Notes

Toward Open Skies: Liberalizing Trade in International Airline Services*

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International air transport services play an important role in world trade. More than one billion passengers fly every year and over twenty million tons of cargo are shipped by air annually.[1] As businesses further expand their operations internationally, and the tourism industry continues to grow, air transport will become an even more crucial part of international commerce. In order to ensure that the international air transport system is able to meet the needs of international trade and tourism, the current regime based on the bilateral exchange of traffic rights[2] must be reexamined.

The International Civil Aviation Organization (ICAO)[3] recently sponsored a World-wide Air Transport Colloquium (the

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1. Wolfgang Michalski et al., *New Policy Approaches to International Air Transport: Main Issues and Summary of the Discussion, in* INTERNATIONAL AIR TRANSPORT: THE CHALLENGES AHEAD 7 (Organisation for Economic Co-operation and Development (OECD) 1993).

2. The international air traffic system presently consists of 1,200 different bilateral agreements that have been negotiated between governments over the past 50 years. These accords designate landing rights and overflight privileges for a country's airlines. NATIONAL COMMISSION TO ENSURE A STRONG AND COMPETITIVE AIRLINE INDUSTRY: CHANGE, CHALLENGE AND COMPETITION 20 (1993) [hereinafter U.S. COMMISSION REPORT]. This framework is in contrast to the General Agreement on Tariffs and Trade, a multilateral agreement that applies the same general rules to all member trading partners. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, U.N.T.S. 187 [hereinafter GATT]. For further analysis of GATT and its possible application to international air transport, see *infra* notes 216-26 and accompanying text. The bilateral system is viewed by many as time consuming, inefficient, and detrimental to the interests of consumers, airports, and cities by its imposition of regulatory limitations on growth and opportunities in the air transport sector. *See infra* notes 103-06 and accompanying text.

3. Based in Montreal, the International Civil Aviation Organization (ICAO) was created in 1944 at the Chicago Conference and currently consists of 156 member states. JACQUES NAVEAU, INTERNATIONAL AIR TRANSPORT IN A

"Colloquium")[4] at which over 500 delegates explored the future of international air transport regulation. The delegates focused on whether to maintain the current framework of bilateral aviation agreements, or to shift to a multilateral framework.[5] The Colloquium was part of the ICAO's ongoing preparation for an Air Transport Conference, to be held in late 1994,[6] which will further address these issues.[7] Although it is unlikely that this Conference will produce an overhaul of the bilateral regime, the current crisis faced by the international airlines industry is propelling the idea of multilateral liberalization forward, particularly in the United States and the European Union (EU).[8]

In an effort to bolster the U.S. airline industry, which has lost over ten billion dollars in the past three years,[9] President Clinton and Congress appointed the National Commission to Ensure a Strong Competitive Airline Industry (the "U.S. Com-

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CHANGING WORLD 49 (1989). It is an arm of the United Nations and its mission is "to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport." Convention on International Civil Aviation, Dec. 7, 1944, art. 44, 61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295, 326 [hereinafter Chicago Convention]. A Legal Director of the International Civil Aviation Organization has described the organization as having "wide quasi-legislative and executive powers in the technical regulatory field, [but] only consultative and advisory functions in the economic sphere." Michael Milde, *The Chicago Convention - After Forty Years*, 9 ANNALS AIR & SPACE L. 119, 122 (1984).

4. The Colloquium took place in April, 1992, in Montreal. ICAO, DOC. NO. 9605, ANNUAL REPORT OF THE COUNCIL 33-35 (1992) [hereinafter ICAO ANNUAL REPORT].

5. Participants also discussed the applicability of international trade concepts, such as market access (defined as access to routes, traffic rights, entry and national treatment), H.A. Wassenbergh, *The Application of International Trade Principles to Air Transport*, 12 AIR L. 84, 88 (1987), and non-discrimination (also referred to as "most-favored nation" treatment or MFN, which requires a country granting a trade privilege to another country to grant that same trade privilege to all other countries of similar diplomatic status, *see infra* notes 220-26 and accompanying text) to air transport. ICAO ANNUAL REPORT, *supra* note 4.

6. The conference, entitled "International Air Transport Regulation: Present and Future," will take place Nov. 23 through Dec. 6, 1994 — exactly fifty years after the Chicago Conference. *ICAO 1994 Meeting Will Mark 50th Anniversary of Chicago Conference*, WORLD AIRLINE NEWS, Apr. 5, 1993, *available in* LEXIS, News Library, Allnws File. For a description of the Chicago Conference, see *infra* notes 31-55 and accompanying text.

7. ICAO ANNUAL REPORT, *supra* note 4, at 34.

8. N.B.: European Union, or EU, will be used throughout this Note to refer to what was formerly known as the European Community, or EC, in order to avoid confusion.

9. *The War in the Skies*, ECONOMIST, Aug. 14, 1993, at 66.

mission") to develop a plan to improve the industry.[10] The EU initiated a similar commission (the "EU Committee of Wise Men") to review the problems of its own beleaguered airlines industry[11] which posted losses totalling seven billion dollars between 1990 and 1992.[12] The global scope of the industry's crisis is demonstrated by the fact that the 221 airline members of the International Air Transport Association (IATA)[13] lost 11.5 billion dollars on international scheduled services alone between 1990 and 1992.[14] This is more than all the net profits made by the industry since international airline services began soon after World War I.[15]

Both the U.S. Commission and the EU Committee of Wise Men have recommended further liberalization[16] in the trade of

10. The 26-member commission, headed by former Virginia Governor Gerald Baliles, began meeting in May 1993 and after intensive study and numerous hearings submitted their recommendations to the President in August of the same year. Its members consisted of industry experts from the private and public sectors, as well as representatives from airline unions and management. U.S. COMMISSION REPORT, *supra* note 2, at ii-2.

11. The Committee of "Wise Men" began conducting hearings in September of 1993 and is chaired by former Belgian Transport Minister, Herman De Croo. *'Wise Men' Seeking Answers to Europe's Airline Crisis*, AVIATION WK. & SPACE TECH., Sept. 6, 1993, *available in* LEXIS, Trans Library, Air File. The EU Committee of Wise Men released its report in February, 1994, and immediately began urging the EU to adopt its recommendations as official EU policy. *Committee Recommends Liberalizing Rules for European Airline Industry*, Daily Rep. for Executives (BNA), at A21 (Feb. 2, 1994).

12. Pierre Sparaco, *E.C. 'Wise Men' Debate Airline Crisis Remedies*, AVIATION WK. & SPACE TECH., Oct. 4, 1993, at 28.

13. For a description of IATA, see *infra* note 60.

14. Paul Betts & David Gardner, *Slow Recovery on the Runway: High Losses and Liberalization Are Forcing Airlines to Restructure*, FIN. TIMES, Nov. 1, 1993, at 14.

15. *Id.* While the primary cause of the industry's decline is debatable, there is evidence that it is a combination of a worldwide economic slowdown coupled with overcapacity problems. Arthur Reed, *A Taxing Situation*, AIR TRANSP. WORLD, Oct. 1993, at 71. Prior to the Gulf War, air traffic had been growing at 6 to 7 percent each year. Margareta Pagano, *Storm Clouds in Europe's Open Skies With Brussels Seeking to Increase Competition, Britain's Airlines are Blazing the Trail of Profitable Independence from the State*, SUNDAY TELEGRAPH, Nov. 7, 1993, at 8. This rise in air traffic encouraged airlines to buy new planes and acquire additional routes. Unfortunately, the demand for air transportation was depressed by the Persian Gulf crisis and the recession, *id.*, and the combination of events resulted in overcapacity. Reed, *supra*. During the period 1990-93, capacity exceeded traffic by 5 percent. *Id* at 72. Extrapolated worldwide, this was equivalent to 400 empty 747s operating on the New York-London route every day. *Id.*

16. Liberalization has been defined as a "policy of gradually lifting restrictions imposed upon existing companies so that managements of those companies can more freely determine their activities in the market." H.A.

international airline services to help combat the industry's problems. The U.S. Commission has recommended a shift in the focus of American policy from bilateral air transport agreements to a comprehensive multilateral agreement.[17] The U.S. Commission's report states:

> The principal challenge for our country is to fashion a new, growth-oriented international aviation framework that allows U.S. airlines to use their competitive strength and international air services to realize their full potential. This goal will require a clear and decisive shift in policy by the United States away from the present system of bilateral regulation of air services to one based on multi-national arrangements that may be regionalized at first, but eventually cover the globe.[18] Achieving this goal will require great patience, because trading blocs of similar philosophy have not yet materialized, even in the European Community.[19]

However, the report recently released by the EU Committee of Wise Men indicates that a similar philosophy is materializing in the EU. The report recommends the creation of "a liberal aviation trading regime and in so doing, [to] send a clear signal to non-European states and air carriers that EU external aviation policy will be consistent and will encourage reciprocal

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Wassenbergh, *New Aspects of National Aviation Policies and the Future of Air Transport Regulation*, 13 AIR L. 18, 20 (1988). Liberalization should not be confused with *deregulation* which goes a step further and "free[s] *'a priori'* the air transportation activity as such from all *'a priori'* government interference." *Id.* These policies are discussed with respect to the experiences of the United States and the EU *infra* notes 132-211 and accompanying text.

17. U.S. COMMISSION REPORT, *supra* note 2 at 20-22.

18. The Clinton Administration endorsed most of the U.S. Commission's recommendations for U.S. international air transport policy in *The Clinton Administration's Initiative to Promote a Strong Competitive Aviation Industry* (the "*Clinton Initiative*") which was issued Jan. 6, 1994. For a summary of the *Clinton Initiative*'s major provisions regarding international air transport see *infra* notes 161-63 and accompanying text.

19. U.S. COMMISSION REPORT, *supra* note 2, at 21-22. However, the EU is moving forward with liberalization including laws against subsidies and limits on capacity, as well as allowing cabotage (the practice of carrying passengers between two different points in another country by a foreign airline) within the EU member states. This effort is scheduled to be completed by April 1, 1997. Karel Van Miert, Vice-President of the EU Air Transport Commission recently stated, "open markets are here to stay." Karel Van Miert, Address at the International Aviation Club (Oct. 8, 1993) (transcript available from the Reuter Eur. Comm. Rep.). The EU is supporting its commitment to "open markets" and "competition." In November, 1993, the EU opened an investigation to determine whether government aid granted to Air France was in violation of EU competition regulations. *E.C. to Investigate Aid to Air France*, Agence France Presse, Nov. 9, 1993, *available in* LEXIS, News Library, Allnws File. For further explanation of EU liberalization, see *infra* notes 167-211 and accompanying text.

growth and expansion of services."[20] In addition, the Wise Men concluded that bilateral agreements "ignore the new realities" of the Single European Aviation Market.[21] These two reports are evidence that, for the first time, there is the potential for an inter-regional "open skies"[22] agreement between the United States and the EU.

This Note examines the current framework of bilateral agreements and regulations in the international airline industry and suggests that the international air transport industry should move toward a more liberalized "open skies" regime grounded in a multilateral or inter-regional framework. Such a development would increase competition among air carriers and produce lower fares,[23] and would help to ensure the continued expansion of the world's largest industry—travel and tourism.[24] In addition, international liberalization would improve the financial condition of some airlines by allowing them access to new markets, and would strengthen the industry as a whole by increasing consumption of air services.[25]

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20. *Committee Recommends Liberalizing Rules for European Airline Industry*, *supra* note 11. Further, the EU Committee of Wise Men recommended that multilateral liberalization begin by deregulating air cargo traffic between the EU and the United States. *Id.*

21. *Wise Men: Bilaterals Ignore 'New Realities' of Single Market*, AVIATION EUR., Feb. 17, 1994, *available in* LEXIS, News Library, Allnws File.

22. The term "open skies" has been subject to different interpretations, but generally denotes an agreement that at the minimum includes open entry on routes, unrestricted capacity and frequency on routes, and unrestricted traffic rights. *In re* Defining "Open Skies," D.O.T. Order No. 92-8-13 (Aug. 5, 1992). In contrast, "closed skies" describes an agreement that is more regulatory and restricts market access, capacity and frequency. For a recent and more complete definition of "open skies" as defined by the U.S. Department of Transportation, see *infra* note 72.

23. ETHAN WEISMAN, TRADE IN SERVICES AND IMPERFECT COMPETITION: APPLICATION TO INTERNATIONAL AVIATION 3 (1990). *See also infra* notes 96-98 and accompanying text.

