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“Open Skies” at a Crossroads: How the United States and European Union Should Use the ECJ Transport Cases to Reconstruct the Transatlantic Aviation Regime

Jacob A. Warden *

I. INTRODUCTION

Nearly 100 years have passed since the Wright brothers' harrowing flight over the North Carolina shore, yet the United States remains the leader of commercial aviation. The U.S. market is the world's most lucrative, and U.S. carriers have become the world's largest.¹ Since the creation of the modern international aviation regime, at the 1944 Chicago Conference, the United States has used this power and prestige to create a system much to its liking: U.S. airlines have obtained mostly unfettered access to dozens of international markets; their domestic market has been shielded from foreign competition; and their economic activities are generally unchecked by any supranational organization.

However, the recent decision of the Court of Justice of the European Communities (“ECJ”) in the Transport Cases² threatens to change this. The

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¹ As many as fifty-five percent of the daily flight operations in the world take place in the United States. See Thomas Gale Moore, *Moving Ahead*, REGULATION, Summer 2002, at 12.

² Case C-466/98, Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland; Case C-467/98, Commission of the European Communities v. Kingdom of Denmark; Case 468/98, Commission of the European Communities v. Kingdom of Sweden; Case C-469/98, Commission of the European Communities v. Republic of Finland; Case C-471/98, Commission of the European Communities v. Kingdom of Belgium; Case C-472/98, Commission of the European Communities v. Grand Duchy of Luxembourg; Case C-475/98, Commission of the European Communities v. Republic of Austria; Case C-476/98, Commission of the European Communities v. Federal Republic of Germany

Transport Cases, brought by the European Commission ("Commission") in an attempt to achieve exclusive authority to negotiate commercial aviation agreements for the collective European Union, partially struck down several bilateral aviation treaties signed between several of the Member States and the United States. Although the ECJ did not formally grant the Commission power to conclude an E.U.-wide aviation agreement with the United States, the Court wiped clean the diplomatic slate by requiring most of the existing agreements to be rewritten.

The Commission, recognizing the logistical nightmare that renegotiation would present, promptly requested that the Member States grant it a mandate to conclude a new bilateral agreement between the European Union and the United States. This mandate has now been approved, and the Commission intends to use its newly-attained power to push for the creation of a Transatlantic Common Aviation Area ("TCAA"), a massive multilateral deregulation that would give all U.S. and E.U. carriers full rights of access to every route, both international and domestic, within the TCAA. Such a radical change to the existing transatlantic aviation regime could give E.U. carriers a new competitive advantage over their U.S. rivals, and could spell economic disaster for the United States and its carriers. Because of these potentially extraordinary consequences, U.S. policymakers must work quickly for compromise.

This Comment offers an analysis of the coming diplomatic struggle, and the factors which will ultimately shape the resulting post-Transport Cases regime. Part I presents the history of the transatlantic aviation regime, and the roots of the aviation rivalry between the European Union and the United States. Part II presents a brief analysis of the ECJ ruling in the Transport Cases, while Part III offers an overview of the European Union's reaction to the decision. Finally, Part IV offers my assessment of the compromise toward which the two sides should work. I believe the most equitable solution is three-pronged, such that the European Union and the United States must: 1) preserve open access for all U.S. and E.U. carriers on transatlantic gateway routes; 2) engage in comprehensive route-swapping between their respective domestic markets to ensure economic balance; and 3) work to create a supranational organization powerful enough to effectively monitor the transatlantic market.

II. THE MODERN TRANSATLANTIC REGIME: A CENTURY IN THE MAKING

Much of the current chaos in the international regime can be attributed to uneven historical development. Since the first International Aeronautical Congress was held in Paris in 1889, two themes have shaped the growth of

[hereinafter the Transport Cases]. With the exception of the U.K. case, which does not discuss all of the major issues addressed in the other cases, all of the ECJ opinions are nearly identical. For the sake of simplicity, page citations are based on the Finland case unless otherwise indicated.

the regime.³ First, the civil aviation industry has proven to be an economic enigma, such that the performance of markets and players alike often defies traditional economic analysis. Second, attempts to modify the international aviation regime often have been shaped by the fact that the United States has held a competitive advantage over Europe since World War II.

A. The Roots of Global Aviation

The legal framework for international air travel was first created by a series of multinational conferences and conventions held after the first Paris Congress. France and Germany signed the first true aviation treaty in 1913, though it quickly expired during World War I.⁴ Following the war, several countries adopted the 1919 Paris Aeronautical Convention, which established the principle that each state should maintain sovereignty within its own airspace.⁵ The Paris Convention also called for the creation of the "International Convention on Air Navigation," a multinational governing body that would last until 1943.⁶ Although the Paris Convention was a critical early step in the aviation regime, it was doomed to failure when several countries (including the United States) opted not to support a supranational aviation body.

