the composition and powers of the Swiss-Belgian management board, the procedure for the appointment of its chairman, the powers of the CEO and of the Belgian shareholders, and

---

[18] Department of Transportation, *Order in the Matter of the Acquisition of Northwest Airlines by Wings Holdings, Inc.*, DOT Order 89-9-29, Docket No. 46371 (29 September 1989) [hereinafter DOT Order 89-9-29].
[19] Edwards, *supra* note 17 at 628.
[20] Bohmann, *supra* note 3 at 698.
[21] J.D. Brown, "Foreign Investment in U.S. Airlines: What Limits should be Placed on Foreign Ownership of U.S. Carriers?" (1990) 41 Syracuse L.R. 1269 at 1275-76.
[22] EU, *Council Regulation 2407/92 on Licensing of Air Carriers*, [1992] O.J. L. 240/1.
[23] *Ibid.* Art. 2(g).

the extent of the Swiss veto rights.[24] The European legislation thus, on its face, appears to be more objective than the US "control test," at least in so far as it expressly defines "effective control." Moreover, it should be noted that the principle of primacy of EU laws over the national laws of Member States makes Council Regulation No. 2407/92 applicable to every EU Member State; consequently, analysis of "effective control" of European carriers is simplified to the extent that national laws no longer have to be taken into account.[25]

In the end, the "substantial ownership and effective control" requirement in both the US and EU is purposefully ambiguous, so that it can be applied in a way that supports the policies that the State wants to promote in light of the given economic and political situation. Moreover, there are three additional factors that contribute to the ambiguity in this area. First, the relevant definitions in national legislation are normally distinct from the definitions used in designation provisions in bilateral agreements and, consequently, "there may be a partial overlap between these two sets of regulations."[26] Second, criteria are interpreted on a case-by-case basis and therefore, national interpretations go even beyond the scope of the law.[27] Third, as was previously mentioned, ownership and control are two independent criteria, so an airline can own the majority of the voting shares of another airline without controlling it (thus, a more in-depth analysis must be done in order to answer questions such as assessing who owns the means of production, what are the voting conditions between the shareholders, etc.). Likewise, an airline can own a minority of shares in a foreign airline and yet be deemed to control it.

---

[24] IATA doc., *supra* note 13 at 16.

[25] For instance, French law provides a specific definition of control, see Loi sur les sociétés commerciales no. 66-537 du 24 juillet 1966, Article 355-1 al.1 (modifiée par la loi no. 85-705 du 12 Juillet 1985): "Une société est considérée comme en contrôlant une autre lorsqu'elle détient directement ou indirectement une fraction du capital lui conférant la majorité des droits de vote dans les assemblées générales de cette société."

[26] WTO, *Note on Developments in the Air Transport sector Since the Conclusion of the Uruguay Round, Part Five.* WTO Doc. S/C/W/163/Add.4 (2001) 5 [hereinafter WTO doc.1].

[27] For an interpretation of the US federal law by the DOT, see *e.g.*, T.D. Grant, "Foreign Takeovers of United States Airlines: Free Trade Process, Problems and Progress" (1994) 31 Harv. J. Legis. 63 at 101.

c. Why has the national ownership and control requirement emerged in the airline industry and does it still have its place in the current global economic environment?

In the first part of the twentieth century, many factors necessitated national ownership restrictions in the nascent airline sector. Although ownership restrictions did not make their way into negotiations for international air traffic rights and bilateral agreements until after 1944,[28] such restrictions were in place in some national laws as early as the 1920s.[29] Such restrictions were a natural by-product of the well-established principle of State sovereignty over the airspace above its territory. Then, as States undertook to grant international air traffic rights through bilateral agreements, ownership restrictions ensured that the State party to the agreement remained the beneficiary of the authorization by preventing the designated carrier from being owned and/or controlled by a government or nationals of a third country. Apart from this, States also applied the principle of national ownership and control to airlines for more general reasons. First, airlines were seen as symbols of national prestige; indeed, "[c]ivil aviation, associated with rapid progress of technology and continuous changes and innovations, has become a mirror reflecting the general standard of [national] society."[30] Thus, to attack a national symbol, acts of terrorism were used against the airlines, especially during the sixties.[31] Secondly, a national airline provides a measure of political and economic independence, particularly in the event of a national security threat. In fact, national security was the main justification cited by States for imposing national "substantial ownership and effective control" restrictions on airlines during the period from the 1920s through the 1940s, a period marked by two world wars. Thereafter, national security remained a primary basis for the imposition of ownership restrictions on airlines due to the Cold War.[32]

---

[28] The *Chicago Convention*, *supra* note 2; *IASTA*, *supra* note 7.

[29] For instance, the *US Air Commerce Act* of 1926 codified restrictive rules, requiring air carriers to maintain fifty-one percent of voting stock under US citizenship and a sixty-six and two-thirds percent US citizen contingent on their board of directors, see the *US Air Commerce Act*, *supra* note 11.

[30] J.S. Gertler, "Nationality of Airlines: Is It a Janus with Two (or More) Faces?" (1994) 19:1 A.A.S.L. 211 at 242.

[31] *Ibid.* at 243.

[32] In the US, laws on foreign ownership of US air carriers have emerged because of the constant threat to national security, see C.G. Alexandrakis, "Foreign Investment in U.S. Airlines: Restrictive Law is Ripe for Change" (1994) 4 U. Bus. Miami L.J. 71 at 73.

In recent decades, the justifications for ownership restrictions on airlines have become increasingly economic. For example, before the 1970s, national protectionism was economically justifiable.[33] In the event of war or international economic crisis, States could hide behind their sovereignty and still maintain their individual markets. However, today, the international scene has changed: privatization, liberalization, globalization, and free trade prevail on the international scene in virtually all major sectors of the world economy, including international air transport.[34] In fact, airlines have been undergoing privatization for more than thirty years,[35] though this process is far from complete, as many airlines are still owned by their governments.[36] With privatization, liberalization, and globalization has come increased competition; to survive this competition, many airlines have had to consolidate through alliances, such as code-sharing, franchising, joint venture alliance.[37] Thus, like many other business and industrial sectors, the airline industry has become very concentrated.[38] Ownership restrictions have therefore become a means of protecting national airlines from foreign competition and maintaining jobs in the domestic airline industry.

The relationship between international trade and investment must also be considered within the context of the present discussion as it is directly related to the issue of foreign investment restrictions on airlines. Despite the remarkable growth in world trade, there are still many restrictive laws relating to foreign direct investment (FDI); hence, FDI has become one of the most controversial areas of international law. The

---

[33] The airline industry started to change mostly after the US airline deregulation of 1978, see the *Airline Deregulation Act*, Pub. L; No. 95-904, § 102(7), (10), 92 Stat. 1705 (codified as amended at 49 USC § 1301-1552 (1982)) [hereinafter the *Airline Deregulation Act*].

[34] This affirmation, according to air transport follows general commercial trends, has to be nuanced. National security is the main counter-argument that makes the aviation industry a particular industry. 'National security' will be discussed thereafter in Part 2, Chapter 1, at 83, below.

[35] ICAO, *The World of Civil Aviation, 2000 – 2003* (Provisional publication of the Circular 287), ICAO Doc. AT/122 (9 October 2001) [hereinafter ICAO Doc. AT/122]; for the evolution of ownership of the European major airlines from 1979 to 1992, see P.S. Dempsey, "Competition in the Air: European Union Regulation of Commercial Aviation" (2001) 66 J. Air L. & Com. 979 at 983, note 4 [hereinafter P.S. Dempsey "Competition in the Air"].

[36] D. Knibb, "Thai Moves Towards Privatisation" *Airline Bus.* (December 2000) 24; C. Baker, "History Lessons" *Airline Bus.* (December 2000) 74.

[37] S. Tiwari & W.B. Chik, "Legal Implications of Airline Cooperation: Some Legal Issues and Consequences Arising from the Rise of Airline Strategic Alliances and Integration in the International Dimension" (2001) J. of Aviation Management of Singapore Aviation Academy 9 at 25.

[38] ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*), No. AT Conf/4 – WP 5 (8 August 1994); M. Brenner, "Airline Deregulation – A Case Study in Public Policy Failure" (1988) 16 Transp. L. J. 179 at 181.

benefits of FDI on the national economies of developing as well as developed countries are essentially three-fold: FDI supplies capital, technology and management resources that would otherwise not be available, FDI increases annual global flow of investment, and FDI allows multinational firms to extend their activities internationally.[39]

The foregoing discussion (privatization, competition, concentration and globalization, and the relation between economic growth and FDI) raises the question of whether the principle of national "substantial ownership and effective control" of airlines" is still legitimate in the current global economic scheme. However, the proliferation of foreign investments between airlines arguably highlights the need to remove national restrictions. Whereas transnational ownership was a marginal phenomenon before the 1990s, in early 2001, more than 57 carriers reportedly held shares in foreign airlines, and over 160 airlines have foreign equity ownership.[40] Moreover, "[m]any regions are involved [and], [n]ot surprisingly, FDI from developed countries is an important part of the total, complemented by 'north-north' investment flows, 'south-south' investments, and even investments from transition or developing economies in airlines of developed countries."[41]

Throughout Europe, a partnership and merger movement dominates the air transport industry. Within the EU itself, national ownership requirements have been replaced by the EC licensing regulation requirement of 'EC ownership' in the Community; therefore, since 1992,[42] European airlines have been free to cooperate in their equity operations.[43] P.S. Dempsey affirms that "[t]oday the EU commercial aviation market is well on its way to becoming a market without state-imposed anti-competitive restrictions. Some experts predicted that liberalization would force unprofitable carriers out of business, into

---

[39] S.S. Haghighi, *A Proposal for an Agreement on Investment in the Framework of the World Trade Organization* (L.L.M. Thesis, Institute of Comparative Law, McGill University 1999) [unpublished] [footnotes omitted].
[40] WTO doc. 1, *supra* note 26, at 4.
[41] *Ibid.*
[42] EU *Council Regulation 2407/92*, *supra* note 22.
[43] R. Polley raises an interesting question on this issue "why more mergers between carriers in different Member States have not occurred following liberalization?" R. Polley explains that national restrictions have been removed inside the Community, "the main problem, however, is that national ownership requirements persist in bilateral air service agreements between Member States and third countries (...)", see R. Polley, "Defense Strategies of National Carriers" (2000) 23 Fordham Int'l L.J. 170 at 192.

mergers, or into buys-outs."[44] Likewise, between the EU and third countries, the movement towards equity cooperation is speeding up; indeed, "as the British Airways/American Airlines alliance and the Boeing/McDonnell Douglas merger case both demonstrate, EU commercial aviation players are realizing the importance of banding together in an increasingly global aviation marketplace."[45] One of the latest examples is Air France's acquisition of a large stake in Air Afrique, increasing its participation from less than 12% of the capital to 35% of the capital.[46] Such examples demonstrate how the airlines of different States are increasingly buying interests in or selling interests to each other.[47] Moreover, these transactions demonstrate that, given the opportunity, airlines will buy as great an interest in foreign airlines as their finances and the law allows. These transactions would undoubtedly increase and perhaps become the norm (greatly increasing growth in the airline industry) if they were not limited by foreign investment restrictions. Thus, the argument for removal of foreign ownership restrictions is persuasive.

The main objective of this thesis is to identify those factors that still justify the imposition of national ownership restrictions on airlines and to examine the prospects for change in the current policies and regulatory regimes that support them. This objective will be developed in three Parts.

Part I will present, in two Chapters, the "great paradox" of the international airline industry. Specifically, Chapter 1 discusses the current situation of an aviation market that is attempting to address globalization and an increasingly competitive market through international consolidation, yet is restricted by persistent national regulatory constraints. Chapter 2 examines the legal regimes on ownership and control of airlines, focusing on the US, Europe and Canada, with special emphasis placed on the increasing number of deviations and exceptions to the standard of "substantial ownership and effective control" of airlines—the author maintains that this represents a progressive shift towards a more liberalized market.

---

[44] Dempsey "Competition in the Air", *supra* note 35 at 984.
[45] *Ibid.* at 985.
[46] T. Kouamouo, "Air Afrique passe sous la tutelle d'Air France" *Le Monde* (17 Août 2001) A12.
[47] For instance, Swissair acquired 42% stake in Portugalia in 1999, see S. Montlake, "Sair Takes Portugalia Stake" *Airline Bus.* (August 1999) 20.

Part 2 will explore, in two Chapters, the validity of the justifications for national ownership restrictions. Chapter 1 will address the issue of whether there is anything unique to the airline industry that would justify the imposition of restrictions on foreign investments in domestic airlines, and whether the public interest is truly being served by these constraints. Through this analysis, it will be determined whether there are still good reasons for keeping national restrictions on foreign investments in this industry. Chapter 2 will look at the legal and economic consequences of revamping the current regime. The author will outline the benefits of liberalizing airline ownership rules and advocate a total abolishment of the restrictions.

Part 3 will study the prospects for change through three Chapters. Chapter 1 will concentrate on the question of what measures are necessary to facilitate the abolition of foreign investment restrictions, such as the liberalization of traffic rights. Chapter 2 will examine the possibility of eliminating ownership restrictions at the regional level as a precursor to the elimination of restrictions worldwide. Chapter 3 will analyze the proposals of the Organization for Economic Co-operation and Development (OECD), the World Trade Organization (WTO), and the International Civil Aviation Organization (ICAO), regarding the air transport liberalization process and, in particular, the ownership and control issues, as well as the role these international organizations can play in this process.

Finally in the conclusion, it is submitted that the aviation industry is mature enough today to benefit from a new regulatory framework, with less legal and economic constraints. The lifting of the foreign ownership restrictions of air carriers would considerably foster the consolidation of the industry on the regional level, and on the multilateral level in the long-term. The year 2001, and especially the terrorist attack of the September 11th 2001, has resulted in a loss of confidence in the air transport industry, and therefore, the rationale of the ownership and control restrictions comes now back to the concept of national identity. However, surprisingly, States seem to consider that passengers will regain confidence in the industry not by establishing a protectionist policy regarding foreign investments, but rather by opening their airlines to foreign States.

Indeed, increased cooperation, through cross-border investments, will undoubtedly contribute to the growth and expansion of the airline industry.[48]

[48] The information in this thesis is up to date as of 31 January 2002.

PART 1.
THE PARADOX OF THE INTERNATIONAL AIRLINE INDUSTRY: RESTRICTIONS ON GLOBALIZATION IN AN INCREASINGLY GLOBAL MARKET

Although there has been some loosening of national ownership and control regulations, progress in this regard has been slow, arduous, and limited. On the one hand, most States understand the necessity of relaxing national ownership restrictions to the process of international civil aviation globalization; thus, they have begun liberalizing the air transport sector and enhancing competition by opening their domestic markets to foreign air carriers and agreeing to more and more freedoms of the air with their negotiating partners. On the other hand, not all national restrictions have been removed and restrictions mandating substantial ownership and effective control of airlines by nationals are among the most persistent. Thus, though the industry itself appears to recognize the need for change, the reaction of States has been slow due to either the complex processes that often go hand-in-hand with legal reform or the divergent political forces at work within certain States, such as the US, or communities of States, like the EU. This is the paradox of the international civil aviation industry today: the "fundamental contradiction in the airline industry" is between the national ties and the international activities of airlines.[49] However, an increasing number of deviations and exceptions to the ownership and control principle reflects the progressive decline of this rule, which is better enabling the airline industry to face the worldwide globalization of air transport.

[49] P.P.C. Haanappel, "Airline Challenges: Mergers, Take-overs, Alliances and Franchises" (1995) 21 A.A.S.L. 179 : "International airlines are almost invariably national rather than multinational companies, but their activities, by their very nature, cross national boundaries, and do so more rapidly and frequently than any other means of transport. Airline activities are therefore largely international in nature."

Chapter 1. Towards an increasingly global open market

"Globalization of the world economy is not an option we can either embrace or reject, it is already a fact of life."[50] To achieve air transport globalization,[51] complete liberalization of the sector is required, including the removal of national ownership restrictions; thus, the question is not whether to liberalize, but how. Deregulation of air transport[52] was a major step toward liberalization, but it was only the first step in the process. Indeed, multilateral negotiations and international regulations are still needed to replace the fifty-year-old bilateral process in place today. Moreover, due to the concentration of airlines brought on by liberalization, continued cooperation between airlines is needed to gradually break down the national regulatory constraints on ownership and control.

---

[50] Speech given by L. de Palacio, "Globalization – The way forward" (Address at the IATA World Transport Summit, Madrid, May 27-29, 2001) [hereinafter de Palacio 2001].

[51] For an overview on what is globalization, see C.W.L. Hill, *International Business: Competing in the Global Marketplace*, 3nd ed. (Boston: Irwin/McGraw-Hill, 2001) 1-30 [hereinafter C.W.L. Hill 2001].

[52] About the 1978 US deregulation, see the *Airline Deregulation Act*, *supra* note 33; the EU liberalization was introduced in three steps through "packages" of legislation in **1987** (EU, *Council Regulation 3975/87, Laying Down the Procedure for the Application of the Rules on Competition to Undertakings in the Air Transport Sector*, [1987] O.J. L. 374/1; EU, *Council Regulation 3976/87, on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerted Practices in the Air Transport Sector*, [1987] O.J. L. 374/9; *Council Directive 87/601/EEC, on Fares for Scheduled Air Services between Member States*, [1987] O.J. L. 374/12; and EU, *Council Decision 87/602/EEC on the Sharing of Passenger Capacity between Air Carriers on Scheduled Air Services between Member States and on Access for Air Carriers to Scheduled Air Service Routes between Member States*, [1987] O.J. L. 374/19; **1990** (EU, *Council Decision 87/602/EEC on the Sharing of Passenger Capacity between Air Carriers on Scheduled Air Services between Member States and on Access for Air Carriers to Scheduled Air Service Routes between Member States*, [1987] O.J. L. 374/19; EU, *Council Regulation 2343/90 on Access for Air Carriers to Scheduled Intracommunity Air Service Routes and on the Sharing of Passenger Capacity between Air Carriers on Scheduled Air Services between Member States*, [1990] O.J. L. 217/8; EU, *Council Regulation 2344/90 Amending Regulation 3676/87 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerted Practices in the Air Transport Sector*, [1990] O.J. L. 217/15); and in **1992** (EU, *Council Regulation 2407/92*, *supra* note 22; EU; *Council Regulation 2408/92 on Access for Community Air Carriers to Intracommunity Air Routes*, [1992] O.J. L. 240/8 (corrected in [1992] O.J. L. 15/33); EU, *Council Regulation 2409/92 on Fares and Rates for Air Services*, [1992] O.J. L. 240/15; EU, *Council Regulation 2410/92 Amending Regulation 3975/87 Laying Down the Procedure for the Application of the rules to Competition to Undertakings in the Air Transport Sector*, [1992] O.J. L. 240/18; EU, *Council Regulation 2411/92 Amending Regulation 3976/87 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerted Practices in the Air Transport Sector*, [1992] O.J. L 240/19).

1. Consolidation and multilateralism required by the new global market

1.1. A progressive shift from concentration to consolidation

The meaning of "market" in aviation terms has changed. It is no longer accurate to talk about markets in terms of limited geographic regions; the aviation market has become global and it can no longer be claimed that competitive practices in one region have little impact on the airlines in other regions.[53] Moreover, globalization will likely be accelerated by the staggering growth of international civil aviation that is expected in the years ahead.[54] As a result, airlines all over the world have started to cooperate to face competition;[55] the industry has been pushed towards concentration, as only few global mega-carriers cover most of the world market today.[56] In fact, there are only about 579 agreements among 220 carriers that make up a total of 29 cooperative arrangements.[57] Indeed, the current strategy adopted by airlines is to expand in order to achieve economies of scale, global marketing, and a presence in a new market. Increased size can be obtained through a multitude of arrangements between air carriers, such as mergers, equity investments, global alliances,[58] code-sharing agreements,[59] and franchise agreements;[60] however, carriers most frequently employ airline alliances based upon "code-sharing," whereby airlines placing their code on the flights of another carrier, selling and marketing the service as their own. In addition, modern alliances increasingly seek to develop synergies, by exploiting common routes, infrastructures and services. Thus, although international mergers are still rare, "during 1999 there were $150 billion worth of global airline Merger and Acquisition (M&A) transactions, according to

---

[53] For further discussion on globalization, see the report of the fourth European Air Transport Conference held in Brussels in 1997, H.L. van Traa-Engelman, "Reports of Conferences: The European Air Transport Conference – Airline Globalization" (1998) 23:1 Air & Space L. 31.

[54] According to ICAO, in Europe, scheduled passenger traffic is going to grow at rate of 6 % in 2001: R.I.R. Abeyratne, "Emergent Trends in Aviation Competition Laws in Europe and in North America" (2000) 23 World Competition. R. 141 at 141[hereinafter Abeyratne "Aviation Competition Laws"].

[55] For a comparative assessment of air transport competition in Europe and in North America, see *ibid.* at 145 and 155.

[56] S. Dempsey, "Airlines in Turbulence: Strategies for Survival" (1995) 23:15 Transp. L. J. 15 at 97 [hereinafter Dempsey "Airlines in Turbulence"]; R. Doganis, "Relaxing Airline Ownership and Investment Rules" (1996) 21 Air & Space L. 267.

[57] WTO doc. 1, *supra* note 26 at 8.

[58] *Ibid.* at 13.

[59] *Ibid.* at 11.

[60] For the definition of an airline franchise, see Haanappel, *supra* note 49 at 180.

Thomson Financial Securities Data"[61]—analysts refer to these transactions as "virtual mergers".

Yet, more and more, cross-border acquisitions and even mergers have begun to replace the more traditional alliance agreements as the industry moves from an era of concentration to a period of consolidation, in which dominant airlines seek increased control over and not merely cooperation with their alliance partners.[62] Most recently, consolidation can be seen on the national level in China, where, in September 2000, the Civil Aviation Administration of China (CAAC) demanded drastic consolidation of the country's more than 30 carriers, and by February 2001 a consolidation was in place.[63] Of course, consolidation extends to the international scene as well, but it is limited due to national requirements for carriers to be substantially owned and effectively controlled by national interests. In the face of these impediments, airlines of differing nationalities needing to consolidate are forced to enter into strategic alliances rather than merge, thereby "keeping their national identities, at least formally, intact."[64] Accordingly, full international consolidation will not be possible as long as national restrictions on ownership are maintained.

1.2. The need for change to the negotiating process: from bilateralism to multilateralism

The regulation of trade in international air transport services involves an elaborate system of bilateral agreements that fixes a set of rules which require: identifying the airlines of the contracting States with the rights to fly on each route, determining the capacity that can be provided by each of those designated airlines, and limiting the capacity that can be offered by airlines from third countries. Under this regime,

---

[61] S. Gawlicki, "Virtual Mergers: With Traditional Mergers Difficult to Pull off, Airlines Finding Creative Ways to Consolidate" (2000) Inv. Dealers' Dig. (WL 4666779).
[62] IATA doc., *supra* note 13 at 7.
[63] Under the plan, Air China will take over China Southwest Airlines and CNAC-Zhejiang Airlines; China Eastern will take over China Northwest Airlines and Great Wall Airlines; and China Southern will take over China Northern Airlines, China Xinjiang Airlines and Yunnan Airlines, see N. Ionides, "China Merger Takes Shape" *Airline Bus.* (February 2001) 26; and the CAAC might make the decision to give up ownership of airlines and strip this CAAC of equity ties to the 10 Chinese airlines, divided into three groups (Air China, China Eastern and China Southern), to allow them to compete more effectively, see N. Ionides, "China to Loosen Central Ownership" *Airline Bus.* (April 2001) 27.
[64] Haanappel, *supra* note 49 at 181.

competition on each route is limited to those suppliers designated by the relevant bilateral air services agreements, and nationality requirements are imposed upon the share register of the designated carriers (*i.e.*, the "nationality clause")—these are the main characteristics of the "bilaterals."[65] Many major actors in aviation still extol the bilateral system for its merits[66] and most of the cooperative agreements between airlines are still primarily bilateral.[67] Furthermore, although multilateralism is increasing at the regional level, bilateralism still reigns supreme at the inter-regional level.[68] Bilateral agreements have become more liberal with the onset of the US "open-skies" agreements[69]—the first such agreement having been signed in 1992 between the US and the Netherlands.[70] However, true economic liberalization of the airline industry will never be achieved through bilateral agreements so long as they remain discriminatory, with their benefits (*e.g.*, liberalization of traffic rights between the partner States) confined to the airlines of the nations that are party to the agreements by the nationality clause.[71]

Why then is the question of change to the bilateral system such a significant issue for the future of the air transport sector?[72] First of all, national constraints, like the national ownership and control requirement, stem from the bilateral agreements.[73] The

---

[65] For an overview of the evolution, the process, and the structure of the bilateral regulation, see ICAO, *Manual on the Regulation of International Air Transport*, ICAO Doc 9626 (1st ed.) (1996).

[66] For the five main advantages of the bilateral system, see R.D. Lehner, "Protectionism, Prestige, and National Security: The Alliance Against Multilateral Trade in International Air Transport" (1995) 45 Duke L.J. 436 at 446.

[67] Agreements with respect to a wider range of activities involved in international air transport, such as joint services, code-sharing, aircraft lease, cargo handling, franchise, maintenance (...).

[68] J.M. Feldman labels as a "catastrophe" the fact that, despite the worldwide liberalization, "the bilateral process is moving backward", see J.M. Feldman, "No Guts, no Glory" *Air Transport World* (1 January 1992) 65.

[69] J.M. Feldman, "It's Still a Bilateral World" *Air Transport World* (August 1997) 35.

[70] *Agreement Between the United-States of America and the Netherlands Amending the Agreement of April 3, 1957, as Amended and the Protocol of March 31, 1978, as Amended,* 14 October 1992, US-Neth., T.IA.S. 11976.

[71] de Palacio 2001, *supra* note 50 (L. de Palacio affirms "these 'Open Skies' agreements do not pave the way for responsible globalization, but continue to be bilateral in nature").

[72] In 1949 already, the bilateral system was questioned, mainly because of its discriminatory character. The doctrine raised the following issue: "The issue is not multilateralism vs. bilateralism *per se*. The question is rather whether a multilateral formula can be found which will mitigate the disadvantages of a bilateral system, without requiring individual states to sacrifice too many of its advantages." Thus, since the 1930s, many proposals have been made in favor of a creation of a multilateral system, the first one was the proposal for world ownership and operation of air services on trunk routes submitted by a French group in 1933. But all the proposals were rejected by the international community, see V. Little, "Control of International Air Transport" (1949) III International Organization 29.

[73] The first bilateral agreement was *Bermuda 1* concluded in 1946 between the US and the UK (*Bermuda I, supra* note 10). Even though it was replaced in 1976 by the *Agreement Between the Government of the*

nationality of the air carrier guarantees that each State gets its own share of the market, with no third parties being allowed to benefit from the bilateral exchange of traffic rights and, thus, under this regime, it is impossible for an air carrier to sell a majority of its shares to a foreign carrier. Therefore, the airline industry cannot consolidate if it continues to be limited by the nationality clause. As G. Lipman noted, "a system with its fundamental characteristics determined by constraints on ownership of, and investment in, airlines, and controls on market access, capacity and price, are inconsistent with the general industrial trade liberalizing approaches being pursued in other economic sectors."[74] Indeed, the bilateral system does not encompass the multinational market access required by the new global system, and it can no longer efficiently accommodate the growing globalization of markets, which indicates that "these agreements are increasingly out of date and ill adapted to the needs of global operators"[75] and therefore "[t]he airline sector must be liberated from its bilateral straitjacket."[76]

Indeed, the airline industry needs a new negotiating process that will foster competition across a broader range of markets than is available in the current bilateral system, which is a barrier to air transport growth. Multilateralism must be the new norm for negotiations of air traffic rights between States. A shift away from bilateralism will likely be spawned by the consolidation that is now underway. With the creation of regional economic blocs, such as the *North American Free Trade Agreement*[77] and the development of the Association of Southeast Asian Nations[78], allowing the Member

---

United States of America and the Government of the United Kingdom Related to Air Services Between their Respective Territories, July 23, 1977, 28 U.S.T. 5367 [Hereinafter *Bermuda II*], *Bermuda 1* served as a model for all the bilaterals concluded afterwards on the issue of airline nationality. For more details about *Bermuda 1*, see Bohmann, *supra* note 3 at 693; G.L.H. Goo, "Deregulation and Liberalization of Air Transport in the Pacific Rim: Are They Ready for America's "Open Skies?" (1996) 18 U. Haw. L. Rev. 541 at 548.

[74] G. Lipman, "Multilateral Liberalization – The Travel and Tourism Dimension" (1994) 19 Air & Space L. 152 at 153.

[75] de Palacio 2001, *supra* note 50.

[76] Lipman, *supra* note 74 at 152.

[77] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United-States*, 17 December 1992, Can. T.S. 1994 No. 2 (1993) 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter *NAFTA Agreement*].

[78] The Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967 by the five original Member countries, namely, Indonesia, Malaysia, Philippines, Singapore, and Thailand. Brunei Darussalam, Vietnam, Laos, Myanma, and Cambodia joined the Association afterwards. The Treaty of Cooperation in Southeast Asia was signed on 24 February 1976 and declared that in their relations with one another, the High Contracting Parties should be guided by common principles. *Inter alia*, ASEAN economic cooperation covers today many areas, including transportation, communication, and tourism.

States of these agreements to cooperate in few economic fields, the completion of the European single aviation market, and the emergence of similar regional affiliations within Central and South America, the potential is there for groups of Nations to negotiate multilaterally offering their airlines baskets of opportunities to a range of markets. However, only if national restrictions on ownership and control are lifted will airlines of different States be able to fully invest in one another.

2. Alliances, open skies, full market access: a three stage process to achieve globalization

The airlines generally favor "full liberalization" of the industry; in other words, complete abolition of all national impediments to the consolidation and globalization of the air market. Due to the complexity of the process, airlines have attempted to implement the full liberalization and the elimination of regulatory constraints incrementally. Whereas the alliance phenomenon constituted the first sign that the current restrictions were outdated, open-skies agreements are the first step in the process of full liberalization.

2.1 Alliances: a strategic means to avoid foreign investment and traffic rights restrictions

"Alliance" is not a legal term in the context of aviation, and because of the existence of all kind of different cooperative arrangements in the airline industry, it is hard to define. In general terms, an alliance is a commercial agreement, where reciprocal rights are negotiated, between two or more airlines from the same State or different States, though the purpose of the agreement can vary from one arrangement to the next.[79] Some have tried to distinguish between "market oriented alliances" that aim at increasing traffic and market share (*e.g.*, code-share agreements, hub coordination, block spacing, and FFP agreements) and "cost oriented alliances" that aim at reducing cost (*e.g.*, joint

[79] For an overview of airline alliances, see J. Naveau, "Les Alliances entre Compagnies Aériennes. Aspects Juridiques et Conséquences sur l'Organisation du Secteur" (1999) 49 ITA Etudes & Doc. 9; for an analysis of the different degrees of commitment of airline alliances, see J. Balfour, "Airline Mergers and Marketing Alliances – Legal Constraints" (1995) 20 Air & Space L. 112 at 112.

ventures, reciprocal sales, catering and maintenance, and asset sharing).[80] Other distinctions between types of alliances have also been made.[81] In any case, the advent of the "global alliance"—caused by, *inter alia*, the national restrictions on ownership and control of airlines—is considered one of the major commercial developments of the last decade[82] and will, therefore, merit special attention.

Foreign investment and traffic rights restrictions have long been predominant issues in the air transport sector; however, there are two main reasons for the emergence of airline alliances since the mid-1990s.[83]- First, forming alliances allowed airlines to expand their markets and receive additional benefits of enhanced presence and customer loyalty, while reducing their capital expenditures and their overall costs through the more efficient use of assets, especially aircraft.[84] Second, and most importantly, forming alliances allowed international airlines to circumvent national restrictions on ownership and control and on traffic rights. Indeed, in the face of increased international competition and ownership restrictions that precluded mergers, alliances were the sole means by which airlines could consolidate market share. As Dr. Abeyratne so aptly stated: "[t]he reason for airlines banding together is to share an otherwise wasted market which is still regulated by bilateral governmental negotiations."[85]

---

[80] See *e.g.* Polley, *supra* note 43 at 195.

[81] For the distinction between "strategic alliances" and "tactical alliances", see *ibid.*; for the distinction between "equity alliances" and "joint venture alliances", see M.S. Simon, "Aviation Alliances: Implications for the Quantas – BA Alliance in the Asia Pacific Region" (1997) 62 J. Air L. & Com. 841 at 843; for the description of 4 types of alliances (interlining, joint operations, code sharing, franchising), see Balfour, *supra* note 79 at 116.

[82] For an overview of airline alliances worldwide, see "The Global Alliance Grouping" *Airline Bus.* (May 2000) 59; about Star Alliance, see N. Ionides, "Expanded Horizons" *Airline Bus.* (Nov. 1999) 34.

[83] According to WTO, "ICAO attributes the recent development of alliances to factors such as: globalization of business practices and attitudes; existing market access constraints resulting from the bilateral system; liberalization trends at domestic and regional levels; and commercial incentive related to economies of scope and scale", see WTO doc.1, *supra* note 26 at 9.

[84] R.I.R. Abeyratne, *Emergent Commercial Trends and Aviation Safety* (Aldershot: Ashgate, 1999) xiii [hereinafter Abeyratne *Emergent Commercial Trends*]; about "The Philosophy of Strategic Alliances", see Abeyratne, *Aviation Trends in the New Millenium* (Aldershot: Ashgate, 2001) [hereinafter R.I.R. Abeyratne *Aviation Trends*]; M.J. AuBuchon, "Testing the Limits of Federal Tolerance: Strategic Alliances in the Airline Industry" (1999) 26 Transp. L.J. 219 at 220; S. Mosin, "Riding the Merger Wave: Strategic Alliances in the Airline Industry" (2000) 27 Transp. L.J. 271 at 272; C. Tarry, "Playing for Profit" *Airline Bus.* (June 1999) 90.

[85] R.I.R. Abeyratne *Emergent Commercial Trends*, ibid. at xii; the main current example is the British Airways/American Airlines alliance proposal; the proposal still has to be approved by the US Department of Justice (DOJ), see e.g. Department of Justice, Immediate Release, "Justice Department Urges DOT to

Today's alliances go far beyond mere cooperation—indeed, they go a long way down the road towards full integration.[86] Not surprisingly, the alliance has for the moment taken the place of the airline merger, since it affords airlines the means to avoid ownership restrictions central to the bilateral system, but at the same time, enjoy the benefits of market consolidation. However, because the alliance relationship is sometimes anchored by a co-ownership of assets or through mutual equity investments,[87] the boundary between alliance and merger has become hazy. Furthermore, as alliances have become more and more strategic, they have given rise to competition law concerns.[88] In any case, though the global airline alliance has proven profitable for more than ten years, it is not a long-term solution for economic integration of the industry[89]—this can only be achieved through international merger, which will only be possible when national authorities eliminate restrictions on foreign investment in domestic airlines.

2.2 Open-skies agreements: a semi-liberalization

The US Open-Skies initiative can be viewed as a step forward in the process of airline liberalization. Instead of simply circumventing national ownership restrictions through arrangements between individual airlines, Open-Skies eliminates one of the most significant impediments to full liberalization of the airline industry by liberalizing traffic rights between the partners. Indeed, "Open-Skies agreements allow unrestricted service by the airlines of each side to, from and beyond the other's territory, without restrictions on where carriers fly, the number of flights they operate, or the prices they charge."[90] The US Open-Skies initiative, which was first announced in a 1992 DOT Order (dated 5

Impose Conditions on American Airlines/British Airways Alliance" (17 December 2001), online: DOJ http://www.usdoj.gov/atr/public/press_releases/2001/9705.htm (date accessed: 18 December 2001).

[86] "KLM and Northwest, who have now been partners for the best part of a decade, have clearly gone further than in integrating operations across the Atlantic", see C. Baker, "Behind The Handshake" *Airline Bus.* (February 2001) 66 at 68.

[87] AuBuchon, *supra* note 84 at 221.

[88] Polley, *supra* note 43 at 196.

[89] Airline alliances have been criticized by a number of authors, as being a "poor man's merger", see *e.g.* IATA doc., *supra* note 13 at 31; Airline alliances are "second-best solutions and do not provide the economic gains tied to tighter integration", see P. Sparaco, "European Deregulation Still Lacks Substance", *Aviation Wk & Space Tech.* (9 November 1998) 53.

[90] Department of Transportation, Immediate Release 68-01, "US Secretary of Transportation Says Bush Administration to Press for Global Aviation Liberalization" (30 June 2001) [hereinafter DOT doc. 68-01].

May 1992),[91] was intended to establish Open-Skies as a worldwide regime. The Open-Skies policy is defined in the DOT Order of 5 August 1992[92] by eleven provisions designed to ease restrictions on the aviation relationship between the US and any other signatory State. For instance, Open-Skies permits open entry on all routes to and from the US and the other party, unrestricted capacity and frequency on all routes, and unrestricted route and traffic rights.[93] "[T]he US government intends to build on the progress in establishing Open-Skies agreements with its aviation partners"[94] by following the arrangement between KLM and Northwest, in which DOT approval of the airline alliances was conditioned upon the Netherlands' acceptance of an Open-Skies agreement.[95]

Though US implementation of its Open-Skies policy has been very successful, with many countries having already agreed to this regime,[96] it does not represent real progress towards full liberalization of the international air transport industry. While the US Secretary of Transportation asserts that "the Bush administration is committed to

---

[91] Department of Transportation, , *Order in the Matter of Defining "Open-Skies"*, 57 Fed. Reg. 19323-01, DOT Order No. 92-4-53 (5 May 1992).

[92] Department of Transportation, *Order in the Matter of Defining 'Open Skies'*, DOT Order 92-8-13, Docket 48130 (5 August 1992) [hereinafter DOT Order 92-8-13].

[93] These three elements are the 3 first provisions defined by the DOT Order. The eight last elements are double disapproval pricing in Third and Fourth Freedom, liberalization of the charter arrangements and cargo regimes, ability to convert earnings and remit in hard currency promptly and without restriction, the right for the carriers to perform their own support functions, the guarantee of fair competition, and explicit commitment for nondiscriminatory operation of and access to computer reservation system. For an analysis of each provision, see *ibid.* at 3; A.L. Schless, "Open Skies: Loosening the Protectionist Grip on International Civil Aviation" (1994) 8 Emory Int'l L. Rev.435 at 447.

[94] The last Open-Skies agreement negotiated by the US was signed by Bush Administration on October 19, 2001 between the US and France, see Department of Transportation, Immediate Release 111-01, "United-States, France Reach Open-Skies Aviation Agreement" (19 October 2001); On June 16, 2001, between the US and Poland, informal discussion are held as well with the UK and with Hong-Kong, negotiations have started with Japan, and an expanded policy is foreseen with African countries (in 2000, agreements were signed with Senegal, Benin, Rwanda, Morocco, and Nigeria), see DOT Doc. 68-01, *supra* note 90; an agreement was signed between the US and Portugal last year, see F. Fiorino, "More Open Skies", *Aviation Wk & Space Tech.* (12 June 2000) 19; about the US Open-Skies policy in Asia, see Goo, see *supra* note 73 at 542; and the US still tries to replace the UK-US bilateral air services agreement with an Open-Skies agreement, see Abeyratne *Emergent Commercial Trends*, *supra* note 84 at xiv.

[95] G.L.H. Goo states that "The recent alliance of Northwest Airlines and the Netherlands' KLM is an excellent example, with both carriers able to fly without restriction into the other's markets, as provided in the 1992 US-Netherlands Open-Skies agreement, and with both also sharing the benefits of the alliance in jointly setting prices and market strategy", see Goo, *supra* note 73 at 563; and see H.A. Wassenbergh, "Future Regulation to Allow Multi-National Arrangements Between Air Carriers (Cross-Border Alliances), Putting an End to Air Carrier Nationalism" (1995) 20 Air & Space L. 164 at 164.

eliminated barriers to free trade in aviation services across the globe,"[97] Open-Skies will only liberalize market access with their partners and neither foreign investment nor cabotage is addressed under the US Open-Skies agreements.[98] As L. de Palacio plainly stated in her speech on globalization: "[t]hese Open-Skies agreements do not really pave the way for responsible globalization, but continue to be bilateral in nature."[99] Thus, as she explained, the U.S. Open-Skies policy cannot lead to full liberalization since the traditional ownership and control requirement is maintained, designation of foreign owned airlines is prohibited, and foreign competition represents just a part of the total aviation market.

While the airline industry is in urgent need of change, the liberalization process is, at best, inching forward. "Open-Skies" is not the answer as market access is only partially liberalized, since any flight from an Open-Skies signatory State to a non-signatory State is subject to the terms of the traditional bilateral agreement between the third State and the carrier's national State, and the requirement on national ownership and control is still fully in place. Consequently, consolidation of the airline industry will not be realized soon.

2.3 Achieving a complete liberalization by the advent of full market access

Clearly, the goal of the airline industry must be complete liberalization if international air carriers are to consolidate their markets and remain competitive. The 1994 ICAO Conference on International Air Transport Regulation identified a number of measures that could be undertaken to achieve unrestricted market access and, ultimately, complete liberalization of the international air transport industry:

> Entering into an agreement or agreements which liberalize(s) blocks of market access (such as the all-cargo market or the non-scheduled market, prior to consideration of one for scheduled passenger operations);

---

[96] Between 1995 and December 2000, nearly 80 Open-Skies bilateral agreements had been concluded (36 in the last 3 years) between approximately 60 countries, see ICAO, *Annual Report of the Council*, ICAO Doc. 9770 (2001) 5 [hereinafter ICAO Annual Report 2001].
[97] DOT Doc. 68-01, *supra* note 90.
[98] Edwards, *supra* note 17 at 609; WTO, *Note on Developments in the Air Transport sector Since the Conclusion of the Uruguay Round, Part Four*. WTO Doc. S/C/W/163/Add.3 (2001) 21 [hereinafter WTO Doc.2].
[99] de Palacio, *supra* note 50.

> Providing a macro-level guaranteed periodic incremental increases not tied to market growth;
>
> Reducing or eliminating over time existing impediments to inward (foreign) investment in national air carriers and having the right of establishment of air carriers;
>
> Initially fully liberalizing basic market access for services touching the territories of both the granting and receiving parties, then optionally phasing in so-called Seventh Freedom and/or cabotage rights at future times.[100]

Accordingly, full market access can be realized by removing all the national restrictions, which means liberalization of traffic rights among States, not just between parties to bilateral agreements (even the US Open-Skies agreements), and abolishment of the principle of substantial ownership and effective control of airlines. This concept of full market access neither contradicts the Open-Skies policy nor undermines it; rather it goes further, establishing a fully integrated open market in which all air carriers would be free to operate and provide services in all participating countries. Implementation of the ICAO framework has begun, but only on a regional level—for example, the EU internal market has been fully liberalized between the Member States since 1997.[101] These recommendations will not be implemented on a global scale until national authorities recognize that complete liberalization is an unavoidable consequence of the growth of the airline industry, as in any other economic sector.

This Chapter can, nevertheless, conclude on a positive note. The airline industry is an industry full of paradoxes: restrictions on foreign investments in an increasingly global air market, the contradiction between nationality of airlines and their international activities, and airlines operating on a multilateral and global scale governed by bilateral agreements that only look at the market between two States.[102] However, signs of progress can be seen among the aviation players since the last ICAO Air Transport Conference of 1994.[103] Indeed, at that time, most governments were not prepared to abandon national ownership restrictions, due primarily to concerns over the risks of

---

[100] ICAO, Working Paper (World-Wide *Air Transport Conference on International Air Transport Regulation: Present & Future*) No. AT Conf/4 – WP 7 (18 April 1994) 8 [hereinafter ICAO Working Paper No. AT Conf/4 – WP 7].

[101] About the EU Liberalization, see *supra* note 52; further analysis on the EU liberalization will be found at 36, below.

