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The EU 'Horizontal Agreements'

Background and Consequences of an Airpolitical Novum

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ABSTRACT

This thesis discusses the background, contents and airpolitical consequences of the so-called 'Horizontal Agreements ("HA"),' concluded by the European Union ("EU") with third countries to give effect to the European Court of Justice's ("Court" / "ECJ") decision of November 2002 in the 'Open Skies' cases brought by the European Commission ("EC" / "Commission") against certain EU Member States.

The Court's decision outlaws the nationality or 'ownership and control' clause in the bilateral ('Open Skies') agreements concluded with the United States by those Member States. As this clause is a standard provision in *all* bilateral air services agreements, the Court's decision actually obliges the Member States to amend those agreements and replace the said clauses by provisions which do *not* discriminate on the basis of nationality.

The Member States have in the meantime mandated the Commission to engage in such negotiations on their behalf on the basis of a jointly developed Model Horizontal Agreement ("MHA"), containing a non-discriminatory so-called Community clause and some other provisions on matters within the exclusive competence of the Community.

This research thus examines the legal and airpolitical implications of these Horizontal Agreements, which the Commission has concluded in the meantime and continues to propose to third countries. In this connection, attention is given to the scenario of the *anticipated* Horizontal Agreement negotiations between the EU and the Republic of Korea.

With Gratitude and Love to My Mother

In Memory of Paul Anthony LeBreton

RÉSUMÉ

Cette thèse traite de l'historique, du contenu et des conséquences aéropolitiques des ententes appelées « Horizontal Agreements » conclues par l'Union Européenne (« UE ») avec des pays tiers, pour appliquer la décision de novembre 2002 de la Cour Européenne de Justice (« Cour ») dans la cause « Open Skies » menée contre les états membres de l'UE par la Commission Européenne.

La décision de la Cour rend illégale la clause de nationalité ou de « propriété et contrôle » dans l'entente bilatérale (« Open Skies ») conclue par les états membres et les États-Unis. Puisque cette clause est standard dans *toutes* les ententes bilatérales de services aériens, dans les faits la décision de la Cour oblige tous les états membres à amender ces ententes et à remplacer lesdites clauses par des articles qui ne discriminent *pas* sur la base de la nationalité.

Entre temps, les états membres ont mandaté la Commission Européenne (« Commission ») de négocier en leurs noms une entente développée conjointement d'un « Model Horizontal Agreement » (« MHA »), contenant une clause non-discriminatoire dite « Community clause » ainsi que d'autres articles portant sur des sujets relevant de la compétence exclusive de la Communauté.

Cette recherche examine donc les implications légales et aéropolitiques de ces ententes horizontales, que la Commission a conclues entre temps et continue de proposer aux pays tiers. Dans ce contexte, une attention est accordée au scénario *anticipé* des négociations d'une entente horizontale entre l'UE et la République de Corée.

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Julianne S. Oh
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TABLE OF ABBREVIATIONS

A

AOC:	Air Operators Certificate	
APEC:	Asia Pacific Economic Cooperation	www.apec.org
ATConf:	[ICAO World] Air Transport Conference	

C

CRAF:	Civil Reserve Air Fleet	
CRS:	Computerized Reservation System(s)	

D

DG:	Directorate General [of the European Commission]	
DG TREN:	DG for Energy and Transportation [of the European Commission]	
DOT:	Department of Transportation [of the U.S.A.]	www.dot.gov

E

EASA:	European Aviation Safety Agency	www.easa.eu.int
EC:	European Community / European Commission	www.europa.eu.int/institutions/comm/index_en.htm
ECAA:	European Common Aviation Area	
ECJ:	European Court of Justice	
EEA:	European Economic Area	
EEC:	European Economic Community	
EFTA:	European Free Trade Association	
EU:	European Union	www.europa.eu.int

F

FAA:	Federal Aviation Administration (of the U.S.A.)	www.faa.gov
FTK:	Freight Ton-Kilometers	

G

GATT:	[The] General Agreement on Tariffs and Trade	
GDP:	Gross Domestic Product	
GNI:	Gross National Income	

H

HA:	Horizontal Agreement	

I

IATA:	International Air Transport Association	www.iata.org
ICAO:	International Civil Aviation Organization	www.icao.int
IIA:	InCheon International Airport	

J

JAA:	Joint Aviation Authorities	www.jaa.nl

M

MALIAT:	[The] Multilateral Agreement of the Liberalization of International Air Transportation	www.maliat.govt.nz/index.shtml
MFN:	Most Favored Nation	
MHA:	Model Horizontal Agreement	
MOCT:	Ministry of Construction and Transportation	www.moct.go.kr

O

OAA:	Open Aviation Area	
OECD:	[The] Organization for Economic Co-operation and Development	www.oecd.org

P

PIASA:	[The] Pacific Islands Air Services Agreement
PPP GDP/GNI:	Purchasing Power Parity GDP/GNI

R

RPK:	Revenue Passenger-Kilometers
RTK:	Revenue Ton-Kilometers [Cargo]

S

SANZ:	Singapore, Australia and New Zealand

T

TCAA:	Transatlantic Common Aviation Area: *aka.* EU-US Open Aviation Area

W

WTO:	World Trade Organization	www.wto.org

--- Code of Airlines[ר] ---

AA:	American Airlines	(AAL)
AF:	Air France	(AFR)
AZ:	Alitalia - Linee Aeree Italiane	(AZA)
BA:	British Airways	(BAW)
KE:	Korean Air Lines	(KAL)
KL:	KLM Royal Dutch Airlines	(KLM)
LH:	Deutsche Lufthansa AG	(DLH)
LO:	LOT – Polish Airlines	(LOT)
NW:	Northwest Airlines	(NWA)
OK:	CSA Czech Airlines	(CSA)
OS:	Austrian Airlines	(AUS)
OZ:	Asiana Airlines	(AAR)
SK:	Scandinavian Airlines System	(SAS)
SQ:	Singapore Airlines	(SIA)

[ר] This list covers only the airlines that appear in the text (including footnotes) of this thesis. Letters in brackets refer to the ICAO designator of that airline. The Codes used herein follow the IATA's designators. **See** <www.iata.org/membership/airlines/airlinemembership.htm>.

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INTRODUCTION

Notwithstanding the constant efforts by the global aviation community to put international air services under a multilateral regime, it is *bilateralism*, including 'Open Skies' type agreements that still prevails.

"Challenges and Opportunities"[1]

Europe is shaking up the conventional regime of international air transport. While there have been many other players who have contributed to changing the overall environment of the industry -- the US with its introduction of the Open Skies model of bilateral air services agreements; the APEC Member Economies with their accomplishment in substantially liberalizing ownership and control restriction through regional integration;[2] and the Pacific Island States with their successful formation of what is by far the youngest open aviation market[3] -- the EC has constantly challenged the existing order of international air transport by maintaining a liberalized common market for its so-called 'Community carriers' within the boundary of its air space. It is now common knowledge that the consequences of European air transport liberalization have not lingered only on a Community level. The Court's 'Open Skies' decisions[4] may be viewed as one of the latest examples of Europe's "own" liberalization bringing about extraterritorial effects. This, a much awaited decision has led the world's civil aviation community to gather and discuss possible effects of these decisions.

By its confirmation of the notion of Community Clause, the Court has put the affected Member States in a difficult position. The Court held that the national ownership and control clauses in bilateral agreements violate the Treaty principles of freedom of establishment[5] as

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[1] Quoted from the theme of the 5th ICAO Worldwide Air Transport Conference (24 ~ 28 March 2003).
[2] John H. Kiser, "The Multilateral Agreement on the Liberalization of International Air Transportation" (Seminar prior to the 5th ICAO Worldwide Air Transport Conference, ICAO Headquarters, 22 March 2003) [Unpublished].
[3] The Pacific Islands Air Services Agreement ("PIASA") was endorsed as of July 2003, *Annual Review of Civil Aviation 2003* (2004) 59:6 ICAO J. 23 at 34; For more information on its formation process, **see** Peter Harbison, "Island countries turn to Multilateralism to improve air services across vast region" (2002) 57:9 ICAO J. 16.
[4] ***E.C.J.*** *Commission v. Belgium* C-471/98, *Denmark* C-467, *Sweden* C-468, *Finland* C-469, *Luxembourg* C-472, *Austria* C-475 and *FRG* C-477, [2002] E.C.R.
[5] Art. 43 of the *EC Treaty* [Art. 52 before amendment, "ex"].

well as national treatment applicable to all other Member States.[6] As a result, the Member States brought before the Court in this case were held obliged to replace the traditional ownership and control provisions with non-discriminatory ones, in accordance with the Community Designation Clause.[7] It should be remembered, however, that substantial ownership and effective control requirements for airlines are not yet globally abolished even though such long-standing nationality requirements have been removed *within* the EC through the stipulation of three liberalization "Packages" based upon the principles establishing the European common market.[8] This decision, therefore, not only placed Member States in an uneasy position, but also had consequences for international civil aviation. One can argue that EC law can in principle be regarded as a kind of "domestic" law, only with binding force over a bigger community than a nation state; like other municipal court decisions, the ECJ's decisions unarguably have binding force over the EC Member States, as provided in the *Treaty of Rome*.[9] This leads one to doubt whether non-Community bilateral partners are obliged to recognize either the legal order of the EC or the notion of Community Clause. It may be worth rethinking the external effects or the "jurisdiction" of the Community legislation and the consequent obligations imposed on the second / third Parties, the extraterritorial nature of EC law has however been witnessed over the years.[10]

Provided that the Court did not concretely decide in favor of the Commission with respect to its full mandate for the external negotiation of bilateral agreements, the Europeans have been cooperating in an attempt to clarify the situation internally before engaging non-Community partners. And, as close the European Commission wished as in the first place, the Commission and the Member States have in the meantime compromised on the concept of a "Horizontal Mandate," *i.e.*, shared mandate applicable to most external air services negotiations with non-Community partners.[11] Arguably, this is merely an internal concern of

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[6] Armand de Mestral, "The Consequences of the European Court of Justice's 'Open Skies' Decision" (March 2003) *Business Briefing – Aviation Strategy: Challenges & Opportunities of Liberalization* at 24 [*Business Briefing*].

[7] Decisions of the E.C.J. rendered to Member States are binding in their entirety under the *Treaty of European Union 1992*, also known as, *Maastricht Treaty* (amending the *Treaty of Rome 1957*), and the Court's recent 'Open Skies' decisions are not exceptions. **See** Mike Cuthbert, *E.U. Law in a Nutshell*, 2nd ed. (London: Sweet & Maxwell, 1997) at 19.

[8] In brief, it is the establishment of a complete free trade zone with no barriers. **See *infra*** Chapter I-3-1-1.

[9] *Treaty Establishing the European Community* 1957 (also known as *Rome Treaty*). **See *infra*** note 123.

[10] de Mestral, ***supra*** note 6 at 23.

[11] Since the European Commission has been developing US-specific strategies in line with the EU-US Open Aviation Area (also known as Transatlantic Common Aviation Area), the discussion of the United

the EC. However, any non-Community bilateral partner may wish to challenge that the Commission has external jurisdiction in order to protect its national carrier(s) or market. Because it is the right of a sovereign State to recognize another sovereign entity according to the general principles of international law, a State is entitled to refuse to recognize the Commission as a negotiating partner on a Member State's behalf. Nonetheless, it seems the Commission has always believed that bilateral partners would simply recognize it once a mutual understanding within the Member States has been achieved.[12] In practice, this has occasionally been the case with certain bilateral partners proving more than favorable to having the Commission on the other side of the negotiation table.

As witnessed in the ICAO 2003 Air Transport Conference ("ATConf"), States demonstrate a wide range of responses to the world's trend of liberalization in international air transport: from conservative protectionism to extreme liberalism. A State that has been maintaining a protective market environment would be unlikely to welcome this 'chaotic' situation created by its European partners, whereas negotiations with States friendly to a liberal market would proceed more smoothly. In turn, such a protectionist State may put Member States and/or the Commission in a puzzling situation, for example (1) by demanding certain 'non-negotiable' concessions in exchange for the multiple designation of Community carriers; (2) by setting new trade barriers in other sector(s) than air services against those European States; or even (3) by expressing a willingness to denounce existing agreements.

In any event, Parties to a trade negotiation will naturally attempt to pursue their own interests to the fullest extent and, if the position of their partners is very different, to find the most plausible arguments to protect their own interests. Hence, European Member States, the Commission and any bilateral partners all are in the end seeking their optimal trade interest out of the situation resulting from the ECJ's 'Open Skies' judgment, which they are presently encountering or soon will: *e.g.*, the imminent negotiations on the Horizontal Agreements. Due to the Court's decision – the binding force of which falls directly on the all EU Member States, as mentioned above – the EC is 'compelled' to amend this 'discriminatory' nationality-based Designation Clause in order to continue their 'beyond-Community' air services. From this, non-Community partner States are presented with numerous

States is not included much in the scope of the current discussion.

[12] Interview with an officer of DG TREN of the European Commission (28 March 2003). The source wishes to remain unknown.

opportunities to solicit a great deal of their trade interest from the Community, given the dynamics of trade negotiations. In sum, the success of the EC - both of Member States and of the Commission in renegotiating existing air services agreements with bilateral partners - seems to depend largely upon partner States' willingness to accommodate European interests despite foreseeable complexities of both substance and procedure.

This thesis therefore seeks to understand this current chapter of ongoing air services liberalization – mainly the acceleration of that process by the EC - and to consider how to turn these challenges into opportunities in a way that best serves the positions of all Parties involved. PART I presents some background to clarify the current state of air transport liberalization, focusing on (i) the notion of substantial ownership and effective control requirements in the current bilateral system of international air transport; (ii) the implications of the ECJ's 'Open Skies' decisions; and (iii) the development of the EU's external aviation policy since the Court's ruling, taking the MHA into account. PART II discusses more analytically the key provisions drafted for the MHA, comparing these to corresponding clauses in existing bilateral agreements. This will lead to a better understanding of the nature of this draft Model Agreement. The implications of such new model Clauses subsequently apply to the examination of an individual third Party's position: that of Korea's in the course of the concerned negotiations that may take place sooner than expected.

PART I

I. International Air Services Agreements: Bilateral System

1. Current Regulatory Regime Governing International Air Transport

In today's "globalized" business environment, air transport or carriage by air may appear to be just like any other transport or service industry. With the boom of economic globalization inaugurated by the Uruguay Round in early 1990's,[13] a greater effort has been made to make international air services part of the world free trade regime represented by the GATT system; more precisely, given the nature of the industry, under the umbrella GATS.[14] Such attempts have scarcely been successful. What singles out international air transport from many other service industries is the doctrine of State sovereignty, which was first spelled out in the Paris Convention 1919.[15] The Paris Convention recognizes that it is a State that grants the freedom(s) of the air[16] to the carrier(s) of a certain other State.[17] Thus, without the mutual consent or permission given by a sovereign State, none can fly from, to, and via the air space of another because the State sovereignty extends to its air space as well as its land and territorial water. International air services agreements have therefore evolved primarily on a bilateral level and through the exchange of those traffic rights between the two sovereign States. Thus, the nationality of air carriers thus becomes a crucial element. This 'Nationality Clause'[18] can be found in every (traditional) bilateral agreement, and is the factor that has hindered the speed of this industry's continued liberalization most.[19]

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[13] The Uruguay Round, 1986-1994, has created the WTO. It has updated the GATT 1947 which was in compatible with the modern trade worldwide as well as produced other related multilateral trade agreements. For more information, **see** <www.wto.org> [Last consulted 10 August 2005].

[14] *The General Agreement on Trade in Services 1994* consisting of the pack of the WTO Agreements. **See *ibid.***

[15] Angela C.J. Lu, *International Airline Alliances: EC Competition Law / US Antitrust Law and International Air Transport* (D. Jur. Thesis, International Institute of Air and Space Law, Leiden University 2002) at 8-9 [The Hague: Kluwer Law International, 2003].

[16] For the (basic) five categories of such rights, **see** McGonigle ***infra*** note 23 at 11; for more in-depth discussion of the freedoms of the air in conjunction with the Traffic Rights issues in general, **see also** Hu ***infra*** note 222.

[17] Lu, ***supra*** note 15.

[18] It refers to the *Designation of Airlines* clauses inserted in bilateral agreements.

[19] In the simplest possible way, the economic liberalization can be defined as the attempts and the process of abolishing the trade barriers set out in terms of the national boundaries.

The "Designation of Airlines,"[20] one of the *mandatory* clauses in existing bilateral air services agreements provides the requirements for the "substantial ownership and effective control"[21] of airlines. They may be viewed as an economic regulation. On the other side of the coin, it is *per se* the requirement that determines the nationality of air carriers. In other words, the Designation of Airlines clause in a bilateral air services agreement confirms the *nationality* of the air carrier(s) designated by the other Party being substantially owned and effectively controlled either by the State Party or their nationals.

1-1. Chicago Convention 1944

The legal instrument called the *Convention on International Civil Aviation* ("Chicago Convention") was created as a result of the Chicago Conference held in 1944.[22] As is well known, the Chicago Convention forms a legal and institutional basis of international civil aviation. It basically lays down the freedoms of the air,[23] and defines the rights and obligations of its member States in the context of international civil aviation. In addition, the Convention sets forth the structure and functions of the International Civil Aviation Organization ("ICAO"), establishing it as one of the United Nation's specialized agencies. This, in short, establishes the framework of public international air law.

In the light of this research, certain attention shall be drawn to the fact that the Chicago Convention recognizes the State sovereignty over its air space,[24] in line with the Paris Convention 1919. This thus created the need for arrangements, bilateral or otherwise, providing for access of foreign carriers to such *national* air space. On this basis, the first bilateral air services agreement was concluded between the UK and the US in Bermuda, 1946.

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[20] Also referred to as "Nationality Clause."
[21] For the full text of an 'ownership and control clause,' **see *infra*** Chapter IV-2-2-1. The first such a clause can be found in the United States Airmail Act of 1934 cited in ***supra*** note 15 at 15.
[22] Lu, ***supra*** note 15 at 10
[23] Sean McGonigle, *Comparative regulation of air transport in the Asia-Pacific region* (LL.M. Thesis, Institute of Air and Space Law, McGill University 2003) at 11 [Unpublished].
[24] Art 1 and Art 6 of the *Chicago Convention.*

Like many other international regimes created as a consequence of the World War II, one can argue that the Chicago Convention was also an end-product of seeking balance in order to avoid air attack amongst the nations involved in the War. In addition, at the time that the Convention was drafted, the degree of development in the Parties' domestic aviation markets varied broadly. It was only the US market that was fairly developed. The Convention is often criticized for allowing such a background of negotiation to result in making national sovereignty sacred, to generate the overprotection of national carriers, and prevent the emergence of a competitive aviation market.[25] These drawbacks of the public international aviation legal order still govern the industry's practice today, and lead to continued debate over the relevant subjects in an effort to make the aviation industry "better" *i.e.*, more liberal, which is still an on-going process.

1-2. Bermuda-Type of Bilateral Air Services Agreements 1946

As mentioned above, the first bilateral air services agreement in history was signed between the UK and the US in 1946 ("Bermuda I"). Since an international agreement is "a meeting of differing political minds," the Bermuda I was likewise the outcome of a compromise between the two Parties that had quite different mindsets in operating their own air transport industries; the UK preferred to keep the industry more centrally controlled whereas the US was more open to let it work under the "market theory." In any event, this – what could have been rather flexible agreement – evolved, in the hands of other countries, into a very rigid type of air services agreement often with tight capacity, and frequency controls on top of a strict tariff setting regime,[26] which is far from open competition.

Even at the very infant stages of international air services, it is true that States preferred a multilateral exchange of traffic rights to one based on a bilateral

[25] Ludolf van Hasselt, "Crossroads for Arab Aviation" (Arab Aviation Conference, Sharm El Sheikh, 25-26 April 2004) [Unpublished].
[26] Comments by Peter van Fenema (August 2005).

level. However, the Bermuda Agreement generated and concretized a pattern of regulating international air services bilaterally.[27]

1-3. Liberalized Bilateral Air Services Agreements: "Open Skies"

With the swift change in business environment resulting from industrialization, globalization and what not, it became obvious that the traditional bilateral air services agreements had ceased to meet the industry's needs. As a result, several government initiatives - initially in the US in the form of deregulation[28] - speeded the introduction of a 'new' type of bilateral air services agreements.

Thanks to a generally positive experience with deregulation in its domestic market, the US felt confident to liberalize internationally as well. Its first attempt toward a more liberalized bilateral air services agreement was with the Netherlands in 1978.[29] It was also with the Netherlands that the US, in 1992, concluded its first so-called "Open Skies" Agreement creating unprecedented liberalization in a bilateral relationship. Later, in 1995, the US successfully knocked on the doors of its European partners[30] with the same Agreement designed for a more free-competition oriented service arrangement, if not yet as "innovative." Unlike the Bermuda model, an 'Open Skies' air services agreement is noticeably free of restrictions. A typical agreement of this type generally contains:

(i) open entry to on all routes;
(ii) unrestricted capacity and frequency on all routes;
(iii) unrestricted route and traffic rights between any point in one contracting state and the other;
(iv) double-disapproval pricing in 3rd and 4th freedom market;
(v) liberal charter arrangements;
(vi) liberal cargo regime;
(vii) conversion and remittance arrangement;
(viii) open code-sharing opportunities;

[27] van Hasselt, ***supra*** note 25.
[28] For more information on the subject, **see** *e.g.*, Paul Stephen Dempsey, "Turbulence in the "Open Skies": The Deregulation of International Air Transport," (1987) 12 Transp. L. J.
[29] Lu, ***supra*** note 15 at 40.
[30] McGonigle, ***supra*** note 23 at 15.

(ix) self-handling provisions;
(x) pro-competitive provisions on commercial opportunities, user charges, fair competition and intermodal rights; and
(xi) explicit commitment for non-discriminatory operation and access for computer reservation systems.[31]

The 'Open Skies' has indeed contributed to liberalizing international air transport regulations and consequently brought the air transport industry closer to a free trade regime.[32] However, although its more market-oriented approach allows for more competition, it still remains bilateral agreements structured on the Chicago Convention. The 'Open Skies' nonetheless reach the best possible end within the existing bilateral framework, particularly when the nationality requirement is concerned. The 'Open Skies' model of bilateral agreements has enabled air carriers operating under different flags to strategically form a broad range of business cooperation among themselves, such as, for example, the so-called (strategic) airlines alliances, provided that foreign investment could not be considered as an option due to the given regime of the strict nationality requirement.[33]

2. Substantial Ownership and Effective Control Requirements

While certain requirements of the air transport industry have changed over the years, the airline "substantial ownership and effective control ("O&C")" requirements have remained as unaffected as bilateralism itself. Along with trends of economic liberalization and globalization, industries that had traditionally been owned and controlled publically, have been privatized; airlines have been prominent among these. This indicates that airlines were put in a position that vulnerably exposed

[31] "Defining "Open Skies" and Requesting Comments," US DOT Order No. 92-8-13 Docket 48130 (5 August 1992).
[32] Lu, ***supra*** note 15 at 42.
[33] The 'Open Skies' agreement has become a 'prerequisite' for such strategic airline alliances, at least, with the US carriers: To form such an alliance with a US carrier and operate under that business cooperation agreement, it is mandatory to have anti-trust immunity granted by the US DOT in accordance with their anti-trust policy and the relevant national regulations, such as the US Antitrust Law (pack of a number of legislations). In such cases, having an 'Open Skies' bilateral agreement signed between the State Parties on behalf of those applicant air carriers' is one of the determining factors for approval. ***E.g.***, while the anti-trust immunity was granted to the KL-NW application so that they could continue forming their alliance, the BA-AA proposal was not due to the fact that there was no 'Open Skies' agreement between the UK and the US. For more comprehensive discussion on the subject, **see** Lu, ***ibid.***

themselves to competition and mounting commercial pressures. With government protection no longer forthcoming in many States, airlines face an increased need for capital injection. When a national airline undergoes financial crisis and where it is understood as commonly that financial institutions do not usually invest in the industry of their own, foreign investment often serves as an attractive alternative.[34] However, this O&C provision in effect has prevented it.

A question remains as to why a majority of nation States have persistently advocated their airlines' national identities even though tangible advantages could have been expected from cross-border investment. The following seems like probable reasons[35]

(i) National security and defense;
(ii) Trade and tourism needs;
(iii) Job creation and preservation;
(iv) Aviation safety;
(v) Conformity with international agreements (traffic rights / bilateral agreements);
(vi) Independence (a national airline as a symbol of sovereignty);
(vii) Other (*e.g.*, national development; consumer benefit; foreign exchange earnings) [36]

This list represents more economic and airpolitical concerns than legal ones, however, *Inter alia*, national security reasons have been frequently evoked as a panacea that serves a variety of interests which could possibly be challenged or criticized either by the voice of the global community or in the form of peer pressure. Yet nation States still push forward with protections. The US, for example, has increasingly in recent years justified its imposition of economic sanctions on certain States for reasons of national security. In the area of international civil aviation, it is the usual 'national security' reasons for which the US has again sought (perhaps partly) to justify their position in support of maintaining the nationality of airlines under the restriction on foreign ownership. Since 1951 during the Korean War, the Civil Reserve Air Fleet ("CRAF") program[37] has existed based upon an argument that

[34] H. Peter van Fenema, "National Ownership and Control Provisions Remain Major Obstacles to Airline Mergers," (2002) 57:9 ICAO J. 7 at 7.
[35] ***Ibid*** at 8
[36] *ICAO Survey of Contracting State,* May 2001 cited in ***supra*** note 34.
[37] **See** *The US Defense Production Act of 1950* as amended at 50 U.S.C. §§ 2061-2170 (1994).

the security of a nation State shall not be left in the hands of foreign nationals and/or the air carriers operated by them.[38] This example may illustrate the degree of complexity of other national interests that weigh more than facilitating cash flow for the sake of airlines by 'simply' liberalizing the O&C criterion.

While the political and economic implications surrounding the O&C had been frequently debated, the legal principles of this concept have been challenged much less often. This is because there is not yet any uniform international legal instrument(s) on this matter. As with the existing bilateral regime, such instruments as are currently in force rely on domestic legislations[39] combined with the discretion of municipal authorities.

2-1. Notion of Substantial Ownership and Effective Control

2-1-1. Substantial Ownership

It is therefore unlikely to find a single agreed upon definition of either "substantial ownership" or "effective control" in any of the existing international legal instruments governing international civil aviation.[40] Ownership of an airline is commonly understood as simply the ownership of voting shares of the airline's stock, and "substantial ownership" usually equates to holding more than 50% of the voting shares,[41] regardless of whether the shareholder is a public or a private entity. Thus, numbers matter in defining substantial ownership.

Aside from this, the above-mentioned privatization of the air

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[38] For more information with respect to the CRAF, **see** Kirsten Böhmann, "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; **See also** <www.af.mil/factsheets> [Consulted 16 June 2005].

[39] Each national legislation differently sets forth caps for foreign own ownership (often refers to 'voting control'). ***E.g.***, there are such arrangement for shareholders like a Rumanian 'golden share,' a Dutch 'option agreement,' and a German 'last in, first out.' **See** H. Peter van Fenema, "Ownership Restrictions: Consequences and Steps to be Taken," (1998) 23:2 Air & Sp L. 63 at 64 [Off-print].

[40] Isabelle Lelieur, *Law and policy of substantial ownership and effective control of airlines: prospects for change* (LL.M. Thesis, Institute of Air and Space Law, McGill University 2002) at 3 [Aldershot: Ashgate, 2003].

[41] It is the European Commission's interpretation on the EC ownership of airlines in its decision in re: the Swissair/Sabena case. **See** EC, *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.

transportation industry challenges the venerable legislative requirements for maintaining the nationality of airlines. Privatization of an industry is an invitation to private players, enabling them to have access to the shares of those formally publicly-owned business entities and, by purchasing such shares, to own the concerned entity in proportion to their shares. In today's globalized business setting, participation in a country's stock market is not limited to the nationals of that country, but open to virtually anyone across the world. This entitles foreign nationals to have ownership of a business entity regardless of its national origin.

As regards the air transport industry, the issue of substantial ownership was never a concern so long as civil aviation remained a governmental instrument, and thereby was substantially owned by the government. This thus did not challenge the nationality requirement for a designated airline(s) in the bilateral air services system.[42] At present, even though the Nationality Clause still exists in bilateral air services agreements, most airlines – though not all - have been or are being privatized, their voting shares could increasingly be coming under the ownership of foreign entities. Consequently, the two – the Nationality Clause and the reality of today's globalized market – may conflict.