As World War II drew to a close, the major powers decided to make another attempt at a lasting multilateral agreement, and convened in Chicago.⁷ The members of the Chicago Conference agreed to base the new regime on the core principle of the Paris Convention, in that every nation would retain sovereignty within its own airspace, but they were divided over what form the international system should take.⁸ The United States, recognizing that much of its military fleet would soon be converted to commercial use, pushed for a laissez-faire regime, which would allow U.S. carriers to capitalize on their impending competitive advantage.⁹ Signatories would grant each other the so-called "five freedoms" of air transport, and international aviation would become an open market.¹⁰ The United

³ E. Rebecca Kreis, *A Comparative Analysis of the Aviation Network Within the European Community and the Ad-Hoc Network Between the United States and Central America*, 24 TRANSP. L.J. 303, 305 (1997).

⁴ Even without the intervention of World War I, this treaty was intended only as a stop-gap until a multilateral aviation agreement could be created. *See id.*

⁵ *Id.*

⁶ *Id.*

⁷ Andras Vamos-Goldman, *The Stagnation of Economic Regulation under Public International Air Law: Examining its Contribution to the Woeful State of the Airline Industry*, 23 TRANSP. L.J. 425, 431 (1996).

⁸ *Id.*; *see also* Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180-82, 15 U.N.T.S. 295-301.

⁹ Vamos-Goldman, *supra* note 7, at 431.

¹⁰ Daniel C. Hedlund, Note, *Toward Open Skies: Liberalizing Trade in International Airline Services*, 3 MINN. J. GLOBAL TRADE 259, 265 (1994). The "five freedoms" of aviation consist of the rights to: 1) fly across another state without landing; 2) land for non-

Kingdom, anticipating this U.S. domination, feared that a laissez-faire regime would jeopardize its aviation industry, and impede its access to the remnants of its empire.¹¹ To protect itself, the United Kingdom pushed for the creation of the International Civil Aviation Organization ("ICAO"), which would monitor competition and protect the world's airlines from one another.¹²

The resulting Chicago Convention represented a compromise between these two positions.¹³ First, by granting one another the first two freedoms (the right to fly across each others' states without landing, and the right to land for non-traffic purposes), the signatories laid the foundation for a laissez-faire world market.¹⁴ While states reserved their right to grant full commercial access to foreign carriers, they could not bar foreign carriers from flying over their airspace or from landing for refueling and maintenance; a provision that would give all carriers theoretical access to the world's airspace. Second, to satisfy the United Kingdom and its allies, the Chicago Convention created the ICAO, which would be granted limited supervisory power within the aviation industry.¹⁵

Once the Chicago Convention took effect, states who wished to increase their access to foreign markets began to sign bilateral agreements granting reciprocal rights of access to specified points of entry.¹⁶ The first major bilateral agreement was the 1946 U.S.-U.K. "Bermuda I" agreement, which became the model for thousands of agreements signed over the next thirty years (creating a network which remains the basis of the modern regime).¹⁷ These agreements varied somewhat in their scope, but even the

traffic purposes; 3) put down passengers, mail, and cargo taken on in the territory of the state whose nationality the aircraft possesses; 4) take on passengers, mail, and cargo destined for the territory of the state whose nationality the aircraft possesses; and 5) take on passengers, mail, and cargo destined for the territory of any other state and the privilege to put down passengers, mail, and cargo coming from any such territory. *See id.* The five freedoms have since been expanded to eight, including: 6) the right to carry traffic between two foreign states via its own state of registry; 7) the right to fly into one foreign state from another foreign state, and discharge or take on traffic for a third foreign state; and 8) cabotage, the right to fly internal domestic routes within a foreign country. *See* Ruwantissa I.R. Abeyratne, *Would Competition in Commercial Aviation Ever Fit Into the World Trade Organization?*, 61 J. AIR L. & COM. 793, 802 n. 29 (1996).

¹¹ Hedlund, *supra* note 10, at 266.

¹² Vamos-Goldman, *supra* note 7, at 431.

¹³ *Id.*

¹⁴ Abeyratne, *supra* note 10, at 802.

¹⁵ *See* Vamos-Goldman, *supra* note 7, at 434. As Vamos-Goldman points out, though, "the ICAO cannot promote every contracting state's desire to operate international airlines, and simultaneously promote a system of efficient and economical air transport." This problem has always impeded the ICAO's ability to effectively regulate global aviation. *Id.*

¹⁶ Abeyratne, *supra* note 10, at 806.