24. Peter Woodman, *Air Policies 'Restricting Growth of Tourism'*, Press Association Newsfile, Nov. 17, 1993, *available in* LEXIS, News Library, Allnws File. The World Travel and Tourism Council (WTTC) recently reported that the travel and tourism industry accounts for 10.2% of gross domestic product and 1 in 10 jobs. *Id.* The value of all travel and tourism, including wages, customer spending, investments, government spending, foreign trade, and business sales, is expected to rise to about $7.9 trillion by 2005 from an estimated $3.4 trillion in 1994. *Bigger Than Ever*, STAR TRIB. (Minneapolis), Nov. 19, 1993, at 5D. The WTTC recently urged an "open skies" aviation policy and warned that "restrictive or protectionist air transport policies could significantly inhibit the growth and development of travel and tourism." *Id. See also infra* notes 99-102 and accompanying text.

25. Opening market access would produce more competition, which in turn would lower fares, and result in more air travel. This occurred in the United

Part I describes early attempts to conclude multilateral aviation agreements. Part II examines the restrictive bilateral framework of international aviation agreements, considers past model agreements, and highlights recent liberal agreements between the United States and the Netherlands. Part III discusses the benefits to be gained from further international aviation liberalization, and the current barriers to achieving such liberalization. Part IV details internal liberalization within the United States and the EU, as well as U.S. attempts to export liberalization. It demonstrates that as the EU continues with its liberalization plan, its aviation policy is becoming more similar to that of the United States. Part V considers different approaches to attain further liberalization of trade in air transport services. The Note concludes that the current system of bilateral aviation agreements has failed to keep pace with the changing nature of the airline industry, and that the United States should conclude an inter-regional "open skies" accord with the EU, which other countries could later join. Finally, the Note asserts that the recent "open skies" agreement between the Netherlands and the United States should serve as the model for such an agreement.

I. MULTILATERAL ATTEMPTS AT AVIATION LIBERALIZATION

A. THE PARIS CONVENTION

Following World War I, the Peace Conference of 1919 (the "Paris Conference") produced the Convention Relating to the Regulation of Aerial Navigation, also known as the Paris Convention.[26] The Paris Conference pitted those who believed that the skies were a collective property owned by all nations[27] against those who felt that sovereignty extended from the ground below up into the sky above it.[28] Perhaps as a result of a new found fear of aviation arising from its lethal and invasive role in World War I, the national sovereignty advocates prevailed and the Paris Convention recognized that every state has

States following domestic deregulation. *See infra* notes 132-45 and accompanying text. Also, in Latin America, a regional "open skies" agreement has led to a 400% increase in air travel since 1989. *See infra* note 242.

26. Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173 [hereinafter Paris Convention].

27. This was referred to as "res communis" under Roman Law. NAVEAU, *supra* note 3, at 25.

28. *Id.*

"complete and exclusive sovereignty over the airspace above its territory."[29] Thus, while international maritime law had established a "free sea" policy,[30] the right of states to control all activity in their airspace was reserved under international aviation law. This strict view of state sovereignty over airspace has helped shape the present framework of bilateral aviation agreements.

B. THE CHICAGO CONVENTION

As the international aviation industry expanded, another conference was called to replace the outdated Paris Convention.[31] Representatives of fifty-two nations attended the Chicago Conference of 1944 on International Civil Aviation and adopted the Chicago Convention.[32] The goal of the conference was to create a multilateral framework for the future growth and regulation of international aviation. At the time, the United States was the strongest aviation power and urged the attending states to adopt a multilateral "open skies" agreement[33] — an arrangement which clearly would have benefited the dominant U.S. airlines industry. The United States argued that capacities,[34] frequencies,[35] and fares should be decided by international market forces and not by any regulatory agency.[36]

In addition, the United States lobbied for the multilateral adoption of the "five freedoms" of the sky.[37] Although only the first two "technical" freedoms were included in the Chicago Convention,[38] the complete list continues to serve as working rules

29. Paris Convention, *supra* note 26, at 190.

30. Inspired by Hugo Grotius' "free seas" philosophy, maritime law has recognized the seas as the collective property of all the states. NAVEAU, *supra* note 3, at 25.

31. EUGENE SOCHOR, THE POLITICS OF INTERNATIONAL AVIATION 2-3 (1991).

32. Chicago Convention, *supra* note 3. *See* PAUL S. DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION 9 (1987).

33. DEMPSEY, *supra* note 32, at 10-11.

34. Capacity is the number of available commercial seats on a particular aircraft multiplied by the frequency of flights on a particular route. *Id.*

35. Frequency is the number of flights over a particular route usually measured on a per week basis. *Id.*

36. ANDREAS F. LOWENFELD, AVIATION LAW II-5 (1972).

37. DEMPSEY, *supra* note 32, at 10.

38. *Id.* at 11. The Chicago Convention was supplemented by the International Air Services Transit Agreement, Dec. 7, 1944, 59 Stat. 1693, T.I.A.S. 487, 84 U.N.T.S. 389 [hereinafter Transit Agreement]. The transit agreement has been ratified by almost 100 nations. DEMPSEY, *supra* note 32, at 51. An additional supplement to the Chicago Convention was the International Air Transport Agreement, Dec. 7, 1944, 59 Stat. 1701, T.I.A.S. 488, U.N.T.S. 387 [hereinafter Transport Agreement]. The Transport Agreement, in contrast to

for bilateral air transport services agreements. The "five freedoms" can be summarized as follows:

> 1) A civil aircraft has the right to fly over the territory of another country without landing, provided the overflown country is notified in advance and approval is given.
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> 2) A civil aircraft of one country has the right to land in another country for technical reasons, such as refueling or maintenance, without offering any commercial service to or from that point.
>
> 3) An airline has the right to carry traffic from its country of registry to another country.
>
> 4) An airline has the right to carry traffic from another country to its own country of registry.
>
> 5) An airline has the right to carry traffic between two countries outside its own country of registry as long as the flight originates or terminates in its own country of registry.[39]

The fifth freedom was the most controversial because many European nations feared that with no limits on capacity, the stronger U.S. airlines would dominate Europe's limited domestic aviation markets.[40]

While the U.S. proposals received support from the Netherlands and the Scandinavian countries, they were not backed by a majority of the states present at the Chicago Conference.[41] The other states, especially the United Kingdom, were wary that the more powerful American aviation industry would dominate the international market in an unregulated free-trade environment.[42] With these concerns in mind, the British proposed the creation of an international aviation organization to coordinate international air transport.[43] The organization was to be responsible for apportioning routes and deciding frequencies and

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the Transit Agreement, provides for the multilateral exchange of all five freedoms of the air. *Id.* However, fewer than a dozen nations have ratified this agreement. DEMPSEY, *supra* note 32, at 51.

39. DEMPSEY, *supra* note 32, at 11. Original text can be found in Transport Agreement, *supra* note 38, at 3.

40. DEMPSEY, *supra* note 32, at 12.

41. I. H. PH. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 9, (4th ed. 1991).

42. RAMON DE MURIAS, THE ECONOMIC REGULATION OF INTERNATIONAL AIR TRANSPORT 46-47 (1989).

43. The British proposed that the "International Air Authority" would: i) control routes and frequencies, ii) allocate quotas to countries' carriers for services on assigned routes, and iii) set rates to avoid waste and get rid of subsidies. The British believed that this system would allow their war-battered aviation industry to recover and better compete with the United States. DEMPSEY, *supra* note 32, at 11-12.

tariffs.[44] Several other countries proposed variations on the American and British models.[45]

In the end, the participants at the Chicago Conference were unable to reach agreement on the multilateral exchange of international air traffic rights.[46] While Article 5 of the Chicago Convention allows for the unrestricted operation of international air services with regard to non-scheduled flights[47] (subject to any regulations of the destination country),[48] Article 6 requires "special permission or authorization" by any contracting state with respect to any scheduled international air service that operates over or into its territory.[49] Thus, Article 6 can be viewed as the starting point for the current restrictive bilateral framework employed in international air service negotiations,[50] because it requires an access-seeking country to obtain separate permission from each state.

Following the Chicago Conference, it was clear that, with the reaffirmation of airspace sovereignty, any liberalization of air transport arrangements would have to occur on a bilateral basis, instead of a multilateral basis.[51] The nations attending the Chicago Conference did agree on a model form for future bilateral agreements.[52] The Form of Standard Agreement for Provisional Air Routes ("Standard Chicago Agreement") was an outline form leaving details such as capacities and rate-making

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44. *Id.*

45. For example, Canada supported the British model, but proposed an even more elaborate international regulatory agency. Australia and New Zealand proposed the internationalization of the world's airlines under one authority in which all states would participate. DIEDERIKS-VERSCHOOR, *supra* note 41, at 9.

46. DE MURIAS, *supra* note 42, at 51.

47. Chicago Convention, *supra* note 3, art. 5. Non-scheduled flights, i.e. "charter flights," are not carried out according to a published timetable, and are not subject to the rates and tariffs applicable to regular scheduled air services. DEMPSEY, *supra* note 32, at 14-16.

48. Chicago Convention, *supra* note 3, art. 5.

49. *Id.*, art. 6. The distinction between Articles 5 and 6 was made to guarantee freedom and flexibility for non-scheduled air traffic. DEMPSEY, *supra* note 32, at 14-16.

50. H.A. Wassenbergh, *Parallels and Differences in the Development of Air, Sea and Space Law in the Light of Grotius' Heritage*, 9 ANNALS AIR & SPACE L. 163, 171 n.16 (1984).

51. Bilateral negotiations require individual governments to meet and arrange for their respective country's airlines to gain access to the other country's market. Typically, the price for such an agreement is a reciprocal promise of market access for the other country's airlines.

52. DE MURIAS, *supra* note 42, at 49.

for the particular parties to negotiate.[53] The United States utilized this form to conclude several Standard Chicago Agreements with other nations.[54] These early agreements were typically very liberal, often exchanging all "five freedoms," and placing no restrictions on capacity or pricing.[55] However, it was the Bermuda I agreement, concluded between the United States and the United Kingdom in 1946, which would serve as the dominant model for future aviation agreements.[56]

II. THE CURRENT BILATERAL FRAMEWORK FOR TRADE IN AVIATION RIGHTS

A. THE BERMUDA I AGREEMENT

In 1946, representatives of the United States and the United Kingdom met in Bermuda where they reconciled some of their previous differences[57] and entered into the Air Services Agreement ("Bermuda I").[58] This agreement represented a compromise between the two countries' differing views regarding the proper amount of regulation in international air transport. The United States retreated from its earlier position that there be no international regulation of fares[59] and agreed to allow the International Air Transport Association (IATA)[60] to determine

53. DEMPSEY, *supra* note 32, at 52.

54. *Id.* These nations included Canada, Denmark, Iceland, Ireland, Norway, Portugal, Spain, Sweden, and Switzerland. *Id.*

55. *Id.*

56. *Id.* at 53.

57. *See supra* notes 33-44 and accompanying text.

58. Air Services Agreement, Feb. 11, 1946, U.S.-U.K., 60 Stat. 1499 [hereinafter Bermuda I].

59. *See supra* note 36 and accompanying text.

60. Founded in Havana in 1945, IATA is based in Montreal and has over 150 members. NAVEAU, *supra* note 3, at 59-64. While the ICAO's membership consists of nations, IATA's members are the airlines which operate international services "under the flag of a state eligible to membership in the International Civil Aviation Organization." Its goals are:

> 1) to promote safe, regular and economical air transport of the peoples of the world, to foster air commerce, and to study the problems connected therewith;
> 2) to provide means for collaboration among the air transport enterprises engaged directly or indirectly in international air transport service;
> 3) to cooperate with the International Civil Aviation Organization and other international organizations.