As stated above, different countries operate using different definitions of 'substantial ownership' of an airline. The US and the EU, for instance, have different numerical requirements in this matter.[43] Jeffery Shane speaks of the US criteria, "all U.S. airlines must be substantially owned and effectively controlled by citizens of the Unites States.[44] Numerically, 75% of the voting securities of a U.S.

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[42] Lelieur, ***supra*** note 40 at 3-4.
[43] For more details, **see** ***ibid.*** at 4-6.
[44] For the statutory definition of "U.S. citizen," **see** *the Federal Aviation Act of the Unites States*, 49 U.S.C. app. § 1301 (1992).

airline must be owned and controlled by U.S. citizens."[45] Effectively, then, US law sets a 25% cap on foreign ownership[46] while the EU stipulates that 50.1% of an airline's equity capital must be owned by EU Member States and/or EU nationals for an airline to qualify as a 'Community carrier' according to *Council Regulation 2407/92*.[47] The disparity between these caps on foreign ownership – 25% and 49.9%, respectively, is striking.

2-1-2. *Effective Control*

The discussion of effective control of a corporation relates to the subject of corporate governance. Plainly put, ownership and control are independent criteria, and as far as control is concerned, the main question is as to *who* controls the business entity in question.[48] It therefore differs from "general public" who can be a major shareholder of a corporation. One airline may, for instance, own the majority of the voting shares of another airline without controlling it.[49] Who then usually exercises "effective control" over an airline is likely a board of directors or executive officers to whom decision-making power is most often granted, as with any other private corporation.

It is important question, then as to whether "such powers reside in other than national hands."[50] If not, the nationality of the airline can be seriously doubted even though it is substantially owned by nationals. The US reconciles this potential problem by requiring that "two-third of the officers and directors of a U.S. airline must be U.S.

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[45] Jeffrey N. Shane, "Foreign Ownership and Control of U.S. Airlines: Prospects for Change" (25th Annual FAA Aviation Forecast Conference: Aviation 2000, Washington D.C., 7 March 2000) [Unpublished].
[46] van Fenema, ***supra*** note 39.
[47] **See *infra*** Chapter I-3-2-1.
[48] IATA Government and Industry Affairs Department, *Report of the Ownership & Control Think Tank World Aviation Regulatory Monitor*, IATA doc. prepared by Peter van Fenema (7 September 2000) at 15.
[49] Lelieur, ***supra*** note 40 at 6.
[50] ***Ibid.*** at 4.

citizens."[51] Such a numerical criterion is not so clearly spelled out in statute, however. The matter, in the case of the US, is more based upon precedent, specifically upon the decisions of the US Civil Aeronautical Board and the US DOT over the past half-century.[52] Overall, the "purposefully ambiguous"[53] notion of substantial ownership and effective control of airlines leaves the issue largely open to interpretation. The creative employment of definitions may be used as a tool to buttress certain State policies as required by its economic and political situation at a given time.[54]

2-2. Implications of O&C Clause in Bilateral Air Services Agreement

Given these examinations, it can be reaffirmed that the substantial ownership and effective control requirements contained in the Designation Clause of bilateral air services agreements have been maintained for a number of reasons, and served a variety of purposes. In reference to the list of justifications for the nationality of airlines to be upheld,[55] it should be remembered that flag carriers represent national sovereignty.[56] Thus it would seem obvious that those States would wish to hold on to such an economically valuable political symbol. This has however been deemed more of an internal concern of a nation State.

Since the state of an airline's substantial ownership and effective control is the gauge that *de facto* determines its nationality in the bilateral system, the Designation Clause (with ownership and control requirement) has *per se* played a significant role in generating difficulties with respect to cross-border mergers and take-overs between airlines. Also, it has limited the exchange of traffic rights on a multilateral level. Accordingly, the ownership and control requirement proved to be one of the main reasons for the air transport

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[51] Shane, ***supra*** note 45.
[52] ***Ibid.***
[53] Lelieur, ***supra*** note 49.
[54] ***Ibid.***
[55] **See *supra*** note 35 and accompanying text.
[56] van Fenema, ***supra*** note 39 at 66.

industry's lagging behind other industries in the global trend of free trade, particularly in its continued suspicion of foreign investment. As noted above, more liberalized bilateral agreements, such as 'Open Skies,' were able only to serve as an interim solution to keep up with radical changes taking place in other business sectors, through which airlines of different nationalities are enabled to form joint operations *e.g.*, strategic alliances and otherwise. How long such interim measures will continue to be effective is unclear.

Meanwhile, several less stringent models of ownership and control clauses have been proposed on both regional and multilateral levels. For example, there is the APEC[57] Multilateral[58] that has successfully removed the substantial ownership requirement while retaining the notion of 'effective control.'[59] Having the US as a Member Economy of this regional grouping but without changes to the overall US policy regarding foreign ownership of airlines may at least partly, clarify why APEC's liberalization attempts could not reach any further,[60] noting Jeffrey Shane's remark: "the control rule is probably the more important feature of the overall framework relating to foreign ownership."[61] In contrast to the American approach, the EU has overcome completely the restrictions of earlier years by establishing the notion of 'Community carrier,' yet *within* the boundary of the Community. Even on a multilateral level, the ICAO Secretariat proposed the 'principle place of business' criteria, also called the "Hong Kong formula,"[62] rather than '[an airline] owned and controlled by certain States or their nationals [exclusively]' in order to raise the degree of flexibility in the current regulatory framework. This model clause has been recommended through its

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[57] *Asia-Pacific Economic Cooperation* is a regional grouping of economies that seeks to promote economic growth, cooperation, trade and investment in the Asia-Pacific region with 21 "Member Economies" as of to-date. The signatories to the APEC Agreement are referred to as "Member Economies" rather than ***e.g.***, contracting parties or member states in line with the efforts to avoid the political connotations that might be resulted from the sovereignty of States. **See** <www.apec.org> [Consulted 26 June 2005]

[58] The Multilateral Agreement of the Liberalization of International Air Transportation ("MALIAT") concluded in Kona, Hawaii in 2001. For more information, **see** <www.maliat.govt.nz/index.shtml> [Consulted 26 June 2005].

[59] For a concise overview of the MALIAT/Kona Agreement, **see** Kiser, ***supra*** note 2.

[60] For more in-depth discussion on the APEC liberalization experience, **see** Chapter IV of ***supra*** note 23.

[61] Shane, ***supra*** note 45.

[62] Van Fenema, ***supra*** note 34 at 9.

Template Agreement[63] consolidated as a result of the 5th ATConf. in 2003.

Discussion continues on this subject hereunder.

3. Liberalization of the Ownership & Control Requirements: the EU Experience

3-1. Single Aviation Market: Three Liberalization Packages[64]

Challenged by the deregulation of the US airline industry in 1978,[65] the EU commenced its own version of liberalization in 1987.[66] Pursuant to the *Single European Act*,[67] the EC launched a series of three legislation "Packages" with the ultimate goal of creating a common market for this industry, to be called the Single Internal Aviation Market.[68] This market would eventually be governed by the Common rules[69] of the EU in which the fundamental Treaty-principles,[70] founding the European Community, are enshrined.

As the first chapter in the process of EU liberalization, the First Package was a mild, yet sure start. It established the principle of Community control of aviation matters, which is *prima facie* an essential first step for further development. This Package consisting of four pieces of legislation[71] provided

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[63] Article X: Designation and Authorization (Model Clause), Para 2 (a) and (b), "Consolidated Conclusions, Model Clauses, Recommendations and Declaration," by the ICAO Secretariat (31 March 2003) at 4-5 [Unpublished] [*ICAO Template Agreement*].

[64] The European Council is conferred exceptional influence in conjunction with the set of rules governing the air transport sector under the system of the EC Treaty. Thanks to such powers, the Council adopted three packages of measures, respectively in 1987, 1990, and 1992, designed to facilitate more competition-oriented service provision and to guarantee free competition, that is to say, to liberalize the EU internal marketplace for air transport. **See *infra*** note 124.

[65] For more information on the US Deregulation, **see** *e.g.*, Paul S. Dempsey, "Airlines in Turbulence," (1995) 23 Transp. L.J. 15.

[66] Lu, ***supra*** note 15 at 28.

[67] *Single European Act 1986*, 1 July 1987, [1987] O.J. L. 169. For more details of the EC Treaties, **see *infra*** note 123.

[68] Sung-Kyu Maeng, *Impact on the EC Single Market on the Relations between the EC and Korea* (LL.M. Thesis, Institute of Air and Space Law, McGill University 1993) at 7-8 [Unpublished].

[69] In re: the law of the European Union, *e.g.*, the Supremacy of the Community law; application of the Community legislations, such as Regulations, Directives, Decisions, the ECJ Cases/Decisions (*e.g.*, effect as precedents) and the binding force thereof; and etc. **See** Cuthbert, ***supra*** note 7.

[70] The Principle of Freedom of Establishment: free movement of goods, persons, services and capital. For general knowledge, **see *ibid*** at 21. More discussion of the freedom of establishment follows *infra.*

[71] EC, *Council Regulation No. 3975/87*, [1987] O.J. L. 374/1; *Council Regulation No. 3976/87*, [1987] O.J. L. 374/9; *Council Directive No. 87/601*, [1987] O.J. L. 374/12; and *Council Decision No. 87/602*, [1987] O.J. L. 374/19.

for liberalized air fare, capacity sharing and market access yet to a limited extent.[72] Then in 1990, the Second Package followed, continuing initiatives launched in the First Package concerning air fare approval, capacity sharing, and route & slot access according to five Regulations.[73] While this second Package has been viewed as being less progressive than it could have been,[74] it still has smoothly bridged the beginning and the ending of the liberalization initiative.

The process of creating a Single Market was (almost) pushed to completion with the introduction of the Third Package in 1992.[75] This final phase lingered on for more than 4 years between the time the Third Package Regulations entered into force in January of 1993 and the time cabotage was eventually freed in the Community, in April of 1997.[76] The EU Single Aviation Market was formed as a result of more than ten years of continuing efforts from the initiation of this Package series.

3-2. The Third Package 1992

The Third Package contains three Council Regulations, No. 2407/92,[77] No. 2408/92[78] and No. 2409/92.[79] This Package deserves particular attention in the context of this paper, as it was here that the concept of a 'Community carrier,' which has constituted the 'hub' for the arguments involved in the 'Open Skies' disputes, was first introduced. Indeed, the notion of the Community carrier is consequently the central ground that has got the

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[72] Lu, ***supra*** note 15 at 29.
[73] EC, *Council Regulation No. 2342/90*, [1990] O.J. L. 217/1; *Council Regulation No. 2343/90*, [1990] O.J. L. 217/8; *Council Regulation No. 2344/90*, [1990] O.J. L. 217/15; *Commission Regulation No. 83/91*, [1991] O.J. L. 10/9; and *Commission Regulation No. 84/91*, [1991] O.J. L. 10/14.
[74] Bernadine Adkins, *Air Transport and E.C. Competition Law* (London: Sweet & Maxwell, 1994) at 217.
[75] McGonigle, ***supra*** note 23 at 17.
[76] EC, Commission, DG TREN, *Consultation paper with a view to revision of Regulations No. 2407/92, 2408/92 and 2409/92 of 23 July 1992*, (March 2003) [Unpublished] [DG TREN— *the Third Package Consultation Paper*].
[77] *Licensing of Air Carriers*, 23 July 1992, [1992] O.J. L. 240.
[78] *Access for Community Air Carriers to Intra-Community Air Routes*, 23 July 1992, [1992] O.J. L. 240.
[79] *Fares and Rates for Air Services*, 23 July 1992, [1992] O.J. L. 240.

Designation Clause of bilateral air service agreements to be amended as is laid down in the Model Horizontal Agreement ("MHA").[80]

Thus, it is worthwhile to look more closely at the three important Council Regulations introduced in the Third Package:

3-2-1. Council Regulations 2407/2408: "Community Air Carrier"

Regulation 2407 provides economic and technical criteria and rules relevant thereto for issuing and withdrawing operating licenses for air carriers that apply equally to all Member States. In other words, the issuing operating licenses falls under the competency of a national authority of a Member State. Thus, a candidate airline shall meet the following criteria, *inter alia,* to be to a 'Community carrier' and thereafter to obtain an operating license for its business undertakings in EC jurisdiction:[81]

(i) The candidate's registered office and its principle place of business shall be located in the issuing Member States;[82]
(ii) It shall be majority owned and effectively controlled by Community nationals;[83]
(iii) The candidate carrier's financial fitness and viability shall be approved according to certain conditions set forth herein;[84]
(iv) The candidate carrier shall hold a valid Air Operator's Certificate ("AOC");[85]
(v) It must have civil liability insurance in order to cover risks in the event of an accident (passengers; cargo and 3rd parties); etc.[86]

As mentioned above, *Regulation 2407* removes restrictions on establishment within the EU, and thereby affirms the principle of

[80] **See *infra*** Chapter IV.
[81] Certain other criteria provided by the concerned Regulation yet irreverent to the scope of the current discussion are not listed. The same applies to the following two other Regulations.
[82] Art 1 and Art 4 (1)(a) of *Council Regulation No. 2407/92*, ***supra*** note 77.
[83] Art 4, ***ibid.***.
[84] Art 5, ***ibid.***.
[85] Art 9, ***ibid.***.
[86] Art 7, ***ibid.***.

freedom of establishment. This also indicates that the conventional requirements of ownership and control no longer exist in the Community legislation – at least not in the same manner, rather it applies Community-wide. Also, referring to (ii) above, the concept of 'majority' replaces that of 'substantial,' which is a slight change but may be viewed as "a more objectively certain" concept.[87] Last but not least, this Regulation defines 'effective control' in a more transparent manner.[88] Some question, however, how significantly this redefinition has improved matters in practice.[89]

Regulation 2408, which revokes *Council Regulation No. 2343/90* as part of the Second Package (except for Article 2 thereof and Annex I thereto),[90] permits Community carriers completely free access to intra-Community air routes, with provisions for foreseeable exceptions, such as public service obligations or situations relating to serious congestion and/or environmental problems.[91] Together with the removal of the traditional O&C requirement through *Regulation 2407,* the legislation could also lead to abolition within the EU of the practice of subjecting reciprocal traffic-right exchanges to carriers' nationality.

3-2-2. Council Regulation 2409: Price Leadership of Community Air Carrier

Regulation 2409, which likewise voids *Council Regulation No. 2342/90* of the Second Package,[92] aims to liberalize price formation by providing guidance to the Member States in setting 'reasonable' air fares. This is intended to protect both consumers from detrimentally high fares and carriers from financial jeopardy due to

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[87] John Balfour, "Airline Ownership and Control – the Position in the European Community," (March 2003) *Business Briefing* at 65.
[88] Art 2 (g), supra notes 77.
[89] ***Supra*** note 87.
[90] <http://europa.eu.int/scadplus/leg/en/lvb/l24086.htm> [Consulted 03 June 2005].
[91] ***Supra*** note 76.
[92] <http://europa.eu.int/scadplus/leg/en/lvb/l24087.htm> [Consulted 03 June 2005].

unacceptably low charges resulting from overly heated competition.[93] This piece of legislation, drafted in an attempt to remove restrictions on tariffs, effectively allows free-pricing of intra-Community routes.[94] In reference to the upcoming discussion at *infra* Chapter IV, it is the Community legislation that has justified the EC in seeking the legal basis for Article 5 of the MHA, indicating that the Community carriers be 'price-leaders' on intra-Community routes.

3-3. On-going March toward a More Free and Consolidated Single Market

In sum, the liberalization process of the aviation industry in the EU might be called an overall success, allowing for a notable expansion of air transport in Europe. Thanks to these three Packages, a completely deregulated single air transport market has been established; the Packages have simplified regulatory procedures and requirements, which ended up providing the Community carriers with more flexibility in their operation; and facilitated their service provision largely.[95] More fundamentally, they also have enabled the Commission to make advanced steps toward its 'ultimate aim' of providing EU citizens with more competitive and efficient air transport services.[96] All trade barriers (in theory) to any nationals of the Member States within the EU have been finally removed from Europe's air transport industry.

The Commission has in the recent past[97] expressed its intent to revise the Third Package to update the Regulations in accordance with current industry practice. The necessary consultations with the Member States have been in

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[93] EC, Commission, DG TREN, Meeting on the possible revision of Regulations 2407/92, 2408/92 and 2409/92 of 23 July 1992 forming the third Package of air transport liberalization (DG-TREN, Brussels, 26 February 2004) ["Consultation Meeting for the Third Package Revision"].
[94] Art 5 of *Council Regulation No. 2409/92,* ***supra*** note 79.
[95] Lu, ***supra*** note 15 at 32-33.
[96] EC, Commission, *Communication from the Commission on the consequences of the Court judgments of 5 November 2002 for European air transport policy*, COM (2002) 649 final (19 November 2002) at 48 [*COM (2002) 649 final*].
[97] March 2003. **See *supra*** note 76.

progress.[98] In its proposal for revision, the Commission focuses mainly on the following:[99]

(i) enhancing the Community carriers' cost-effective management by modifying certain provisions governing the licensing requirements and procedures, and the air fare calculation system;

(ii) setting out more transparent and precise criteria for the 'effective' control' of Community carriers;

(iii) incorporating the Court's holding of the Open Skies cases into the revised Third Package, including but not limited to the concept of a "Community cabotage area" vis-à-vis third countries;

(iv) expanding the Commission's internal competence in a few selected areas among those presented;

(v) aviation safety issues in response to the new circumstances with the establishment of EASA; etc.

Reaction to these proposed revisions has been mixed. As of early 2004, most Member States and other stakeholders expressed general contentment with the current state of the Third Package. Although some did support reform on item (ii) above, a majority expressed their reluctance regarding items (iii) and (iv).[100] An impact assessment study is currently being prepared by the Commission which will accompany the official presentation of a proposal.[101]

Being a Single *Internal* Aviation Market, though, the effect and advantages of such liberalization will not extend beyond EU territory. Therefore, regardless of the degree of an intra-Community market being 'liberal,' third country carriers have not yet been affected by all these regulations at all.[102] Indeed, the current framework of the general principles of international law does not allow otherwise. Also, these new regulations will not apply to air transport

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[98] ***Supra*** note 93.
[99] ***Supra*** note 76.
[100] ***Supra*** note 93.
[101] European Commission, "Concise overview of current development of EU aviation policy," (May 2004) [Unpublished] ["Concise Overview of EU Aviation Policy"].
[102] Lu, ***supra*** note 15 at 32.

services between points within the Community and points in third countries.[103] This detail was a particular concern of the Commission for fear that having so many exceptions would prevent the EU from enjoying the full benefits of the liberalized business environment.[104] It however did not take the Commission so long to take action in seeking to *externally* optimize the *internal* achievement of having the O & C barrier removed: Its legal challenges of the 'Open Skies' agreements served that purpose.[105]

All that having been said, the EC has lately been attempting not only to have the notion of 'Community carrier'[106] recognized beyond the boundary of the EU, but also to expand the applicability of such Community legislations. The Horizontal Agreement ("HA") with their non-Community bilateral partners,[107] for example, makes their extraterritorial application more obvious and 'legitimate.' At this stage, the attempt of applying the Community regulations to non-EU air carriers remains on intra-Community routes only. Thus, its applicability has not as of yet been tested on air routes between points within the Community and those beyond. More discussion of this point follows in Part II.

Whatever the 'destination' may be, there must be only a 'road ahead' in the dictionary of the EC. Rarely does the Commission take a pit stop along the way to liberalization. More than apparently, the EC keeps moving forward regardless of their achievement in the past, not only within the Community but outward as well.

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[103] ***Ibid.***
[104] McGonigle, ***supra*** note 23 at 18-19.
[105] **See *infra*** Chapter II.
[106] *Council Regulations 2047/92 and 2048/92*, **see *supra*** Chapter I-3-2-1.
[107] ***E.g.***, Articles 4 and 5 of the proposed Model Horizontal Agreement ("MHA"). **See *infra*** Chapters IV and V.

II. The ECJ's 'Open Skies' Decision

1. Case Summary

1-1. Parties: *Commission v. Certain Member States*

1-1-1. Applicant: European Commission

1-1-2. Defendants: Austria,[108] Belgium,[109] Denmark,[110] Finland,[111] Germany[112] Luxemburg,[113] Sweden,[114] and the UK[115]

1-2. Facts

1-2-1. With the view that the conclusion of international air services agreements fall under the external competence of the EC (*i.e.*, the Commission), the Commission has been seeking since the early 1990's to have a 'full' negotiating mandate granted by the European Council ("Council").[116] The purpose of this mandate was to replace the set of bilateral air services agreements that had been concluded between each Member State and third countries, with a single EU-wide agreement. These attempts have been made in particular for the negotiations with the US;[117]

1-2-2. In 1994, the Commission expressed its concerned opinion to the Member States that the US 'Open Skies' initiatives would adversely affect the EU internal aviation market due to the discriminatory nature of the national ownership and control requirement therein, and notified it to those Member States. To advocate free and fair

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[108] ***E.C.J.*** *Commission v. Austria*, C-475/98 [2002] E.C.R.
[109] C-471/98
[110] C-467/98
[111] C-469/98
[112] C-476/98
[113] C-472/98
[114] C-468/98
[115] C-466/98
[116] **See *supra*** note 64.
[117] DOCI-619998J0467-bas-cen [2002] E.C.R. para 15-17.

competition for all EU carriers, the Commission argued that it had to negotiate a bilateral with the US on Member States' behalf; [118]

1-2-3. Regardless of the Commission's opposing view, seven defendant States out of eight had signed 'Open Skies' Agreements with the US.[119] However, due to the fact that the UK had never signed an 'Open Skies' model bilateral but instead that of a Bermuda-type,[120] the Commission's plea constituting this legal action only partly applied to the UK's case;[121]

1-2-4. The Commission's letters of formal notice to the seven Member States followed in 1995 and 1996. Therein, the Commission warned that individual 'Open Skies' Agreements with the US infringed the Community law;[122]

1-2-5. Given the unsatisfactory responses from the seven Member States concerned to its reasoned opinion pursuant to Article 226 (ex 169) of the *EC Treaty*,[123] the Commission eventually launched legal actions against the respective Member States before the ECJ in 1998. The Commission claimed that they had breached Community law by entering individually into bilateral negotiations (and the conclusion thereof) with the US in the field of international air services;[124]

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[118] "European Commission Takes Legal Action against EU Member States' 'Open Skies' Agreements with the United States" *The European Union Press Release* (11 March 1998), <www.eurunion.org.news/press/1998-1/pr16-98.html> [Consulted August 1999].

[119] ***Ibid.***

[120] *The Bermuda II Agreement of 1977*. Fore more in-depth discussion on the subject, **see *infra*** IV-2-1-1 and IV-2-2-1.

[121] C-466/98. That is the designation of airlines based on the substantial ownership and effective control by the UK and its nationals. **See** McGonigle, ***supra*** note 23 at 20.

[122] ***Supra*** note 118.

[123] *Treaty Establishing the European Community ("EC Treaty")*, 7 February 1992, [1992] O.J. C 325/33, as amended by the *Treaty of Amsterdam*, 2 October 1997, [1997] O.J. C. 340. The *TEC* amended the *Treaty Establishing the European Economic Community*, 25 March 1957, also known as the *Rome Treaty*, 298 U.N.T.S. 11, as amended by the *Single European Act*, 1 July 1987, [1987] O.J. L. 169; and incorporates changes made by the *Treaty on European Union*, also known as the *Maastricht Treaty*, 7 February 1992, [1992] O.J. C. 191. The *EC Treaty* and the *Maastricht Treaty, supra,* have recently been merged into one consolidated version, *the Treaty of Nice*, 26 February 2001, [2002] O.J. C. 325. **See also** Lu, ***supra*** note 15 at 28 and note 3 at 70.

[124] Opinion of Advocate General Tizzano in the Cases of C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98 (Delivered 31 January 2002), Press Release No 10/02, <http://europa.eu.int/cj/en/cp/aff/cp0210en.htm> [Consulted February 2002] [Opinion of AG].

1-2-6. Meanwhile, the Council accepted the Commission's request *in part* and granted a *limited* mandate to negotiate with the US in 1996 including the matters of ownership and control, but *excluded* traffic rights negotiation;[125]

1-3. Issue

Whether the defendant Member States had failed to fulfill their obligations under the EC Treaty[126]:

1-3-1. In particular, whether their recent 'Open Skies' bilateral agreements with the US have infringed the principles constituting the EC Treaty on

- *the Community's external competence;*[127] *and*
- *the right of establishment*

1-3-2. Also, secondarily, whether those 'Open Skies' Agreements drafted to better serve the interests of individual Member States, as opposed to those of the Community, would result in diminishing fair competition within the Community's internal market, particularly because of the provisions regarding

- air fares on intra-Community routes;
- computerized reservation systems ("CRS"); and
- the allocation of airport slots

1-4. Rules

1-4-1. Primary Legislation: the EC Treaty

A. Article 10 (ex 5)[128]

B. Article 43 (ex 52)[129]

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[125] McGonigle, ***supra*** note 23 at 19-20.
[126] Mainly pertinent to Art 10 (ex 5) and Art 43 (ex 52). **See *supra*** note 117.
[127] A claim not made against the UK.
[128] O.J. C. 325 at 42. **See *supra*** note 123.
[129] ***Ibid.*** at 52.

1-4-2. Secondary Legislation: Council Regulations (EEC)

A. No. 2407/92 [130]

B. No. 2408/92 [131]

C. No. 2409/92 [132]

D. No. 2299/89 [133] as amended by Council Regulation No.3089/93[134]

E. No. 95/93 [135]

1-5. Holding

The ECJ held its judgment (partially) in favor of the Commission:

The 'Open Skies' Agreements in question violate certain aspects of the Community Law: both primary and secondary legislation.[136] Therefore, the Court rules that, by entering into or maintaining in force international commitments with the US, the Defendants have failed to fulfill their obligations under Article 10 and Article 43 of the EC Treaty.[137]

1-5-1. IN RE: The Right of Establishment

The substantial ownership and effective control requirements inserted in the "Designation of Airline(s)" clauses, also known as the Nationality Clauses, of the concerned bilateral agreements, violate the Community principle of freedom of establishment underlying Article 43 of the EC Treaty.[138]

1-5-2. IN RE: Other Disputed Issues: Provisions on certain 'Soft Rights'[139]

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[130] **See *supra*** Chapter I-3-2-1.
[131] ***Ibid.***
[132] **See *supra*** I-3-2-2.
[133] *A Code of Conduct for Computerized Reservation Systems*, 24 July 1989, [1993] O.J. L. 220.
[134] 29 October 1993, [1993] O.J. L. 278.
[135] *Common Rules for the Allocation of Slots at Community Airports*, 18 January 1993, [1993] O.J. L. 14
[136] ***Supra*** note 124.
[137] ***Supra*** note 117.
[138] ***Supra*** note 124.
[139] Soft Rights are also referred to as 'doing business rights,' such as ground handling at airports, service maintenance, CRS and/or code-sharing, which come with Hard Rights that are fundamental for the provision of air services on international routes, *i.e.* the traffic rights defined by the Chicago Convention. **See** Lu, ***supra*** note 15 at 37; **see also** Hu, ***infra*** note 222 at 20.

Concerning (i) air fares and rates charged by carriers designated by the US on intra-Community routes; and (ii) CRS offered for use or used in the Defendants' territories, Denmark, Sweden, Finland, Belgium, Luxemburg, Austria and Germany have infringed Council Regulations No. 2409/92 and No.2299/89 as amended.[140]

As a consequence, the defendant Member States were held obliged to bring the concerned bilateral agreements in conformity with the Community law.[141]

Analysis of the given judgment follows.

2. Analysis of the Judgment

2-1. Community Competence

2-1-1. AETR Principle

In the AETR Case[142] in 1970, the Court ruled that competence for negotiating and concluding agreements shifted from the Member States to the EC insofar as such agreements affected the operation of EC legislation:[143] Namely, the legal personality and treaty-making power of the EC was confirmed by the ECJ in its decision for this Case,[144] which is often referred to as the "AETR principle."