¹⁷ The Bermuda I agreement may actually be a better representation of the U.S.-U.K. compromise than the Chicago Convention. During U.S.-U.K. bilateral negotiations, the United States relaxed its objections to the IATA, while the U.K. relaxed its objections to ca-

most liberal agreements left fares and tariffs under the exclusive control of the International Air Transport Association ("IATA"), the ICAO's sister organization.¹⁸ This eliminated price competition from international aviation, meaning that airlines could only compete through capacity and service frequency.¹⁹

B. Moving Toward Deregulation

Following the Chicago Convention, competition within domestic markets was equally well-regulated. The U.S. aviation industry was placed under the control of the U.S. Civil Aeronautics Board ("CAB"), which was given the power to control routes and fares within the domestic market, and could approve or disapprove fares set by the IATA on international routes.²⁰ During the 1970s, however, CAB studies revealed that rigid price restrictions had gradually caused the airline industry to become unprofitable.²¹ To remedy this problem, Congress passed the Airline Deregulation Act of 1978, which relaxed air transport restrictions in favor of a freer market.²² As deregulation began to take effect in the U.S. market, several waves of expansion and consolidation eventually led to an oligopoly.²³

Because post-deregulation U.S. carriers were generally more efficient than foreign carriers, the deregulation movement began to spread to foreign markets. The European Community ("EC"), the largest foreign market for U.S. carriers, seemed the most likely to follow the U.S. lead. However, because the Member States' domestic markets were often too small to justify

capacity and service-frequency competition. See Adam L. Schless, *Open Skies: Loosening the Protectionist Grip on International Civil Aviation*, 8 EMORY INT'L L. REV. 435, 440 (1994).

¹⁸ See Hedlund, *supra* note 10 at 269. The IATA membership consists of airlines operating under the flag of an ICAO member. In order to legally operate in the United States (and other countries), the IATA was required to seek antitrust immunity. See *id.* at 268, n.60; Lars Gorton, *Air Transport and EC Competition Law*, 21 FORDHAM INT'L L. J. 602, 603 (1998).

¹⁹ Seth M. Warner, Comment, *Liberalize Open Skies: Foreign Investment and Cabotage Restrictions Keep Noncitizens in Second Class*, 43 AM. U. L. REV. 277, 286 (1993). By vesting airlines with control of their capacity and routes, bilateral agreements weakened the ICAO's enforcement power. See Hedlund, *supra* note 10, at 267.

²⁰ Hedlund, *supra* note 10, at 289.

²¹ Schless, *supra* note 17, at 442.

²² Warner, *supra* note 19, at 289.

²³ Eli A. Friedman, Comment, *Airline Antitrust: Getting Past the Oligopoly Problem*, 9 U. MIAMI BUS. L. REV. 121 (2001). Oligopoly generally exists when an industry consists of only a few firms, or the industry is dominated by a few firms. See *id.*; RICHARD G. LIPSEY & PAUL N. COURANT, MICROECONOMICS 243 (11th ed. 1996). Since deregulation, the U.S. domestic market has generally been dominated by its five or six largest carriers. This trend could be disrupted by the bankruptcies of United and US Airways, both of whom command a significant market share within the United States. See U.S. Dep't of Trans. Domestic Market Survey, available at <http://www.transtats.bts.gov>.

self-deregulation, European deregulation could only take place through a lengthy and complicated EC-wide process.²⁴

The foundation for EC deregulation was the 1957 Treaty of Rome (the first installment of the future EC Constitution), which had given the EC the authority to create "the framework of a common transport policy."²⁵ The common transport policy was limited to rail, road, and inland waterway transport, but stipulated that the Council of Europe ("the Council") could extend the transport policy to maritime and aviation transport by unanimous vote.²⁶ This provision effectively granted each Member State veto power over any EC air or maritime regulations, diminishing the EC's ability to develop a common transport policy.²⁷ However, as the ECJ ruled in the 1974 case *Commission v. French Republic* (the "French Seaman" case), the Treaty of Rome did not necessarily preclude the EC from indirectly regulating the air or maritime industries.²⁸

During the early 1980s, the Commission relied on the French Seaman case to justify greater involvement in the aviation market, by using its authority under the Rome Treaty's competition clauses to indirectly regulate EC air carriers.²⁹ The Member States initially balked at this policy, but the

²⁴ Romina Polley, *Defense Strategies of National Carriers*, 23 FORDHAM INT'L L.J. 170, 178 (1999).

²⁵ See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997) [hereinafter EC TREATY], Articles 74-75 and 84; see also Matthew Driven, *Liberalization and Privatization in European Community Air Transport Law*, INT'L LEGAL PERSP., Spring 1994, at 97.

²⁶ See Jurgen Basedow, *Airline Deregulation in the European Community-Its Background, its Flaws, its Consequences for E.C.-U.S. Relations*, 13 J. L. & COM. 247, 251 (1994). The maritime and aviation sectors were not included in the common transport policy for two reasons. First, the original six EC members-Belgium, France, Germany, Italy, Luxembourg, and the Netherlands-are located closely enough together that their internal air and maritime markets were not large enough to merit consideration during the early phases of integration. Second, the Member States were generally satisfied with the early system of bilateral treaties that had governed air transport since the Chicago Convention. See *id.*; see also Paul Stephen Dempsey, *Competition in the Air: European Union Regulation of Commercial Aviation*, 66 J. AIR L. & COM. 979, 994 (2001); Gorton, *supra* note 18, at 608; Moritz Ferdinand Scharpenseel, L.L.M. Perspective, *Consequences of E.U. Airline Deregulation in the Context of the Global Aviation Market*, 22 NW. J. INT'L L. & BUS. 91, 95 (2001).