IATA Articles of Association, art. III. From a regulatory standpoint, IATA works to coordinate tariffs if governments delegate that responsibility to IATA in bilateral agreements. Market access and capacity remain within the jurisdiction of governments. NAVEAU, *supra* note 3, at 59-64.

fares relating to air traffic between the two countries.[61] In return for the U.S. concession allowing some regulation of fares, the British relaxed their previous demands that there be capacity regulation, especially with regard to fifth-freedom rights which allow an airline to carry passengers between countries outside of the airline's home country so long as the flight originates or terminates in the airline's home country.[62]

Bermuda I's defining characteristics were its liberal arrangements regarding capacity determination and carrier designation, and its restrictive delegation of rate-making to IATA, subject to both countries' approval.[63] Between 1946 and 1976, many governments, including the United States and United Kingdom, utilized the Bermuda I agreement as a model for their bilateral air transport agreements with other nations.[64]

B. THE NETHERLANDS PROTOCOL

In the late 1970s, as it was deregulating its domestic airline industry,[65] the United States began to work toward deregulation on an international level. This endeavor echoed the earlier "open skies" stance taken by the United States at the Chicago Conference in 1944.[66] The United States called for "open" bilateral agreements based upon a prohibition of government intervention with fares, except by mutual agreement.[67] In 1978, the United States concluded the first such agreement — the Protocol Relating to the United States-Netherlands Air Transport Agreement.[68] The primary goals of the Netherlands Protocol are "to promote an international aviation system based on com-

61. DEMPSEY, *supra* note 32, at 53.

62. *Id.*

63. The capacity determination rules of Bermuda I are considered liberal since they allow the carriers themselves, and not their respective governments, to determine capacity and fifth freedom rights. Bermuda I, *supra* note 58, Final Act, paras 3-6. The carrier designation provision is considered liberal since it allows for multiple designation — signatories are allowed to designate an "air carrier or air carriers." *Id.*, art. 2. The ratemaking provisions can be found in sec. II of the Annex.

64. DEMSPEY, *supra* note 32, at 57.

65. *See infra* notes 132-48 and accompanying text for a discussion of U.S. deregulation and its effects.

66. *See supra* notes 33-39 and accompanying text.

67. DIEDERIKS-VERSCHOOR, *supra* note 41, at 50.

68. Protocol Relating to the United States-Netherlands Air Transport Agreement of 1957, Mar. 31, 1978, 29 U.S.T. 3088 [hereinafter the Netherlands Protocol]. The Netherlands Protocol amended the Air Transport Agreement, Apr. 3, 1957, U.S.-Neth., 12 U.S.T. 837 [hereinafter the Netherlands Agreement].

petition among airlines in the marketplace with minimum governmental regulation," and "to make it possible for airlines to offer the traveling and shipping public low-fare competitive services."[69]

The Netherlands Protocol contains liberal provisions regarding capacity and fares. Capacity is unrestricted, except that the air services made available "shall bear a close relationship to the requirements of the public for such services."[70] Fares are also unrestricted and are to be set by the airlines, with government intervention limited to "prevention of predatory or discriminatory practices, protection of consumers from the abuse of monopoly power, and protection of airlines from prices that are artificially low because of direct or indirect governmental subsidy or support."[71]

C. THE NETHERLANDS OPEN SKIES AGREEMENT AND GLOBAL AIRLINE ALLIANCES

In October 1992, the United States and the Netherlands extended their commitment to the liberalization of trade in air transport services by concluding the most liberal "open skies"[72]

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69. Netherlands Protocol, *supra* note 68.

70. Netherlands Agreement, *supra* note 68, art. 10, *amended by*, Netherlands Protocol, *supra* note 68, art. 11.

71. Netherlands Protocol, *supra* note 68, art. 6(a).

72. Although the term "open skies" has been subject to various interpretations over the years, the U.S. Department of Transportation (DOT) issued an order in August, 1992, (two months prior to the conclusion of the Netherlands Open Skies Agreement) establishing an official definition of "open skies." This was done as part of a DOT initiative to negotiate open skies agreements with European countries. The following basic elements constitute "open skies":

(1) Open entry on all routes;

(2) Unrestricted capacity and frequency on all routes;

(3) Unrestricted route and traffic rights, that is, the right to operate service between any point in the United States and any point in the European country, including no restrictions as to intermediate and beyond points, change of gauge, routing flexibility, coterminalization, or the right to carry Fifth Freedom traffic;

(4) Double-disapproval pricing in Third and Fourth Freedom markets and [i] in intra-EU markets: price matching rights in third-country markets, [ii] in non intra-EU markets: price leadership in third-country markets to the extent that the Third and Fourth Freedom carriers in those markets have it;

(5) Liberal charter arrangement (the least restrictive charter regulations of the two governments would apply, regardless of the origin of the flight);

(6) Liberal cargo regime (criteria as comprehensive as those defined for the combination carriers);

agreement to date. The Netherlands Open Skies Agreement[73] gives U.S. and Dutch airlines open entry into each other's markets, unrestricted capacity and frequency on all routes and the greatest possible degree of freedom in setting fares.[74]

The Netherlands Open Skies Agreement is the first agreement to give each country the right to designate as many airlines as it wishes to have access to unlimited route rights.[75] Under the previous U.S.-Netherlands agreement, each country could specify and limit the route access of the other country's designated airlines. In contrast, the Netherlands Open Skies Agreement allows each country's airlines access to "a point or points" in the other country without limitation.[76] Furthermore,

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(7) Conversion and remittance arrangement (carriers would be able to convert earnings and remit in hard currency promptly and without restriction);
(8) Open code-sharing opportunities;
(9) Self-handling provisions (right of a carrier to perform/control its airport functions going to support its operations);
(10) Procompetitive provisions on commercial opportunities, user charges, fair competition and intermodal rights; and
(11) Explicit commitment for nondiscriminatory operation of and access for computer reservation systems.

In re Defining "Open Skies," *supra* note 22.

73. Agreement to Amend the Air Transport Agreement, as amended, and the Protocol Relating to the United States-Netherlands Air Transport Agreement of 1957, as amended, Oct. 14, 1992, U.S.-Neth., T.I.A.S. No. 11976 [hereinafter the Netherlands Open Skies Agreement]. The Netherlands Open Skies Agreement amended the Netherlands Agreement and the Netherlands Protocol, thereby incorporating all provisions of those agreements which it did not displace.

74. *Id.*, para. 9, 13. *See also Netherlands, U.S. Declare Open Skies*, PLAIN DEALER (Cleveland), Sept. 6, 1992, *available in* LEXIS, News Library, Allnws File. One airline official describes the Netherlands Open Skies Agreement as the "first and only true 'open skies' agreement in the world. . . . Fares are totally deregulated. Routings are totally deregulated. Capacity is totally deregulated. There literally are no restrictions." *United States International Aviation Policy, Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 103d Cong., 2d Sess. (1994) (statement of Elliott M. Seiden, Vice-President - Law and Government Affairs, Northwest Airlines, Inc.), *available in* LEXIS, News Library, Allnws File [hereinafter *International Aviation Policy Hearings*].

75. Netherlands Open Skies Agreement, *supra* note 73, at para. 3. The Netherlands Open Skies Agreement gives both the Netherlands and the United States "the right to designate as many airlines as [they wish] to conduct international air services in accordance with [the] Agreement and to withdraw or alter such designations." *Id.* In addition, "airlines of both countries can fly from any point in either country to any point in the other, via any intermediate point, and beyond to any point." *International Aviation Policy Hearings*, *supra* note 74, (statement of Elliott M. Seiden, Vice-President - Law and Government Affairs, Northwest Airlines, Inc.).

76. Netherlands Open Skies Agreement, *supra* note 73, para. 12.

it places no restrictions on capacity or frequency.[77] In addition, the Netherlands Open Skies Agreement retains the liberal rate setting provisions of the Netherlands Protocol which delegates ratemaking to the airlines "based primarily on commercial considerations in the marketplace."[78] Finally, with respect to ancillary matters, the Netherlands Open Skies Agreement allows for the establishment of foreign sales offices and self ground-handling by each of the designated airlines.[79] It also contains provisions for a dispute settlement mechanism.[80]

The Netherlands Open Skies Agreement has already helped to foster an alliance[81] between Northwest Airlines (Northwest) and KLM Royal Dutch Airlines (KLM).[82] The Department of Transportation (DOT) approved the two airlines' integration plan which allows them to operate as if they were a single global airline system.[83] The DOT also granted the two carriers antitrust immunity.[84] The DOT stressed that it wanted to send a clear signal to European governments that the cooperation demonstrated by the United States with a foreign carrier was

77. *Id.*, at para. 9 (1), (2). The Netherlands Open Skies Agreement provides that "[n]either Contracting Party shall unilaterally limit the volume of traffic, frequency or regularity of service . . ." *Id.*, para. 9 (2). In contrast, the Netherlands Protocol required capacity to be related to traffic demand for services. *See supra* note 70 and accompanying text.

78. Netherlands Protocol, *supra* note 68, art. 6. Ratemaking is subject only to government intervention to prevent monopolies, predatory pricing, and artificially low prices due to government subsidies. *Id.*

79. Netherlands Open Skies Agreement, *supra* note 73, para. 6.

80. *Id.*, at para. 10. The agreement provides for a panel of three arbitrators made up of one from each contracting party, and a third arbitrator, agreed upon by both parties, to serve as President of the arbitral tribunal. In the event that the parties cannot agree on a third arbitrator, the parties can request that the President of the Council of the International Civil Aviation Organization appoint one. The panel's decisions are final and each contracting party must give the panel decision full effect, consistent with its national law. *Id.*

81. The Netherlands Open Skies Agreement specifically allows for the right of designated airlines to "enter into cooperative arrangements such as blocked-space, code-sharing or leasing agreements with another airline . . . " and "hold out and advertise such services to the public as through services." Netherlands Open Skies Agreement, *supra* note 73, at para. 12.

82. *Open-Skies Pact Spurs KLM, Northwest to Operate as One*, PLAIN DEALER (Cleveland), Sept. 13, 1992, *available in* LEXIS, News Library, Allnws File.

83. Bill Poling, *DOT Clears NWA, KLM to Operate as 'Single Carrier' in Global Arena*, TRAVEL WKLY., Jan. 14, 1993, *available in* LEXIS, Trans Library, Air File.

84. *See* Acquisition of Northwest Airlines by Wings Holdings, Inc., D.O.T. Order No. 93-1-11, at 1 (1993), *available in* WESTLAW, FTRANS-DOT Database (approving and granting antitrust immunity to Northwest and KLM to integrate services).

the direct result of the "open skies" agreement between the United States and the Netherlands.[85] The DOT added that it wanted to encourage other EU member states to enter into "open skies" agreements with the United States.[86]

As a result of their alliance, Northwest and KLM have been able to integrate their systems and use code-sharing which allows all marketing, ticketing and baggage handling procedures to be run as if by one airline.[87] For example, under the alliance, Northwest can offer its customers access to any of KLM's destinations via Amsterdam — even destinations Northwest itself does not service. The goal is to make flight service that combines the two airlines as "seamless" as possible.[88] It also allows for expansion of access to air traffic routes[89] since both airlines'

85. Poling, *supra* note 83.

86. *Id.*

87. John J. Oslund, *Flying the Open Skies: KLM-NWA Alliance Could Serve as a Model for Other Airline Agreements*, STAR TRIB. (Minneapolis), Sept. 21, 1992, at 1D. A recent alliance between Continental and Alitalia Airlines demonstrates the extent to which some partners are combining their marketing operations. The two airlines have agreed to use planes painted with Alitalia's colors on one side, and Continental's on the other. *Continental, Alitalia Linking Routes*, STAR TRIB. (Minneapolis), May 3, 1994, at 3D.

88. Telephone interview with David G. Mishkin, Vice President for International and Regulatory Affairs, Northwest Airlines Inc. (Feb. 7, 1994).

89. This route expansion generated controversy recently when Northwest began adding flights to Germany via Amsterdam on planes operated by Northwest's partner, KLM. Adam Bryant, *U.S. Tries to Restore the Once-Friendly Skies*, N.Y. TIMES, Aug. 30, 1993, at D1. This upset the German government which viewed the flights as a violation of the U.S.-German aviation agreement. Germany contended that Northwest was not authorized to operate the shared flights to Germany with KLM. Northwest responded that the U.S.-German aviation accord was sufficiently pro-competitive to allow for the code-sharing services with KLM. This dispute, in part, led to a threat by Germany to renounce the U.S.-German aviation agreement. *Id.* However, the two countries were able to renegotiate their agreement. Adam Bryant, *Airline Accord Reached by U.S. and Germany*, N.Y. TIMES, Sept. 24, 1993, at C2. The two countries agreed to a four-year deal which maintains current passenger capacity levels for two years, and then allows limited capacity increases during the following two years. During this time, the two countries hope to negotiate an "open skies" agreement to be in place by the time the current accord expires. Joan M. Feldman, *Bilateral Chaos: The U.S. Which Once Negotiated Bilaterals That Maximized Capacity, Is Forced To Retreat Under Protectionist Pressure*, AIR TRANSP. WORLD, Nov. 1993, at 46, 46. While the new agreement puts some temporary restrictions on U.S. airlines' access to Germany, *id.*, it will ultimately result in greater liberalization of trade in air services between the two countries.