Speaking of the relevant 'Open Skies' cases, the Court indeed exercised the said precedent in judging for the Commission's claim, however, to the limited extent thereof. Referring to the Holding above (I-5-2), as opposed to the manner that its ruling was given in the AETR case, the Court confirmed the Community's exclusive competence *specifically* with regard to the above-mentioned matters,

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[140] Report by Michael Hawkings, The Incorporated Council of Law Reporting for England and Wales, <www.lawreport.co.uk> [Consulted 12 December 2002].
[141] "The ECJ has the exclusive authority to interpret the primary and secondary Community law and this law has supremacy over the domestic law of Member States." **See** de Mestral, ***supra*** note 6.
[142] ***E.C.J.*** *EC Commission v. EC Council* [1971] E.C.R. 263.
[143] Balfour, ***supra*** note 87 at 68.
[144] ***Ibid.***

such as intra-EU fares/rates, CRS and airport slots[145] within the scope of the relevant EC legislation cited previously.[146]

It is certainly remarkable that the ECJ extended the application of the so called AETR principle in the field of aviation, which has generally been the point of reference as far as the EC external relations/jurisdiction is concerned.[147] However, it is still questionable whether it was as "firmly established" as the Commission interpreted or so wished.[148] No matter how the situation has unfolded ever since the concerned judgment (*e.g.*, how far the Commission had gone in exercising the Community's external competence, and how much it has accomplished in making this ruling in practice), the judgment in itself does not appear to leave a wide range of flexibility in interpretation, as it seems to have dwelled strictly on a statutory interpretation. The Commission has nevertheless shown its tendency to stretch the Court's ruling on the matter of Community competence to as wide an application as possible.[149]

2-1-2. Negotiating Mandate

Although it was the clarity sought the most by the Commission in its motion: *i.e.*, who would be entitled to negotiate and conclude 'Open Skies' agreements with the US – the EC, or still the Member States – the Court has left its holding somewhat vague on this petition. Consequently, the topic of the Commission's comprehensive negotiating mandate with the US and/or the fate thereof has been intensely debated.

Given the Court's ruling on the EC competence only limited to certain matters despite the Commission's strong opposing allegation,

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[145] **See *supra*** note 135.
[146] **See *supra*** II-1-5-2.
[147] de Mestral, ***supra*** note 6 at 24
[148] *COM (2002) 649 final,* ***supra*** note 96 at 7.
[149] **See** para 29 and 30 of ***ibid.*** at 7.

it was then very likely to understand that "competence for negotiating and concluding such agreements had NOT entirely shifted from Member States to the EC," and thus the Member States won over this argument.[150]

Meanwhile, even without the Court's 'explicit' affirmation, the Commission obtained a full mandate for negotiation with the US, and identified further areas which the EC legislation covers and therefore to which the Community's exclusive competence applies, such as aviation safety. Such areas have been merged even in the Model Horizontal Agreement, which Member States also agreed upon.[151] Hence, considering the recent development in this area of business[152] and the Commission's achievement therein, further *de jura* argumentation on the Court's initial judgment regarding mandates may not be necessary.

Whatever the case may be, it has established indisputably that only the EU has the authority to conclude a commitment of this nature where agreements affect the exercise of Community competence: in essence, involving an area covered by the EU law.

2-2. Non-Discrimination: Freedom of Establishment

The Court dismissed all the pleas presented by the defendant Member States on the basis that the so-called Nationality Clause in bilaterals, more specifically in the Open Skies' Agreements between the EU Member States and the US, permits the US (a third country) to refuse or withdraw traffic rights in cases where air carriers designated by a Member State are not owned by that Member State or their nationals; *i.e.*, the Clause permits refusals based on nationality.[153] Thus, the nature of national ownership and control requirement in such a provision was found to be discriminatory and

[150] ***Supra*** note 143.
[151] **See *infra*** Chapter III.
[152] **See *ibid. infra*.**
[153] **See *supra*** II-1-5-1.

consequently inconsistent with the Treaty principle laid down in Article 43 thereof. Since the ECJ is the 'Supreme Court' of the EC, and since the judgment could not be any clearer (unlike its holding for other arguments), the Nationality Clause in 'Open Skies' Agreements is unquestionably a violation of EC law: the Commission "scored."

John Balfour comments that anybody could hardly predict how the Court would apply its jurisprudence where there had been no precedent and where the applicability of the concerned Treaty principle was equivocal on the matter of 'Member States vs. third country' relations, particularly in international civil aviation.[154] The ECJ definitely contributed to establishing certain legal clarity on what had been a highly debateable topic, and it should in any event be acknowledged that this decision has made a great impact on the dynamics of international civil aviation.

The question of 'circumvention' has been raised as a result of the right of establishment granted to all EU Community carriers, as has, in a related context, the question of what would constitute the legal form of such an establishment under the EC law. The Commission responds as follows: According to EC law, "[a] registered office and its principal place of business"[155] shall represent the legal form of such an establishment, the notion of which integrates an agency, a branch, or a subsidiary with a legal personality.[156] No matter which legal form it takes, the freedom of establishment does not indicate an unqualified right to operate subject to the relevant Community legislation.[157] Given this, the correct interpretation might be that it is the right granted to operate on the same term as those applied to local nationals in a Member State: the National Treatment.[158]

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[154] ***Supra*** note 143.
[155] *Council Regulation 2407/92*, ***supra*** note 77.
[156] **See *infra*** Chapter IV-2-2-1.
[157] **See *supra*** I-3-2.
[158] **See** EC, Commission, "Non-Paper: Issues addressed in the EU Model Horizontal Agreement {SEC (2005) 336 ANNEX 2}" to *Communication from the Commission on "Developing the agenda for the Community's external aviation policy* {COM (2005) 79 final}, (11 March 2005) at 8 [*SEC (2005) 336* ANNEX 2].

3. Rethinking the 'Open Skies' Cases

Soon after this judgment was availed, experts presented their views on what implications this decision would have in various contexts, and they predicted what the future of international civil aviation would look like in the light of this judicial landmark. Some of those predictions turned out to be correct;[159] others did not. Some clouds over the skies have been cleared up since the first global gathering after the judgment at the ICAO 5th ATConf., probably thanks to the impressively persistent course of actions taken by the Commission. Given the political consequences that the judgment has generated, such as the Commission's immensely strengthened position on air transport matters both internally and externally, some doubts arise; was legal certainty the Commission's sole purpose?; how 'fairly competitive' has the EU internal market become in the wake of this judgment?; what was then the overall idea behind this proceeding?

In fact, considering the EC's general policy of promoting competition on the basis of their own Community economic regulations, the entire process of the dispute – from the EC's initial petition to the ECJ's final judgment – leads to the question of whether the EC turned the clock back as far as the principle of open competition in the Community is concerned.[160] It leaves the impression of inconsistency because the proceeding resulted in 'banning' competition amongst the EU Member States; before the Court's ruling, the Member States had been 'aggressively' competing with one another for the sake of their own economic interests in the sphere of international air services, based on bilateral agreements with third countries – whether or not such competition deteriorated the economic interest on the Community level. Now, there should be 'no' competition, in theory, among Member States within the EU boundary,[161] while the Community as a whole or as one 'body' would compete with the rest of the world with theoretically more strengthened competitiveness under the 'common' Community policy.

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[159] The concerns about "incoherence" were already raised on the grounds of differently-granted traffic rights between bilaterals, which is deemed relevant to the 'free rider issue' in the course of today's HA negotiations. **See** Richard Janda and Joseph Wilson, "Has Europe Kick-started the Global Liberalization of Airline Ownership and Control?," (March 2003) *Business Briefing* at 48.

[160] Henri Wassenbergh, "Common Market, Open Skies and Politics," (2000) 25:4/5 *Air & Sp. L.*174 at 175.

[161] ***Ibid.***

The above argument may be viewed as one of those intellectual efforts to reveal the flaws encompassing the entire package of the Open Skies cases in question, which may be true. However, it raises the following problem: As was briefly mentioned above, the Open Skies cases and the consequent Court judgment have in general been viewed as part of the EU's long-standing efforts to liberalize the air services industry. However, depending on whether one takes the perspective either of the EU internal market or else of third-party trade partners, this view may vary.

Simply put, it abolished competition within the EU internal market among Member States on the grounds of promoting non-discrimination among Community carriers; however, competition is known to be one of the indispensable elements in a liberalized industry or economy.

Also, in relations of Member States vis-à-vis the non-Community bilateral partners in international air services, the structure of agreement remains the same, as is clearly stated by the Commission when recently introducing a 'new' type of air services agreement: Model Horizontal Agreement replacing the voided bilaterals by the Court decision.[162] Is this MHA in the end an 'innovatively liberal' agreement? It is true that as a consequence of the judgment, more fundamentally of the Commission's proceeding, the EU (both Member States and the Commission) and some of their bilateral partners have meanwhile "liberalized" certain provisions of the existing bilateral air services agreements as well as the philosophy that formed the standard bilaterals (as discussed in the preceding Chapter). Nonetheless, from the partner States' perspective, it is the negotiating partner on the other side of the table that has changed. Where there used to be an individual Member State, the Commission can now be found in addition to that Member State.[163] Thus, the regulatory framework of bilateralism governing international air transport may not have significantly changed despite this "landmark" decision.

The business relationship between the EU and the US in this sector is, needless to say, most crucial to the European Community. One may question why the EC has

[162] **See *infra*** Chapter IV.
[163] **See *infra*** Chapters IV and V.

taken the trouble of bringing the eight Member States before the Court, alleging that their 'Open Skies' Agreements with the US were not in consistence with the EU Law and the Treaty Principles:

i. Speaking of the external performance of the Community, the Darwinian model – pursuing a winning position in any competing environment, *i.e.* seeking more of economic benefit as a bigger and more power-loaded entity in this particular case – could possibly identify the Commission's initial interest in bringing this lawsuit to the ECJ. Thus, the picture of "the European Community vs. the rest of the world" would summarize the dynamic; and

ii. One of the EC's major goals in this legal dispute may have been to enhance its external competence with regard to Member States' air transport agreements with third countries, which prior to the decision, had not been as complete as that over the Community's internal market.[164] As was stated above, the Court decision itself did not grant the full mandate to the Commission in negotiating bilaterals with non-Community partners. Thus, it is still a partial success or 'acceptable' compromise between the Commission and the Member States. Is gaining 'ultimate' external competence then the reason that the Commission has been attempting to bring more Member States before the Court lately?

In brief, it may be a fair understanding that the EC has basically been pursuing its economic and political interest both internally and externally as regards this particular sector of industry, as has often been witnessed in many other domains of "globalization."

In any event, it turns out that the ECJ has empowered the Commission on this subject. The Commission, fully geared up by the uploaded legitimacy on its line of thoughts and action thanks to the judgment of 2002, commenced the Round 2 of this

[164] Wassenbergh, ***supra*** note 160.

'dinosaur' legal action as of March 2005 against the rest of the Member States that are 'eligible' to be sued.[165] The Commission launched yet again another battle by sending out formal letters of notice and reasoned opinion to the concerned Member States, following the preliminary measures taken in July and December 2004 respectively,[166] and it is an action still consistent with its concerns expressed not long after the judgment was given in 2002 with respect to the illegality of four other Member States' 'Open Skies' with the US.[167] In addition to France, Greece, Italy and Portugal that have been on the Commission's mind since the judgment in 2002, five out of ten new Member States, except for those that had not signed an 'Open Skies' agreement with the US, are welcomed by what seems to be a never-ending legal action soon after they became part of the Union. Thus far, a total of 20 out of 25 EU Member States have been claimed for this cause by the Commission.[168]

It seems likely that the ECJ's judgment will be held in favor of the Commission, if Round 2 resembles the preceding experiences of those eight Member States. At this point, it seems also questionable whether it is necessary to pursue another dispute of the same kind, because the ECJ's decision binds Community-wide and the Court has already declared that any 'Open Skies' bilateral agreements with third Parties of the same nature should be brought into line with the Community law, *i.e.*, the Court's ruling. Is this not the reason that the EC has been devoted to making the HA happen, even though the Court's holding was directly addressed the US and not those other third country partners? What merit then does the Commission see in launching another round of what is widely known to be a lengthy and dreadful lawsuit?

This may suggest what the Commission really wants and furthermore provides more of a fair ground to the thoughts exercised by far for the fundamental intentions underlying the initial 'Open Skies' cases presented above.

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[165] "The Commission continues to take action against illegal "Open Sky" agreements," (16 March 2005) *The Europa Press Release* IP/05/305 <http://europa.eu.int> [Consulted 17 August 2005].
[166] ***Ibid.***
[167] ***Supra*** note 143.
[168] ***Supra*** note 165.

III. Post-ECJ Development in the European Community

1. The EU External Aviation Policy & Relations: A Brief Overview

1-1. Key Principles of the EU External Aviation Policy

The development of the EU's external aviation relations and policy has been merged with the process of expanding the Commission's engagement and role in this domain. Given the fundamental nation-based approach to international relations in negotiating bilateral air services agreements,[169] the Commission has not yet obtained a distinct formal status under the current regime in the area of the 'European Community vs. third Party' aviation relations. According to the general principles of international law, the European Union is not yet recognized as a nation state,[170] and consequently the European Commission, though it is the Community's executive body, could not represent each Member State as long as the notion of national sovereignty is still vital. Thus, the Community's external aviation policy has been developed in concert with the Commission's efforts, both internal[171] and external,[172] to seek its most legitimate position representing the Community as a whole.

In addition, the current nation-based approach to international aviation relations has also resulted in fragmenting the EU air transport industry,[173] and this has important commercial implications. Such fragmentation of their industry and market has been found to be attributable to the following "key problems" facing the EU aviation industry:

(a) EU airlines and their customers are failing to benefit from the full potential of the EU Single Market;
(b) On a global level, many European players are of a sub-optimal size, compared to their major international rivals;

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[169] <www.centreforaviation.com> [Consulted April 2003].
[170] It is therefore not a single sovereign state, unlike the United States.
[171] Vis-à-vis EU Member States, which the Open Skies cases could represent as one of such examples.
[172] For instance, regarding its observer status at ICAO.
[173] ***Supra*** note 169.

(c) Some carriers are facing serious financial difficulties and need airline partners for new investment to improve their long term commercial viability;

(d) The influence of the EU is reduced when there is no common approach to trading partners or international negotiations.[174]

In response to such concerns, the Commission whose main goal is to promote "safe, secure and efficient" air transport for the benefit of European citizens in the EU has to take initiatives to develop a competitive external "European" aviation policy with a focus on:

- Bringing agreements into line with Community law, maximizing the potential of the Single Market;
- Taking forward an agenda for reform internationally, aimed at stimulating air services and increasing international investment in the industry;
- Ensuring that effective competition is preserved and promoted in order to spread the economic benefits to consumers; and
- Guaranteeing high standards of safety, security, environmental protection and passenger protection in the EC and promoting them worldwide.[175]

In line with the above "mission statement," the Commission has also set the negotiating priorities with its third country partners as follows:

(i) Key bilateral partners, such as the US, Russia, and Japan;
(ii) Neighboring countries (ECAA);[176]
(iii) Developing countries; and
(iv) In multilateral fora (ICAO)[177]

1-2. Policy Development post-ECJ

The Open Skies decision boosted the EC's motivation to refine its external policy, accelerated the relevant procedures and directed them toward establishment of a "coherent voice of Europe."

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[174] ***Supra*** note 169.
[175] *COM (2002) 649 final,* ***supra*** note 96 at 10-12.
[176] The Commission has been attempting to develop the said European Common Aviation Area as a basis for reaching out to the regions further away, *e.g.*, the Mediterranean and the East. **See *ibid.***
[177] ***Ibid.*** at 13-14.

Regardless of the Commission's fundamental aims and intentions with either overflowing or underlying the 'Open Skies' cases (and the Round 2 thereof), and also aside from the anticipated "success" of its recent development, the EC certainly deserves comment on its multidimensional performance. The Commission has been unifying the expression of the EU's best interests vis-à-vis third Parties, and simultaneously sought balance with Member States in sharing the negotiating mandate; it has also constructed more practical and feasible solutions within the scope of Court's ruling; and it has further succeeded in convincing other EU institutions of the value of its position particularly with a further developed 'parallel' approach toward negotiating mandates of the Community; that is, a negotiation mandate with the US and a negotiation mandate with other third countries (so-called "Horizontal Mandate").[178] The Commission specifically requested the Council to grant these mandates in its *Communication on Relations between the Community and Third Countries in the Field of Air Transport* in March 2003.[179]

Subsequently in June 2003, the Council eventually granted the Commission the requested mandates and approved the proposal for a Procedural Regulation.[180]

The Commission has been acting according to its "Package of Measures" proposed to create a legal framework for all bilateral relations between the EU and third countries in international air transport, in an attempt to put an end to the uncertainty that prevails in this sector.[181]

Referring to the negotiating priorities listed in the previous section, the Commission has categorized those countries in a more elaborate and comprehensive manner (*e.g.*, the EU-Mediterranean / EU-Arab / EU-East) and developed varied strategies and policies corresponding to each regional

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[178] <http://www.europa.eu.int/comm/transport/air/international/dev_en.htm> [Consulted 18 July 2005].
[179] **See** *COM (2002) 649 final,* ***supra*** note 96.
[180] Proposal for the *Regulation 847/2004*, **see *infra*** III-2-2.
[181] <http://europa.eu.int/scadplus/leg/en/lvb/l24260.htm> [Consulted 29 April 2005].

grouping.[182] It thus becomes possible to customize approaches to different regions according to the level of their (aviation) industry development and business environment. Undoubtedly, the EC has actively been enhancing their bilateral relationship with the US;[183] Russia & China respectively;[184] and with neighboring East European countries[185] in addition to the separate handling measures adopted for the former 10 accession States.[186]

2. Major Accomplishments Post-"Open Skies" Judgment

2-1. Comprehensive Mandate: the EU-US Open Aviation Area[187]

The EU's central external aviation relations - more accurately speaking, that of its Member States - have developed with the United States throughout the post-World War era. Thus, the external relationship with the US, in addition to the fact that it is the biggest market in air services industry, determines the successful growth of European aviation in its international performance. With the initiative by the Commission, both Parties have long been working together to establish a transatlantic "single market," which *ideally* provides for a fully effective environment for service provision as well as investment,[188] *i.e.*, enabling mergers and acquisitions between airlines holding different nationalities, which is generally not feasible within the current framework due to the foreign O&C restriction discussed previously. The EU-US Open Aviation Area ("OAA"), which used to be known as TCAA, is therefore designed as a multinational business zone within which airlines

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[182] As of mid 2004, the Commission's mandate for an ECAA remained valid with Romania and Bulgaria (still being "third countries"). Speaking of other regions, the Commission has focused on the West Balkans for an ECAA; the Mediterranean States for the Euro- Mediterranean Aviation Agreement; and Turkey. **See** EC, *Commission, Communication from the Commission on a Community aviation policy towards its neighbors* {COM (2004) 74 final} (09 February 2004) [*COM (2004) 74 final*].

[183] **See *infra*** Chapter III-2-1.

[184] "Air transport: an ambitious external relations agenda," *The Europa Press Release*, IP/05/288 (14 March 2005) <http://europa.eu.int> [Consulted 16 August 2005].

[185] "EU and Ukraine seal GALILEO and aviation agreement," *The Europa Press Release*, IP/05/666 (3 June 2005) <http://europa.eu.int> [Consulted 16 August 2005].

[186] As of 01 May 2004, they have become "new" Member States of the EU. Given the circumstances, the negotiations for the expansion of the ECAA have ceased ever since, ***supra*** note 101 at 1. For more details of the 10 new Member States, **see** <http://europa.eu.int>.

[187] For more profound discussion on this topic, **see** Lu, *EC Competition Law / US Antitrust Law and International Air Transport*, ***supra*** note 15.

[188] ***Supra*** note 169.

would freely provide services according to the rule of market (supply & demand) with, theoretically, no intervention. Such a "free trade zone" where open competition shall be assured to the optimal level, was deemed to require, as an essential first step, the abolition of the existing 'relatively protective' air services agreements signed bilaterally between the US and certain EU Member States. This eventually resulted in the Open Skies disputes in concern.

The Commission stressed the economic benefits expected from this deal; it would generate "upwards of 17 million extra passengers a year, consumer benefits of at least $5billion a year, and would boost employment on both sides of the Atlantic" according to the estimation investigated by the Brattle Group (US Consultants).[189]

Thus, under this much-awaited comprehensive mandate,[190] the EC, *i.e.,* the Commission is finally granted the right to negotiate all arrangements applicable to air transport between and within the two territories, including, but not limited to:[191]

- Market access[192] (routes, capacity, and frequency);
- Air fares;
- Harmonized application of competition rules;
- Ensuring adequately strict airline safety and aviation security standards; and most importantly,
- The removal of the current airline O&C restriction from the internal markets of both sides.

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[189] The Brattle Group Study prepared for the DG TREN of the European Commission: "The Economic Impact on an EU/US Open Aviation Area," (December 2002). <http://www.europa.eu.int/comm/transport/air/international/dev_en.htm> [Last consulted 07 August 2005].

[190] Interestingly, the Council has granted a comprehensive mandate to the Commission (a particular Unit in charge of individual subject matter) in a far less 'dramatic' fashion for certain other areas of bilateral negotiations, such as in the area of aviation safety; since the establishment of EASA, the Commission has been engaged in a similar type of comprehensive bilateral (aviation safety) agreements with its partners from various parts of the world., which constitutes an interesting topic for comparison. **See** <www.easa.eu.int>.

[191] <http://www.europa.eu.int/comm/transport/air/international/dev_en.htm> [Consulted 28 April 2005].

[192] The given comprehensive mandate however excludes 5th / 7th freedom rights between EU Member States and third countries for US carriers.

The EC is now expecting to see a "successful and mutually satisfactory conclusion" of the negotiation on this OAA with the US, which is supposed to bring a 'greater choice of services and lower fares.' The Council has also recently given its views to the Commission on the need for such outcome as soon as possible.[193]

The comprehensive negotiating mandate / agreement is however not only limited to relations with the US but may concern other States or regional groupings. The Commission has ambitiously presented its action plans on creating by 2010 another Common Aviation Area with its neighboring third country partners, the so called, "European Common Aviation Area ("ECAA") particularly with the Western Balkan and the Mediterranean States.[194] The Commission will also request for other comprehensive negotiating mandates with certain potential candidates in mind, such as Australia, New Zealand, India, Chile and South Africa for future comprehensive air services agreements, building a similar type of Open Aviation Areas.[195]

The determining factor for the Council to grant the Commission comprehensive mandates is, though, the "added value" that can be foreseen to result from the proposed case.[196] According to the Council's definition, the "added value" refers to the considerable prospects for new opportunities on both EU-industry and consumers' ends. Such proposed agreements should demonstrate the possibility of achieving greater level of regulatory convergence that may also promise a competitive level playing field.[197] It is also important to note that the prerequisite for a consideration by the Council to grant a comprehensive mandate is the willingness of a negotiating partner State's to accept the Community Clause, a criterion which applies

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[193] EC, Council, *Council conclusions on developing the agenda for the Community's external aviation polity* {COM(2005) 79 final}, " (June 2005) [*Council Conclusion June 2005*] at 6. http://www.europa.eu.int/comm/transport/air/international/doc/2005_06_council_conclusions_en.pdf [Consulted 17 July 2005].

[194] EC, Commission, *Communication from the Commission on developing the agenda for the Community's external aviation polity* {COM (2005) 79 final}, (11 March 2005) at 8-9 [*COM(2005) 79 final*].

[195] ***Ibid.*** at 10.

[196] ***Supra*** note 193 at 6.

[197] ***Ibid.*** at 5.

universally. However, in general, the anticipated benefit to the Community from such Community-level negotiations will be assessed case-by-case.[198]

2-2. *Regulation 847/2004* [199]

The *Regulation*, which was approved by the Council in response to the said Commission's "Proposal for a Procedural Regulation"[200] in April 2004, constitutes an important part of the Commission's Package Measures. The major purpose of having this Regulation is to guarantee an adequate exchange of information in a transparent manner within the EU and among all Member States, so that in the future, the chances of infringing the Community law in bilateral relations with third countries would be reduced, if not completely prevented.[201] This Regulation mainly provides for a procedure regarding bilateral negotiations that may be conducted by the Member States, under which those Member States are obliged to adopt the Model Clauses jointly developed with the Commission, and (more fundamentally) to be subject to non-discriminatory procedures in the areas of consulting with stakeholders as well as 'equally and transparently' distributing traffic rights as part of such negotiations.[202]

According to the Regulation, Member States are still entitled to conduct negotiations bilaterally with their third country partners for a new air services agreement or for the amendment of the existing agreements even with respect to matters falling under the Community competence; but only insofar as the certain obligations are fulfilled: cooperation, information exchange and non-discrimination.[203] In turn, it also provides clear guidance for Member States

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[198] ***Supra*** note 193 at 6.
[199] EC, *Regulation (EC) No 847/2004 of the European Parliament and of the Council on the Negotiation and Implementation of Air Services Agreements between Member States and Third Countries*, 29 April 2004, [2004] O.J. L.157.
[200] **See** EC, *Commission, Communication form the Commission on relations between the Community and third countries in the field of air transport* {COM (2003) 94 final} (26 February 2003) [*COM (2003) 94 final*].
[201] ***Ibid.*** at 10-14.
[202] Arts 1-7 of the *Corrigendum to Regulation No. 847/2004*, 2 June 2004, [2004] O.J. L. 195.
[203] ***Ibid.***

in handling their bilateral relations with third Parties.[204] The *Regulation 847/2004* entered into force as of 30 May 2004.[205]

In a similar effort to ensure more transparent and efficient information exchange on the Community level, the Commission introduced the "CIRCA" system through which all Member States could view up-to-date information and data regarding bilateral negotiations proceeded by other Member States, including the text of all relevant air services agreements.[206] However, Member States are only advised and encouraged to provide such information *voluntarily*. At this stage, no enforcement measures could be taken even if certain Member States act contrarily.

Recent efforts and developments in the EC aviation external policy have successfully produced legislation, which indicates the application of the so-called "airy" principles/theories to a more tangible context in practice and more ultimately the enforcement power loaded on the subject matter.

2-3. Horizontal Mandate and Model Horizontal Agreement

The horizontal mandate is granted for the amendment of clauses in bilateral agreements relating to the foreign O & C restriction of airlines and all matters coming under the exclusive external competence of the Community.[207] In this context, Member States and the Commission still play complementary roles within the current institutional structure that governs external relations of the Community.[208] Apart from the US negotiation, with certain exceptions such as the ECAA project, the Commission and the Member States have agreed to share a mandate of negotiating with their bilateral partners to meet the obligations set forth by the Court's judgment. Pursuant thereto, the EC successfully categorized the areas taken care of by either the Commission on

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[204] "Concise Overview of EU Aviation Policy," ***supra*** note 101 at 1.
[205] <http://europa.eu.int/scadplus/leg/en/lvb/l24260.htm> [Consulted 29 April 2005].
[206] EC, Commission, DG TREN, "Seminar for the Accession Countries on External Aviation Policy of the EU" (Brussels, 19 March 2004) [Unpublished].
[207] EC, Commission, DG TREN, "The New Framework for Air Transport Relations between the EU and Arab State" (Ministerial Meeting, Beirut, 17 March 2004) ["Beirut Presentation"].
[208] *Council Conclusion June 2005,* ***supra*** note 193 at 2.

a Community level, or by an individual Member State, the division of which is evidently presented in the text of the Model Horizontal Agreement ("MHA").

The Structure of the MHA appears as follows:[209]

A. Main Text (Art 1-10)
- Designation Clause (Art 2)
- Other Clauses under the EC Exclusive Competence
  - Regulatory Control (Art 3)
  - Taxation of Aviation Fuel (Art 4)
  - Tariffs on intra-EU routes (Art 5)
- General Provisions

B. Annexes

Thus, other than the matters covered by the Model Clauses from Articles 2 to 5, Member States still hold the negotiating mandate with third Parties for what is contained in traditional bilateral air services agreement, *e.g.*, traffic rights. Briefly, the MHA is drafted for the very specific purpose of revising the existing bilateral air services agreements held by the ECJ to be violating Community law. Thus it is neither a traditional nor a comprehensive bilateral air services agreement. It is certainly not a multilateral agreement, either: as of today, it may therefore be viewed as a *sui generis* international agreement. More discussion on this topic follows in PART II.