[102] This last paradox has been stressed by Ms de Palacio last May at the conference on air transport Globalization, see L. de Palacio 2001, *supra* note 50.

[103] C. Thornton & C. Lyle, "Freedom's Paths" *Airline Bus.* (March 2000) 74.

weakening their sovereignty, as, for States, having an airline owned and controled by national interests was a sign of prestige and independence. Today, fewer States continue to shy away from the liberalization of international air transport. The process of achieving globalization is underway and the air transport landscape now stands "somewhere" in between one of three stages: (1) the alliance phenomena of the early 1990s, which is still ongoing; (2) the US Open-Skies policy which began in 1992, and has yet to be implemented in some major aviation markets (*e.g.*, the English market); and (3) full market access, which to date has only been implemented on a regional basis, due to constraints imposed by the bilateral regime (Open-Skies included) that effectively serve as a "brick wall," preventing further progress down this path.

Chapter 2. The progressive decline of national regimes on ownership and control of airlines

Transnational investment is a fact that lawmakers cannot ignore. According to the ICAO Air Transport Bureau, foreign investors, including foreign air carriers, owned 166 of the 984 air carriers operating worldwide in 2001. This trend affects the airlines of developing countries and developed countries alike,[104] since foreign ownership of all airlines has increased.[105] Yet despite this apparent evolution, States have generally maintained foreign ownership limitations on airlines,[106] and while there are progressively more signs of relaxation of these restrictions, it is unlikely that the "ownership and control principle" will be abandoned anytime soon. Thus, the paradox of the airline industry remains firmly entrenched, particularly in the US where national restrictions on airline ownership are still very strict.

---

[104] WTO doc.1, *supra* note 26 at 5.
[105] *Ibid.* at 15; Brown, *supra* note 21 at 1270.
[106] For an overview of the national restrictions all over the world, see WTO Doc.1, *ibid.* at 20 (ICAO and IATA source, 1 October 2000); see also IATA doc., *supra* note 13 at 43 (result of the survey led by IATA in 2000, a questionnaire was used to compile a country-by-country overview for about 30 States, plus the European Economic Area).

1. The US exception: perpetuating protectionism despite DOT's willingness to liberalize

America 'should not be an orphan' in the internationalization of the aviation industry; but while the US air transport regulators (*i.e.*, the DOT) try to adapt US policy to meet global economic needs, US law continues to limit foreign ownership in the nation's airline industry.[107]

1.1 The protectionist US law

The law on foreign ownership has been a major concern for the US Congress since the commercial aviation industry first took shape in the late 1920s. It is interesting to analyze briefly the three stages of the ownership law, as it has been continuously strengthened since that time. The law was born out of the US national security concerns that predominated the late 1920s and thereafter evolved to meet US economic and political ends. Initially, national ownership restrictions were imposed on many US industries that were deemed essential to national security; since the aviation industry was directly involved in national defense,[108] the 1926 *Air Commerce Act*[109] was enacted, in part, to place limitations on foreign ownership of US air carriers. Notably, this Act was the first regulation of the airline industry as a whole, and was thus also intended to foster development of the fledgling industry.[110] The 1926 Act stated that aircraft could be registered in the US only if owned by US citizens; it further required that US citizens control at least fifty-one percent of the voting interest of any US air carrier, and that the carrier's president and at least two-thirds of its board of directors be US citizens.[111] After

---

[107] The US has adopted a very restrictive regulation on foreign ownership in different sectors, see Abeyratne *Aviation Trends*, *supra* note 84 at 362-364.

[108] For further information about national defense concerns of the US in the 1920s, see S.M. Warner, "Liberalize Open Skies : Foreign Investment and Cabotage Restrictions Keep Non Citizens in Second Class" (1993) 43 Am. U. L. Rev. 277 at 305; Bohmann, *supra* note 3 at 696.

[109] *US Air Commerce Act*, *supra* note 29.

[110] D.T. Arlington, "Liberalization of Restrictions on Foreign Ownership in U.S. Air Carriers: the United States must take the First Step in Aviation Globalization" (1993) 59 J. Air L. & Com. 133 at 141.

[111] *Air Commerce Act*, ch. 344, § 3(a), 44 Stat. 568, 569, and § 9(a), 44 Stat. 573, *supra* note 11. The Act defines a US citizen as: (1) an individual who is a citizen of the United-States or its possession, or (2) a partnership of which each member is an individual who is a citizen of the United-States or its possessions, or (3) a corporation or association ... of any State, Territory, or possession thereof, of which the president and two-thirds or more of the board of directors or other managing officers thereof, as the case may be, are

the Great Depression of the 1930s, the state of the economy took its place as a major element of US national security and law-makers chose "protectionism" as the primary means of safeguarding the nation's airline industry.[112] The *Civil Aeronautics Act* of 1938[113] thus modified the *Air Commerce Act* by strengthening restrictions on foreign ownership of US airlines: the statute increased the minimum percentage of US citizen-held voting equity required for US air carriers from fifty-one to seventy-five percent,[114] and left the US citizenship requirement intact.

Today, the *Federal Aviation Act* of 1958 governs the US airline ownership regime.[115] Enacted during the tense climate of the Cold War, the Act further narrowed citizenship restrictions for owners of US air carriers and thereby restricts who may operate commercial aircraft in the United States. It requires that anyone wishing to operate aircraft within the US must first apply for and obtain a "certificate of public convenience" from the DOT and further provides that this certificate can only be issued to an air carrier that is a "citizen of the United States." Section 1301(16) of the Act defines a "US citizen" as:

> (a) an individual who is a citizen of the U.S. or one of its possession, or
>
> (b) a partnership of each member is such an individual, or
>
> (c) a corporation or association created or organized under the laws of the U.S. or of any State, Territory, or possession of the U.S., of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75% of the voting interest is owned or controlled by persons who are citizens of the U.S. or one of its possessions.[116]

The US *Federal Aviation Act* has remained essentially unchanged since 1958—"at least as far as the written law is concerned."[117] However, the law has been criticized as ambiguous in a number of key respects. First, the US citizenship provision lacks requisite specificity; for example, the statutory definition of citizenship refers to partnerships, but does not address the question of whether "a partnership" includes only individual persons

---

individuals who are citizens of the United-States or its possessions and in which at least 51 per cent of the voting interest is controlled by persons who are citizens of the United-States or its possessions.

[112] For further information about the US economic protectionism since the 1930s, see Bohmann, *supra* note 3 at 696; see Edwards, *supra* note 17 at 603; see Alexandrakis, *supra* note 32 at 74.

[113] *Civil Aeronautics Act*, *supra* note 11.

[114] *Ibid.*, ch. 601, § 1(13), 52 Stat. at 978.

[115] *Airline Deregulation Act*, *supra* note 33.

[116] *Ibid.*, 49 U.S.C. app.§ 1301(16) (1988).

[117] Arlington, *supra* note 110 at 142.

or it includes corporate partners as well?[118] Second, the law contains no objective standard for what constitutes "effective control" of an airline; hence, US regulators are free to subjectively interpret this notion according to prevailing US interests—indeed, neither the CAB nor DOT has ever established a clear definition of "effective control".[119] The issue of control as it relates to the percentage of non-voting shares of an airline that may be held by foreigners thus remains "a matter of policy, not law."[120] Consequently, US restrictions on "ownership and control" of airlines have actually been tightened through the broad discretionary powers that the statute affords US regulatory authorities.[121]

---

[118] About the uncertainty of the word "partnership" and the whole interpretation of the citizenship requirement, see J.T. Stewart, "U.S. Citizenship Requirements of the Federal Aviation Act – A Misty Moor of Legalisms or the Rampart of Protectionism" (1990) 55 J. Air L. & Com. 685.

[119] Warner, see *supra* note 108 at 307.

[120] H. Wassenbergh, "Towards Global Economic Regulation of International Air Transportation through Inter-Regional Bilateralism" The Hague (August 2001) at 7 [Unpublished].

[121] *Inter alia*, the DOT recently made a decision about the DHL case. In January 2001, in light of the strong possibility that DHL Airways may be under the control of foreign nationals, Federal Express Corporation requests the DOT to conduct a formal investigation into the compliance of DHL Airways with the statutory citizenship requirements applicable to all US air carriers, see Department of Transportation, Order dismissing *Third-Party Complaint of Federal Express Corporation in Docket OST-t-2001-8736 and of United Parcel Service Co. (in Docket OST-2001-8824) without prejudice Grant the Motions to File Otherwise Unauthorized Documents Filed by Federal Express Corporation and DHL Airways Inc.*, DOT Order 2001-5-11, Docket OST-01-8736-8 (11 May 2001), online: DOT http://152.119.239.10/docimages/pdf58/120921 web.pdf (date accessed: 14 May 2001), the department dismissed the complaint over DHL Airway's citizenship (more precisely, it dismissed FedEx's petition to revoke DHL Airways' authority to operate scheduled all-cargo service between the United-States and Kuwait). In its decision, the DOT emphasized: "The regulations permitting foreign air freight forwarders to operate in the US were created to 'eliminate the citizenship barrier to entry, promote competition among indirect air carriers, increase business on US air carriers, and reaffirm the US commitment to promote competition in the air transportation industry.' The Department's Decision affirming the DHL WE license accomplishes these objectives.", see Department of Transportation, Immediate Release 45-01, "DOT Rules on Petitions Against DHL" (11 May 2001), online: DOT http://www.dot.gov/affairs/dot45-01.htm (date accessed: 1 October 2001); DHL WE, Immediate Release , "DHL Worldwide Express Welcomes DOT Ruling" (11 May 2001), online: DHL WE http://www.dhl-usa.com/press_display/1,3574,79,00.html (date accessed: 1 October 2001); DOT's related decisions are the following: Department of Transportation, *Application of DHL Aiways, Inc. pursuant to 49 U.S.C. Section 40109(c) – Exemption – U.S.-Kuwait via Brussels and Bahrain*, Docket No. OST-2000-6937 (14 February 2000); Department of Transportation, *Application of the Registration of DHL Worldwide Express, Inc., as a Foreign Air Freight Forwarder*, Docket No. OST-2000-8732-1 (10 October 2000); Department of Transportation, *Application of Federal Express Corporation against DHL Airways, Inc. Regarding Compliance with U.S. Citizenship*, Docket No. OST-2001-8736 (19 January 2001); these three last decisions can be found online: DOT http://dms.dot.gov/search/hitlist.asp (date accessed: 4 October 2001).

1.2 DOT discretion - overstepping the bounds of the Federal Aviation Act

Since 1958, the CAB and then the DOT[122] have employed a "two-pronged" approach to the *Federal Aviation Act*'s citizenship requirement: first, to qualify as a "US citizen," an airline must satisfy the Act's US ownership percentages (§ 1301(16)(c)); and second, only the airlines that can qualify as a "US citizen" may "control" a US air carrier. The latter condition is particularly vague, as the law does not define what constitutes "control" and, thus, the notion of "control" has been susceptible to varying interpretations, based upon the policy goals of the administration in place at the time.

1.2.1 Adapting air transport policy to meet US economic & political ends

1.2.1.1 Pre-1989

In the 1960s, DOT policy was dominated by political suspicion. Because of the Cold War, the US took a guarded approach *vis-à-vis* those countries it viewed as susceptible to communist influence, lest air traffic rights be granted to a country that could suddenly move into the enemy camp; thus, the DOT narrowly interpreted citizenship restrictions applicable to airline ownership. As in the 1920s and 1930s, national security concerns pushed the US towards protectionism, and its protectionist stance was only toughened by the good economic climate within the US airline industry. Indeed, at that time, carriers in America's burgeoning civil aviation industry were reaping the benefits of healthy competition in the domestic US market, which made them a great deal more efficient than their international competitors. Not surprisingly, DOT sought to preserve the US civil aviation industry's success, together with the abundance of capital it engendered, with a stringent interpretation of the US citizenship requirement.

Beginning in the 1960s and continuing through the late 1980s, the CAB and then the DOT applied an "actual control" test, whereby an airline that satisfied the ownership percentage requirements of the *Federal Aviation Act* might still not qualify for US citizenship. The first case to apply the test was *Willye Peter Daetwyler, D.B.A. Interamerican Airfreight Co., Foreign Permit* (1971).[123] In addressing the issue of

---

[122] About the functions and mandate of the DOT, see Grant, *supra* note 27 at 69.

[123] Civil Aeronautics Board, *Order in the Matter of Willye Peter Daetwyler, D.B.A. Interamerican Airfreight Co., for Amendment of its Foreign Permit Pursuant to Section 402(f) of the FAA of 1958,* Docket No. 118, 120-21 (1971).

whether Interamerican qualified as "a citizen of the United-States", the CAB held that the enterprise did not qualify as a US licensed air carrier: while Interamerican met the legal criteria for citizenship, it failed to conform to the spirit of the statute.[124] The next major case to address the issue of "actual control" was *Première Airlines, Fitness Investigation* (1982).[125] In *Première Airlines*, the CAB likewise focused on whether the airline was a US citizen as defined in the 1959 Act with respect to the issue of control. Once more, the CAB maintained its strict stance, demanding that Première reorganize to address the Board's concerns over "actual control".[126]

US regulators took even more stringent stances in two later cases. The first was the case of *Page Avjet Corporation* (1983),[127] where the CAB held that even though all voting stock and over seventy-five percent of the nonvoting stock lay in the hands of US citizens, the corporation was nevertheless subject to foreign control.[128] The second of these decisions came in *Intera Arctic Services* (1987),[129] in which the DOT made clear that merely fulfilling the letter of the control/ownership statute would not render a certification applicant immune from scrutiny.[130]

After decades of strictly interpreting ownership and control requirements, the DOT finally began to temper its interpretation beginning around 1989, in response to the changing needs of the US airline industry. The DOT's change of heart reveals the political nature of the ownership and control issue and clearly demonstrates why States

---

[124] The CAB held that "where an applicant has arranged its affairs so as to meet the bare minimum requirements set forth in the Act, it is the Board's view that the transaction must be closely scrutinized and that the applicant bears the burden of establishing that the substance of the transaction is such as to be in accordance with the policy, as well as the literal terms of the specific statutory requirements," see *ibid.* at 121; for further information about the decision, see Arlington, *supra* note 110 at 144.

[125] Civil Aeronautics Board, *Order in the Matter of Première Airlines and Fitness Investigation*, CAB Order 82-5-11 (5 May 1982).

[126] For details about the different steps of the *Première* decision, see Arlington, *supra* note 110 at 145.

[127] Department of Transportation, *Order in the Matter of Page Avjet Corporation*, DOT Order 83-7-5, Docket No. 40,905 (1 July 1983).

[128] The CAB stated, "[w]e have recognized that a dominating influence may be exercised in ways other than through a vote": *ibid.* at 3; "The nonvoting foreign shareholders held the power to veto major company decisions, including any decisions pertaining to company consolidation, merger, acquisition, or liquidation", *ibid.* at 4; for further information about *Page Avjet Corporation* case, see Arlington, *supra* note 110 at 147, and Brown, *supra* note 21 at 1277.

[129] Department of Transportation, *Order in the Matter of Intera Arctic Services, Inc.*, DOT Order 87-8-43, Docket No. 44,723 (18 August 1987).

[130] "If persons other than US citizens, individually or collectively, can significantly influence the affairs of [the carrier], it is not a US carrier", see *ibid.;* Arlington, *supra* note 110 at 150; Brown, note 21 at 1276.

are so reluctant to abolish these restrictions since they can be an effective tool for furthering a State's national economic interests.

1.2.1.2 Post-1989

In the late 1980s, the national security threat that predominated US aviation policy throughout the Cold War began to subside and the few political rivals that remained *vis-à-vis* the United States were not strong competitors in air transport. However, the suspicion of foreigners that was initially born of national security concerns was seemingly transformed into economic suspicion and led to a fierce fare war that ultimately contributed to the deterioration of the financial health of the entire airline industry.[131] The many airline bankruptcies that followed the US airline deregulation revealed the poor state of the US civil aviation industry during this period.

In the wake of deregulation, an intense competition erupted between the "big three" US carriers (United, American, and Delta), a few weaker US airlines, and their foreign airline competitors (mainly the European carriers). With many US airlines beset by chronic losses and urgently in need of an infusion of capital,[132] the DOT was forced to look beyond the limitations of the *Federal Aviation Act* to aid an ailing US airline industry. Protecting the nation from its political enemies was no longer a major concern of the DOT; instead, DOT's focus shifted to the formation of new economic partnerships to sustain US dominance of international civil aviation. To this end, DOT's decisions were increasingly influenced by the aviation relationship that the US was pursuing with the home country of the foreign airlines wanting to invest in US carriers. Three cases clearly illustrate this shift in priorities: the Northwest/KLM case, the USAir/British Airways (BA) case, and the Continental/Air Canada.

(1) ***Northwest/KLM.*** In 1989, KLM sought to make a major investment in Northwest Airlines, America's fourth largest carrier. The DOT studied this unprecedented transaction for more than three years and, in that time, altered its interpretation of the facts and reversed its own position based upon new-found economic interests. In fact, the

[131] According to M. Kass, "[u]ncertainty and change have harmed the United-States airline industry in recent years", see H.E. Kass, "Cabotage and Control: Bringing U.S. Aviation Policy into the Jet Age" (1994) 26 Case W. Res. J. Int'l L. 143 at 143.

DOT had initially refused KLM's proposal for investment in Northwest, based primarily on the *Federal Aviation Act*'s citizenship test.[133] In 1991, however, Northwest again applied to the DOT, requesting relaxation of its 1989 consent Order for the same Northwest/KLM transaction,[134] and in 1992 the DOT surprisingly granted Northwest's request.[135] Subsequently, the United States and the Netherlands concluded the first Open-Skies agreement, whereupon the DOT approved the Northwest/KLM request to merge functions and to act as one airline, cooperating in crucial areas such as pricing and strategy. In approving the transaction, the DOT completely ignored the ownership restrictions of the 1958 Act, as evidenced by the consequent protestations of other US air carriers.[136]

(2) ***USAir/British Airways.*** Likewise, in July 1992, British Airways (BA) announced a plan to invest in USAir, the sixth largest US air carrier, and to merge into a single brand.[137] The first BA proposal was rejected by the DOT, not only because the proposal would have given BA effective control in USAir, but also because the United Kingdom did not want to remove its protectionist barriers on US carriers' access to London. However, in March 1993 a second BA proposal was accepted by the DOT. The agency's rationale in this case was similar to that in the KLM decision: the DOT reasoned that approval of the USAir/BA transaction would increase the likelihood of a US-UK Open-Skies agreement, though in the end no agreement was reached.[138] Indeed, to date there is no Open-Skies agreement between the US and the UK. Nevertheless, despite the

---

[132] About the need for capital of the airline industry, see Grant, *supra* note 27 at 71.

[133] DOT Order 89-9-29, *supra* note 18; for more details about this decision, see Brown, *supra* note 21 at 1278; Grant, *supra* note 27 at 99; Arlington, *supra* note 110 at 152.

[134] Department of Transportation, *Order in the Matter of the Acquisition of Northwest Airlines by Wings Holdings, Inc.*, DOT Order 91-1-41 (14 January 1991).

[135] *Ibid.* at 5.; for more details about the second decision of the US DOT, see Mosin, *supra* note 84 at 278; Arlington, *supra* note 110 at 156; Bohmann, *supra* note 3 at 701.

[136] Grant, *supra* note 27 at 100.

[137] About the first BA's proposal of July 1992, see Grant, *supra* note 27 at 114; Alexandrakis, *supra* note 32 at 84; Edwards, *supra* note 17 at 611; Arlington, *supra* note 110 at 158 & 173; L.R. Rose & B. Coleman, "British Airways Buys Stake in USAir, Drawing Protests From Other Carriers" *The Wall St. J.* (22 January 1993) A3.

[138] Department of Transportation, *Order in the Matter of Joint Application of British Airways PLC for an Exemption Pursuant to Section 416(b) of the Federal Aviation Act of 1958; Application of USAir for a Statement of Authorization to offer Code-Share under 14 CFR Parts 207 and 212; Application of USAir for a Statement of Authorization for a Wet Lease*, DOT Order 93-3-17, Docket Nos. 48,634, 48,640 (15 March 1993); for further details about the second BA's proposal of March 1993, see Grant, *supra* note 27 at 128; Alexandrakis, *supra* note 32 at 88; Edwards, *supra* note 17 at 613.

collapse of the US-UK Open-Skies negotiations in October 2000, negotiations are still pending and, according to Mr. A. Sentence, the chief economist at BA, such an agreement could be a "stepping stone" towards an EU-US common aviation area.[139]

(3) ***Continental/Air Canada.*** The 1993 Continental/Air Canada agreement represents another example of the DOT's use of the citizenship requirement as a political and economic tool. In contrast to the two previous cases, here the US did not seek to conclude an Open-Skies agreement with Canada; instead, the US priority was to keep its northern neighbor as a major US investment partner: "[b]ecause Air Canada's partner was a major US investment group and the US-Canada bilateral relationship was less offensive than the US-UK relationship, the control prong of the US citizenship test was not violated and the DOT ultimately approved Air Canada's proposal."[140]

The major decisions of the US CAB and DOT since 1958 show how US airline ownership restrictions do not simply serve as a legal basis for establishing the nationality of an airline; to the contrary, in each case the restrictions were interpreted in a way that furthered some overarching economic and/or political objective. Early on, the DOT's rejection of merger proposals reflected US dominance in the international civil aviation sector, but beginning with the Northwest/KLM decision, the DOT began to adopt a more flexible position with regard to foreign investment in US airlines, owing to the airlines' desire to find new financial resources to address their need for capital combined with the US need to safeguard good relations with traditional economic partners.[141] In fact, the nationality requirement has been completely ignored in cases where there was no US interest to be served by enforcing it. For example, in the case of the transaction between Iberia and Aerolineas Argentinas, though it was obvious that Iberia was taking the control of the Argentinian airline, the DOT remained silent in exchange for concessions from the Argentine government that benefited US airlines operating in that country.[142] Clearly,

---

[139] C. Baker, "U.S. and UK Remain Apart on Open Skies" *Airline Bus.* (December 2000) 19; The US remains adamant that an Open-Skies agreement is a prerequisite also for clearing the BA/AA alliance, but the UK government still hesitates to open its market, see J.D. Morrocco, "Open Skies Impasse Shifts Alliance Plans" *Aviation Wk & Space Tech.* (November 9, 1998) 45; S. Mosin, see *supra* note 84 at 283.

[140] See Alexandrakis, *supra* note 32 at 89; for further information about Continental-Air Canada agreement, see Kass, *supra* note 131 at 175.

[141] Even during the Cold War, the US tended to relax their policy regarding "friendly and neighboring" countries that do not present a threat to national security, see Bohmann, *supra* note 3 at 707.

[142] IATA doc., *supra* note 13 at 25; Bohmann, *supra* note 3 at 708.

from these cases one may reasonably conclude that the US citizenship requirement for airlines is no longer a *per se* legal barrier to foreign investment since, at the end of the day, US regulators accept or refuse transactions based *not* on the letter of the 1958 Act, but instead on the prevailing political and economic priorities. Indeed, "the true cause of the demise of [these] ... deal[s], was actually a conglomeration of many factors having little to do with the law itself."[143] Accordingly, the US *Federal Aviation Act* is arguably outdated and should therefore be repealed, readapted, or replaced to address the current to world economic situation.

1.2.2 "Open-Skies" as a strategic tool—using the ownership and control requirement as an international bargaining chip

In the Open-Skies era, US ownership restrictions have been maintained primarily as a bargaining chip: "in short, the exclusion of cabotage and ownership/control elements [has] not eliminate[d] these issues as DOT bargaining chips when the agency pursues liberal bilateral aviation terms [i.e., Open-Skies]."[144] As the DOT's decisions in Northwest/KLM and USAir/British Airways demonstrate, the basic bargaining position of the US has been, 'if you (State X) give us (the US) Open-Skies, we will give your airline the approval it needs with respect to national ownership and control.' The linking of these two policy elements has given the US a tremendous advantage in its zealous pursuit of Open-Skies.[145] Notwithstanding the US airline industry's seemingly insatiable thirst for foreign capital, the desire of foreign airlines to invest in American air carriers and, thereby, own a piece of the US market has apparently been even stronger. Thus, by conditioning DOT approval of foreign investment on the granting of Open-Skies, US carriers have gained unrestricted access to as many markets and passengers as possible.

The domineering nature of this practice brings the fairness of the DOT's policy into doubt. Here, the fact that the DOT acted within the scope of its authority when it instituted the 1992 Open-Skies Order is not in question; rather, it is the DOT's intellectual honesty in implementing Open-Skies that is at issue. Specifically, the *Federal Aviation*

---

[143] Arlington, *supra* note 110 at 134.
[144] Grant, *supra* note 27 at 83.
[145] S. Dempsey talks about a "theological devotion [of the DOT] to Open-Skies", see Dempsey "Airlines in Turbulence", *supra* note 56 at 90; and for more details about the US Open-Skies policy, see the DOT Order 92-8-13, above Chapter 1, 2.2, at 21.

Act strictly defines "US citizen" and, although the DOT is allowed to apply the statute on a case-by-case basis, it must act within the limits of the law. However, the "contradictions and uncertainty in DOT's stance towards foreign takeovers" render the letter of the law meaningless,[146] such that it is impossible to know with certainty the extent to which a foreign investor can invest in a US airline. Indeed, the one conclusion that can be drawn from the Northwest/KLM case is that the transaction received DOT approval *only* after an Open-Skies agreement between the US and the Netherlands was finalized by the DOT.[147]

Nevertheless, perhaps despite the DOT's actions, the trend over the past few years has increasingly been towards liberalizing national ownership restrictions; so much so, that it has become clear that the time has come to drop national restrictions on ownership and control of airlines altogether. US regulators have been pressured to do just that: *inter alia*, in 1992, the General Accounting Office (GAO) recognized the financial necessity of relaxing the statutory limits on foreign investment and control of airlines; in 1993, the National Commission report recommended amendment to *Federal Aviation Act*;[148] and foreign airlines such as Singapore International Airlines (SIA) have lobbied for the US to abandon protectionism.[149]

2. The two faces of Europe: internal EU liberalization versus restrictions on third parties

The policy on substantial ownership and effective control of airlines among European Union Member States is less obscure and less protectionist than the US policy; however, while ownership restrictions have been totally removed within the European

---

[146] For comments on DOT's attitude by two Secretaries of Transportation, see Grant, *supra* note 27 at 101.

[147] Therefore, since 1992, by making the Open-Skies policy a priority, the international community has been aware that the DOT's decision, in assessing the degree of control a foreign airline retains on a US air carrier, has been depending on whether the foreign country has or has not liberal relationship with the US In the air transport sector, as a trade industry, business' rules apply; which means that the national ownership and control requirement can be used as a means to reach the US final goal which is the conclusion of as many Open-Skies as possible to get access to foreign markets.

[148] United States General Accounting Office, *Airline Competition. Impact of Changing Foreign Investment and Control Limits on U.S. Airlines in Report to Congressional Requesters,* GAO Doc. GAO/RCED-93-7 (9 December 1992); the National Commission to Ensure a Strong Competitive Airline Industry, *Change, Challenge, and Competition: a Report to the President and Congress submitted on 19 August* 1993, Washington, D.C.: U.S. Government Printing Office, 1993; for further information about these two reports, see Gertler, *supra* note 30 at 218.

Union, the restrictive protectionist system persists between European Member States and third countries. Moreover, the nationality requirement has not been completely eliminated throughout the whole European Union. Indeed, the EU has continuously had to struggle against its own Member States on this issue.

2.1. The European law

2.1.1 The law applicable to EU Member States

The liberalization of the European system represented a major deviation from the principle of substantial ownership and effective control. Within the "Three Packages" framework adopted by the EU Council in 1992,[150] the traditional national ownership and control requirement was replaced by the concept of "Community Carrier." The new rules included in the third package[151] were a product of the EU Council's call for new regulation for the licensing of air carriers within the European Community.[152] Regulation 2407/92 applies to virtually all commercial aviation.[153] It provides that a Community carrier may receive an air carrier's license from its national aeronautical authority if it is majority-owned and effectively controlled by an EU Member State (and/or by nationals of an EU Member State)[154] and has its principal place of business in that Member State.[155] Carriers that meet these requirements enjoy Community status and can thus benefit from the advantages of Community legislation: *e.g.*, the right of establishment throughout the Community and cabotage.[156] In addition, the EU Regulation is less obscure than the US legislation to the extent that the notions of "ownership" and "control" have been clearly defined. First, instead of the term "substantial ownership," the EU Regulation uses the expression "majority ownership."[157] Thus, an operating license may be granted if more

---

[149] N. Ionides, "SIA Challenges the USA to Relax Foreign Ownership" *Airline Bus.* (May 2001) 27.
[150] The European Liberalization regulation, *supra* note 52.
[151] E.U, *Council Regulation 2407/92*, *supra* note 22.
[152] EU, *Council Regulation (EEC) 2343/90*, *supra* note 52 at Art. 3(1).
[153] *Ibid.* at Art. 1(2).
[154] *Ibid.* at Art. 4(2).
[155] *Ibid.* at Art. 4(1).
[156] An EU air carrier may fly any route within the EU, any international route within the EU; any domestic route within its own country, and any domestic route within another EU country.
[157] EU, *Council Regulation (EEC) 2343/90*, *supra* note 52 Art. 4(2).

than 50% of the capital of the air carrier is held by any Member State or its citizens.[158] Second, unlike its US counterpart,[159] the E.U. Regulation expressly defines "effective control".[160]

Of course, Regulation 2407/92 applies only between and among the 15 Member States plus Norway, Iceland, and Lichtenstein.[161] Likewise, the EU-Switzerland agreement is an aviation-specific association agreement whereby Switzerland takes over the provisions of the EU internal air transport market.[162] Thus, between these parties, "the traditional substantial ownership and effective control clause has become inoperative, and any challenges to an airline's traffic rights within the internal aviation market would have to be based on evidence that the airline concerned does not qualify as a Community air carrier."[163]

2.1.2 The law applicable to Non-Member States

While the EU internal air transport market has been liberalized, the same cannot be said for its external air transport. Indeed, the common European air carrier license system does not apply to air traffic between EU Member States and third countries; instead, bilateral agreements negotiated by individual Member States still apply. Thus, in so far as there are disparities in carrier designations in the bilateral agreements between individual Member States and third parties, there are disparities between the air traffic rights of Member States in the international market.[164]

---

[158] For comments given by the European Commission about the "majority ownership", see Bohmann, *supra* note 3 at 720.

[159] About the similarities and differences of interpretation of the notion "effective control" between the European Commission and the US DOT, see *ibid.* at 722.

[160] For the European definition of 'effective control', see the introduction, above, at 4.

[161] The three latter States are subject to the above Community legislation by virtue of the European Economic Area (EEA) Agreement of 1994, see EU, Decision of the EEA Joint Committee 7/94 Amending the Protocol 47 and Certain Annexes to the EEA Agreement, [1994] O.J. L 160/1. The EEA Agreement is an association agreement and extends most features of the EU internal market, including the single air transport market from the 15 EU States to these three additional European countries.

[162] An agreement on air transportation between the EU and Switzerland was signed on 21 June 1999. However, this agreement is not yet in force as this depends also on the ratification of the agreement on the free movement of persons, which is a mixed agreement, and will have to be ratified by the Member States of the EU as well. This ratification process is still incomplete as Ireland, France, and Belgium have not yet been able to terminate their internal ratification procedures. As the situation is today, it is likely that this agreement might become applicable during the year 2002.

[163] IATA doc., *supra* note 13 at 19.

[164] J. Basedow, "Airline Deregulation in the European Community – its Background, its Flaws, its consequences for E.C.-U.S. Relations" (1994) 13 J.L. & Com. 247 at 268.

The main reason behind the EU's dual system is that non-EU countries do not recognize the changes that have occurred inside the EU; therefore, third foreign countries are still entitled to "withhold or revoke an operating permit if a carrier is not substantially owned and effectively controlled" by the contracting Member State and/or its nationals, according to the bilateral agreements. For example, if a carrier of Member State A is taken over by a carrier of Member State B, a third country could prevent the Member State B carrier from exploiting the traffic rights granted to carriers of Member State A by withholding or revoking the operating license granted to the carriers of Member State A. It is for precisely this reason that there have been so few mergers or takeovers between European carriers.[165]

2.2. The shift towards European Commission representation of the entire EU commercial aviation community

2.2.1 From the traditional "nationality clause" to the "community clause"

The bilateral system still in place between EU Member States and third countries is a source of controversy because it runs contrary to two key provisions of the EC Treaty.[166] First, Article 6 of the Treaty prohibits "any discrimination on grounds of nationality."[167] However, the nationality clause in a bilateral air transport agreement allows a third State to revoke a European airline's operating permit if substantial ownership and effective control of the designated European airline are not vested in nationals of the contracting party. The nationality clause thus contravenes Article 6 by excluding nationals from other EU Member States from enjoying the benefits granted by the bilateral agreement on the basis of nationality. Moreover, the nationality clause undermines one of the fundamental rights, granted by Article 49 of the *EC Treaty*—the

---

[165] For instance, this problem raised between the Netherlands and Great Britain, see Haanappel, *supra* note 1 at 99.

[166] Considering that air transport relations between EU Member States and third States are within the scope of the Treaty, see *E.C.J., Ahmed Saeed Flugreisen and Silver Line Reiseburo GmbH v. Zentrale zur Bekampfung unlauteren Wettbewenbs e. V. Reference for a Preliminary Ruling: Bundesgerichtshof - Germany . Competition – Air Tariffs*, C-66/86 [1989] E.C.R. 803, 822.

[167] *EC Treaty* Art. 6, amended by *Maastricht Treaty* Art. G(8); and has become Art. 12 *on the consolidated version of the Treaty establishing the European Community, as amended by the Treaty of Amsterdam* (Part 1: Principles) (*Treaty of Amsterdam, Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, 2 October 1997, [1997] O.J. (C340)1 [hereinafter *Treaty of Amsterdam*].

right of establishment.[168] EU, *Council Regulation 2407/92* has been expressly extended this right to the European air transport regulation.[169]

Despite the apparent conflict between the nationality clause and the *EC treaty*, it is unclear whether Member States will be required to remove the clause from their bilateral agreements. The European Court of Justice has yet to take a position on this issue.[170] In the meantime, EU Member States are being encouraged to modify their bilateral agreements through introduction of a "Community clause" in place of the traditional ownership and control clause, so as to give force to the *EC Treaty* and the European policy of treating the Community as a whole. However, so far most EU States have been cautious and even reticent to include the "Community clause" in their bilateral agreements for two reasons:

> (a) Such a clause, if introduced in a bilateral with a third country, would open up the benefits, obtained through the respective bilateral negotiations, to the airlines of all Member States without any guarantee that the latter would offer reciprocal benefits through similar changes of their own bilaterals concluded with third countries;
>
> (b) The prospect for the third country concerned to have all Member States' airlines in a position where they could claim to be entitled, as a Community carrier, to enjoy the traffic rights exchanged with just one of their fellow-Members. This possibility made foreign countries hesitant to grant this concession in bilateral negotiations unless specific safeguards were introduced and, more importantly, unless counter-demands were met which would offset the value of this major concession.[171]

Only a few Member States have actually taken the "Community clause" into account in their bilateral agreements in order to prevent third countries from objecting to the nationality of a designated carrier, so long as it is owned by EU nationals. For instance, in the bilateral agreement between Germany and Brunei,[172] the ownership clause grants

---

[168] Art. 49 of the Treaty grants the right of establishment in other Member States to nationals of any Member State and requires the Member States to allow the establishment on the same conditions as those, which they apply to companies incorporated in their countries ("restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited ..."); it has become the Art. 43 in the *Treaty of Amsterdam* (Title 3, Chapter 2).

[169] With respect to the contractions between bilateral agreements and the *EC Treaty*, another question has been raised by K. Bohmann: whether article 307 of the Treaty protecting agreements entered into prior to January 1, 1958, applies as well to agreements that were originally entered into force before 1958 but amended thereafter. In that case, all the bilateral agreements from before 1958 would not contradict the Treaty and would still be valid, see Bohmann, *supra* note 3 at 729.

[170] Advocate-General Lenz has taken a strong position and demanded that "a bilateral agreement has to be denounced if the non-member country is not prepared to amend the agreement", see *ibid.*

[171] IATA doc., *supra* note 13 at 19.

[172] *Air Transport Agreement Between the Federal Republic of Germany and Brunei Darusalam*, German Federal Gazette (BGB1) 1994, II-3670, Art. 3(4).

Brunei the right to challenge traffic rights of a carrier designated by Germany only if the carrier is not able to demonstrate that it is substantially owned and effectively controlled by EU nationals,[173] and specifically references to the EU, *Council Regulation 2407/92*, Article 4(5).[174] Moreover, in 2004 the benefits of the "Community Clause" will be enhanced with the onset of the *Societas Europeae* (SE), which will allow airlines, like other companies, to use the new EU corporate structure. Thus, in addition to the "Community Clause," future bilateral agreements involving EU Member States will likely contain EU carrier designation clauses, as opposed to designation clauses that are limited to a specific country.[175]

2.2.2 Commission authority to negotiate bilateral air transport agreements

The EU Commission has long maintained that it has exclusive competence to negotiate and conclude new bilateral air services agreements between the EU and third parties. Beginning with the formation of the common EU aviation market pursuant to the third package in 1992, the Commission undertook to take over the implementation of the bilaterals on behalf of all EU Member States. This step was necessary to address the need for consolidation of European aviation policy and the EU airline industry as a whole. Indeed, while the US market had become more and more competitive through multiple airline mergers (TWA-USAir, UA-USAir, Delta-Continental, etc.), the European market remained scattered and divided and European airlines were left to compete with US "mega carriers."[176] To address these deficiencies, the Commission sought a unified EU bilateral agreement with the US[177]; without a mandate from Member States, however, the Commission lacks the requisite strength of negotiating position to arrange such an

---

[173] For the text of the clause that Germany includes into its new or existing bilateral agreements, see IATA doc., *supra* note 13 at 20.
[174] EU, *Council Regulation 2407/92*, *supra* note 22 Art. 4(5).
[175] Haanappel, *supra* note 1 at 102.
[176] M. Wassenbergh states that "[w]ith a mandate to negotiate, the EC could and would position itself as representing the EU as one country/market, bringing the EU at the same level with the US, thereby turning 'seven Freedom' to/from the US for EU-air carriers into 'EU-third and fourth Freedom' traffic", see Wassenbergh, *supra* note 120 at 17; according to L. Jones, States must "build a fortress Europe", see L. Jones, "When the Going Gets Tough..." *Airline Bus.* (May 1998) 26; C. Thornton, "The Europe's New Transport Commissioner has Set out her Agenda on Air Transport and Appears determined to See it Through" *Airline Bus.* (March 2000) 32.
[177] The Transatlantic Common Aviation Area (TCAA) is a US proposal that has been promoted by the European Commission; its purpose is to harmonize at the most liberal level, traffic rights, capacity, routings and pricing. Further discussion on this initiative will be found at 117 below.

agreement. This leaves Europe in a difficult position *vis-à-vis* the US. While the Commission has urged the US to change its aviation policy, particularly with regard to what it sees as protectionist rules on ownership and control of airlines,[178] the force of these calls for liberalization is weakened by the fact that the EC has no clear mandate and, thus, no authority to engage in discussions with the US on behalf of all EU Member States. Moreover, some EU Member States remain reticent to the Commission's claim of exclusive competence over bilateral agreements for fear that their sovereignty and national interests would be subordinated if they allow the Commission to negotiate on their behalf.

Nevertheless, even in the absence of a mandate, the authority of the Commission to negotiate bilaterals with third States cannot be reasonably questioned. Article 113 of the *EC Treaty*, which confers on the Commission the exclusive power to negotiate trade agreements with non-Member States, cannot be extended to the field of transportation; however, according to AETR Doctrine, the Community has the implied power to negotiate treaties with third States in all areas where it has adopted internal measures pursuant to a mandate of the *EC Treaty*. Moreover, Part 1 of the Treaty governs the entire transportation sector and provides for the adoption of "a common policy in the sphere of transport."[179] Accordingly, faced with the recalcitrance of Member States to renounce to their bilaterals, in 1995 the Commission filed a complaint under Article 169 of the *EC Treaty* against seven Member States (Austria, Belgium, Denmark, Finland, Germany, Luxembourg, and Sweden) that had completed bilaterals with the US after the implementation of the third package. These proceedings are still pending and, to date, the European Court of Justice have not taken its final ruling.[180]

---

[178] The last official call for change was on 14 March 2001 at the 26th Annual FAA Commercial Aviation Forecast Conference.

[179] Basedow, *supra* note 164 at 273.

[180] For further information about the Commission's action against EU Member States, see Dempsey, *supra* note 35 at 1069; EU, Press Releases 16/1998, "European Commission takes legal action against EU Member States "Open-Skies" agreements with the United States" (11 March 1998).

3. The Canadian regime

3.1 Canadian law

Canadian law related to ownership and control of airlines is very similar to that of its influential neighbor to the south. Article 55 of the *Canada Transportation Act*[181] defines "Canadian" as:

> a Canadian citizen or a permanent resident within the meaning of the Immigration Act, a government in Canada or an agent of such a government or a corporation or other entity that is incorporated or formed under the laws of Canada or a province, that is controlled in fact by Canadians and of which at least seventy-five per cent, or such lesser percentage as the Governor in Council may by regulation specify, or the voting interests are owned and controlled by Canadians.[182]

The Articles of Association of Air Canada—established pursuant to the *Air Canada Public Participation Act*[183]—contain the same ownership and control requirement. Article 6(1)(b) of this Act sets forth, *inter alia*:

> Provisions imposing constraints on the issue, transfer and ownership (...) of voting shares of the Corporation to prevent non-residents from holding, beneficially owning or controlling, directly or indirectly, otherwise than by way of security only, in the aggregate voting shares to which are attached *more than twenty-five per cent of the votes* that may ordinarily be cast to elect directors of the Corporation.[184]

Under the *National Transportation Act*, licenses for domestic services may be issued only to a "Canadian",[185] unless the Minister of Transport determines that it is in the public interest to grant an exemption to this requirement.[186] The same "Canadian" requirement applies to the licensing of Canadian international scheduled and non-scheduled air services, with the important distinction that no exemptions can be granted.[187] While satisfaction of the ownership criteria can be objectively determined based on the mandated ownership percentages, the notion of "control" is not defined by the Act and, thus, like similar regulations in the US and other nations, it remains vague. A Report of

---

[181] *National Transportation Act*, 1987, R.S.C. 1985, c. 28 (3rd Supp.); *Canada Transportation Act, Act to Continue the National Transportation Agency as the Canadian Transportation Agency, to Consolidate and Revise the National Transportation Act, 1987, and the Railway Act and to Amend or Repel Other Acts as a Consequence*, assented to May 29th, 1996, Chapter C-10.4 [hereinafter *Canada Transportation Act]*.

[182] *Canada Transportation Act, ibid.* at Art. 55.

[183] *Air Canada Public Participation Act, Act to Provide for the Continuance of Air Canada under the Canada Business Corporations Act and for the Issuance and Sale of Shares thereof to the Public*, assented to August 18, 1988, Chapter A-10.1 (hereinafter *Air Canada Public Participation Act*).

[184] *Ibid.* at Art. 6(1)(b) [emphasis added].

[185] *Canadian Transportation Act, supra* note 181 at Art. 61.