²⁷ Dempsey, *supra* note 26, at 994. In 1966, French President Charles De Gaulle, fearing that his country had sacrificed too much sovereignty to EC institutions, temporarily pulled out of the EC. The "empty chair crisis" was resolved by giving Member States de facto veto power over areas of high national interest (including aviation and maritime transport), such that policy changes in these areas could only be made through unanimous vote. *Id.*

²⁸ Basedow, *supra* note 26, at 252. The French Seaman case specifically held that the general principles of the Rome Treaty could still be applied to maritime law, which allowed the EC to indirectly regulate maritime transport through other provisions of the Rome Treaty. The ECJ would later extend this rule to air transport in *Nouvelles Frontières*. See *id.*; see also Gorton, *supra* note 18, at 608; Scharpenseel, *supra* note 26, at 95.

²⁹ Driven, *supra* note 25, at 99.

ECJ upheld the Commission's authority in the 1986 "Nouvelles Frontieres" case (*Ministere Public v. Lucas Asjes*, ruling that the EC indeed had the power to apply its competition rules to air transport).³⁰ The European Parliament ("EP") also began to pressure the EC to bolster its aviation policy, and, in 1983, brought suit against the Council to force a more proactive approach to the common transport policy.³¹ Although the ECJ refused to force the Council to take any specific steps within the aviation sector, it suggested that the Council had a duty to incorporate aviation into the broader common transport policy.³²

The true impetus for EC airline deregulation arrived with the passage of the Single European Act ("SEA") in 1987.³³ The stated goal of the SEA was to create a common market across the EC, by lifting all barriers to trade across the Member States.³⁴ To this end, the SEA amended the Treaty of Rome in order to strengthen the EC's ability to direct common policies (including a common transport policy) for the EC at large. Perhaps the most significant change was to the Council's decision-making process, which was changed from a unanimous voting system to a qualified majority voting system.³⁵ This removed the veto power of individual Member States, enabling the Council to adopt more stringent regulations against the Member States and forcibly deregulate the EC internal market (including the aviation sector).³⁶

Formal airline deregulation occurred between 1987 and 1992, with the implementation of the "three packages."³⁷ The first package, passed in 1987, had little value beyond the symbolic, as existing airlines were largely exempted from its provisions.³⁸ True progress toward deregulation began with the second package, passed in 1990, which granted intra-EC third,

³⁰ Cases 209-213/84, *Ministere Public v. Lucas Asjes*, 1986 E.C.R. 1425 [1990]; Driven, *supra* note 25, at 99.

³¹ Driven, *supra* note 25, at 99; Dempsey, *supra* note 26, at 1013.

³² See Basedow, *supra* note 26, at 251; Gorton, *supra* note 18, at 608; Scharpenseel, *supra* note 26, at 95.

³³ See Scharpenseel, *supra* note 26, at 95; Basedow, *supra* note 26, at 252; Gorton, *supra* note 18, at 608.

³⁴ Scharpenseel, *supra* note 26, at 95.

³⁵ Driven, *supra* note 25, at 99.

³⁶ Dennis A. Duchene, *The Third Package of Liberalization in the European Air Transport Sector: Shying Away From Full Liberalization*, 23 *TRANSP. L.J.* 119, 128 (1995).

³⁷ See Scharpenseel, *supra* note 26, at 95. Although the third package was passed in 1992, it did not fully take effect until 1997. *Id.*

³⁸ Substantively, the first package consisted of Council Regulations 3975/87 and 3976/87, Council Decision 87/602, and Community Directive 87/601. The most important of these was Directive 87/601, which for the first time defined what would be considered an "EC carrier": a carrier that is 1) owned by the nationals of a Member State or the Member State itself; and 2) has its principal place of business or central administration within the EC. See Council Directive 87/601, 1987 O.J. (L 374) 9; Duchene, *supra* note 36, at 128-9; Scharpenseel, *supra* note 26, at 95.

fourth, and limited fifth freedom rights to EC carriers,³⁹ and increased the carriers' power to set fares.⁴⁰ The third package, in 1993, erased the remaining barriers to a free aviation market.⁴¹ By 1997, when the provisions of the third package took full effect, the Member States' airlines had been granted full cabotage (the right to fly internal domestic routes within a foreign country) within the collective European Union.⁴²