The Council expresses its full support for the mutual cooperation and coordination between the Commission representing the EC and Member States in conducting bilateral negotiations in conformity with the Community jurisprudence.[210]

In the light of this unique concept of a horizontal ("mixed") mandate, it will be interesting to review a related 'package concept,' so called "mixity." In the course of the preparation for the MHA and even now, there has been a factor

[209] EC, Commission, DG TREN, "Introduction to the Model Horizontal Agreement" (In- house Presentation, Brussels, August 2004) ["MHA Presentation"].
[210] ***Supra*** note 193 at 3.

that could have hindered the entire cooperation process. The mixity, which is similar to such concepts as 'veto' or 'boycott,' can occur if/when a Member State does not want the Commission to conclude an agreement on behalf of the Community, arguing that the proposed agreement contains mixed elements; *i.e.* that the Community has competence to conclude it because of certain provisions falling into its exclusive competence; but, on the other side, the agreement contains also provisions that are within the exclusive competence of Member States. The Commission was therefore forced to avoid intrusion of anything that could give arguments to Member States because the horizontal agreement had to be signed also by all Member States, given its nature of comprising 'mixed' competence. Thus, in case a Member State exercised this mixity, the HA could have become a totally useless instrument. Eventually, the Commission succeeded in preparing a MHA which seemed to be acceptable to all Member States, and is being used as an initial draft for each negotiation today.[211]

On a related note, the Council also emphasizes the importance and need of teamwork in a synchronized and determined manner between the Member States and the Commission in order to minimize the chances of interruptions in bilateral agreements with the third-party States.[212]

As was mentioned above, the EC developed a "customized" negotiation strategy applicable to each partner: that is, "No one size fits all." Apparently this Region-by-Region[213] approach has been working well. Since October 2003 when the Commission commenced its initial negotiation with SANZ,[214] the EC has been initialing HAs with 15 States. New Zealand and Australia initialed their agreements on 14 March 2005 and 7 April 2005 respectively. In addition, the Commission has initialed similar agreements with *inter alia*

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[211] Private communication.
[212] ***Supra*** note 210.
[213] The principal negotiating priorities/groupings apply to the horizontal negotiations as well:
(a) EU candidate countries (Bulgaria, Romania and Turkey); (b) Western Balkans; (c) Arab/Middle East (Jordan, Lebanon, Morocco); (d) SANZ (Singapore, Australia and New Zealand); (e) East Asia (China, Japan, Korea, Hong Kong and Macao); (f) Chile; and (g) Russia and Ukraine.
[214] "Concise Overview of EU Aviation Policy," ***supra*** note 101 at 1.

Chile, Singapore, Lebanon, Bulgaria, Bosnia-Herzegovina, Macedonia, Morocco[215] and most recently in June 2005, Ukraine.[216] Considering the rather short period of time between its launch and the present, and the large volume of existing bilaterals to be amended on the other hand, the progress seems to be significant. The EC has obviously succeeded in getting responses from each grouping.[217]

Given the focus of the present discussion, it is interesting to note that the Commission, in one of its latest Communications, expressed its view on the prospects in the Asian region, and its interest in seeking opportunities to develop more enhanced bilateral relationships in air transport, either in the form of a comprehensive mandate, *i.e.*, Open Aviation Area, or that of horizontal agreements.[218] China and India are the primary targets and Japan and Korea are also desirable partners.[219] China already declared jointly with the EU that it had signed the agreement on "EU-China cooperation in Civil Aviation"[220] on 06 July 2005 following the EU-China Aviation Summit held in Beijing.[221] This may generate interesting dynamics in the Northeast Asian air transport markets, and further it might be a signal for the future EU-China Open Aviation Area, which might occur sooner than anticipated.

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[215] "EU aviation agreements with Australia and New Zealand," *The Europa Press Release*, IP/05/783 (23 June 2005) <http://europa.eu.int> [Consulted 16 August 2005].
[216] "EU and Ukraine seal GALILEO and aviation agreement," ***supra*** note 185.
[217] **See *supra*** note 215.
[218] *COM (2005) 79 final,* ***supra*** note 194 at 10.
[219] ***Ibid.***
[220] <http://www.europa.eu.int/comm/transport/air/international/doc/2005_07_06_joint-declaration.pdf> [Consulted 12 August 2005].
[221] <www.euchinaaviationsummit.com/Index.htm> [Consulted 12 August 2005].

PART II

IV. Model Horizontal Agreement vs. the Existing Bilateral Agreement: Article-by-Article Analysis

In this Chapter, the legal and airpolitical implications of the new Standard Clauses will be examined by comparing the Standard Clauses of the Model Horizontal Agreement (MHA) proposed by the European Community with the corresponding provisions of the traditional bilateral air services agreements.

"The backbone of bilateral agreements is uniform"[222] while each agreement is unique. Therefore, although other agreements have been reviewed, the Korea-Netherlands Agreement will be used as an example of the pattern and wording of existing bilateral agreements to simplify the discussion. As is well known, even though one State remains the same on the one side of certain inter-governmental agreements - the Government of Korea, such agreements either slightly or notably vary depending on the other negotiating partner; by reading such agreements, the overall approach of the other Party to a concerned negotiation could usually be perceived.[223] In this respect, although the said Agreement was initially signed in 1970 when the regulatory framework for international air traffic remained highly rigorous and Korea has not been known as an 'easy' partner to negotiate with, the vision therein seems to have been more future-oriented. The Parties apparently have chosen to be more "innovative," for example, by careful wording rather than rephrasing or virtually rewriting the relevant Articles of the Chicago Convention as if changing data in a math formula.[224] In any event, this is still a traditional restrictive Bermuda-type agreement, and certainly stays in the framework set out by the Chicago Convention as do other Agreements reviewed. Where applicable and necessary, relevant provisions selected from other bilateral agreements will be presented for comparison.

As was stated above, the EU Model Horizontal Agreement is one of the noteworthy achievements resulting from cooperation between Member States and the European Commission. The efforts of the EC to make the notion of the "Community" as well as

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[222] Hong Hu, *Open Skies and its recent impact on the Asia-Pacific region* (LL.M. Thesis, Institute of Air and Space Law, McGill University 1997) at 19 [Unpublished].
[223] It is generally true in any type of contracts.
[224] Supposedly, this might have become possible by the ever so famous Dutch business mindset.

the "Community carrier" clear and comprehensive are evident throughout the entire text of MHA. By concluding Horizontal Agreements (HA) with non-EU States, the EC wishes to provide all airlines operating via air routes under a bilateral air services agreement with legal certainty, and to further develop more coherent external relations between the Community on the one side and those third countries on the other.[225] The MHA mainly focuses on the designation of the Community carriers on a non-discriminatory basis and on the matters falling under the Community competence in fulfilment of the Open Skies judgment by the ECJ. To understand the MHA better, the Single Aviation Market in the EU shall also be taken into account.[226]

1. Preamble

1-1. Traditional Bilateral Agreements

Although the wording may slightly vary from one to the other, in the Preamble of a bilateral air services agreement, two governments express their desire to develop aviation relations between the two States by concluding such an agreement, and mention that the States concerned are Parties to the Chicago Convention.[227] As was already mentioned in Chapter I, the Preamble simply acknowledges that the current regulatory regime provided by the Chicago Convention has created the need for such bilateral agreements in order to provide for those items which could not be included when the Convention was drawn up on a multilateral level for legal, political and various other reasons.

It also recognizes the fundamental principle underlying the Chicago Convention: All States should be able to participate in air transportation on an equal basis[228] and contribute to its development. This fundamental principle in essence constitutes a 'fair' ground for each State to exercise its sovereign

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[225] EC, Commission, DG TREN, "The Horizontal Mandate and Bilateral Air Services Agreements" (Crossroads for Arab Aviation Conference, Sharm El Sheikh, 25-26 April 2004) [Unpublished] ["Arab Conference Presentation"].
[226] **See** ***supra*** Chapter I-3-3.
[227] **See** any or all Agreements listed on Annex 1 of the attached Appendix.
[228] I. Diedriks-Verschoor, *An Introduction to Air Law* (The Hague: Kluwer, 1997) at 11.

rights in granting the air traffic rights while assuming at the same time that the same or "better" would be granted by other States in return.[229]

1-2. Model Horizontal Agreement

It acknowledges the policies and principles established by *Regulation 847/2004*.[230] It suggests the nature of a horizontal agreement seeking an 'overlapping area,' *i.e.*, a compromise between the current international regulatory regime: the bilateral system and the Community law requirements.[231] More specifically, a horizontal agreement is neither a traditional bilateral agreement nor a multilateral agreement; it is different from a comprehensive air transport agreement such as the EU-US Open Aviation Area.[232]

It makes note of the horizontal mandate between the Community institutions and Member States, and then it clarifies the purpose of introducing a horizontal agreement. That purpose is not to replace entirely the existing bilateral agreements between EU Member States and a third country but to AMEND them, only where necessary, in accordance with the principles of the *Rome Treaty*, the Community law.[233] Emphasis is given to the principle of non-discrimination.[234]

In addition, the MHA asserts that the intention of introducing a horizontal agreement is to maintain, not to change, the provisions concerning traffic rights, thus any amendment made by a horizontal agreement will not affect the balance between EU and non-EU airlines.[235]

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[229] McGonigle, ***supra*** note 23 at 10.
[230] ***Supra*** note 199.
[231] ***Supra*** note 225.
[232] ***Ibid.***
[233] EC, Commission, DG TREN, "Information Note: Model Horizontal Agreement," (11 June 2004) at 1 [Unpublished] ["MHA Information Note"]; ***Supra*** note 209.
[234] **See** the main text of the attached Appendix.
[235] ***Supra*** note 209.

2. Designation

2-1 Designation of Airlines

The Designation Clause often referred to as "Nationality Clause" in the bilateral air services agreements currently in use between certain Member States and Korea, in general, reads as in the "Existing Provisions" Column on the left and the corresponding provisions in the MHA appears on the right-side Column:

The Existing Provisions	MHA Standard Clause Article 2[236]
(a) Each Contracting Party shall have the right to designate in writing to the other Contracting Party one airline /airlines for the purpose of operating the agreed services (b) On receipt of such designation, the other Contracting Party, through its aeronautical authorities, shall, subject to the provisions of paragraphs *(c)* and *(d)* of this Article, grant without undue delay to the airline designated the operating authorization (c) The aeronautical authorities of one Contracting Party may require an airline by the other Contracting Party to satisfy them that it is qualified to fulfill the conditions prescribed under the	**2.** On receipt of a designation by a Member State, [*name of the third country*] shall grant appropriate authorizations and permissions with minimum procedural delay, provided that: i. the air carrier is established in the territory of the designating Member State under the Treaty establishing the European Community and has a valid Operating License in accordance with European Community Law; ii. effective regulatory control of the air carrier is exercised and maintained by the Member State responsible for issuing its Air Operators Certificate and

[236] EC, Commission, DG TREN, Working Paper: *Draft Model Horizontal Agreement* (11 June 2004) at 2 [*Draft MHA*].
[237] Art 3 of *the Air Transport Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Korea,* the Kingdom of the Netherlands and the Republic of Korea, 24 June 1970, ICAO Doc. 2240. [*the Korea-the Netherlands Agreement*].

laws and regulations normally and reasonably applied by them in a manner not inconsistent with the Convention to the operation of international commercial air services.[237]	the relevant aeronautical authority is clearly identified in the designation; and iii. the air carrier is owned and shall continue to be owned directly or through majority ownership by Member States and/or nationals of such other states, and shall at all times be effectively controlled by such states and /or such nationals.

2-1-1. Traditional Bilateral Agreements

The "Designation of Airlines" provision, found in every bilateral agreement, is indeed the key element that buttresses the nationality of air carrier, and further leads to the long-standing discussion with regard to the "substantial ownership and effective control" of an airline, the critical issues of which were touched upon in Chapter I. While it does not particularly provide for the designation of airlines, the Chicago Convention, through Article 17[238] and Article 21,[239] affirms the significant implications of the "nationality" in the international civil aviation system as a whole.

This provision suggests that only an airline that was designated by an appropriate aeronautical authority of one Contracting Party is permitted to "utilize the rights granted in those bilateral agreements."[240] This provision enables such a designated airline to have access to the rights provided in a bilateral air services

[238] *Chicago Convention* 1944, Art. 17 [Nationality of Aircraft].

[239] *Chicago Convention* 1944, Art. 21 [Report of Registrations].
"Each contracting States undertakes to supply ... information concerning the registration and ownership of any particular aircraft registered in that State. ... [E]ach contracting State shall furnish reports to the International Civil Aviation Organization, ... giving such pertinent data as can be made available concerning the ownership and control of aircraft registered and habitually engaged in international air navigation..."

[240] McGonigle, ***supra*** note 23 at 11.

agreement, the most significant of which are the traffic rights[241] that are illustrated above.[242]

The idea of designating airlines in bilateral agreements was initially created in the International Air Transport Agreement ("Air Transport Agreement")[243] and the International Air Services Transit Agreement ("Air Services Transit Agreement"),[244] both of which were drafted at the time when the Chicago Convention was laid down in 1944. Also, both Agreements seem to supplement the Chicago Convention in substance. According to S. McGonigle, the designation of airlines was necessary back then because:

> [it] was designed to ensure that only "friendly" States and their airlines would be permitted access to what were valuable commercial rights. There was a concern that rights granted by a State could be exploited by non-friendly nationals, who could take control of an airline in a friendly State.[245] The rights were valuable since, in the post-war era, aircraft had a limited range. In order to operate most routes, one or more stops for refueling of air craft (and passengers) was required.[246]

Such reasoning appeared to be valid given the circumstances of those times, *i.e.*, the Cold War era during which the world was divided into opposing political camps. Would the nationality of air carriers that are to operate via certain routes between certain Contracting States matter as much in today's environment where there are, in theory, no more "enemy" States and their nationals to fear? As has often been pointed out, the regulatory regime shall evolve with the swiftly changing political and commercial environment all around the globe.

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[241] ***Ibid***. at 12.
[242] **See** Chapter I.
[243] *International Air Transport Agreement* (Chicago 1944), U.S. Dept. of State Publication 2282.
[244] *International Air Services Transit Agreement* (Chicago 1944), ICAO Doc. 7500.
[245] **See** J. Gertler, "Nationality of Airlines: Is it a Janus with Two (or More) Faces?" (1994) 19-1 Ann. Air & Sp. L. 211 at 237.
[246] McGonigle, ***supra*** note 23 at 12.

In discussing the Designation Clause, it is also worth mentioning that this clause differs in the various types of bilateral agreements with regard to the number of airlines to be designated; as was briefly introduced above, they are Bermuda I, Bermuda II and Open Skies. In most of traditional bilateral agreements like Bermuda I and Bermuda II, one or a limited number of air carriers are designated[247] whereas in the Open Skies type of agreements, the so-called multiple designation applies – theoretically as many as wished. Using, for example, the bilateral agreements between Korea and the EU Member States that are listed in the attached Appendix, it is only the Korea-Austria Agreement that evidently designates "multiple" air carriers in its amendment[248] while in the Korea-UK Agreement, it is specifically stated that not more than two (2) carriers shall be designated by each Contracting Party.[249] It is true, as a consequence, that this multiple designation is closely linked with the subject of the allocation of the traffic rights to those candidate airlines. However, it is more a 'domestic' concern than an intergovernmental one. This will be discussed later in the appropriate context. In addition, it would be fair to say that the concept of multiple designation is totally unrelated to the discussion of the nationality of air carriers although it is the same provision in a bilateral agreement that generates such connotations respectively. The nationality of air carriers still remains "sacred" regardless of the number of airlines to be designated under a certain Agreement. Occasionally, the number of designated airlines in a specific bilateral can be important though, insofar as it creates room for

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[247] Hu, ***supra*** note 222 at 28.

[248] **See** the Exchange of Notes dated16 August 1996 amending the *Agreement between the Austrian Federal Government and the Government of the Republic of Korea for Air Services between and beyond their respective territories*, the Federal Republic of Austria and the Republic of Korea, 15 May 1979, ICAO Doc. 3247 [*the Korea-Austria Agreement*].

[249] Art 4 (1) of the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Korea for Air Services between and beyond their respective territories*, the UK and the Republic of Korea, 5 March 1984, U.K.T.S. No. 47 (1984) [*the Korea-UK Agreement*].

other or additional EU carriers after the respective HA has come into force, which is a 'new' situation resulting from the Community clause,[250] see discussion below.

In sum, the notion of designating a certain airline enrooted deeply in the bilateral system is the part that is challenged the most by the present subject, the EU Model Horizontal Agreement, more fundamentally by the Open Skies cases.

2-1-2. Model Horizontal Agreement

As can be perceived by comparing the terms used in Article 2 of the MHA and other provisions therein, Article 2 is the only provision that completely supersedes[251] the existing Designation Clauses whereas other provisions of the MHA only complement those corresponding ones to correct the irregularity stemming in the exercise of competence. This highlights the importance of this Community Designation Clause in a horizontal agreement.[252]

Article 2 of the MHA provides that any EU Member State can designate any EU carrier with an establishment in its territory in order to allow Community carriers to benefit from the right of establishment within the EU including equal opportunity access to air routes for third countries.[253] This basically shifts the scale of entity that is required to substantially own and effectively control an airline from the level of a nation state to that of the European Community.

The concept of a Community carrier, which was established by *Council Regulation 2407/92*,[254] is clearly presented throughout

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[250] Private communication.
[251] Art 2 (1) of *Draft MHA*, ***supra*** note 236 at 2
[252] ***Supra*** note 233 at 1.
[253] ***Supra*** note 209.
[254] *Council Regulation 2407/09*, ***Supra*** note 77.

Paragraph 2 of this provision. The "European Community Law" applicable to granting the operating licenses as in Paragraph 2 (iii) also refers to *Regulation 2407/92*.[255] This Regulation which was discussed in Chapter I as part of the Third Package of liberalizing the EU internal market sets forth the requirements for and harmonizes the conditions for granting air carrier's licenses at Community level and thus they are valid throughout the Community.[256] Simply, any air carrier that has an air operators certificate ("AOC") issued by any Member State is considered a Community carrier. Therefore, it is suggested that the holding of an AOC, mentioned in this new Clause, issued by a national authority of a Member State shall not determine the granting of traffic rights to third countries by that Member State.[257] This is owing to the Commission's interpretation that "holding of an AOC is a requirement for obtaining an air carrier's license and not vise versa."[258] This constitutes the legal basis for the conclusion that any Community carrier having a place of business *e.g.*, subsidiary, branch or agency -- which is mostly phrased as "established" -- in the territory of a Member State shall be able to "exercise traffic rights from that State to a third country in the same manner and on the same terms as carriers which are nationals of the Member State in question."[259] Related discussions with a few hypothetical Scenarios follow, *infra* V-2.

"Such other States listed in Annex 3" found in Paragraph 2 (iii) and Paragraph 3 (iii) of the MHA refer to Iceland, Liechtenstein, Norway and Switzerland, States that have concluded special Agreements with the Community governing the air transport sector,[260] into which *Regulation 2407/09* is incorporated.[261] Thus, as far as this HA is concerned, air carriers owned and controlled by Iceland, Liechtenstein, Norway under the EEA Agreement; and by Switzerland under the EU-

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[255] "MHA Information Note," ***supra*** note 233 at 2.
[256] *COM (2003) 94 final*, ***supra*** note 200 at 4.
[257] ***Ibid.***
[258] ***Ibid.***
[259] ***Ibid.***
[260] **See** Appendix.
[261] ***Supra*** note 255.

Swiss Air Transport Agreement are also considered 'Community carriers.'[262]

In case any such bilateral agreements contain a provision(s) designating airport(s) for the purpose of exercising traffic rights, the Commission acknowledges that it falls under the competence of Member States, with emphasis on the principle of non-discrimination based on nationality or identity.[263]

2-2. Rights of Revocation and Suspension

The following Paragraphs of the Designation Clause, occasionally provided separately, deserve special attention since this is where the requirements of ownership and control are unmistakably stated in each and every bilateral agreement. These particular Paragraphs of the designation provision have fundamentally caused the Commission to initiate the proceedings over the equal right of establishment for Community carriers under the EU Community Law in the 'Open Skies' cases.

The Existing Provisions	**MHA Standard Clause Article 2[264]**
(d) Each Contracting Party shall have the right to refuse to accept the designation of an airline and to withhold or revoke the grant to an airline of the operating authorization referred to in paragraph (*b*) of this Article or to impose such conditions as it may deem necessary in the exercise by	**3.** [*name of the third country*] may refuse, revoke, suspend or limit the authorizations or permissions of an air carrier designated by a Member State where: i. the air carrier is not established in the territory of the designating Member State

[262] ***Ibid.***
[263] *COM (2003) 94 final,* ***supra*** note 200 at 5; **See** *Council Regulation 2408/92* as the relevant Community law.
[264] *Draft MHA*, ***supra*** note 236 at 2-3
[265] The Grant of Rights provision (also known as, "Traffic Rights"): Article 2 of the present Agreement between the Netherlands and Korea.

an airline of the privileges specified in such authorization in any case where it is not satisfied that substantial ownership and effective control of that airlines are vested in the Contracting Party designating the airline or in its nationals. (e) Each Contracting Party shall have the right to suspend the exercise by an airline of the privileges specified in [paragraph (*x*) of Article *Y*][265] or to impose such conditions as it may deem necessary on the exercise by an airline of those privileges in any case where the airline fails to comply with the laws and regulations referred to [in Article *Z*][266] hereof or otherwise fails to operate in accordance with the conditions prescribed in the present Agreement, provided that unless immediate suspension or imposition of conditions is essential to prevent further infringements of laws or regulations, the right shall be exercised only after consultation with the other Contracting Party.[267]	under the Treaty establishing the European Community or does not have a valid Operating License in accordance with European Community law; ii. effective regulatory control of the air carrier is not exercised or not maintained by the Member State responsible for issuing its Air Operators Certificate, or the relevant aeronautical authority is not clearly identified in the designation; or iii. the air carrier is not owned and effectively controlled directly or through majority ownership by Member States and/or nationals of Member States or by other states listed in Annex 3 and/or nationals of such other states. In exercising its right under this paragraph, [*name of the third country*] shall not discriminate between Community air carriers on the grounds of nationality.

2-2-1. Traditional Bilateral Agreements

Recalling the "birth" of a designation clause in bilateral agreements, its standard version, still in use today, was first written into the Air Transport Agreement as well as the Air Services Transit

[266] The Application of Laws and Regulations provision: Article 7 of the present Agreement between the Netherlands and Korea.
[267] Article 3 of *the Korea-the Netherlands Agreement.*

Agreement.[268] Not only the above traditional designation clause taken from the Korea-the Netherlands Agreement, but also all other designation clauses found in the Agreements listed in the Appendix appear 'unoriginal' from the model provision that can be found in both of the said multilateral Agreements.[269] It is more so in those bilateral agreements at the earlier stage of the international civil aviation history, such as the US-Korea Bilateral Air Services Agreement originally drafted in 1957.[270] The standard wording from both multilateral Agreements was adopted without any major alterations. This highlights universally and unvaryingly the nationality requirement for international air services has been acknowledged and 'reaffirmed' through 'copying' this model provision in nearly every Agreement that has been drafted in the successive years.

Apart from all other topical issues surrounding the ownership and control clauses, some of which were laid out in Part I, it may be interesting to reflect on the fact that one word, "either" has, by and large, made the nationality requirement in international air services more strict and concrete.[271] In the initial Bermuda I Agreement between the UK and the US, the provision in question was drafted in the following manner:

> [T]o withhold or revoke the exercise of the rights specified in the Annex to this Agreement by a carrier designated by the other Contracting Party in the event that it is not satisfied that substantial ownership and effective control of such carrier are vested in nationals of ***either*** contracting Party....[272]

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[268] **See** Art. 1, Sec.5, *International Air Services Transit Agreement*, Chicago, 1944, ICAO Doc. 7500; Art. 1, Sec.6, *International Air Transport Agreement,* Chicago 1944, U.S. Dept. of State Publication 2282.
[269] Art. 1, Sec.5, *International Air Services Transit Agreement*, Chicago, 1944, ICAO Doc. 7500; Art. 1, Sec.6, *International Air Transport Agreement*, Chicago 1944, U.S. Dept. of State Publication 2282.
[270] Art 4 of *the US-Korea Agreement.*
[271] McGonigle, ***supra*** note 23 at 13
[272] Article 6 of *the Agreement between the United Kingdom and the United States*, 11 February 1946, 3 U.N.T.S. 253, 60 Stat. 1499, T.I.A.S. 1507 cited in ***supra*** note 271 [Emphasis added].

Based on the way the provision is drafted, a bit more flexibility in regulating the nationality of the designated air carriers could have been granted. For example, the carriers designated either by the UK or the US could have been owned and controlled by any nationals of the *two* contracting Parties involved. As is well known, the UK ended up being dissatisfied with the result of the Bermuda I Agreement and the two Parties later replaced this bilateral agreement with Bermuda II, the corresponding Article of which removed the word, "either."[273] Thereafter, other States formulated this provision in their bilateral agreements as in the example above. The provision has certainly been used as a point of reference, and obviously created a more limited regulatory scope for ownership of airlines. Thus, by simply deleting one word, it has become impossible for nationals of one contracting Party to be able to own and control a designated airline from the other Party.[274] This regulatory framework, making the 'nationality' of airlines untouchable, has remained unchanged ever since.

2-2-2. *Model Horizontal Agreement*

Paragraph 3 of this new Designation Clause prevents third party countries from exercising their rights to refuse, revoke, suspend or limit the authorization to the designated carrier based on its nationality, in other words, being 'substantially owned and effectively controlled solely by nationals of the designating Member State's as can be found in the above model clause in a traditional bilateral agreement. As was already stressed in Part I, the Court sought the legal ground from Articles 43 and 48 of the Rome Treaty in holding that the ownership and control requirement in bilateral agreements be incompatible with the fundamental principles of EU Law.[275] It ensures the freedom of establishment as follows:

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[273] McGonigle, ***supra*** note 23 at 14.
[274] ***Ibid.***
[275] ***E.C.J.*** *Commission v. the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxemburg, Austria and Germany,* C-466/98, C-467/98, C-468/98, C-471/98, C-472/98, C-475/98 and C-476/98 cited in

> Article 52 and 58 of the Treaty [*i.e.* Article 43 and 48 as renumbered] thus guarantee nationals of Member States of the Community who have exercised their freedom of establishment and companies or firms which are assimilated to them the same treatment in the host Member State as that accorded to nationals of that Member State....[276]

The Commission asserts that such ownership and control clauses, the so-called Nationality Clauses (in the existing bilateral agreements) by their nature violate the non-discrimination principle underlying the freedom of establishment by referring to Article 43 (1) of the said Treaty:[277]

> Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals in a Member State in the territory of another Member State shall be prohibited. Such prohibition also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the country of any other Member State.[278]

In addition, the importance of fully exercising such freedoms guaranteed by the Treaty in a non-discriminatory manner has been emphasized through the legal reasoning applied to other preceding cases by the Court.[279] It supports the reasoning of the 'Open Skies' judgment and indeed justifies the replacement of this provision.

Also, it might be worthwhile to restate that within the EU internal market there are no such requirements as national ownership and control of airlines in accordance with the Treaty principle in question. The establishment of such a deregulated market was done through the

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"MHA Information Note," ***supra*** note 233 at 2.
[276] ***Ibid.***
[277] *COM(2003) 94 final,* ***supra*** note 200 at 3.
[278] ***Ibid.***
[279] **See *E.C.J.*** C-55/94, *Gebhard,* [1995] ECR I-4365; C-19/92, *Kraus,* [1993] ECR I-1663; C-340/89, *Vlassopoulou,* [1991] ECR I-2357 cited in *COM (2003) 94 final* at 3-4.

Third Package[280] as was introduced in Chapter I. In brief, as far as the EU Community law and principles are concerned, it is deemed totally legitimate to replace or amend the existing designation clauses. However, third Party countries may not necessarily agree to the suggested Standard Clause in a HA.

2-3. Remarks

2-3-1. 'Free Riders'

What is referred to as 'non-discrimination' among Community carriers becomes the issue of the Most Favored Nation (MFN) treatment[281] toward all Community carriers from the third countries' standpoint. Overall, whenever the MFN principle applies, the 'free rider' issue is bound to arise.

During the course of preparing for the MHA, the third party partners of the EC have apparently expressed their concerns with respect to this 'free rider' issue that would very likely arise as a result of replacing the Designation Clause in the way the EC had wished.[282] This would be of particular importance if a Member State and a third country provide for "different levels of access to each other's market" under their existing bilateral agreement,[283] since no bilateral agreements regulate air services in the same manner concerning, for example, the exchange of traffic rights, capacity and frequency.

In such cases, the new Designation Clause may result in breaking the negotiating balance as well as diminishing the benefits from reciprocity, which is regarded as the fundamental principle underlying

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[280] *Council Regulations 2407/92, 2408/92 and 2409/92.*
[281] The MFN principle tells that a State shall not discriminate foreign players based on their country of origin; for example, under the general trade regime, country A shall treat exporter *b* from country B as equally as exporter *c* from country C.
[282] EC, Commission, DG TREN, "Working Paper: Standard Clauses for Inclusion in Air Services Agreements" (Experts Meeting, Brussels, 16 March 2004) at 5.
[283] ***Ibid.***

bilateral agreements.[284] With the possibility of a total 'strange' carrier being designated according to the new Clause, a third country would not necessarily receive reciprocal benefits from the Member State that has issued the operating license to that carrier. Thus, the Member State of that 'strange' carrier would very likely benefit from the concerned 'non-discriminatory' designation at no cost while the third country in concern would still be left with its demands unfulfilled vis-à-vis that Member State: No gain from the deal!