Industry analysts speculated at the time that Germany would not withdraw from the agreement with the United States because of concerns that such a move would hinder the possibility of a marketing alliance between Lufthansa and United Airlines. Bryant, *supra*. These predictions proved to be correct when two weeks after Germany reached an agreement with the United States,

respective route rights are effectively combined.[90] The alliance has produced increased profits for both airlines.[91]

Marketing alliances, like the one between Northwest and KLM, are evidence that as the shape of the airline industry evolves, the international regulatory framework must also evolve.[92] While an alliance such as Northwest/KLM was unheard of at the time of the Chicago Conference in 1944, similar alliances are becoming increasingly common as international airlines join together to better position themselves as competitors in the global market.[93] In the absence of any liberalizing

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Lufthansa announced an alliance with United. *Lufthansa, United Planning to Combine European and Asia/Pacific Networks*, STAR TRIB. (Minneapolis), Oct. 5, 1993, at 1D.

A Northwest official recently testified that the Northwest-KLM alliance increased the level of competition in the U.S.-Germany market. This, in turn, caused the Germans to seek the alliance between Lufthansa and United. In order to gain U.S. approval of that alliance, the Germans were forced to negotiate a more liberal air transport agreement with the United States. *International Aviation Policy Hearings*, *supra* note 74, (statement of Elliott M. Seiden, Vice-President - Law and Government Affairs, Northwest Airlines, Inc.). After recently signing the new accord with the United States, the German Minister of Transport, Matthias Wissman stated "Both partners want to be pioneers in the area of open sky. Together, we will do our best to convince the other countries to subscribe to this more liberal view of air transport." *Germany to Seek Open Skies in Next Agreement with U.S.*, AVIATION EUR., June 2, 1994, *available in* LEXIS, News Library, Allnws File.

90. Oslund, *supra* note 87.

91. Northwest's Chief Financial Officer, Mickey Foret, recently reported that the alliance was generating an economic benefit of $100 million a year for each carrier. *Northwest Reports $18.3 Million Profit in First Quarter*, STAR TRIB. (Minneapolis), Apr. 22, 1994, at 1D, 5D.

92. E. Tazewell Ellett, *International and U.S. Legal and Policy Impediments to the Growth of the Airline Industry: Time for a Change in the World Order?*, 5 AIR & SPACE L. 3 (1991). The author points out that, "[u]nfortunately, the ever-increasing business pressures for the creation of truly multinational airlines are running into formidable obstacles created by an anachronistic international civil aviation legal and policy framework which becomes more and more outdated with each wave of business innovation." *Id.*

93. For example, Lufthansa and United have formed an alliance which includes code-sharing and will combine Lufthansa's strong presence in Europe with United's extensive Asia/Pacific network. *Lufthansa, United Planning to Combine European and Asia/Pacific Networks*, *supra* note 89. Also, a tentative European alliance emerged called Alcazar. Its members include KLM, Swissair, Scandinavian Airlines, and Austrian Airlines. Alcazar had hoped to select an American partner - either Northwest or Delta. David Phelps, *4 European Airlines Divided on Choice of U.S. Partner - Northwest or Delta*, STAR TRIB. (Minneapolis), Oct. 15, 1993, at 1D. This initiative has apparently stalled as the four Alcazar partners called off talks regarding their partnership due to conflicting views on which airline to select as their U.S. partner. Roger Cohen, *European Airlines End Talks - Merger Plan Fails Over U.S. Strategy*, N.Y. TIMES, Nov. 22, 1993, at D1. In addition, Sabena Belgian World Airlines has

multilateral agreements, airlines are beginning to use the alliance system as a "stopgap measure" to expand their services.[94] However, alliances that operate in the absence of an "open skies" agreement are somewhat limited and less effective. For example, the recent alliance between Lufthansa and United Airlines has only limited code-sharing, and places restrictions on the integration of the two airlines' commercial activities.[95] In order that airlines might fully utilize network alliance systems, it is imperative that the international aviation community move beyond the barriers of the current restrictive bilateral framework, and achieve large scale liberalization in the trade of air traffic services. The conclusion of the Netherlands Open Skies Agreement signals a movement in the right direction.

III. LIBERALIZING INTERNATIONAL AIR TRANSPORT: BENEFITS AND BARRIERS

A. THE CASE FOR FREE TRADE IN THE AIR

Further liberalization of the international air transport industry will likely lead to more competition, a wider range of services, greater efficiency, and lower fares.[96] The effect that liberalization can have on fares in a domestic market has been demonstrated. A Brookings Institution study found that U.S. consumers have saved $6 billion (in 1977 dollars) in fares annually since domestic deregulation began in 1978.[97] In the United Kingdom, where both British Airways and British Midland are private companies and the air transport policy is relatively liberalized, passengers enjoy the lowest fares in the EU. Fares in most other EU member states are thirty percent higher.[98] An

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expressed an interest in establishing "closer links" with Delta Airlines. *Sabena Looks for Closer Links with Delta Air Lines*, AFX News, Mar. 28, 1994, *available in* LEXIS, News Library, Allnws File.

94. Telephone Interview with David G. Mishkin, *supra* note 88.

95. *International Aviation Policy Hearings*, *supra* note 74, (statement of Elliott M. Seiden, Vice-President - Law and Government Affairs, Northwest Airlines, Inc.).

96. *Free Trade in the Air: Report of the Think Tank on Multilateral Aviation Liberalization* (Global Aviation Associates, Ltd.), Jan. 1991, at 11 [hereinafter *Free Trade in the Air Report*]

97. STEVEN MORRISON & CLIFFORD WINSTON, THE ECONOMIC EFFECTS OF AIRLINE DEREGULATION 1-2 (1986). This Brookings Institution study also found that deregulation led to at least a $2.5 billion (in 1977 dollars) annual increase in industry profits. *Id.* at 2.

98. Peter Woodman, *'Open Skies' Bring Lower Fares to UK*, Press Ass'n Newsfile, Nov. 3, 1993, *available in* LEXIS, News Library, Allnws File.

expansion of liberalization internationally would likely produce lower fares on a global level.

In addition to these direct benefits of liberalization, there would also be important secondary effects[99] on other sectors of the global economy. For example, the travel and tourism industry is becoming increasingly important to the overall world economy. In the United States, travel and tourism has become the nation's leading export. In 1990, the industry generated $52.8 billion in expenditures from almost forty million international visitors.[100] The health and continued expansion of travel and tourism depends a great deal upon the availability of affordable and convenient air transportation.[101] One European author argues that since travel and tourism generate direct and indirect employment for 200 million people worldwide (19 million in the EU alone) and will create almost 150 million more jobs worldwide over the next decade, the policy of "[p]rotecting [national flag carriers] with high fares and subsidies . . . obstructs this job creation. Instead, the EU, with 20 m[illion] unemployed, [should] open its airspace — and create more jobs throughout its economy."[102]

In addition, further liberalization on an inter-regional or multilateral level will help to eliminate the problems associated with the present bilateral regime. The current bilateral system is viewed by many as time consuming,[103] overly protective of na-

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99. For example, the U.S. Commission stated in the National Commission Report: "No U.S. citizen has to look far to find a friend, neighbor or relative associated with civil air transport. From the tires on the airplanes to the seatbelt restraints that protect passengers, the reach of the commercial air transportation industry in the creation of jobs and economic activity in the U.S. is immense." U.S. COMMISSION REPORT, *supra* note 2, at 5. Civil air transport plays a similarly important role in the economies of other countries besides the United States.

100. Chuck Y. Gee, *Aviation & Tourism: The Travelling Public*, 20 TRANSP. L.J. 1, 2 (1991).

101. *Id.*

102. *Flights of Fancy*, ECONOMIST, Feb. 5, 1994, at 69, 70.

103. One observer describes the process as follows:

> Negotiations can drag on, requiring several rounds of meetings in each country. Each round may last from a couple of days to several weeks. The costs in manpower and time are enormous. Even a small country such as Cyprus may have up to ten government and airline officials in its negotiating team. Negotiators spend many days on each negotiation, not only in the formal face-to-face meetings but in preparation as well. The whole process is so slow that the larger countries normally have a large backlog of bilateral negotiations, with many countries each waiting their turns. A two-year wait is not unusual. Currently about forty countries are waiting to negotiate new agreements with Japan. Thus, far from being flexible, the [bilateral] system militates

tional airlines, and detrimental to the interests of consumers, airports and cities. The restrictive and protectionist measures contained in many bilateral aviation agreements restrain the business and operational opportunities of the airlines by acting as non-tariff barriers[104] to free trade in air services.[105]

Although international air traffic has grown under the bilateral system, it has now run up against serious limitations. As a twelve-member think tank of industry experts recently concluded:

> Bilaterals are increasingly seen by entrepreneurial airline managements as imposing unacceptable restrictions on the development of the industry. The bartering process of bilaterals tends to reduce the opportunities available to the level considered acceptable by the least competitive and most restrictive party. Moreover, the practical problems, in terms of time and expense, of negotiating and renegotiating dozens of agreements is imposing enormous strains on the system.[106]

A movement toward a multilateral negotiation framework would alleviate many of the problems associated with the bilateral regime, and facilitate the needed liberalization of the air transport industry.

B. BARRIERS TO MULTILATERAL LIBERALIZATION

Before further liberalization on a large scale can occur, there are several hurdles which must be cleared. Ever since the delegates at the Paris Conference decided that a nation's airspace is sovereign, air sovereignty has been a barrier to liberalization.[107] Airspace sovereignty has helped to produce the current complex regime consisting of over 1200 bilateral aviation agreements. However, sovereignty over air rights is an issue that like-minded states could resolve once they recognize that there are substantial benefits to be gained from liberalization.[108]

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against quick decisions and rapid innovation. New services and new market opportunities are delayed or may be lost altogether.

Rigas Doganis, *The Bilateral Regime for Air Transport: Current Position and Future Prospects, in* INTERNATIONAL AIR TRANSPORT: THE CHALLENGES AHEAD, *supra* note 1, at 59.

104. Wassenbergh, *supra* note 5, at 88.

105. *ICAO Delegates Oppose Early Shift From Bilateral System*, WORLD AIRLINE NEWS, Apr. 20, 1992, *available in* LEXIS, News Library, Allnws File.

106. *Free Trade in the Air Report*, *supra* note 96, at 13.

107. *See supra* notes 26-30 and accompanying text.

108. Countries have relinquished aspects of their sovereignty in the past to gain membership to such organizations as the U.N. and GATT once they have realized the benefits of joining those organizations.

A more imposing stumbling block to liberalization lies in the vested interest that some governments have in their state-owned airlines. Fearful of what might happen to their airlines in a competitive market,[109] such governments may attempt to halt the movement toward "open skies." In fact, the amount of state ownership in an airline is a solid indicator of a government's views with respect to liberalization. Governments which own or subsidize their airlines are more protectionist, while governments in countries where airlines are not state owned or subsidized are more liberal with respect to air transport trade.

A brief survey of several European countries illustrates this point. In Britain, where British Airways[110] and British Midland are both privatized and profitable, the government favors further liberalization.[111] The same is true in Switzerland where the government owns only twenty-three percent of Swissair.[112] While the Dutch government's interest in KLM is higher at thirty-eight percent, both the airline and the government are ardent advocates of liberalization.[113] In contrast, the French government wholly owns Air France,[114] and both the government and airline[115] oppose further liberalization.[116] In addition, the governments of Greece (which owns 100% of Olympic Airways) and Italy (which owns 86.4% of Alitalia Airlines) both maintain

109. For example, in order to reduce overcapacity and increase efficiency it would be necessary to cut back on airlines' workforces. Such a move would be politically unpopular.

110. In an article describing the benefits of privatization, British Airways was described as having been "among the world's most profitable [airlines] for several years, and despite the recession has built itself into one of the world's few truly global carriers . . ." Richard W. Stevenson, *The Pain of British Privatization Has Yielded a String of Successes: Corporate Comebacks Tied to Efficiency Drives*, N.Y. TIMES, Feb. 22, 1994, at A1.

111. *See* Michele McDonald, *Most Europeans Remain Cautious About Airline Competition*, TRAVEL WKLY, Oct. 28, 1993, *available in* LEXIS, News Library, Allnws File.