C. Beyond Deregulation: Today's Transatlantic Market

The transatlantic aviation market has been chaotic since deregulation, and some debate exists as to whether deregulation has been the unqualified success that many in the industry believe. Three inherent economic flaws exist in the aviation market: 1) airlines are simultaneously fuel-, labor-, and capital-intensive (increasing cost sensitivity and industry risk); 2) airlines suffer from the paradox of overcapacity (they must fly often to cover high fixed costs, yet each new flight increases supply, lowers fares, and decreases revenue); and 3) the "inventory" of air carriers, seat space, is infinitely perishable (it is lost once the flight departs).⁴³ These flaws have caused dozens of airlines to fail, pushing aviation markets toward oligopoly or monopoly, and raising serious questions as to whether the industry can thrive in a fully competitive market. How best to combat these tendencies has been a source of debate on both sides of the Atlantic.

³⁹ As far as third and fourth freedom rights were concerned, Council Regulation 2343/90 allowed flagship carriers free access from their home state to any other Member State, and granted greater market access to non-flagship carriers (through the "multiple designation" process). Fifth freedom rights, meanwhile, were limited to fifty percent capacity (such that a carrier could fly from country A to C, stopping in B to pick up new passengers, provided that no more than half the passengers on the B-C leg of the flight originally boarded at B). See Council Regulation 2343/90, 1990 O.J. (L217) 8; Driven, *supra* note 25, at 99.

⁴⁰ Council Regulation 2342/90 saw a shift from "double approval" fare pricing, whereby proposed fares could be *approved* only with the consent of both affected Member States, to "double disapproval" fare pricing, whereby a proposed fare could be *voided* only by the consent of both affected Member States. See Council Regulation 2342/90, 1990 O.J. (L 217) 1; Driven, *supra* note 25, at 99.

⁴¹ The key parts of the third package are Council Regulations 2407/92, 2408/92, and 2409/92. Regulation 2407/92 requires Member States to recognize all EC carriers equally, based on the nationality provisions described in Regulation 87/601. Regulation 2408/92 erased the remaining restrictions on fifth freedom rights, such that EC carriers were now permitted to pick up as many passengers as they wanted. This also had the practical effect of granting sixth and seventh freedom rights to all EC carriers, and laid the groundwork for eighth freedom (cabotage) restrictions to be phased out by 1997. Regulation 2409/92 eliminated any supervision on fare pricing for all EC carriers, allowing double disapproval only for "excessively high" or "predatorily low" fares. See *supra* notes 38-40, and accompanying text; Driven, *supra* note 25, at 99.

⁴² See Scharpenseel, *supra* note 26, at 95.

⁴³ Paul Stephen Dempsey, *Airlines in Turbulence: Strategies for Survival*, 23 TRANSP. L.J. 15, 20 (1995) [hereinafter Dempsey II]; Vamos-Goldman, *supra* note 7, at 442.

1. *The U.S. Approach: Preserving Competition*

To preserve competition among its airlines, the United States has adopted a two-pronged aviation policy. First, to combat the domestic market's trend toward oligopoly, regulators actively encourage new entrants and discourage unnecessary consolidation among U.S. carriers. This has led to a vicious economic cycle, whereby boom periods allow new carriers to flood the market, and bust periods dramatically cull the herd.⁴⁴ Prices remain low during either period, though, from increased competition (boom) or depressed demand (bust).⁴⁵ Second, U.S. policymakers have greatly improved U.S. access to foreign markets, enabling larger U.S. carriers to shift their excess capacity abroad. This has given U.S. airlines a privileged place in the global aviation market, but has also led to friction with major foreign carriers (particularly those in the European Union).

Prior to the September 11th attacks, the U.S. domestic market was beginning to show signs of economic maturity: market growth had declined since the 1960s; passenger demand had been flat since the mid-1980s; and trip volume (per capita flights taken) among American consumers was extraordinarily high.⁴⁶ This problem was compounded by the market's increasingly oligopolistic tendencies, as the bulk of domestic air traffic (particularly long-haul traffic) was operated by a decreasing number of carriers. U.S. regulators were forced to adopt aggressive airline antitrust policies to sustain a competitive market.⁴⁷

Unlike international airline cooperation, as explained below, domestic airline cooperation is the exclusive prerogative of the U.S. Department of Justice ("DOJ").⁴⁸ This allows the DOJ to address cooperation through its own guidelines, which analyze whether the merger will result in a concentrated market, create adverse competitive effects, prevent another airline's entry into the market (or force an airline to exit the market), and whether a more competitive alternative exists.⁴⁹ The DOJ has routinely barred larger

⁴⁴ New entrants are often low-fare airlines serving the most competitive routes and markets, which further complicates the economic cycle. Dempsey II, *supra* note 44, at 26.

⁴⁵ *Id.*

⁴⁶ *Id.* at 20; Vamos-Goldman, *supra* note 7, at 442.