In addition, in case a third country ["***State C** (e.g., Korea)* "] has concluded a more restrictive bilateral agreement with one Member State ["***State A** (e.g., Poland)*"] than with another Member State ["***State B** (e.g., the Netherlands)*"]; and eventually a carrier (*e.g., LOT Polish Airlines*) from the ***State A** (Poland)* gets designated by ***State B** (the Netherlands)* under this new Designation Clause, it would consequently leave the gate wide open for the carrier of ***State A*** (*LOT of Poland*), under a more restrictive agreement, to circumvent its restrictions because the regulations that will govern the operation of the designated carrier *(LOT)* from the ***State A** (Poland)* are to be the less restrictive bilateral agreement between the concerned ***State C** (Korea)* and ***State B** (the Netherlands)*.

To this end, a third country, having signed all varying bilateral agreements with Member States and being tied with the obligation to apply the MFN treatment to all Community carriers, would very possibly question what opportunities would these challenges bring to the country. On the other hand, it is not yet very clear whether the EC has meanwhile found any harmonized solutions with respect to these 'free rider' issues. A more thorough examination on the subject follows *infra* V-2-1-3.

[284] ***Supra*** note 282.

2-3-2. *Allocation of Traffic Rights*

Another focal issue at the intra-Community level dealing with this provision is the allocation of traffic rights to a few, supposedly more competitive, European carriers that will fly "under the flag of the European Union." This is where the Community interest versus an individual Member State's interest may well conflict. Simply speaking, as long as the sovereignty of each Member State is recognized, which country would be willing to cease the international[285] operation of its national flag carrier(s) for the sake of other (Member) States - unless its economic performance has been notably so poor? Thus, this conflict of interest involves not only the socio-economic concerns of a certain country but also its so-called 'national pride.' From the birth of the EU to this recent MHA, the Europeans have almost always managed to find solutions to "the impossible," although patience has often been required. Thus, it will rather be a matter of time before the EC and the MS can reconcile their conflicting interests.

Still, the issue of allocating traffic rights to this day lingers at the national level as a problem that has to be dealt with by an individual Member State subject to the principles of transparency and non-discrimination.[286] It should also be noted that 'equal and transparent' distribution of traffic rights in Article 2 (3) above – in terms of frequency, capacity and designation – to all Community carriers established in the territory of a certain Member State refers only to the *unused* and *available* rights at a given time.[287] In other words, when the traffic rights, such as frequency and capacity, agreed between the Netherlands (a EU Member State) and Korea (a third country) under their bilateral agreement are all actually being operated by their own

[285] 'International' refers to the carriage beyond the EU territory in this context since connecting the points between one Member State and another is still considered technically 'international' as well.
[286] For more information on the principles and procedures, **see** Annex to *COM (2003) 94 final* at 17-18.
[287] ANNEX 2 to *COM (2005) 79 final*, ***supra*** note 158 at 9.

designated (national) carriers, any other Member States (and their carriers) cannot claim the 'equal' distribution of such traffic rights because there are no rights available to be allocated. However, all Community carriers are entitled to *additional* rights that may be acquired though future negotiations between any Member States and third countries.[288] This, overall, is related to the discussion of the balance of traffic rights, which continues in V-2-1-2 below.

2-3-3. *Hard Rights Negotiations on Other States' Behalf*

Meanwhile, what this new Standard Clause seems to indicate is that the application of this Clause will create situations where a Member State ends up negotiating so-called hard rights with a third country on behalf of certain carriers from other Member States, since the mandate to negotiate hard rights still remains with Member States even in the wake of the ECJ decision. This MHA would not automatically alter such provisions as capacity, frequency and route schedules. Thus, depending on the outcome of the application of the new Designation Clause, it is still up to an individual Member State and that third country whether to confirm or modify those provisions granting such hard rights to the other Party.

For instance, if the Netherlands somehow decides to designate British Airways ("BA") instead of their own KLM Royal Dutch Airlines ("KL"), which is deemed fully consistent with this new Designation Clause, the third party bilateral partner who will be in the process of modifying its existing bilateral with the Netherlands shall in theory begin with granting the same rights of capacity and/or frequency to the newly designated carrier, BA, as if it is another Dutch carrier, according to the non-discrimination principle among any Community carriers enshrined in the MHA. Considering that BA is certainly a different carrier from KL, would then this third party partner

[288] Comments by Peter van Fenema (August 2005).

necessarily wish to grant the same capacity / frequency rights to BA as had been granted to KL (considering, *e.g.*, the market position of their own carriers)? So, if this third Party partner raises concerns resulting from this 'unwanted' designation of a 'Community carrier' by a Member State: in this case, the Netherlands, the Netherlands is the sovereign entity that is entitled to settle the potential conflict in terms of its own bilateral agreement, under which certain hard rights, *i.e.*, capacity, frequency and/or route(s), will in effect be operated by a carrier from its fellow Member State. It may seem 'chaotic.'

However, regarding this new element that will be introduced by the HA, some people suggest that it will provide a (EU Member) State with a wider choice amongst candidate carriers (not only national ones but also all established, *i.e.*, interested Community carriers) in making use of the traffic rights that are still 'owned' and allocated by States under the bilateral system, which shall positively contribute to a nation's economy. This view is advocated by the idea that the national economy needs sufficient and efficient international air transport services irrespective of the nationality of the carriers providing those services, rather than attempting to protect one's own national airlines only. From this standpoint, what should be taken into third countries' account is just the possibility that the available traffic rights on the European partner State's side may be claimed by more than one *Community* carrier -- in case there is already multiple designation in the existing bilateral with that EU Member State -- whereas before the HA, it used to be more than one *national* carrier. Thus, it is also possible that Community carrier(s) may continue to be the national carrier(s) that already operates.[289]

While leaving the discussion of the concerned topic at this, further exchange of related opinion/arguments among interested parties is certainly encouraged.

[289] Comments by Peter van Fenema.

Having all that said, even the replacement of the Designation Clause with the MHA Standard Clause does not seem to effect a change to the "untouchable" nature of the "nationality" of air carriers in the international air transport system. Simply speaking, the replacement shifts just the scope of air carrier's identity – from nation States to an economic bloc, the European Community.

3. Safety / Regulatory Control – complementing the Safety Provisions

Article 3 of the MHA complements the corresponding provisions in the current bilateral agreements as follows:[290]

The Existing Provisions	MHA Standard Clause Article 3[291]
Certificates of airworthiness, certificates of competency and licenses issued or rendered valid by one Contracting Party, and still in force, shall be recognized as valid by the other Contracting Party for the purpose of operating the routes and services provided for in this Agreement, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established pursuant to the Convention on International Civil Aviation. Each Contracting Party reserves the right, however, to refuse to recognize, for the purpose of flight above its own territory, certificates of competency and licenses granted to its own nationals by another State.[292]	**2.** When a Member State has designated an air carrier whose regulatory control is exercised and maintained by another Member State, the rights of [*name of the third country*] under the safety provisions of the agreement between the Member State that has designated the air carrier and [*name of the third country*] shall apply equally in respect of the adoption, exercise, or maintenance of safety standards by that other Member State and in respect of the operating authorization of that air carrier.

[290] Art 3 (1) of *Draft MHA*, ***supra*** note 236 at 3.
[291] ***Ibid.***
[292] Article 11 of *the Korea-the Netherlands Agreement.*

3-1. Traditional Bilateral Agreements

The provisions with respect to safety regulations appear identical in almost every bilateral agreement formulated on the basis of Articles 31, 32 and 33 of the Chicago Convention.[293] The slight differences that may be found among these in the provisions of each bilateral agreement are merely in the wording, or more precisely speaking, the composition thereof. Rather than using the provisions based on the original text of the Chicago Convention dating back to 1944, States could certainly agree upon more comprehensive, up-to-date safety provisions (as found in the Korea-UK Agreement[294]) in order to meet present day needs. By and large, they speak of the same.

It then becomes obvious that each Party to a bilateral agreement expresses its wishes to operate and maintain air safety according to the highest standards that exist. Thus, what matters most is not the formulation of the provision, but that such safety standards are extremely dependent on the social, economic and political situation of each Party.

3-2. Model Horizontal Agreement

According to the Commission, this provision is inserted in order to address legitimate concerns that could be raised by any third country as a consequence of making changes to the Designation Clauses.[295] The new Designation Clause would likely create a situation in which the designating Member State may not be the Member State that has issued the AOC of the designated carrier; thus, when the possibility of safety oversight is taken into account, the State that exercises regulatory control may not be the contracting State of a bilateral agreement with a certain third country.[296] In this regard, the European side has considered preparing allegedly a fair ground for any third country to invoke safety provisions in the air services agreements with

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[293] **See** *Chicago Convention 1944.*
[294] **See** Art 9A of *the Korea-United Kingdom Agreement* as amended by the Exchange of Notes dated 29 June 2001. Also listed in Annex 2 (c) of the attached Appendix.
[295] ***Supra*** note 282 at 6.
[296] "MHA Information Note," ***supra*** note 233 at 3.

the designating Member State with respect to all designated Community carriers.[297]

In addition, it may be considered noteworthy that the licensing Member State shall be held responsible for monitoring of the safety of Community carriers operating any routes within the Community pursuant to *Regulation 2407/92*.[298] The same rule applies to an air route from any point of origin within the territory of the Community to the territory of a third country in question.[299]

3-3. Remarks

The European Community has, for years, been making efforts to harmonize the safety regulations and requirements on a Community level. With the recent establishment of a Community authority in charge of aviation safety, the European Aviation Safety Agency,[300] more of uniformity in Community standards and procedures is being accomplished in this arena.[301] Moreover, the common rules applicable Community-wide in the field of aviation safety have been established and have been in force since September 2003.[302] Therefore, as far as the substance of safety regulatory control is concerned, it would be fair to consider all EU member States equally reliable - if not all Member States, at least the 15 original members. This might mitigate some of the concerns of the third countries that will have to become a Party to a horizontal agreement with their European partners.

In addition, third countries would probably need to have a more thorough understanding of the rather complicated institutional cooperation in the field of aviation safety within the Community (for any future incidents where it might become necessary). On the EU level, there are currently the Commission, EASA, the Joint Aviation Authorities and national aeronautical

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[297] "MHA Presentation," ***supra*** note 209.
[298] *COM (2003) 94 final*, ***supra*** note 200 at 5.
[299] ***Ibid.***
[300] **See** <www.easa.eu.int> [Last consulted 20 August 2005].
[301] ***Ibid.***
[302] *Council Regulation 1592/2002* amended by *1643/2003* and *1701/2003*.

authorities that are each in charge of slightly different dimensions of safety issues concerning the air space of the EC, yet work closely together,[303] whereas at one-on-one nation State level, such an institutional structure tends to be much more straightforward: *e.g.*, the FAA of the United States, the Federal Ministry of Transport in the case of Germany, and the Ministry of Construction and Transportation in the case of Korea.

On a different note, one might question whether Article 3 of the MHA extends its authority to the matters related to personnel licenses.[304] Given the principle of the free movement of labor within the EU territory, the new Designation Clause might generate *de facto* wet-leasing, a situation which some third countries might find aversive.

4. Taxation of Aviation Fuel – operating intra-EU Route

The Existing Provisions	**MHA Standard Clause Article 4**[305]
Aircraft operated on [the agreed][306] [international][307] services by the designated airline of each/either Contracting Party, as well as fuel, lubricating oils, spare parts, regular aircraft equipment and aircraft stores [introduced into the territory of one Contracting Party, or taken][308] [including food, beverages and tobacco][309] on board *Version 1*[310] aircraft in that territory, by or on behalf of the other Contracting or its designated airline and intended solely for use by or in the aircraft of those airlines shall be	**2.** Notwithstanding any other provision to the contrary, nothing in each of the agreements listed in Annex 2(d) shall prevent a Member State from imposing taxes, levies, duties, fees or charges on fuel supplied in its territory for use in an aircraft of a designated air carrier of [*name of the third country*] that operates between a point in the territory of that Member State or in the territory of another Member State.

[303] EC, Commission, DG TREN, "Information Note to ICAO re: EASA" (March 2004) [Unpublished].
[304] **See** Article 32 of *the Chicago Convention.*
[305] *Draft MHA*, ***supra*** note 236 at 3.
[306] Choice of a term as in the Version 1 Agreement.
[307] Choice of a term as in the Version 2 Agreement.
[308] Choice of wording as in the Version 1 Agreement.
[309] Specs shown in the Version 2 Agreement.
[310] Article 4 of *the Korea-the Netherlands Agreement.*
[311] **See** Article 24 [Customs Duty] of *the Chicago Convention.*
[312] Article 4 of *the Korea-Austria / Korea-Belgium Agreements* (identical). **Also** found in Art 5 of *the*

accorded the following treatment by the first Contracting Party in respect of customs duties, inspection fees and other similar national or local duties and charges: (a) in the case of fuel, lubricating oils, spare parts, regular aircraft equipment and aircraft stores remaining on board aircraft at the last airport of call before departure from the said territory, exemption; and (b) in the case of fuel, lubricating oils, spare parts, regular aircraft equipment and aircraft stores not included under (a), treatment not less favorable than that accorded to similar supplies introduced in the said territory and intended for use by or in the aircraft of a national airline of the first Contracting Party, or of the most favored foreign airline, engaged in international air services. This treatment shall be in addition to and without prejudice to that which each Contracting Party is under obligation to accord under Article 24 of the Convention.[311] *Version 2*[312]	

Korea-Finland Agreement, Art 5 of *the Korea-Germany Agreement*, Article V of *the Korea-Spain Agreement*, and Art 6 of *the Korea-United Kingdom Agreement* as part.

[313] In the bilateral agreements signed at a later date than the selected version(s) above, under the relevant title, certain additional provisions may appear, through which Article 24 of the Chicago Convention seem to be more thoroughly applied, for instance; (i) Necessary airline documents, such as time tables, air tickets and airway bills, intended for the use of a designated airline of one Contracting Party and introduced into the territory of the other Contracting Party, shall be exempted from taxes, customs duties, inspection fees and other similar charges in accordance with the provisions of the laws and regulations of each Contracting Party (Art 5 (5) of the Korea-Finland Agreement); (ii) The regular airborne equipment, as well as the materials, supplies and spare parts normally retained on board aircraft oriented by a designated airline of one Contracting Party, may be unloaded in the territory of the other Contracting Party only with the approval of the customs authorities of that Contracting Party. In such case, they may be placed under the supervision of the said authorities up to such time as they are re-exported or otherwise disposed of in accordance with customs regulations (Art 5 (4) of the Korea-Finland Agreement; Art 6 (4) of the Korea-United Kingdom Agreement); (iii) Passengers in transit across the territory of either Contracting Party shall be subject to no more than very simplified control. Baggage and cargo in direct transit shall be exempted from customs duties and other taxes and eligible import duties (Art V (4) of the Korea-Spain Agreement); (iv) To the extent that no duties or other charges are imposed on goods mentioned [in this Article], such goods shall not be subject to any economic prohibitions or restrictions on importation, exportation or transmit that may otherwise be applicable (Art 5 (5) of the Korea-Germany Agreement); and (v) Each Contracting Party shall, on a reciprocal basis, grant relief from turnover tax or similar indirect taxes on goods and services supplied to any airlines designated by the other Contracting Party and used for the purposes of its business. The tax relief may take the form of an exemption or a refund (Art 5 (6) of ***ibid.***). **See also** Annex 2 (d) of the attached Appendix.

1. [...] such aircraft shall be exempt from all customs duties, inspection fees and other duties or taxes on arriving in the territory of the other Contracting Party, provided such equipment and supplies remain on board the aircraft up to such time as they are re-exported. 2. There shall also be exempt from the same duties and taxes, with the exception of charges corresponding to the services performed: (a) aircraft stores taken on board in the territory of either Contracting Party, within limits fixed by the authorities of the said Contracting Party, and for use on board aircraft engaged in an international service of the other Contracting Party; (b) spare parts entered into the territory of either Contracting Party for the maintenance or repair of aircraft used on international services by the designated airline of the other Contracting Party; (c) fuel and lubricants destined to supply aircraft operated on international services by the designated airline of the other Contracting Party, even when these supplies are to be used on the part of the journey performed over the territory of the Contracting Party in which they are taken on board. Materials referred to in sub-paragraphs (a), (b) and (c) above may be required to be kept under customs supervision or control.[313]	

4-1. Traditional Bilateral Agreements

While the other questioned provisions of traditional bilateral agreements in the scope of the present discussion follow pretty much the same format and pattern in reference to the 'standard versions' recognized and used globally in this sector, this provision, 'exemption from charges, taxes and such,' is quite variable and depends strongly on the individual agreement between the Parties. This is perhaps because the tax revenue is in general regarded as one of the areas where the 'critical' interest of governments' lies.

The imposition of taxes, duties, and other similar charges on goods and services introduced into the territory of a nation state (and/or an independent customs area) from another has been understood as one of the few areas where a nation State may exercise its sovereign rights, *i.e.*, discretion to the fullest extent possible under the GATT[314] regime governing international trade. It is indeed assumed that such goods and services are intended to be consumed or performed within the boundary of the former State.[315]

However, the nature of the goods and services that are carried on board aircraft operating international routes cannot be regarded as the same as those mentioned above. As is set out by Article 24 of the Chicago Convention in a comprehensive and thorough manner, and has accordingly been adopted in bilateral agreements, such goods and services distinct from those mentioned above because they are expected to remain on board rather than being disposed of in the territory of foreign States, namely other Contracting Parties while they have certainly been 'imported' thereto.

And yet, as is often the case with international treaties, Article 24 of the Chicago Convention still seems to leave quite a bit of 'space' for interpretation since its Contracting States can exercise their discretion and make exceptions, presumably in line with the above-stated principle ensured under the GATT regime. For instance, consider Version 1 (b) "*treatment not less favorable than .... the most favored foreign airline, engaged in international air services.*" First, this version is preparing a legal ground for any future possibilities that such taxes, charges, fees might *exceptionally* or *discretionally* be imposed; and second, it precisely provides for the application of the MFN and the National Treatment (also known as, Non-discrimination) principles, if and when any such occasions occur.

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[314] The General Agreement on Tariffs and Trade initially sign in 1947 and last amended by the Uruguay Agreement in 1994, as a result of a multilateral trade negotiation taken place in Uruguay. **See also** <http://www.ciesin.org/TG/PI/TRADE/gatt.html> and <http://www.worldtradelaw.net/uragreements> [Consulted July 31 2005].

[315] Personal class note for the International Economic Law (Sogang Graduate School of International Studies, Seoul, Fall 1999).

Given this, Article 4 of the MHA, which only complements the corresponding provisions in the current bilateral agreements,[316] appears to be legitimate at a glance.

4-2. Model Horizontal Agreement

Council Directive 92/12/EEC[317] and Council Directive 92/81/EEC[318] constitute the legal basis for Article 4 of the MHA[319] and this is another area in which the Community competence shall be recognized. In order to bring the existing provisions in conformity with the relevant EU legislation, it was necessary to design Article 4 to make an exception to the said provisions within traditional bilateral agreements, according to the Commission.[320]

The EC has reckoned that should a Member State choose to enter into a bilateral agreement with another Member State to tax aviation fuel according to Article 14 (2) of Directive 2003/06, the potential for conflict with EU law arises.[321] These EU legislations regulate domestic tax matters, *i.e.*, tax matters within the boundary of the Community. In this context, Article 4 is needed in a HA, for regulatory consistency, in such cases where a non-EU State was granted 5th freedom rights on intra-Community routes, which is within the boundary of the Community, under the existing bilateral agreements.[322] Thus, from the EC's perspective, without this provision making an exception to the current regulatory framework in the subject matter, non-EU carriers would continue to benefit from their cost-competitiveness from fuel tax exemption while Community carriers shall bear the added cost of the fuel tax flying the

[316] Art 4 (1) of *Draft MHA*, ***supra*** note 236 at 3
[317] The General Arrangement for products subject to excise duty and the holding, movement and monitoring of such products, 25 February 1992, which covers the application of customs duties.
[318] The Harmonization of the structures of excise duties on mineral oils, 19 October 1992, which covers the exemption of aviation fuel from excise duties.
[319] ***Supra*** note 282.
[320] "MHA Information Note," ***supra*** note 233 at 3.
[321] ***Ibid.***
[322] ***Ibid.***

same intra-Community routes.[323] This represents the EU's overall position on fuel taxes: Taxation of aviation fuel shall not be prevented.[324]

4-3. Remarks

Article 4 seems to be a masterpiece of making the best out of the loopholes of the current regulatory system.

It does not apparently contradict any judicial stand that the EC itself has been defending. For instance, the principle of non-discrimination still underlies this provision, which is represented by the MFN and the National Treatment principles. More specifically, by applying the Community legislations 'equally' to both Community Members and third parties, the EC does not discriminate foreign players against their own within their 'domestic' market: National Treatment. In addition, this provision applies to any third parties regardless of their origins, which fulfills the requirement for equal treatment among foreign players: MFN. However, recalling the EC's concern that the Community carriers might lose their competitiveness by bearing the imposed fuel tax in the EU internal market, one of the underlying intentions of making this exception under Article 4 seems to be to safeguard the economic interest of the Community carriers, the 'domestic players.'

Also, it is commonly understood that under the current regime of international law, national laws apply wherever a concerned international legal instrument does not fully regulate. In this context, agreements on international air services are no exceptions. Not only Article 24 as was mentioned in Section 4-1, but generally the Chicago Convention recognizes the application of national legislations wherever necessary. Due to the nature of being 'international' agreements signed by two (or more) sovereign States, bilateral air transport agreements serve in the same manner. Thus, the application of the EU law within the Community boundary in order to complement the relevant international legal instrument(s) is indeed legitimate

[323] ***Ibid.***
[324] ***Ibid.***

within the scope of current international legal order, and therefore cannot be challenged.

On the other hand, even where such national law application was permitted, it has been the long standing common practice among Contracting States to grant fuel tax exemptions to carriers operating international routes even on the occasions illustrated in 2 (c) of Version 2 under the Existing Provisions above, "*even when these supplies ... **on the part of the journey performed over the territory of the Contracting Party** ... in which they are taken on board...*" Given this analysis, there is no necessity for Article 4 to provide an exception in this respect. Furthermore, the relevant Community legislations could have been waived for non-EU carriers because it is not the case that all other Contracting Parties do not have their own national tax legislations to apply to the foreign carriers operating in their territories but have in any event chosen to grant exemptions according to the multinational agreement.

In any event, as a result of respecting this non-discrimination principle and exercising the rights granted by the international regulatory regime, what the EC could possibly expect seems to be more tax revenues generated by non-EU carriers operating intra-Community routes and simultaneously protecting their own carriers' economic interests.

5. Tariffs on Intra-EU Flights

The Existing Provisions	**MHA Standard Clause Article 5**[325]
Version 1[326] (1) The tariffs to be charged by the airline of one Contracting Party for the carriage to or from the territory of the other Contracting Party shall be established at reasonable levels,	**2.** The tariffs to be charged by the air carriers designated by [*name of the third country*] under an agreement listed in Annex 1 containing a provision listed in Annex 2(e) for carriage wholly

[325] *Draft MHA*, ***supra*** note 236 at 4.
[326] Article 9 of *the Korea-the Netherlands Agreement.*
[327] Such notice period varies case-by-case; ***e.g.***, it is agreed sixty (60) days in case of *the Korea-Finland Agreement* and thirty (30) days in the agreement between Korea and Germany.

due regards being paid to all relevant factors including cost of operation, reasonable profit, characteristics of service (such as standards of speed and accommodation) and the tariffs of other airlines as applied on the specified routes or sections thereof. (2) The tariffs referred to in paragraph (1) of this Article, together with the rates of agency commission used in conjunction therewith, shall, if possible, be agreed by the designated airlines concerned of both Contracting Parties, in consultation, where it is deemed suitable, with other airlines operating over the whole or part of the route, and such agreement shall, where possible, be reached through the rate-fixing machinery of the International Air Transport Association. (3) The tariffs so agreed shall be submitted for the approval of the aeronautical authorities of the Contracting Parties at least ninety (90) days[327] before the proposed date of their introduction; in special cases, this time limit may be reduced, subject to the agreement of the said authorities. (4) If the designated airlines cannot agree on any of these tariffs, or if for some other reason a tariff cannot be fixed in accordance with paragraph (2) of this Article, or if during the first thirty (30) days of the ninety (90) days' period referred to in paragraph (3) of this Article one Contracting Party gives the other	within the European Community shall be subject to European Community law.

[328] Article 12 of *the Korea-the Netherlands Agreement*: Dispute Settlement.

	Contracting Party notice of its dissatisfaction with any tariff agreed in accordance with the provisions of paragraph (2) of this Article, the aeronautical authorities of the Contracting Parties shall endeavor to determine the tariff by agreement between themselves.	
(5)	If the aeronautical authorities cannot agree on the approval of any tariff submitted to them under paragraph (3) of this Article and on the determination of any tariff under paragraph (4), the dispute shall be settled in accordance with the provisions of Article *S*[328] of the present Agreement.	
(6)	No tariff shall come into force if the aeronautical authorities of either Contracting Party have not approved it.	
(7)	The tariffs established in accordance with the provisions of this Article shall remain in force until new tariffs have been established in accordance with the provisions of this Article.	

5-1. Traditional Bilateral Agreements

Traditionally, bilateral agreements contain strict rules with respect to pricing, together with capacity, routes, exchange of traffic rights and the designation of carriers.[329] Bermuda I developed the double approval system, under which the government intervention was fully permitted. Such double approval of tariffs has indeed been criticized as it creates an anti-competitive environment in the industry. The example above is not a major exception although under this provision, air carriers are allowed to set rates themselves and/or to

[329] Lu, ***supra*** note 15 at 14.

consult the IATA machinery. In the end, though, this provision still requires approval of the proposed tariffs by the authorities of both Contracting Parties.

With the liberalization of the industry mainly under the Open Skies regime, more liberal patterns of establishing tariffs[330] have been introduced and used. Under which, market forces, *i.e.*, demand and supply, have become the primary consideration in determining tariffs and thus designated airlines are entitled to set fares and rates on the basis of their commercial considerations.[331]

However, neither under the traditional bilateral agreements nor in the Open Skies type of agreements, has it been evidently 'forced' that any national legislations of one Contracting Party shall be the governing regulation in establishing tariffs.

5-2. Model Horizontal Agreement

To be in compliance with the Community legislation, tariffs to be charged by the designated carriers by a third country operating intra-Community routes, in other words, exercising their 5th freedom rights within the boundary of the Community shall be subject to *Regulation 2409/92*.[332] [333] As was introduced in Chapter I, *Regulation 2409/92* sets forth the criteria and procedures for establishing tariffs on any air carriage entirely within the Community.[334] This Regulation allows Community air carriers to freely set air fares, and yet any legitimate authorities, such as Member States and/or the Commission may intervene in case such fares and rates are set unreasonably high or low, *e.g.*, fare dumping.[335]

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[330] Such as the "country of origin" and the "double disapproval" clauses. Fore more details, **see** Hu, ***supra*** note 222 at 34-35.
[331] ***Ibid.*** at 34.
[332] *Council Regulation 2409/92*: Price Leadership, ***supra*** note 79.
[333] "MHA Presentation," ***supra*** note 209.
[334] Lu, ***supra*** note 15 at 32.
[335] Articles 5, 6 and 7 of *the Council Regulation 2409/92* cited in Lu, ***ibid.***

This provision is intended to prevent third country carriers from dominating the EU internal market, as price leaders, by introducing new products or lower tariffs.[336] However, the need of this provision for a HA had been doubted internally at the EU level; during the consultation process, a Member State raised a question whether the traditional double approval regime would have served pretty much the same purpose since Member States could disapprove any tariff that a third Party filed under a double disapproval regime if it were deemed to undercut Community carriers, but the Commission responded that it would be needed in this new instrument for the sake of avoiding uncertainty on the part of third-party authorities.[337] In this context, it should also be pointed out that under a double disapproval regime, the tariff's legality cannot be challenged unless *both* Parties disapprove it, *i.e.*, not alone a EU Member State. Henceforth, it was eventually included. Overall, it may, at this point, be worthwhile to recall the ECJ's judgment that the fundamental reason to include a tariffs provision to a HA was due to the exclusive Community competence in regulating the concerned matters by virtue of *Regulation 2409/92.*

In any event, third countries may view this provision as a 'protectionist mechanism' employed to safeguard the interest of Community carriers, which is apparently inconsistent with the EC's general liberal approach toward not only aviation but trade as a whole. A certain third country has already rejected this provision in the course of a horizontal negotiation with a certain Member State, arguing "it is inconsistent with the liberal fares strategy discussed at ICAO."[338] However, the Commission counterargues that this provision in fulfillment of *Regulation 2409/92* does not seem to put Member States in a position to contradict their obligations under international law.[339] This provision seems to contain certain disputable elements.