112. *See* James Ott, *More Skies to Open as U.S. Signs Pacts*, AVIATION WK. & SPACE TECH., Sept. 14, 1992, *available in* LEXIS, Trans Library, Air File.

113. *Lubbers Says Dutch Government Has No Demands On Alcazar*, Reuters, Nov. 19, 1993, *available in* LEXIS, News Library, Allnws File. A KLM spokeswoman recently stated: "[I]t is KLM, not the Dutch government that makes the decisions . . . The government is a big shareholder with whom we have regular conduct, but the suggestion that they decide is incorrect." *Id.*

114. Ott, *supra* note 112.

115. For example, at the recent ICAO World Air Transport Colloquium, Bernard Attali, chairman of Air France, defended the bilateral system as a way to preserve competition in the global airline industry. James Ott, *Free Trade Advocates Foresee End of Bilaterals*, AVIATION WK. & SPACE TECH., Apr. 13, 1992, *available in* LEXIS, Trans Library, Air File.

116. Ott, *supra* note 112.

restrictive and protectionist air services trade policies.[117] American carriers are all privately held and they, along with the U.S. government, favor further liberalization.[118]

U.S. carriers are privately held and thus face the risk of bankruptcy if they operate inefficiently.[119] In contrast, many EU airlines continue to depend on government subsidies which allow them to operate less efficiently because profit margins are not as crucial to their survival.[120] However, it appears that there is a movement in the EU to end the practice of using subsidies to protect airlines and distort competition. The EU Wise Men Committee's report recommends that member-states' airlines only be eligible for one final "shot of aid," and only as much as is necessary to put those airlines on a commercially viable footing.[121]

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117. RESOURCES, COMMUNITY AND ECONOMIC DEVELOPMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE, INTERNATIONAL AVIATION: MEASURES BY EUROPEAN COMMUNITY COULD LIMIT U.S. AIRLINES' ABILITY TO COMPETE ABROAD, GAO-RCED-93-64, 17, 33 (1993) [hereinafter GAO INTERNATIONAL AVIATION REPORT].

118. *Id.* at 16, 19.

119. Interestingly, the EU views U.S. Chapter 11 bankruptcy laws as unfair government assistance to U.S. airlines. The European Parliament recently adopted a resolution requiring a revision in U.S. bankruptcy laws before the EU will consider concluding any air transport agreements with the United States. *U.S. Bankruptcy Rules Need Revision Prior to Air Pact, EC Parliament Says*, Daily Rep. for Executives (BNA), Nov. 17, 1993, *available in* LEXIS, News Library, Allnws File.

120. DEMPSEY, *supra* note 32, at 81-84.

121. *Committee Recommends Liberalizing Rules for European Airline Industry*, *supra* note 11. The EU Committee chairman, Herman de Croo, further stated that "capital injections and state aid have severely contributed to overcapacity and uneconomic pricing" in the airline industry. He concluded, "[i]f we do not change that, it will kill this most important sector of the economy." *'Change or Die' Warning to Airlines*, DAILY TELEGRAPH, Feb. 2, 1994, at 25. While this proposal has received support from IATA and the Association of European Airlines ("AEA"), the French government has openly denounced any limitations on state aid to national air carriers. French Transport Minister called the EU Wise Men Committee's Report a "brilliant intellectual exercise that does not take into account today's economic and [political] realities." Air France posted losses of $1.2 billion in 1993. Pierre Sparaco, *France Resists Wise Men's Report*, AVIATION WK. & SPACE TECH., Feb. 21, 1994, *available in* LEXIS, Trans Library, Air File. Although initially very resistant to the EU Wise Men Report's recommendations, Air France later announced a restructuring plan which it hopes will boost productivity by 30% over three years. This plan will cut staff costs by freezing salaries and eliminating 5,000 jobs. Pierre Tran, *Air France Rescue May Help Consumers in Long Run*, Reuter Eur. Bus. Rep., Mar. 11, 1994, *available in* LEXIS, Trans Library, Air File. As EU airlines become more competitive, they will be more likely to endorse "open skies" agreements since they will feel more confident about competing in a free market. Robert

In addition, state ownership may become less of a barrier to liberalization because of a worldwide trend toward privatization.[122] Forty different airlines throughout the world have moved, or are moving, toward private ownership.[123] In Europe, the German government plans to sell its 56.9% stake in Lufthansa.[124] Greece, Portugal and Italy have also recently considered privatizing their respective state-owned airlines to varying degrees.[125] The most recent example of this trend occurred in India where the Indian Government converted Air India and Indian Airlines into public limited companies in a first step towards privatization.[126] In addition, India approved a unilateral "open skies" policy without reciprocity requirements in hopes of increasing competition and promoting tourism.[127] Israel recently approved a similar "open skies" measure.[128] Thus, while there are clearly barriers to liberalization, these examples demonstrate that many countries are moving in the direction of further liberalization.

Trautman, *U.S. Acts to Open Global Skies, With Europe First*, Reuter Eur. Community Rep., Jan. 13, 1994, *available in* LEXIS, News Library, Allnws File.

122. Michalski, *supra* note 1, at 17.

> Further liberalisation appears to be likely nevertheless, as international air transport gradually loses it distinct status. In the past, the special regulatory treatment of the industry was largely predicated on the desire of governments to maintain national flag-carriers to meet prestige, military and security-of-supply objectives and to have a protected source of invisible earnings. As the strategic importance of efficient international airline services for overall national competitiveness becomes increasingly recognized, and as governments disengage themselves from the direct involvement in the provision of air services, broad economic considerations - including the interests of users - favoring liberalization are given increasing weight in the formulation of public policies. *Id.*

123. *Free Trade in the Air Report*, supra note 96, at 12.

124. GAO INTERNATIONAL AVIATION REPORT, *supra* note 117, at 40.

125. *Id.*

126. Shirish Nadkarni, *Air Corporation Act Repealed; Two National Carriers Lose Their Status*, So. CHINA MORNING POST, Jan. 31, 1994, *available in* LEXIS, News Library, Allnws File. The two airlines have been renamed Air India Ltd. and Indian Airlines Ltd., and will no longer be dependent on state aid. They are now free to raise capital publicly. *Id.*

127. *India to Open Skies to Foreign Airlines*, Xinhua General Overseas News Service, Feb. 12, 1994, *available in* LEXIS, News Library, Allnws File.

128. Julian Ozanne, *Israel Backs 'Open Skies' Policy to Encourage Tourism: Charter Flight Rules Liberalised*, FIN. TIMES, Feb. 7, 1994, at 6.

IV. INTERNAL LIBERALIZATION: THE UNITED STATES AND THE EU

The greatest potential for further liberalization lies in the possibility of an inter-regional open-skies agreement between the United States and the EU. Although individuals like Representative James Oberstar (D. Minn.-Chair-House Aviation Subcomm.) have called for another Chicago Conference to attempt to reach a multilateral agreement,[129] this has yet to occur.[130] In addition, given the difficulties and large amount of time inherent in negotiating any all-inclusive multilateral trade agreement,[131] it is more likely that liberalization in the foreseeable future will occur on an inter-regional basis.

While taking different approaches, both the United States and EU have liberalized their internal air transport markets to varying degrees. An examination of the liberalization that has occurred within the United States and the EU suggests that there is an unprecedented opportunity for the two parties to conclude an "open skies" agreement.

A. THE U.S. EXPERIENCE: DEREGULATION AND ATTEMPTS TO EXPORT LIBERALIZATION

The deregulation of the U.S. airline industry produced dramatic changes in the U.S. aviation market, and helped spread the ideology of airline liberalization to other nations. Given its significance, it is necessary to consider the general principles embodied in U.S. deregulation to determine if they are desirable for a global liberalization strategy. In 1978, the United States passed the Airline Deregulation Act[132] which entailed a liberali-

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129. Telephone interview with Mary Walsh, Assistant to Representative James Oberstar (Oct. 4, 1993). Oberstar has called for:

> an international conference, similar to that in 1944 when all the nations of the world joined to create what is today's international aviation trade regime . . . . I think we should talk about cross border investments and ownership and cabotage in order to fully liberalize and unleash the forces of competition that have saved U.S. travelers billions of dollars in the internal market.

Business World (ABC News television transcript, Feb. 23, 1992), *available in* LEXIS, News Library, Allnws File.

130. However, the ICAO Conference scheduled for the end of 1994 could signal a move toward another multilateral convention to redefine international air transport agreements. *See supra* note 6.

131. For example, the recently concluded Uruguay Round of the General Agreement on Tariffs and Trade, began in 1987 and concluded in December 1993.

132. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) codified at 49 U.S.C. §§ 1301-1542 (1988).

zation of pricing and market entry.[133] These liberalization measures helped produce increased competition which benefitted consumers in the form of lower fares[134] and a wider range of airline services.[135] Deregulation also promoted efficiency as airlines were forced to cut costs and streamline operations in order to maintain profitability and protect their respective market shares from being eroded by new entrants into the market.[136] A 1986 economics study prepared by the Brookings Institution concluded that with respect to efficiency, deregulation served the public interest more effectively than regulation would have.[137]

The primary method employed by the airlines to increase their efficiency after deregulation was to strengthen their networking through "hubbing-and-spoking."[138] Hub and spoke services replaced the point to point networks that were in existence during the period of regulation. Airlines developed several hubs — centrally located airports — that could be fed by a network of numerous spokes. Flights are then scheduled to arrive at similar times from the spokes, so that passengers can transfer at the hub to connecting flights which then depart at a similar time.[139] Industrial organization economists have argued that

133. *Id.* at 92 Stat. 1706, § 3(a)(4). The Act stressed the "placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital." *Id.*

134. With the increase of new airlines in the market because of the liberalization of entry requirements, competition increased and fares fell. *See* WEISMAN, *supra* note 23, at 18-20.

135. The increase in competition coupled with the increase in the number of newly-formed airlines led to an expansion in services as some airlines concentrated on basic, low fare/high traffic service, while others focused more on premium, high fare/low traffic service. Thus, consumers had a wider variety of services to choose from. *See id.*

136. *See id.*

137. MORRISON & WINSTON, *supra* note 97, at 72. The Brookings Study also found that "deregulation has led to a yearly welfare gain to travelers and carriers of roughly $8 billion (in 1977 dollars) without generating any substantial losses to specific groups in society." *Id.* at 51. *See also* ELIZABETH BAILEY ET AL., DEREGULATING THE AIRLINES 202 (1985) which concludes that "deregulation is leading to a substantially more efficient airline system." *Id.*

138. *See* DANIEL M. KASPER, DEREGULATION AND GLOBALIZATION: LIBERALIZING INTERNATIONAL TRADE IN AIR SERVICES 30-34 (1988).

139. This allows for an increase in the spoke-to-spoke connection possibilities, as well as more frequent flights. This increase in frequency of flights benefits the consumer. Also, smaller communities which might not have produced enough traffic to support a direct service, were able to reach other destinations via the hub. WEISMAN, *supra* note 23, at 21.

hubbing-and-spoking networks produce economies of scope[140] which produce cost savings due to joint production of differentiated products.[141] An extension of this practice globally under a liberalized aviation regime might produce similar cost savings on an international level. By sharing a mutual hub, international airline alliance partners could coordinate the pooling of similar destination passengers arriving from different international starting points, and create greater efficiencies in their international operations.

Although deregulation in the United States did not eliminate all market imperfections in air transport services, most observers agree that it produced increased efficiency and benefits for both consumers and airlines.[142] Deregulation has contributed to the creation of jobs,[143] a rise in airline employee salaries,[144] and a decrease in airfares.[145] On the other hand, critics of deregulation charge that these successes have been marred by "excessive concentration, destructive competition, and unfair pricing."[146] Some critics have even advocated "roll[ing] back deregulation."[147] However, even these critics admit that it is

140. *See id.* at 35-38. While an in-depth analysis of the theory of economies of scope is beyond the reach of this Note, a brief description is in order. Economies of scope exist whenever the cost of providing the services of shareable input of two or more product lines are subadditive (i.e., less than the total cost of providing these services for each product line separately). In the airline context, hubbing and spoking allows the airlines to attain economies of scope by agglomerating passengers from different spokes (different product lines). This allows for an increase in density of passengers on flights making operations more efficient and the cost of different product lines subadditive. *See id.*

141. *Id.* at 5, 36-37.

142. *Id.* at 25.