[186] *Ibid.* at Art. 62.

the Standing Committee on Transport explains the notion of "control" by simply stating that "in determining where control 'in fact' lies, the Canadian Transportation Agency analyzes financial, managerial and operational relationships."[188]

3.2 Canadian cases

One of the most important cases on the airline nationality issue the Canadian Transport Commission (CTC) has had to deal with was the *Okanagan Helicopters Ltd. Change of Control* case in 1983.[189] Here, United Helicopters Ltd., a British company, sought to acquire 49% of the ordinary voting shares and 100% of preference non-voting shares in Okanagan ownership, a Canadian firm. The CTC rejected the transaction on the grounds that even if it were approved, it was highly unlikely that the United Kingdom would reciprocate and allow Canadian companies to hold controlling interests in UK air carriers and, therefore, allowing the Okanagan transaction would merely restrict competition and prejudice the Canadian public interest.[190]

The *Air 2000 Airlines* case similarly shows the stringent approach of Canadian regulators with respect to foreign ownership and control of airlines. In this case, the National Transportation Agency (NTA)[191] rejected an airline organizational proposal because, among other things, 25% of the Canadian airline was to be owned by Air 2000, an English carrier. In 1988, after a complete restructuring of the airline, the Agency finally gave its approval to the transaction with two conditions: (1) the NTA required the airline to change its name (it was renamed "Canada 3000"), and (2) the company had to notify the Agency of any changes of shareholders, officers, directors, and generally of any

---

[187] *Ibid.* at Arts. 69 and 73.

[188] Standing Committee on Transport, *Restructuring Canada's airline industry: fostering competition and protecting the public interest*, report (December 1999), online: Canada's Parliament http://www.parl.gc.ca/InfoComDoc/36/2/TRAN/Studies/Reports/tranrp01/09-rap-e.htm (date accessed: 11 May 2001).

[189] At that time, there was no statute that specifically addressed the matter of foreign ownership and control of Canadian Airlines, as the *National Air Transportation Act* was drafted in 1987. However, the Canadian regulatory bodies (the Air Transport Board and later the Canadian Transport Commission), have required, as a matter of government policy, that Canadian air carriers be owned and effectively controlled by Canadians.

[190] Air Transport Committee, *Okanagan Helicopters Ltd. Change of* Control, Decision No. 7791 (15 December 1983); for more information, see Gertler, *supra* note 30 at 244.

[191] The National Transportation Agency was created by the 1987 Act as a successor of the former CTC.

circumstances which could result in non-compliance with the Canadian ownership and control provisions.[192]

Two other cases in which the NTA has dealt with the issue of foreign "control" of a Canadian airline are also revealing. First, in the *Minerve Canada* case (1988), the Agency canceled Minerve's licence because "Minerve S.S., a French company, was in an overriding position to influence the Board of Directors of Minerve Canada so as to constitute foreign control."[193] In contrast, in the 1993 case of *Canadian Airlines International Ltd.* (CAI),[194] which involved the financial bailout of CAI by rival Air Canada, the NTA said, "a larger and financially strong company would not necessarily gain control of a smaller and weaker company merely because of a business or equity alliance relationship."[195]

As these few cases demonstrate, Canadian regulators generally tend to adhere to the letter of the law when it comes to the issue of foreign ownership and control of airlines. However, in those instances where there are superseding political and/or economic considerations, "the flexibility of bilateralism... facilitate[s] arrangements whereby the designation and authorization of airlines [does] not depend on a strict application of the 'substantial ownership' and 'effective control' standards."[196] This "flexibility" is demonstrated, for example, by the fact that Canadian Airlines maintained its designation as a Canadian airline even though American Airlines (i.e., a US carrier) effectively controlled Canadian, albeit with just 25% ownership of the voting shares.

3.3 Canadian protectionism under attack

In 1999, the Canadian Minister of Transport, David Collenette said, "I remain committed to ensuring that our national transportation policy objectives are met and that

---

[192] National Transport Agency, *Air 2000 Airlines*, decision No. 239-A-1988 (12 August 1988); for further information, see Gertler, *supra* note 30 at 246.
[193] National Transport Agency, *Minerve Canada*, Decision No. 618-A-1989 (6 December 1989); for further details, see Gertler, *supra* note 30 at 247; the decision can be found online: Canadian Transportation Agency http://www.cta-otc.gc.ca/decisions/1989/A/618-A-1989_e.html (date accessed: 4 October 2001).
[194] National Transport Agency, *Canadian Airlines International Ltd.*, Decision No. 297-A-1993 (27 May 1993); for further details, see *ibid.*; the decision can be found online: Canadian Transportation Agency http://www.cta-otc.gc.com/decisions/1989/A/618-A-1989_e.html (date accessed: 4 October 2001).
[195] *Ibid.* at 24
[196] See Gertler, *supra* note 30 at 249.

we have a safe, healthy, Canadian owned and controlled air industry that meets the needs of Canadians well into the 21st century."[197] Mr. Collenette further made it clear that in establishing a framework for the restructuring of the airline industry, the question of whether it was in the public interest for the policy of ownership and control of airlines to remain unchanged was "not up for discussion."[198] Thus proposals for restructuring the Canadian airline industry through international merger and consolidation have been severely curtailed by a policy that essentially says that "if the final compliance with these ownership and control requirements is not achieved, the proposal [must be] rejected"[199]— and there are little prospects for any immediate change. Indeed, as recently as March 2001, in a speech on the Canadian airline restructuring process that had been implemented one year earlier, Minister Collenette reiterated his firm position, stating: "I still believe that we should continue to protect the domestic environment from increased foreign ownership and from cabotage," especially, he said, since opening the Canadian market to foreign carriers would not benefit the domestic economy, as foreign airlines are "only interested in providing service on the major routes for their own benefit."[200]

Notwithstanding the Canadian government's stringent position, the National Transportation Act Review Commission, which was set up in March 1993 by the former Progressive Conservative government, has advocated a relaxation of the existing limitations on foreign ownership in Canadian airlines.[201] It stated that "the *Chicago Convention* concept of the national carrier is being outdated rapidly by economic events," and proposed the adoption of a "new standard for evaluating foreign investment in Canadian aviation."[202] A 1999 report on Canada's troubled air industry from the House of Commons Transport Committee likewise recommended increasing foreign ownership in

---

[197] The Canadian Transportation Agency, New Release H100/99, "Minister of Transport Issues Policy Framework for Restructuring of Airline Industry" (Oct. 26, 1999), online: Transport Canada http://www.tc.gc.ca/releases/nat/99_h100e.htm (date accessed: 10 May 2001) [hereinafter Restructuring of Airline Industry]; for more information about the Canadian restrictive policy on foreign direct investment, see Abeyratne *Aviation Trends*, *supra* note 84 at 361-362.
[198] Restructuring of Airline Industry, *ibid.*
[199] *Ibid.*, part named "Backgrounder proposed legislation for Review Process for any Merger/Acquisition of Major airlines".
[200] *Ibid.*, part named "Speaking Notes for Transport Minister David Collenette - Airline Restructuring: One Year Later", Ottawa, Ontario 5 March 2001.
[201] See Gertler, *supra* note 30 at 222 note 26.
[202] *Ibid.* at 222.

the Canadian airline industry,[203] and was backed by presentations such as that given by University of British Columbia professors William Stanbury and Tom Ross in November 1999, which urged the Minister of Transport to "change the positions he has adopted on foreign ownership."[204] Moreover, a Report of the Standing Committee on Transport from December 1999 on the Canadian government's plan for restructuring of the airline industry, maintained that the 25% foreign ownership limit was "a regulatory barrier to entry because the industry requires a great deal of funding and there are not sufficient pools of capital within Canada to allow existing carriers to expand their operations."[205] In contrast with the position taken by the Ministry of Transport,[206] the Standing Committee opined that "eliminating barriers to entry will result in a healthy, competitive airline industry with benefits for everyone."[207]

The present status in Canada is thus that the two positions on foreign ownership restrictions for airlines are locking horns. On the one hand, the Ministry of Transport, headed by Mr. Collenette, remains steadfast in its protectionist view on foreign investment—a view that is likely to become even more firm given the current crisis in air transport and the increased concerns for national security since September 2001. On the other hand, promoters and advocates of Canadian airlines, recognizing the dire need within the industry for an influx of capital, increasingly push for the liberalization of Canadian restrictions on foreign ownership and control of airlines; in fact, Air Canada

---

[203] Council of Canadians, Immediate Release, "Transport Committee Recommendations Threaten Safe, Affordable and Accessible Canadian Air Service" (December 1999), online: the Council of Canadians www.canadians.org/media/media-991208.html (date accessed: 11 May 2001).

[204] The Fraser Institute, Media Release, "Avoiding the Maple Syrup Solution: Restructuring Canada's Airline Industry" (17 November 1999), online: the Fraser Institute http://www.fraserinstitute.ca/media/media_releases/1999/1999111http://www.fraserinstitute.ca/media/media_releases/1999/1999111 (date accessed: 8 September 2001); an interesting analysis named "Does Foreign Ownership really Matter" can be found on the Stanbury and Ross document; they explain that it is understandable that governments want to protect their domestic firms "in the name of nationalism"; however, the stringent position of the Minister of Transport is not justified, see T.W. Ross & W.T. Stanbury, "Avoiding the Maple Syrup Solution: Comments on the restructuring of Canada's Airline Industry" publication (1999), online: the Fraser Institute http://www.fraserinstitute.ca/publications/pps/32/ (date accessed: 8 September 2001).

[205] Standing Committee on Transport, *supra* note 188.

[206] Restructuring of Airline Industry, *supra* note 197.

[207] Standing Committee on Transport, *supra* note 188.

(the nation's largest carrier) recently made it clear that "it would support an increase in the foreign ownership restriction to 49 per cent from 25 per cent."[208]

4. Erosion of the "substantial ownership and effective control" principle

In the 1990s, a number of countries adopted new policies and amended rules regarding foreign investment in national airlines. In many cases (*e.g.*, China, Mexico, Peru, Australia, New Zealand, Bangladesh, etc.), existing regulations were relaxed, though for different reasons.[209] In addition to these changes to national laws, more and more deviations and exceptions to the "substantial ownership and effective control" principle have been developed by the airline industry itself, which has grown impatient with the slow pace of statutory and regulatory changes in this area.

4.1 Pathways to change

Foremost among the existing deviations from the traditional principle of national ownership and control has been the creation of multi-national airlines. These multi-nationals are normally comprised of airlines from the same geographic region, grouped together in an effort to strengthen their respective markets through a common identity. For example, Scandinavian Airlines System (SAS) is a joint operating organization of the national airlines of Norway, Sweden, and Denmark, which was created in 1951. Each of the SAS component airlines is substantially owned and controlled by nationals of the countries concerned. However, SAS is appointed as the designated airline and, thus, the holder of traffic rights in each of the three bilateral agreements concluded with third countries.[210] Other examples of multi-national airlines include Air Afrique, which was

---

[208] K. McArthur, "Ottawa may ease airline ownership rules" *The Globe and Mail* (2 October 2001) A10. Moreover, it is interesting to note that Air Canada is not only 'protected' from major foreign investments, but as well, from any majority investments. Indeed, when Ottawa privatized Air Canada in the 1980s, it introduced a 10 per cent cap on individual share ownership to ensure that the airline was widely held. The limit has since been boosted to 15 per cent. Today, the 15 per cent cap is questioned and might be raised, as the foreign cap, see K. McArthur & S. Chase, "Schwartz spurns Air Canada as Ottawa mulls ownership cap" *The Globe and Mail* (5 October 2001) B1.

[209] WTO doc.1, *supra* note 26 at 6.

[210] IATA doc., *supra* note 13 at 20.

created in 1961 between eleven African States,[211] Gulf Air, which was created in 1950 between four Persian Peninsula Partner States (the national carriers of Bahrain, Oman, Qatar and Abu Dhabi (the United Arab Emirates), and Alliance Air, which was founded by the governments of Uganda and Tanzania, in conjunction with South African Airways.[212]

Another more recent deviation from the "substantial ownership and effective control" principle can be found in a multilateral Open-Skies agreement. In November 2000, the United States and four State Parties to the *Asia Pacific Economic Cooperation (APEC) Agreement* (Brunei, Chile, New Zealand, and Singapore) concluded an Open-Skies agreement that did away with the traditional requirement that an airline must also be "substantially owned" by nationals of the designated country. While the *APEC Open-Skies agreement* retains the *Bermuda I*-type requirement that an airline be "effectively controlled" by nationals of the State whose government designates the airline to receive traffic rights, the "substantial ownership" requirement is replaced by a requirement that the designated airline simply be incorporated in that State and have its principal place of business there. By eliminating the "substantial ownership" requirement, this multilateral Open-Skies agreement could open the door to increased cross-border investment for domestic airlines that have historically been forced to rely almost exclusively on domestic sources of investment capital.[213]

Along the same lines, new criteria have been established that redefine the traditional requirement of national ownership and control and which can thus be viewed as deviations. For instance, Hong Kong uses the "principal place of business" standard in its bilaterals; indeed, the Hong Kong clause grants the contracting party the usual right to revoke the operating permit granted to the airline designated by Hong Kong "in any case where it is not satisfied that that airline is incorporated and has its principal place of

---

[211] The eleven States gathered in Air Afrique are Benin, Burkina Faso, Congo, Centrafrique, Côte d'Ivoire, Tchad, Togo, Mali, Mauritanie, Niger, and Senegal.

[212] Alliance Air can be seen to be a resurrection of the defunct East African Airways; for more details about these international airlines, see IATA doc., *supra* note 13 at 20.

[213] For more details about the *APEC agreement*, see IATA doc., *supra* note 13 at 21; WTO doc. 2, *supra* note 98 at 25; D. Knibb, "Bilateral Accord Sparks Ownership Debate...as APEC Moves Towards Multilateral Open Skies" *Airline Bus.* (January 2001) 24.

business in Hong-Kong."[214] Another criterion that deviates from the traditional notion of "national carrier" is the concept of "community of interest" that was first introduced by ICAO in 1983.[215] According to this concept, the traditional conditions for *national* ownership and control are instead employed by a group of countries that share the same regional or economic interests. For example, although British West Indies Airways (BWIA) is substantially owned and controlled by Trinidad and Tobago, other Member States in the Caribbean Economic Community (CARICOM) have designated BWIA as the carrier that receives the traffic rights granted by third countries (*e.g.*, US, UK, and Germany) under their respective bilateral agreements.

Notwithstanding these many deviations, however, the "substantial ownership and effective control" principle has not been effectively superceded; in fact, it remains the dominant standard for establishing the nationality of airlines, particularly as it relates to the designation of traffic rights. However, the force of these possible pathways of change is increasingly enhanced by an ever-growing number of exceptions to the principle.

4.2 Exceptions to the principle of national ownership and control

More and more, States are amending the legal regimes that govern foreign ownership of their domestic air carriers and thereby breaking down the time-honored system of national restrictions. Many different factors have been behind this push. For some developing countries, increased foreign investment limits were necessary in order to obtain the financing needed to keep their national air transport activity operational, if not solvent. For example, in the 1990s, Brazil raised its ceiling on foreign ownership from 20% to 49.5%, Korea raised its cap from 20% to 49%, Thailand went from 30% to 49%, and Peru upped its limit to 70%. Bangladesh even went so far as to permit operation of its domestic carriers by joint ventures and unlimited foreign ownership of its cargo airlines. Then again, other countries have eliminated national restrictions altogether and have allowed 100% foreign capital investment in their airlines due primarily to their geographical setting. For example, with the emergence of Singapore as a major transit hub in the Asian-Pacific region, the Singaporean government saw fit to abolish ownership

[214] IATA doc., *supra* note 13 at 24.
[215] For the 1983 *ICAO Resolution*, see IATA doc., *supra* note 13 at 22.

restrictions that had limited foreign investment in its national airline, Singapore International Airline (SIA) to 27.5%, so that foreign investors could now hold 100% of SIA.[216] Likewise, both Australia and New Zealand were recently forced to accede to the reality of their isolated markets and relax limits on foreign ownership of airlines. Under the foreign acquisition regulations implemented by Australia in 1999, foreign carriers can own up to 49% of an Australian international airline and 100% of an Australian domestic carrier.[217] New Zealand, on the other hand, has removed foreign investment limits for its airlines altogether, but still requires that "control" of the airline must remain with its nationals.[218]

In addition to the changes in national airline ownership regimes, there have been a number of instances where multi-national airlines have departed from the traditional ownership and control requirement, oftentimes in spite of their respective national regulations. Case in point is the relationship between Iberia and Aerolineas Argentinas. Iberia (a Spanish airline and partner, along with American Airlines and British Airways, in the Oneworld Alliance) is the biggest investor in Aerolineas Argentinas, owning more than 60 percent of Argentinean air carrier. While Iberia's ownership of Aerolineas Argentinas is permissible under Argentine domestic law, which allows foreign airlines and/or other investors to own up to 70 percent of an Argentinean airline, it is patently inconsistent with the nationality clause in the US-Argentine bilateral agreement. Nevertheless, the Argentinian government welcomed the Iberia deal for the infusion of

---

[216] Ionides, *supra* note 82 at 36.

[217] The difference between these two percentages is due to the special protection of Quantas, viewed as an "Australian Icon", see Knibb, "Australian Ownership Rules Criticised" *Airline Bus.* (August 1999) 26; "Australian Government to Ease Foreign Ownership restrictions" *Aviation Daily* (19 August 1999) 3; IATA doc., *supra* note 13 at 24; Australian Commonwealth Department of transport and regional services, *International Air Services*, Policy Statement (June 2000), online: the Australian Commonwealth Department of Transport and Regional Services http://www.dotrs.gov.au/aviation/intairservices.pdfhttp://www.dotrs.gov.au/aviation/intairservices.pdf (date accessed: 10 May 2001).

[218] Knibb, see *supra* note 213; moreover, Air New Zealand suffers from lack of capital, so the NZ government currently analyzes foreign bids to recapitalize the national carrier; this urgent need of capital has probably pushed as well the government to relax national restrictions on ownership of airlines, see S. Bartholomeusz, "Ansett's survival goes to the heart of deregulation policy" *The Age* (7 September 2001), online: The Age http://www.theage.com.au/business/2001/09/07/FFX2JVQF9RC.html (date accessed: 7 September 2001); G. Thomas, "Air NZ plummet hits SIA and BIL" *The Age* (25 September 2001), online: The Age http://www.theage.com.au/news/national/2001/09/25/FFXEPDK02SC.html (date accessed: 26 September 2001); G. Evans, "Air NZ shares bounce as talks continue" *The Age* (26 September 2001), online: The Age http://www.theage.com.au/news/national/2001/09/26/FFX44YQ02SC.html (date accessed: 26 September 2001); Z. Coleman, "Government rescues Air NZ" *The Globe and Mail* (5 October 2001) B7.

capital it gave to Aerolineas Argentinas, while the US acquiesced to the Iberia-Aerolineas Argentinas arrangement in exchange for expanded traffic rights from the Argentinian government, arguably providing proof positive of the advantages that a liberal airline ownership regime would afford.[219]

Perhaps no case better demonstrates how cross-border investment can be used to save national airlines from bankruptcy then the joining of Swissair and Sabena. On January 25, 2001, the two airlines entered into an agreement whereby SairGroup (a subsidiary of Swissair) would increase its stake of ownership in Sabena from 49.5 to 85 percent. The Swissair/Sabena agreement was to take effect once the bilateral agreement between Switzerland and the EU, which would make EU rules applicable to Switzerland, entered into force.[220] However, because of financial difficulties encountered by Swissair, the January 25, 2001 accord was cancelled and a new agreement signed on July 17, 2001, pursuant to which SairGroup ownership of Sabena would remain at 49.5 percent. But after a financial package from the Belgian government failed to address Sabena's need for additional capital, Swissair agreed to contribute up to 60 per cent of a restructuring plan.[221] Of course, in retrospect, the wisdom of Swissair's decision to bail out Sabena is in doubt, as it likely contributed to the carrier's recent financial collapsed.[222]

In the global air transport marketplace, which favors full market access, concentration, competition, and multi-lateralism, bilateral agreements with their restrictions on ownership and control of airlines are no longer relevant. Nevertheless, States are slow to react to new economic trends, mainly because of protectionist considerations. While few States have taken the initiative in relaxing their regulations, airlines have not stood pat waiting for change. Through cross-border investment

---

[219] H.P. van Fenema, "Ownership Restrictions: Consequences and Steps to be Taken" (1998) 23 Air & Space L. 63 at 65; IATA doc, *supra* note 13 at 25; about the need of capital of the Argentinian carrier, D. Knibb, "Aerolineas Rescue Relies on Spain" *Airline Bus.* (August 2000) 18.

[220] IATA doc., *supra* note 13 at 26.

[221] Swissair Group, New Release 20/01/DC, "Swissair Group et le gouvernement belge signent un accord sur Sabena" (17 July 2001), online : Swissair Group http://www.swissairgroup.com/apps/media/press/index.html/?period=archive&language=f#?period archive1language=f (date accessed: 27 September 2001).

transactions, the airlines have become increasingly globalized like many other important industries. Clearly, the international community must do more to liberalize the air transport sector and expand market access. Indeed, as we have seen, even those few liberal countries that have relaxed the national ownership requirement, often still maintain the "control" criterion. Still, the removal of some national limitations on foreign ownership is a positive first step, since restrictions represent the biggest impediment to free circulation capital between international industries and are a major reason for the lack of globalization in the air transport industry.

[222] D. Michaels & R. Thurow, "Swiss banks draw ire" *The Globe and Mail* (5 October 2001) B7.

PART 2.
JUSTIFICATIONS OF NATIONAL RESTRICTIONS REVISITED

For several decades, the question of the justification for national restrictions in the international airline industry has been debated between national and international aviation entities, but absolutely no consensus has been reached by the international community. Presently, twenty years after the first deregulation act of the air transport sector, seven years after the last ICAO Air Transport Conference, and only two years before the next ICAO Conference, it is time to fully and objectively assess whether legitimate reasons remain that favor foreign investment restrictions. Particularly in light of the progressive shift of the airline industry towards a more liberal market, it must be asked whether there are credible reasons for maintaining such a restrictive regime. Chapter 1 therefore surveys the whole debate regarding the ownership restrictions, and advocates their abolishment; Chapter 2 examines the legal and economic consequences and the benefits of a regime overhaul.

Chapter 1. Analysis of legal, economic, and security justifications of the national restrictions

In the year 2000, the American Bar Association (ABA), through its Air and Space Law Forum Special Committee on Cross-Border Investment and Right of Establishment in the International Airline Industry, raised a series of pertinent issues "in determining whether there should be any change in US laws on foreign investments in the airline industry and whether it is feasible to work towards a common international standard on cross-border investments."[223] As most of the issues raised by the ABA are not only

[223] American Bar Association, "Cross-Border Investment in International Airlines: Presenting the Issues" (2000) Air & Space Law. 20 [hereinafter ABA doc.].

related to the US airline industry, but also concern the entire international airline industry, the issues will be surveyed in the following analysis.[224]

To reach a more objective conclusion on the prospective need for changing national restrictions, two important issues must be taken into account. First, what is different or unique about the airline industry, compared to other industries, that requires special restrictions on foreign investments? Due to its great military, political, and security importance, aviation has been particularly protected by States since the First World War.[225] However, times have changed since the beginning of aviation, and even though these characteristics are still true today, commercial aspects have become equally important. Thus, airlines have progressively become a real industry, facing the same competition rules as any other industries.[226] Today, very few industries are concerned by foreign investment restrictions, and even "strategic" industries are more and more subject to market rules.[227] Nevertheless, opinions vary with respect to the wisdom of altering the substantial ownership and effective control principle. Many people argue that some of the particularities like security and safety should never be dropped for economic reasons since the original reasons why special restrictions on foreign investment had been imposed in the sector still exist.

The second issue that must be addressed is whether national restrictions on foreign ownership and control are in favor of the "public interest". The notion of 'public interest' is very broad: it includes the interest of States,[228] of airlines and their employees, of

---

[224] The arguments analyzed hereunder are the most frequently arguments discussed by governments; therefore, this list of arguments herein presented does not aim at being exhaustive.

[225] Wassenbergh, *supra* note 120 at 5.

[226] Mr. Schless states that "Once the free market principles are implemented there is no reason to expect aviation to develop differently from other global industries like computers, cars, chemicals, fashion or media", see Schless, *supra* note 93 at 461; the same opinion has been expressed by Doganis, *supra* note 56 at 269.

[227] The US still remains very protectionist, imposing national restrictions on many sectors, such as broadcasting, electric power, nuclear power, and shipping, see Warner, *supra* note 108 at 304. In Canada, national ownership and control is required in certain sectors as well; for instance, "[b]oth the *Telecommunications Act* and the *Broadcasting Act* limit foreign ownership of operating companies in the industries to 20 percent", see D. Johnston, D. Johnston, S. Handa, *Getting Canada Online – Understanding the Information Highway* (Toronto: Stoddart Publishing Co. Limited, 1995) 121; however, presently, Canada is pushing for ownership limit changes, see P. Brethour, "Telecom ownership review coming: AT&T" *The Globe and Mail* (30 October 2001) B1 & B6; see also, K. Damsell, "Ownership rules key: Astral" *The Globe and Mail* (14 December 2001) B5.

[228] The ABA raises the following questions: "what benefits, if any, might accrue to US interests by a change in the rules pertaining to foreign investments in US airlines?" and "are the national interests served by

passengers, of investors and any other contractors involved directly or indirectly in the airline industry. Accordingly, do ownership and control restrictions serve the legal and economic public interest, as well as the security public interest? H. Wassenbergh stresses the significance of this notion by encouraging governments to take into account the needs of society before implementing any new policy,[229] indicating that "[t]o pursue a liberal air policy (...) will require governments to recognize the international public interest as of primary importance, as their national interest will depend on increased international co-operation."[230]

1. Legal and economic arguments

States view aviation as vital to their national economic interests and consequently feel a need to support and sustain their own airlines.[231] As a result, a number of legal and economic reasons have commonly been forwarded by governments in favor of national restrictions on foreign investments. However, the legitimacy of most of these arguments is questionable and will therefore be examined to determine the risks of the elimination of foreign investment restrictions, which would lead the international airline industry towards mergers and takeovers.

1.1 The interests of passengers

How would the liability of an airline be determined, in case of an accident for instance, if it were majority owned by foreign citizens? This first legal argument has been raised in order to protect passengers who wished to pursue a negligent air carrier for compensation. The current legal regime is based on the *Chicago Convention*[232] and on the

---

restrictions on foreign investment in airlines fundamentally directed to "ownership" and "control"?", see ABA doc., *supra* note 223 at 20.

[229] "Government tasks are to deploy activities which are in the public interest, which fulfil an essential role in the society, which are not supposed as such to yield a profit, at least should nor be undertaken nor exploited for profit and activities that are needed by the society, but do not find a private undertaking to deploy them", see Wassenbergh, *supra* note 120 at 12.

[230] H. Wassenbergh, *supra* note 120 at 15.

[231] Doganis, *supra* note 56 at 268.

[232] The *Chicago Convention*, *supra* note 2.

"Warsaw system"[233] (on 28 May 1999, a new Convention was signed in Montreal to update the "Warsaw system").[234] In cases of foreign ownership, this liability regime does not change, as it is an international regime applicable to the whole international community. However, there must be a clearly identifiable locus of responsibility for the safety and security of airlines. The concern is that if a carrier is owned by nationals who are not citizens of the designating country, it may be difficult to demonstrate the designating government's continuing competence in the technical aspects of airline and aircraft certification. In practice, this concern does not seem to be a problem because, whatever the owner's nationality, the aircraft that caused damages must be registered and the State of registration is responsible for any technical problems.[235] Therefore, if, for instance, a French air carrier is majority owned by Canadians citizens, but the aircraft is registered in France, the French State will be recognized as responsible for any technical defects of the aircraft.

---

[233] The "Warsaw system" is composed by eight private international air law instruments, which are: the *Convention for the Unification of Certain Rules Relating to International Carriage by air*, signed at Warsaw, 12 October 1929, 137 L.N.T.S. 11, 49 Stat. 3000, T.S. 876, ICAO Doc. 601 (entered into force on 13 February 1933) (hereinafter the *Warsaw Convention*), the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by air signed at Warsaw, 12 October 1929,* done at the Hague, 28 September 1955, 478 U.N.T.S. 371, ICAO Doc. 7632 (entered into force on 1 August 1963) (hereinafter *The Hague Protocol 1955*), the *Convention Supplementary to the Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, signed in Guadalajara, 18 September 1961, 500 U.N.T.S. 31, ICAO Doc. 8181 (entered into force on 1 May 1964) (hereinafter the *Guadalajara Convention 1961*), the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by air signed at Warsaw, 12 October 1929, as Amended by Protocol done at The Hague on 28 September 1955*, signed at Guatemala City, 8 March 1971, ICAO Doc. 8932 (not yet in force) (hereinafter the *Guatemala City Protocol 1971*), *Additional Protocol N°1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by air signed at Warsaw, 12 October 1929,* signed at Montreal, 25 September 1975, ICAO Doc. 9145, 22 I.L.M. 13 (not yet in force) (hereinafter the *Additional Protocol N°1*), the *Additional Protocol N°2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by air signed at Warsaw, 12 October 1929,* signed at Montreal, 25 September 1975, ICAO Doc. 9146, 22 I.L.M. 13 (not yet in force) (hereinafter the *Additional Protocol N°2*), the *Additional Protocol N°3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by air signed at Warsaw, 12 October 1929,* signed at Montreal, 25 September 1975, ICAO Doc. 9147, 22 I.L.M. 13 (not yet in force) (hereinafter the *Additional Protocol N°3*), the *Montreal Protocol N°4, to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by air signed at Warsaw, 12 October 1929,* signed at Montreal, 25 September 1975, ICAO Doc. 9148, 22 I.L.M. 13 (not yet in force) (hereinafter the *Additional Protocol N°4*).

[234] The *Convention for the Unification of Certain Rules for International Carriage by Air*, signed at Montreal, 28 May 1999, ICAO DCW Doc. No. 57 (not yet in force) (hereinafter the *Montreal Convention*); for more information about the Montreal Convention, see T.J. Whalen, "The New Warsaw Convention: the Montreal Convention" (2000) 25:1 Air & Space L. 12.

[235] The *Chicago Convention, supra* note 2 Art. 17-21.

Will consumers benefit from the ease of cross-border investment limitations, in terms of price and service? Consumers usually oppose international airline mergers, because they fear "price grouping" and reduced service, but this can beshown to be groundless. First, the fear of a price increase stems from the idea that "when two airlines merge, fares generally rise where the new airline dominates the market."[236] This idea arose following the past merger wave between US airlines, such as when Trans World Airlines (TWA) acquired Ozark Airlines in 1986. In fact, even though these mergers have decreased competition and raise prices to some degree,[237] they occurred in the already very concentrated US market. With respect to cross-border investments in the world market, there would be completely different consequences. E. Perkins, while criticizing the mergers of airlines, has himself admitted some advantages of merging: he explains that a merger of competitors usually leads to significant economies of scale, which leads to lower prices, but this process has not worked in the US market because "each of the seven giant airlines is large enough: getting bigger isn't going to gain much in the way of economies of scale."[238] On a worldwide scale, on the other hand, there are still many airlines that must be strengthened (through cross-border investment operations) to become more competitive and offer lower prices. It can be argued that multiple mergers in an industry-wide consolidation would even tend to decrease fares, and one of the reasons mentioned is the presence of low-fare carriers.[239] Moreover, another advantage of airline consolidation for consumers is the development of loyalty programs. Indeed, passengers or any other airline consumers who participate in FFP can receive benefits because merged airlines usually have more cities offered as destinations for frequent-fliers miles.

Aside from the fear regarding prices, passengers are concerned about the reduction of service quality. Indeed, 'bumpy' service was the short-term result of the US airline consolidation, mainly because airlines had to work out problems with their schedules and

---

[236] L. Miller, "Airline Merger Offers Fliers No Pie in Sky" (1996) Wall St. J. Eur. 8 at 8.
[237] *Ibid.*; J. Mosteller, "The Current and Future Climate of Airline Consolidation: The Possible Impact of an Alliance of Two Large Airlines and an Examination of The Proposed American Airlines-British Airways Alliance" (1999) 64 J.Air L. & Com. 575 at 600.
[238] E. Perkins, "Mergers will squeeze consumers" (1997) Orange County (Cal.) Reg. D04.
[239] Mosteller, see *supra* note 237 at 601.

operations.[240] Thus, the DOT received thousands of consumer complaints in 1987.[241] On a global basis, however, international airline mergers could benefit airline service to consumers in the long run. For example, carriers can learn more efficient and popular service techniques from each other, and can share their know-how and their operating means. In addition, as cross-border investments strengthen weaker carriers, competition might increase among the carriers. With the increase in competition, it would not be in the interest of airlines to lessen the quality of their services; if they did so, airlines would lose consumers and lose the benefit of the costs that had been cut.

1.2 The interest of airline employees

How will the interests of labor be affected if foreign investment restrictions are relaxed?[242] The removal of ownership and control limits, which leads to international mergers, have a double effect on airline's employees.

The first effect is on the employment itself. So far, employees have always opposed any change in national regimes, for fear that it would result in a loss of jobs. Many unions are concerned that foreign investors would use their control over national airlines to replace national workers with foreign workers.[243] Others have taken the BA/USAir proposal as an example to prove the legitimacy of the risk of job loss.[244] However, none of these arguments are really justified, they just represent an assessment of what may happen. In the current difficult economic climate for the airline industry, airlines need to consolidate. J. Mosteller states that "[t]he perception of the airlines may very well be that if they do not defend themselves via consolidation, they may not be able to stay competitive against the giant alliances that would form. Thus, if the airlines did not

---

[240] *Ibid.* at 602; Miller, *supra* note 236 at 9.
[241] "Complaints About U.S. Airlines Up Almost Seven-Fold In August" (1987) J. Rec. (Okla. City).
[242] ABA doc., *supra* note 223 at 22.
[243] Bohmann, *supra* note 3 at 713; pilots' associations have expressed their fear about the impact on employment, such as the Federation of Airline Pilots' Association (IFALPA), see "Ownership Trend Creates Need for New Links Between States and Airlines" (June 1992) 47 ICAO J. 14; and see the Coalition of Airline Pilots Associations (CAPA) document, CAPA minutes, *Memorandum of Understanding*, APA headquarters Fortworth, Texas (9-10 February, 2000), online: CAPA http://www.capapilots.org/Download%20Files/minutesfeb910.htm (date accessed: 14 May 2001).
[244] Edwards, *supra* note 17 at 636 (this article provides a study made by the Economic Strategy Institute) and Arlington, note 110 at 165 (this article provides the arguments of the "Big Three" US air carriers directly in competition with USAir).

merge, their profits could decrease by such a margin that layoffs would happen anyway."[245] From this point of view, we can deduce that it might be more risky for the industry's employment if airlines remain isolated and competitively weak. Moreover, we can easily add that, by principle, a competitive industry produces more output than a monopolized one. This suggests that employment levels will be enhanced if a competitive industry is fostered. T. Ross and W. Stanbury agree with this theory, and, in their discussion of the Canadian industry, they affirm that, "while a monopoly that guarantees jobs might seem like a nice way to protect employment through a restructuring, in the long run there will be more jobs in an efficient competitive market place."[246] The competitive marketplace can largely evolve if foreign investments between international airlines are authorized, since the infusion of capital would contribute to the development of the fleets of airlines, and consequently, of their networks, which would clearly increase the need for employees.[247] The other fear about jobs is that foreign investments lead to the employment of foreign workers instead of national workers, due to lower labor costs in some countries. Two remarks can be made on this point. First, it cannot be ignored that this situation already exists: no international regulations prevent airlines from hiring foreign crew or administrative staff. The removal of foreign ownership restrictions could enhance such a phenomenon because mergers or financial alliances would create single entities, gathering airlines from different countries, and making foreign employment easier. Thus, this is a legitimate risk that should be taken into account as a possible consequence of the authorization of international mergers and takeovers among airlines. However, in practice, it is unlikely that cross-border investments would significantly change their current staff representation around the world. Indeed, it is hard to imagine that a carrier like Air France would replace its current crew by Korean or Mexican flight attendants. While it might save money, the public image of the airline is important to protect as well. As crew members are the closest link of the airline to its passengers, national customers would probably not wish to deal with foreign interlocutors when they choose the main national airline. Major international airlines are more eager to work on

[245] Mosteller, *supra* note 237 at 599.
[246] Ross & Stanbury, *supra* note 204 (part named: "Protecting Jobs is Both Inefficient and Unfair").
[247] In order to defend the BA/USAir proposal, USAir demonstrated that the infusion of capital would "assure the employment future of 46,000 USAir employees", see Arlington, *supra* note 110 at 166.

the service's quality and on their image for keeping their customers' loyalty, than to find absolutely any means to reduce costs with respect to their crew. The second remark about the risk of the reduction of employment of nationals is that it is necessary to determine whether nationals of particular countries are really concerned by this risk and whether the risk does in fact exist. As in most economic sectors, in the airline industry, labor costs much less in developing countries than in developed countries. Thus, European States and the US are concerned about employment effects, since the labor costs are quite high in these countries. This could explain why employees in the US, for instance, are so reticent about foreign investment liberalization. However, they have no reason to fear: American labor is not at all endangered by the lifting of restrictions since US labor costs are in fact quite low, at least in comparison to most of the EU countries. Thus, even with substantial foreign investment, US carriers would have an economic incentive to employ US citizens rather than Europeans.[248] Consequently, US jobs would not likely be endangered by higher foreign investment limits as a result of the reasonable US labor costs, nor would jobs in the EU as a result of the importance of preserving brand image.

The second effect of the removal of ownership and control limits on airline's employees is the integration of employees in a new entity. Indeed, one of the most difficult tasks facing merging airlines is how to integrate their employees And how to integrate the personnel, cultures, and policies of two different organizations. This issue raises the particular question of the seniority rankings, which are used by the airline pilots to determine which pilots fly the popular schedules and routes. Merging the pilot lists of two airlines could push pilots down the seniority ladder.[249] It is certainly a delicate process to adapt an airline structure to another one: it is time consuming, especially considering the seniority system of such employees as pilots, who are generally resistant to any change in their position in the hierarchy after years of service. Still, this point should not justify blocking the liberalization of foreign investment. The synergy of two organizations is possible to implement even if, for instance, the synergy of pilots would require a great deal of effort with respect to the reorganization of operations. Moreover, the removal of foreign investment restrictions does not automatically entail mergers

[248] Bohmann, *supra* note 3 at 714.

between air carriers: it could simply lead to the contribution of capital among airlines without any need to integrate the seniority rankings of pilots.

1.3 The interests of other involved contractors

What are the economic costs and benefits to the national economy of relaxing restrictions on foreign ownership?[250] To what extent should national economic security be concerned by the issue of the ownership and control of airlines?

Airlines contribute to their local economies in many important ways. If an airline meets financial difficulties, its activity and number of employees might be reduced. In the long run, the carrier may even disappear if it does not receive financial support. This support may come in through cross-border investments.[251] Thus, lifting foreign investment limits could help to preserve the economic well-being of airlines, and, in turn, the economy that is dependent upon them.

The current global market has an interdependent nature. It is interdependent inside the aviation industry itself where international airlines are all economically related because they all depend on the aviation market. The market, taken as a whole, is interdependent as well, as every economic activity depends on each other. In his article on foreign ownership, D. Arlington describes the important role USAir has had on the Pennsylvania economy by being "the second largest private employer in the southwestern part of the State" and "important to many of the other local economies that it serves" in the short and long run.[252] USAir served the building trade by making enormous investments in a huge new terminal and a large hub; it employs thousands of people who work, live and contribute to the local economies all around the US; and it brings a flow of professional visitors to Pennsylvania and also enhances tourism. Indeed, tourism is just one example of an industry that is directly concerned by the economic well-being of air carriers. Furthermore, having a good international airline has a huge impact on the

---

[249] Mosteller, *supra* note 237 at 599; McKinsey & Company, "Making Mergers Work" *Airline Bus.* (June 2001) 110 at 111.

[250] ABA doc., *supra* note 223 at 20.

[251] In the next sub-paragraph, we will examine why the airline industry needs more and more foreign capital to support its infrastructure and, hence, the urgency to raise foreign ownership restrictions in the airline industry.

promotion of a country as an international tourism destination in addition to all the industries that benefit from tourism. Thus, restrictions on ownership and control of airlines have two negative consequences on the tourism industry. First, if a national carrier has difficulties because it suffers from a lack of capital resources and goes bankrupt, the national tourist economy is also at risk, as would be the overall economy if tourism represents one of the main income sources for the country. The second negative effect that foreign investment restrictions have on the tourism sector is that restrictions are inherently biased against growth, as they tend to reduce the availability of new service opportunities to the level acceptable to the least competitive airline. Airlines are preventing from expanding their services at the rate they feel the market will sustain. Indeed, if foreign investors were allowed to offset the lack of capital felt by airlines, then airlines could operate more efficiently. Thus, restrictions on foreign investment penalize not only air carriers, but also travelers, shippers and the overall vigor of the world economy. G. Lipman, as the President of the World Travel & Tourism Council, stated a few years ago that "the airline sector must be liberated from its bilateral straitjacket" and added that "the system's ethos of growth within restraints can no longer accommodate efficiently the growing globalization of markets, and their increasing interdependence."[253] Presently, the promotion of tourism is a main argument used by some governments that are willing to lift the foreign ownership limit.[254] Indeed, the current air transport recession has contributed to the tourism recession; therefore, it is more important than ever to modify the current restrictive bilateral system that is directly biased against growth. The public interest depends on this shift.

1.4 National airline interests

Airlines are of course the entities that are the most concerned by the issue of ownership and control. This question is quite controversial with respect to the interests of the airlines. On the one hand, it has been admitted by most of the international community that national airlines need outside capital, not only as a prerequisite for growth, but also as a condition for survival; hence, the necessity to remove foreign

[252] Arlington, *supra* note 110 at 169.
[253] Lipman, *supra* note 74 at 152.

investment restrictions. On the other hand, a number of risks run by air carriers have often been raised with respect to the possible impact on airlines if they were not protected by national restrictions anymore. After studying the question of the need for outside capital resources, below, the extent to which it is risky for airlines to open their capital and control to foreigners will be analyzed. In other words, the legitimacy of the economic risks faced by the airlines will be examined.

1.4.1 Need for outside capital in national airlines

Why is access to a deeper capital market so important for the airline industry?

The main idea is that foreign investments spur national economic growth and development since they bring new scarce capital resources. They represent an engine for growth in developed countries and even more so in developing countries. Indeed, the success of newly industrialized States like Hong Kong, Singapore, and Taiwan, as well as the growth of some west African countries, is due to a fostered cross-border investments policy. Thus, foreign capital resources support national economies and benefit individual national enterprises since they increase trade and create jobs.[255]

In the airline industry, foreign capital resources have the same benefit. They help airlines remain competitive in the worldwide market, and are essential for airlines to avoid bankruptcy. Indeed, the airline industry is very fragile. It suffers from severe business risks as there are high fixed costs, highly cyclical demands, and intensive competition. Consequently, to be profitable, the airline industry should earn more than other industries; however, airlines earn less.[256] Therefore, airlines require national and foreign capital to finance their investments and expenses. Two alternatives exist for raising capital: first, internal alternatives such as asset sales or trading labor for equity; and, second, external alternatives, which are either national, such as government assistance, or international, with foreign investment.[257] Often, the lack of national capital resources must be offset by foreign capital contributions for national airlines to be

---

[254] "ANZ Asks Government To Lift Foreign Ownership Limits" *Aviation Daily* 345:10 (16 July 2001) 5.
[255] Haghighi, *supra* note 39 at 6 and 22.
[256] Dempsey, *supra* note 56 at 21.
[257] *Ibid.* at 78.

strengthened.[258] According to this logic, foreign investments should not be limited if they should be implemented to their full use in the global economic world. Especially in the airline industry, national governments should not snub outside capital: it inhibits the proper development of air services, whereas it could enable airlines to survive or grow. The evolution of the US airline industry perfectly illustrates the need to lift national restrictions on foreign investments and open the market to unlimited outside capital resources. Following deregulation and in the 1990s, many US air carriers that faced difficulty, such as TWA or Pan Am, could have been more effectively supported by foreign capital and would have had a better chance of long-term success.[259] In addition, these foreign contributions may have allowed certain US airlines to have survived and the US market would have been more competitive than it is today.