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[336] "MHA Presentation," ***supra*** note 209; "MHA Information Note," ***supra*** note 233 at 3.
[337] ***Supra*** note 282 at 7.
[338] ***Ibid.*** at 8.
[339] ***Ibid.*** at 6.

5-3. Remarks

It could be understood as a more internal concern shifting the applicable law from national legislations of Member States to that of the European Community. However, looking to the traditional tariffs provisions, the tariffs were to be set by mutual consultations and consent among the interested parties such as the respective aeronautical authorities and the designated airlines. Also, as mentioned above, the proviso is often included that the Parties may seek guidelines from the IATA's tariff machinery, which is an internationally recognized institution.

The line in Article 5(2) of the MHA, "*the tariffs to be charged by the air carriers designated by [a third country] ... for carriage wholly within the European Community shall be subject to European Community law*," however removes the practice of mutual understanding and consequently leads to a suspicion of extraterritorial application of the Community law to those third Parties that are not signatories to the Treaty establishing the EC – the law of this particular group of nation states: A *sui generis* legal order, which is neither a national law nor completely international.

It would have been considered more 'fair,' had it left the possibility of mutual consultations between the negotiating Parties, rather than unilaterally applying the EC law regardless.

To this end, it does not seem to 'dramatically' contribute to bringing in a more pro-competitive or liberalized pricing regime, either.

6. Annexes

6-1. Traditional Bilateral Agreements

Unlike the main text, this is the part of a traditional bilateral agreement -- together with a memorandum of understanding -- that noticeably distinguishes one agreement from another according to particular arrangement and agreements made between the contracting Parties involved.

In general, the Annexes specify the route schedule to be operated by the designated airlines by the contracting Parties as well as capacity and frequency. For instance, it lists the point(s) of origin; the point(s) of ultimate destination; intermediate points and points beyond in terms of the granted traffic rights under a certain Agreement. In addition to such standard specifications, any noted exceptions with regard thereto may be found depending on the outcome of such agreement between the Parties concerned.[340] At times, the capacity and frequencies for both passenger and cargo services may be determined as well.[341]

In sum, the Annex(es) of a traditional bilateral agreement is usually the place where most of the – bilaterally agreed – *hard rights* are dealt with. In connection with the present discussion, these are therefore the issues that fall outside the EU's Community competence. The Annexes of the HA however serve a totally different purpose.

6-2. Model Horizontal Agreement

The Annexes to the MHA consist of (i) a list of air services agreements between EU Member States and the third country in question; (ii) a list of amended provisions in the said air services agreements; and (iii) a list of certain countries other than EU Member States that can own and control the Community Carriers.[342] These certain other countries are currently Iceland, Liechtenstein and Norway having become eligible under the EEA Agreement with the EU bloc as well as Switzerland having signed the EU-Swiss Air Transport Agreement.[343]

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[340] **See** Annex to *the Korea-the Netherlands Agreement* and/or that to *the Korea-Germany Agreement.*
[341] ***E.g.,*** *the Korea-Germany Agreement.*
[342] "MHA Presentation," ***supra*** note 209.
[343] "MHA Information Note," ***supra*** note 233 at 2.

7. Concluding Note

The EU MHA seems to be brilliantly drafted in a manner that serves the best interest of the EC within the 'transitional' legal framework. The EC has certainly made the optimal use of the horizontal mandate. The horizontal mandate apparently enables the EC to enjoy benefits from the so-called 'double standards'; (i) at times, the *Community* operates as one nation State under the single jurisdiction – as in *the United Europe*; (ii) while at other times, Member States stand individually with full sovereignty guarding their respective national borders. Considering the 'complex' identity of the Community at the current stage, the EC deserves to be called "Janus." As far as the matters relating to designation are concerned, the Community is expected to be treated as a single entity; as if the Community carriers are from one nation State. For the rest, particularly regarding Article 4 and Article 5, the sovereignty and the national territory of each Member State still count. It would be fair to note though, no matter how the EC's 'playing ground' could be perceived by non-EU States, it is still legitimate given the legal framework.

Community Territory vs. National Territory

It seems worthwhile to question the notion of 'territory' in the context of the MHA. Certain evolution seems to be required in understanding 'territory' or 'jurisdiction' considering the MHA. In traditional bilateral agreements, it used to stand for "space" within the national borders, whereas it mostly indicates the entire bloc of the European Community in the MHA. Throughout the entire horizontal agreement, it is more than clearly expressed that the EC wishes that the rest of the world would recognize its air space as the so-called '*Single Sky*,' which is in the end just a wider range of (national) territory. However, due to the negotiating mandate for traffic rights still remaining with Member States, the single Community jurisdiction and national territories coexist in the context of their external relations.

5th Freedom vs. De Facto Cabotage

Technically speaking, Articles 4 and 5 of the MHA seem to bear the implication of granting cabotage rights to air carrier(s) of a foreign State. They appear to treat the

European Union as one bloc which economically functions as a single jurisdiction, and within which the restrictions of the substantial ownership and effective control requirements have been eliminated as well. In addition, the reason that air carriers engaged in operating international routes were initially exempted from the imposition of such charges in another contracting State was because national borders have been recognized; also the nature of the listed items was such that they were to be consumed beyond a certain jurisdiction (such as duty-free merchandise). However, the imposition of charges and tariffs, especially according to laws of their own, on international flights, indicates that the EU is a single jurisdiction in which national borders among the Member States are abolished. Manifestly, air navigation between the points in one (sovereign) territory has been defined as cabotage.

And yet, from a political perspective, the borders between EU Member States still exist and therefore, the sovereignty of each State extends to its air space. Further, Member States are the ones still negotiating traffic rights. Regretfully, no dramatic liberalization has been achieved: For third carriers, traffic between Member States is formally still 5th freedom traffic.

Thus, as far as the traditional notion of rights and obligations over sovereign air space is concerned, the 'new' situation where the EU stands has created a unique and interesting model since the European Community is not yet a fully politically united entity such as a federal State, but it is still an economic bloc: the Common Market.

Finally, speaking of the supra-Community effects of those clauses in a HA, it would be fair to say the introduction of a few new clauses would not miraculously speed up the process of liberalizing the industry on a global level, given the limitation of the current legal framework governing international air transport. Then, one may question what they would really bring about, other than extraterritorial application of the EU legislation as well as the general principles of their own *Rome Treaty*.

V. Thinking an EU-Korea Horizontal Agreement

1. "Cross Examination" of Both Parties as Business Partners

As is widely accepted, air transport is a crucial contributor to a nation's economy in the contemporary world. It not only generates significant amount of revenues in the macro-economic perspective, but also provides "essential links to connect a city, community and/or region with the global network."[344] This is true regardless of the developmental state of a nation state,[345] and thus air transport/air services have become integral components of life worldwide. Air transport has neither been viewed merely as a "money maker" nor simply as a means of transportation. The industry thus has represented a package of mixed values since its birth, *e.g.*, national pride, as mentioned in the preceding Chapters. In short, on the subject of international air services, the stakes involved in, and as a result of necessary negotiations are in general exceptionally large (given the scale of the industry) at bilateral, plurilateral, and/or multilateral level. Therefore, finding a 'winning' position in such negotiations is a critical matter to all Parties involved. It will not be of a great exception in the present examination of the 'what seems to be imminent' negotiations for a Horizontal Agreement between the EC and Korea.

1-1. Korea: An 'Attractive' Trading Partner to the EC?

Unlike the "seemingly modest attitude" that Korea has generally shown in the global aviation community throughout its modern civil aviation history, and the "reserved approach" to the relatively recent issue of liberalization of the industry,[346] Korea's overall performance in the global aviation market has been superb in the recent past. According to industry statistics presented by

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[344] ICAO, Economic Commission, Agenda Item 30 "Economic Contribution of Civil Aviation," Document Reference A 35-WP/197; EC 29; 21/9/04 (35th Session of the ICAO General Assembly, Montreal, Canada 28 September 2004 – 08 October 2004) at 2 [Unpublished].

[345] ***Ibid.***

[346] ***E.g.***, by removing such barriers as the national ownership and control requirements in bilateral agreements.

ICAO,[347] Korea is ranked as the 7th largest air transport country in 2003 based on its total ton-kilometers performance.[348] The statistics provided by Korea's civil aviation authority – the Ministry of Construction and Transportation ("MOCT") – also indicates the continuing growth in international operation of the Korean national flag carriers between 1992 and 2003.[349]

Based on the RPKs, Korean Air – Korea's major national carrier ("KE"), is ranked within the top 20 global air carriers together with five European carriers[350] according to statistics on the year 2002.[351] In recent years, especially since 2000 when it had participated in launching the SKY Team[352] as a founding member, KE's performance has been gradually improving and it has also demonstrated its stable management skills despite quite a number of dramatic "ups-and-downs" in the international air transport community.[353] These include such events as 9/11 in 2001, the SARS epidemic in 2003 and skyrocketing oil prices in 2004 and certain counterproductive situations in its domestic market.[354] During 2004, income increased by 15%, 21% in operating revenue, and 18.2% in FTK respectively as compared to the previous year's performance,[355] not to mention other numerical data presenting its achievement. A few new routes were opened both for passenger and cargo services as well in the same fiscal year.[356] What is also remarkable amongst KE's achievement in the year 2004 is that the SKY Team has welcomed 3 new partners including Europe's own KLM Royal Dutch

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[347] *Annual Report of Civil Aviation 2003* (2004) 59:6 ICAO J. 1 at 12.

[348] Its total operation is estimated to be 14,036 (millions) and in the case of its total passenger-kilometers performance, 63,099 (millions) is recorded. **See *ibid.***

[349] *Statistics and Annual Reports: Aviation* <www.moct.go.kr/EngHome/DataCenter/Statistic/Statistic01.htm> [Consulted 16 July 2005].

[350] Those European "Community" carriers are BA, AF, LH, KL and Iberia (IB). **See**, IATA's *World Air Transport Statistics* ("WATS," 47th ed.) & *Global Aviation Business Intelligence* ("GABI" 2002) cited in EC, DG TREN, *Air Transport Vademecum No. 1,* (4th Quarter 2003) at 2 [Unpublished].

[351] ***Ibid.***

[352] One of the most recent global airline alliances. For more details, **see** <www.skyteam.com> [Last consulted 10 August 2005].

[353] **See** *Korean Air 2004 Annual Report* <www.koreanair.com/img/pdf/annual04.pdf> [*KAL 2004 Report*]

[354] Such as 'sluggish' economy and weak domestic consumption. **See *ibid.*** at 26.

[355] ***Ibid.*** at 25-29.

[356] For the passenger services, routes to Prague, Saint Petersburg, Penang, Taiwan, and Shanghai; and for the cargo services, to Oslo, Dubai, and Vienna. **See *ibid.*** at 25. These are the routes determined 'profitable' to be new revenue sources whereas the (existing) unprofitable routes were reduced in an effort to restructure and survive in a commercially challenging environment, ***ibid*** at 26.

Airlines ("KL"). As a result, SKY Team now has four European partner carriers.[357] Considering of the thorough process of evaluation, assessment and strategic planning with respect to partner carriers for an air carrier to join or form a global alliance, the fact that the interest in joining the Sky Team among (European) carriers has grown affirms, to a certain degree, the value of KE as a business Partner. This indeed is an encouraging starting point from KE's position.

Speaking of the cargo services sector, both Korean national carriers, KE and Asiana Airlines ("OZ"), have been recognized as strong players, both included on the list of the Top 20 Global Cargo Airlines.[358] According to its 2004 Annual Report, Korean Air Cargo has enhanced its performance on its European and Chinese routes and that has resulted in bringing about 35% growth in the form of FTK from its European market.[359] The cargo operation seems to be the segment that Korean carriers have comparative competitiveness, which may be nourished and strengthened even more by further care and efforts by the Korean carriers (and the Korean government).

The history of civil aviation in Korea began as early as 1948 and yet, until the beginning of 1970's, the provision of air services in Korea has mainly been carried out by foreign air carriers.[360] This was so due primarily to the turbulent domestic circumstances.[361] However, in line with the legendary reputations that the country has been gaining for the speed of its economic growth, its air transport industry has developed even more rapidly.[362] While the scale of its aviation industry and the performance of its national carrier, KE have remained insignificant for a long period time at the earlier stage of its history, the privatization of KE, liberalization of its tourism industry, and deregulation of its market as a whole have taken place not much later than in

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[357] These are AF, Alitalia (AZ), CSA Czech Airlines (OK) in addition to the newest partner KL. ***Supra*** note 353 at 36.
[358] Ranking by RTKs 2002 v 2001, ***supra*** note 350 at 6.
[359] *KAL 2004 Report*, ***supra*** note 353 at 28.
[360] Maeng, ***supra*** note 68 at 74.
[361] Such as the Korean War, underdeveloped economy, politically unsettled environment and etc. **See *ibid.***
[362] ***Ibid.***

the cases of other major world players, such as the US and the EC.[363] Korea's deregulation[364] has been materialized by putting its 2nd air carrier: Asiana Airlines' operation in action since 1988.[365] Since OZ[366] was licensed to take part in the scheduled services via initially domestic routes and later on certain international routes (from short-haul to long-haul), Korea has managed its civil aviation industry under this two-airline system.[367] OZ is currently a member of the Star Alliance,[368] and has been seeking optimal business opportunities through a number of other partnerships and joint ventures.[369] Considering its rather brief history as a global carrier, the airline has been growing quite extensively in the past decade.

Based on the given statistics and other information provided above, the following points have been examined to draw a conclusion for the question initially raised – whether or not Korea could be evaluated as a valuable business partner in view of continuing/further-developing bilateral air services, for example, from the EC's perspective:

First, it might be fair to state that Korea, if not yet a world's leader in the area of international civil aviation, has proved its diligence in improving its air transport industry over the past half century and as of the end of 2003 it was placed 7th in terms of its total ton-kilometers performance in the international

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[363] KE was fully privatized in 1969; the overseas travel that had been heavily regulated was liberalized in the 2nd half of 1980's thanks to the Seoul Olympics; and also based on the extraordinary economic boom, a more liberal ground for 'open' competition with foreign carriers began around the same period of time. In comparison, the deregulation of the US market is dated in 1978 and the liberalization of the EC internal market was completed with the 3rd package entered into force in 1993. For more details, **see *supra*** note 360 at 74-77.

[364] The background to this deregulation is: (i) that Korea's air transport market had grown too big for a single carrier to cover in a monopolistic fashion; (ii) the government's wide application of its deregulation and liberalization policy to all sectors of its economy; and (iii) the government's response to and awareness of the world's trend toward airline deregulation. **See** Maeng, ***ibid.*** at 76.

[365] ***Ibid.*** at 75-76.

[366] **See** <http://us.flyasiana.com/aboutasiana/aboutasiana_index.asp> for more up-to-date corporate profile [Last consulted 02 August 2005].

[367] Maeng, ***supra*** note 364.

[368] **See** <www.staralliance.com> or <http://us.flyasiana.com/aboutasiana/aboutasiana_partners_star.asp> [Consulted 02 August 2005].

[369] Aside from being part of the Star Alliance, OZ is partnered with more of the airlines from the North American, Asia-Pacific regions than with the European Community carriers. **See** <http://us.flyasiana.com/aboutasiana/aboutasiana_partners.asp> [Last Consulted 03 August 2005].

air transport market.[370] It has also shown efforts to contribute to enhancing aviation safety and security internationally by participating in relevant activities.[371] It is generally true concerning the Northeast Asian region, but Korea in particular is quite a densely populated area and a large portion of the total population (only considering the South)[372] could be counted as potential frequent overseas travelers[373] thanks to the country's overall economic status.[374] Thus, Korea would apparently continue to provide airlines with a good number of passengers originating not only from/to Korea but also from/to other points in the overall populated Northeast Asia. On a related note, a great deal of attention had been given to the InCheon International Airport ("IIA") even before its official opening in 2001. This is because the IIA was designed to serve as a hub for the Northeast Asian region.[375] Considering its enormous scale and highly technology-oriented facilities, and the fact that the airports in adjacent Japan have been heavily congested (thus, airport fees in the Japanese airports are very high), the IIA[376] might be viewed as another appealing factor for foreign carriers and their governments (to taken into account in exercising their 5th freedom rights in a more cost-efficient manner as well as in assessing the market value of Korea in the international air transport).

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[370] **See *supra*** note 347.

[371] *Shaping the Future: Highlights of the 35th Session of the ICAO Assembly* (2004) 59:9 ICAO J. 1at 45; **See also** *the Overview of the civil aviation policy in Korea* at <www.rokca.org/cooperation> [Consulted 26 July 2005].

[372] 48,422,644 as of July 2005, statistics provided in the *CIA World Factbook*, <www.cia.gov/cia/publications/factbook/geos/ks.html#People> [Consulted 19 July 2005].

[373] Hu points out that "South Korea is another critical country in Northeast Asia.... Koreans have become enthusiastic travelers [since the liberalization of overseas travel in 1988]. Over 20% of the population travels abroad by air [as of 1997].... " ***Supra*** note 222 at 95.

[374] According to the World Development Indicators Database for the year 2004, Korea is ranked 11th in terms of Total GDP; 12th in terms of Total GNI (Atlas Method); and ranked 14th in terms of PPP GDP. Data available at <www.worldbank.org/data/quickreference/quickref.html> [Last consulted 10 August 2005]; For other statistics regarding Korea, **see also** the *CIA World Factbook, **supra*** note 372. www.cia.gov/cia/publications/factbook/geos/ks.html#top [Consulted 19 July 2005].

[375] Ministry of Construction and Transportation of the Republic of Korea, Annual Policy Report, *Korea's Territory and Transportation: "Policy and Vision,"* (2004) <www.moct.go.kr> under "Policies" [Consulted 18 July 2005].

[376] Annual Reports could be downloaded from its official web site <www.airport.or.kr/Eng/home.jsp> [Last consulted 20 July 2005].

Not only at the international forums where political leaders gather,[377] but through other means of communication, the government of Korea and its civil aviation authority, MOCT, have been presenting their policies and position in relation to international civil aviation.[378] More specifically, they have made their position quite clear in regard to the safety and security issues.[379] However, they have not been as clear about the issue of liberalizing the industry on a global level, *e.g.,* by altering the O&C requirements in bilateral air services agreements. Some authors view that Korea has adopted a liberal aviation policy given that it had signed a "very liberal bilateral with the US."[380] This statement may be debatable especially considering the rather 'unique' relationship between Korea and the US established over time since 1950s, which is however beyond the scope of the present discussion. One of the few recent resources 'publicly' accessible that may represent Korea's view regarding the liberalization of the O&C requirements may be its presentation at the 5th ICAO Worldwide Air Transport Conference held in 2003.[381] It might possibly be inferred from this Working Paper that Korea has 'moderately' expressed its wish to advocate the *status quo.*[382] In the text, phrases like the following have been repeated several times, which may indicate a particular emphasis:

> "... Korea believes that the national ownership and control criterion is more appropriate for the bilateral air transport framework... [and] **[t]he principal place of business plus a strong link**[383] is a broadly based liberal solution that respects the interests of most States, which includes those who wish to maintain the national ownership and control criterion..... **However**, in the long run, ... concerns about the 3rd Party free ride and national defense

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[377] ***E.g.,*** **see** ***supra*** note 371 at 45.
[378] ***E.g.,*** **see** ***supra*** note 375.
[379] ***E.g.,*** **see** <www.rokca.org/cooperation>
[380] Hu, ***supra*** note 222 at 97.
[381] Republic of Korea, "Liberalizing Airline Ownership and Control," Document Reference ATConf/5 - WP/101; 24/3/03 (ICAO 5th ATConf., Montreal, 24 – 29 March 2003) [Unpublished].
[382] ***I.e.,*** keeping the traditional O&C requirements.
[383] "The principal place of business plus a strong link"was the model clause proposed by the ICAO Secretariat at the ATConf/5 for the discussion in concern.

> still remain..... Therefore, the model clause[384]..... should be considered for adoption in the bilateral air services agreements at **the option of States.**" [385]

It will nonetheless be inappropriate to jump to the conclusion that Korea is advocating a protectionist approach with respect to the liberalization issues, due to the lack of sufficient supporting information. Also, there are opposing views on Korea's overall aviation policy as was stated above. On the other hand, as of mid-2004, the EC side was still left indecisive with respect to the negotiation with Korea for the replacement of existing bilaterals between the EU Member States and Korea itself; they were not even sure whether or not the negotiations would proceed under the horizontal mandate.[386] The situation might have developed otherwise, in the meantime. In short, Korea has successfully kept its position "vague" on the subject matter, if that was indeed their true intention and "policy." In any event, Korea's statement cited above indicates the 'conflict of interest' critically linked to the issues that shall be addressed in relation to the EC's MHA in the sections below. To this end, it may however be fair to understand that Korea is definitely not one of those States that wish to make more *rapid* progress, such as Singapore that has at all times been waving the flag for the group of liberalists.

Secondly, speaking of both Korean carriers, KE and OZ have apparently placed themselves on quite a solid ground in the Northeast Asian region. Again, referring to those statistics cited above, they are no longer "ignorable" players in this business in relation to both their size as business entities, and the volume of traffic they carry. KE, as of today, operates in approximately 86 cities in 30 countries,[387] and OZ services 54 cities in 17 countries in the case of the passenger traffic.[388] [389]

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[384] The principal place of business plus a strong link, **see *ibid.***
[385] ***Supra*** note 381 [Emphasis added].
[386] Private communication.
[387] <www.koreanair.com/local/na/eng/gd/ak/ci/ak_corpinfo.htm> [Consulted 31 July 2005].
[388] <http://us.flyasiana.com/aboutasiana/aboutasiana_index.asp> [Consulted 02 August 2005]. In case of cargo services, it flies to 14 countries, 19 cities, ***ibid.***
[389] At the 35th ICAO General Assembly, S. Rhee, Korea's Representative to the ICAO Council, stated that Korea was, as of the 2nd half of 2004, operating international air services under the bilateral agreements with 82 Sates. **See also *supra*** note 371 at 45.

In the light of international air services, Korea is accordingly a market with good prospects. The (only) remaining assignment for foreign interested Parties may be to work with the 'mysterious' regulators representing the Korean authorit(ies) in charge.

1-2. The EC: Still Worthy of 'Friendship' – from Korea's Perspective?

The question, whether it is still worthwhile to be "friendly" with the EC, has been asked ever since the EC began to establish a liberalized single market of their own, if not longer. When the three liberalization Packages were introduced and the EC Single Aviation Area was eventually launched in early 1990's, the rest of the world projected the issues that are brought by the EC's HA today in the context of the bilateral agreements and negotiations: the issues of the negotiating partner and the Community Clause.[390] As far as Korea is concerned, the answer turned out to be positive even back then.[391]

Putting other related questions aside, there seems to be only one simple question to be asked at this point: what economic benefits or losses Korea will be able to expect, either by having the existing bilateral relations with the entire European Community denounced, or by cooperating with its European partners in light of the HA so that Europeans could amend the current bilaterals in compliance with their legal order. The former hypothesis *prima facie* could lead to the cessation of air services between the European continent and the Korean peninsula (even the points beyond considering the 5th freedom rights granted under those Agreements), whereas the latter enables both Parties to continue their economic activities at the very least.

Europe is the third biggest market in the world[392] and Korea has already gained access to a large portion of this market through bilaterals with most of the 15 EC Member States (before its 2004 enlargement) plus those other

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[390] Maeng, ***supra*** note 68 at 83.
[391] ***Ibid.*** at 83, 92-93.
[392] *Airline Business* cited in ***supra*** note 350.

States falling under the umbrella of the EC Single Aviation Market.[393] In addition, it is the European routes that have generated 14% of KE's total revenue in the year 2004, in the case of passenger traffic, and nearly 28% in the case of cargo.[394] Particularly in case of cargo operation, this is the 2nd largest pie after the North American routes.[395] Even at a glance, this stake is too large to lose simply by neglecting the amendment of the existing Agreements. Also, it does not appear to be a very wise choice to abandon the already-established commercial relationship for the same reason. It is true though that what the EC is demanding creates quite a bit of hassle, especially where there is no obligation for third Parties, for example, Korea, to be bound by the judgment of Europe's own court under the framework of current public international law. However, there is no other way that the EC Member States and the EC "Community" carriers can continue to operate air services unless this amendment has been formalized. The third Parties still have a choice between the two procedural alternatives though: they could either negotiate with each and every concerned Member State individually or consider using the HA under which the EC speaks in one voice, and may well provide the advantage of "relative simplicity and speed."[396]

As far as Korea's economic interest in the European market is concerned, there seems to be no gain from rejecting the amendment to the current bilaterals. It then turns to the question how and to what extent Korea will 'cooperate' with the EC, and accept their proposed deal.

2. Assessment: Questions to be Addressed

The anticipated Horizontal Agreement brought by the European Community to Korea would likely appear as in the attached Appendix that was put together in reference to the draft MHA which the European Commission has been developing with Member

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[393] **See *infra*** Annex 3 of the Appendix.
[394] *KAL 2004 Report*, ***supra*** note 353 at 53.
[395] ***Ibid.***
[396] *SEC (2005) 336*, ***supra*** note 158 at 5.

States and later has been used as a basic instrument for negotiations with certain other third countries, such as Singapore, Australia, New Zealand, and with Chile.

The following questions are addressed on the basis of the understanding of the Model Clauses presented in the previous Chapter. A comprehensive economic analysis, and consultations for the assessment of costs and benefits that might be expected from the arrangement would, in any event, be necessary to complete the process of seeking answers to those questions.

2-1. Designation of Community Carriers (Art 2 of the MHA)

2-1-1. General Questions regarding Multiple Designation

As was discussed previously, Article 2 of the MHA designed to replace the old provisions – "Mock" EU-Korea MHA as appended – is mandatory in order to conclude a HA as well as to continue air services with the EC, more fundamentally speaking. This is indeed the key provision allowing all interested Community carriers to benefit from a specific bilateral with Korea, provided that such a bilateral yet contains a multiple designation provision.[397] A few hypothetical cases follow:[398]

Scenario A:

Korea already has bilateral relations with a number of EU Member States, mostly among the countries before its latest enlargement. Referring to "... in exercising its right under Article 2 (3) of the MHA, Korea shall not discriminate between Community air carriers on the grounds of nationality," how big of a difference vis-à-vis Korean passengers and in the overall revenues generated by international air traffic in the Korean economy would it make if BA, after designation by the Scandinavian authorities, operated on the

[397] Comments by Peter van Fenema (August 2005).

[398] **DISCLAIMER**: The names of airlines appearing hereunder are employed merely as examples and thus do not represent any prejudice of the author.

routes between Scandinavia and Korea instead (or on top) of SAS (Scandinavian Airlines System, hereinafter, "SK")?

Either of the above-mentioned carriers seems almost equally competitive in their commercial reputation, reliability and so forth. Yet, one may consider another hypothesis: what if an airline from one of the EU's new Member States is designated for the routes that had been operated by a carrier from one of the "old" Member States; *e.g.*, the Netherlands designates LOT Polish Airlines ("LO")?

According to this Clause, the third country, Korea shall not 'discriminate' against LO due to its nationality. What other choices would then those third countries, including Korea, have with respect to accepting this Clause? In comparison to the other example between BA and SK, there is indeed a difference between KL and LO. Currently lacking a reasonable number of selected "EU carriers," all those air carriers from all 25 EU Member States are theoretically eligible to be designated by its/their own State or by others. Consequently a third country should consider them as equal candidates that may appear on the list of designation.

Scenario B:

On a related note, the selection of certain Community carriers representing the entire European Community and the allocation of traffic rights accordingly among them, would be entirely the EC's internal business. It may not be an immediate challenge that third countries would have to grapple with, either.

However, it would still be worthwhile to take this scenario into account because this will likely change the dynamics in a third country's market, *e.g.*, that of Korea's. Once the European Community successfully reaches the solution of narrowing all the Community carriers currently in operation down to a few (hypothetically BA, LH, AF and SK or otherwise), it could very well

be that certain European carriers shall be replaced by certain others, which is in any event, legitimate in view of the Standard Designation Clause of the MHA.

In the case of such 'multiple-cross-designations,' what impact would it bring to the domestic market of Korea for example, and how will Korea then be able to handle and/or balance the agreement on hard rights between Korea and an individual Member State on such topics as market access: capacity and frequency provisions on certain routes?[399] From a third country's perspective, this situation nonetheless seems less 'uncertain' and thus a bit more predictable than the above by having only a few names of air carriers clearly presented. In essence, the same issue is lingering though: Korea would have to accept the designation whatever the identity of the European carrier might be.