143. Joe Cobb, *The Airline Commission's Boost for Deregulation*, HERITAGE FOUND. REP., Sept. 29, 1993, *available in* LEXIS, News Library, Allnws File. The number of airline industry employees was 540,412 in 1992, as compared to 330,495 in 1982 (an increase of 64%). *Id.*

144. Overall industry salaries and wages in 1992 were 34% higher in nominal dollars than in 1982. *Id.*

145. Consumers have saved $6 billion in fares annually since deregulation took effect in 1978. *See* MORRISON & WINSTON, *supra* note 97 and accompanying text.

146. Bruce Stockfish, *Opening Closed Skies: The Prospects For Further Liberalization of Trade in International Air Transport Services*, 57 J. AIR L. & COM. 599, 623 (1992).

147. Paul S. Dempsey, *The Disintegration of the U.S. Airline Industry*, 20 TRANSP. L.J. 9, 44 (1991). Professor Dempsey argues that deregulation was a bad recipe for the U.S. airline industry. He explains:

> There are more than two temperatures at which to cook a pot of stew. In the 1970s, the competitive dial was set on LOW. The stew wasn't warm enough, so Congress turned the dial up to HIGH by promulgating the Airline Deregulation Act of 1978. The competitive bubbles be-

highly unlikely that the United States will return to the level of regulation that existed in 1977.[148]

In addition to deregulating its own airline industry, the United States has attempted to export its liberalization ideals internationally by renegotiating and attempting to liberalize a series of pre-existing bilateral air transport agreements. This strategy has met with only limited success as many countries maintain single national flag carriers which they protect based on claims of national security, national pride and other non-economic factors.[149] Along with opposing liberalization, these countries favor the bilateral system because it allows them to better protect their sovereignty.[150]

As part of the U.S. attempt to export deregulation on a global basis, Congress passed the International Air Transportation Competition Act of 1979.[151] The Act declared that U.S. air transport policy negotiating principles should emphasize the "greatest degree of competition that is compatible with a well-functioning international air transportation system."[152] In effect, the goal of the Act was to export deregulation to the international level.[153] The Act failed in this objective largely because it was an attempt to force multilateral liberalization by exporting U.S. domestic deregulation bilaterally — and on an international level with little account of the diversity of other countries' aviation trade policies.[154] Many countries that oppose liberalization were not receptive to entering into liberal bilateral agree-

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gan to boil, causing stew to splatter over the side of the pot. The aroma was sweet for a short while, until it turned foul with smoke. Before the stew burns a charcoal black, Congress should turn the dial down to MEDIUM, so that we can have stew the public can eat.

Id. at 42-43.

148. *See id.* at 44.

149. DEMPSEY, *supra* note 32, at 82.

150. *ICAO Calls Session on Future Airline Regulation*, AIRLINE FIN. NEWS, July 22, 1991, *available in* LEXIS, News Library, Allnws File. State sovereignty over airspace has sowed a seed of fragmentation in the international air transport regime since any state essentially has a veto power as to who is able to fly into their country. NAVEAU, *supra* note 3, at 230. For an explanation of the origin of sovereignty's role in the air transport trade regime, see *supra* notes 26-30 and accompanying text.

151. International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 35 (1980) (codified as amended in scattered sections of 49 U.S.C. (1988)).

152. *Id.*, § 17. An additional stated purpose was to prevent "unfair, deceptive, predatory, or anticompetitive practices in air transportation." *Id.*

153. *See* NAVEAU, *supra* note 3, at 144-50.

154. *See id.* at 145.

ments with the United States.[155] Thus, while this effort had some limited success,[156] it failed to substantially liberalize the international air transport regime.

While the U.S. attempt at exporting liberalization under the International Air Transportation Competition Act of 1979[157] was essentially a bilateral attempt to attain a multilateral result, the United States has also taken steps to promote liberalization unilaterally. For example, the Underserved Cities Program,[158] initiated by the Bush Administration, allows a foreign airline to introduce a new international service to a U.S. city, without a separate bilateral negotiation, provided that no U.S. carrier wants to serve the route, and the United States has a procompetitive agreement in place with the airline's home country.[159] A 1992 study published by the United States Airports for Better International Air Service (USA-BIAS) concluded that the seventeen new services approved under this program generated $3.8 billion in annual revenues for nine of its member cities and created 83,000 new jobs.[160]

The most recent expression of the U.S. aviation policy is presented in *The Clinton Administration's Initiative to Promote a Strong Competitive Aviation Industry* (*Clinton Initiative*).[161] The *Clinton Initiative* adopted many of the international policy recommendations made by the National Commission to Ensure a Strong and Competitive Airline Industry.[162] The Administration's four general strategies are:

> 1) The United States will actively seek unrestricted multilateral agreements with those groups of nations that are willing to grant comparable benefits to U.S. carriers and to [the U.S.] economy;

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155. However, the EU is now in the process of making its laws uniform throughout the Union, possibly clearing the way for a common external Union aviation policy. *See infra* notes 178-211 and accompanying text.

156. Under this policy, the United States concluded liberal agreements with countries such as Israel and Peru. *See* NAVEAU, *supra* note 3, at 151-52. The Netherlands Protocol is another such agreement concluded as a result of the U.S. policy. *See supra* notes 65-71 and accompanying text.

157. *See supra* notes 151-56 and accompanying text.

158. *See* Expanding International Air Service Opportunities to More U.S. Cities, 55 Fed. Reg. 4039 (Feb. 6, 1990).

159. *See id.*

160. *USA-BIAS Wants DOT to Press for More International Routes*, AVIATION DAILY, Dec. 29, 1993, *available in* LEXIS, Trans Library, Air File. Cities that have benefited from this program include Baltimore, Detroit, Minneapolis, Washington, Charlotte, and Philadelphia. *Id.*

161. *Administration Unveils Sweeping Aviation Initiative*, INSIDE DOT & TRANSP. WK., Jan. 7, 1994, *available in* LEXIS, News Library, Allnws File.

162. *See supra* notes 9-10, 16-19 and accompanying text.

2) While the United States will pursue multilateral accords, it will also seek to liberalize existing bilateral agreements;

3) The United States will vigorously defend all existing bilateral rights and take appropriate actions where necessary;

4) The United States will explore the formation of a global coalition of like-minded, free market nations that recognize the benefits to citizens and national economies of expanded air travel.[163]

The U.S. commitment to liberalization will be tested in upcoming open skies negotiations with Canada.[164] The United States already has a liberal bilateral agreement with Mexico.[165] Although aviation agreements were not included in the North American Free Trade Agreement[166] (NAFTA), the cooperation exercised by these three countries in concluding NAFTA suggests that now is an ideal time to explore the formation of a regional "open skies" area in North America.

B. THE EU LIBERALIZATION MOVEMENT

As noted earlier, in contrast to the free-market arena in which U.S. airlines operate, many of Europe's airlines fly in a market filled with government owned or subsidized carriers.[167] European countries, for the most part, view their airlines as "public utilities" — a service that needs to be provided on a non-discriminatory basis to all citizens even at the cost of ineffi-

163. Transportation Secretary Federico Peña, Speech at the Department of Transportation Briefing (Jan. 6, 1994), Federal News Service, *available in* LEXIS, News Library, Allnws File [hereinafter DOT Briefing].

164. *See* Kevin Dougherty, *Pressure Builds for New Air Deal with U.S.*, FIN. POST, Feb. 15, 1994, at 3. It is expected that Canadian Transport Minister Doug Young and U.S. Transportation Secretary Peña will meet to discuss a new air transport agreement sometime in 1994. *See id.*

165. Chris Aspin, *A Status Quo Maintained: Airlines Under a NAFTA*, BUS. MEXICO, June, 1992, *available in* LEXIS, News Library, Allnws File.

166. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mexico-Canada, *reprinted in* 32 I.L.M. 605 (1993) [hereinafter NAFTA].

167. Duane E. Woerth, *Assessing International Aviation*, AIRLINE PILOT, Aug. 1992, at 33-34, *cited in* David T. Arlington, Comment, *Liberalization of Restrictions on Foreign Ownership in U.S. Air Carriers: The United States Must Take the First Step in Aviation Globalization*, 59 J. AIR L. & COM. 133, 168 n.198 (1993). As of August 1992, the percentage of government ownership of Europe and Asia's top airlines was as follows:

ciency and higher fares.[168] This combination of regulation and subsidization has produced an anti-competitive and inefficient air transport market.[169] As a result, European air fares are, on average, about four times greater than air fares in the United States.[170] Further, European airlines have operating costs that are forty-eight percent higher than those of their American counterparts.[171] The only European airlines which regularly make a profit are British Airways and British Midland—both of which are privately owned.[172] As part of their plan to strengthen the European airline industry, the EU Committee of Wise Men has recommended eliminating subsidies to EU airlines.[173] The plan is just one part of an overall movement toward the liberalization of the EU aviation market.

EUROPE	Airline % Govt. Owned	ASIA	Airline % Govt. Owned
Air France	100	Air China Intl.	100
Iberia	100	China Airlines	100
Olympic	100	Garuda Indonesia	100
TAP-Air Portugal	100	Phillipine Air	100
JAT-Yugoslav	100	Thai Airways	100
Aer Lingus	100	Vietnam Airlines	100
Alitalia	83	Singapore	55
Austria	75.8	Malaysia	52
Finnair	70	Korean Air	0
Sabena	[62.5]*	All Nippon	0
SAS	50	Japan Airlines	0
Lufthansa	48	Air India	[0]**
KLM	39		
Swissair	23		
British Airways	0		
Icelandair	0		

Id. *Sabena is, in effect, 100% government owned — the Belgian government owns 62.5% of its national carrier, and Air France (which is 100% government owned itself) controls the remaining 37.5% of Sabena. *Belgium Presses 'Separation' of Sabena From Air France*, AVIATION EUR., June 30, 1994, *available in* LEXIS, News Library, Allnws File. **Air India was converted into a public limited company in 1994. Nadkarni, *supra* note 126.

168. DEMPSEY, *supra* note 32, at 93-95.

169. Lisa Buckingham, *An Air of Absurdity*, GUARDIAN, Feb. 5, 1994, at 23. Furthermore, 95% of all European routes are monopolies or duopolies and only 26 routes out of more than 600 include more than two operators. *Id.*

170. *Id.*

171. *Flights of Fancy*, *supra* note 102, at 69.

172. Buckingham, *supra* note 169.

173. *Flights of Fancy*, *supra* note 102, at 69. *See also supra* note 19, and note 121 and accompanying text.

1. Origins of a Unified European Air Transport Policy

The European Economic Community (EEC), now known as the EU, was created in 1957 by the EEC Treaty.[174] The goal of the EEC Treaty was to create a "common market" and listed as one of its objectives the adoption of a common policy in the sphere of transport.[175] Since air and sea transport had external international implications, the Treaty limited its express coverage at the time to road, rail and inland waterways.[176] It provided that air and sea transport could be incorporated at a later date by unanimous European Council action.[177]

In the early 1970s, the European Community Commission[178] (the "Commission") and the European Community Council of Ministers[179] (the "Council") began considering liberalization and unification proposals for the European airline industry.[180] In 1979, the Commission issued its first official Memorandum concerning air transport services.[181] Civil Aviation Memorandum No. 1's objective was to increase competition gradually in order to improve flexibility and innovation in the air transport industry.[182] Civil Aviation Memorandum No. 2,[183] released five years later, while recognizing that "American style deregulation would not work in the present European context," sought to pressure European airlines into increasing their effi-

174. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, March 25, 1957, 298 U.N.T.S. 3 [hereinafter EEC TREATY or Treaty of Rome]. The original signatories were Belgium, Italy, France, the Federal Republic of Germany, the Netherlands and Luxembourg. Denmark, Ireland, and the United Kingdom joined in 1973, Greece in 1981, and Portugal and Spain in 1986. GAO INTERNATIONAL AVIATION REPORT, *supra* note 117, at 12.

175. EEC TREATY, *supra* note 174, art. 3 (e).

176. *Id.* art. 84.

177. *Id.* art. 84 (2).

178. The Commission is a non-partisan executive body comprised of 17 Commissioners chosen by the member states. Its goal is to oversee EU development and ensure that business transactions are conducted in conformity with the relevant provisions of the EEC TREATY. DEMPSEY, *supra* note 32, at 97.

179. The Council of Ministers consists of representatives from each member state and is the governing body of the EU responsible for carrying out the objectives of the Union. *Id.* at 98.

180. NAVEAU, *supra* note 3, at 185.

181. 8139/79, Memorandum by the Commission on the Contribution of the European Communities to the Development of Air Transport Service, EUR. COMM. BULL. No. 5 (1979).