Thus, a pertinent question is whether the airline industry needs to be supported by foreign investors. Capital needs are presently very strong. First, it has been recognized that air carrier activity requires more and more capital contribution to face their huge expenditures; since the 1960s, capital spending by the world's airlines has continuously increased.[260] Second, during the year 2001, the air transport sector entered into a deep and mid- or long-term financial crisis, which was made even worse in September. Consequently, many carriers are looking at how they can help each other to survive,[261] and some governments even ask for a more liberal interpretation of the ownership and control provisions in the bilaterals "to facilitate any cross-border mergers or acquisitions necessary to maintain the viability of the aviation industry during the crisis."[262] Foreign capital resources are not only necessary, but are urgently required for a number of airlines, and all the world's regions are concerned by the crisis. Swissair and Sabena are the most recent examples of bankrupted aviation companies. Swissair's collapse, which occurred at the beginning of October, was mainly due to the excessive ambition of the

---

[258] Haanappel, *supra* note 1 at 96.
[259] Grant, see *supra* note 27 at 71; Bohmann, note 3 at 711; Edwards, note 17 at 619.
[260] According to a 1990s study, world's airlines need about $815 billion today, compared with $147 ten years ago, see Dempsey, *supra* note 56 at 76.
[261] "1944 and all that" *Sunday Times – London* (7 October 2001), available on WL 27457432.
[262] ICAO, Working Paper (*Substantial Ownership and Effective Control over Designated Airlines*) No. A33-WP/181 (25 September 2001) [hereinafter ICAO Working Paper No. A33-WP/181]; "UK says airline merger and acquisition rules should be relaxed" (3 October 2001) *Airline Indus. Info.*.

managers who stretched the airline beyond its financial capacity.[263] The disastrous financial outcome of the Swiss group led to the bankruptcy of the French airlines AOM and Air Liberté as well, after their struggles of half of the year, during which time they had requested more capital resources from their main investor, the SairGroup.[264] The Belgium airline, Sabena, also suffered since the Swiss industry was its main investor[265] and as a result, Sabena collapsed in November.[266] In North America as well, the airline industry has not escaped the current worldwide crisis, and therefore it needs capital more than ever.[267] However, national restrictions on ownership and control are so high in the US and in Canada, that, despite the outside capital need to support their activity, American and Canadian airlines are almost entirely dependent upon national resources.[268] In addition to the problems faced by airlines in the most developed countries, air carriers from developing countries suffer from under-capitalization as well. The current crisis worsens the lack of national capital sources that these countries have always known.[269]

At present, only a few governments seem to understand the importance of opening their national carriers' capital to foreign investors, which would enable airlines to face the current air transport crisis and ensure their long-term survival. The New Zealand

---

[263] Michaels & Thurow, *supra* note 222 at B7.

[264] For more information about AOM and Air Liberté struggle, see Mallet, "Companies & finance international: French airlines in crisis" *Financial Times* (9 April 2001), online: Financial Times http://specials.ft.com/In/ftsurveys/industry/sc22356.htm (date accessed: 16 May 2001); "L'Etat est contraint de jouer au "pompier social"" *Le Monde* (18 October 2001), online: Le Monde http://www.lemonde.fr/rech_art/0,5987,235581,00.html (date accessed: 5 November 2001); "Air Liberté espère revenir à l'équilibre en 2003" *Le Figaro* (2 November 2001), online: Le Figaro http://www.lefigaro.fr/cgi.bin/gx.cgi/AppLogic+FTContentServer?pagename=FutureTense/Apps/Xcelerate (date accessed: 5 November 2001).

[265] D. Michaels & R. Thurow, *supra* note 222 at B7.

[266] B. Crols, "Flag-carrier Sabena in death spiral" *The Globe and Mail* (6 November 2001) B13.

[267] McCartney, "Widening losses at airlines make shakup unavoidable" *The Globe and Mail* (6 November 2001) B15.

[268] K. McArthur, "Air Canada courting investors" *The Globe and Mail* (3 November 2001) B1.

[269] For instance, in the Caribbean region, see Caribbean Alpa, *The problem with all Caribbean carriers is undercapitalization*, publication, online: Caribbean Alpa http://www.caribbeanalpa.com/discussion/posts/1546.html (date accessed: 14 May 2001); in addition, some of the Caribbean airlines suffer from the September 11 US tragedy and, as a result, have to find short term funding, see "Air Jamaica hurt by US tragedy" *The St. Vincent Herald* (4 November 2001), online: Caribbean Alpa http://www.caribbeanalpa.com/news/index.shtml (date accessed: 5 November 2001); moreover, small countries, such as El Salvador, opposes national restrictions because of the need of outside capital, see Kass, *supra* note 131 at 150.

government, for instance, has finally relaxed foreign ownership limits in Air New Zealand, after a few months of debate.[270]

1.4.2 Potential risk of inhibiting transport operations

To what extent would the air transport operations of airlines be affected if foreign investment restrictions were relaxed?

The air transport operations of airlines have two components: the internal operations include the long-term flight schedule design, which is decided by the planning service; and the outcome of the internal operation, which is also part of the daily operation of any airline, which includes dealing with the possible material inconveniences resulting from the flight, such as delays, cancellations, and lost baggage.

Some have argued that the facilitation of airline mergers, fostered by cross-border investment liberalization, would impede the flight schedule management, and that the loss of time that would result from trying to combine two airline programs would be very costly. In addition, airlines would likely be unable to afford these costs, as "85% of an airline's cost structure is fixed to its schedule."[271] This position is understandable, given that changes to flight schedules require months of advanced planning. As the main activity of airlines, scheduling is animportant and expensive process with respect to time, employees, and money. Where there is a merger, the flight schedules of the merged airlines would have to be combined, which makes the process even more complex and costly. Planning services must work on the possible program synergies between the two carriers. However, if two carriers decide to merge, it is for all the economic benefits they may eventually obtain. To assess all the benefits of such a financial strategy, airlines must maintain a long-term perspective. Thus, materially, an integrated planning department must be created to combine schedules; while financially, the new department should develop common market-profitability measures, since a large part of the synergy in an

---

[270] *The Age* articles, *supra* note 218; *Aviation Daily*, *supra* note 254 at 5; "The New Zealand Government Relaxes Foreign Ownership Limits in Air New Zealand" *Air Transport World* (1 October 2001) 12.

[271] On the argument about the effects of mergers on the schedules of airlines, see McKinsey & Company, *supra* note 249 at 111 ("The general rule in successful post-merger management is that it is critical to get value quickly. But in airline mergers, a large portion of the synergies are revenue improvements, especially given the constraints in reducing cost. Unfortunately, these benefits require long-lead time decisions supported by careful planning. By the time the dust settles on the merger, these critical decisions are often far, far behind schedule").

airline merger comes from network optimization.[272] To agree on solutions, common measures must be implemented. With such a well-managed policy, airline's merger can be, in the long-run, a very high-profitable operation.

Concerning the internal operation's outcomes, such as delays, cancellations, lost baggage, or long lines, it has been argued that "[e]ven in the best times, the 'product' has a high service failure rate. (...) Failing to adequately plan for operational transition has been the undoing of many airline mergers."[273] However, mergers are not entirely to blame for service failures. First, airlines are often considered responsible for the inconveniences of air transport operations, whereas inconveniences are often caused by other entities: delays and cancellations can be due to air traffic control or airport inefficiency, lost baggage and long lines are mainly due to airport disorder or unreliable airline/airport subcontractors. Second, concerning the few failures caused by the airline's negligence, there would seem to be no reason for greater service failures that would be directly caused by national or international airline mergers. In this area as well, therefore, the full integration of the main services are required, using such planning services as described above, and demanding an organizational and rational synergy. No trouble should be faced by either the carrier or the consumer if the merger leadership team outlines a process that not only matches its capabilities, but can also be executed smoothly.

To sum up the issue regarding the air transport operations of airlines, the relaxation of foreign investment restrictions does not inhibit the normal course of the airline's daily operations. Even in the case of mergers or takeovers, air transport operations should not be affected if the concerned airlines have a managed and monitored rational integration.

1.4.3 Possible risk of a decline in competition

To what extent can competition between airlines be affected if foreign investment restrictions are relaxed?[274]

---

[272] *Ibid.* at 113.
[273] *Ibid.* at 111.
[274] This issue can been formulated differently as well: "The debate finally deals with the issue of whether the current regime imposes an obstacle to the development of liberalized and open aviation markets or whether the protection of the domestic aviation industry from foreign competition is still necessary", see Bohmann, *supra* note 3 at 715.

It is generally agreed that the lifting of foreign investment restrictions would increase competition in the airline industry; as a result, the airlines as well as the public community will benefit from this heightened competition. Indeed, the advantages of a liberal ownership and control regime with respect to competition are demonstrable in two ways. First, restrictions on the ownership and control of airlines impede new entrants from penetrating national markets. In the 1999 report of the Canadian Standing Committee on Transport, it is stated that "raising the foreign ownership limit to a higher level would remove a significant barrier to entry and enhance competition in the domestic air market."[275] National competition is effectively disadvantaged by all the restrictions since the enormous amount of capital needed to create new carriers may not be available in the hands of national individuals or entities.[276] Therefore, in most countries, despite the air transport liberalization, a main air carrier usually dominates national market, and a very few number of small carriers may attempt to survive alongside it.[277] If national restrictions are lifted, the enhanced competition would provide lower fares and more choices for customers,[278] and would thus benefit the public interest. In fact, it would be profitable to the market as a whole, including the airline industry. To what extent would more competition, fostered by the withdrawal of ownership and control restrictions benefit airlines? The basic theory is that since, by definition, a monopolist has no competitors, it has no incentive to search for ways to lower its production costs. Rather, it can simply pass cost increases on to consumers in the form of higher prices. According to C. Hill, "The net result is that a monopolist is likely to become increasingly inefficient, producing high-priced, low-quality goods, while society suffers as a consequence."[279] Of course, this theory also applies to the airline industry: demand will increase only if airlines try to improve their services, both qualitatively and quantitatively. Thus, the role of government in the market economy is to encourage vigorous competition among

---

[275] Standing Committee on Transport, *supra* note 188.
[276] *Ibid.* ("[T]he industry requires a great deal of funding and there are not sufficient pools of capital within Canada to allow new entrants to compete in the market").
[277] This is the case in Canada, increasing the foreign ownership limit may ensure that Canada has two competing national airlines, rather than one dominant carrier, see Standing Committee on Transport, *supra* note 188.
[278] Bohmann, *supra* note 3 at 715.
[279] C.W.L. Hill, *International Business: competing in the global marketplace*, 2nd ed. (Chicago: Richard D. Irwin, 1997) at 39 [hereinafter C.W.L. Hill 1997].

product or service companies; in doing so, it fosters private ownership and foreign ownership.

The second advantage of the withdrawal of foreign investment restrictions with respect to competition is the important capital contributions that could follow as a consequence. While new entrants increase competition in the domestic market, access to foreign capital enhances competition in the international market. Indeed, additional investment in the domestic airline industry would enable national carriers to compete more effectively with foreign carriers, as funding would allow existing carriers to expand their operations.[280] Access to foreign capital would enhance competition among air-faring States, as well as between developed and developing States, as it would allow the latter to reap the benefits of market competition and to compete much more fairly with dominant nations in the air carrier market.[281]

Despite the recognition of the advantages that the removal of foreign investment restrictions would have for competition, some authors insist that increased levels of foreign investment would lead to unfair competition. They argue that cross-border investments would lead to the domination of State-owned foreign airlines in the international airline industry. As a big concern for American carriers, this fear is cited by many authors: "heavily subsidized or even State-owned foreign airlines could invest in US carriers and, due to their State financial support, enjoy a competitive advantage over other US carriers."[282] Indeed, it is probably easier for an airline to depend on State subsidies than to seek private capital funds. Moreover, the airlines, constantly supplied by government subsidies, may be more tempted to offer lower prices to consumers than private carriers would be, and, consequently, they would dominate the market. A fair concern to raise would therefore be whether all these arguments against liberalization of cross-border investments are relevant. In fact, these arguments were probably more valid

[280] This argument has been often used for US airlines to remain competitive on the international scene, see Bohmann, *supra* note 3 at 715; see as well Department of Transportation, "Entry and Competition in the U.S. Airline Industry: Issues and Opportunities" Special Report 255 (30 July 1999), online: DOT http://www.ostpxweb.dot.gov/aviation/domau/dottrbre.pdf (date accessed: 10 May 2001). The same argument is used to promote Air New Zealand in the international airline market, see *aviation* Daily, *supra* note 254 at 5.

[281] Goo, *supra* note 73 at 562.

before the 1990s, when most of the airlines were still public-owned, than they are today.[283] In her article, A. Edwards addresses a catastrophic scenario resulting from this 'imagined' State-owned airline domination,[284] but it makes less sense now since the aviation landscape has been different for many years. Considering itself to be the most concerned State, due to its current aviation supremacy, the US has little reason for reacting against cross-border investment liberalization by criticizing the domination of State ownership of airlines. Several reasons explain why this reaction would be overstated. First, the move towards the partial or full privatization of public air carriers worldwide has made much progress in the past year, and only few important airlines remain State-owned. Second, the US airline market is already so concentrated and competitive that it is unlikely that a public airline would try to penetrate the US market. Third, public airlines should not seem to be a threat because regulations are becoming more and more stringent with respect to State aids[285] The partially privatized airlines or the subsidized airlines are more and more limited in capital funds, so they can afford to neither invest substantially in foreign airlines, nor drop ticket fares to remain competitive. Finally, if in any event the US or other countries remain concerned by this risk of unfair competition, they may always limit the ownership liberalization to carriers that are not owned or controlled by their governments.[286]

Considering all the above, it can be concluded that the relaxation of foreign investment restrictions will certainly affect competition in the airline industry. It will have a positive impact on the public interest, as well as on air carriers.

---

[282] Bohmann, *supra* note 3 at 715; Edwards, *supra* note 17 at 633; the ABA has raised this issue too by asking "[d]oes it matter whether the foreign investor is a government-subsidized airline?", see ABA doc., *supra* note 223 at 21.

[283] "From 1985 to 1994, the governments announced privatization plans or expressed their intentions of privatization for approximately 115 national airlines. Since 1995, another 50 carriers have joined the list", see ICAO doc. AT/122, *supra* note 35 at 2.5.

[284] "U.S. carriers will be forced to drop ticket fares to match the State subsidized carrier. (...) The strong carriers will be weakened by this artificial competition. (...) Additionally, it may prove destructive to the nationwide aviation infrastructure (...)", see Edwards, *supra* note 17 at 633-634.

[285] For instance, with respect to the EU, see Bohmann, *supra* note 3 at 716; see as well Dempsey "Competition in the Air", *supra* note 35 at 1124-1139.

[286] Bohmann, *ibid.*.

1.4.4 Potential risk of loss of traffic rights and the cabotage concern

To what extent are traffic rights of national airlines linked to the ownership and control issue? This main issue will be analyzed through two important questions that represent ones of the biggest economic concerns for governments and the airline industry.

The first relevant question to be answered is whether the international traffic rights of national airlines are really endangered by the relaxation of foreign investment restrictions.

International traffic rights involve the consent to routes between two States and are negotiated by bilateral agreements. State parties to these agreements designate the national airlines that are authorized to operate between the two countries and the main condition in the designation clause is the national ownership and control requirement of the designated airlines. If the lifting of foreign investment limits is decided by one State, the consequence on traffic rights will be as follows: the State A liberalizes its ownership and control law, and its airline A' is majority bought by B', the airline of State B. This acquisition allows B' to use the traffic rights of A', which had been previously negotiated between A and a third country C. The problem here is that C has not negotiated with B the traffic rights linking State A to State C, and there is no reason that State B should be able to access the State C' market, if C does not receive reciprocal market access into the State B.[287] There may be many reasons why C would not want B' to benefit from the traffic rights. For instance, C' would have to face more competition than foreseen in the negotiated agreements because, through financial operations with airlines of State parties to the agreements (*e.g.* takeovers, mergers, share purchases) third countries could benefit from the same routes. Accordingly, to protect its national economy and air carrier, C could cancel the traffic rights previously granted to A by using its revoke right granted in

[287] P. van Fenema gives some examples of this complex situation. For instance, "[i]f the US has a restrictive bilateral with France and a liberal bilateral with the Netherlands, Air France should not be able to profit from KLM's free market access into the US by buying a controlling interest in KLM. Because Air France would thus get market access into the US without having given reciprocal market access into France to the US carriers. Unthinkable in traditional *quid-pro-quo* thinking!" and then raises an interesting issue by asking "whether the outcome, i.e. the US revoking or restricting KLM's traffic rights, would or should be different if not Air France, but an independent French tour operator, bank or private investor – neither directly nor indirectly related to Air France – would have assumed control of KLM", see H.P. van Fenema, *supra* note 219 at 64.

the designating clause of the bilateral agreement. This situation has occurred many times. The countries that are most subject to the risk of the loss of their traffic rights are the EU Member States because cross-border investments have been fully liberalized among the Member States, but third countries do not recognize this liberalization; therefore, if an European airline purchases an airline from another European country, the State of the purchased airline will probably need to renegotiate its traffic rights with its partners. Thus, when British Airways purchased the French airline Air Liberté, the Moroccan State had asked certain conditions of the French State so that the traffic rights previously consented to Air Liberté on Morocco would be maintained. Outside the EU, this problem with respect to traffic rights was faced by *Aerolineas Argentinas*, which held traffic rights on the US; when *Iberia* purchased majority shares of the Argentinian airline, the US had undertaken a re-examination of the traffic rights since the number of Argentinian shares in the airline had become too low. It would therefore seem that traffic rights of national airlines are jeopardized by the withdrawal of foreign investment restrictions. However, in order to avoid risking the loss of traffic rights, the international community should first liberalize traffic rights before starting the process of cross-border investment liberalization. Indeed, if air routes do not need to be negotiated on a bilateral basis anymore, and if States step forward in the process of liberalization and replace Open-Skies agreements by plurilateral or multilateral arrangements, which would fully liberalize air transport market, there would be less concerns about the risk that governments and the airline industry could lose the traffic rights that are already in force in the event of the allowance of cross-border investment.[288]

The second important question to answer is: what would be the national economic benefits/costs for the opening of cabotage rights as a consequence of the liberalization of the ownership and control of airlines?

Cabotage (i.e. domestic air traffic rights) is "the transportation of passengers, cargo, or mail by a foreign airline between two points in the same nation-the foreign carriage of

[288] This issue of traffic right liberalization being a first step before relaxing the foreign investment restrictions will be further discussed below in Part 3 Chap. 1, at 100.

domestic traffic."[289] Article 7 of the *Chicago Convention* has affirmed the State's right to restrict cabotage.[290] Indeed, there has been a great deal of controversy over its interpretation.[291] In fact, some States have been particularly stringent about granting cabotage rights to foreign airlines, especially the US, which refuses in any event that foreigners should penetrate the US market, except in case of emergency.[292] The issues of cabotage and theownership and control of airlines both raise the same national concern: that is, the access of foreign carriers to national air transport markets. The main concern is that the liberalization of only one of these two restrictions would grant foreign carriers this access. Accordingly, the liberalization of ownership and control restrictions would be sufficient to give foreign airlines the chance to penetrate the market. Consequently, cabotage restrictions would be rendered meaningless. National governments have been wary of the competitive advantage a foreign airline could secure if given the opportunity to buy national airlines. Such an opportunity would allow foreign airlines to circumvent cabotage rules by operating within the internal air transport market through their national subsidies. This is why foreign ownership is considered, by P. Dempsey, as the "back door to cabotage."[293]This national concern has inspired governments to protect their market and their airlines to a great extent, hence the remaining strict regime on foreign investments. For example, the US has never wanted to take the risk of reducing the US airline market[294], since cross-border investments could allow the foreign investor to assume all the routes and market advantages of the target carrier.[295]

---

[289] Schless, *supra* note 93 at 452, note 113.

[290] The *Chicago Convention*, *supra* note 5 Art. 7.

[291] The terms "specifically" and "exclusive basis" in the second sentence of the text have been interpreted differently, and need to be clarified. Mainly, it raises the question as to whether cabotage is granted to one State, or whether the same rights would need to be made available to other states, see Kass, *supra* note 131 at 152; and see Warner, *supra* note 108 at 314-315.

[292] Like for the ownership and control issue, the US maintains a very strict position on cabotage, remaining very protectionist. However, DOT's policy is evolving progressively towards a more liberal interpretation and acceptance of cabotage, following the US airline industry call for change, see Kass, *supra* note 131 at 156-163.

[293] Edwards, *supra* note 17 at 626

[294] The US, more than any other State, feels threatened by this issue since, as it has the biggest and strongest air transport market in the world, it does not want to lose its supremacy.

[295] A. Edwards even states that a simple increase of ownership limits to 49% would give too much control to foreign airlines; thus, this increase "will allow foreign carriers to indirectly commit cabotage via actual control of US airlines. Therefore, liberalization of the US domestic market will create the threat of potential foreign dominance", see Edwards, *supra* note 17 at 628-629.

The potential threat for the airline industry should be analyzed with respect to the effects of cross-border investment on cabotage. This issue has seen a great deal of debate. Most authors advocate the denial of cabotage rights to foreign air carriers since cabotage represents a big danger for national economy. The same arguments as those used against the increase of foreign investment are usually advanced against the granting of cabotage rights as well. These reasons include the protection of national security and of the national carrier competitive advantage in the national market, which would also tend to safeguard national employment. However, at the present time, more and more States and authors support the idea of eliminating cabotage restrictions, citing two reasons. First, the main justifications for cabotage restrictions are not relevant, such as national security.[296] Second, other justifications can be interpreted differently, so the current consequences of granting cabotage rights to foreign carriers would in fact benefit national economy.[297] Thus, it is difficult to give a clear and definitive answer about the national economic consequences of cabotage. To determine whether cabotage is worthwhile for the economy, a deeper analysis of the issue would be necessary. For the moment, we can say that as with the ownership issue, the changing scene of the aviation industry of the past twenty years has required an evolution of the main air transport concepts and restrictions in order to maintain the competitiveness of national airline industries. Indeed, I believe that the liberalization of cabotage would result in more financial and economic benefits than economic losses.

In fact, whether the effects of cabotage on national economies are positive or not, the airline industry will probably not suffer the effects. The US air transport market demonstrates this since the US has always been one of the most reticent States to cabotage. Thus, two reasons explain why opening cabotage would not significantly affect

---

[296] National security is not a good reason for keeping cabotage restrictions because States would not be more threatened in case of cabotage liberalization; national security is probably more concerned by the ownership and control issue than the cabotage issue, see Section 2 at 75, below; moreover, for the ones who believe in the fact that cabotage would be too risky for national security, it can be argued that cabotage rights granted to foreign airlines can always be suspended in case of emergency or war, see Warner, *supra* note 108 at 317.

[297] F. Bliss answers positively the question "[d]o cabotage rights in fact constitute great economic opportunity?"; he states that cabotage would enhance competition in the airline industry and therefore it would benefit the industry itself and the consumer, see F.A. Bliss, "Rethinking Restrictions on Cabotage: Moving to Free Trade in Passenger Aviation" (1994) 17 Suffolk Transnat'l L. Rev. 382 at 399, and notes 63

the US airline industry. First, it would be absurd and irrational that a foreign airline set up a route network in a country where almost every airline suffers from "chronic economic anemia".[298] Indeed, in the US, the airports are already surcharged, the slots are all taken, and the internal market is highly competitive, even among the very few major US air carriers. Accordingly, it would not be worthwhile for a foreign carrier to penetrate the US market.[299] On this point, Mr. Scocozza indicates that "cabotage rights must be valued in light of the highly competitive US market, rather than on the vast size of the market."[300] In fact, such a closed market exists in each EU Member State as well. Indeed, by the third package of liberalization,[301] cabotage between all the Member States has been decided, and it entered into effect after a transitional period which ended on April 1, 1997. However, since 1997, European airlines have not been very eager to penetrate each other's internal markets, given the fact that each market is already very competitive and does not provide enough demand for new entrants.

Second, cabotage is not going to bother the US airline industry for the following reason: the US industry is the strongest in the world[302] and, as such, has a tremendous advantage over the worldwide scale. If a foreign carrier wants to enter the US market, it would find it difficult to compete. Indeed, it is hard to imagine that the liberalization of the US domestic market would create the threat of potential foreign dominance.[303] In their comparison of US and European carriers, Gibson and Goldstein note that

> [t]he US carriers have dramatically lower costs, a larger domestic passenger base, greater experience running hub and spoke-networks, and sophisticated management and pricing systems. (...) Since few foreign carriers mount heavy transpacific or transatlantic schedules, the number of foreign carrier flights actually added to US airways would be minor. Many of these would be at off-peak hours, due to the timing of the intercontinental flights they meet or continue. Would Singapore Airlines set up a huge hub in San Francisco and

---

and 65. S. Warner develops the same idea by stressing the advantage the US economy would benefit from cabotage liberalization, see Warner, *supra* note 108 at 317-318, and note 276.

[298] Dempsey, *supra* note 56 at 91.

[299] Cabotage in the US would be useful for foreign carriers only to extend some of their existing US services to major inland cities. A Seoul-to-Los Angeles-to-Dallas route, for instance, would allow Korean Air Lines to offer single-airline convenience for travelers to and from this destination.

[300] Bliss, *supra* note 297 at 399, note 66.

[301] The third package of the EU liberalization (1992), *supra* note 52.

[302] The US airline industry has always been considered as the strongest airline industry in the world. However, the terrorist events occurring in the US since September 11th have seriously endangered the national industry, and most of the US airlines currently survive because of State assistance. It is still too early to state the real impact, in the mid and long run, of the attacks on the US airline industry, but it will probably be weakened on the worldwide scale and will need time to regain its previous state.

[303] Edwards, *supra* note 17 at 628-629.

> offer deep discount flights throughout the US? I doubt it. Such a foray would be expensive and meet heavy competition. Most of the airline's low-labor cost advantages would disappear operating from a US base.[304]

Considering all the above, it can be concluded that the lifting of foreign investment restrictions does not have a detrimental effect on traffic rights, given that an alternative solution can be found. Nor would it affect national economy since cabotage is not a danger for the national airline industry. It can even be said that cabotage, fostering national competition by its nature, benefitsthe whole industry and the public interest. Consequently, the maintenance of the requirement of the substantial ownership and effective control of airlines is not justified by arguments with respect to international traffic rights and cabotage.

1.4.5 Risk of loss of bargaining chip

Is the State's bargaining chip power, resulting from ownership restrictions, essential for the national airlines to expand their route?

As discussed above,[305] it seems that one of the main reasons for States to keep their ownership restrictions includes a desire to keep their bargaining power. The behavior of the US demonstrated this: by implementing the Open-Skies policy,[306] the US started to negotiate, on a bilateral basis, market access with its partners and used their strict ownership law as a strategic tool to extend their air routes worldwide.[307] In a bilateral struggle, a State can effectively expect "extra" benefits from its partners in exchange for concessions that may be extracted from the other party whose carrier's nationality is in doubt or from a party that owns such a carrier.[308] As P. van Fenema notes, "[t]he external aspect of ownership and control is thus primarily a matter of airpolitical expediency, not

---

[304] Warner, *supra* note 108 at 317, note 275.
[305] For further discussion of the bargaining chip notion, see Part 1, Chap. 2, above, at 34.
[306] See Part 1, Chap.1, above, at 20.
[307] In short, the bargaining chip can be described as follows: if you (State X) give me (the US) Open-Skies, I will give you my approval regarding national ownership and control restrictions.
[308] "For example, if a foreign airline gains control over a US airline, this foreign airline could essentially obtain complete access to the US aviation market. In these circumstances, the foreign airline's government would have little incentive to grant other US airlines greater access to its own market", see Warner, *supra* note 108 at 312.

of law or principle."[309] The issue of bargaining power with respect to ownership and control requirements has played an important role in a number of negotiations, such as in the British Airways/KLM joint venture discussions of 1991 and in the 'Alcazar' negotiations between Swissair, Austrian Airlines, SAS and KLM, thereafter,[310] as well as in KLM/Northwest and BA/USAir transactions.[311]

Despite these several uses, two characteristics of the current aviation landscape show that there is increasingly less justification for governments to fear losing their leverage in the negotiating bilateral process in the event of the liberalization of the ownership and control rule. The first point is that the international airline industry is moving progressively towards a multilateral negotiating process and abandoning bilateralism. Of course, bilateral agreements still remain the main method by which air carriersbargain; however, both the need to lift national constraints (mainly foreign investments and market access restrictions) and the need for equal States to belong to the same group, and therefore gathering around the same interests, lead the airline industry towards a more regional, plurilateral and/or multilateral environment.[312] In this new context, reciprocal relations predominate to the detriment of unequal negotiations that are characterized by bargaining chip power. Some States see this future landscape as unrealistic and too optimistic since there are huge economic differences among the States. The US, especially, believes that reciprocity is not conceivable - it has too much to give and not enough to receive - its domestic air transport market could be endangered in such a multilateral environment.[313] However, even this argument is no longer true, since the superiority of the US airline industry is less and less obvious due to changing circumstances and new trends such as the current air transport crisis that is directly affecting the US industry, the alliance phenomenon, airline concentration (more and more in Europe), and the development of regional agreements. Thus, air carriers can increasingly play on an equal basis, which makes reciprocal relations more possible. Hence, national leverage in the negotiating bilateral process becomes less vital for airlines to survive. Furthermore, a possible future shift in the airline industry would make the use

[309] H.P. van Fenema, *supra* note 219 at 64.
[310] *Ibid.*
[311] See Part 1, Chap. 2, above, at 30.
[312] See Part 1, Chap. 1, above, at 14.

of ownership restrictions as a bargaining chip ineffective. Concerning the possibility that traffic rights might be liberalized prior to the ownership and control restrictions: if this occurred, States would no longer pursue the same goals in their bilateral negotiations, namely, to try to get traffic rights from their partners to the greatest possible extent and by any means. Thus, as a first step, the liberalization of traffic rights would allow the airline industry to play on the worldwide scene on a less political basis.

Accordingly, considering the evolutionary environment and the current needs of the airline industry, the lack of State bargaining power would not endanger national carriers. Therefore, the liberalization of ownership and control should proceed, given that States, and especially the strongest ones, do not have to fear the loss of their bargaining power in their possibly more equal future air transport relations.

2. Aviation safety and national security justifications

In this section, it will be determined whether the substantial ownership and effective control requirement is a prerequisite to maintaining effective aviation safety and national security.[314] Safety and security are the two most important features of the airline industry.[315] While legal and economic needs are flexible, safety and security obligations are not. National measures are required to deal with situations of emergency or threat; the consequences of carelessness in this regard directly concern the public interest. Thus, these two absolute air carrier obligations make the airline industry particularly unique, since considerations of the public interest are involved more than in most others. However, is it fair to consider that safety and security protection would be limited to national restrictions on ownership and control? Are there no other alternatives to maintaining the highest required level of safety and security?

---

[313] Edwards, *supra* note 17 at 620.

[314] The usual distinction in air transport is between aviation safety and aviation security. Safety relates to the prevention of accidental events that can affect material or people (design of aircraft, maintenance, etc.), while security is the prevention of intentional acts which aim to affect planes or people (hijacking, bombs, etc.). For our study, these two notions will be analyzed in the context of the ownership and control issue; thus, aviation safety will be studied according to its current definition, whereas security will not be studied regarding aviation security, but regarding national security. National security does not aim to protect the air transport but the State itself.

[315] Abeyratne, *Emergent Commercial Trends*, *supra* note 84 at 165.

2.1 Aviation safety and flag of convenience

"Would increasing permissible foreign investment in [national] airlines raise legitimate safety issues? Could foreign ownership of a [national] airline render that airline less responsive to [national authority] safety oversight?"[316]

Aviation safety is related to the state of the aircraft itself. High safety standards are defined by States and by the international community (ICAO) in order to ensure the highest possible level of passenger security.[317] Nevertheless, countries still have different levels of safety standards; while some require a high level of safety before accepting the registration of an aircraft, others remain much less stringent. In this latter case, it is therefore less expensive for airlines to register their fleet in these countries, as they do not have to comply with more strict criteria. Under the current regime, an air carrier cannot easily transfer its registry because the vast majority of countries still require that the carrier be substantially owned and effectively controlled by nationals of the State. The main concern is that if this last restriction is lifted, it will become possible for an air carrier to transfer its registration. Hence, the risk of the "flag of convenience".[318] This concept has been used in maritime law for decades.[319] Indeed, ship owners can transfer the registration of their vessels to more favorable countries of registry to avoid burdensome taxes, potentially high liability exposure for maritime disasters, and less stringent safety requirements. The US has been very concerned by this problem; indeed, as a result of the high costs of compliance with the US requirement of registration, many American ship owners have decided to reflag their vessels. Thus, in 1995, the US realized that the US fleet would vanish entirely unless decisive steps were taken to support the

---

[316] ABA doc., *supra* note 223 at 21.

[317] In 1997, ICAO has launched the Safety Oversight Programme, by which experts have assessed the capacity of participating States to control the level of safety for which they have responsibility. The program has been extended to personnel licensing, operation of aircraft and aircraft airworthiness. The State's audit is almost complete today; it has represented a successful operation approved by the whole community of States, see Abeyratne, *Emergent Commercial Trends*, *supra* note 84 at 166.

[318] "A flag of convenience is used to describe the flags of such countries...whose laws allow – and indeed make it easy – for ships owned by foreign nationals or companies to fly the flags. This is contrast to the practice in the maritime countries (and in many others) where the right to fly the national flag is subject to stringent conditions and involves far reaching obligations", see Kass, *supra* note 131 at 150, note 44.

[319] The American Bar Association raises the following issue: "To what extent are the ownership and control requirements in the maritime and defense industry instructive?", see ABA doc., *supra* note 223 at 20.

merchant marines. As a result, the *Maritime Security Act* was adopted in 1996,[320] which states that US ships would be subsidized over the next decade; in return, carriers must participate in the Maritime Security Fleet.[321] Despite these efforts, US ships and other national fleets continue to decline, departing and registering in "open registry" countries,[322] which makes their safety more dubious.

Regarding this situation, should the airline industry be concerned by a similar risk of the flag of convenience and lax safety standards in the event of the development of cross-border investment development? Several reasons have been raised thus far to demonstrate that aviation safety would not be endangered by a change to the ownership and control principle.

The first reason emphasizes the fact that the aviation and the maritime sectors are quite different on many points; therefore, situations faced by both sectors are not necessarily analogous. One of the differences is the meaning and application of the ownership and control requirement with respect to each of the two fields. Due to the bilateral regime, the requirement in the aviation sector prevents or at least impedes the cross-border mergers of air carriers; by constrast, the sale of US shipping companies to foreign shipping lines is not as affected by statutory ownership requirements. In fact, while the US DOT closely examines any links of the US owners of US air carriers with foreign interests, the US Maritime administration (Marad) does not seem to be equally interested in the ultimate ownership situation of US shipping companies that receive federal subsidies. As K. Bohmann states, "it appears as if Marad views the ownership status of a shipping company and potential foreign interests in the company as less important than the continuing maintenance of a US-flagged and US-crewed shipping line."[323] Another major difference between the aviation and the maritime sectors is their legal regime. Restrictions on traffic rights do not exist in the maritime sector, whereas in aviation, an airline can only exploit traffic rights that are designated to that carrier by the carrier's State of registry. Thus, an airline will always choose a country of registry that

---

[320] *Maritime Security Act*, Pub. L. No. 104-239, 110 Stat. 3118 (1996).
[321] For further discussion on US maritime laws, see Bohmann, *supra* note 3 at 730-738.
[322] "Open registry" countries are the countries with less strict registration requirements that permit the registration of almost all ships owned by foreign nationals.

owns attractive and profitable traffic rights, rather than a country with low costs and safety standards.[324] Accordingly, the risk of the flag of convenience is unlikely to have a great influence on the aviation sector.

A second reason that explains why the international community should not fear an extreme diminishment of safety standards is the existence of an international framework that defines uniform standards in certification so that the safety of civil aviation can be ensured. As a result of this, it makes no sense that the question of aviation safety should be linked to and depend upon the foreign ownership and control issue.[325] 'Ownership' and 'safety' are two different issues that must be resolved separately. Thus, as a primary concern, the international community of States is bound to certain safety standards defined by the *Chicago Convention* and is also notified of international Standards And Recommended Practices (SARPs) drafted by ICAO. Provisions of the *Chicago Convention*, which deals with the subject of safety (Articles 11, 12, 31, 32 and 32(b)), impose imperative rules on States to ensure high safety standards for international civil aviation.[326] States are bound to take ICAO SARPs into account, as well (Articles 37 and 38 of the *Chicago Convention*), in order to maintain a uniform safety framework.[327] Complementing this regulatory framework on safety, ICAO established the Universal Safety Oversight Audit Programme (USOAP) in January 1999.[328] Thus, to go back to our main concern, it is obvious that safety does not depend on national foreign investment policy, but rather on whether States comply with the minimum safety standards.

Finally, a third reason also demonstrates how aviation safety would not be jeopardized by any change in the ownership and control principle. ICAO proposed an alternative solution in 1998 in order to liberalize the ownership and control principle

---

[323] K. Bohmann provides an interesting explanation of Marad's behavior, see Bohmann, *supra* note 3 at 737.

[324] *Ibid.* at 727.

[325] "While governmental concern for ensuring safety is laudable, it is not an objective that is necessarily related to foreign ownership" notes Kass, *supra* note 131 at 150-151.

[326] The *Chicago Convention*, *supra* note 2; for further comments on these Articles, see Abeyratne *Emergent Commercial Trends*, *supra* note 84 at 167-168.

[327] SARPs are enounced in 18 Annexes of the *Chicago Convention*, see Abeyratne *Emergent Commercial Trends*, *ibid.*; M. Milde, "Enforcement of Aviation Safety Standards" (1996) 45 Abhandlungen 3 at 4-9. The programme has been very well accepted by States, *e.g.* by the US, see C. Shifrin, "FAA plans safety change" *Airline Bus.* (June 1999) 11.

[328] See Part 2, Chap. 1. Section 2, below, at 78; for the safety program outcome, see ICAO Annual Report 2001, *supra* note 96 at 11.

without weakening aviation safety; it has been approved by the European Civil Aviation Conference (ECAC). The ECAC addresses this solution:

> In recommending the liberalization of the ownership and control provisions, the ICAO Air Transport Regulation Panel stated that provision should be made for a strong link to remain between the airline and the designating State, primarily to ensure that there would be no confusion about which State was responsible for a carrier's safety and to prevent the emergence of "flags of convenience" airlines. A strong link can be ensured by requiring both the following elements: that a carrier's principal place of business be in the country which designates it; and that a carrier hold an Air Operator's Certificate from the country designating it.[329]

Accordingly, broadening the criteria of substantial ownership and effective control by including the "strong link" requirement in the bilateral agreements, seems to be a good "compromise" between full liberalization and the priority for safety. Indeed, the criteria of the "strong link" is based on the concept that an airline operation will essentially remain an enterprise that has a single identifiable geographic base; therefore, it can prevent airlines from registering in unreliable States with less stringent or unknown safety rules.

In addition, in 1998 the ECAC proposed a model standard bilateral clause on safety[330] to include in the bilaterals, which would enable States to withdraw from a foreign airline's permit if there were grounds to suspect that the safety of its operations fell short of international standards. By this clause, safety would be better ensured, and would be resolved independent of the ownership and control issue. Therefore, whatever States decide about the liberalization of ownership, aviation safety would not be endangered.

---

[329] ECAC, *Task Force on Ownership and Control Issues, First Meeting*, ECAC Doc. OWNCO/1 – WP/2 (24 December 1998) [hereinafter ECAC Doc. 1998]. To define the "strong link", ICAO recommends that: "[i]n judging the existence of a strong link, States should take into account elements such as the designated air carrier establishing itself, and having a substantial amount of its operations and capital investment in physical facilities in the designated State, paying income tax and registering its aircraft there, and employing a significant number of nationals in managerial, technical and operational positions", see ICAO, *Policy and Guidance Material on the Economic Regulation of International Air Transport*, ICAO Doc. 9587 (1999) at 2.2.

[330] ECAC Doc. 1998, *ibid.*, ECAC recognizes that "one of the elements of the ECAC/JAA aviation safety action programme comprises the strengthening of controls over the safety of foreign aircraft (...), that provision in bilateral agreements could provide a basis for strengthening controls over safety of foreign aircraft through both general provision and provision enabling random ramp checks, that is desirable for Member States to have available to them a safety model aviation safety clause for incorporation into their bilateral agreements."

2.2 National security

How might the achievement of national security objectives be affected by changes in the rules that apply to foreign investments in US airlines? Would it be possible to achieve these objectives by other methods if the rules were changed?[331]

Aviation has always been essential to ensuring national security. National security is the most specific feature that makes the aviation industry so unique, compared to any other industry, and so important for States. Indeed, States need to maintain a strong domestic airline industry that is capable of serving the nation loyally in times of crisis, and can better ensure the capability of the industry if it is owned by nationals. This is why the US has always been so reticent *vis-à-vis* the liberalization of ownership and control, since the preservation of national security is the main priority of the US government; furthermore, it explains the stringent DOT's decisions regarding airline alliances (*e.g.* the KLM-Northwest alliance) and all the reticence expressed so far by US politicians regarding foreign investments in US carriers.[332] The US security performance is implemented by the framework of the Civil Reserve Air Fleet (CRAF) program, established in 1952 under a *Memorandum of Understanding between the US Departments of Commerce and Defense.*[333] This program was executed pursuant to Executive Order 10219, wherein President Truman directed the Secretary of Commerce to formulate plans and programs for "the transfer or assignment of aircraft from civil carriers to the Department of Defense (DOD), when required to meet needs of the armed forces."[334] The CRAF program was activated for the first time in 1990 during the Persian Gulf War; the successful operations proved the real necessity of the program.[335] This main concern on preserving US national security remains today; the Cold War is over now, yet the US still

---

[331] ABA doc., *supra* note 223 at 21.
[332] Arlington, *supra* note 110 at 162-164.
[333] C.M. Petras, "Foreign Ownership of US Airlines and the Civil Reserve Air Fleet Program: Cause for Concern?" 15 March 2001, at 3, note 6 [unpublished].
[334] *Ibid.* at 3, note 7.
[335] For more details about the CRAF operation during the Gulf War, see *ibid.* at 5; see Arlington, *supra* note 110 at 161-162; Edwards, *supra* note 17 at 640.

struggles against enemies who do not accept American political interference outside its territory.[336]

Will national security still be guaranteed for future emergency missions if the level of foreign investment in US carriers increases? Are restrictions on ownership and control a prerequisite to preserving national security? The debate on this point has always been, and still is, very dynamic. National security may be the only reason that truly justifies foreign investment restrictions. Therefore, apart from a few authors who believe that the national security argument against foreign ownership is just an excuse that is used to protect national economy,[337] the debate is usually more complex as it includes the possible alternative solutions that could ensure the protection of national security without retaining restrictions on ownership and control.

The first possible alternative is that the government ensures that aircraft remain available for national defense purposes by making participation in the CRAF a condition for registering an aircraft in the United States.[338] This alternative is not adapted at all to a war situation. Indeed, "even if foreign investors consented to participate in CRAF, the issues relating to the airline's willingness to serve the nation in times of crisis would have a deleterious effect of reliability of the CRAF fleet."[339] This problem occurred during the Gulf War, when some foreign ships refused to make deliveries to certain ports,[340] severely limiting their usefulness.[341] Furthermore, considering the political instability of certain countries today, the US may not know at all times which countries it may trust.[342]

---

[336] For instance, September 11th events are probably a consequence of the US external policy in the Middle East. The threat is no longer against Eastern countries; the scenario is presently more complex, given that the threat extension is harder to assess, hence, the need to maintain national security measures.

[337] "[I]nternational airlines, in many countries including the United States, have sought to stabilize their positions in an increasingly competitive global marketplace by playing the trump cards of national security and prestige but keeping hidden their real agenda of protectionism", see Lehner, *supra* note 66 at 450.