⁴⁷ The problem with an oligopoly is that participants are presented with a classic prisoner's dilemma: a firm can collude with other firms (assuring all a minimum level of success), or can choose to compete (raising the ceiling on its potential returns, but also creating risk that it will be left behind). Oligopoly is not inherently bad for consumers, because the minimum efficient scale, or "smallest output at which long-run average cost reaches its minimum because all available economies of scale in production and/or distribution have been realized," may be too large to support more than four or five firms. Problems arise when oligopolists collude rather than compete; the goal of U.S. regulators is to encourage the latter. See Lipsey & Courant, *supra* note 23, at 243-256 and G-11.

⁴⁸ Michael J. AuBuchon, *Testing the Limits of Federal Tolerance: Strategic Alliances in the Airline Industry*, 26 TRANSP. L.J. 219, 245 (1999).

⁴⁹ Alberto G. Rossi, Comment, *Grounding Future Consolidations: United-US Airways Cancel Flight*, 54 ADMIN. L. REV. 883, 888 (2002).

carriers from purchasing their smaller, financially-troubled brethren, as consolidation would further centralize the market.⁵⁰

Forcing the market to remain competitive has lowered prices on many routes, but has also created excess capacity in the domestic market.⁵¹ To offset this problem, the U.S. government has done its best to encourage foreign governments (particularly Europeans) to grant unprecedented rights to U.S. airlines, primarily through the "Open Skies" policy. Although U.S. officials pledged that Open Skies would help the world move "toward a truly open environment for international aviation services," the practical result of the policy has been to create enormous competitive advantages for U.S. carriers (vis-à-vis major foreign rivals).⁵²

When the United States concluded its first Open Skies agreement, a 1992 bilateral treaty with the Netherlands, the initial beneficiary of the deal was KLM (the Dutch national airline). Carriers licensed in either the United States or the Netherlands were granted open access to international routes between the two countries.⁵³ This gave KLM an immediate competitive advantage over other European carriers, as it now had total gateway access to the lucrative U.S. market.⁵⁴ Fearing that their carriers would be left behind, other nations pushed for their own Open Skies agreements with the United States.⁵⁵ U.S. diplomats were happy to comply, as the growing network of Open Skies agreements began to give U.S. carriers quasi-cabotage within the European Union.⁵⁶ Although U.S. carriers could not fly true domestic routes within the Member States (e.g., Paris to Marseille), they could

⁵⁰ *Id.* The DOJ's decisions to block the United-US Airways merger and Northwest's proposed purchase of Continental are two examples of the policy to preserve financially trouble airlines in order to maintain a competitive marketplace. See *id.*; Friedman, *supra* note 23, at 129.

⁵¹ Dempsey II, *supra* note 43, at 30.

⁵² DOT Order 92-8-13 (*In the Matter of Defining "Open Skies"*), Docket 48130 [hereinafter Open Skies Memo]. The model Open Skies agreement is based on eleven principles: 1) open entry on all routes; 2) unrestricted capacity and frequency on all routes; 3) unrestricted route and traffic rights (or full fifth freedom access); 4) double-disapproval pricing in third and fourth freedom markets; 5) liberal charter arrangements; 6) liberal cargo regimes; 7) conversion and remittance arrangements; 8) open code-sharing opportunities; 9) self-handling provisions (granting a carrier the right to provide its own support operations); 10) pro-competitive provisions on commercial opportunities; and 11) commitment for non-discriminatory computer reservation system (CRS) access. *Id.*

⁵³ Aviation Transport Services Agreement, Oct. 14, 1992, U.S.-Netherlands, Article 12-3(A), T.I.A.S. No. 11,976.

⁵⁴ Gateway access limits foreign airlines to international flights to and from the foreign country. In the U.S.-Netherlands context, KLM is not permitted to fly from Detroit to Boston without first flying to a non-U.S. city; nor is Delta permitted to fly from Rotterdam to Amsterdam without first flying to a non-Dutch city. See *id.*

⁵⁵ Schless, *supra* note 17, at 450.

⁵⁶ Benoit M.J. Swinnen, *An Opportunity for Trans-Atlantic Civil Aviation: From Open Skies to Open Markets?*, 63 J. AIR L. & COM. 249, 272-273 (1997).

establish cross-border "hub-and-spoke" networks (e.g., creating a hub in Frankfurt, with spokes to Paris and Marseille).⁵⁷

To fully realize this competitive advantage, though, U.S. carriers needed an influx of labor and equipment. Rather than shifting their own aircraft and employees to Europe, U.S. carriers decided to pursue cooperative alliances with E.U. carriers. Alliances are important to carriers at all levels, because they both increase business opportunities (by giving passengers more flexible travel options) and reduce costs (by allowing participants to cut excess capacity on overlapping routes). However, alliances are particularly vital for an international carrier, as a successful alliance allows the foreign carrier to build inroads to another nation's domestic market without violating foreign ownership restrictions.⁵⁸ The U.S. government recognized that foreign nations would be more willing to accede to Open Skies agreements if their carriers were permitted to ally with U.S. carriers, and modified its antitrust policy by granting preferential treatment to Open Skies carriers.