182. Stacy K. Weinberg, Note, *Liberalization of Air Transport: Time for the EEC to Unfasten its Seatbelt*, 12 U. PA. J. INT'L BUS. L. 433, 439 (1986).

183. Proposal for a Council Decision on Bilateral Agreements, Arrangements and Memoranda of Understanding Between Member States Relating to Air Transport, 1984 O.J. (C 182) 1-2.

ciency and providing better service and lower fares to passengers.[184] While these Memoranda were promising indicators of liberalization of the EU air transport regime, neither of the two memoranda were officially adopted by the Council.[185]

In 1986, the European Court of Justice helped to clarify the extent to which the EEC Treaty applies to air transport in the EU when it decided the *Nouvelles Frontières* case.[186] The specific issue in the case was whether the French government's prohibition of the sale of airline tickets below a government established price floor constituted a violation of the EEC Treaty competition or antitrust laws. These laws prohibit non-competitive behavior such as price fixing, and in general promote free trade among EU member states.[187] The court ruled that France's action was a violation and stated that "like other means of transport, air transport remains subject to the general rules of the Treaty including those concerning competition."[188] Thus, although the two Memoranda were not adopted, the *Nouvelles Frontières* decision means that anti-competitive behavior by EU airlines can be policed by the Commission under the competition rules. Following the decision, the Commission brought enforcement proceedings against several major EU airlines alleging anti-competitive behavior in violation of Article 85 of the EEC Treaty.[189] This threat of litigation caused the accused airlines to conform their restrictive tariff, pooling, and capacity agreements with Article 85.[190] By forcing airlines to comply with the competition rules, the EU air transport market has become more competitive.

2. The EU Liberalization Packages

The Single European Act,[191] adopted in 1986, set as its goal the creation of a single European market without internal fron-

184. DEMPSEY, *supra* note 32, at 101. More specifically, Memorandum No. 2 called for liberalization in the following areas: capacity; market entry; state aid; pricing; and competition. *Id.*

185. Weinberg, *supra* note 182.

186. Cases 209-213/84, *Ministère Public v. Lucas Asjes*, 32 E.C.R. 1425, 3 C.M.L.R. 173 (1986). [hereinafter *Nouvelles Frontières*].

187. EEC TREATY, *supra* note 174, arts. 85-86.

188. *Nouvelles Frontières*, *supra* note 186.

189. *See* Werner F. Ebke & Georg W. Wenglorz, *Liberalizing Scheduled Air Transport Within the European Community: From the First Phase to the Second and Beyond*, 19 TRANSP. L.J. 417, 431-33 (1991).

190. *Id.*

191. Single European Act, adopted in Luxembourg on Feb. 17, 1986 and at The Hague on Feb. 28, 1986, *reprinted in* 25 I.L.M. 506, No. 12 (1986), 1987 O.J.

tiers in which the free movement of services (including air transport), goods, labor, and capital is unimpeded.[192] In preparation for the single European market's target date of January 1, 1993, the Council adopted its first civil aviation liberalization package in 1987.[193] The rules in this package supplanted more restrictive rules between the EU member states and "marked the first step toward a more liberal regime."[194] These rules allowed member states to designate several of their airlines to operate certain air services, created new traffic rights, and liberalized capacity and fare regulations.[195]

In June 1990, the second liberalization package was adopted by the Council and became effective in November 1990.[196] This measure further relaxed regulations on market access, capacity sharing, and fares.[197] The third package,[198] which became effective in 1993, established the framework for a legitimate internal market for air transport, consisting of freedom of establishment and freedom to provide services.[199] It allows nationals of member states to establish airlines in other member states,[200] removes capacity restrictions, and creates traffic rights on substantially all EU routes.[201] Fares are freed

(L 169). [hereinafter SEA]. Article 8A of the SEA specifically refers to Article 84, the article in the EEC Treaty that deals with air transport. *Id.* at 511. Most of the provisions in the Single European Act are amendments to the EEC Treaty or new provisions that were added to the treaty. *Single European Act a Milestone on the Road Toward a European Union*, 4 COMMON MKT. REP. (CCH) 10, 812 (1986) (CCH Comment).

192. SEA, *supra* note 191, at art. 8A.

193. Council Directive No. 87/601 on fares for scheduled air services between Member States; Council Decision No. 87/602 on the sharing of passengers capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States, 1987 O.J. (L 374) 12-26. *See also* Ben Van Houtte, *Community Competition Law in the Air Transport Sector (I)*, 18 AIR & SPACE L. 61, 62 (1993).

194. Van Houtte, *supra* note 193, at 62.

195. *Id.*

196. Council Regulations No. 2342/90 on fares for scheduled air services and No. 2343/90 on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States, 1990 O.J. (L 217), 1-14.

197. Jeffrey R. Platt, *The Creation of a Community Cabotage Area in the European Community and its Implications for the US Bilateral Aviation System*, 17 AIR & SPACE L. 183, 184-85 (1992).

198. Council Regulations No. 2407/92 on licensing for air carriers, No. 2408/92 on access for Community air carriers to intra-Community air routes, and No. 2409/92 on fares and rates for air services, 1992 O.J. (L 240).

199. Van Houtte, *supra* note 193, at 62.

200. *Id.*

201. *Id.*

from oversight by any member state's authority, subject only to restrictions on predatory or excessive pricing.[202]

Thus, while some regulation still exists, European airlines are now largely free to compete on intra-Union routes.[203] Further, by April 1997, the EU will allow for cabotage — the right to fly domestic sectors in a foreign country — among the member states.[204] While the EU liberalization packages are only in effect with respect to the twelve member states, they will be extended to six of the seven members of the European Free Trade Association (EFTA)[205] once the EU and EFTA finalize the European Economic Area (EEA).[206]

3. The Next Step: External EU Aviation Policy

Until recently, the EU's air transport policy has focused primarily on internal liberalization. Although the liberalization packages have transformed the EU's "international" bilateral system into a "domestic" system based on multilateral principles,[207] EU member states still have separate agreements with countries outside of the Union and maintain their own separate negotiating authority.[208] The adoption of a common external policy combined with individual member states ceding their negotiating authority to the EU Commission, are necessary preconditions to the successful conclusion[209] of any EU air

202. *Id.*

203. *Id.*

204. *Flights of Fancy, supra* note 102, at 70.

205. Toby R. Gooley, *Countdown to the New Europe; Western Europe Unification; The New Europe*, TRAFFIC MGMT., Sept. 1992, *available in* LEXIS, News Library, Allnws File. The European Free Trade Association consists of Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland. *Id.*

206. *Wise Men: Bilaterals Ignore 'New Realties' of Single Market, supra* note 21. The EU liberalization measures will not apply to Switzerland. *Id.*

207. *Id., citing* EU Committee of Wise Men Report. This, in effect, has made the EU internal aviation market more like the internal aviation market of the United States.

208. *Id.* On average, each EU member state has 60-70 different bilateral air transport agreements with countries outside of the EU. *Id.*

209. While the EU is and will continue to be the dominant force in negotiating a single external European aviation agreement, two other organizations deserve mention. First, the Association of European Airlines ("AEA") is comprised of 20 Western European airlines and contributes opinions and research to the formation of European aviation policy. DEMPSEY, *supra* note 32 at 95-100. Second, the European Civil Aviation Conference ("ECAC") is an organization comprised of representatives of 22 member states. This organization also helps to form European aviation policy. In 1982, the ECAC was instrumental in concluding an agreement between 12 of its member states and the United States. *See* The Memorandum of Understanding (on air fares for sched-

transport agreements with outside countries.[210] Recognizing the inefficiencies of the present situation, the EU Committee of Wise Men has recommended the adoption of a common external aviation policy by the middle of 1995.[211]

V. A PROPOSAL FOR FURTHER LIBERALIZING TRADE IN AIR SERVICES

As the EU's internal liberalization nears completion, there will be an opportunity for the United States and the EU to expand their liberalization philosophies to an unprecedented international level. For the first time, the United States (1990 population-250 million) will have an equivalent market in the EU (1990 population-340 million) with which to negotiate an "open skies" agreement.[212] Given this unprecedented opportunity, it is necessary to consider what liberalization strategy would be the most effective and practical to pursue.

A. POSSIBLE APPROACHES TO FURTHER LIBERALIZATION

Further international liberalization may be possible at a bilateral level if countries conclude bilateral agreements with the same standard terms.[213] For example, prior to the adoption of a

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uled services over the North Atlantic) Between ECAC States and the United States, Washington, 2 May 1982, *cited in* NAVEAU, *supra* note 3, at 68-73.

210. *E.C. Role in Negotiating Airline Pacts on Access Debated by Transport Ministers,* Int'l Trade Daily (BNA), Sept. 29, 1993, *available in* LEXIS, News Library, Allnws File. There is some resistance to the EU taking this role. Britain, for example, is negotiating with the United States for a new air transport agreement and does not favor any EU-wide negotiated agreement at this time. *Id.*

211. *Wise Men: Bilaterals Ignore 'New Realties' of Single Market, supra* note 21. Since EU member states disagree on the amount of control they are willing to cede to the EU commission for air transport negotiations with third countries, many European aviation officials believe that it might be 5-10 years before the EU Commission gains the necessary negotiating authority. GAO INTERNATIONAL AVIATION REPORT, *supra* note 117, at 32-33. In 1990 and 1992, the EU Commission submitted proposals which would establish the legal basis for it to negotiate on behalf of the EU with outside countries. Neither proposal has yet been adopted. *Id.*, at 33-34.

212. Michael Goldman & Cyril Murphy, *Multilateral Age Approaches; International Aviation Agreements Shift From Bilateral to Multilateral Strategies,* AIRLINE BUS., Feb., 1994, *available in* LEXIS, News Library, Allnws File. In addition, the two parties have similar economic markets. In 1990, the Gross Domestic Product (GDP) of the United States was $5.5 trillion, while the GDP of the EU was $6.0 trillion at that time. GAO INTERNATIONAL AVIATION REPORT, *supra* note 117, at 12 n.2.

213. Michael E. Levine, *Scope and Limits of Multilateral Approaches to International Air Transport, in* INTERNATIONAL AIR TRANSPORT: THE CHALLENGES

common external policy in the EU, the United States could negotiate "open skies" agreements with several different like-minded European states which incorporate the same liberal standard terms with respect to market access, capacity, and pricing. Such standard agreements would provide the basis for eventual multilateral negotiations.[214] However, past U.S. attempts to achieve liberalization through bilateral agreements have met with only limited success.[215] In addition, as the EU becomes more integrated and moves closer to developing a common external policy — single member states will likely delay entering into "open skies" agreements with third countries until the question of a common external EU policy is resolved.

A more comprehensive approach to liberalization is "ideal" multilateralism,[216] which incorporates certain basic principles expressed in the General Agreement on Tariffs and Trade (GATT).[217] It would allow each member state's airlines to compete for passengers regardless of a carrier's nationality.[218] Eventually, all carriers would be able to carry cargo and passengers on equal terms with other market participants — national treatment in GATT terms.[219] Most Favored Nation (MFN) status[220] would also apply since "ideal" multilateralism would require that the extension of any privilege by one country to another be extended automatically to all other member countries.[221]

"Ideal" multilateralism was considered during the Uruguay Round in the context of negotiations on the inclusion of aviation services within the GATT framework under the rubric of the

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AHEAD *supra* note 1, at 82-84. This has been referred to as the concept of "Defined Standard Multilateral Terms." *Id.*

214. *Id.*

215. *See supra* notes 149-57 and accompanying text.

216. Levine, *supra* note 213, at 75.

217. *See* GATT, *supra* note 2.

218. Levine, *supra* note 213, at 75.

219. The national treatment obligation of GATT requires that "internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale . . . of products, . . . not be applied to imported or domestic goods so as to afford protection to domestic production." GATT art. III:1.

220. The MFN principle is the principle of "non-discrimination." GATT art. I contains an MFN obligation which states that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating or destined for the territories of all other contracting parties." *Id.*, art. I:1.