[338] Petras, *supra* note 333 at 8.

[339] *Ibid.*

[340] The same program as the CRAF program exists in the maritime sector. It is called the Maritime Security Program (MSP) and it provides subsidies to US carriers that make their vessels available for military use during a national emergency, see Bohmann, *supra* note 3 at 736-737 and note 192; on the concern to preserve US citizenship requirements for MSP vessels operators, see "US questions Maersk's power" *FairPlay* (19 July 2001) 22.

[341] Edwards, *supra* note 17 at 641.

[342] "While commercial aviation is becoming increasingly global, political alliances between nations are constantly shifting. Iran, which was once the United States' closest ally in the Arab World, is now a sworn enemy, while Russia, which was dubbed "the Evil Empire" and "the force of evil in the world" during the

Since international airlines may act as instruments for their governments, the US cannot afford to take the risk of losing the fleet of foreign airlines in times of emergency and war.[343]

Another alternative that should be addressed is the possibility to commandeer aircraft. In other words, if a foreign-owned airline violates its CRAF agreement and refuses to provide its aircraft in times of crisis, the DOD could simply commandeer the aircraft it needs. In reality, though, this option would be terrible for preserving political relations between States. For instance, by doing so, the US would risk increasing international tensions: "it would clearly be a less than desirable *modus operandi* for the CRAF program."[344]

A third solution to preserving national security in the event of unlimited foreign investments would be the purchase of aircraft by the DOD. However, this seems problematic. First, if there is an emergency, there no time to create an entire fleet: looking for new aircraft, flight and ground crew is time-consuming and would render the CRAF program inefficient. Second, purchasing aircraft would be an inadvisable financial operation for the US government since it would generate tremendous costs in terms of operation, maintenance, and personnel and it would remove all of the benefits of the CRAF program.[345]

Despite the strength of the national security argument against the lifting of foreign investment restrictions, the US DOD should reconsider the question by taking note of the following ideas. First, with respect to the argument of the doubtful loyalty of foreign airlines and the lack of patriotism that would be required to ensure security in the US, it can be argued that even though this notion of patriotism is an important stimulus, it is well-known that it is not the primary motivation of CRAF participants since economic

---

1980s, is now an important international partner of the United States" and this context is in constant evolution, see Petras, *supra* note 333 at 11.

[343] "During times of crisis we need to know without question that there is support", see K. Walker, "US DoD gives Red Light to Ownership Changes" *Airline Bus.* (June 1999) 11.

[344] Petras, *supra* note 333 at 10.

[345] "There is no prospect that the US Congress will provide the DOD with the financial means to acquire a significantly larger organic fleet of transport aircraft", see IATA doc., *supra* note 13 at 60 (Separate comments of Jeffrey N. Shane on "Airlines and National Security in the US").

benefit is the main incentive.[346] Thus, such an incentive should function in a properly structured multilateral environment, and foreign airlines would likely preserve security in the United States as well as the American airlines. Furthermore, additional legal alternatives can secure the defense commitment of the US. Specific contracts could be drafted that would safeguard the necessary supply of aircraft; whereby the combination of a contractual commitment with the personal liability of directors and managing officers would raise the likelihood of compliance with the CRAF program.[347] Moreover, even if a foreign airline were to obtain control over a US air carrier, the effects of this transaction on US national security would, if necessary, be reviewable by the President of the United States under Section 101(16) of the *Federal Aviation Act*. When he considers appropriate, the President can suspend or prohibit any international acquisition, merger, or takeover in case foreign control threatens to impair the national security.[348] This provision can be a possible solution, considering that the aircraft will probably stay in the US territory. Indeed, foreign carriers would likely not invest in US carriers in order to get access to aircraft and to use their aircraft in their homeland markets. It is therefore unlikely that the foreign investors would, in the event of an emergency, remove the aircraft of US carriers aircraft from the US market. As a final alternative, in a regime of unlimited foreign investment, the US government can even anticipate any inconvenience. For instance, the DOT, in conjunction with other government agencies, could retain the right to disapprove of foreign investment in US carriers if national security is threatened.[349] In addition, it can even be legally foreseen that, if the DOD is not satisfied with a foreign carrier's contractual commitment to participate in CRAF, the DOD could require a lower foreign investment limit, as an exception, for foreign airlines that want to participate in the CRAF

---

[346] "While participation in the CRAF Program is optional for US airlines, such participation is a prerequisite to eligibility for doing significant business with the military (49 U.S.C. § 41106)", see *ibid.* at 61.

[347] Bohmann, *supra* note 3 at 712-713; another related idea has been addressed: "to avoid any doubt about the impact of liberalization on CRAF participation, more specific legal requirements for US-controlled and foreign-controlled carriers alike – possibly implemented in the form of permit conditions – should be seriously considered", see IATA doc., *supra* note 13 at 62 (Separate comments of Jeffrey N. Shane on "Airlines and National Security in the US").

[348] Warner, *supra* note 108 at 310 note 238 (50 U.S.C.A. app. § 2170 (West Supp. 1993), "The President may direct the Attorney General to seek appropriate relief, including divestment relief, in the district courts of the United-States in order to implement and enforce this section". Section 2170(f)(3) further provides "[f]or purposes of this section, the President [...] may, taking into account the requirements of national security, consider among other factors the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the US to meet the requirements of national security").

[349] Kass, *supra* note 131 at 179.

program, such as the current 25% limit. Thus, this last proposal would allow the international airline industry to conclude financial operations, without any constraints, like any other important industry.

To conclude this first Chapter, with respect to the legal, economic, safety and security justifications of the ownership and control regime, it can be noted that the debatehas evolved since 1946. National security concerns have historically been at the core of the argument against foreign investment in US air carriers; then, economic reasons were addressed by governments in order to justify foreign investment restrictions. However, some of these justifications seem less valid now. Indeed, either they are just used as "excuses" to hide national protectionism and, therefore, do not make sense (*e.g.* job losses, competition, economic security concerns), or they represent completely different problems that may simply be resolved independent of the ownership and control issue (*e.g.* the responsibility regime, cabotage and safety concerns). Regarding the legal and economic reasons, the airline industry does not differ at all from other economic sectors, except that this tends not to be a highly profitable industry. Accordingly, the need of foreign capital is certainly the most relevant issue and is directly related to the question of ownership and control of airlines, which also represents the main reason in favor of the liberalization of foreign investment. National security is, in fact, the tricky part of the study, since it validates certain protectionist measures. National security makes the aviation industry unique with respect to the particular protections that are required, especially as compared to other industries; more importantly, the public interest is directly concerned by the proper implementation of the national security program. These past months have shown the world that national security is still a present concern, especially for the US, so it might not seem to be the time for legal changes that might risk national security. Yet the airline industry must move on and evolve, as any industry, towards liberalization and globalization; alternatives must also be considered so as not to give up the related commitments. Thus, as national security seems to be the only credible argument in favor of national restrictions on ownership and control, it seems excessive to

use it as the sole impediment to industry growth, despite its great importance. National security is not an insurmountable reason and alternatives can be found, as discussed above. There is no doubt that it would be much more in the public interest to foster foreign investments among international airlines, rather than maintaining unnecessary restrictions. Accordingly, the substantial ownership and effective control requirement should be revoked.

Chapter 2. Consequences of the abolition of the ownership and control restrictions

Since the growth of the airline industry requires a liberal regime with respect to foreign investments, and since there are no legitimate reasons that justify such a restrictive regime, the substantial ownership and effective control principle should be reconsidered. What would the consequences of an overhaul of the regime be? Chapter 2 will address these consequences by, first, studying the legal effects of a liberal regime. It will be determined which national laws would apply. Chapter 2 will then focus on the economic benefits for the airline industry of the free movement of capital worldwide. As a third point, the following main issue will be raised: what will be the prospective scenario regarding airline consolidation (*e.g.* mergers) in the event of the total liberalization of the ownership and control rule in the international airline industry?

1. Legal effects

1.1 The right of establishment: application of the law of the State of commercial activities

The recognition of the notion of 'nationality' in civil aviation is based on the *Chicago Convention* and the subsequent agreements – nationality of aircraft and

nationality of airline.[350] Accordingly, aircraft and airlines are governed by the laws of their nationality. The question here is: if a foreign airline takes over a national air carrier, which legal regime would apply? If foreign investments among international airlines become unlimited, and if the ownership and control requirement is totally removed, the right of establishment (i.e. the right of a foreign investor or foreign airline to set up an airline in a given country)[351] can be recognized. Consequently, the foreign airline that takes over the national carrier would no longer be governed by the laws of its State, and hence will no longer be a "foreign flag" operator. This right has been recognized inside the EU in the aviation sector, by the third package of the EU liberalization.[352] Presently, EU nationals have the right to own and operate a carrier in each Member State.

The right establishment is an indirect legal consequence of this proposed overhaul of the ownership regime, as it is in fact directly related to cabotage: the foreign airline becomes a national company and is thereby allowed to participate in the domestic air transport market. Even though the ownership regime overhaul makes the cabotage restrictions non-applicable, the right of establishment would be instaured. This statement can in fact support the necessity of revamping the ownership regime because, as discussed above, the foreign carrier would invest in a national business, this business would be a national operator and, therefore, national law would apply; consequently, a liberal regime on ownership and control cannot have a negative impact on the national system. For instance, if a European carrier operates within the US market, it will be subject to the full application of US laws, including tax and regulatory measures, just like US nationals are. Its employees would also be taxed and regulated at the federal and State level:

> In other words, any airline that participates in US domestic commerce – whether US or foreign owned – will have to bear all the burdens, and not just reap the benefits, of US Commerce. (...) [I]t is neither realistic nor equitable as a matter of law or policy to allow foreign air carriers to participate as foreign carriers in US domestic air services. The proper means of opening US markets to those carriers governed by foreign law is to confer upon

[350] The *Chicago Convention*, see *supra* note 2, Art. 17 and 20 (nationality of aircraft); IASTA, *supra* note 7, Art.1 § 5 (nationality of airline).
[351] Haanappel, *supra* note 1 at 97.
[352] EU, *Council Regulation 2407/92*, *supra* note 22.

them a right of establishment, i.e., the right to own and operate a carrier that complies with US laws – in other words – a US air carrier[353]

In sum, foreign nationals that participate in any national domestic air commerce will have to participate on the terms that would be generally applicable to all companies that participate in other domestic sectors of the economy. Thus, the right of establishment seems to be a logical continuity of the airline liberalization process: it would allow the air industry to evolve like any other main industry since no different legal treatment would be given.

1.2 Extraterritoriality: application of the law of the affected State

With the growing global trend towards international air transport, airlines, particularly with respect to US and European carriers, are increasingly eager to form alliances with foreign counterparts in order to enhance the efficiency of their international operations. In addition, revamping the ownership regime would lead to more international financial cooperation among the air transport actors, with such developments as mergers and takeovers. All these operations inevitably raise antitrust issues, especially considering that the aviation industry is dominated by a relatively small number of market participants[354] and, more importantly, that these operations create legal interference between the national laws because the State's interests tend to increasingly be outside their territory, hence, the increasing importance of extraterritoriality, given that "[e]xtraterritoriality is one concept which could affect more than one jurisdiction in the application of domestic trade law."[355]

In the last paragraph, it is recognized that, by the right of establishment, national law is applicable to any company operating a domestic service, whether it is held by national hands or foreign hands, since the domestic market is affected. This means that the applicability of law is not linked to property, but to national interests. By the same logic, but regarding a different legal concept, that is, extraterritoriality, international

---

[353] IATA doc., *supra* note 13 at 58-59 (Separate comments of Warren Dean on "The Right of Establishment").

[354] G.P. Elliott, "Antitrust at 35,000 Feet: the Extraterritorial Application of United States and European Community Competition Law in the Air Transport Sector" (1997-1998) 31 Geo. Wash. J. Int'l L. & Econ. 185 at 187.

airline mergers that risk affecting several domestic markets will have to comply with all the national legal regimes involved and, more specifically, with national competition laws (antitrust laws).[356] Extraterritoriality has been highly recognized by both the US and the EU, as an abundant jurisprudence, from the US courts and from the Court of Justice of the European Communities, has justified the application of national laws even though the commercial activity is outside the territory, the activity is conducted by foreign citizens, or the company is owned by foreigners.[357] While the US has always had a wide scope of extraterritorial jurisdiction in respect of anti-competitive practices, the EU has become more and more active in recent years in this respect, as it has disapproved of mergers of US companies in the aviation industry. Two main cases in the aircraft manufacturing industry can be taken as examples: the European Commission objected to two major merger operations in the US, which had already been approved by the US authorities, lest they lead the companies to a dominant position on the international market. The first big opposition concerned the Boeing-McDonnell Douglas merger in 1999;[358] the other objection concerned the 2001 General Electric Co. proposal to take over its rival Honeywell.[359] These decisions led to another main issue, which is the need to harmonize the rules of competition in the international air industry, especially between the US and

---

[355] R.I.R. Abeyratne, "Would Competition in Commercial Aviation ever fit into the WTO?" (1996) 61 J. Air L.& Com. 793 at 849 [hereinafter R.I.R. Abeyratne "Competition in Commercial Aviation"].

[356] "One cannot deny that in the era of global economy, some degree of extraterritoriality in the enforcement of national competition rules is inevitable", see *ibid.*.

[357] For more details about the cases in the US and in the EU, see *ibid.* at 849-852; J.W. Young, "Globalism Versus Extraterritoriality. Consensus Versus Unilateralism: Is There a Common Ground? A US perspective" (1999) 24 Air & Space L. 209 at 211-213.

[358] "The EC finally approved the merger of the companies on July 30, 1997, but only after Boeing had acceded to major concessions, resulting partly from political pressure from the Clinton Administration", see K. Luz, "The Boeing-McDonnel Douglas Merger: Competition Law, Parochialism, and the Need for a Globalized Antitrust System" (1999) 32 Geo. Wash. J. Int'l L.& Econ. 155 at 155; T. O'Toole, "The Long Arm of the Law" – European Merger Regulation and its Application to the Merger of Boeing & McDonnell Douglas" (1998) 11 Transnat'l L. 203 at 203; Dempsey "Competition in the Air", *supra* note 35 at 1117-1122.

[359] "In its appeal against the Commission's July ruling blocking the world's largest industrial merger, GE is understood to have launched a stinging attack on the theories and practices that are used by the European antitrust authorities. (...) The Commission has defended the argument, saying the combined group would have driven rivals out of the market by offering a combination of engines and avionics products"? see F. Guerrera, "GE fires salvo at European Commission" *Financial Post* (5 November 2001) FP11; P. Bocev, "l'Europe recale le mariage GE-Honeywell" *Le Figaro* (4 July 2001) 1; A. Chuter, "Growing pains: Differing approaches taken by US and European regulators over the proposed GE/Honeywell merger highlight a need for common guidelines" *Flight Int'l* (19 June 2001).

the EU antitrust laws.[360] Globalization requires more cooperation and concentration; therefore, if the airline industry begins to concentrate internationally as a result of revisions of the ownership regime, a uniform regime of antitrust laws[361] will need to be drafted by the international community in order to avoid any impediments to the growth of the airline industry.[362]

2. Economic benefits

The liberalization of FDI between international airlines will certainly benefit the entire aviation industry and, moreover, it will benefit the public interest. In his book on International Business, Charles Hill describes the costs and the benefits of FDI to home and host-countries, not specifically with regard to the aviation industry, but in general: he asserts that States tend to adopt a pragmatic stance, pursuing FDI policies to maximize the national benefits and minimize the national costs of FDI.[363] In fact, most of the benefits overweigh the costs of foreign investments in a national industry, whether with regard to an airline or any other company. Some important benefits will be addressed, using the following example: an European airline (A) invests in more than 50 per cent of a south-American airline (B).

An increase of foreign investments would benefit the south-American industry. By creating a deeper cooperation, a foreign company makes "a positive contribution to the host economy by supplying capital, technology, and management resources that would otherwise not be available and thus boost that country's economic growth."[364] The airline industry is concerned by these benefits. Thus, by taking our example, B would probably be in need of capital, as does any air carrier, in order to expand or just to survive and avoid bankruptcy; a contribution in technology would allow B to enhance its productivity,

---

[360] "If ever there was an illustration that the united states of America and the united states of Europe are separated by more than water, it is General Electric's efforts on both sides of the Atlantic to gain approval for its merger with Honeywell", see Chuter, *ibid.* at 5.
[361] For a comparative study of the state of competitive law in the US and in the EU, see Elliott, *supra* note 354 at 196-204.
[362] This issue regarding the harmonization of competition laws will be addressed in Part 3, Chap. 1, below, at 108.
[363] Hill 2001, *supra* note 50 at 211.
[364] *Ibid.* at 213.

as technology can be incorporated in a production process (*e.g.* aircraft supply) or it can be incorporated in a product (*e.g.* a bigger structure, personal computers); furthermore, foreign management skills acquired through FDI may also produce important benefits for B, such as the training of B's personnel to occupy managerial, financial, and technical posts in the new structure. In fact, these three spin-off effects concern airlines from developed countries[365] and developing countries.[366] Indeed, the absence of national restrictions on ownership and an increase of foreign capital input would enable weaker States, with limited sources of capital, to keep a carrier inside their territory, which is a sign of their independence. Furthermore, allowing the free movement of capital in the airline industry would enhance employment in the company B because of its activity expansion that would be a consequence of A's capital input. Employment would increase in B's country as well due to the repercussions of B's growth on all the related companies, such as airport businesses and tourism companies, as well as, to go further afield, increased local spending by B's employees. In addition, by increasing consumer choice (*e.g.* B increase its flight frequency), foreign investment can help to increase the level of competition in B's national market, thereby driving down prices and increasing the economic welfare of consumers.[367] All these benefits demonstrate that the international community of States should open air markets to foreign investments as it would be profitable for airlines as well as entire national economies.

As discussed above, FDI would also benefit A and the home-country itself. However, the benefits of A would not limit B's profits, in a sense that if the host-country as well as the home-country can take advantage of international financial operations, the entire airline industry will be enriched. Of course, the whole industry would benefit equally from the increase of FDI only if all States liberalize their national regimes with respect to ownership and control.[368] Thus, benefits to the home-country, and so to A, from outward FDI arise, *inter alia*, from employment effects. Some fear that foreign ownership

---

[365] Sparaco, *supra* note 89 at 53; Belgium and Switzerland have recently lost their national airline.

[366] For instance, in 1999, Venezuela was without a flag-carrier after Viasa's demise, see D. Knibb, "No Flag in its Future" *Airline Bus.* (May 1999) 72.

[367] "FDI's impact on competition in domestic markets may be particularly important in the case of services, such as [air transport] and telecommunications (...), where exporting is often not an option because the service has to be produced where it is delivered", see Hill 2001, *supra* note 50 at 218.

[368] Indeed, if every State does not liberalize on the same basis, some will benefit from their investments outside their territory without letting foreign airlines invest in their domestic market.

of national airlines reduces national employment because personnel costs are lower in certain countries. Thus, in our example, A might hire ground and flight crew in the host-country. First, it is not very likely that this would occur since airlines care about their "image" – it would be too risky, regarding its national brand image, for Air France to hire Korean crews.[369] Second, even though it is a possibility, the benefits for A would outweigh the costs (risk of jobs losses) anyway, given that its investments abroad would allow A to expand its network, and therefore its national activity. By investing in B, A will penetrate a new market, benefiting indirectly from traffic rights.[370] What is more, A can get some slots in the host-country, which would provide it with a strategic position on the 'A' market.[371] With the current regime with respect to ownership and control, it is already possible to get some of these benefits through certain specific agreements such as global alliances or code-sharing, but only to a limited extent. Lifting foreign investment restrictions would allow national airlines, as investors, to maximize their profits on a worldwide scale.

3. Airline consolidation limits

By advocating a total liberalization of the ownership and control principle, the present study has demonstrated the need for the airline industry to adapt to the current economic trends, which include regionalism and multilateralism, liberalization and globalization, consolidation and concentration. Where concentration between airlines of different nationalities is concerned, airlines currently limited themselves to international alliances rather than creating new, multinational airlines. Once foreign investment restrictions are liberalized, mergers and takeovers will ideally prevail. So far, alliances have been a very profitable means to concentrate the industry, and are well-adapted to airlines, given that alliances contribute for 70 per cent of the airline synergies in terms of services, marketing, costs and network.[372] However, the industry increasingly needs to go further afield in the integration process. Mergers and acquisitions will bring the airline

[369] See Part 2, Chap. 1, above, at 58.
[370] For instance, this is the way Swissair could extend its operations on the European market.
[371] British Airways had adopted this strategy when it purchased almost 20% of the capital of the south-African airline Comair.

industry the benefits applicable to any industry, such as bargaining power, cost rationalization, skill sharing around the combined company in addition to the benefits that are specific to the airline business, such as network optimization (increase of slots[373] and traffic rights), increased market power (by the power of combined schedules, FFP, agency agreements, and corporate contracts), and improved alliance position.[374] Thus, capitalistic operations between airlines will have to be developed.

While international and national entities would struggle for a free trade environment in an airline industry without any regulatory constraints, to allow the industry to continue growing, a question should be raised regarding the interest of this struggle: in the long-run, will the free movement of capital among international airlines lead to a highly consolidated industry, similar to what is occurring in other main international industries, or, on the contrary, will the industry growth still be limited? Three limits seem to confine the airline industry's growth to a great extent, whether foreign investments are restricted or not.

The first limit is competition law, a regulatory constraint that is applicable to any other industry. Merger control policies monitor national and international airline concentration and tend to limit the strongest cooperation among airlines in order to prevent the formation of monopolies (US anti-trust regulations) or in order to prevent an undertaking from achieving a market position that makes competition impossible or that injures the consumer (EU merger regulation).[375] Thus, in EU, the merger regulation[376] applies to all concentrations (i.e., where two undertakings merge or where an undertaking acquires part or whole ownership of another undertaking, which have a "Community

---

[372] Naveau, *supra* note 79 at 23-27.

[373] "Under the current structure, national carriers have a competitive advantage since they own all the attractive slots and have superior access to airport facilities", see Polley, *supra* note 43 at 179-180.

[374] McKinsey & Company, *supra* note 249 at 110-114 ("Careful adherence to the "10 commandments" of airline post-merger management will ensure airlines get the most out of a merger").

[375] Dempsey "Competition in the Air", *supra* note 35 at 1102.

[376] "Competitiveness in the EU's air transportation sector is governed by two principal mechanisms, the competition rules (*EU, Council Regulation 3975/87* and *EU, Council Regulation 3976/87*, *supra* note 52), which arise from Articles 85 and 86 of the Treaty of Rome, and the merger regulation (*EU, Council Regulation 4064/89 on the Control of Concentrations Between Undertakings*, [1989] O.J. L. 395/1), which is derived from Articles 87 and 235 of the *Treaty of Rome*", see *ibid.* at 1102; for an overview of the merger regulation and its application before 1998, see L. Gorton, "Air Transport and EC Competition Law" (1998) 21 Fordham Int'l L.J. 602 at 615-619.

dimension").[377] The Commission examines disparate factors regarding the airline concentrations,[378] and if it "determines that a concentration does strengthen an undertaking's dominant position, or gives rise to one, the regulation requires the Commission to issue a decision declaring the concentration incompatible with the common market."[379] This regulation has been applied a number of times since its introduction as a result of the increasing number of cross-border airline acquisitions within the EU.[380] Regarding the US anti-trust regulation, the essential substantive provisions can be found in the Sherman Act, Sections one and two.[381] Mainly, Section one declares every contract illegal that is "in restraint of trade or commerce among the several States, or with foreign nations"; Section two declares a person guilty of a felony "every person who shall monopolize (...) any part of the trade or commerce among the several States, or with foreign nations." Congress passed Section two to ensure that no single person or persons engage in the willful acquisition or willful maintenance of power "to foreclose competition or gain a competitive advantage, or to destroy a competitor."[382] This regulation applied, for instance, this year to the United Airlines' plan to purchase US Airways.[383] In Canada, the competition policy is similar to the one that exists in the US. The *Competition Act* regulates mergers at Articles 91 through 100, stating in its Art. 92:

> Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens ... competition substantially in a trade, industry or profession ... the Tribunal may, subject to sections 94 to 96, in the case of a completed merger, order any party to the merger or any other person to dissolve the merger ... .[384]

According to these regulations, the international airline merger and acquisition movement, fostered by the liberalization of the ownership and control principle, will find its limit in the anti-trust rules. Indeed, national competition authorities tend to enhance competition within their countries, and increasingly on the worldwide scale, which leads

---

[377] *EU, Council Regulation (EEC) 4064/89, ibid.*, Art. 3(1) and Art. 1(1).
[378] The factors are the necessity of preserving or developing effective competition within the Union, the economic and financial power of the undertakings, the interests of all concerned consumers, etc., see Dempsey "Competition in the Air", *supra* note 35 at 1114 ; see also Balfour, *supra* note 79 at 114.
[379] Dempsey "Competition in the Air", *ibid.* at 1115.
[380] Polley, *supra* note 43 at 187.
[381] *Sherman Antitrust Act*, 15 U.S.C. §§ 1-2 (1994).
[382] Elliott, *supra* note 354 at 197, note 83.
[383] D. Field, "Regulatory Hurdles Remain for United' s Merger Plans" *Airline Bus.* (April 2001) 13.
[384] *Competition Act*, RS, 1985, c. C-34, s 1; RS, 1985, c. 19 (2nd Supp.), s. 19.

to extraterritoriality development in order to avoid a market that is too highly concentrated. As discussed above, market consolidation has been blocked a few times by competition authorities, lest it lead the companies to a dominant position on the international market. The first big opposition concerned the Boeing-McDonnell Douglas merger in 1999; the other objection was to the 2001 General Electric Co. proposal to takeover its rival Honeywell.[385]

The second and third limits to the effects of the foreign investment liberalization are directly related to the airline industry, and show again the particularities of this industry. First, given that the airline industry is not a highly profitable industry by nature as a result of the tremendous operational costs of the air carriers, the number of potential investors, whether they are external investors or airlines, in the air transport market is much lower than in any other industries. Therefore, even in an environment with the free movement of capital, investors will have little interest in purchasing stakes in foreign airlines. Thus, US airlines have shown no interest in investing in European airlines so far. Moreover, an increase of foreign investment would surely benefit the air carriers of developing countries, but investors must find a reason for investing in these airlines. In fact, by buying into foreign airlines, air carriers usually hope to achieve a different aim indirectly -- cabotage. Thus, even though the US air market is far from the world's largest and potentially most lucrative domestic aviation market under a single sovereignty, many European airlines have endeavored to win access to the huge American market by purchasing stakes in US airlines.[386] At present, this indirect rationale for investing may be questioned, too, since the American market is already a highly concentrated market, so much so that it is very risky and difficult for a European carrier to impose itself in this market. The third limit to the effect of the foreign investment liberalization and to the growth of the air transport is due to the limited material means that are specific to air transport operations. Two main concerns illustrate this material problem: airports, through the hub policy lead by the air carriers, cannot be extended indefinitely, so most of the airports in the world are already saturated and overcrowded; in addition, air routes are

[385] The Boeing-McDonnell Douglas merger in 1999, see Luz; O'Toole; and Dempsey, *supra* note 358; the 2001 General Electric Co. proposal to takeover its rival Honeywell, see Guerrera; Bocev; Chuter, *supra* note 359.
[386] T.D. Grant, *supra* note 27 at 76.

also not unlimited, and even if they were unlimited, the Air Traffic Control (ATC) could not efficiently control hundreds of flights all landing at the same time. Given this situation, as the foreign investment liberalization is supposed to consolidate the airline industry in order for it to continue growing, the consequences of this liberalization will be quickly limited as the growth will reach its maximum more rapidly than in other industries, such as the computer or telephony industry where there are fewer material constraints.

This second Chapter can be concluded by stressing once more the importance of revamping the substantial ownership and effective control principle; an increase of foreign investments in the airline industry would benefit the home-countries and the host-countries in their reciprocal economic markets. Legally, an increasing international cooperation will affect the national legal systems, especially with regard to the applicability of the law, which will require legislators to make a particular effort to harmonize the national regimes. Furthermore, the final reflection about the limits of airline consolidation provides some detachment to the consideration of the ownership issue. Indeed, even though there is no doubt that the current regime should be revised, the international community should be conscious that this will not remove all the constraints that make the airline industry a difficult industry; its fragile financial features and the limited availability of infrastructure will not make the airlines' growth easy to achieve.

PART 3.
CROSS-BORDER INVESTMENTS LOOM ON THE HORIZON – THE STEPS TO BE TAKEN TOWARDS ACHIEVING LIBERALIZATION

Cross-border investments must be totally liberalized in the airline industry. Alternative solutions that range from the current regime to just short of the total liberalization of foreign investments have been proposed by national and international entities in order to foster foreign investments without liberalizing ownership restrictions. I believe that these alternatives would only serve to strengthen the complexity of the ownership and control issue. For instance, there has been the suggestion of separating the ownership from the control, i.e. allowing substantial foreign investments in national airlines and still retaining national control of the industry, as a protection against these domestic, economic and regulatory concerns.[387] This solution will in fact not significantly change the current restrictive landscape since the control criterion is already the main factor that determines the allowance of foreign investments. Another proposed alternative solution is setting a minimum international standard of 49% foreign voting equity interest in national airlines with the option for States to raise or eliminate the cap. However, even though this alternative would surely benefit the industry, it is still not an acceptable solution since foreign investment restrictions will still prevail. Accordingly, this study advocates the abolishment of any national constraints regarding foreign investment development among air carriers if the international community wants to advance air transport policy and adapt it to the global economy. The idea of harmonizing national restrictions, suggested ten years ago, is no longer relevant in the present global environment; at present, most States are moving towards a world without barriers.

To reiterate, the question is no longer *whether* we should liberalize, but rather *how* we should liberalize. Part 3 examines the future prospects of cross-border investment development. Chapter 1 will concentrate on the prior necessary measures to take in order to facilitate the abolition of foreign investment restrictions. Chapter 2 will examine the possibility of eliminating the ownership restrictions at the regional level as a precursor to

[387] See Part 3, Chap. 2, Section 1, below, at 110.

the elimination of restrictions worldwide. Chapter 3 will analyze to what extent the three relevant international organizations--OECD, WTO, ICAO--are involved in the ownership issue, and address the question of what role they can play in the reform process.

Chapter 1. Necessary measures prior to withdrawing foreign investment restrictions

The liberalization process of foreign investments cannot be achieved directly without resolving other concerns that have greater priority. Some concerns are particular to the airline industry, such as the traffic rights issue and the safety and security matter; others are indirectly related to this industry, such as State behavior and the legal harmonization issue. All these concerns should be settled as soon as possible to make the ownership and control liberalization process function effectively in the airline industry.

1. Liberalization of traffic rights

Earlier in this study,[388] we analyzed to what extent the traffic rights and the ownership and control issues are linked. These issues are, in fact, inter-dependant on two aspects. The first issue involves the risk that an airline (A') could see its international traffic rights previously granted by a partner-State (B) being canceled, in the event that it is taken-over by a foreign airline (C').[389] The second issue involves the cabotage restrictions, which would no longer be relevant in the event of ownership liberalization. While it was concluded that cabotage is probably not a danger for national airline industries, and therefore ownership restrictions could be liberalized without endangering national markets, the concern about traffic rights would, on the contrary, require

[388] See Part 2, Chap. 2, Section 1, above, at 70.

[389] An additional example demonstrates this risk of the loss of traffic rights: "the proposed KLM-British Airways merger in 2000 would have implied that KLM became British-controlled, since the capitalization of BA was approximately four times that of KLM. The US DOT indicated that if such a merger were to take place, it would deny KLM the routes between the Netherlands and the US on the grounds that KLM would no longer be under Dutch control and therefore in violation of the 1992 US-Netherlands Agreement", see WTO doc. 2, *supra* note 98 at 20.

necessary measures to be taken before withdrawing foreign investment restrictions in order to avoid this risk of losing traffic rights. The measure that would need to be taken is the liberalization of traffic rights by the international community as a first step before starting the process of the liberalization of cross-border investment. Indeed, if air routes do not have to be negotiated on a bilateral basis anymore, and if States proceed with the process of liberalization and replace Open-Skies agreements by plurilateral or multilateral arrangement by which air transport market access would be fully liberalized, then there would be less of a risk that governments and the airline industry could lose the traffic rights that are already in force in the event of the allowance of cross-border investment. The traffic rights issue is considered a keystone of air transport liberalization; as such, it should be resolved before any other concerns. Thus, the fifth freedom of the air should be liberalized among States (i.e. the right of A' airline to collect traffic in B and fly the traffic to C), as well as the seventh freedom (i.e. fifth freedom without the requirement that the flight begins or ends in the territory of the contracting party designating the air carrier).

It is certain that the liberalization of international traffic rights will not be an easy task to achieve, given the strong interaction between the air transport policy and national political interests. Furthermore, liberalizing the fifth and seventh freedoms on a bilateral basis would take time and lead to competitive distortions among contracting States. In addition, liberalization will not be achieved *vis-à-vis* third countries to the bilateral agreements. For these reasons, the international aviation community has been giving careful consideration to the prospect of achieving market access changes by way of a simplified multilateral agreement, which could be a more efficient framework for the granting of the traffic right concerned. Once agreed, this would provide certainty of access to the fifth and seventh freedom traffic rights of all the contracting parties. Even though there would still be the need for negotiations to achieve such rights with third countries, it could be expected there would be greater prospects of successful outcomes from negotiations with these third countries, given the greater negotiating power of the parties involved in the multilateral approach.

2. Harmonization of aviation safety and security standards

In the aviation safety study in Part 2,[390] it was concluded that the international community should not fear a relaxation of safety standards in the event of the liberalization of ownership and control of international airlines. Even though the question of aviation safety and the foreign ownership and control issue are linked in a way, 'ownership' and 'safety' are still two different issues that have to be resolved separately. Indeed, safety concerns will not be resolved by keeping a restrictive regime on foreign investments, but by taking measures that are directly related to aviation safety and security. Thus, in order to ensure a maximum level of safety worldwide and to avoid any conflict between different national safety regulations,[391] the harmonization of national regulations should be provided by the international community before lifting the foreign investment restrictions.

In addition to the minimum safety standards defined by ICAO (the *Chicago Convention* and SARPs), the Organization has created, in January 1999, the Universal Safety Oversight Audit Programme (USOAP).[392] A total of 177 States have been audited under the USOAP so far and, as of 15 November 2001, 168 corrective action plans had been submitted by the States that were audited. The question to raise is therefore how will ICAO be able to implement the necessary measures that are foreseen in the USOAP. To provide States in need of assistance with the necessary resources to implement safety-related projects and to correct deficiencies identified through the USOAP, the ICAO Assembly endorsed the establishment of an International Financial Facility for Aviation Safety (IFFAS). The IFFAS is to be financed by voluntary contributions from States as

---

[390] See Part 2, Chap. 1, 2.1., above, for more on this issue.

[391] "The most likely foreign investors in US domestic airlines would be foreign airlines governed by their homeland safety regulations. One can easily envision a non-US owner challenging US safety regulations that differed from those of the foreign owner's homeland, where the foreign owner believes its homeland regulations to be superior. (...) This in turn could create practical difficulties as influential foreign owners could bring political and/or diplomatic pressure to bear on US authorities to either amend or permit variances from US safety regulations", see IATA doc., *supra* note 13 at 64 (separate comments of Joanne W. Young).

[392] See Abeyratne *Emergent Commercial Trends*, Milde, Shifrin,, *supra* note 327; "ICAO USOAP assists Contracting States to identify and correct deficiencies in the implementation of ICAO SARPs and relevant, associated procedures, guidance material and safety-related practices. It also provides for action plans to address identified deficiencies and direct assistance, when required, to carry out corrective measures", ICAO, Immediate Release (PIO 12/2000), "Implementing SARPs – the key to aviation safety and

well as from non-traditional sources, including contributors within or beyond the aviation community.[393] In addition to global plans, safety actions have been taken regionally as well. The EU has been very active in recent years with respect to aviation safety concerns. On 27 September 2000, the European Commission adopted a proposal for a European Parliament and Council Regulation, which would put in place a Community system of air safety and environmental regulation and would create a single European Aviation Safety Agency (EASA). The EASA would take on the mantle of the Joint Aviation Authorities (JAA), which is currently responsible for developing aviation safety criteria. The proposed Agency will develop its know-how in all the fields of aviation safety in order to assist Community legislators in the development of common rules in the field.[394] In addition, the European Commission has proposed concluding agreements with ICAO, the JAA, and EUROCONTROL.[395] These agreements will form the basis for the European Community assistance to ICAO for enlarging its audit programme and for providing assistance to the Community through all of these organizations in order to secure consistent and coherent Community intervention in the form of remedial projects in countries where audits have revealed deficiencies. At the same time, actions are also being taken with regard to the harmonization of aviation security standards, particularly since the tragic events of September 11th. An ICAO resolution calls for a full review of international aviation security conventions and of Annex 17 of the *Chicago Convention*.[396] Moreover, the Assembly directed ICAO to consider the establishment of a Universal Security Oversight Audit Programme, modelled after the highly successful USOAP, in order to assess the implementation of security-related SARPs.[397] At the

---

efficiency" (6 December 2000), online: ICAO http://www.dot.gov/affairs/dot45-01.htm (date accessed: 6 December 2001).

[393] ICAO, Immediate Release PIO 12/2001, "ICAO Assembly Resolutions Focus on Improving Aviation Safety and Security" (5 October 2001), online: ICAO http://www.icao.int/cgi/goto.pl?icao/en/nr/pio200112.htm (date accessed: 6 December 2001).

[394] For additional information on EASA, see EU, *Commission Proposal NO. 500PC0595 for a Regulation of the European Parliament and of the Council on establishing Common Rules in the Field of Civil Aviation and Creating a European Aviation Safety Agency*, (2 July 2001), online europa http://www.europa;eu;int/eur-lex/en/com/dat/2000/en_500PC0595.html (date accessed: 15 January 2002); Thornton, *supra* note 176 at 32.

[395] EUROCONTROL is a European body in charge of the development of a coherent and coordinated air traffic control system in Europe.

[396] the *Chicago Convention*, *supra* note 2, Annex 17 (about safeguarding International Civil Aviation Against Acts of Unlawful Interference).

[397] ICAO Immediate Release, *supra* note 393.

European level, on 10 October 2001, the Commission proposed the adoption and enforcement of common EU security rules for civil aviation. The common rules will be based on the rules set out in Document 30 of ECAC and will aim for increased control of both international and domestic flights.[398]

Thus, in the event of the liberalization of the ownership and control of international airlines, the fear about the flag of convenience, whether or not this fear is justified, will no longer be a concern once the harmonization of aviation safety and security measures has been achieved globally. H. Wassenbergh indicates that it is the duty of ICAO to achieve "a global harmonization of national aviation laws regarding [aviation safety and security] together with an adequate system to monitor the implementation of the rules in practice, under penalty of exclusion from participation in international air transport."[399] Indeed, in the long run, a harmonized safety and security regulation would prevail among the entire community of States. Consequently, if countries continuously harmonize the minimum standards that are required among the jointly owned and controlled international airlines, cross-border investments will even tend to raise the safety and security level oversight worldwide.

3. Urgent internal political changes in the EU and in the US

3.1 A desirable resolution of the Commission/Member States conflict

In order to harmonize its policy on the ownership and control of airlines with third countries, the European Commission first needs a special mandate to negotiate. However, this has yet to be established. Thus, with respect to the problem discussed in the first Part of this study,[400] the Commission has no authority to engage in discussions on ownership

[398] For more information about the European actions on aviation security, see EU "Towards new rules on aviation security following the attacks" Doc. IP/01/1397 (10 October 2001), online: europa http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1397 (date accessed: 6 December 2001); EU, "Air Security – Short presentation of the proposal for a regulation establishing common rules for civil aviation security" Doc. of the European Commission Directorate General for Energy and Transport (October 2001), online: europa http://www.europa.eu.int/common/transport/library/press-kit-surete-en.pdf (date accessed: 6 December 2001).

[399] Wassenbergh, *supra* note 120 at 11.

[400] See Part 1, Chap.2, section 2, above, at 40.

and control, especially with the US, on behalf of all EU Member States. Furthermore, as long as the Commission will not be able to negotiate an Open-Skies agreement with the US, cross-border investments will not be liberalized. The main reason holds that the transatlantic market represents the most important air transport market worldwide; therefore, once an agreement has been negotiated by these two leveraged parties about foreign investment and traffic right policies, the other States, reluctant thus far to such a regulatory shift, will be encouraged to cooperate and to liberalize their policies as well in order to remain competitive on the international market.

Since 1995, the Commission has been struggling with EU Member State sovereignty and has been asking the Member States to renounce their bilaterals with the US in order to negotiate on their behalf. On January 31 2002, the Advocate General, Antonio Tizzano, has finally delivered his opinion on the cases. He proposes that the Court should declare that: first, Denmark, Sweden, Finland, Belgium, Luwembourg, Austria, and Germany have infringed the rules on the division of powers between the Community and the Member States by inserting in the Open-Skies agreements rules relating to the fares that US air carriers may charge on intra-Community routes and to computerized reservation systems; second, all the defendant Member States have infringed the Community principle of freedom of establishment by maintaining or inserting the nationality clause in the Open-Skies agreements. On the other hand, Advocate General Tizzano considers that, in the absence of an appropriate basis in an express legislative provision (as is the case here), the necessity to conclude an international agreement in order to attain one of the objectives of the Treaty may give rise to an exclusive external competence of the Community only where such necessity is formally affirmed by the competent Community institutions. Since the Council considered there was no necessity to conclude, at Community level, an agreement of the "open skies" type with the USA, contrary to the Commission's view on the matter, the Advocate General considers that the claimed exclusive competence of the Community to conclude such an agreement cannot, therefore, be founded on its alleged "necessity".[401]

---

[401] *E.C.J.*, Opinion of Advocate General Tizzano, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* (C-466/98), *Kingdom of Denmark* (C-467/98), *Kingdom of Sweden* (C-468/98), *Republic of Finland* (C-469/98), *Kingdom of Belgium* (C-471/98), *Grand Duchy of*

The role of the Advocate General is to assist the Court of Justice by delivering an opinion, in other words a proposed draft decision. This opinion is not binding on the Court, however, in most of the cases, the subsequent court ruling agrees with his guidance. In this case, it is relevant to raise the question of the effects that a similar final judgment would have on the European and international airline industry, and more specifically on the ownership and control issue. Two effects can be pointed out. First, the use of the traditional 'nationality clause' in the bilateral agreements has always been an impediment to European airline mergers. Losing that nationality, through a takeover by an airline with another nationality, means losing vital routes. This is one of the main points that scuppered the 'on-off' talks between BA and KLM. The condemnation by the Court of the use of 'nationality clause' will certainly lead to its removal, and hopefully, will kick off a restructuring of the European airline industry through mergers and takeovers. The second effect of a similar final ruling would be related to the conclusion of the EU-US Open-Skies agreement. However, this effect is not as likely as the increase of European airline mergers because the exclusive competence of the Commission to conclude Open-Skies with the US was not finally recognized. Indeed, member States are still allowed to conclude agreements with the US in the respect of the EC law. Thus, the Commission will still have to struggle a long while before getting full authority. The legal consequences that would result from a decision in the Commission's favor are difficult to predict. Probably, "[a]ll the Open-Skies agreements between EC Member States and the US would be lacking in legal basis, and hence presumably void, under EC law."[402] As a result, will the EU countries be disciplined enough to renounce their personal relations with the US? It appears highly unlikely that there will be any change in the positions until the Court rules one way or the other. In fact, the European Commission does not expect Member States to grant a mandate until it is absolutely required. At the same time, it is now time for EU Member States to understand this necessary shift in order to pursue and

---

Luxembourg (C-472/98), *Republic of Austria* (C-475/98), *Federal Republic of Germany* (C-476/98) [2002], online: europa http://curia.eu.int/jurisp/cgibin/form.pl?lang=en&Submit=Rechercher&docrequire=alldocs&numaff=&datefs=&datefe=&nomusuel=&domaine=TRAN&mots=&resmax=100 (date accessed: 1 February 2002).