This policy shift was both simple and effective. Because airline alliances are essentially price-fixing arrangements, they are subject to DOJ antitrust review. Following the development of the Open Skies policy, however, the U.S. government gave the Department of Transportation ("DOT") authority to grant antitrust immunity to an international airline alliance if it was "not adverse to the public interest [and would not] substantially reduce or eliminate competition."⁵⁹

The DOT could exempt alliances created under an Open Skies agreement, because the treaties are inherently pro-competitive arrangements (such that they remove all barriers to entry for potential competitors within the affected markets).⁶⁰ When alliances were created without an Open Skies agreement, however, the DOT would deny immunity (allowing the DOJ to analyze the alliance and dictate terms to the applicants).⁶¹ By signing an Open Skies agreement, foreign nations generally could ensure that their airlines would be allowed to cooperate with U.S. carriers.⁶²

KLM was the first foreign airline to benefit from this practice, as its alliance with Northwest was granted DOT immunity shortly after the Open Skies agreement between the United States and the Netherlands was concluded.⁶³ Although the DOT cited several economic reasons for allowing

⁵⁷ *Id.*

⁵⁸ Svetlana Mosin, Comment, *Riding the Merger Wave: Strategic Alliances in the Airline Industry*, 27 TRANSP. L.J. 271, 279 (2000).

⁵⁹ See 15 U.S.C.A. § 1; Charles N.W. Schlangen, Comment, *Differing Views of Competition: Antitrust Review of International Airline Alliances*, 2000 U. CHI. LEGAL F. 413, 418 (2000).

⁶⁰ *Id.* at 425.

⁶¹ *Id.* at 418.

⁶² Swinnen, *supra* note 56, at 280.

⁶³ Hedlund, *supra* note 10, at 272; Mosin, *supra* note 58, at 278.

the alliance, the agency clearly believed that the presence of an Open Skies agreement would increase competition on U.S.-Dutch routes.⁶⁴ Furthermore, the DOT indicated that granting approval to the alliance "would encourage other European countries to liberalize their bilateral agreements with the United States," and generally increase efficiency in the transatlantic market (by eliminating the two carriers' overlapping routes).⁶⁵ When KLM-Northwest subsequently applied for an alliance with Alitalia, the Italian flagship carrier, DOT approved the application on similar grounds.⁶⁶

However, when American Airlines ("AA") and British Airways ("BA") attempted to create an alliance in 1997, the lack of a U.S.-U.K. Open Skies treaty helped defeat their application. The existing U.S.-U.K. bilateral agreement, the 1977 "Bermuda II" treaty, allows only four airlines direct access to London's Heathrow airport: AA, BA, United Airlines, and Virgin Atlantic (the so-called "Heathrow Four").⁶⁷ Without a more liberal agreement, the DOT believed that several transatlantic routes would be effectively dominated by three carriers, with no chance for a competing carrier to operate.⁶⁸ This was enough to preclude immunity in spite of any potential economic merits of the AA-BA merger.⁶⁹

Open Skies has allowed U.S. carriers to divide and conquer foreign markets, and created U.S. dominance in the transatlantic market. E.U. car-

⁶⁴ Mosin, *supra* note 58, at 278. The DOT's analysis concluded that the combined KLM-Northwest airline would control less than ten percent of the total U.S.-Europe market, ranking fifth overall. The only specific routes which might see a drop in competition were Amsterdam/Detroit and Amsterdam/Minneapolis-St.Paul (though these routes would be partially protected by connecting service from British Airways and Air France). Furthermore, the DOT believed that that public interest in allowing the merger outweighed this loss in service. *See id.* As Schlangen suggests, this analysis demonstrates the DOT's willingness to ignore economics in favor of a perceived public benefit. Schlangen, *supra* note 59, at 434.

⁶⁵ Mosin, *supra* note 58, at 279; D.O.T. Order 93-1-11, Docket 48343 (*In the Matter of the Acquisition of Northwest Airlines by Wings Holdings, Inc.*).

⁶⁶ Mosin, *supra* note 58, at 283; D.O.T. Order 99-12-5, Docket OST-1999-5674 (*Joint Application of Alitalia-Linee Aeree Italiane S.P.A., KLM Royal Dutch Airlines, and Northwest Airlines, Inc.*).

⁶⁷ Mosin, *supra* note 58, at 282. Bermuda II partially liberalized Bermuda I, but did not grant full Open Skies privileges to either U.S. or U.K. carriers. Vamos-Goldman, *supra* note 7, at 435.

⁶⁸ Jeff Mosteller, *The Current and Future Climate of Airline Consolidation: The Possible Impact of an Alliance of Two Large Airlines and an Examination of the Proposed American Airlines-British Airways Alliance*, 64 J. AIR L. & COM. 575, 588 (1999).