Scenario C:

Would it be possible, under Article 2 of the MHA, for a Member State to designate an air carrier of another Member State that has not yet signed a bilateral agreement with Korea? By just looking to this Standard Designation Clause, no limitations or restrictions are found that a Member State cannot designate an airline of another Member State if the latter does not have a bilateral agreement with the concerned third country. However, the answer to this question would perhaps be not. Recognizing that even a HA is based on the bilateral system to which the "ABC" of the traditional regulatory framework established by the Chicago Convention still applies, it should be remembered that the agreement on traffic rights comes before designating air carriers. In addition, a hard-rights negotiation, more precisely adding or eliminating traffic rights between any Parties, lies

[399] Precise information of such provisions is unlikely to be understood by the manner that the main text of bilateral agreements is written. A Memorandum of Understanding is usually used as a means of defining such details (sometimes, partly available in the form of annexes as well). However, these details are not generally considered publicly available information, *i.e.*, 'confidential.'

beyond the scope of a HA even though the conclusion of a HA may result in altering certain relevant parts of the existing hard rights on a case-by-case basis. The Commission's statement with respect to the discussion of 'balance of traffic rights,' *infra* Section 2-1-2 will support the present logic of viewing this concern.

To this end, it might also worth noting whether Korea or any third country bilateral partner of the EC, would (be willing to) recognize the EC's designation criteria, which may vary from the fashion that Korea uses with certain EU Member States.[400] As was pointed out previously, 'how to designate what carrier' is totally a 'domestic' concern, the procedures of which any bilateral partners are not engaged in. For instance, the US DOT applies "fit, willing and able" criterion when assessing the qualifications of candidate airlines,[401] in line with the philosophy that safety maintenance and economic viability shall be sufficient for an airline to conduct its business activities in today's 'deregulated' international air transport market.[402] This example suggests that designation criterion of each country or entity varies as widely as the broad range of general aviation policies which they have demonstrated over the years. Although this has always been the case, what makes the difference with the Designation Clause of the MHA is that the concerned Clause limits the 'freedom' of the other States to refuse the designated Community carriers, which they had been entitled under traditional bilaterals. The effect of the MFN principle laid down in this Clause may extend to a broader range than only carriers' nationality underneath the surface. On such limited ground of exercising its discretion to refuse designated carriers from the European side, it may seem more critical to third

[400] Which may still be the same or similar, though.
[401] Henri Wassenbergh, "The Regulation of Market Entry," (2 November 1996) [Unpublished] cited in Hu, ***supra*** note 222 at 29.
[402] ***Ibid.***

countries like Korea understanding how and why the EC designate certain carriers, not others.

2-1-2. *Balance of Traffic Rights*

States have commonly been 'suspicious' about whether the Designation Clause in a HA would in effect bring changes in traffic volumes on the routes between their own territories and that of the EU Member States,[403] despite the 'preamble' of the MHA where the EC's position, not intending to change balance of traffic rights is stated.[404] Such concerns were expressed as well during the 35th ICAO Assembly held in 2004 as well.

In response thereto, the Commission stresses that all traffic rights between the concerned States will remain unaffected even after the amendment to the concerned provision is done through a HA.[405] Again, the negotiating mandate for traffic rights is in the hands of Member States, not the Commission, and a HA covers only the areas that are subject to the Community law, which does not apply to traffic rights. Thus, it is correct that the total balance of traffic rights and the volumes thereof would not be changed, unless an individual Member State and the third country concerned do otherwise. According to the Commission, what might occur as a consequence would be that the number of airlines operating may increase within the already agreed traffic rights pursuant to the existing bilaterals.

However, as was briefly discussed in IV-2-3-2 *supra*, 'the increase in the number of operating airlines' may occur only if there are unused and available traffic rights, and if under the concerned bilateral agreement, multiple designation is already provided as well. Therefore, in the case of Korea, it is very unlikely that the country

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[403] ANNEX 2 to *COM (2005) 79 final,* ***supra*** note 158 at 7.
[404] **See *supra*** Chapter IV-1-2.
[405] ***Supra*** note 403.

will have to face this problem any time soon. As far as the existing bilaterals between Korea and the EU Member States that are listed in Appendix are concerned, it is only the Korea-Austria Agreement that allows multiple designation. In other words, unless Austria intends to distribute its traffic rights exchanged with Korea to other Community carriers – should there be any unused rights, not even will the number of Community carriers operating on routes between the EC (*i.e.*, Austria) and Korea immediately increase much.

Along the line, it is however not the total volume that would likely matter but rather which carrier is going to replace or come on top of the carrier originally designated that could possibly affect the Korean national flag carriers' competitiveness.

It should also be examined whether such 'possible' alternations among the Community carriers designated to operate on routes between Europe and Korea will result in any type of 'restructuring' in the current strategic alliances or other forms of joint operation that both KE and OZ are currently members. In the case of the SKY Team, there are now a number of European 'Community' carriers that are also members. How would the Korean carriers prudently take measures in response to such a change of dynamics? More specifically, if the current European alliance partners of KE, such as AF, KL, AZ, and OK[406] end up being replaced by other(s), would KE be able to maintain the *status quo* economically and/or expect to perform better? It is certainly highly hypothetical since those Community carriers tied to alliances would also consider their own business interest, yet what costs and benefits would the Korean air carriers be able to see here, just in case?

[406] **See** *Table of Abbreviations* for the corresponding airline codes.

2-1-3. 'Free Rider' Issues

Yet again, the 'free rider' issue that will most likely come along with the Community designation is not only one particular State's concern. Rather, both the nature of the problem and the alternative solutions have been investigated from 'multidimensional' angles: on an intra-EC level, in multilateral forums such as the ICAO General Assembly, and in the course of bilateral negotiations for the amendment of this Clause. Throughout the present discussion, this issue has also been addressed in various contexts.[407] In addition, we already took a glance how Korea in particular has been concerned about this topic in the previous Section.[408]

An alternative solution has been applied to certain HAs that were already initialed by means of including "waiver" provisions. For instance, in the course of negotiating with SANZ in the 1st quarter of 2004, an additional Item was inserted into the standard version of Article 2(3) of their draft Agreements, reading as follows:

In case of Australia:

> *Australia* may refuse, revoke, suspend or limit the operating authorization or technical permission of an airline designated by a Member State where:
>
> ... ...
>
> iii. .... *Australia* can demonstrate that grant of the operating authorization would permit that carrier to circumvent the restrictions in the bilateral agreement [under which that airline is authorized to operate] by exceeding any limitations on capacity or frequency to be provided between points in the parties to that agreement.[409]

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[407] **See *supra*** Chapters II-2-2 and IV-2-3-1.
[408] **See *supra*** note 381.
[409] Article 2 Para 1 (b) Item iii of the *Draft HA* between the European Community and Australia, as it stands as of 23 April 2004 [Unpublished].

Singapore and New Zealand seem to have more 'specifically' defined the conditions from which they wished to prevent the possibility of 'free riding' as follows:

> *Singapore/New Zealand* may refuse, revoke, suspend or limit the operating authorization or technical permission of an airline designated by a Member State where:
>
> … …
>
> iii. [an airline designated by a Member State] is already authorized to operate under a bilateral agreement between *Singapore/New Zealand* and another Member State and *Singapore/New Zealand* can demonstrate that, by exercising traffic rights under this Agreement on a route that includes a point in that other Member State, it would be circumventing restrictions on the third, fourth and fifth freedom traffic rights imposed by that other agreement.[410]

At the current stage, however, it is not certain whether these provisions have been maintained in the final HA text.

Another example used in practice is the Chilean text for handling 'free rider' concerns. Both Parties (Chile-the EC) agreed upon the waiver provisions at the conclusion of their HA as follows:

> *The Republic of Chile* may refuse, revoke, suspend or limit the operating authorization or technical permission of an airline designated by a Member State where:
>
> … …
>
> iv. the air carrier is already authorized to operate under a bilateral agreement between *the Republic of Chile* and another Member State and *the Republic of Chile* can demonstrate that, by exercising traffic rights under this Agreement on a route that includes a point in that other Member State, it would be circumventing restrictions on traffic rights imposed by that other agreement; or

[410] Article 2 (3) iii of the *Draft HA* between the European Community and Singapore/New Zealand respectively, as it stands as of 23 April 2004 and 10 February 2004 respectively [Unpublished].

v. the air carrier holds an Air Operators Certificate issued by a Member State and there is no bilateral air services agreement between *the Republic of Chile* and that Member State, and traffic rights to that Member State have been denied to the air carrier designated by *the Republic of Chile*.[411]

Apparently, these "customized provisions" inserted in the Chile-EU HA not only provide a reasonable solution for this 'free rider' problem but also *Item v* above, in particular suggests a 'vehicle' to prevent any future trouble(s) that might be generated by replacing the designation clause in general, as demonstrated in Scenario C above. Furthermore, *Item v* (the last sentence thereof) emphasizes the importance of reciprocity even in negotiating a HA, given that it is still a bilateral agreement.

These models could be considered as useful reference materials for either Korea or any other third countries when developing certain waiver provisions of their own, if needed, which could be *added* to the Standard Designation Clause for the purpose of tackling the given problem. In addition, the OECD Model Provision (for cargo)[412] has been recommended as a key to resolve the 'free rider' issues more permanently, not to mention other positive contributions this model provision might possibly bring to the current regulatory restrictions.[413] Therefore, such other recommended model provisions may also be taken into account in the process of forming the relevant waivers. For

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[411] Article 2 (3) of the *Agreement between the European Community and the Republic of Chile on certain aspects of air services*. (Date initialed uncertain).

[412] The model provision suggested by the OECD permits a Contracting Party receiving a designation to refuse or limit it where the designated carrier is effectively controlled by either:

(a) An airline of such Contracting Party or by nationals of such Party who directly or indirectly control one of its airlines, or

(b) A third country, or by nationals of a third country, which is not a Contracting Party to this Agreement and those air services arrangements with the receiving Contracting Party are more restrictive in terms of international air cargo transportation rights and privileges than those provided under this Agreement.

See "Liberalization of Air Cargo Transport," Directorate for Science, Technology and Industry, Division of Transport, OECD (2 May 2002) at 67, cited in McGonigle, ***supra*** note23 at 64.

[413] **See *ibid.***

example, based on the quoted OECD Model Provision in *supra* note 412, the following variation may be referred which may serve as an option, where appropriate:

> [*Name of the third country*] may refuse, revoke, suspend or limit the operating authorization or technical permission of an air carrier designated by a Member State where:
>
> … …
>
> It is already authorized to operate under an air services arrangement between [*Name of the third country*] and another Member State that is more restrictive in terms of traffic rights and privileges than those provided under this Agreement and by operating a route subject to this Agreement, the designated carrier **is NOT proved** to be exercising only traffic rights and/or privileges that are subject to that other arrangement (by either the contracting Member State or that other Member State).

It appears that finding ways of 'stretching' the limit that a third country partner could, to the maximum degree, veto or boycott the manner that this Standard Clause is drafted, would be an interesting exercise insofar as not discouraging the fundamental goal here that the existing designation clause should be revised. For example, looking to the above experience of including waiver provision(s), it may also be feasible to insert either the reversed burden of proof and/or the concept of "*prima facie*"; all given examples above provide that it is the third country's responsibility to "demonstrate" that a certain designated Community carrier is circumventing applicable bilateral restrictions. However, referring to the second half of the above 'variation,' particularly the added emphasis and the bracketed phrase, the burden of proof may be shifted to the EC Member States: the so called 'reversed burden of proof.' In this case, the concerned

Member State(s) is held responsible for proving that the designated carrier in question is NOT circumventing such applicable restrictions. According to this logic, that designated carrier is *prima facie* circumventing unless otherwise proved. If a third country 'succeeds' in drafting a waiver in this manner, it may provide the third State with more 'flexibility' in refusing an 'unwanted' Community carrier designated by a Member State with which the country wishes to continue or further develop their bilateral air services. Also, by applying the said "reversed burden of proof," less pressure would be imposed on the third country (in an effort to demonstrate a free rider). In theory, all these listed waivers could possibly still be added without discriminating against Community carriers based on their nationality, which may at the same time satisfy the urgent need of the EC to have this Clause consistent with the Community law. So far, the Commission has accepted a number of 'free rider' clauses. Whether or not it would continue to do so with new negotiations of such clauses remains to be seen and depends on its negotiating position in each case.[414]

Likewise, the "trick" of stretching the limit of waiver could be employed, only if so desired by a certain third country and/or indeed depending on the third country's bargaining position.

2-2. Other Community Competence Issues (Art 3-5 of the MHA)

2-2-1. Regulatory Control: Article 3

Speaking of the safety regulations, which are now incorporated on a Community level, and the standards thereof in the EU, it is true that the level is generally maintained quite highly as the Commission asserts.[415] Referring to the previous discussion on this matter in

[414] Comments by Peter van Fenema (August 2005).
[415] *SEC (2005) 336, **supra*** note 158 at 10.

Chapter IV,[416] the overall questions that third countries may have to raise in the context of the Article 3 of the MHA would rather be of 'procedure' than of substance. As it was mentioned above, there are a number of authorities involved in the sphere of European aviation safety. For instance, the national aeronautical authorities of Member States are in charge of issuing AOC plus certain other certificates, while the JAA has been in charge of establishing (technical) regulations applicable to the safety issues. Moreover, at its transitional stage, EASA has been taking over the JAA's role in addition to other competencies that have been granted in cooperation with the Commission. Finally, the Commission represents the Community externally, such as the competence in entering into any commitment covering the EU aviation safety with third countries. In a simple diagram, the US FAA equals EASA and the Commission together. While the EC is aiming to put the aviation safety agenda altogether under the control of EASA eventually, it has not happened yet.

Therefore, the "aeronautical authorities" referred to in the MHA is neither necessarily a single authority nor based upon a single national boundary. Compared to the conventional regime that holds the State of registry responsible for the concerned regulatory control,[417] the overall situation is no longer as simple and transparent as that an *x* aircraft is operating in the name of *x*' airlines designated by *X* state where *x* aircraft is registered. In sum, the given institutional 'joint operation' in the EU represents another added pragmatic and procedural complexity as a consequence of concluding an HA.

In terms of the substantial regulations that still apply to the operation of air services on international routes in practice, it is broadly the

[416] **See *supra*** Chapters IV-3-2 and IV-3-3.
[417] With regard to the notion of State of Registry, **see** Art. 83 bis of *the Chicago Convention* as well as Arts. 12, 30, 31 and 32 where the notion is applicable.

Chicago Convention,[418] and in particular, the safety provision(s) enclosed in each bilateral agreement, considering the complementary nature of Article 3.[419]

Examining Korea within this Model Clause may lead it to question whether or not this provision would prompt *de facto* wet-leasing. The EC Treaty principle of the freedom of establishment encompassing 'free movement of labor' makes it worthwhile to recall that the process of negotiating an 'Open Skies' agreement with the US turned out to be somewhat unsatisfactory (perhaps from the US perspective), because the practice of wet-leasing conflicts with Korea's national legislation.[420] However, it is possible to find a middle ground reconciling both Parties interest with respect to this Clause, even though that the experience with the US may recur. This provision may not be treated as critical as the Designation Clause in the course of negotiating a HA.

2-2-2. *Intra-Community Operation: Articles 4 & 5*

Whereas these Clauses produce legally and politically quite heated debates, they – with respect to the Korean carriers' operation via EU intra-Community routes – may not appear to be as vital in this assessment from Korea's economic perspective in particular. This may be the case since Korea's 5th freedom rights to operate intra-Community routes are relatively insignificant.[421]

However, these Clauses may hold more direct economic implications than others upon consideration of a carrier's operational cost in general. With respect to Article 4 of this Model Agreement, taxation on fuel would result in increasing overall operational cost even if it is limited to intra-Community routes. Since taxes are generally imposed

[418] **See** the relevant provisions of the Convention mentioned in ***supra*** Chapter IV-3.
[419] **See** ***supra*** IV-3-1.
[420] **See** Hu, ***supra*** note 222 at 95-99.
[421] Maeng, ***supra*** note 68 at 95.

on a percentage basis, it is a simple calculation that the sum will amount to already high oil prices (particularly in today's circumstances when oil prices go up so rapidly). Consequently, the third Party carriers may have to bear multiplied additional cost. This may be a more sensitive matter for carriers from countries like Korea that do not have natural resources, and therefore rely heavily on imports.

The relevant Community legislation to Article 5, *Council Regulation 2409/92* lays down specific rules on pricing and spells out the price leadership of Community carriers.[422] This places a 'ceiling' on the price competitiveness of foreign carriers that might threaten the Community carriers' market position within the EU common market. In reality, this provision may not generate any 'dramatic' change because even under the traditional bilateral regime (except for certain 'Open Skies' model agreements), tariffs have been subject to the approval by the authority of a partner State. It would not in any event have been approved in case the proposed tariffs by the third country partner or their carriers were set much lower than their own.[423]

In a nutshell, although the Europeans would argue that the concerned provision is to maintain an intra-EU level paying field according to the Community legislation -- not merely to tax foreign carriers (more), this Clause still seems to be designed in order to promise a more advantageous ground for the EU Community carriers, which third country partners and their air carriers may want to take into their consideration. No matter what immediate impact may be foreseen as a result of having this provision (more precisely the way it is drafted by the EC in the MHA) inserted in a HA, Korea requires an agreeable yet enabling approach as a third country. With such a posture, it may avoid adding another regulatory 'fixture' on top where its national

[422] **See *supra*** I-3-2-2.
[423] **See *supra*** IV-5.

carriers may yet experience decreasing flexibility in their operating conditions.

Article 4, the "intra-Community taxation" Clause is not found in the draft Agreements with the SANZ States,[424] whereas a draft Agreement for China is provided with slight modifications. Instead of having a complementary effect, the Model Clauses replace the existing bilateral provisions between China and the EU Member States on such matters like ground-handling and taxation.[425] Thus, each case within an individual State varies, which Korea or any other third country has to keep in mind.

In addressing questions and seeking alternatives thereto, a third country partner, such as Korea, can list risks and advantages encompassing their own situation by amending the existing bilateral agreements with the HA of the European Community. Then, how strong would Korea's bargaining position be in safeguarding the economic interest of its own carriers and simultaneously making a step ahead as part of the 'liberalization movement' in the international air transport sector?

From a perspective of a State that has maintained a relatively conservative approach toward international civil aviation, the EU MHA is challenging quite a bit of the "comfort and protection" provided by the Chicago Convention and the bilateral system created thereupon.

3. Suggestions for Korea's Bargaining Strategy

So far, it seems that Korea has been taking a 'wait-and-see' approach to the entire HA dossier since the EC actively began contacting its third country partners for rounds of negotiations. As compared to other Asia-Pacific States, the response from Korea appears rather passive.[426] However, Korea seems to be neither in a position to keep silence for much longer nor to treat the matter with the so-called "why bother?"

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[424] ***Supra*** notes 409 & 410.
[425] *Draft HA with the People's Republic of China* (for internal review), 29 March 2004 [Unpublished].
[426] Private communication.

attitude. As examined previously, the whole bloc of the EU is quite an 'attractive' market for Korea; too appealing to lose by excessively taking its own 'sweet' time for the negotiation of this HA. This occurs since EU Member States lack other options to continue international air services without amending the relevant provisions. In case their third Party partners are not willing to cooperate, they will have to terminate those agreements.

How would Korea then moderate a 'conflict of interest' at the negotiation table vis-à-vis its European 'friends'? The following are a few suggestions drawn from the discussion throughout this research. By and large, bargaining Parties are more than clearly aware of what they want to achieve from the deal, while it is another 'universal truth' that they wish to give up on 'nothing' in return – if this proves possible. Simply, no one can always insist on only winning at negotiations: "Something's gotta give!" Thus, a more reasonable assessment of the preparation for this 'imminent' negotiation lists what Korea would not mind 'giving up' while considering what the country should receive from the EC. In this regard, the EC's major focus lies on revising the Designation Clause: Equal designation of all Community carriers. If Korea tries excessively to hold on to the EC's No. 1 interest, it will undoubtedly be a 'bleeding' match. Therefore, it would probably facilitate the bargaining if Korea could accommodate the EC's request on the said provision to the greatest extent possible. However in return for accepting the proposed designation clause Korea may consider the following options to ask in reciprocity:

3-1. Immediate Concerns

3-1-1. Waiver / Concessions

For improved price competitiveness of the Korean flag carriers, 'waiving' Articles 4 & 5 of the MHA might be a good start. As discussed above, it would be undesirable if KE and OZ have to expand operation costs by allowing the EU Member States to impose either fuel taxes or to intervene in the Korean carriers' determination of tariffs for intra-Community routes – further emphasizing the price leadership of Community carriers. Particularly in today's business

environment where state aids are considered a "taboo" (and provided that the Korean carriers are unlikely to benefit from any type of subsidies to compensate for such additional expenditure), the price competitiveness of the Korean carriers that could be achieved in marketplaces may be accorded the highest priority. As could be deduced from the 'free rider' discussion, it is yet being witnessed that certain waivers could be granted from the EC side and such waivers need not be limited to a certain area of the MHA. Thus, the waiver option may be applicable to these Clauses as well. Even within the scope of this HA, it is noteworthy that 'customized' Annexes with regard to imposing taxes on fuel still seem to remain under the discretion of Member States. Whatever the case may be, what eventually determines the success of air services operation is consumers' choice, as with any other area of business. What appeals to them is that the cheaper the fare, the better the quality of services. Therefore, as long as the Korean carriers do not trigger the argument of price dumping, this option seems to be worth considering.

Although the following examination on the option of concessions be viewed as being beyond the scope of a HA, it still remains in the line with the concerned amendment. It may seem irrelevant to a HA negotiation in the context of a negotiating partner (the Community vs. Korea) and the standard text of the Agreement because concessions would be asked for bilaterally with a concerned Member State on one-on-one basis (not the entire Community). Additionally, the negotiating agenda (mostly hard rights in terms of the given examples below) will likely not fit in the standard text; it is all about exceptions. It is still part of the HA negotiation in substance because Korea will be asking for 'alterations/modifications' on the existing bilaterals in return for accepting certain foreseeable disadvantages resulting from the amendment in order for the EU Member States to fulfill their legal obligations imposed by their own court: the ECJ. Thus, it could be

interpreted as a 'gesture' that does the Europeans a 'favor,' depending on perspectives.

Korea may consider requesting concessions. Potential requests include slot allocations in highly congested hub airports like London Heathrow, charges for using airport and other aviation facilities, and/or matters relating to air transport facilitation. This list may comprise simplifying immigration and customs control for Korean nationals, where such improvement is deemed necessary. Concessions may address part of a list (which could possibly be extensive) of what needs to be improved in the area of international air services with its European partners.

If however Korea cannot find a strong ground for insisting on making such exceptional treatment in the area of passenger services, why not consider concessions in the cargo sector? As seen in the previous Section, both Korean carriers' performances in this division have proved to be quite competitive. Korea could however still consider the possibility of obtaining, for instance, the 7th freedom or access to the 'community cabotage,' if one is not already granted to the Korean carriers. More benefits indicate better conditions – if Korea could gain more transportation/operational rights in the cargo sector out of its European partner States, the newly gained business opportunities may perhaps be allocated to its 2nd carrier, OZ. "Concessions" on cargo operations may provide Korea with quite a strong bargaining posture, since it has been a less 'sensitive' area than that of passenger services, considering the history of air transport liberalization.[427]

In evaluation of legal instruments, there is room for flexible or 'creative' interpretation. The MHA may not be an exception. Being more creative, Korea could seek to extend its options to a variety of

[427] For more details, **see** "Liberalization of Air Cargo Transport," Directorate for Science, Technology and Industry, Division of Transport, OECD (2 May 2002), found at <www.oecd.org> [Consulted 04 August 2005].

areas, such as even charter carriers, if so needed. What matters in the end is whether or not Korea will lose revenues in the air transport sector as a whole. Thus, as long as the anticipated economic benefits keep up with the past and lead to growth, the country is not losing due to the 'new' challenges brought about by the horizontal negotiations of concern.

3-1-2. Enhancing the Existing Competitiveness

Aside from the on-site negotiations with the EC, Korea may consider enhancing high quality of services both by the airlines and at the airport(s). Singapore Airlines (SQ) is a good example. It is being said that the high reputation of SQ's service quality that it had gained globally over the years was one of the reasons the Europeans had been hesitant to fully liberalize their market with Singapore,[428] up to the degree of partnership that Singapore ultimately desired with the EC.[429] The Europeans have expressed their concerns about the relatively less competitive position of their carriers vis-à-vis SQ.

The Korean carriers do not have less advantage(s) here. Although it is mostly off the record, a lot of passengers have commented upon the decreasing quality of services offered by the European carriers. It has become more noticeable after the tragic event of 9/11. Airlines have shown an 'unfriendly' attitude and even a high degree of 'defensiveness' toward their own passengers, in order to minimize the possibility to be held liable for any type of compensations. This is totally understandable since most of the airlines around the globe have been suffering financially in the wake of 9/11. This however seems a bit contradictory to the given situation where airlines were losing their business for a lengthy period of time due to the fear of terrorism in the air and therefore, airlines should have provided

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[428] *COM (2005) 79 final,* ***supra*** note 194 at 10. In this document, the Commission's concerns are addressed to the Asia-Pacific region in general including Australia and New Zealand.
[429] Private communication.

'better' services to attract their customers. Nonetheless, this does not always seem to have been the case. In addition, supposedly for the sake of 'aviation security,' the apparent targeting of passengers from 'certain' regions has often been witnessed at airports as well. With the recent introduction of a bundle of more thoroughly drafted Passenger Rights by the European Commission applicable to all the Community carriers,[430] – which has become effective as of 17 February 2005 and binding EU-wide[431] – passengers traveling on the European carriers, regardless of their country of origin, *may* appreciate a higher quality of services in the future.

On the other hand, numbers grow in that passengers originating from elsewhere become more aware of the quality of services provided by the Korean carriers and thus, their reputation has been improving certainly.[432] This therefore seems to be definitely the area where Korean carriers have strength: their competitive advantages. The smooth and efficient handling in international airports, such as at IIA also needs to be taken into account as part of the strategy. As was stressed above, customers' choice is the determining factor for a carrier's fate and ultimately affects a State's performance in international civil aviation as a whole.

In addition, Korea may consider scrapping the bilateral agreements with certain Member States depending on their individual demands laid on the bargaining table. In this case, Korea may need to ensure that it would gain as much commercial advantage from the negotiations with other Member States, pending analysis of those agreements it might decide to decline.

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[430] EC, *Council Regulation (EC) No. 261/2004* establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, 11 February 2004, [2004] O.J. L. 46.
[431] More information on "Air Passenger Rights" including leaflet and poster available at <http://www.europa.eu.int/comm/transport/air/rights/info_en.htm> [Consulted 07 August 2005].
[432] Information in this passage obtained / acquired through private communications.

3-2. Long-Term Considerations

More in the long run, the Korean flag carriers do need to gain overall "reliability" in the context of safety and security, considering the unfortunate accident records that marred their image in the past.

It has also been suggested that regional cooperation would promise a better future for Korea's air transport industry.[433] It is true that the Northeast Asian region may not have as great a geographic advantage as the European continent in establishing a strong inter-regional bloc. The recent success of the Pacific Islands Forum ("PIF") in endorsing an agreement creating an open aviation area, PIASA,[434] may denote the importance of finding like-minded partners. Indeed, the PIF has overcome the disadvantage of vast distances in geography, a small population, plus not very well-established domestic markets. Despite this, nothing has stopped them from forming a regional grouping,[435] which certainly proves "doability." Korea has also been demonstrating its interest in developing regional cooperation as was introduced above.[436] It seems like a good long term plan to strengthen Korea's position in the field of international civil aviation in general, irrespective of the immediate outcome from the HA negotiations with the EC.

The recent EU-China Joint Declaration might bring about prospects for Korea's long-term planning; it might open the door for a more feasible formation of the Northeast Asian Open Aviation Area. China is indeed a huge market that has a great deal of potential, as is already well known. Korea has certain assets to attract Chinese partners. Among these are more expertise and experience in surviving the pressures under a market economy; longer history of operating privatized airlines together with international strategic cooperation, such as forming alliances; and the new airport, IIA. The airport should be an attractive hub location considering the routes that the Chinese

[433] **See** Maeng, ***supra*** note 68 at 95-97.
[434] ***See*** *ICAO Annual Report of Civil Aviation 2003,* ***supra*** note 347 at 34; **see also** PIASA <www.forumsec.org.fj/division/DEPD/infra/aviation/PIASA_final%2004.pdf >.
[435] **See** ***supra*** notes 3 & 347 and accompanying texts.
[436] ***See supra*** note 37.

carriers operate. When the market is deemed 'ripe,' eventually forming an EU-Northeast Asia Open Aviation Area may be an attainable goal.