[402] J. Balfour, "A Question of Competence: the Battle for Control of European Aviation Agreements with the US" (2001) 16-SUM Air & Space L. 7 at 18.

finalize the air transport liberalization: granting the Commission a full mandate is one of the prerequisites to revising the ownership and control principle.

3.2 The US DOT and the US Congress: necessity of fair play in international aviation policy

In order for the international community to liberalize foreign investment restrictions on the worldwide scale, the US must adopt fair behavior regarding the main issue, *vis-à-vis* its nationals, as well as *vis-à-vis* the foreign entities, since the US holds a predominant role in this liberalization process. Clearly, if the US decides in favor of a liberal ownership system in the airline industry, it will start by doing so in its own territory and then will expand its policy in other States through regional reciprocal agreements, such as by an EU-US agreement. By these agreements, the remaining countries that are reticent about a liberal foreign investment policy will need to follow this trend, if they want to remain competitive on the international aviation market. This is how the liberalization process of the ownership and control issue should be pursued. In reality, for such an evolution to occur, the US authorities must agree on the policy they want to follow: the Congress should change the US protectionist statutes and the DOT should respect the letter of the law.

Presently, the inconsistent US context is as follows. On the one hand, the major decisions of the US CAB and DOT since 1958 show that these authorities have shaped US policy by exercising a great deal of discretion. In each case, the ownership restrictions were interpreted in a way that furthered some overarching economic and/or political objective.[403] Thus, the DOT's decisions have become more and more liberal, adapting the law to American economic needs certainly, but more importantly, to the needs of the airline industry. The DOT has taken the place of the legislator. On the other hand, a very protectionist legal regime prevails with respect to the ownership of airlines. The US Congress is not eager to change the ownership statutes. Since 1993, the US Congress has examined several bills to amend the *Federal Aviation Act*'s ownership provision that

[403] See Part 1, Chap. 2, 1.2.2. above, at 29; "DOT arguably reached the outer limits of allowable agency discretion when it permitted KLM to buy forty-nine percent of the equity and twenty-five percent of the voting stock in Northwest", see Grant, *supra* note 27 at 70.

would allow up to forty-nine percent foreign voting stock,[404] but none of these proposals has had the necessary political support to become law. Changing US statutes is very difficult. Some argue that this is due to the fact that some air regulations, such as the ownership law, have been in place since the very beginning of the airline industry development; therefore, any change of these laws could harm the US economy. Others argue that US law cannot be changed due to the risk it may create since the US air market is so huge that any regulatory change, especially regarding the ownership issue, would affect the national air transport market. This second reason is certainly the main concern.

Nevertheless, the timing is appropriate the US to introduce a new regulatory system. The abolishment of national restrictions on foreign investments is not optional for the US Congress. It should even be considered a priority since it would enable the launch of the liberalization of foreign investment globally. Indeed, if the majority of States advocate this liberalization and direct their actions towards it, the US would be better to take a leadership role with respect to this trend in order to maintain its strong position on the aviation market in the long run. Thus, this legislative shift will enable the DOT to play fairly on the international scene, as most of its decisions will comply with the text of the law.

4. Harmonization of competition laws

Earlier in this study, the argument was advanced that it is necessary to harmonize competition rules in the international air industry, especially between the US and the EU antitrust laws.[405] Two recent cases in the aircraft manufacturer industry clearly demonstrate the differences among the national systems, especially between the EU and the US competition laws,[406] and illustrate the need to develop an effective system for

---

[404] The most recent proposal to change the law came in 1995, *Bill to Amend Title 49, United-States Code, to Authorize the Secretary of Transportation to Reduce Under Certain Circumstances the Percentage of Voting Interests of Air Carriers Which are Required to be Owned and Controlled by Persons Who are Citizens of the United-States*, 104th Congress 1st Session, H.R. 951 (15 February 1995), Bill introduced by representative Clinger.

[405] See Part 2, Chap. 2, section 1, above, at 90.

[406] The Boeing-McDonnell Douglas merger in 1999, see Luz; O'Toole; and Dempsey, *supra* note 358; the 2001 General Electric Co. proposal to takeover its rival Honeywell, see Guerrera; Bocev; Chuter, *supra* note 359.

reconciling the differences in countries' domestic laws and politics. The airline industry is not absent of the conflict of laws, which may impede the industry growth. Globalization requires more cooperation and concentration. By international merger and takeover development among air carriers, and with the revision of the ownership regime, a uniform regime of antitrust laws[407] should be drafted by the international community in order to avoid any impediments to the growth of the airline industry.

Unlike the harmonization of safety standards, the harmonization of national competition laws is much more complex. The achievement of multilateral cooperation will only come if the airlines and their governments are prepared to work together for mutual long-term advantage through compromise. However, serving all the national and international private interests, which are so different from each other, within one agreement would be a very ambitious task. Indeed, since the 1990s, there have been attempts at harmonization, which confirm the difficulty in reaching consensus. The Munich Group in the 1993 GATT Plurilateral Agreement proposed the creation of a code of international antitrust law and an international enforcement agency to address disputes as they arise.[408] Despite the uniformity and clarity advantages of such a system, it has not been possible to implement it yet, mainly due to the fact that, even if an international code that was acceptable to all countries could be developed, disputes in interpreting these laws would inevitably arise.[409] Aside from this international initiative, the bilateral system has been used to propose certain initiatives with respect to harmonizing competition law. Thus, the US has twice attempted to negotiate bilateral agreements encompassing antitrust issues. In 1991, the EU and US reached an understanding with regards to the implementation of their respective laws.[410] This agreement was intended to promote coordination between the EU and US to reduce the danger of differences in their respective competition rulings concerning transatlantic mergers. The agreement achieved little success owing to the absence of an agreement for the exchange of confidential

---

[407] For a comparative study of the state of competitive law in the US and in the EU, see Elliott, *supra* note 354 at 196-204.
[408] Luz, *supra* note 358 at 171, note 154.
[409] *Ibid.* at 172.
[410] *Agreement Between the Government of the United-States of America and the Commission of the European Communities Regarding the Application of their Competitive Laws*, [1995] O.J. L. 95/47.

information.[411] The second unsuccessful attempt was enacted in the *International Antitrust Enforcement Act* of 1994 (IAEAA),[412] which authorized the Federal Trade Commission to pursue reciprocal agreements with foreign antitrust enforcement agencies.[413] Furthermore, an additional effort with respect to harmonization was made in 1998 when the EU and the US entered into a supplemental arrangement on the subject of their competition laws: "[I]t was intended to further clarify the principles under which the parties cooperate to eliminate anti-competitive activities in each other's respective territories."[414]

These few examples of negotiations demonstrate that it does not seem likely that an international system of uniform antitrust laws will soon be achieved. At the same time, it represents a necessary complement to the successful implementation of the revision of ownership regime, since it would be required in order to strengthen the progress of the international airline concentration process. It should therefore remain a priority for the international community. At present, what can be said is that the harmonization approach presents the most viable option for addressing international antitrust concerns, much more than a globalized antitrust law regime, as each State would maintain its own antitrust provisions. The WTO is probably the best entity to be in charge of dispute resolution regarding competition issues, given its great experience in this field and its efficient dispute mechanism.[415]

This first Chapter has tried to list the major initiatives that the international community should make within the next years. The implementation of the liberalization of international airline ownership and control may cause problems in the industry if States do not enhance international cooperation. A variety of measures should be taken, and only the principal ones are listed above. Most of these measures would require long and

---

[411] For more information about the 1991 Agreement, see Dempsey "Competition in the Air", *supra* note 35 at 1102-1103.
[412] *International Antitrust Enforcement Act*, 15 U.S.C. §§ 6201-6212 (1994) (hereinafter IAEAA).
[413] For more information about IAEAA, see Luz, *supra* note 358 at 173.
[414] Dempsey "Competition in the Air", *supra* note 35 at 1104.
[415] These last suggestions have been addressed by Luz, *supra* note 358 at 174-177.

complex negotiating processes. Nevertheless, it is the only way to safeguard the safety and security of the transport worldwide and to 'normalize' the airline industry itself, by allowing it to grow as any other international industry. If the international community intensifies its efforts of liberalization and harmonization, it may reach the final settlement of the ownership issue, which will undoubtedly be subject to a long negotiating process as well. Thus, the second Chapter of this analysis addresses the intermediate steps to undertake among States before finalizing the liberalization of cross-border investment for international airlines.

Chapter 2. Regionalism: a prerequisite to reach multilateralism

While the air transport evolution follows the economic movement towards globalization, the macro-economic dimension has replaced the micro-economic level. Thus, the national or bilateral negotiating process between States has moved in recent years towards a regional negotiating process in the move towards a multilateral system. At present, therefore, international air carriers are not evolving in isolation, they are linked together through bilateral, regional, or multilateral agreements and in this manner they adopt common economic measures. Subject to international negotiations, the ownership and control issue is going to be resolved according to this movement: finding regional solutions to the cross-border investment concern seems to be a fair and rational regulatory approach for the present in order to reach a multilateral answer in the long run.

1. A regional approach to the airline liberalization process

1.1 The role of regionalism in the aviation industry

"The world airline industry has too many players and must face the same painful consolidation that is sweeping other sectors of the economy."[416] A "bloc-regional" approach is necessary for the consolidation of a liberalized aviation industry, which is "over-fragmented" at present.[417] Indeed, the airline industry needs a new negotiating process that will foster competition across a broader range of markets. A shift away from bilateralism will likely be spawned by the consolidation that is now underway: with the passage of NAFTA, the development of the ASEAN region as an economic bloc,[418] the completion of the European single aviation market, and the emergence of similar regional affiliations within Central and South America, the potential is there for groups of Nations to negotiate regionally, offering their airlines a number of opportunities in accordance with the range of markets. Today, there would be more than fifty different groupings of States that are, or could become, involved in the regulation of aviation.

Regionalism presents advantages for developing countries as well as developed countries. Regionalism represents an opportunity for developing countries to strengthen their positions in the global air transport market. Indeed, instead of maintaining isolated markets, smaller countries from the same area of the world could gather by common interests-- hence the idea of a 'Community of Interests'--and cooperate in order to become a strong community, able to compete with other stronger economic regions. For instance, a unity among Arab airlines is being tested over proposals for a single aviation market in the region as they struggle with their weak economic situation.[419] It is likely

---

[416] R. Gibbens, "World has too many airlines: IATA boss" *National Post* (4 December 2001), online: national Post http://www.nationalpost.com/financialpost/worldbusiness/story.htm (date accessed: 5 December 2001).

[417] Jeanniot Sees Regional Blocs As Cure For Over-Fragmentation, *Aviation Daily* 344:43 (31 May 2001) 2 [hereinafter Jeanniot].

[418] G.C. Hufbauer, C. Findlay, Flying High – Liberalizing Civil Aviation in the Asia Pacific (Washington D.C.: Institute for International Economics, 1996) 109.

[419] "With the Middle East peace dividend yet to materialize, weak oil prices, a continuing UN economic embargo on Iraq and political instability in many countries, these are challenging times for the Arab world. (...) Arab airlines have not escaped the suffering?", T. Gill, "Opening Arab Skies" *Airline Bus.* (June 1999) 47.

that "[i]n the long-run, airlines from this region will merge for their own benefit."[420] Also facing the air transport crisis, it has been predicted for few years that "the Latin American airline industry will be consolidated radically over the next five to ten years through large mergers or through the formation of holding companies (...)."[421] Meanwhile, the Andean Pact nations (Bolivia, Colombia, Ecuador, Peru, and Venezuela) agreed to a traffic rights exchange, granting each other all five freedoms of the air and agreeing to designate multiple national airlines to serve any of the destinations within the region.[422] Regionalism benefits the developed countries as well and has therefore been the main negotiating process used in recent years. The European market is the best model of integration in the air transport sector. The 'Three Packages' of liberalization has created a strong 'Community of Interests', able to compete more equally with the US. The APEC is another example of the development of regionalism and its ability to strengthen the regional economy.[423] Regarding all these agreements, it is evident that regionalism is valuable for two reasons. First, it allows like-minded States to find initial compromises, which suggests that a multilateral compromise may be easier to arrive at later. Second, it benefits developing countries because, individually, they may not be able to compete fairly with dominant nations like the US in the air carrier market, but as a regional group they will be able to reap the benefits of market competition and compete more fairly on the market in the long run.[424]

1.2 Regionalism: a first step to liberalize airline ownership and control

Regional agreements could be a bridge to full liberalization, as both de Palacio and Jeanniot assert. Such agreements could be "progressively extended", with the accelerated elimination of "artificial barriers to access and entry to markets," as well as lifting limits

---

[420] D. Cameron, "Out of the Wilderness" *Airline Bus.* (June 1999) 50; the Arab cooperation has already started by few initiatives in the fields of ground handling and computer reservation system, T. Gill, "A Firmer Base" *Airline Bus.* (June 2000) 49-50.
[421] C. Shifrin, "Towards Unsettled Skies" *Airline Bus.* (June 1999) 87.
[422] Lehner, *supra* note 66 at 471.
[423] N. Ionides, "Spoiling for Choice" *Airline Bus.* (October 2000) 84.
[424] According to G. Goo, "[o]ptimistically, the long-term results of a "plurilateral" relationship could place these [developing countries]in a more favorable negotiating position with the US to finally discard the old bilateral agreements", see Goo, *supra* note 73 at 562.

on transnational investment.[425] Indeed, inside a 'Community of Interests', States should not fear foreign investment liberalization in their national airlines, if all the measures taken are reciprocal measures agreed upon in the regional agreement. In this case, the traditional concerns regarding the ownership liberalization, such as traffic rights, national security, and economic security, do not seem as relevant, since the regional partners would be equal. Among all the liberal regional agreements that have been negotiated so far,[426] two main examples, dealing, *inter alia*, with the relaxation of the ownership rule, can be exposed. Among the EU Member States, for example, the traditional national ownership and control requirement was replaced by the concept of "Community Carrier."[427] Carriers that meet the legally defined requirements enjoy Community status and can thus benefit from the advantages of Community legislation, *e.g.*, the right of establishment throughout the Community and cabotage. The other agreement, signed on May 1st, 2001, which deals with the ownership and control principle of designated airlines is the *APEC Agreement*: more than simply a regional agreement, the *APEC Agreement* is a plurilateral agreement.[428] The Agreement retains the traditional *Bermuda 1* requirement that an airline be "effectively controlled" by nationals of the country, the government of which designates the airline to serve another country. However, it is significant that the agreement does away with the traditional requirement that an airline must also be "substantially owned" by nationals of the designating country. In place of that requirement is a condition that the airline simply be incorporated in that country and have

---

[425] Jeanniot, *supra* note 417.

[426] States from different regions of the world have implemented a regional Open-Skies policy, with a liberalization of the ownership and control restrictions and of third, fourth and fifth freedom rights. For instance, the Southern African Development Community (SADC) States are in the negotiating process in order to implement such a policy, see K.J. Max, "South African liberalisation makes progress" *Flight Int'l* (October 24, 2000) 4; as well, three regional agreements containing "Community of Interest" provisions have been listed by ICAO (CARICOM, COMESA, ACAC), see WTO doc.2, *supra* note 98 at 25.

[427] The three Packages of the European Liberalization, *supra* note 52.

[428] On November 15, 2000, the US and four APEC countries (Brunei, Chile, Singapore, and New Zealand) reached an agreement, called *Multilateral Agreement on the Liberalization of International Air Transportation* [hereinafter the *APEC Agreement*]. The document contemplates that other countries may sign on and thus provides a potential foundation for a broad multilateral Open-Skies regime. It may be more appropriate to talk about a plurilateral agreement instead of regional agreement, as the *APEC agreement* is much broader than the Asia Pacific region; "Peru and other Latin American countries – particularly the Central American countries, where the Group TACA carriers are based – are likely candidates, [M. Gerchick as former DOT deputy assistant secretary] said, pointing to the Bush administration's focus on the Western Hemisphere and well as its commitment to effecting the Free Trade Area of the Americas as a strong reason for extending APEC to other regions", see "APEC Multilateral Moves U.S. Toward

its principal place of business there.[429] Article 3 of the *APEC Agreement* is very controversial, as it is ambiguous as to whether the ownership and control issue has been liberalized or not. While some Partner States, such as New Zealand, call for a global easing of restrictions on air service agreements,[430] other States, especially the US, remain protectionist regarding certain issues. Furthermore, Article 3 contains an oddity: it states that each government has the right to reject an airline designated by another government if the airline is "substantially owned" by nationals of the first country. In other words, the US may refuse to authorize service by a Chilean airline if the airline is "substantially owned" by US nationals. Why would a government want special protection from its own citizens? Why did experienced negotiators allow this very un-liberal provision into their pioneering new Agreement?[431] In addition, the US DOT has established a reporting system that enables the US to monitor the degree of US ownership of foreign carriers and

---

Globalizing Pacts" *Aviation Daily* 344:22 (1 May 2001) 3; N. Ionides, "Five Sign Up to Asia-Pacific Multilateral Agreement" *Airline Bus.* (June 2001) 34.

[429] Article 3 'Designation and Authorization' of the *APEC Agreement*:

1. Each Party shall have the right to designate as many airlines as it wishes to conduct international air transportation in accordance with this Agreement and to withdraw or alter such designations. Such designations shall be transmitted to the concerned Parties in writing through diplomatic or other appropriate channels and to the Depositary.
2. On receipt of such a designation, and of applications from the designated airline, in the form and manner prescribed for operating authorizations and technical permissions, each Party shall grant appropriate authorizations and permissions with minimum procedural delay, provided that:
    a. **effective control** of that airline is vested in the designating Party, its nationals, or both;
    b. the airline is incorporated in and has its **principal place of business** in the territory of the Party designating the airline;
    c. the airline is qualified to meet the conditions prescribed under the laws, regulations, and rules normally applied to the operation of international air transportation by the Party considering the application or applications; and
    d. the Party designating the airline is in compliance with the provisions set forth in Article 6 (Safety) and Article 7 (Aviation Security).
3. Notwithstanding paragraph 2, **a Party need not grant authorizations and permissions to an airline designated by another Party receiving the designation determines that substantial ownership is vested in nationals.**
4. Parties granting operating authorizations in accordance with paragraph 2 of this Article shall notify such action to the Depositary.
5. Nothing in this Agreement shall be deemed to affect a Party's laws regulations concerning the ownership and control of airlines that it designates. Acceptance of such designations by the other Parties shall be subject to paragraphs 2 and 3 of this Article.

[430] Ionides, *supra* note 428 at 34.

[431] To these questions, the answer can be summarized in one word: labor. Indeed, it has been argued many times, and as we see earlier in this study, that US labor interests were reportedly concerned that cross-border investment" would mean that US airlines would export capital and jobs to low-cost, foreign airline subsidiaries. Therefore, US unions reportedly secured a commitment from the US DOT that this fear would be fully addressed. US negotiators then proposed the provision, which was nominally included in the Agreement as a means to address concerns about "flag of convenience".

issued an order that imposed upon the airlines (including Lan Chile, Air New Zealand, Singapore Airlines and Royal Brunei Airlines) of four of the Partner States[432] a 30 days' advance notice to the DOT of any transaction in which a US national either increases its ownership of a foreign carrier's stock by 20 percent or results in a US national owning 40 percent or more of a foreign carrier's stock.[433] Accordingly, the *APEC Agreement* is more symbolic than practical for many signatories,[434] as the liberal measures on ownership and control in the Agreement are quite narrow.[435] However, the deal may still prove to be significant. It marks the first major play by Washington to move beyond the existing Open-Skies policy, leaving the agreements unchanged, but bundling bilaterals into multilaterals. Thus, it can serve as a starting point for multilateral negotiations in order to proceed to the complete abandonment of national ownership and control restrictions.

To complete this discussion of regionalism, it bears noting that, as with regionalism in trade, the regional fragmentation of the overall aviation market could result in more competition within specific blocs, but barriers could arise for competitors from outside the agreement, which would exclude them from competing with carriers from inside the bloc. In fact, regionalism is just a starting point towards multilateralism; the different regional groups that are created will need to gather in the long run in order to harmonize, *inter alia*, the cross-border investments among the international airlines around the world. On this point, L. de Palacio states that "it has not been possible yet to create links between these regions and thus allow airlines to benefit from a much larger market, but the Commission is actively pursuing this goal and tries to develop relations with these other regions."[436] Since 1995, an attempt to bring closer together the two main aviation

---

[432] No comparable requirement is imposed on the airlines of any other countries, including countries with the most restrictive bilateral agreements with the US.

[433] In January 2001, according to its own terms, the DOT issued a 'Show Cause Order', "amending the US licenses of carriers of the participating countries, requiring them to notify DOT of any increase in beneficial shareholding by a US shareholder by 20% or more, within 30 days after such a change", Department of Transportation, *Order in the Matter of Amending the US Licenses of Carriers of the Participating Countries*, DOT Order 01-1-13 (16 January 2001); "Multilateral Pact Carriers Must Report Ownership Changes" *Aviation Daily* 342:43 (1 December 2000) 4.

[434] This is because most of them already have bilateral Open-Skies agreements with a number of other signatories and some with all of them. Those that do not, such as Singapore and Chile, are not going to see direct flights as a result of this new agreement.

[435] "Asian carriers have given a cautious welcome to the deal, saying true liberalization will not take place until airline ownership rules are revamped globally", see Knibb, *supra* note 213 at 24.

[436] de Palacio 2001, *supra* note 50.

regions of the world, the US and the EU,[437] has been achieved by negotiating a Transatlantic Common Aviation Area (TCAA). Proposed by the Association of the European Airlines (AEA), the TCAA contains virtually all of the features of the US model Open-Skies agreement, but goes considerably beyond that model.[438] Briefly, in addition to allowing full pricing freedoms and providing alliances with operating flexibility, the TCAA identifies four core areas for liberalization: first, the freedom to provide services between any points in the Area, including two points in a single country; second, unrestricted airline ownership and the right of establishment;[439] third, the harmonization of standards for the evaluation of airline competitive behavior;[440] and fourth, the elimination of restrictions on the use of leased aircraft and the reservation of the carriage of government-financed traffic to national carriers.[441] The TCAA proposal seeks to address the problem of the lack of government policy coordination by creating a mechanism for regulatory convergence. Indeed, it is a priority to establish a dialogue between the EU and the US, about their respective visions of the market-based regulatory environment in which they want airlines to operate.[442] Even though some people remain opposed to such an opening of air transport,[443] the TCAA benefits the European airline industry as much as the US airline industry, the consumers and the shareholders.[444] However, there have been only informal talks between Brussels and Washington so far, and although the political negotiations will continue, no one seems optimistic about a

---

[437] "We are all well aware of the fact that the existing bilateral air transport relations form a complex political web. It will not be easy to replace. Therefore the Commission is of the opinion that the two most important air transport markets in the world, the US and EU should take the lead", see L. de Palacio, "Beyond Open Skies" (Address at the European Commission Beyond Open Skies Conference, Chicago, 6 December 1999).

[438] H. Wassenbergh proposes a Draft text of a supplemental bilateral air transport services agreement between Member States of the EU and the US, see Wassenbergh, *supra* note 120 at 19.

[439] Ownership and control of carriers could be vested in nationals of any of the participating TCAA Member States.

[440] Abeyratne "Aviation Competition Laws", *supra* note 54 at 154.

[441] For an overview of the AEA's proposal: AEA, *Towards a Transatlantic Common Aviation Area*, AEA Policy Statement (September 1999).

[442] The European Commission's vision of a regulatory structure that will allow airlines to benefit from liberalization, see de Palacio 2001, *supra* note 50.

[443] Especially the transport worker unions, see B. Lancesseur, "Un Cadre Réglementaire rigide – La mise à plat s'impose" *Aéroports Magazine* (Mai 2001) 18.

[444] U. Schulte-Strathaus, "Common Aviation Areas: the Next Step Toward International Air Liberalization" (2001) 16-SUM Air & Space L. 4 at 5; European carriers are determined to push the TCAA project, see M. Pilling, "Only a Call Away" *Airline Bus.* (March 2001) 39; Air France calls for further negotiations on TCAA, see Lancesseur, *supra* note 443 at 21; C. Baker, "French Push for TCAA" *Airline Bus.* (December 2000) 18.

transatlantic breakthrough being achieved soon. First, too many disagreements still remain between the parties. Indeed, "a TCAA may be agreed upon only if it is limited to the exchange of third and fourth and, for EU air carriers, seventh freedom air traffic rights (not 'external' fifth freedom),"[445] and only if the ownership and control liberalization is limited to "the APEC formula for ownership of designated air carriers,"[446] in accordance with the will of the US. Second, external factors to the TCAA impede further negotiations. The US-UK relations regarding air transport liberalization are still not clarified. The UK, often considered as the 'champion' of liberalization and free competition, continues to protect access to London Heathrow airport, when almost all other EU Member States have an Open-Skies agreement in place. At the present time, negotiations continue between the two States but it is still unclear whether an Open-Skies will be concluded soon. The other external obstacle to TCAA negotiations is Ireland, which still protects the so-called Shannon stop for reasons of domestic policy, even though granting authorization to land in Shannon would improve the area economically. While a rapid compromise is quite possible for these two impediments mentioned above, it is not the case for the biggest hurdle that stands in the way of the TCAA negotiations: the default of the European Commission's mandate. In the framework of the cases 'Commission against seven Member States', the Advocate General, Antonio Tizzano, considered that the claimed exclusive competence of the Community to conclude an agreement with the US is not founded.[447] Furthermore, it will probably take some time before a change occurs in the Member States' positions, since it is not expected that they grant a mandate to the Commission before it is absolutely necessary.

Considering all the above, the process of cross-border investment liberalization seems arduous, even at the regional level. As long as the negotiations remain between States, as part of the same 'Community of Interests', the liberalization process works quite well (*e.g.* the EU), but as soon as regional agreements broaden and become plurilateral, such as the *APEC Agreement*, liberalization is inevitably more limited since they must take various interests into account. Thus, the harmonization of regional policies

---

[445] Wassenbergh, *supra* note 120 at 9.
[446] *Ibid.*, otherwise "it is likely that [the US] Congress would have to amend the *Federal Aviation Act* before the US could sign the TCAA", see Schulte-Strathaus, *supra* note 444 at 6.
[447] *E.C.J.*, *supra* note 401.

regarding, *inter alia*, the ownership and control of airlines, is much more complex; however, progressively expanding all the agreements seems to be a reasonable way to achieve, in the long-run, a complete liberalization of foreign investments worldwide.[448]

2. A multilateral approach to the airline liberalization process

2.1 The role of multilateralism for the airline industry

Multilateralism is the final objective that will enable the international community of States to have a unique regulation with respect to air transport liberalization. While some argue that multilateralism will be reached only progressively by gathering the various regional agreements (*e.g.* the TCAA), others believe that a multilateral agreement can be achieved in a few steps under the auspices of an international organization such as ICAO. Even though the importance of the role of international organizations with respect to air transport liberalization should not be disregarded,[449] it is likely that a multilateral agreement that harmonizes air transport rules, such as the airline ownership and control issue, will be reached by harmonizing the regional agreements incrementally. This process will not, therefore, be resolved soon. Thus, as soon as the air transport world is divided into regions, a multilateral framework "may be achieved by liberal 'bilateralism' between regions. It will not be in the world's interest, if the regions (...) become ever so many protectionist 'fortresses' and eventually will start a fight bilaterally between them in order to try and conquer the world's sky, just as the States initially did and still may try to do."[450]

---

[448] H. Kass expresses this idea very clearly by stating:

> A plurilateral arrangement will not open all markets immediately, but it will gradually achieve this goal by increasing the number of countries that are committed to a specific set of principles. For example, the US position is that it is unwilling to discuss changes in foreign ownership and cabotage, except on a case-by-case basis...By signing Open-Skies agreements with individual nations, a base of common agreement would be solidified. It would then be much easier to convene a multilateral convention among these countries to consider subjects such as foreign ownership and cabotage.

See *supra* note 131 at 180.

[449] Further discussion on the role of international organizations on the air transport liberalization will be found, below, at 125.

[450] Wassenbergh, *supra* note 120 at 11.

Nations and airlines would benefit from multilateralism. Among other advantages,[451] multilateralism is a better vehicle than bilateralism for achieving widespread liberalization: it can end the waste of time and the expense of negotiating and renegotiating a large number of bilateral air agreements; it can further promote increased standardization of the numerous regulatory arrangements that exist in the bilaterals; increased international traffic would add to the value of export services and reduce the cost of importing foreign airline services; and it can "open developing countries to increased air service by foreign providers, thereby resulting in greater economic development."[452] Therefore, it would be appropriate to undertake the first step towards the multilateral agreement establishment. The question to raise now is how a multilateral agreement on air transport can be concluded by taking into account the various interest groups concerned, particularly consumers, airlines, governments, and labor.

2.2 A new multilateral agreement on air transport

The international community is facing a very ambitious task by facing the establishment of a multilateral framework on air transport. So far, no international agreements have been reached on the commercial aspects of civil aviation – it was one of the main flaws of the *Chicago Convention* – owing to the preeminent State protectionism or to the great use of national air transport as a bargaining chip. The principal objective of such an agreement would be air transport liberalization and it must therefore be designed with the consideration of the needs of the various interests (*e.g.* air transport consumer and worker interests, airline and airport interests, and tourism and trade interest). Moreover, a question that is fundamental to the design of the new agreement is whether it would replace existing bilateral agreements or would complement them. Considering the restrictive provisions of the current bilaterals, it is hard to imagine how they can be combined with a multilateral agreement on air transport liberalization. Therefore, in the long run, an exclusive application of the multilateral agreement is advocated.

The structure of this proposed new air transport multilateral agreement should include certain essential elements. The provisions must be clear and flexible, in such

[451] "The merits of a multilateral system" are clearly addressed by Lehner, *supra* note 66 at 458-462.
[452] For more details about this last benefit, see *ibid.* at 466.

ways that permit air carriers to maximize upon opportunities. First, it should start with a Preamble that, after defining the principal terms of the agreement, should affirm the main goals the Parties want to pursue by implementing the agreement, including: "promote the freedom of movement of persons, goods, capital, services, ideas and information"; "maintain a global network of safety...and promote security"; "optimally advance the solidarity"; and "meet the needs of international inter-course, trade and tourism."[453] In addition, the Preamble should guarantee 'an increasing participation of developing countries by taking particular account of the serious difficulty of the least-developed countries' and recognize 'the international public interest as of primary importance,'[454] as well as 'consumer protection'. Finally, the *Chicago Convention* should be included in the Preamble in order to preserve the basis air transport principles, such as the sovereignty of airspace and the equality of opportunity in international air services.

Second, the structure of the multilateral agreement should include two parts. The first part should combine the main economic provisions that were previously approved on a regional basis. Among other provisions, it should deal with 'market access', 'airline designation and authorization', 'safety and security' and "dispute settlement mechanism'. Regarding the 'market access' issue, the agreement should provide for certainty of access to the fifth and seventh freedom traffic rights of all the contracting parties.[455] Since further liberalization of market access is conceivable in the long run, it would include the Eighth and the ninth Freedoms. However, while the first seven freedoms need to be

---

[453] H. Wassenbergh has drafted a proposed Preamble of a multilateral economic air treaty, see Wassenbergh, *supra* note 120 at 11.

[454] *Ibid.* at 12.

[455] According to the model of Article 2.1 of the *APEC Agreement* (see the *APEC Agreement*, *supra* note 428) the provision should state:

> Each Party grants to the other Parties the following rights for the conduct of international air transportation by the airlines of the other Parties,
>
> a. the right to fly across its territory without landing;
>
> b. the right to make stops in its territory for non-traffic purposes;
>
> c. the right, in accordance with the terms of their designations, to perform scheduled and charter international air transportation between points on the following route:
>
> i. From points behind the territory of the Party designating the airline via that Party and intermediate points to any point or points in the territory of any other Party and beyond;
>
> ii. Between the territory of the Party granting the right and any point or points.

granted directly, cabotage rights can be rendered applicable under reserve, as many countries will be reticent to such liberalism. For instance, cabotage rights can thus be granted only to some of the airlines so designated in the present agreement or only to the air carriers that have entered into an alliance with an authorized designated air carrier. With respect to the 'designation and authorization' provision, it has to be determined whether it is more appropriate to adopt a provision similar to Article 3 of the *APEC Agreement*,[456] which removes the ownership restrictions, but retains the control requirement of the air carrier by nationals of the designating Party, or to remove both the ownership and the control provisions. Considering our previous argumentation in favor of a total elimination of foreign investment restrictions, the second option is advocated. However, it is necessary to keep a strong link between the designating State and the airline for safety reasons; the elements of a strong link include the airline being an establishment and having its principal place of business in the relevant State, and also holding an Air Operator's Certificate from that State.[457] Moreover, the multilateral agreement should refer to Article 4.1 of the *APEC Agreement*, as it gives the Parties more freedom to designate airlines. According to these few remarks, the 'Authorization and Designation' provision of the multilateral agreement can be drafted on the model of Article 4 of the *APEC agreement*, apart from the part 2.a of the Article.[458] With regard to the airline 'safety and security' issue, the multilateral agreement should guarantee that the level of international air transport safety and security would not be affected by the liberalization. Once again, the *APEC agreement* can be taken as an example, whereby the contracting Parties agree to "maintain and administer safety standards" (Article 6) and "reaffirm that their obligation to each other to protect the security of civil aviation against acts of unlawful interference forms an integral part of this agreement" (Article 7). Nevertheless, these 'promises' do not constitute a sufficient safeguard. To ensure flight safety, the further control of qualified actors, producers, and air carriers is required. Therefore, ICAO has to achieve a global harmonization of national aviation laws

---

[456] The *APEC Agreement*, *supra* note 429, Art. 3.

[457] This criterion of principal place of business, originally developed by ECAC, has become more important over time, in the bilateral and regional agreements. For more information about this criterion, see WTO doc. 2, *supra* note 98 at 21-25; Haanappel, *supra* note 1 at 101-102; H.A. Wassenbergh, "The Sixth Freedom Revisited" (1996) 21 Air & Space L. 285 at 291-292.

[458] The *APEC Agreement*, *supra* note 429, Art. 4.

regarding certification and licensing, authorization of air carriers, airport operations and air navigation, aviation communication and surveillance while creating an adequate system to monitor the implementation of the rules in practice, under penalty of exclusion from participation in international air transport. Incorporating this system in a multilateral agreement is the only way to ensure its efficacy. Finally, the multilateral agreement should provide a dispute settlement mechanism that can solve any disagreement not resolved by a first round of consultations. A flexible *ad hoc* mechanism has been foreseen by the *APEC Agreement*, in its Article 14.

The second part of the multilateral agreement should include other important principles, either used generally in trade agreements or newly developed, in order to improve the equality among the Parties and, therefore, facilitate the conclusion of such an agreement. Three issues will be presented: the fair competition principle and the convergence of competition policy, the transparency principle, and the reciprocity principle. First, the issue of competition must be included in the agreement, through two aspects. Competition among air carriers must be executed fairly, and cannot be left to the free forces of the market place. "It will therefore be necessary to find and agree upon the exact limits of justifiable government intervention...Also, it may be necessary to try and determine the amount of competition in any given market, which achieve optimal results for the consumer."[459] Thus, a specific provision should be drafted.[460] Moreover, special attention must be given to the issue of competition policy divergence. It has been mentioned earlier that harmonizing the different competition regimes should be a priority in order to strengthen the progressing process of international airline concentration and to equalize the strength of forces among the State Parties. Accordingly, including an additional provision called 'Promotion of Convergence of Competition Policy' is highly recommended. Another important principle to insert in the multilateral agreement is the principle of transparency: a transparency requirement means that State Parties must promptly provide a publication of all relevant rules and regulations, administrative guidelines, and all other decisions, rulings or measures of general application which pertain to or affect the operation of the Agreement to each other. It is necessary for

[459] Wassenbergh, *supra* note 120 at 28.

maintaining good relations among States. The third issue to address is the reciprocity principle. In order to establish equal relations among the partner States, the multilateral agreement should indicate whether there are reciprocal benefits and costs for each of them. Some authors have declared that "real reciprocity is unlikely and essentially impossible" among States,[461] owing to the huge differences between the air markets. In a sense, it is true that there may be some unbalanced advantages; however, in the long run, reciprocity seems to be more and more possible, as regionalism will progressively reduce the differences between nations. Furthermore, the reciprocity principle is related to the MFN basic GATS principle, which requires that a GATS member accord the service suppliers of other members with treatment that is no less favorable than it accords service suppliers of any other country. Including the MFN principle in the multilateral agreement would mean, for instance, that if the US lifts its restrictions on ownership and control of airlines *vis-à-vis* the EU, it would have to do so for all the partner States of the Agreement. Such balanced relations would surely improve the international air transport globally.[462]

The structure of a new air transport multilateral agreement should finally include some appendixes that deal with specific issues, such as State assistance and slot allocation. Indeed, in order to render possible the implementation of the agreement, States should anticipate particular situations, draft additional regulations, and foresee specific exceptions.

This second Chapter can be concluded by stating that a complete liberalization of air transport is now underway, with various regional agreements already concluded.

---

[460] A 'fair competition' provision can be drafted on the model of Article 11 of the *APEC Agreement*, *supra* note 428.

[461] A. Edwards states that, by the reciprocity principle, the US will always give more than what they will get, as some countries still refuse to concede liberal rights to US carriers (*e.g.* the UK), see Edwards, *supra* note 17 at 629-632.

[462] Instead of applying the MFN principle as such, some authors advocate a 'conditional MFN treatment' scenario where only those Parties willing and able to accede to terms of the Agreement would be required to comply, see Abeyratne "Competition in Commercial Aviation", *supra* note 355 at 840. This option does not fit the Multilateral Agreement goal, which is to liberalize the air transport constraints and to balance the benefits among States, as it will even increase the differences among them.

However, the resolution of certain remaining issues will likely be tricky, particularly the airline ownership and control restriction, which is probably one of the most difficult issues to liberalize. The recent plurilateral *APEC Agreement* is a good illustration of this arduous task and shows how difficult it is to break the protectionism of the US. The TCAA negotiations may face the same reticence regarding foreign investment restrictions. Despite this concern, it is likely that the liberalization process will progress incrementally towards a multilateral agreement. The US is favorably disposed to the idea of a case-by-case liberalization; therefore, by gathering the liberalizing agreements in stages, and by creating a fair, equal, and reciprocal multilateral agreement, there is a good chance that the main economic air transport constraints, such as ownership and control and traffic rights, may finally be removed from the international air transport policy worldwide.

Chapter 3. The role of international organizations

Considering the analysis of the previous Chapter, the air transport liberalization process has clearly always come from within the industry. Since the beginning of international civil aviation, States have always had to take the first step to negotiating further rights among them, facing the inadequacy of the international regulations. Indeed, as the *Chicago Convention* was mute with respect to the exchange of traffic rights between commercial air carriers, in 1946, States started to negotiate bilaterally.[463] More recently, the two ICAO Conferences in 1992 and 1994 showed how difficult it is to reach an agreement on the wholesale abandonment of the bilateral system in favor of a more open multilateral system. Conscious of the need to cooperate on a larger scale, States therefore started to conclude regional agreements, in order to liberalize the air markets further. Today, it is time to go beyond the regional stage and progressively gather the regional agreements into plurilateral conventions and, later, into a multilateral treaty.

[463] Abeyratne "Competition in Commercial Aviation", *ibid.* at 794.

Even though this last ambitious task will be mostly led by the airline industry, international organizations have a key role to play in this undertaking. ICAO, WTO, and OECD are the main organizations that intervene in this process by helping governments to tackle the economic, social, and political challenges of the globalized air transport economy. These three organizations are not in competition, as their roles are different. They cooperate in order to improve and accelerate the liberalization process by providing new ideas and debates with respect to difficult issues, such as the airline ownership and control issue.

Thus, this third Chapter is will analyze the proposals of the OECD, WTO, and ICAO regarding the air transport liberalization process and regarding the ownership and control issue in particular, as well as the role they can play in this process.

1.The Organization for Economic Co-operation and Development

1.1 The role of OECD in air transport

Generally, the OECD groups thirty member States that share a commitment to democratic government and the market economy. The OECD plays a prominent role in fostering good governance in public service and corporate activity. It helps governments ensure responsiveness with respect to key economic areas by monitoring the sector. Deciphering emerging issues and identifying effective policies, it helps policy-makers adopt strategic orientations. It is well known for its country surveys, reviews, publications and statistics.

The OECD has an important role to play in the air transport liberalization process and in the establishment of a multilateral agreement. So far, the organization has produced several internationally-agreed instruments, decisions and recommendations, and has provided input to policy debate on current and emerging issues with respect to the prospect of a multilateral agreement. It has provided forums for all participants in the transport chain to consider the suggested reforms. To coordinate a policy and to avoid any overlap in activities, the OECD Secretariat has maintained close contact with the AEA,

ECAC, IATA, ICAO, and WTO. The most recent and interesting OECD proposal regarding the air transport liberalization is the 1999 regulatory reform in international air cargo transportation.

1.2 "OECD Principles for the Liberalization of Air Cargo"

An initiative with a potential impact on the air transport liberalization process is currently undergoing consideration by the OECD. In June 1999, the OECD transport division organized a workshop on "Regulatory Reform in International Air Cargo Transportation",[464] which was followed by the preparation of a Working Paper entitled "OECD Principles for the Liberalization of Air Cargo"[465] in June 2000, and a further workshop in Paris on 4-5 October 2000 that identified issues and possible approaches. Following the 2000 Workshop, the OECD coordinated the activities of Informal Working Groups led by representatives of individual Member States – with the participation of government, international organization, aviation industry and air cargo – that had been formed to address the issues. The "2000 Liberalization Principles" document has been proposed by the OECD Secretariat to assist the interested parties with the liberalization of air cargo services. It suggests practical ways to promote liberalization in the air cargo transport sector, identifying conceptual issues that need to be addressed and the principles that should guide liberalization initiatives. Then, the document focuses on two alternative broad implementation approaches that may be taken: first, by amending existing bilateral agreements, and second, by introducing a new multilateral agreement. In other words, the first proposal is a Protocol for existing air service agreements that liberalizes certain specific air cargo issues and that would allow early implementation of targeted improvements to air cargo arrangements; the second proposal is a multilateral agreement that could provide an effective and efficient alternative approach for a body of interested Member States wishing to liberalize market access as well as auxiliary cargo-related

---

[464] OECD, Directorate for Science, Technology, and industry – Division of Transport, *Regulatory Reform in International Air Cargo Transportation*, Doc. No. DSTI/DOT(99)1 (June 1999).

[465] OECD, Directorate for Science, Technology, and industry – Division of Transport, *OECD Principles for the Liberalization of Air Cargo*, Doc. No. DSTI/DOT(2000)1 (June 2000) [hereinafter *OECD Liberalization Principles*].

services without reliance on re-negotiating a complex web of bilateral air service agreements.[466]

Concretely, the OECD Principles deal, *inter alia*, with 'grant of traffic rights', 'designation and authorization', 'prices', 'consumer protection', 'leasing', 'fair competition', 'promotion of convergence of competition policy', 'safety and security', 'ground handling', and 'dispute settlement'. With respect to only the airline ownership and control issue, the OECD proposes the removal of the ownership requirement, in addition to the control requirement, unlike the APEC designation clause. Thus, Article 3 of the proposed multilateral agreement, called "designation and authorization", suggests a multiple designation provision, with a "principal place of business" criterion. Article 3 has received various comments from States. For instance, France has approved it, stating that "there is no reason to question the aptness of a system that would subject combined and all cargo carriers to different ownership and control regimes depending on whether or not they subscribed to the multilateral agreement", while Greece has refused the multiple designation provision.[467]

The OECD initiative with respect to the sole air cargo liberalization holds that international air cargo demands are continuing to increase more rapidly than international air passenger demands, and the constraints "restrain [the carrier's] *corporate and business structures*, notably their *ownership and control* structures, the *possibility* to contract freely with domestic/local carriers abroad, and to diversify into complementary services such as *freight-forwarding*. Taken together, these constraints prevent air carriers from developing the *seamless* transport services needed by domestic and international customers."[468] Moreover, it seems that air cargo issues are by nature less subject to

---

[466] For more information about the "2000 Liberalization Principles", see *inter alia* the following documents, OECD, Directorate for Science, Technology, and industry – Division of Transport, *Draft Annotated Agenda – OECD Workshop on Principles for the Liberalization of Air Cargo Transportation*, Doc. No. DSTI/DOT/A(2000)1 (August 2000); OECD, Directorate for Science, Technology, and industry – Division of Transport, *OECD Workshop on Principles for the Liberalization of Air Cargo Transportation – Paris, 4-5 October 2000 – Summary Record*, Doc. No. DSTI/DOT/M(2000)1 (November 2000); OECD, Directorate for Science, Technology, and industry – Division of Transport, *OECD Principles for the Liberalization of Air Cargo Transportation – Comments on DSTI/DOT(2000)1*, Doc. No. DSTI/DOT/RD(2000)1 (September 2000).