221. Levine, *supra* note 213, at 75.

General Agreement on Trade in Services (GATS).[222] Largely due to U.S. opposition, the final Uruguay Round Agreement includes only an annex on air transport services which excludes "hard rights"—air traffic rights. The annex does include "soft rights" such as aircraft repair and maintenance services, the marketing of air-transport services and computer reservation services.[223]

The primary U.S. objection to the inclusion of air traffic rights in GATT was a belief that GATT's MFN obligation would work to discourage liberalization.[224] Since MFN requires that any concession granted to one state be applied to all member states, smaller states would be likely to act as "free riders" and have no incentive to liberalize their own markets.[225] Larger states, on the other hand, would delay extending concessions until they could complete the complex task of determining the net benefits of extending these concessions to all member nations.[226]

Given the difficulties of negotiating an all inclusive multilateral agreement and the limited impact inherent in the bilateral approach, the most constructive alternative is a plurilateral agreement — a compact between two or more nations which other nations are encouraged to endorse and become parties to.[227] A plurilateral agreement begins as a bilateral or a limited multilateral agreement and expands into a more inclusive mul-

222. Although GATT previously covered only trade in goods, the recent adoption of GATS extends the coverage of GATT principles to trade in specific services. GATT, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, *done* Dec. 15, 1993, MTN/FA II-A1B at 3 [hereinafter GATS].

223. GATS, Annex on Air Transport Services, *id.* at 37. At one point the U.S. negotiators were prepared to include air transport in a GATS provision in order to have other services covered under GATT. Paul V. Mifsud, *New Proposals for New Directions: 1992 and the GATT Approach to Trade in Air Transport Services*, 13 AIR L. 154, 165 (1988). However, they eventually aligned themselves with the domestic airlines industry who felt that GATT was not the appropriate forum for the regulation of trade in air traffic rights. This belief was based on concerns regarding the applicability of MFN to trade in air services, and the inadequacy of GATT's dispute settlement mechanism and procedure. Joan M. Feldman, *On Getting From Here to There; International Aviation Structure is Becoming Obsolete*, AIR TRANS. WORLD, July 1990, *available in* LEXIS, Trans Library, Air File.

224. Stockfish, *supra* note 146, at 641-42.

225. KASPER, supra note 138, at 95-100.

226. *Id.*

227. *Id.*, at 120-21. A variation on plurilateralism is possible in that "many . . . successful bilateral air service agreements include a provision that, should a multilateral agreement accepted by both parties come into force, their bilateral agreement will be amended to conform to the multilateral agreement." Dr. Assad Kotaite, *Multilateralism: A View from ICAO, in* AIR TRANSPORT LAW AND

tilateral agreement.[228] Thus, it has been referred to as "phased multilateralism."[229] This process could also occur on an inter-regional basis between representatives of similar blocs of like-minded trading partners. Once the initial parties reach an agreement, other blocs or states would be eligible to sign on to the stated terms of the agreement and further liberalize trade in air services.

B. PRINCIPLES OF A MODEL "OPEN SKIES" AGREEMENT

There are certain fundamental principles[230] that should be included in any liberal air transport agreement.[231] First, the agreement should provide that market access in member states be open and that there be no restrictions on capacity or frequency of services.[232] Second, it should provide that all fares and rates be determined by the market, subject only to competition rules, and all other governmental controls on pricing should be eliminated.[233] In order to help ensure that this liberalization does not lead to an oligopoly situation where a few major players dominate the market, rules are needed to prohibit anti-competitive agreements, predatory behavior and abuse of dominant market position.[234] Non-discriminatory rules are also necessary for matters such as fair commercial opportunities, setting up sales and distribution offices in member countries, ground handling, and other airport facilitation issues essential to airline opportunities.[235] Finally, a model "open skies" agreement must

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POLICY IN THE 1990S: CONTROLLING THE BOOM 89, 92 (Pablo Mendes de Leon ed., 1991).

228. Ott, *supra* note 112.

229. Levine, *supra* note 213, at 79.

230. Whatever liberalization measures are taken, safety standards must continue to take precedence over economic considerations. NAVEAU, *supra* note 3, at 233. It is also important that the effects of aviation on the environment continue to be monitored. *Id.* at 227-28. Finally, it is necessary to maintain the ICAO as a forum for nations to exchange technical information, as well as to help, as the ICAO charter notes, "foster the planning and development of international air transport." *Id.* at 51.

231. *Free Trade in the Air Report*, *supra* note 96, at 15-16. This report, drafted in 1991, was produced by a think tank of international aviation authorities, including both airline executives and former high-level government leaders in the field of aviation. *Id.* at i-ii.

232. *Id.* at 15.

233. *Id.*

234. *Id.* at 16.

235. *Id.* These are commonly referred to as "doing business" rules. *Id.*

have an accession clause open to any state willing and able to abide by the agreement's terms.[236]

C. SPECIFIC RECOMMENDATIONS FOR FURTHER LIBERALIZATION

1. U.S.-EU Negotiations: A Starting Point

The greatest potential for liberalizing air transport under the above principles lies in a plurilateral, inter-regional agreement between the United States and the EU. Both parties have, to varying degrees, liberalized their internal markets. However, prior to any serious U.S.-EU passenger agreement negotiations, the EU must develop a common external aviation policy,[237] and member states must "denationalize" their airlines.[238] Otherwise, claims of sovereignty will continue to fragment the international aviation regulatory landscape, and EU air transport policy will continue to lag behind other free trade measures taken within the European Union.[239]

The impact of a U.S.-EU agreement would be great as it would directly affect almost 600 million people.[240] In addition, it is a realistic possibility since it would involve two roughly equivalent markets with similar bargaining power,[241] and would bring together two like-minded parties. Once concluded, such an agreement should be open to any other states willing to comply with its terms and conditions.[242]

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236. *Id.*

237. See *supra* notes 207-11 and accompanying text.

238. NAVEAU, supra note 3, at 204-05. "Denationalization" requires, *inter alia*, that EU member states cease viewing their airlines as state property, and halt all subsidies to carriers. *Id.*

239. One author observes, "[t]oday Phillips, the Dutch electronics firm, can build a manufacturing facility in Barcelona with relative ease. But if KLM Royal Dutch Airlines sought to establish hub-and-spoke operations centered in Barcelona, the Spanish Air Force would likely be scrambled to escort the KLM jets out of sovereign Spanish airspace." Paul S. Dempsey, *Aerial Dogfights Over Europe: The Liberalization of EEC Air Transport*, 53 J. AIR L. & COM. 615, 682 (1988).

240. See *supra* note 212 and accompanying text.

241. See *supra* note 212 and accompanying text.

242. There is interest outside of the EU and the United States in multilateral air transport liberalization. For example, India and Israel have recently adopted "open skies" policies. *See supra* notes 127-28 and accompanying text. In Asia, an airline official in Singapore recently criticized the bilateral process as producing fragmented liberalization, and proposed inter-regional negotiations. *Regional Aviation Ties Should be "Less Restrictive"*, STRAITS TIMES, Sept. 9, 1992, *available in* LEXIS, News Library, Allnws File. (Comments by Mathew Samuel, Singapore Airlines' director of corporate affairs, at the Malaysian Chartered Institute of Transportation National Transportation Conference, Sept. 8, 1992). The Chairman of Japan Airlines has recognized an

As an initial step toward multilateral passenger aviation liberalization, the United States and the EU should conclude an all-cargo agreement that would create "open skies" for air cargo services. This type of agreement would face fewer barriers since the United States already has very liberal cargo accords with several European countries.[243] Preliminary negotiations for such an "open skies" air cargo agreement are tentatively scheduled to begin in 1994.[244] Although analysts are optimistic about the successful conclusion of an all-cargo agreement, they are less hopeful about the conclusion of a similar "open skies" passenger agreement in the near future.[245] However, the negotiation of an "open skies" cargo agreement is clearly a move in the direction of a longer term liberalized air passenger agreement between the United States and the EU.

2. The Netherlands Open Skies Agreement as a Model for a U.S.-EU "Open Skies" Agreement

The United States and the EU should look to the Netherlands Open Skies Agreement[246] as a starting point in their in-

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"irreversible trend toward greater liberalization." *Views on Change of Air Rights Vary Widely at ICAO Conference*, WORLD AIRLINE NEWS, Apr. 13, 1992, *available in* LEXIS, News Library, Allnws File. In addition, a study has recently concluded that airlines in Southeast Asia, which are among the most efficient in the world, are having their growth inhibited by the current restrictive bilateral framework and would benefit from international liberalization. *Southeast Asian Carriers Feel Threatened by Restrictive Bilaterals*, WORLD AIRLINE NEWS, Oct. 11, 1993, *available in* LEXIS, News Library, Allnws File. Finally, the Andean Pact nations of Bolivia, Columbia, Ecuador, Peru, and Venezuela have had a regional "open skies" agreement in force since 1989, and recently pledged to continue moving forth in their efforts to integrate Latin American air travel. *Andean Pact Airlines Form New Association to Integrate Air Travel*, WORLD AIRLINE NEWS, Sept. 20, 1993, *available in* LEXIS, News Library, Allnws File. This "open skies" policy, part of the Cartagena Agreement, has led to a 400% increase in air travel since 1989. This increase can be seen in the proliferation of new companies, services, routes and frequencies across the five member group. *Id.* These are all promising signs for further global liberalization.

243. Goldman & Murphy, *supra* note 212. The European countries are the United Kingdom, Germany, and the Netherlands. *Id.*

244. *E.U., U.S. Open High-Level Meetings on Multilateral Air Freight Regime*, AVIATION EUR., Feb. 17, 1994, *available in* LEXIS, Trans Library, Air File.

245. Robert Trautman, *U.S. Acts to 'Open' Global Skies, With Europe First*, Reuter Eur. Community Rep., Jan. 13, 1994, *available in* LEXIS, News Library, Allnws File.

246. *See supra* notes 72-81 and accompanying text for a description of the Netherlands Open Skies Agreement. The Netherlands Open Skies Agreement incorporates the Netherlands Protocol and the Netherlands Agreement.

ter-regional negotiations. This agreement would provide an effective and useful "open skies" model for several reasons. First, it was negotiated by the United States and the Netherlands — a member of the EU. Second, the effects of the Netherlands Open Skies Agreement can be studied with respect to the KLM-Northwest alliance.[247] Most importantly, the Netherlands Open Skies Agreement is one of the most liberal agreements to date and embodies many of the ideal principles discussed above.[248] Its liberal provisions on market access, fare setting, and "doing business" rules would allow U.S. and EU airlines to enter new markets and more easily form alliances to improve efficiency. Its provisions allowing government intervention to prevent monopolies and predatory pricing provide a safeguard against excessive concentration in the industry that could potentially result from increased competition.

VI. CONCLUSION

International air transport plays a crucial role in international trade and tourism. As this role continues to expand, the present bilateral framework for the exchange of air traffic rights is rapidly becoming incapable of accommodating the industry's evolution. This situation, along with the great expense of time and financial resources required to negotiate numerous bilateral agreements,[249] clearly indicates that there is a need for liberalization in the international air transport industry.

The key to any meaningful liberalization lies with the United States and the EU. To begin this process, the United States and the EU should conclude an "open skies" air cargo agreement. As the EU moves toward adopting a common external aviation policy, the two parties should negotiate an interregional "open skies" passenger agreement, based on the Netherlands Open Skies Agreement.[250]

An "open skies" agreement must include provisions for unlimited market access, liberal fare setting subject only to antitrust or competition laws, and unrestricted capacity. In addition, the agreement should allow for accession by any like-

247. *See supra* notes 81-91 and accompanying text. For a general explanation of the relationship between liberalization and airline alliances, see *supra* notes 92-95 and accompanying text.

248. For details of the ideal principles of a liberal air transport agreement, see *supra* notes 230-36 and accompanying text.

249. *See supra* notes 103-06 and accompanying text.

250. Netherlands Open Skies Agreement, *supra* note 73.

minded state. Implementation of these principles in an agreement between the United States and the EU, and eventually on a multilateral level, would result in lower fares for consumers worldwide[251] and help to ensure the continued growth of the travel and tourism industry.[252] In addition, these developments would strengthen the international air transport industry by increasing the consumption of air transport services.[253]

The current regime of bilateral air transport agreements which governs trade in air services has been solidly in place for the last half a century. As the 50th anniversary of the Chicago Convention nears, the international aviation community must recognize that the current system is outdated and inadequate. The bilateral system is presently incapable of supporting the continued expansion and globalization of the international air transport industry, and must be replaced by a multilateral regime. Only then will it be possible to truly "open" the skies to free trade in air services.

251. *See supra* notes 96-98 and accompanying text.
252. *See supra* notes 24, 99-102 and accompanying text.
253. *See supra* notes 25, 242 and accompanying text.