The HA negotiation then becomes an interim measure[437] leading to a more futuristic and concrete business engagement and bigger-scale aviation policies and relations.

3-3. Lessons from Other Third Countries' Experience

Certainly, there is no right or wrong approach. It is entirely legitimate that each State implements a different policy (and sticks to it), which has been formulated on the basis of different views, mindsets, cultures, mentalities, acceptable business ethics and of course their own varied economic and political situations. For instance, there is virtually no domestic market in the case of Singapore. If that is the case, there is no other option but seeking to increase traffic volume via international routes; the more foreign carriers fly from/to/over Singapore, the better SQ's performance becomes as a result of these increased market access and larger traffic volumes expected through reciprocity. Such geographic situation of Singapore might have constituted the major reasons to develop its liberal aviation policy.[438] Then, the rest follows.

Speaking of the degree of joint actions between Australia and New Zealand, and their reasonable amount of cooperation, it must be pointed out that they have been sharing a lot in common, such as history, ethnic majority, the origin of their culture, and their creation as independent nation States. Also they are geographically located adjacent to one another and much more. As a result, it is more likely for them to find the like-minded approach. The liberalization of their air transport seems to have peaked, yet is highly effective. They have demonstrated a good example that a high degree of liberalization is possible without 'scaring off' other States.[439]

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[437] This view may reduce the pressure that Korea may be bearing with regard to the current challenge: HA.
[438] Private communication.
[439] Private communication.

Speaking of the draft versions of the EU-SANZ HA as it stood in late 2003 and early 2004, which has been illustrated in the course of drafting the attached Appendix, *"Mock" EU-Korea Horizontal Agreement*, it was unable to detect any 'dramatic' conflicts against the EC's initial proposal. It must not be totally surprising given the degree of their overall liberal aviation policy, which has got even the EC to slow down, finding their requests 'too demanding.'[440] As was said, all three States of the "SANZ" grouping have meanwhile initialed a HA respectively with the EC. If they have kept a similar approach to balancing interests, the final Agreements will not have differed much from the said draft Agreements.

Not only those advocates of liberal aviation policies, such as SANZ, but also a number of East European States have also initialed the HAs with the EC.[441] In this context, it would be interesting to reflect on what may be underlying a variety of reactions that those States have shown in the course of negotiations although the end result is the "same": they have all agreed to revise the existing bilaterals with HAs. This would be a useful exercise for Korea to assess its own position (what is different and what is similar). Speaking of those East European States above, perhaps one of 'many' underlying reasons for their tactic may be that they have considered their gains through this 'preliminary' cooperation to strengthen their positions in becoming part of the ECAC in the near future, if not their 'hoped-to-be-soon' accession to the European Union.

As the EC sloganned for the MHA, 'no one model fits all.' One State cannot, or rather shall not copy another State's approach or strategy. However, there are always lessons to pick up, which may be either good or bad.

In brief, Korea's bargaining position vis-à-vis the European Community does not appear to be so unconventional. First, already a majority of the EC's third Party partners have shown

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[440] **See** *COM (2005) 79 final,* ***supra*** note 194 at 10.
[441] **See** ***supra*** Chapter III-2-2-2.

reluctance in signing HAs because they seem quite uncertain as to what benefits they could expect from this 'new' type of arrangement. On the other hand, it is simply a must for Europeans to replace the existing bilaterals with the HAs to continue their air services operation due to the Court judgment.

Secondly, within the current, rather restrictive bilaterals between Korea and the EU Member States (see, Chapter IV *supra* and Appendix *infra*), there will unlikely be any major changes as a result of accepting multiple designation of Community carriers. Referring to the relevant discussions above, certain conditions should be met for Community carriers to be additionally designated on top of the originally designated carrier(s): those existing bilaterals mentioned above indicate that there may be very few unused traffic rights (between Korea and any Member States) in addition to that there is almost no multiple designation allowed under those bilaterals, except for that with Austria. Thus, the issue of free rider may not challenge Korea as much in the very near future; *i.e.*, not much (dangerous) change for Korea's position to be expected as a result of signing a HA. This suggests that the dangers or risks that Korea might have been foreseeing as a result of concluding a HA with the EC may be more psychological than real. The effect of a HA with the EC will matter more when negotiating additional hard rights in the future.

Thirdly, as was briefly mentioned at the top of this Chapter, Korea's market value even from the European perspective is not just something that can be disregarded.[442] It is true that the `European carriers enjoy 5th freedom rights granted by Korea; connecting services to the nearest Japan, China, and elsewhere in the Far East, which are all quite valuable markets as well. Again from Korea's point of view, losing access to the entire continent of Europe by not responding to the call from the European side for the amendment of the existing bilaterals is not feasible. It is just a matter of time; the Europeans' visit is imminent.

To this end, it seems fair to conclude that Korea could be more confident of their bargaining position and embrace the negotiations. Challenges and Opportunities usually come together!

[442] **See *supra*** note 219 and accompanying text.

CONCLUSION

The "substantial ownership and effective control of airlines" is indeed a long-standing 'headache' enrooted in the bilateral system. Simply put, it seems like a "chicken & egg" problem: as long as the bilateral system stands, in reality, simply removing the nationality requirement is undoable, since without it, there would be no base to operate air services on a reciprocity basis – the issue of foreign market access flies non-stop en route to the question of nationality. On the other side of the coin, as long as the ownership and control requirements are mandatory in concluding international air services agreements, forming a single multilateral regulatory regime in this industry still seems far. In other words, if a multilateral forum is provided where States do not need to exchange traffic rights relying upon reciprocity, the ownership and control restriction could be liberalized, if not totally removed. Then, which one would or should come first: the establishment of a multilateral regime or the removal of the ownership and control requirements? Neither seems to be completely achievable by itself. Yet, at the current stage, it is also quite unpredictable: discussion concerning it has stalled long enough. Due to the widely varied interest of States, it has not been simple to please everyone with one solution.

Nonetheless, the world aviation community has constantly been attempting to find a solution that may please as many as possible. When the community in the interim gathered at the 35th ICAO General Assembly in September 2004, a significant amount of efforts with quite a number of noteworthy achievements were presented in response to the questions raised at the 5th World Air Transport Conference held in March 2003 and more fundamentally to liberalize the industry with a focus on removing ownership and control restrictions as an essential first step.

Undoubtedly, the ECJ's 'Open Skies' judgment has created a milestone in international civil aviation history. This ruling has *inter alia* forced the global aviation community to 'evolve.' When the judgment was first declared in 2002, a number of 'educated' concerns were expressed over the vagueness in it, particularly with respect to the European Commission's full negotiating mandate with the United States in an attempt to establish a common market for the aviation industry between the two jurisdictions, which was 'supposedly' the

Commission's fundamental purpose. However, it has not taken very long for the Commission to eventually obtain it; the European Council, as of 2003, granted the Commission a comprehensive mandate, representing the entire Community, for its 'ambitious' project of creating an EU-US Open Aviation Area.

The EU certainly deserves applause for its unfailing and persistent efforts in liberalizing the international air transport sector, and being a driving force in the process. In addition to receiving a comprehensive mandate for the EU-US OAA, the Commission and Member States have cooperated in introducing the Model Horizontal Agreement, under the given horizontal – *i.e.* shared – mandate, that would serve to bring the ownership and control requirements in current bilateral air services agreements voided by the Court's decision into conformity with EC law.

Indeed, the nature of a Horizontal Agreement has been questioned since such a form of legal instrument is not what is commonly found, considering, for instance, the shared mandate of execution. Briefly speaking, it is not a totally new kind of international air services agreement but still a bilateral agreement where the notion of *national* ownership and control is shifted to that of the *European Community's.* Although not being an 'innovative' model of air services agreements, it could still be seen as the most developed *sui generis* by far. Furthermore, this Horizontal Agreement in effect generates the extraterritorial application of not only Community legislation but the external recognition of 'Community carriers.' In any event, the EC has been scoring considerable achievements since the ECJ's 'Open Skies' decision, of which the 'invention' of Model Horizontal Agreement is a part. In sum, these EC activities have, on a global scale, contributed to advancing the discussion of liberalization.

As was anticipated, in the course of such negotiations or attempts thereof for the EC to amend the said voided designation of airlines provision and eventually to fulfill their legal obligations imposed by the ECJ, the EC's third country bilateral partners have shown diverse reactions to this European way of liberalizing the international air services regime. While some States have already initialed the proposed horizontal agreements with the EC, a majority of the third countries have shown reluctance thereto. The concerned horizontal negotiations as well as agreements of that nature may appear to be somewhat 'intimidating' to third countries. However, the bargaining position of non-Community bilateral partners in

general may not be as shaky as it might have been imagined since the EU is the Party that is under pressure to revise the concerned provisions, not the non-Community countries.

Speaking of Korea's position with respect to the negotiations with the EC for a horizontal agreement, it might be an 'unrelated' past experience of its own trade negotiation that Korea may prefer to take into account, the conditions of which might be applicable to the present situation: The "Screen Quota" negotiation with the United States.

In brief, Americans[443] have been very unhappy about Korea's Screen Quota policy, alleging it is an unfair trade practice against the GATT free trade principles to which both Parties are signatories, and thus it is a safeguard measure setting up an obvious trade barrier. Throughout a serious of rounds, Americans have been targeting to abolish this quota. Understandably, the Korean government has been reluctant, since this industry encompasses not only its commercial value but also the attached 'sentimental' value to the country and its people, just as national pride blended in matters related to the international civil aviation. This agenda has been touted for a lengthy period of time.

In summation, as opposed to the Korean government's initial concern about the effect of direct distributorship by the 'gigantic' US firms into its domestic market by removing this Screen Quota, in recent years, the Korean film industry has been growing in prominence more than ever and has gained competitiveness internationally. What brought about such results in the end was the Korean version of America's own "Buy American" campaign put forth by the Korean nationals. More Korean moviegoers *intentionally* chose to see Korean films, which they might have done otherwise without such evident threats of the invasion of their cultural values by 'aliens.' The additional revenue generated by the increased audience members, as a consequence, enabled the Korean filmmakers to invest more resources in their production, which in turn led to improvements in the quality of Korean films in general. This pattern of circulation has contributed to strengthening this particular industry's competitiveness against the uncontrolled massive 'import' by the US distributors.

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[443] Interestingly, the US does not come across as an extreme liberalist in trade on a consistent basis, the practice pattern of which has been witnessed through a number of and a variety of trans-border deals over the years. For example, **see** their national security argument with respect to the liberalization of O & C clause discussion ***supra*** I-2-2.

Given such an extraordinary experience, Korea may believe in the nature of its own nationals as being 'patriotic' or having the tendency to become 'patriotic' under certain external pressures. Consequently, the country may consider more boldly joining in the global movement toward liberalization of the international civil aviation industry. In the worst case scenario, it is more than likely that the nationals of Korea will voluntarily safeguard their own national flag carriers. Just as the aviation industry is not an 'infant' anymore, nor are the Korean flag carriers. They seem to have reached a state at which they may confidently be exposed to free competition given the statistical proofs.

Since the rise of 'liberal thinking' in international civil aviation, perhaps springing from the US' deregulation of its airlines, continued progress internationally has been quite sluggish. As substantiated by observation of its history of liberalization, such an 'established' pattern would not change dramatically, yet it is assuring that it has moved forward: slowly yet surely. On the contrary, during the past few years, a fair amount of development has been witnessed thanks to our fellow Europeans who have speeded up the process. Thus, awaiting yet another round of liberalization movement in a European style is even 'thrilling.'

Dr. H. P. van Fenema begins one of his recent articles, on the topic of the airline ownership and control, as follows:

> "On a coach class flight from Amsterdam to Montreal..... [one] passenger [questions], 'do the other coach passengers know or care about the ownership of the airline they are flying on or the nationality of its CEO and supervisory board? .... Hardly anyone knows or really cares as long as [its service] is [good] and the price is acceptable... "[444]

Precisely, when it comes to the issues of real world business management and/or day-to-day business transactions, such 'intellectual' debates on the 'discriminatory' nature of the ownership and control clauses in bilateral air services agreements, the great principles of non-discrimination (equal treatment) and freedom of establishment, and the notions thereof tend to lose their original value and do not matter much. Do airlines carry out their everyday operation with the implications of a court's ruling in their mind? Would passengers avoid choosing a certain airline because they violated EC Treaty principles? Mostly probably not! It then becomes more of a question whether the business will gain or lose due to the resultant

[444] van Fenema, ***supra*** note 34 at 7.

situations. The ideal regulatory framework, specifically speaking, for the international air services industry will secure for the service providers a healthy business environment and confer to consumers more cost-efficient, yet higher quality services, most desirably on a global scale through which goods, labors, and capital could flow *truly* beyond the national borders. The win-win on both ends – that must be what really matters in the end.*

* **DISCLAIMER**: Recent development in international civil aviation may affect the accuracy of the information presented herein. The latest date of data cited varies: see each corresponding footnote(s). However, the last update generally stands between the time range of end-2004 and the 2nd quarter of 2005.

APPENDIX

"Mock" Horizontal Agreement
between the European Community and the Republic of Korea
on Certain Aspects of Air Services[i]

THE EUROPEAN COMMUNITY

of the one part, and

THE REPUBLIC OF KOREA

of the other part

(hereinafter referred to as 'the Parties')

NOTING that bilateral air service agreements have been concluded between [several][ii] Member States of the European Community and *the Republic of Korea* containing provisions contrary to Community law.

NOTING that the European Community has exclusive competence with respect to several aspects that may be included in bilateral air service agreements between Member States of the European Community and third countries,

NOTING that under European Community law Community air carriers established in a Member State have the right to non-discriminatory access to air routes between the Member States of the European Community and third countries,

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[i] This full-text draft of a mock Horizontal Air Transport Agreement ("Draft"), in essence, follows the Model Horizontal Agreement presented by the European Commission applicable to its all non-Community partners, based on which the Government of Korea may soon have to consider negotiating with the European Community to amend the concerned provisions of the existing bilateral air services agreements signed between its Member States and Korea. The additional suggestions and/or variations (***e.g.***, choice of terms) provided hereunder may complement the fundamental frame of this Draft, which are made in reference to a few selected draft horizontal agreements, as of 2004, with certain non-Community partners of the EC in the Asia-Pacific region; each indeed varies.

[ii] Due to the limited information, the precise number of Member States that have, to date, signed their bilateral agreements with Korea is not available. The same applied to the attached Annexes.

HAVING REGARD to the agreements between the European Community and certain third countries providing for the possibility for the nationals of such third countries to acquire ownership in air carriers licensed in accordance with European Community law,

RECOGNIZING that provisions of the bilateral air service agreements between Member States of the European Community and *the Republic of Korea*, which are contrary to European Community law, must be brought into full conformity with it in order to establish a sound legal basis for air services between the European Community and *the Republic of Korea* and to preserve the continuity of such air services,

NOTING that provisions of the bilateral air service agreements between Member States of the European Community and *the Republic of Korea*, which are not contrary to European Community law, do not need to be amended or replaced,

NOTING that it is not a purpose of the European Community, as part of these negotiations, to increase the total volume of air traffic between the European Community and *the Republic of Korea*, to affect the balance between Community air carriers and air carriers of *the Republic of Korea*, or to negotiate amendments to the provisions of existing bilateral air service agreements concerning traffic rights.

HAVE AGREED AS FOLLOWS:

ARTICLE 1

General Provisions

1. For the purposes of this Agreement, 'Member States' shall mean Member States of the European Community.

2. References in each of the agreements listed in Annex 1 to nationals of the Member State that is a party to that agreement shall be understood as referring to nationals of the Member States of the European Community.

3. References in each of the agreements listed in Annex 1 to air carriers or airlines of the Member State that is a party to that agreement shall be understood as referring to air carriers or airlines designated by that Member State.

ARTICLE 2[iii]

Designation by a Member State

1. The provisions in paragraphs 2 and 3 of this Article shall supersede the corresponding provisions in the articles listed in Annex 2 (a) and (b) respectively, in relation to the designation of an air carrier by the Member State concerned, its authorisations and permissions granted by *the Republic of Korea*, and the refusal, revocation, suspension or limitation of the authorisations or permissions of the air carrier, respectively.

2. On receipt of a designation by a Member State, *the Republic of Korea* shall grant the appropriate authorisations and permissions with minimum procedural delay, provided that:

i. the air carrier is established in the territory of the designating Member State under the Treaty establishing the European Community and has a valid Operating Licence in accordance with European Community law;

ii. effective regulatory control of the air carrier is exercised and maintained by the Member State responsible for issuing its Air Operators Certificate and the relevant aeronautical authority is clearly identified in the designation; and

iii. the air carrier is owned and shall continue to be owned directly or through majority ownership by Member States and/or nationals of Member States, or by other states listed in Annex 3 and/or nationals of such other states, and shall at all times be effectively controlled by such states and/or such nationals.

[iii] In the draft EC-SANZ horizontal agreements, this provision is titled "Superseding amendments" instead. *Draft Air Transport Agreement between the European Community and Australia/ New Zealand/ Singapore* (2003 & 2004) [Unpublished] [*EC-SANZ Agreement*].

3. *The Republic of Korea* may refuse, revoke, suspend or limit the authorisations or permissions of an air carrier designated by a Member State where:

i. the air carrier is not established in the territory of the designating Member State under the Treaty establishing the European Community or does not have a valid Operating Licence in accordance with European Community law;

ii. effective regulatory control of the air carrier is not exercised or not maintained by the Member State responsible for issuing its Air Operators Certificate, or the relevant aeronautical authority is not clearly identified in the designation; or

iii. the air carrier is not owned and effectively controlled directly or through majority ownership by Member States and/or nationals of Member States, or by other states listed in Annex 3 and/or nationals of such other states.

In exercising its right under this paragraph, *the Republic of Korea* shall not discriminate between Community air carriers on the grounds of nationality.

ARTICLE 3[iv]

Rights with regard to regulatory control (of safety)

1. The provisions in paragraph 2 of this Article shall complement the articles listed in Annex 2 (c).

2. Where a Member State has designated an air carrier whose regulatory control is exercised and maintained by another Member State, the rights of *the Republic of Korea* under the safety provisions of the agreement between the Member State that has designated the air carrier and *the Republic of Korea* shall apply equally in respect of the adoption, exercise or

[iv] Articles 3, 4 and 5 of this Draft may be combined and titled "Complementary amendments" as in the Draft Horizontal Agreements between the EC and SANZ.

maintenance of safety standards by that other Member State and in respect of the operating authorisation of that air carrier.

ARTICLE 4

Taxation of aviation fuel

1. The provisions in paragraph 2 of this Article shall complement the corresponding provisions in the articles listed in Annex 2 (d).

2. Notwithstanding any other provision to the contrary, nothing in each of the agreements listed in Annex 2 (d) shall prevent a Member State from imposing taxes, levies, duties, fees or charges on fuel supplied in its territory for use in an aircraft of a designated air carrier of *the Republic of Korea* that operates between a point in the territory of that Member State and another point in the territory of that Member State or in the territory of another Member State.

ARTICLE 5[v]

Tariffs for carriage within the European Community

1. The provisions in paragraph 2 of this Article shall complement the articles listed in Annex 2 (e).

2. The tariffs to be charged by the air carrier(s) designated by *the Republic of Korea* under an agreement listed in Annex 1 containing a provision listed in Annex 2 (e) for carriage wholly within the European Community shall be subject to European Community law.

[v] Only "Amendments" provision be found in the Draft Horizontal Agreement between the EC and Australia, where all the provisions from Article 2 to Article 5 of this Draft are incorporated in terms of the outcomes of the individual negotiation between the two Parties in concern.

ARTICLE 6

Application of other provisions[vi]

The provisions of the agreements listed in Annex 1, other than those affected by Articles 1 to 5 of this Agreement, shall continue to apply, provided that they are not in contradiction with these Articles.

ARTICLE 7

Annexes to the Agreement

The Annexes to this Agreement shall form an integral part thereof.

ARTICLE 8[vii]

[Version 1][viii]

Resolution of conflicts

Any conflict arising from the interpretation or implementation of this Agreement shall be resolved by mutual agreement of the Parties.

[Version 2][ix]

Dispute settlement

1. Any dispute arising in relation to the implementation of the provisions set out in Article 2 and Article 3 of this Agreement shall be resolved under the dispute settlement provisions of the relevant Agreement between *the Republic of Korea* and the Member State concerned as listed in Annex 1.

2. In relation to any dispute that arises under paragraph 1 of this Article, the Community shall be represented by the Commission of the European Communities.

[vi] In other words, "Confirmation of other provisions."
[vii] Variations of the Dispute Settlement provision presented
[viii] An example from the *Draft EC-China Agreement*, which is worded in a more generic fashion.
[ix] An example from the *EC-SANZ Agreement,* which represents the Parties' arrangement on the subject matter out of their negotiations.

ARTICLE 9

Revision or amendment

The Parties may, at any time, revise or amend this Agreement by mutual consent.

ARTICLE 10

Entry into force and provisional application

1. This Agreement shall enter in force when the Parties have notified each other in writing that their respective internal procedures necessary for its entry into force have been completed.

2. Notwithstanding paragraph 1, the Parties agree to provisionally apply this Agreement from the first day of the month following the date on which the Parties have notified each other of the completion of the procedures necessary for this purpose.

3. Agreements and other arrangements between Member States and *the Republic of Korea* which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally are listed in Annex 1 (b). This Agreement shall apply to all such Agreements and arrangements upon their entry into force or provisional application.

ARTICLE 11

Termination

1. In the event that an agreement listed in Annex 1 is terminated, all provisions of this Agreement that relate to the agreement listed in Annex 1 concerned shall terminate at the same time.

2. In the event that all agreements listed in Annex 1 are terminated, this Agreement shall terminate at the same time.

IN WITNESS WHEREOF, the undersigned, being duly authorised, have signed this Agreement.

Done at [....] in duplicate, on this [...] day of [..., ...] in the Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovak, Slovene, Spanish, Swedish and *Korean* languages. In case of divergence the [English/French] text shall prevail over the other language texts.

FOR THE EUROPEAN COMMUNITY: FOR *THE REPUBLIC OF KOREA*:

ANNEX 1

List of agreements referred to in Article 1 of this Agreement

(a) Air service agreements between *the Republic of Korea* and Member States of the European Community which, at the date of signature of this Agreement, have been concluded, signed and/or are being applied provisionally[x]

- Agreement between **the Government of the Federal Republic of Austria and the Government of the Republic of Korea** relating to Air Services signed at Vienna on 15 May 1979, hereinafter referred to "Korea-Austria Agreement" in Annex 2;

  Modified by the Exchange of Notes dated 16 November 1990,[xi]

  Modified by the Exchange of Notes dated 16 August 1996,

  Last modified by [*Agreed Minutes / Memorandum of Understanding*] done at [*place*] on [*date*].[xii]

- Agreement between **the Government of the Kingdom of Belgium and the Government of the Republic of Korea** relating to Air Services signed at Brussels on 20 October 1975, hereinafter referred to "Korea-Belgium Agreement" in Annex 2 ;

- Agreement between **the Government of the Republic of Finland and the Government of the Republic of Korea** relating to Air Services signed at Seoul on 12 November 1996, hereinafter referred to "Korea-Finland Agreement" in Annex 2;

- Agreement between **the Government of the French Republic and the Government of the Republic of Korea** relating to Air Services signed at Seoul on 7 June 1974, hereinafter referred to "Korea-France Agreement" in Annex 2 ;

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[x] The information in Annex 1 and 2 of this Draft is to be further completed and thus listed only insofar as the relevant documentations have availed to the author.

[xi] This is the date of certification by the Federal Ministry for Foreign Affairs of the Republic of Austria.

[xii] The complete list of modifications following the initial agreements between the concerned Parties provided herein, including the last, is not always available due to the limited access to the government documentations as was noted above. The same applies to the entire foregoing list of the Annexes.

- Agreement between **the Federal Republic of Germany and the Republic of Korea** relating to Air Services signed at Bonn on 7 March 1995, hereinafter referred to "Korea-Germany Agreement" in Annex 2 ;
- Air Transport Agreement between **the Kingdom of Spain and the Republic of Korea**, signed at Seoul on 21 June 1989, hereinafter referred to "Korea-Spain Agreement" in Annex 2;
- Agreement between **the Government of the Kingdom of The Netherlands and the Government of the Republic of Korea** relating to Air Services signed at the Hague on 24 June 1970, hereinafter referred to "Korea-The Netherlands Agreement" in Annex 2;
- Agreement between **the Government of the United Kingdom of Great Britain & Northern Ireland and the Government of the Republic of Korea** relating to Air Services signed at Seoul on 5 March 1984, hereinafter referred to "Korea-United Kingdom Agreement" in Annex 2;

  Modified by the Exchange of Notes dated 13 August and 30 October 1991,

  Modified by the Exchange of Notes dated 11 September 1996,

  Modified by the Exchange of Notes dated 29 June 2001.

Etc.

(b) Air service agreements and other arrangements initialled or signed between *the Republic of Korea* **and Member States of the European Community which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally**[xiii]

[xiii] The author does not have full access to the information necessary for this section because the air services agreements usually do not become available to 'general public' until long after they have come into force and been applied.

ANNEX 2

List of articles in the agreements listed in Annex 1 and referred to in Articles 2 to 5 of this Agreement

(a) Designation by a Member State:

- Article 3, Paragraphs 1,[xiv] 2, 3 and 6 of the Korea-Austria Agreement;
- Article 3, Paragraphs 1, 2, 3 and 6 of the Korea-Belgium Agreement;
- Article 3 of the Korea-Finland Agreement;
- Article 3, Paragraphs 1, 2, and 3 of the Korea-Germany Agreement;
- Article 3, Paragraphs 1, 2, and 3 of the Korea-The Netherlands Agreement;
- Article III, Paragraphs 1, 2, 3 and 5 of the Korea-Spain Agreement;
- Article 4 of the Korea- United Kingdom Agreement;

Etc.

(b) Refusal, Revocation, Suspension or Limitation of Authorisations or Permissions:

The articles listed below are being superseded only to the extent they contradict with Article 2, Paragraph 3 of this Agreement.[xv]

- Article 3, Paragraphs 4 and 5 of the Korea-Austria Agreement;
- Article 3, Paragraphs 4 and 5 of the Korea-Belgium Agreement;
- Article 4 of the Korea-Finland Agreement;
- Article 3, Paragraphs 4 and 5 of the Korea-Germany Agreement;
- Article 3, Paragraphs 4 and 5 of the Korea-The Netherlands Agreement;
- Article III, Paragraph 4; Article IV of the Korea-Spain Agreement;
- Article 4, Paragraph 4; Article 5 of the Korea-United Kingdom Agreement;

Etc.

[xiv] Article 3 (1) as provided for in the Exchanges of Notes dated 16 August 1996, amending *the Korea-Austria Agreement*: Regarding multiple designation.

[xv] Such additional note(s) could be inserted as in the case of the *EC-SANZ Agreements*, where applicable.

(c) Regulatory control:

- Article 7 of the Korea-Austria Agreement;
- Article 7 of the Korea-Belgium Agreement;
- Article 9 of the Korea-Finland Agreement;
- Article 11 of the Korea-The Netherlands Agreement;
- Article VIII of the Korea-Spain Agreement;
- Article 9A as provided for in the Exchange of Notes dated 29 June 2001 amending the Korea-United Kingdom Agreement;

Etc.

(d) Taxation of Aviation Fuel:

- Article 4 of the Korea-Austria Agreement;
- Article 4 of the Korea-Belgium Agreement;
- Article 5 of the Korea-Finland Agreement;
- Article 5 of the Korea-Germany Agreement;
- Article 4 of the Korea-The Netherlands Agreement
- Article V of the Korea-Spain Agreement;
- Article 6 of the Korea-United Kingdom Agreement;

Etc.

(e) Tariffs for Carriage within the European Community:

- Article 9 of the Korea-Austria Agreement;
- Article 9 of the Korea-Belgium Agreement;
- Article 12 of the Korea-Finland Agreement;
- Article 9 of the Korea-Germany Agreement;
- Article 9 of the Korea-The Netherlands Agreement;
- Article VI of the Korea-Spain Agreement;
- Article 8 of the Korea-United Kingdom Agreement;

Etc.

ANNEX 3

List of other states referred to in Article 2 of this Agreement

(a) The Republic of Iceland (under the Agreement on the European Economic Area);

(b) The Principality of Liechtenstein (under the Agreement on the European Economic Area);

(c) The Kingdom of Norway (under the Agreement on the European Economic Area);

(d) The Swiss Confederation (under the Agreement between the European Community and the Swiss Confederation on Air Transport)

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