[467] For the State comments of all the provisions, see OECD, Directorate for Science, Technology, and industry – Division of Transport, *OECD Principles for the Liberalization of Air Cargo Transportation – Comments on Articles contained in DSTI/DOT(2000)1*, Doc. No. DSTI/DOT/RD(2000)2 (September 2000).

[468] *OECD Liberalization Principles*, *supra* 465 at 3.

national sensitivities, and much fewer political issues are raised than with respect to those related to passenger transport. Therefore, it was easier to start the necessary air transport liberalization process with respect to air cargo for a greater acceptance by the interested parties, which then was gradually extended to passenger transportation.

The "2000 Liberalization Principles" proposal is very well-drafted and the international community of States will probably find it very useful for creating the framework for air transport liberalization. So far, the proposal has received widespread support from the governments and from the largest international carriers.[469] However, the problem is that setting air cargo free is not simple, as about "60% of it still travels in the belly of passenger carriers: no possibility of that being freed separately from passenger rights."[470] Therefore, the only way to apply the OECD proposal is to separate completely the air cargo operations from the passenger operations by removing the combi-carriers, which would no longer take place overnight. The document has been submitted to national delegations, organizations and relevant industry parties for comments by the end of 2001. The comments received will be circulated in advance of the Workshop on this issue, which is scheduled for beginning of the year 2002.

2. The World Trade Organization and the GATS

2.1 Implication for international air transport policy

Generally speaking, the WTO is the only international organization dealing with the global rules of trade between nations. The Organization came into being in 1995[471] as the successor to the *General Agreement on Tariffs and Trade* (GATT). At its core are the WTO agreements, the legal ground-rules for international commerce and for trade policy. The agreements have three main objectives: to help trade flow as freely as possible, to achieve further liberalization gradually through negotiation, and to set up an impartial

[469] P. Conway, "Could Cargo Lead Liberalisation" *Airline Bus.* (December 2000) 29.
[470] *Ibid.*
[471] The Uruguay Round of Multilateral Trade Negotiations under the GATT was launched in Punta del Este, Uruguay, in September 1986, and lasted till 1994, when the *Marrakesh Agreement Establishing the World Trade Organization*, (33 I.L.M. 1144 (entered into force 1 January 1995)) was signed [hereinafter the *Marrakesh* Agreement].

means of settling disputes. By lowering trade barriers, consumers and producers can enjoy secure supplies and greater choice with respect to products and services. WTO's rules – the agreements – are the result of negotiations between the members. The current set was the outcome of the 1986-1994 Uruguay Round negotiations, which include a major revision of the original GATT and a *General Agreement on Trade in Services* (GATS),[472] which brought services within a multilateral framework of principles and rules similar to that covering trade in goods under GATT. The GATS contains a number of annexes that cover special situations of individual service sectors, including the Annex on Transport services.[473]

Air transport services were clearly included in the GATS because the parties negotiating that agreement did not want to exclude any service sectors from progressive liberalization; however, they were not really eager to do so. Thus, the annex coverage applies to only three air transport services: aircraft repair and maintenance, the selling and marketing of air transport, and computer reservation systems.[474] It specifically excludes traffic rights[475] and all the services directly related to their exercise. The reluctance of the aviation community to subject the sector to the GATS process stems from the basic GATS principles of most favored nation (MFN), national treatment, and transparency,

---

[472] *Ibid.*, Annex 1B.

[473] In fact, GATS is made up of four components: the framework agreement, containing basic obligations applying to all Member States; national schedules of commitments made by States, specifying the modes or mode of delivery and any conditions on the market areas covered; national lists of exemptions from the obligations of Article II, dealing with Most Favored Nation (MFN) treatment; and a number of annexes. Three features of the GATS are particularly important: the GATS defines a process aimed at the progressive removal of barriers to trade in service; the aim is to cover all tradable services in all sectors; and the balance of benefits for a country is measured in relation to trade in all goods and services and not just any one sector.

[474] V. Rodriguez Serrano, "Trade in Air Transport Services: Liberalizing Hard Rights" (1999) 24 Air & Space L. 199 at 203-204.

[475] Article 6(d) of the Annex defines 'traffic rights' as follows: "'Traffic rights' means the right for scheduled and non-scheduled services to operate and /or to carry passengers, cargo and mail for remuneration or hire from, to, within, or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership, and control". These rights are also called 'hard rights', "they have direct economic value because they give access to routes, hence to markets"; as opposed to 'soft rights', that "are rights granted to the airlines of the signatory States of a bilateral or multilateral agreement in the territory of another signatory that do not, by themselves, have direct economic value. Soft rights typically include ground handling at airports, services, maintenance, and more recently, computer reservation systems or code sharing. They are accessory to the exercise of hard rights", see B.M.J. Swinnen, "An Opportunity for Transatlantic Civil Aviation: from Open Skies to Open Markets?" (1997) 63 J. Air L. & Com. 249 at 250.

which do not correspond to the international air transport policy.[476] Moreover, other particularities of GATS make the Agreement difficult to apply to air transport services.[477]

The concern here is whether the air transport sector, and more specifically the airline ownership issue, can be liberalized within the GATS framework, as it provides a multilateral structure that allows for the globalization of industry, or are the differences of perspective between the main GATS principles and the air transport principles too great to realize liberalization in this structure. On the one hand, the air transport sector remains a particular industry, controlled by its own principles, and divergent from those of any other business sectors. Thus, the air transport liberalization process is led by the industry itself, and the current system of exchanging air transport rights reciprocally, through regional and plurilateral agreements among like-minded countries, has been successful so far and continue to work well. In addition, the main feature of air transport, which is traffic rights, has been specifically excluded from the Annex, and this includes the ownership and control issue. Therefore, if it is decided that the liberalization process should be achieved within the GATS framework, it must bring something more than the current system,[478] and it must take into account, at the same time, the industry particularities by modifying the Annex. On the other hand, air transport is a very strong business, so ignoring WTO and the GATS in the liberalization process would be unrealistic. Thus, the air transport sector should be completely included in the GATS framework for two main reasons. First, most of the economic sectors are now regulated

---

[476] For more details about the application's concerns of these three GATS principles to air transport services, see R. Janda, "Passing the Torch: Why ICAO Should Leave Economic Regulation of International Air Transport to the WTO" (1995) 21 Air & Space L. 409 at 417-418; R. Katz, "The Great GATS" *Airline Bus.* (September, 1995) 81; Goo, *supra* note 73 at 566-567; Lehner, *supra* note 66 at 468-469; Thornton, Lyle, *supra* note 103 at 74.

[477] For instance, "the potential conflict (and consequently a need for clarification and harmonization) where the same activity is subject to both the GATS and other arrangements which are not included in bilateral or multilateral agreements concluded before 1 January 1995", see ICAO, Working Paper (*Report by the Council on Trade in Services*), A31-WP/23, EC/3 (7 April 1995) at 3; in addition, "the GATS conflicts with some of the basic principles of the Chicago Convention", see Lehner, *ibid.*

[478] As Mr. R. Loughlin, from the US DOT, stated, earlier this year in a ICAO meeting:

> any proposition to *add* or *substitute* another system for exchanging and enforcing air transport rights must meet two tests: first, it must not put at risk the very significant gains already made, and the current operating freedom enjoyed, under the reciprocal system; second, it should be convincingly shown to promise improvements that could not be obtained under the existing and evolving bilateral/plurilateral/regional regimes.

R. Loughlin, "The current GATS Round in a Historical Perspective" (Dialogue on Trade in Aviation-Related Services, ICAO, Montreal, 12 June 2001) [unpublished].

by the 'WTO agreements'[479] and the air transport sector should not remain on the fringe of the world trade system.[480] One of the reasons is the current interdependance of the world and of all of the economic sectors.[481] If the "international economic system of today is the notion of "liberal trade", meaning the goal to minimize the amount of interference of governments in trade flows that cross national borders,"[482] then, given this interdependance, the goal can be reached only if the whole economy is controlled by the same liberalized system. The second reason why the air transport sector should be totally regulated by the GATS framework is the efficiency of the whole WTO system, which benefits governments, consumers, and the industries themselves.[483] To give only three examples of the great Uruguay Round achievements, it provides a sophisticated dispute-settlement process for all portions of the 'WTO agreements', and provides a legal text (rather than just a customary practice) to carry out its procedure. These new procedures include measures to avoid 'blocking', which occurred under previous consensus decision-making rules. The agreement also provides for a new 'appellate procedure', which will be substituted for some of the procedures that were vulnerable to blocking. This is the only worldwide dispute-settlement mechanism that exists in the world, and is therefore necessary to the effective implementation of international economic rules. Indeed, the WTO is the most powerful organization with sanction and repression powers.[484] In addition, the Uruguay Round achieved an agreement on safeguards and escape-clause measures, and provides domestic adjustment assistance policies whereby "[e]ach of the major industrialized nations has adopted its own policy approaches to the challenge of

---

[479] The 'WTO agreements' are annexes of the *Marrakesh Agreement* (it includes the *Multilateral Agreements on Trade in Goods* (Annex 1A), the *General Agreement on Trade in Services* (Annex 1B), the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (Annex 1C), the *Understanding on Rules and Procedure Governing the Settlement of Disputes* (Annex 2), the *Trade Policy Review Mechanism* (Annex 3), the *Plurilateral Trade Agreements* (Annex 4)); ministerial decisions and declarations; understanding on commitments in financial services. For more details about each agreements, see M.J. Trebilcock & R. Howse, *Regulation of International Trade*, 2nd ed. (London: Routledge, 1999); see also T. Flory, *L'Organisation Mondiale du Commerce – Droit institutionnel et substantiel* (Bruxelles : Etablissements Emile Bruylant, 1999).

[480] "[W]hatever the special features of the air transport industry, the GATS excludes no service sector and the Annex on Air Transport Services is formulated so as to apply, in principle, to all aspects of the industry", see Janda, *supra* note 476 at 419.

[481] J.H. Jackson, *The World Trading System – Law and Policy of International Economic Relations*, 2nd ed. (Cambridge: the MIT Press, 1997) at 6.

[482] *Ibid.* at 11.

[483] Janda, *supra* note 476 at 409.

economic adjustment, including adjustment to trade liberalization."[485] As a third reason, it can be noted that the GATS, together with the WTO Final Act, offer developing countries certain positive guarantees regarding liberalization, as it "is designed to allow for the coexistence of various domestic regulatory approaches, including departures from the MFN principle, while seeking progressive liberalization."[486]

Considering all the above, the GATS framework appears to be an unavoidable and a necessary tool to achieve air transport liberalization, including the liberalization of hard rights. In order to complete this liberalization, the services covered by the air transport Annex need to be expanded in order to remove the specific hurdles to trade that exist in air transport.

2.2 Implication of the air transport liberalization process: extension of the Annex on air transport services

Achieving air transport liberalization imposes the extension of the Annex on air transport services by including traffic rights (which essentially encompass the seven air transport freedoms) and all the services that are directly related to their exercise. According to Article 6(d) of the Annex,[487] it involves the capacity, tariff, designation of airlines, and the ownership and control issues. The extension of the Annex has been foreseen in the text itself, as Article 5 states that the scope of the Annex shall be reviewed every five years, which aimed at achieving a higher degree of liberalization.[488] In the preparation of such a review, extensive discussions have taken place in the past at various levels regarding the activities that could potentially be included in the Annex. Thus, the round of negotiations for review was launched by the third WTO Ministerial Conference held in Seattle from 30 November to 3 December 1999. This conference was suspended

---

[484] About the dispute-settlement mechanism, see Jackson, *supra* note 481 at 107; see also Trebilcock & Howse, *supra* note 479 at 58.
[485] Trebilcock & Howse, *ibid.* at 239.
[486] Janda, *supra* note 476 at 428.
[487] Definition of 'traffic rights', *supra* note 475.
[488] Article 5 of the Air Transport Annex goes on to specify that:

> The Council for Trade in Services shall review periodically, and at least every five years, developments in the air transport sector and the operation of this Annex with a view to considering the possible further application of the Agreement in this sector.

on the last day without any decision being adopted. Today, the negotiations continue;[489] however, it still remains unclear whether or not 'hard rights' will be included in the Annex. The reticence of many States to include them and the important principle of decision by consensus among WTO members are two obstacles that slow down the liberalization of market access and of airline ownership and control in the GATS framework.

In order to reach decisions in the rounds of negotiations, it is likely that the Annex expansion will be very incremental and will result from two stages. The first stage is to clarify and strengthen the current Annex and to include new soft rights. Basically, it means obtaining a more equivalent treatment on the basis of reciprocity, as almost half of the States took 'MFN exemptions'[490] with respect to marketing and selling and CRS.[491] Therefore, existing exemptions should be the subject of new negotiations. Clarification is also needed with respect to the definition of services given in the Annex.[492] Furthermore, from the WTO meetings, it is clear that some States would like to bring a number of services under the GATS umbrella, including cargo, express mail, non-scheduled services for passengers, and ground handling services (such as fuelling, cleaning, air catering).[493] This first undertaking is certainly the easiest step towards liberalization, even though a few rounds of negotiations will still be necessary. The second stage of the Annex expansion is its extension to hard rights. By referring to Article 6(d) of the Annex, the ownership and control issue is part of this stage. Despite the language of the Annex itself that would make it easy to include traffic rights,[494] it will certainly take many years before reaching a consensus on these issues. Indeed, apart from two sectors that have already

---

[489] The last Ministerial Conference met in Doha, Qatar, in November 2001. Before, the WTO has also held meetings in Geneva in 2000 to explore and exchange views on the subjects that could be included within the GATS agreement. "[The] last meeting considered, *inter alia*, the addition of a specific annex for tourism services to the GATS, which would include air transport services as one of the activities related to tourism. The sectorial classification attached to that annex has shown that the relevant transport services include scheduled and non-scheduled air transport services for passengers, airport ground handling, cargo, repair service, fuel, etc., see A.J. Al Dawoodi, "The impact of the GATS on air transport from the general perspective of developing countries" (Dialogue on Trade in Aviation-Related Services, ICAO, Montreal, 12 June 2001) [unpublished].

[490] A State that gets a 'MFN exemption' means that it is not obliged to offer MFN treatment in the sector.

[491] Katz, *supra* note 476.

[492] Rodriguez Serrano, *supra* note 474 at 209-210.

[493] *Ibid.* at 208-209; Loughlin, *supra* note 478.

received support for future inclusion under the scope of the GATS (*e.g.* air cargo services and non-scheduled flights),[495] most of the States are not yet ready to proceed with such a revolutionary shift from the current bilateral system and the MFN principle is their first concern.[496] Various solutions have been proposed to solve this problem. One solution would alter the nature of the MFN obligation to make it a "conditional MFN under which countries that mutually agree to accept higher levels of obligation should not be required to extend the same treatment to countries which were unwilling to do so".[497] Some authors have proposed a specialized application of the MFN clause based upon mirror reciprocity. This would mean that "every WTO member would offer to every other member the equivalent of the most favorable bilateral arrangement into which it is currently prepared to enter on the basis of mirror reciprocity."[498] Through such an application, there could be no situations where countries could take advantage of the MFN clause without offering reciprocal benefits. By this means, developed countries as well as developing countries would be protected, as no one would be committed by any obligation if it found this obligation could not be adapted to its own environment.

It seems that these proposals could alleviate the State concern regarding the liberalization of difficult air transport issues, such as market access and ownership and control. However, further detailed studies need to be conducted and no decision on these issues is expected for this round of negotiations. The very complex legal procedure in WTO is not the only reason why a consensus cannot be obtained: political conflict is the principal reason. However, the liberalization process is not blocked at all. Market access and foreign investments continue to be liberalized progressively through bilateral, regional, and plurilateral agreements; in parallel, ICAO continues to play its role in the liberalization process, by pursuing multilateral discussions on these specific topics. Thus,

---

[494] "This argument focuses on the inclusive character of GATS provisions, and the exclusion of traffic rights as exceptions, for "[i]n an inclusive agreement with exceptions it is always easier to remove the exception than to extend the scope of the agreement"", Rodriguez Serrano, *supra* note 474 at 211.

[495] *Ibid.* at 211-212; ICAO, Working Paper (*Report of the Council on Trade in Services*) No. A33-WP/7 (5 June 2001) at 4 [hereinafter ICAO Working Paper NO. A33-WP/7].

[496] As far back as the 1940s, some attempts were made to utilize the MFN clause with bilaterals, see Little, *supra* note 72 at 37.

[497] See *e.g.* Lehner, *supra* note 66 at 470.

[498] Janda, *supra* note 476 at 423-424; Rodriguez Serrano, *supra* note 474 at 213-214.

all these initiatives will surely help governments to find a consensus within a few years through the GATS framework.

3. The International Civil Aviation Organization

3.1 The prominent role of ICAO in the air transport liberalization process

ICAO is the worldwide intergovernmental organization created by the *Chicago Convention* of 1944[499] for the promotion of the safe and orderly development of international civil aviation throughout the world. As a specialized agency of the United Nations, it sets international standards and regulations that are necessary for safe, regular, efficient and economical air transport.[500] It also serves as a medium for co-operation in all fields of civil aviation among 187 Contracting States (as of 25 February 2001).[501] Policy is developed in multilateral meetings, and a significant volume of preliminary research and analysis, which support the meetings of policy development bodies, is achieved by the ICAO Secretariat. Moreover, ICAO provides Contracting States with various published statements of its policy on international air transport regulatory matters, as developed or endorsed by the Assembly or the Council, as well as guidance materials and information developed by ICAO bodies or the Secretariat.[502] With respect to air transport liberalization, ICAO has the mandate, experience, and expertise in a wide range of air transport matters – technical, economic and legal. R.I.R. Abeyratne stresses the fact that:

> [M]ultilateralism in the form of a broad-based consensus on principles and guidance to States in the conduct of their air transport activities has enjoyed renewed interest in ICAO in recent years. While seeking to progressively develop positions and guidance to assist States in their regulatory/economic activities, ICAO recognizes the sovereignty of States in pursuing their own national air transport policies and objectives. ICAO's role in this sphere is therefore merely **consultative** and **recommendatory** without being incompatible with liberalization in this sector.[503]

It is important to recall briefly the ICAO's role because it seems that its role has been very frequently misunderstood in recent years. Indeed, the Organization has often faced

---

[499] The *Chicago Convention*, *supra* note 2 Art. 43.
[500] *Ibid.* Art. 37 and Art. 38.
[501] *Ibid.* Art. 44, Art. 54, and Art. 55.
[502] See ICAO Doc. AT/122, *supra* note 35.
[503] Abeyratne "Aviation Competition Laws", *supra* note 54 at 160 [emphasis added].

criticism on different points. It has been reproached, *inter alia*, on the ground that the *Chicago Convention* requires a system of air transport regulation based only on bilateral agreements or restrictions, which makes it incompatible with air transport globalization and liberalization trends. However, it can be argued that, in fact, the key provisions of the Convention are mainly the recognition that every State has complete and exclusive sovereignty over the airspace of its territory (Art.1) and that no scheduled international air service may be operated over or into the territory of a contracting State except with a special permission or authorization of that State (Art.6). The terms of special permission or authorization, based on reciprocity, can be strict or liberal, negotiated bilaterally or multilaterally.[504] Thus, despite certain necessary amendments,[505] the *Chicago Convention* is adaptable to the current environment. Another flaw of the Convention that has been highly stressed by the international community is the inadequacy of its dispute settlement mechanism. The dispute settlement Articles of the Convention (Art. 84-88) have been invoked in five instances to date, three of which concerned disputes over sovereign airspace infringement; all three were settled through diplomatic negotiations, as the Council never issued a decision on the merits of the case.[506] This argument does not make ICAO unfit or ineffective for the international air transport liberalization process and the assistance of States in their economic activities. In addition, the bilateral and regional agreements themselves usually have their own dispute settlement system. Given their respective roles, WTO's framework is certainly more adapted than ICAO's structure to be in charge of an international judicial system. Finally, to the inefficiency of the ICAO has also been criticized, since it is unable to make binding legal decisions or to reach concrete results at their meetings or international conferences thus far.[507] However, even though the outcomes have not always been as expected, ICAO represents more a discussion forum than a place of decision-making, where States exchange their ideas about the economic regulation of international air transportation. Thus, it provides States with a

[504] Thornton, Lyle, *supra* note 103 at 74.
[505] M. Milde, "The Chicago Convention – Are Major Amendments Necessary or Desirable 50 Years Later" (1994) 19:1 A.A.S.L. 401 at 414-447.
[506] The three cases were: India versus Pakistan 1952-1953, Pakistan versus India 1971-1976, Cuba versus United-States 1996-1998.
[507] There was four ICAO air transport conferences in 1977, 1980, 1985, and 1994 respectively. Apart from the 1994 conference, the three first "conferences were by no means comprehensive in their deliberations

better understanding of the main air transport issues.[508] According to the role defined above, the Organization has performed its functions properly so far, and still has an important role to play in assisting States with respect to their comprehension of the constant evolution of civil aviation.

ICAO is competent and needs to take an active role in developing future regulatory arrangements in two areas. First, ICAO has to retain its leadership role in regulating technical matters, such as safety, security and environment. In addition to specific provisions in the *Chicago Convention* related to the prevention of any civil aviation incidents,[509] ICAO has been very active in regulating these big issues; for instance, one of the main achievements was the creation of USOAP in January 1999.[510] The current air transport liberalization process cannot be achieved properly, whether this process is led by the industry itself or by an organization, if a strict and clear regulation is not drafted with regard to safety and security essentially. The ownership and control issue is a good example of the necessity for such a regulation.[511] Therefore, ICAO should be recognized as a worldwide auditor of safety and security standards for international civil aviation. There is no better experienced organization to deal with these issues. Second, ICAO has an economic vocation. The *Chicago Convention* mandated to ICAO the development of principles and techniques regarding the economic air transport development,[512] and it has become more and more involved in trade aviation-related services, especially since the 1994 WorldWide Air Transport Conference.[513] After the Conference, the ICAO Council was assigned the study of certain issues related to future regulatory arrangements for international air transport to the Air Transport Regulation Panel (ATRP). In 1997, the

---

and had only addressed specific issues at each conference", see Abeyratne "Competition in Commercial Aviation", *supra* note 355 at 814.

[508] Abeyratne "Competition in Commercial Aviation", *ibid.* at 803.

[509] The *Chicago Convention*, *supra* note 2 Art. 9-17, Art. 24-26.

[510] About the ICAO's actions regarding the civil aviation safety, see Part 2, Chap.1, 2, above, at 78.

[511] Indeed, in the event of the liberalization of foreign investment, the main concern is the risk of flag of convenience, see *ibid.*

[512] The *Chicago Convention*, *supra* note 2 Preamble, art. 44.

[513] Unlike the three first ICAO air transport Conferences, the 1994 Conference has started to take into account commercial aspects of air transport, such as market access, ownership and control, capacity, and pricing issues. This Conference has been successful as it has made the international community of States gaining consciousness about the need to liberalize. For more details about the economic role of ICAO since 1994, see *e.g.* ICAO Working Paper No. AT Conf/4 – WP 7, *supra* note 100 at 4; ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*) No.

ATRP adopted certain recommendations regarding market access for carriers.[514] Moreover, in July 1998, the WTO Council for Trade in Services decided to confer observer status upon ICAO, which was thereby permitted to attend WTO meetings on an *ad hoc* basis.[515] Presently, ICAO works continuously on the key regulatory issues that would need to be resolved to enable the international community to move towards further globalization.[516]

Accordingly, ICAO is certainly a "nimble, networked agency ... that can develop better modes of consultation and engagement with global civil society."[517] As such, the Organization has an essential place in the air transport liberalization process. Its economic role should be more acknowledged as complementary to the role played by the WTO. Furthermore, it "has clearly a vital role in respect of safety, security, environment, transit, etc., without which full liberalization of market access would be impossible ... [therefore] ICAO in many ways could facilitate the whole process."[518]

3.2 ICAO activities with respect to the liberalization of airline ownership and control

As stressed by Dr. Assad Kotaite, President of the ICAO Council, the relaxation of ownership legislation remains a major policy goal for ICAO.[519] In fact, ICAO started seriously discussing the airline ownership and control issue in 1992, when the Worldwide

---

AT Conf/4 – WP 10 (19 April 1994) at 4-6; Abeyratne "Competition in Commercial Aviation", *supra* note 355 at 809-825.

[514] Thus, the Council of ICAO has issued a series of recommendations as a guide to the Organization's Contracting States in adjusting to an increasingly competitive airline environment while fostering fair competition. The recommendations are the conclusion of several years of work on the broad issue of the economic regulation of international air transport (among them, it can be noted the proposals to broaden the ownership and control criteria, to create an aviation industry-focused dispute settlement mechanism for use in the liberalizing environment, and to elaborate a series of model clauses for use in bilateral or multilateral air services agreements), see Abeyratne "Competition in Commercial Aviation", *supra* note 355 at 826-829; Rodriguez Serrano, *supra* note 474 at 206-208; D., Hughes, "ICAO delegates Shun US Free-Market Stance" *Aviation Wk. & Space Tech.* (2 January 1995) 37.

[515] Rodriguez Serrano, *supra* note 474 at 205-206.

[516] ICAO Working Paper No. A33-WP/7, *supra* note 495 at 2; "Progressive Liberalization Actively Supported by ICAO, Council President Tells IATA Annual General Meeting" (June 2001) 56 ICAO J. 30 [hereinafter ICAO J. Doc. 2001].

[517] R., Janda, "ICAO as a Trustee for Global Public Goods in Air Transport" (Dialogue on Trade in Aviation-Related Services, ICAO, Montreal, 12 June 2001) [unpublished].

[518] F., Sørensen, "Market Access Liberalization of Air Transport" (Dialogue on Trade in Aviation-Related Services, ICAO, Montreal, 12 June 2001) [unpublished].

[519] WTO doc. 1, *supra* note 26 at 7.

Air Transport Colloquium convened by the Council identified the problems of an airline multinational ownership that would deserve future actions.[520] In 1994, ICAO was at the forefront of guidance in this area, as the 'airline substantial ownership and effective control' principle was one of the main subjects addressed at the Fourth Worldwide Air Transport Conference.[521] At that time, within the framework of the ICAO Conference, ICAO bodies, national and international organizations, and States analyzed the issue and drafted comments on different topics, such as the necessary change of the national restrictions, the way to broaden the ownership and control criteria, the right of establishment, and the risks at stake in case of a lifting of the restrictions.[522] Then, in 1997, after careful consideration of safety risks and other problem involved, the ICAO ATRP recommended the broadening of ownership and control criteria used in bilateral agreements in its ATRP/9-4, by proposing the criteria of "the principal place of business" and "a strong link".[523] Meetings organized by ECAC on the questions of ownership and control followed in 1998 and 1999. Seventeen States and seven organizations exchanged their points of view, specifically on "ownership and control in the bilateral agreements" and on "the model of clause of a strong link between the air carrier and the designating State", in light of the 1997 ICAO recommendations.[524] Finally, the year 2001 was quite active as well on the ownership liberalization issue. The ICAO Secretariat has initiated a comprehensive study and, as a first step, has launched a survey on States' relevant

---

[520] Gertler, *supra* note 30 at 222-225.

[521] Abeyratne *Emergent Commercial Trends*, *supra* note 84 at 23.

[522] See *e.g.* ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*) No. AT Conf/4 – WP 8 (20 April 1994); ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*) No. AT Conf/4 – WP 9 (21 April 1994); ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*) No. AT Conf/4 – WP 18 (20 July 1994); ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*) No. AT Conf/4 – WP 30 (12 August 1994); ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*) No. AT Conf/4 – WP 47 (23 August 1994); ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*) No. AT Conf/4 – WP 52 (8 September 1994); ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*) No. AT Conf/4 – WP 68 (20 October 1994).

[523] ICAO, *Broadening of Ownership and Control Criteria*, ICAO Doc. No. ATRP/WP/5 (14 November 1996); ICAO Doc. 9587, *supra* note 329 at 2-1.

[524] ECAC Doc. 1998, *supra* note 329; ECAC, *Report on Task Force on Ownership and Control Issues, Second Meeting*, OWNCO/2 (26 February 1999).

policies and practices. In May, a questionnaire[525] was sent to each ICAO Member States and the Secretariat has already received some answers back. Since most of the countries, and especially the ones with unclear policies, have not replied yet, it is still too early for ICAO to provide the outcome of the survey and the current state of the worldwide ownership policy. However, it is interesting to note that the first replies clearly reveal that more and more ICAO Member States call for further liberalization and that, surprisingly, most of the States do not want to slow down the liberalization of the ownership policy after the September 11th attack. On the contrary, States believe that a dynamic policy on cross-border investments would be a better solution in order to give confidence back to the airline industry. Moreover, recently, Egypt has proposed a paper proposing the application of a principal place of business test under certain conditions with the objective of promoting and consolidating the air transport regulatory regime and achieving a higher degree of flexibility as to the acceptance of the designation of foreign airlines.[526] The United Kingdom has drafted a note as well, in September 2001, calling for further urgent liberalization measures, especially due to the great pressure caused by the September 11 attack with respect to the aviation industry. In addition, the UK stresses the important role of ICAO by stating that it is "incumbent upon ICAO to display leadership in helping to sustain the viability of the industry through these difficult times by urging States to use the flexibility already available to them in interpreting their bilateral obligations."[527] In October 2001, the ICAO Economic Commission has underlined that foreign investments in airlines "might be an overriding concern in the near future" and that the Secretariat "has already commenced work on studying this subject further in preparation for AT Conf/5."[528]

The next great worldwide undertaking organized by ICAO regarding the air transport liberalization is the Fifth ICAO Air Transport Conference on "Challenges and Opportunities of Liberalization", which is set to take place from 24 to 29 March 2003.

---

[525] ICAO, *Questionnaire on State's Policies and Practices Concerning Air Carrier Ownership and Control*, Attachment to State letter SC 5/2-01/50, online: ICAO http://www.icao.int/cgi/goto_atb.pl?icao/en/atb/ecp/S150-survey.htm;ecp (date accessed: 2 January 2001).
[526] ICAO, Working Paper (*Substantial Ownership and Effective Control of designated airlines*) No. A33-WP/96 (17 August 2001).
[527] ICAO Working Paper No. A33-WP/181, *supra* note 262.
[528] ICAO, Working Paper (*Economic Commission – Draft Text for the Report on Agenda Item 26*) No. A33-WP/262 (2 October 2001).

The objective of the Conference is "to develop a framework for the progressive liberalization of international air transport, with safeguards to ensure fair competition, safety and security, [and including] measures to ensure the effective and sustained participation of developing countries."[529] As mentioned earlier, ICAO represents more of a discussion forum than a place of decision-makings; therefore, the aim is not to make any decisions, but rather to provide a global forum for ICAO Member States and other concerned parties to examine issues and policy options in the field of air transport regulation and promote a better understanding of the concept and the impact of full liberalization. The scope of the conference will mainly focus on the key regulatory issues associated with liberalization, the review of a template air services agreement, and the adoption of a declaration of global principles for international air transport.[530] Air carrier ownership and control is one of the key regulatory issues that will be examined at the 2003 Conference.[531] By taking into account the outcomes of the questionnaire and of the study led by the ICAO Secretariat on the complex question of airline ownership, ICAO will be able to raise the right issues involved in the question. Furthermore, ICAO is currently preparing the Conference in collaboration with the WTO and the OECD so that all the possible options will be presented and analyzed at the Conference in order to guide States in updating the 'designating clause' in their bilateral, regional, and plurilateral agreements with regard to the air transport liberalization context. ICAO, through the 2003 Conference, does not intend to go beyond the limits of what is realistically feasible. This means that, in a much more mature environment regarding liberalization than for the 1994 worldwide air transport conference, ICAO and all the parties present at the Conference will 'simply' address the global principles and help States to move towards liberalization. In addition, the idea of drafting, in the long run, a multilateral agreement on air transport liberalization may be raised as well, but probably only from the perspective of a brief first multilateral approach.

---

[529] ICAO J. Doc. 2001, *supra* note 516 at 30.
[530] *Ibid.*
[531] The issues that will be examined are air carrier ownership and control, market access, product distribution, fair competition and safeguards, conditions of carriage and consumer protection, extra-territorial friction, dispute resolution, and registration and transparency of air services agreements.

'Cooperation' will be the final word of this third Part. Cooperation is required and is indeed the norm between the international organizations involved in the air transport liberalization process. ICAO, WTO, and OECD do not compete with each other: they are complementary and not substitute organizations. The WTO should continue with expanding the existing scope of the GATS Air Transport Annex to hard rights, as the GATS is the proper framework for progressive multilateral liberalization. However, the WTO cannot lead this process alone. ICAO, as the universal expert in the field, must pursue its discussions and continue drafting international regulations in the technical and economic aspects in order to ensure a viable liberalization of, mainly, market access and foreign investments. Finally, OECD is the indispensable organization that guides the WTO, ICAO, and the States in pursuing their roles by identifying principal problems and by proposing strategic solutions. Facilitate State's negotiations is the role and responsibilities of these organizations. However, Members of the WTO, ICAO, and OECD are States, so the organizations cannot undertake any action without the good will of individual States to cooperate among them. An effort of harmonization is urgently required for safety, security and competition among the national regulations in order to avoid undesirable consequences with respect to foreign investment development. Furthermore, since achieving harmonization and liberalization will likely be reached only incrementally, the negotiations should start as soon as possible between States and regions, in the hope of one day reaching a multilateral agreement.

CONCLUSION

The time has come to offer the aviation industry a new regulatory framework, similar to those of other mature industrial sectors that benefit from a global and liberal market. Cross-border investments, through international M&As, are presently occurring in all sectors, and are particularly characteristic of service sectors that, as a result of regulatory reform, have seen the privatization and liberalization of trade and investment regimes and are now able to restructure more freely at both national and international levels. Unlike mergers in the past, mergers are currently motivated by the desire to consolidate the capacity to serve global markets and fully benefit from scale economies. The airline industry should benefit from the same liberal environment; it is no longer a novice industry and should leave the restrictive bilateral system that has served the industry for fifty years in order to gain more global strength. The main objective of this thesis was to identify the factors that still justify the imposition of national restrictions on airlines; the present analysis demonstrated that none of the legal and economic reasons justify these restrictions any longer. Protectionism is in fact the main concern of certain States, such as the US, probably much more than the protection of the airline industry itself. Today, the only tenable reason for keeping national ownership restrictions on airlines is the national security concern; however, such concern is justifiable, it is flexible and can be resolved separately from the airline ownership and control issue. Accordingly, the lifting of the foreign ownership restrictions should be the main concern for national policies worldwide, since it would play a paramount role in the future global consolidation of airlines and would be an important step towards the normalization of the industry.

The year 2001 has reminded the world of the fragility of the airline industry. With respect to Europe, a number of air carriers have faced serious economic problems: medium-sized carriers have been badly hit by the increase of oil prices, demonstrating that they are not well-suited to withstanding economic shocks, while the larger European carriers have still had difficulties competing with the highly consolidated American airline market. With respect to the United States, the fall-out from the US global slowdown was already eroding margins of the large carriers as transatlantic travel fell

away while the world's largest economy entered into a recession.[532] The September 11th apocalyptic attack of the World Trade Center, which used civil aviation as a weapon of destruction, has exacerbated the global problems faced by an already fracturing industry. Indeed, the attack has lead to a loss of confidence in the industry and in the span of three months, the industry has claimed well-known national carriers like Swissair and Sabena.[533] At this stage, it is still too early to predict whether this is the beginning of a long-term crisis or simply a short recession. What is clear, however, is that airlines are currently under unprecedented pressure. Even though the major airlines are starting to recover at this time, their assets and stock market value are still very low. This whole situation clearly calls for consolidation[534] and, therefore, makes cross-border investments in the airline industry not only desirable, but a necessity in order to address the needs of the industry; it is now urgent that foreign investments be fostered.

Unfortunately, the development of cross-border investment faces two obstacles, which are also resulting from the crisis. First, an economic obstacle prevails. Indeed, as the entire industry is affected by the recession, no airline has any money to invest in other carriers. Furthermore, owing to the global recession of national economies, it would be risky for the investors outside the industry to invest their capital in such a fluctuating and unpredictable industry.[535] The second obstacle concerns national security. The September 11th terrorist attack has resulted in a loss of confidence in the air transport industry. As airlines were misused as a weapon of destruction, air travel has become an unreliable and risky means of travelling. In this year 2002, the main challenge for the whole aviation industry is, therefore, to give confidence back to passengers all around the world. To this

---

[532] P.Y. Dugua, "Le ciel américain broie du noir" *Le Figaro* (23 June 2001) III.

[533] "The head of the global airlines body IATA has forecast that global 2001 losses in the sector will be in the region of US$10 billion to $12 billion. Only during the Gulf War did losses approach this year's levels, and the bad news is that the problems facing the industry look set to continue well into 2002", see M. Glackin, "Airline Consolidation is the only route to survival" *The Scotsman* (24 December 2001), online: The Scotsman http://209.185.240.250/cgibin/linkrd?Lang=EN&lah=7986709cb8b8d0bfa2360ae6558c6ed8&lat=1010085559&hmaction=http%3a%2f%2fwww%2eairliners%2enet%2fnews%2fredirect%2emain%3fid%3d30291 (date accessed: 24 December 2001).

[534] *Ibid.*

[535] For instance, regarding the situation in Canada, "[Thomas Ross, a professor at the University of British Colombia] said raising the foreign cap would allow other airlines to come in and invest in Air Canada. But airlines around the world are short of cash because of a dramatic drop in bookings since the Sept. 11 terrorist attacks. "People inside the industry don't have much cash right now, and people outside the

end, passengers should be able to rely on their national airlines, they need transparency, in other words, they need an airline owned and controlled by nationals. Indeed, as a simple example, if BA were to be owned and controlled half by a Middle East airline, British people would probably not feel comfortable with their 'half national' airline. Accordingly, after being used as an instrument to protect national economies, the issue of airline ownership and control comes back now to its original concept of national identity. It is such because passengers, concerned with safety and security, need to refer to an airline with a single national identity.

Does this mean that the liberalization process of ownership and control restrictions is presently blocked? Probably not, since the situation has not changed much in reality.

First, it is true that, while the main reason for the reluctance of States *vis-à-vis* foreign investment liberalization had been mainly economic since the end of the Cold War and the international diplomatic context was no longer threatened, the original rationale has returned, as aviation safety and national security are the dominant preoccupation of all States, and the US is certainly the most affected State. However this has always been the case: the US has always claimed the necessity of keeping national ownership restrictions for the effectiveness of the CRAF Program. It is indeed legitimate to believe that political differences, even among the closest US allies, have the potential for disruptive effects on CRAF operations at any time, particularly as the US is currently involved in controversial political issues, such as in the Middle East. Nevertheless, the international community of States should keep negotiating with the US in order to find a compromise among the diverse solutions mentioned above in the analysis of national security.[536] It will likely take a few years to convince the US to liberalize their ownership system, especially since politics are so important to lawmaking in the US and the Administration, even though it wants to move forward, will not pick a fight with domestic labor or the military unless there is a big payoff. However, due to the need for outside capital of US carriers, the US will probably be pushed to discuss changes in foreign ownership soon, and will likely decide to proceed on a case-by-case basis. Thus, the

---

industry are probably looking at it and saying: 'Is this really a place to put my money?'"", see McArthur, Chase, *supra* note 208 at B4.

[536] See Part 2, Chap. 1, Section 2, above, at 83.

principle of substantial ownership and effective control of airlines will be liberalized progressively through regional and plurilateral agreements, as is already the case with the *APEC Agreement* (even though the control criterion is still maintained in the Agreement).

Second, the liberalization process of ownership and control restrictions should neither be slowed down because of the need of airlines to gain back passenger confidence. Indeed, States have, finally, not been more reluctant to liberalize their ownership policy since September 2001. Surprisingly, the first replies to the ICAO questionnaire on ownership and control reveal that States want to go ahead in the liberalization process and open their markets to foreign States in order to strengthen the airline industry.

Thus, this thesis suggests that States collaborate more with each other, on a global basis. International cooperation has always been more efficient than protectionism in improving the national industries. Today, increased cooperation, through cross-border investments, will undoubtedly contribute to the growth and expansion of the airline industry. The opinion of the Advocate General of the Court of Justice, delivered on January 31 2002, about the cases 'Commission against 7 Member States', is another step towards more concentration in the airline industry. A final similar judgment of the European Court of Justice would step up competition in the European air travel market. In the long-run, such a decision would create a more concentrated European market which, at that point, would justify a Commission's exclusive mandate to negotiate, on behalf of the Member States, an Open-Skies agreement with the US. Thus, hopefully, a compromise on foreign investments will be concluded between the US and the EU within the next few years in the TCAA framework, despite some unresolved issues. Such a compromise would solidify a base of common agreements; it is only at this point that it will be possible to discuss the idea of drafting a multilateral convention that deals with subjects such as foreign ownership and cabotage. In the meantime, international organizations should all work together on the process of air transport liberalization. It is clear that the question of which organizations should be in charge of the process is irrelevant. ICAO, WTO and OECD are complementary, and as such they cooperate. They are all composed of States that share most opinions with each other. Furthermore, these organizations respond to the same principles, such as the principles of fairness and of

transparency, and they pursue the same goals, which is liberalizing the air transport industry in accordance with the public interest and with every country's interest. Since their roles are different, it is their responsibility, *vis-à-vis* the international community, to collaborate in order to make possible the liberalization of national ownership and control restrictions.

BIBLIOGRAPHY

1. Primary Materials

1.1 Legislation

1.1.1 Canada

Air Canada Public Participation Act, An Act to Provide for the Continuance of Air Canada under the Canada Business Corporations Act and for the Issuance and Sale of Shares thereof to the Public, Assented to August 18, 1988, Chapter A-10.1.

Canadian Transportation Act, An Act to Continue the National Transportation Agency as the Canadian Transportation Agency, to Consolidate and Revise the National Transportation Act, 1987, and the Railway Act and to Amend or Repel Other Acts as a Consequence, Assented to May 29th, 1996, Chapter C-10.4.

Competition Act, RS, 1985, c. C-34, s 1; RS, 1985, c. 19 (2nd Supp.), s. 19.

National Transportation Act, 1987, R.S.C. 1985, c. 28 (3rd Supp.).

1.1.2 France

Loi sur les sociétés commerciales, no. 66-537 du 24 juillet 1966, article 355-1 al.1 (modifiée par la loi no. 85-705 du 12 Juillet 1985).

1.1.3 United States

Air Commerce Act, Pub. L. No. 69-254, SS 1-14, ch. 344, § 3(a), 44 Stat. 568, 569, and § 9(a), 44 Stat. 573 (1926).

Airline Deregulation Act, Pub. L; No. 95-904, § 102(7), (10), 92 Stat. 1705 (codified as amended at 49 USC § 1301-1552 (1982)).

Bill to Amend Title 49, United-States Code, to Authorize the Secretary of Transportation to Reduce under Certain Circumstances the Percentage of Voting Interests of Air Carriers which are Required to be Owned and Controlled by Persons who are Citizens of the United-States, 104th Congress 1st Session, H.R. 951 (15 February 1995).

Civil Aeronautics Act, Pub. L. No. 75-706, ch. 601, § 1(13), 52 Stat. at 978 (1938).

International Antitrust Enforcement Act, 15 U.S.C. §§ 6201-6212 (1994).

Maritime Security Act, Pub. L. No. 104-239, 110 Stat. 3118 (1996).

Securities Exchange Act, 17 C.F.R. § 240.12b-2 (1988 & Supp. 1995).

Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (1994).

1.2 Cases

Air Transport Committee, *Okanagan Helicopters Ltd. Change of Control*, Decision No. 7791 (15 December 1983).

E.C.J., Ahmed Saeed Flugreisen and Silver Line Reiseburo GmbH v. Zentrale zur Bekampfung unlauteren Wettbewenbs e. V. Reference for a Preliminary Ruling: Bundesgerichtshof - Germany . Competition – Air Tariffs, C- 66/86 [1989] E.C.R. 803, 822.

E.C.J., Opinion of Advocate General Tizzano, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* (C-466/98), *Kingdom of Denmark* (C-467/98), *Kingdom of Sweden* (C-468/98), *Republic of Finland* (C-469/98), *Kingdom of Belgium* (C-471/98), *Grand Duchy of Luxembourg* (C-472/98), *Republic of Austria* (C-475/98), *Federal Republic of Germany* (C-476/98) [2002], online: europa http://curia.eu.int/jurisp/cgibin/form.pl?lang=en&Submit=Rechercher&docrequire=alldocs&numaff=&datefs=&datefe=&nomusuel=&domaine=TRAN&mots=&resmax=100 (date accessed: 1 February 2002).

National Transport Agency, *Air 2000 Airlines*, decision No. 239-A-1988 (12 August 1988).

National Transport Agency, *Minerve Canada*, Decision No. 618-A-1989 (6 December 1989). online: Canadian Transportation Agency http://www.cta-otc.gc.ca/decisions/1989/A/618-A-1989_e.html (date accessed: 4 October 2001).

National Transport Agency, *Canadian Airlines International Ltd.*, Decision No. 297-A-1993 (May 27, 1993), online: Canadian Transportation Agency http://www.cta-otc.gc.ca/rulings-decisions/decisions/1993/A/297-A-1993_e.html (date accessed: 4 October 2001).

1.3 Government Documents

1.3.1 Canada

Standing Committee on Transport, *Restructuring Canada's airline industry: fostering competition and protecting the public interest*, report (December 1999), online: Canada's Parliament http://www.parl.gc.ca/InfoComDoc/36/2/TRAN/Studies/Reports/tranrp01/09-rap-e.htm (date accessed: 11 May 2001).

1.3.2 United States

Civil Aeronautics Board, *Order in the Matter of Willye Peter Daetwyler, D.B.A. Interamerican Airfreight Co., for Amendment of its Foreign Permit Pursuant to Section 402(f) of the FAA of 1958*, Docket No. 118, 120-21 (1971).

Civil Aeronautics Board, *Order in the Matter of Première Airlines, Fitness Investigation*, CAB Order No. 82-5-11 (5 May 1982).

Department of Transportation, *Application of DHL Aiways, Inc. Pursuant to 49 U.S.C. Section 40109(c) – Exemption – U.S.-Kuwait via Brussels and Bahrain*, Docket No. OST-2000-6937 (14 February 2000), online: DOT http://dms.dot.gov/search/hitlist.asp (date accessed: 4 October 2001).

Department of Transportation, *Application of the Registration of DHL Worldwide Express, Inc., as a Foreign Air Freight Forwarder*, Docket No. OST-2000-8732-1 (10 October 2000), online: DOT http://dms.dot.gov/search/hitlist.asp (date accessed: 4 October 2001).

Department of Transportation, *Application of Federal Express Corporation against DHL Airways, Inc. Regarding Compliance with U.S. Citizenship*, Docket No. OST-2001-8736 (19 January 2001), online: DOT http://dms.dot.gov/search/hitlist.asp (date accessed: 4 October 2001).

Department of Transportation, *Entry and Competition in the U.S. Airline Industry: Issues and Opportunities*, Special Report 255 (30 July 1999), online: DOT http://www.ostpxweb.dot.gov/aviation/domau/dottrbre.pdf (date accessed: 10 May 2001).

Department of Transportation, *Order in the Matter of Page Avjet Corporation*, Order 83-7-5, Docket No. 40,905 (1 July 1983).

Department of Transportation, *Order in the Matter of Intera Arctic Services, Inc.*, DOT Order 87-8-43, Docket No. 44,723 (18 August 1987).

Department of Transportation, *Order in the Matter of the Acquisition of Northwest Airlines by Wings Holdings, Inc.*, DOT Order 89-9-29, Docket No. 46371 (29 September 1989).

Department of Transportation, *Order in the Matter of the Acquisition of Northwest Airlines by Wings Holdings, Inc.*, DOT Order 91-1-41 (14 January 1991).

Department of Transportation, *Order in the Matter of Defining "Open-Skies"*, 57 Fed. Reg. 19323-01, DOT Order No. 92-4-53 (5 May 1992).

Department of Transportation, *Order in the Matter of Defining 'Open Skies'*, DOT Order 92-8-13, Docket 48130 (5 August 1992).

Department of Transportation, *Order in the Matter of Joint Application of British Airways PLC for an Exemption Pursuant to Section 416(b) of the Federal Aviation Act of 1958;*

Application of USAir for a Statement of Authorization to Offer Code-Share under 14 CFR Parts 207 and 212; Application of USAir for a Statement of Authorization for a Wet Lease, DOT Order 93-3-17, Docket Nos. 48,634, 48,640 (15 March 1993).

Department of Transportation, *Order in the Matter of Amending the US Licenses of Carriers of the Participating Countries*, DOT Order 01-1-13 (16 January 2001).

Department of Transportation, *Order Dismissing Third-Party Complaint of Federal Express Corporation in Docket OST-t-2001-8736 and of United Parcel Service Co. (in Docket OST-2001-8824) Without Prejudice Grant the Motions to File Otherwise Unauthorized Documents Filed by Federal Express Corporation and DHL Airways Inc.*, DOT Order 2001-5-11, Docket OST-01-8736-8 (11 May 2001), online: DOT http://152.119.239.10/docimages/pdf58/120921 web.pdf (date accessed: 14 May 2001).

The National Commission to Ensure a Strong Competitive Airline Industry, *Change, Challenge, and Competition: a Report to the President and Congress submitted on 19 August* 1993, Washington, D.C.: US Government Printing Office (1993).

United States General Accounting Office, *Airline Competition. Impact of Changing Foreign Investment and Control Limits on U.S. Airlines in Report to Congressional Requesters*, GAO Doc. GAO/RCED-93-7 (9 December 1992).

1.3.3 Australia

Australian Commonwealth Department of transport and regional services, *International Air Services*, Policy Statement (June 2000), online: the Australian Commonwealth Department of Transport and Regional Services
http://www.dotrs.gov.au/aviation/intairservices.pdf (date accessed: 10 May 2001).

1.4 International Materials

1.4.1 Treaties and Other International Agreements

Additional Protocol N°1 to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929, signed at Montreal, 25 September 1975, ICAO Doc. 9145, 22 I.L.M. 13 (not yet in force).

Additional Protocol N°2 to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929, signed at Montreal, 25 September 1975, ICAO Doc. 9146, 22 I.L.M. 13 (not yet in force).

Additional Protocol N°3 to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929, signed at Montreal, 25 September 1975, ICAO Doc. 9147, 22 I.L.M. 13 (not yet in force).

Additional Protocol N°4, to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929, signed at Montreal, 25 September 1975, ICAO Doc. 9148, 22 I.L.M. 13 (entered into force 14 June 1998).

Agreement Between the Government of the United States of America and the Government of the United Kingdom Related to Air Services Between their Respective Territories, 11 February 1946, U.S.-U.K., 60 Stat. 1499.

Agreement Between the Government of the United States of America and the Government of the United Kingdom Related to Air Services Between their Respective Territories, 23 July 1977, 28 U.S.T. 5367.

Agreement Between the United-States of America and the Netherlands Amending the Agreement of April 3, 1957, as Amended and the Protocol of March 31, 1978, as Amended, 14 October 1992, US-Neth., T.IA.S. 11976.

Agreement Between the Government of the United-States of America and the Commission of the European Communities Regarding the Application of their Competitive Laws, O.J. (1995) L. 95/47.

Air Transport Agreement Between the Federal Republic of Germany and Brunei Darussalam, German Federal Gazette (BGB1) 1994, II-3670.

Convention for the Unification of Certain Rules Relating to International Carriage by air, signed at Warsaw on 12 October 1929, 137 L.N.T.S. 11, 49 Stat. 3000, T.S. 876, ICAO Doc. 601 (entered into force on 13 February 1933).

Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal, 28 May 1999, ICAO DCW Doc. No. 57 (not yet in force).

Convention on International Civil Aviation, 7 December 1944, 15 U.N.T.S. 295, ICAO Doc. 7300/6.

Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed in Guadalajara, 18 September 1961, 500 U.N.T.S. 31, ICAO Doc. 8181 (entered into force 1 May 1964)

International Air Services Transit Agreement, 7 December 1944, 84 U.N.T.S. 389, 394, ICAO Doc. 7500, also reproduced in ICAO Doc. 9587.

International Air transport Agreement, 7 December 1944, 171 U.N.T.S. 387.

Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 1144 (entered into force 1 January 1995)).

Multilateral Agreement on the Liberalization of International Air Transportation, 15 November 2000 (opened for signature).

North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United-States, 17 December 1992, Can. T.S. 1994 No. 2 (1993) 32 I.L.M. 289 (entered into force 1 January 1994).

Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929, done at The Hague, 28 September 1955, 478 U.N.T.S. 371, ICAO Doc. 7632 (entered into force on 1 August 1963).

Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929, as Amended by Protocol done at The Hagueon 28 September 1955, signed at Guatemala City, 8 March 1971, ICAO Doc. 8932 (not yet in force).

Treaty of Amsterdam, Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2 October 1997, O.J. (C340)1(1997).

1.4.2 International Civil Aviation Organization Documents

ICAO, *Annual Report of the Council - 2000*, ICAO Doc. 9770 (2001).

ICAO, *Broadening of Ownership and Control Criteria*, ICAO Doc. ATRP/WP/5 (14 November 1996).

ICAO, *Questionnaire on State's Policies and Practices Concerning Air Carrier Ownership and Control,* Attachment to State letter SC 5/2-01/50, online: ICAO http://www.icao.int/cgi/goto_atb.pl?icao/en/atb/ecp/S150-survey.htm;ecp (date accessed: 2 January 2001).

ICAO, *Manual on the Regulation of International Air Transport*, ICAO Doc 9626 (1st ed.) (1996).

ICAO, *Policy and Guidance Material on the Economic Regulation of International Air Transport*, ICAO Doc. 9587 (1999).

ICAO, *The World of Civil Aviation, 2000 – 2003* (Provisional publication of the Circular 287), ICAO Doc. AT/122 (9 October 2001).

ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*) No. AT Conf/4 – WP 7 (18 April 1994).

ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*) No. AT Conf/4 – WP 10 (19 April 1994).

ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*) No. AT Conf/4 – WP 8 (20 April 1994).

ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*) No. AT Conf/4 – WP 9 (21 April 1994).

ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*) No. AT Conf/4 – WP 18 (20 July 1994).

ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*), No. AT Conf/4 – WP 5 (8 August 1994).

ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*) No. AT Conf/4 – WP 30 (12 August 1994).

ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*) No. AT Conf/4 – WP 47 (23 August 1994).

ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*) No. AT Conf/4 – WP 52 (8 September 1994).

ICAO, Working Paper (*World-Wide Air Transport Conference on International Air Transport Regulation: Present & Future*) No. AT Conf/4 – WP 68 (20 October 1994).

ICAO, Working Paper (*Report by the Council on Trade in Services*) No. A31-WP/23, EC/3 (7 April 1995).

ICAO, Working Paper (*Report of the Council on Trade in Services*) No. A33-WP/7 (5 June 2001).

ICAO, Working Paper (*Substantial Ownership and Effective Control of Designated Airlines*) No. A33-WP/96 (17 August 2001).

ICAO, Working Paper (*Substantial Ownership and Effective Control over Designated Airlines*) No. A33-WP/181 (25 September 2001).

ICAO, Working Paper (Economic Commission – Draft Text for the Report on Agenda Item 26) No. A33-WP/262 (2 October 2001).

1.4.3 European Union Documents

1.4.3.1 Regulations, Directives, Decisions

EU, *Commission Decision No. 95/404/EC on a Procedure Relating to the Application of the Council Regulation 2407/92 (Swissair/Sabena)*, [1995] O.J. L. 239/19.

EU, *Commission Proposal No. 500PC0595 for a Regulation of the European Parliament and of the Council on Establishing Common Rules in the Field of Civil Aviation and Creating a European Aviation Safety Agency*, (2 July 2001), online europa http://www.europa;eu;int/eur-lex/en/com/dat/2000/en_500PC0595.html (date accessed: 15 January 2002).

EU, *Council Decision 87/602/EEC on the Sharing of Passenger Capacity between Air Carriers on Scheduled Air Services between Member States and on Access for Air Carriers to Scheduled Air Service Routes between Member States*, [1987] O.J. L. 374/19.

EU, *Council Directive 87/601/EEC on Fares for Scheduled Air Services between Member States*, [1987] O.J. L. 374/12.

EU, *Council Regulation 3975/87 Laying Down the Procedure for the Application of the Rules on Competition to Undertakings in the Air Transport Sector*, [1987] O.J. L. 374/1.

EU, *Council Regulation 3976/87 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerted Practices in the Air Transport Sector*, [1987] O.J. L. 374/9.

EU, *Council Regulation 4064/89 on the Control of Concentrations Between Undertakings*, [1989] O.J. L. 395/1.

EU, *Council Regulation 2342/90 on Fares for Scheduled Air Services*, [1990] O.J. L. 217/1.

EU, *Council Regulation 2343/90 on Access for Air Carriers to Scheduled Intracommunity Air Service Routes and on the Sharing of Passenger Capacity between Air Carriers on Scheduled Air Services between Member States*, [1990] O.J. L. 217/8.

EU, *Council Regulation 2344/90 Amending Regulation 3676/87 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerted Practices in the Air Transport Sector*, [1990] O.J. L. 217/15.

EU, *Council Regulation 2407/92 on Licensing of Air Carriers*, [1992] O.J. L. 240/1.

EU, *Council Regulation 2408/92 on Access for Community Air Carriers to Intracommunity Air Routes*, [1992] O.J. L. 240/8 (corrected in [1992] O.J. L. 15/33).

EU, *Council Regulation 2409/92 on Fares and Rates for Air Services*, [1992] O.J. L. 240/15.

EU, *Council Regulation 2410/92 Amending Regulation 3975/87 Laying Down the Procedure for the Application of the Rules to Competition to Undertakings in the Air Transport Sector*, [1992] O.J. L. 240/18.

EU, *Council Regulation 2411/92 Amending Regulation 3976/87 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerted Practices in the Air Transport Sector*, [1992] O.J. L. 240/19.

EU, *Decision of the EEA Joint Committee 7/94 Amending the Protocol 47 and Certain Annexes to the EEA Agreement*, [1994] O.J. L. 160/1.

1.4.3.2 Other European Documents

EU, "Air Security – Short presentation of the proposal for a regulation establishing common rules for civil aviation security" Doc. of the European Commission Directorate General for Energy and Transport (October 2001), online: europa http://www.europa.eu.int/common/transport/library/press-kit-surete-en.pdf (date accessed: 6 December 2001).

EU, "Towards new rules on aviation security following the attacks" Doc. IP/01/1397 (10 October 2001), online: europa http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1397 (date accessed: 6 December 2001).

1.4.4 Organization for Economic Cooperation and Development Documents

OECD, Directorate for Science, Technology, and industry – Division of Transport, *Regulatory Reform in International Air Cargo Transportation*, Doc. No. DSTI/DOT(99)1 (June 1999).

OECD, Directorate for Science, Technology, and industry – Division of Transport, *OECD Principles for the Liberalization of Air Cargo*, Doc. No. DSTI/DOT(2000)1 (June 2000).

OECD, Directorate for Science, Technology, and industry – Division of Transport, *Draft Annotated Agenda – OECD Workshop on Principles for the Liberalization of Air Cargo Transportation*, Doc. No. DSTI/DOT/A(2000)1 (August 2000).

OECD, Directorate for Science, Technology, and industry – Division of Transport, *OECD Principles for the Liberalization of Air Cargo Transportation – Comments on DSTI/DOT(2000)1*, Doc. No. DSTI/DOT/RD(2000)1 (September 2000).

OECD, Directorate for Science, Technology, and industry – Division of Transport, *OECD Principles for the Liberalization of Air Cargo Transportation – Comments on Articles contained in DSTI/DOT(2000)1*, Doc. No. DSTI/DOT/RD(2000)2 (September 2000).

OECD, Directorate for Science, Technology, and industry – Division of Transport, *OECD Workshop on Principles for the Liberalization of Air Cargo Transportation – Paris, 4-5 October 2000 – Summary Record*, Doc. No. DSTI/DOT/M(2000)1 (November 2000).

1.4.5 Documents from other international organizations

AEA, *Towards a Transatlantic Common Aviation Area*, AEA Policy Statement (September 1999).

ECAC, *Report on Task Force on Ownership and Control Issues, First Meeting*, ECAC Doc. OWNCO/1 (24 December 1998).

ECAC, *Report on Task Force on Ownership and Control Issues, Second Meeting*, ECAC Doc. OWNCO/2 (26 February 1999).

IATA, Government and Industry Affairs Department, *Report of the Ownership & Control Think Tank World Aviation Regulatory Monitor*, IATA doc. prepared by P. van Fenema (7 September 2000)

WTO, *Note on Developments in the Air Transport sector Since the Conclusion of the Uruguay Round*, Part Four. WTO Doc. S/C/W/163/Add.3 (2001).

WTO, *Note on Developments in the Air Transport sector Since the Conclusion of the Uruguay Round*, Part Five. WTO Doc. S/C/W/163/Add.4 (2001).

2. Secondary Materials

2.1 Books

Abeyratne, R.I.R., *Emergent Commercial Trends and Aviation Safety* (Aldershot: Ashgate, 1999).

Abeyratne, R.I.R., *Aviation Trends in the New Millenium* (Aldershot: Ashgate, 2001).

Flory, T., *L'Organisation Mondiale du Commerce – Droit institutionnel et substantiel* (Bruxelles: Etablissements Emile Bruylant, 1999).

Hill, C.W.L., *International Business: competing in the global marketplace*, 2nd ed. (Chicago: Richard D. Irwin, 1997).

Hill, C.W.L., *International Business: competing in the global marketplace*, 3rd ed. (Boston: Irwin/McGraw-Hill, 2001).

Hufbauer, G.C., Findlay, C., *Flying High – Liberalizing Civil Aviation in the Asia Pacific* (Washington D.C.: Institute for International Economics, 1996).

Jackson, J.H., *The World Trading System – Law and Policy of International Economic Relations*, 2nd ed. (Cambridge: the MIT Press, 1997).

Johnston, D., Johnston, D., Handa, S., *Getting Canada Online – Understanding the Information Highway* (Toronto: Stoddart Publishing Co. Limited, 1995).

Trebilcock, M.J., Howse, R., *Regulation of International Trade*, 2nd ed. (London: Routledge, 1999).

2.2 Articles in Journals

Abeyratne, R.I.R., "Would Competition in Commercial Aviation ever Fit into the WTO?" (1996) 61 J. Air L. & Com. 793

Abeyratne, R.I.R., "Emergent Trends in Aviation Competition Laws in Europe and in North America" (2000) 23 World Competition. R. 141

Alexandrakis, C.G., "Foreign Investment in U.S. Airlines: Restrictive Law is Ripe for Change" (1994) 4 U. Bus. Miami L.J. 71.

American Bar Association, "Cross-Border Investment in International Airlines: Presenting the Issues" (2000) Air & Space Law. 20.

Arlington, D.T., "Liberalization of Restrictions on Foreign Ownership in U.S. Air Carriers: the United States must take the First Step in Aviation Globalization" (1993) 59 J. Air L. & Com. 133.

AuBuchon, M.J., "Testing the Limits of Federal Tolerance: Strategic Alliances in the Airline Industry" (1999) 26 Transp. L.J. 219.

Balfour, J., "Airline Mergers and Marketing Alliances – Legal Constraints" (1995) 20 Air & Space L. 112.

Balfour, J., "A Question of Competence: the Battle for Control of European Aviation Agreements with the US" (2001) 16-SUM Air & Space Law. 7.

Basedow, J., "Airline Deregulation in the European Community – its Background, its Flaws, its consequences for E.C.-U.S. Relations" (1994) 13 J.L. & Com. 247.

Bliss, F.A., "Rethinking Restrictions on Cabotage: Moving to Free Trade in Passenger Aviation" (1994) 17 Suffolk Transnat'l L. Rev. 382.

Bohmann, K., "The Ownership and Control Requirement in U.S. and European Union Air Law and U.S. Maritime Law-Policy; Consideration; Comparison" (2001) 66 J.Air L. & Com. 689.

Brenner, M. "Airline Deregulation – A Case Study in Public Policy Failure" (1988) 16 Transp. L. J. 179.

Brown, J.D., "Foreign Investment in U.S. Airlines: What Limits should be Placed on Foreign Ownership of U.S. Carriers?" (1990) 41 Syracuse L.R. 1269.

"Complaints About U.S. Airlines Up Almost Seven-Fold In August", (1987) J. Rec. (Okla. City).

Dempsey, S., "Airlines in Turbulence: Strategies for Survival" (1995) 23:15 Transp. L. J. 15.

Dempsey, S., "Competition in the Air: European Union Regulation of Commercial Aviation" (2001) 66 J. Air L.& Com. 979.

Doganis, R., "Relaxing Airline Ownership and Investment Rules" (1996) 21 Air & Space L. 267.

Edwards, A., "Foreign Investment in the U.S. Airline Industry: Friend or Foe?" (1995) 9 Emory Int'l L.R. 595.

Elliott, G.P., "Antitrust at 35,000 Feet: the Extraterritorial Application of United States and European Community Competition Law in the Air Transport Sector" (1997-1998) 31 Geo. Wash. J. Int'l L. & Econ. 185.

Gawlicki, S., "Virtual Mergers: With Traditional Mergers Difficult to Pull off, Airlines Finding Creative Ways to Consolidate" (2000) Inv. Dealers' Dig. (WL 4666779).

Gertler, J.S., "Nationality of Airlines: Is It a Janus with Two (or More) Faces?" (1994) 19:1 A.A.S.L. 211.

Goo, G.L.H., "Deregulation and Liberalization of Air Transport in the Pacific Rim: Are They Ready for America's "Open Skies"? (1996) 18 U. Haw. L. Rev. 541.

Gorton, L., "Air Transport and EC Competition Law" (1998) 21 Fordham Int'l L.J. 602.

Grant, Th.D., "Foreign Takeovers of United States Airlines: Free Trade Process, Problems and Progress" (1994) 31 Harv. J. on Legis. 63.

Haanappel, P.P.C., "Airline Challenges: Mergers, take-overs, alliances and franchises" (1995) 21 A.A.S.L. 179.

Haanappel, P.P.C., "Airline Ownership and Control, and Some Related Matters" (2001) 26-2 Air & Space L. 90

Janda, R., "Passing the Torch: Why ICAO Should Leave Economic Regulation of International Air Transport to the WTO" (1995) 21 Air & Space L. 409

Kass, H.E., "Cabotage and Control: Bringing U.S. Aviation Policy into the Jet Age" (1994) 26 Case W. Res. J. Int'l L. 143.

Lehner, R.D., "Protectionism, Prestige, and National Security: The Alliance Against Multilateral Trade in International Air Transport" (1995) 45 Duke L.J. 436.

Little, V., "Control of International Air Transport" (1949) III International Organization 29.

Lipman, G., "Multilateral Liberalization – The Travel and Tourism Dimension" (1994) 19 Air & Space L. 152.

Luz, K., "The Boeing-McDonnel Douglas Merger: Competition Law, Parochialism, and the Need for a Globalized Antitrust System" (1999) 32 Geo. Wash. J. Int'l L.& Econ. 155.

Milde, M., "The Chicago Convention – Are Major Amendments Necessary or Desirable 50 Years Later" (1994) 19:1 A.A.S.L. 401.

Milde, M., "Enforcement of Aviation Safety Standards" (1996) 45 Abhandlungen 3.

Miller, L., "Airline Merger Offers Fliers No Pie in Sky" (1996) Wall St. J. Eur. 8.

Mosin, S., "Riding the Merger Wave: Strategic Alliances in the Airline Industry" (2000) 27 Transp. L.J. 271.

Mosteller, J., "The Current and Future Climate of Airline Consolidation: The Possible Impact of an Alliance of Two Large Airlines and an Examination of The Proposed American Airlines-British Airways Alliance" (1999) 64 J.Air L. & Com. 575.

Naveau, J., "Les Alliances entre Compagnies Aériennes. Aspects Juridiques et Conséquences sur l'Organisation du Secteur" (1999) 49 ITA Etudes & Doc. 9.

O'Toole, T., ""The Long Arm of the Law" – European Merger Regulation and its Application to the Merger of Boeing & McDonnell Douglas" (1998) 11 Transnat'l L. 203.

"Ownership Trend Creates Need for New Links Between States and Airlines" (June 1992) 47 ICAO J. 14.

Perkins, E., "Mergers will Squeeze Consumers" (1997) Orange County (Cal.) Reg. D04.

Polley, R., "Defense Strategies of National Carriers" (2000) 23 Fordham Int'l L.J. 170.

"Progressive Liberalization Actively Supported by ICAO, Council President Tells IATA Annual General Meeting" (June 2001) 56 ICAO J. 30.

Rodriguez Serrano, V., "Trade in Air Transport Services: Liberalizing Hard Rights" (1999) 24 A.A.S.L. 199.

Schless, A.L., "Open Skies: Loosening the Protectionist Grip on International Civil Aviation" (1994) 8 Emory Int'l L. Rev.435.

Schulte-Strathaus, U., "Common Aviation Areas: the Next Step Toward International Air Liberalization" (2001) 16-SUM Air & Space Law. 4.

Simon, M.S., "Aviation Alliances: Implications for the Quantas – BA Alliance in the Asia Pacific Region" (1997) 62 J. Air L. & Com. 841

Stewart, J.T., "US Citizenship Requirements of the Federal Aviation Act – A Misty Moor of Legalisms or the Rampart of Protectionism" (1990) 55 J. Air L. & Com. 685

Swinnen, B.M.J., "An Opportunity for Transatlantic Civil Aviation: from Open Skies to Open Markets?" (1997) 63 J. Air L. & Com. 249.

Tiwari, S., Chik, W.B., "Legal Implications of Airline Cooperation: Some Legal Issues and Consequences Arising from the Rise of Airline Strategic Alliances and Integration in the International Dimension" (2001) J. of Aviation Management of Singapore Aviation Academy 9.

van Fenema, H.P., "Ownership Restrictions: Consequences and Steps to be Taken" (1998) 23 Air & Space L. 63.

van Traa-Engelman, H.L., "Reports of Conferences: The European Air Transport Conference – Airline Globalization" (1998) 23:1 Air & Space L. 31

Warner, S.M., "Liberalize Open Skies : Foreign Investment and Cabotage Restrictions Keep Non Citizens in Second Class" (1993) 43 Am. U. L. Rev. (Washington, DC) 277.

Wassenbergh, H.A., "The Sixth Freedom Revisited" (1996) 21 Air & Space L. 285.

Wassenbergh, H.A., "Future Regulation to Allow Multi-National Arrangements Between Air Carriers (Cross-Border Alliances), Putting an End to Air Carrier Nationalism" (1995) 20 Air & Space L. 164.

Whalen, T.J., "The New Warsaw Convention: the Montreal Convention" (2000) 25:1 Air & Space L. 12.

Young, J.W., "Globalism Versus Extraterritoriality. Consensus Versus Unilateralism : Is There a Common Ground? A US Perspective" (1999) 24 Air & Space L. 209.

2.3 Unpublished Manuscripts

Haghighi, S.S., A Proposal for an Agreement on Investment in the Framework of the World Trade Organization (LL.M. Thesis, Institute of Comparative Law, McGill University 1999).

Petras, C.M., "Foreign Ownership of US Airlines and the Civil Reserve Air Fleet Program: Cause for Concern?" (15 March 2001).

Wassenbergh, H., "Towards Global Economic Regulation of International Air Transportation through Inter-Regional Bilateralism" The Hague (August 2001).

2.4 Addresses and Papers Delivered at Conferences

Al Dawoodi, A.J., "The impact of the GATS on air transport from the general perspective of developing countries" (Dialogue on Trade in Aviation-Related Services, ICAO, Montreal, 12 June 2001) [unpublished].

Janda, R., "ICAO as a Trustee for Global Public Goods in Air Transport" (Dialogue on Trade in Aviation-Related Services, ICAO, Montreal, 12 June 2001) [unpublished].

Loughlin, R., "The current GATS Round in a Historical Perspective" (Dialogue on Trade in Aviation-Related Services, ICAO, Montreal, 12 June 2001) [unpublished].

Palacio (de), L., "Beyond Open Skies" (Address at the European Commission Beyond Open Skies Conference, Chicago, 6 December 1999).

Palacio (de), L., "Globalization – The way forward" (Address at the IATA World Transport Summit, Madrid, 27-29 May, 2001).

Sørensen, F., "Market Access Liberalization of Air Transport" (Dialogue on Trade in Aviation-Related Services, ICAO, Montreal, 12 June 2001) [unpublished].

2.5 Articles in Magazines

"ANZ Asks Government To Lift Foreign Ownership Limits" *Aviation Daily* 345:10 (16 July 2001) 5.

"APEC Multilateral Moves U.S. Toward Globalizing Pacts" *Aviation Daily* 344:22 (1 May 2001) 3.

"Australian Government to Ease Foreign Ownership Restrictions" *Aviation Daily* (19 August 1999) 3

Baker, C., "French Push for TCAA" *Airline Bus.* (December 2000) 18.

Baker, C., "US and UK Remain Apart on Open Skies" *Airline Bus.* (December 2000) 19.

Baker, C., "History Lessons" *Airline Bus.* (December 2000) 74.

Baker, C., "Behind The Handshake" *Airline Bus.* (February 2001) 66.

Cameron, D., "Out of the Wilderness" *Airline Bus.* (June 1999) 50.

Chuter, A., "Growing pains: Differing Approaches Taken by US and European Regulators Over the Proposed GE/Honeywell Merger Highlight a Need for Common Guidelines" *Flight Int'l* (19 June 2001) 5.

Conway, P., "Could Cargo Lead Liberalisation" *Airline Bus.* (December 2000) 29.

Feldman, J.F., "No Guts, no Glory" *Air Transport World* (January 1992) 64.

Feldman, J.M., "It's Still a Bilateral World" *Air Transport World* (August 1997) 35.

Fennes, R., of DG VII, is quoted by Karen Walker, "The Great Global Debate" *Airline Bus.* (September 1999) 96.

Field, D., "Regulatory Hurdles Remain for United's Merger Plans" *Airline Bus.* (April 2001) 13.

Fiorino, F., "More Open Skies" *Aviation Wk & Space Tech.* (12 June 2000) 19.

Gill, T., "Opening Arab Skies" *Airline Bus.* (June 1999) 47.

Gill, T., "A Firmer Base" *Airline Bus.* (June 2000) 49.

Hughes, D., "ICAO Delegates Shun US Free-Market Stance" *Aviation Wk & Space Tech.* (2 January 1995) 37.

Ionides, N., "China Merger Takes Shape" *Airline Bus.* (February 2001) 26.

Ionides, N., "China to Loosen Central Ownership" *Airline Bus.* (April 2001) 27.

Ionides, N., "Expanded Horizons" *Airline Bus.* (November 1999) 34

Ionides, N., "Five Sign Up to Asia-Pacific Multilateral Agreement" *Airline Bus.* (June 2001) 34.

Ionides, N., "SIA Challenges the USA to Relax Foreign Ownership" *Airline Bus.* (May 2001) 27.

Ionides, N., "Spoiling for Choice" *Airline Bus.* (October 2000) 84.

"Jeanniot Sees Regional Blocs As Cure For Over-Fragmentation" *Aviation Daily* 344:43 (31 May 2001) 2.

Jones, L., "When the Going Gets Tough..." *Airline Bus.* (May 1998) 26.

Katz, R., "New Directions?" *Airline Bus.* (June 1992) 36.

Knibb, D., "No Flag in its Future" *Airline Bus.* (May 1999) 72.

Knibb, D., "Australian Ownership Rules Criticized" *Airline Bus.* (August 1999) 26.

Knibb, D., "Aerolineas Rescue Relies on Spain" *Airline Bus.* (August 2000) 18.

Knibb, D., "Thai Moves Towards Privatisation" *Airline Bus.* (December 2000) 24.

Knibb, D., "Bilateral Accord Sparks Ownership Debate...as APEC Moves Towards Multilateral Open Skies" *Airline Bus.* (January 2001) 24.

Lancesseur, B., "Un Cadre Réglementaire rigide – La mise à plat s'impose" *Aéroports Magazine* (Mai 2001) 18.

Max KJ, "South African Liberalisation Makes Progress" *Flight Int'l* (24 October 2000) 4.

McKinsey, "Making Mergers Work" *Airline Bus.* (June 2001) 110.

Montlake, S., "Sair Takes Portugalia Stake" *Airline Bus.* (August 1999) 20.

Morrocco, J.D., "Open Skies Impasse Shifts Alliance Plans" *Aviation Wk & Space Tech.* (9 November 1998) 45.

"Multilateral Pact Carriers Must Report Ownership Changes" *Aviation Daily* 342:43 (1 December 2000) 4.

"New Zealand To Allow Increased Foreign Ownership" *Aviation Daily* 342:36 (20 November 2000) 5.

Pilling, M., "Only a Call Away" *Airline Bus.* (March 2001) 38.

Shifrin, C. , "FAA plans safety change" *Airline Bus.* (June 1999) 11.

Shifrin, C., "Towards Unsettled Skies" *Airline Bus.* (June 1999) 87.

Sparaco, P., "European Deregulation Still Lacks Substance" *Aviation Wk & Space Tech.* (9 November 1998) 53

Tarry, C., "Playing for Profit" *Airline Bus.* (June 1999) 90.

"The Global Alliance Grouping" *Airline Bus.* (May 2000) 59.

"The New Zealand Government Relaxes Foreign Ownership Limits in Air New Zealand" *Air Transport World* (October 2001) 12.

Thornton, C., "The New: Europe's New Transport Commissioner has Set out her Agenda on Air Transport and Appears Determined to See it Through" *Airline Bus.* (March 2000) 32.

Thornton, C., Lyle, C., "Freedom's Paths" *Airline Bus.* (March 2000) 74.

"UK Says Airline Merger and Acquisition Rules should be Relaxed" (3 October 2001) Airline Indus. Info.

"US Questions Maersk's Power" *Fair Play* (19 July 2001) 22.

Walker, K., "US DoD gives Red Light to Ownership Changes" *Airline Bus.* (June 1999) 11.

Walker, K., "Sans Frontiers?" *Airline Bus.* (February 2000) 34.

2.6 Articles in Newspapers

"Air Jamaica hurt by US tragedy" *The St. Vincent Herald* (4 November 2001), online: Caribbean Alpa http://www.caribbeanalpa.com/news/index.shtml (date accessed: 5 November 2001).

"Air Liberté espère revenir à l'équilibre en 2003" *Le Figaro* (date accessed: 2 November 2001), online : Le Figaro http://www.lefigaro.fr/cgi.bin/gx.cgi/AppLogic+FTContentServer?pagename=FutureTense/Apps/Xcelerate (date accessed: 5 November 2001).

Bartholomeusz, S., "Ansett's survival goes to the heart of deregulation policy" *The Age* (7 September 2001), online: The Age http://www.theage.com.au/business/2001/09/07/FFX2JVQF9RC.html (date accessed: 7 September 2001).

Bocev, P., "l'Europe recale le mariage GE-Honeywell" *Le Figaro* (4 July 2001) 1 and 5.

Brethour, P., "Telecom ownership review coming: AT&T" *The Globe and Mail* (30 October 2001) B1 & B6.

Coleman, Z., "Government rescues Air NZ" *The Globe and Mail* (5 October 2001) B7.

Crols, B., "Flag-carrier Sabena in death spiral" *The Globe and Mail* (6 November 2001) B13.

Damsell, K., "Ownership rules key: Astral" *The Globe and Mail* (14 December 2001) B5.

Dugua, P.Y., "Le ciel américain broie du noir" *Le Figaro* (23 June 2001) III.

Evans, G., "Air NZ shares bounce as talks continue" *The Age* (26 September 2001), online: The Age
http://www.theage.com.au/news/national/2001/09/26/FFX44YQ02SC.html
(date accessed: 26 September 2001).

Gibbens, R., "World has too many airlines: IATA boss" *National Post* (4 December 2001), online: national Post
http://www.nationalpost.com/financialpost/worldbusiness/story.htm (date accessed: 5 December 2001).

Glackin, M.,"Airline Consolidation is the only route to survival" *The Scotsman* (24 December 2001), online: The Scotsman
http://209.185.240.250/cgibin/linkrd?Lang=EN&lah=7986709cb8b8d0bfa2360ae6558c6ed8&lat=1010085559&hmaction=http%3a%2f%2fwww%2eairliners%2enet%2fnews%2fredirect%2emain%3fid%3d30291 (date accessed: 24 December 2001).

Guerrera, F., "GE fires salvo at European Commission" *Financial Post* (5 November 2001) FP11.

Kouamouo, T., "Air Afrique passe sous la tutelle d'Air France" *Le Monde* (17 Août 2001) A12.

"L'Etat est contraint de jouer au "pompier social"" *Le Monde* (18 October 2001), online: Le Monde http://www.lemonde.fr/rech_art/0,5987,235581,00.html (date accessed: 5 November 2001).

Mallet, V., "Companies & finance international: French airlines in crisis" *Financial Times* (9 April 2001), online: Financial Times
http://specials.ft.com/In/ftsurveys/industry/sc22356.htm (date accessed: 16 May 2001).

McArthur, K., "Ottawa may ease airline ownership rules" *The Globe and Mail* (2 October 2001) A10.

McArthur, K., Chase, S., "Schwartz Spurns Air Canada as Ottawa Mulls Ownership Cap" *The Globe and Mail* (5 October 2001) B1 and B4.

McArthur, K., "Air Canada courting investors" *The Globe and Mail* (3 November 2001) B1.

McCartney, S., "Widening losses at airlines make shakup unavoidable" *The Globe and Mail* (6 November 2001) B15.

Michaels, D., Thurow, R., "Swiss banks draw ire" *The Globe and Mail* (5 October 2001) B7.

Rose, L.R., & Coleman, B., "British Airways Buys Stake in USAir, Drawing Protests From Other Carriers" *The Wall St. J.* (22 January 1993) A3.

Thomas, G., "Air NZ plummet hits SIA and BIL" *The Age* (25 September 2001), online: The Age http://www.theage.com.au/news/national/2001/09/25/FFXEPDK02SC.html (date accessed: 26 September 2001)

"1944 and all that" *Sunday Times – London* (7 October 2001), available on WL 27457432.

2.7 Press Releases

Council of Canadians, Immediate Release "Transport Committee Recommendations Threaten Safe, Affordable and Accessible Canadian Air Service" (December 1999), online: the Council of Canadians www.canadians.org/media/media-991208.html (date accessed: 11 May 2001).

Department of Justice, Immediate Release, "Justice Department Urges DOT to Impose Conditions on American Airlines/British Airways Alliance" (17 December 2001), online: DOJ http://www.usdoj.gov/atr/public/press_releases/2001/9705.htm (date accessed: 18 December 2001).

Department of Transportation, Immediate Release 45-01, "DOT Rules on Petitions Against DHL" (11 May 2001), online: DOT http://www.dot.gov/affairs/dot45-01.htm (date accessed: 1 October 2001).

Department of Transportation, Immediate Release 68-01, "US Secretary of Transportation Says Bush Administration to Press for Global Aviation Liberalization" (30 June 2001).

Department of Transportation, Immediate Release 111-01, "United-States, France Reach Open-Skies Aviation Agreement" (19 October 2001).

DHL WE, Immediate Release , "DHL Worldwide Express Welcomes DOT Ruling" (11 May 2001), online: DHL WE http://www.dhlusa.com/press_display/1,3574,79,00.html (date accessed: 1 October 2001).

EU, Press Release 16/1998, "European Commission takes legal action against EU Member States "Open-Skies" agreements with the United States" (11 March 1998).

ICAO, Immediate Release PIO 12/2000, "Implementing SARPs – the key to aviation safety and efficiency" (6 December 2000), online: ICAO http://www.icao.int/icao/en/nr/pio200012.htm (date accessed: 6 December 2001).

ICAO, Immediate Release PIO 12/2001, "ICAO Assembly Resolutions Focus on Improving Aviation Safety and Security" (5 October 2001), online: ICAO http://www.icao.int/cgi/goto.pl?icao/en/nr/pio200112.htm (date accessed: 6 December 2001).

The Canadian Transportation Agency, New release H100/99, "Minister of Transport Issues Policy Framework for Restructuring of Airline Industry" (26 October 1999), online: Transport Canada <http://www.tc.gc.ca/releases/nat/99_h100e.htm> (date accessed: 10 May 2001).

The Fraser Institute, Media Release, "Avoiding the Maple Syrup Solution: Restructuring Canada's Airline Industry" (17 November 1999), online: the Fraser Institute http://www.fraserinstitute.ca/media/media_releases/1999/1999111 (date accessed: 8 September 2001).

Swissair Group, New Release 20/01/DC, "Swissair Group et le gouvernement belge signent un accord sur Sabena" (17 July 2001), online: Swissair Group http://www.swissairgroup.com/apps/media/press/index.html/?period=archive&language=f#?period archive1language=f (date accessed: 27 September 2001).

2.8 Miscellaneous

CAPA minutes, *Memorandum of Understanding*, APA headquarters Fortworth, Texas, (9-10 February 2000), online: CAPA http://www.capapilots.org/Download%20Files/minutesfeb910.htm (date accessed: 14 May 2001).

Caribbean Alpa, *The problem with all Caribbean carriers is undercapitalization*, publication, online: Caribbean Alpa http://www.caribbeanalpa.com/discussion/posts/1546.html (date accessed: 14 May 2001).

Ross, T.W., Stanbury, W.T., "Avoiding the Maple Syrup Solution: Comments on the restructuring of Canada's Airline Industry" publication (1999), online: the Fraser Institute http://www.fraserinstitute.ca/publications/pps/32/ (date accessed: 8 September 2001).

2.9 Websites visited

Australian Commonwealth Department of Transport and Regional Services	http://www.dotrs.gov.au
Canadian Parliament	http://parl.gc.ca
Canadian Transportation Agency	http://cta-otc.gc.ca
Caribbean Air Line's Pilots Association	http://www.caribbeanalpa.com
Coalition of Airline Pilots Associations	http://www.capapilots.org
Council of Canadians	http://www.canadians.org
Department of Transportation	http://www.dot.gov
DHL	http://dhl-usa.com

European Union	http://www.europa.eu.int
Financial Times	http://www.ft.com
Fraser Institute	http://www.fraserinstitute.ca
International Civil Aviation Organization	http://www.icao.org
Le Figaro	http://www.lefigaro.fr
Le Monde	http://www.lemonde.fr
National Post	http://www.nationalpost.com
Swissair Group	http://www.swissairgroup.com
The Age	http://www.theAge.com.au
The Scotsman	http://www.thescotsman.co.uk
Transport Canada	http://www.tc.gc.ca