⁶⁹ *Id.* Admittedly, AA and BA collectively held a sixty-percent market share within the U.S.-U.K. market at the time of their application, and it is unlikely that U.S. regulators would allow for such an economic behemoth even with an Open Skies agreement. This should not diminish the importance of Open Skies agreements in attaining antitrust immunity, however, as BA was equally unsuccessful in its earlier attempts to form an alliance with US Airways (which would have been a much smaller entity than AA-BA). *See id.*; Mosin, *supra* note 58, at 283.

riers, however, have begun to chafe at the fact that Open Skies allows U.S. carriers to shift their excess capacity to Europe, but grants E.U. carriers only minimal access to the United States.⁷⁰ The Transport Cases will enable Europe to address this perceived imbalance, because the collective voice of the Member States is enough to offset U.S. economic might. A prolonged diplomatic fight would hurt the U.S. airline industry even in the best of times, but could prove devastating amid the aftershocks of September 11th.⁷¹ Passenger volume is down by at least 25%, carriers have been forced to spend millions of dollars to upgrade their security procedures, and many carriers (most notably United Airlines and US Airways) have succumbed to bankruptcy.⁷² Foreign markets, expected to outgrow the U.S. market by several percent, remain the industry's salvation, and maintaining access to Europe is a vital step toward this goal.⁷³

2. *The E.U. Approach: Conflict and Compromise*

Unlike the United States, which created a federal system from bottom to top, the European Union has been built by imposing federalism from top to bottom.⁷⁴ Tension between the Commission and the Member States, and among the Member States themselves, has increased as European integration has progressed, and has greatly complicated what otherwise could be smooth policymaking. These tensions have particularly plagued the aviation sector, as some of the Member States have grown increasingly reluctant to cede any more sovereignty to the European Union, while others have stubbornly refused to abandon their traditionally state-owned airlines.⁷⁵ Unless the Member States are able to work together, by streamlining their aviation policies and respecting the Commission's authority, the United States will continue to dominate transatlantic aviation.⁷⁶

The biggest obstacle to collective action has traditionally been the Member States' unwillingness to grant the Commission increased sovereignty in the aviation sector. Although the Commission was given a limited

⁷⁰ Swinnen, *supra* note 56, at 272.

⁷¹ Industry members predict that the September 11th tragedy will "plunge us back into the red as an industry... [and] lead to some very heavy losses." Michael Whitaker, *Competition in the Airline Industry after September 11, 2001*, 14 DEPAUL BUS. L.J. 319, 324 (2002). These troubles have been further exacerbated by the ongoing conflicts in Afghanistan and Iraq.

⁷² Phillip A. Karber, *Reconstructing Global Aviation in an Era of the Civil Aircraft as a Weapon of Destruction*, 25 HARV. J.L. & PUB. POL'Y 781 (2002).

⁷³ See Kevin O'Toole, *A New Balance*, FLIGHT INTERNATIONAL, Jul. 1, 2003, at 74.

⁷⁴ Denis J. Edwards, *Fearing Federalism's Failure: Subsidiarity in the European Union*, 44 AM. J. COMP. L. 537, 538 (1996).

⁷⁵ John Richardson, *The European Union in the World—A Community of Values*, 26 FORDHAM INT'L L.J. 12 (2002).

⁷⁶ John Balfour, *A Question of Competence: The Battle for Control of European Aviation Agreements with the United States*, 16-SUM AIR & SPACE LAW 7, 8 (2001).

mandate to negotiate specific regulatory agreements in 1995, the Member States have generally balked at attempts to expand this authority.⁷⁷ Rather than face the risk of losing their national carriers to the collective European Union, the Member States have preferred to protect their carriers' market share (and the prestige associated with having a national carrier).⁷⁸ This has prevented E.U. carriers from merging into cross-border mega-carriers capable of withstanding U.S. competition.⁷⁹

The Member States also must find common ground in the ongoing debate over government ownership. Some of the Member States attach so high a symbolic value to their national carriers that they are willing to invest great effort to save their carriers despite long economic odds.⁸⁰ This complicates the E.U. internal aviation market, by creating major barriers to entry for non-government carriers.⁸¹ The Member States have the discretion to refuse licenses to carriers that cannot prove their "financial fitness," a subjective determination easily skewed toward government-owned airlines.⁸² The Member States also have the power to restrict route access and reserve airport slots, privileges which may be exclusively granted to their national airlines.⁸³ These competitive advantages are further enhanced through tax breaks and direct subsidization.⁸⁴

The Commission has been granted the power to combat excessive subsidization through Article 87 of the Treaties (which specifically outlaws any practice by a Member State that distorts competition).⁸⁵ To this end, the Commission theoretically blocks direct operational subsidies unless a car-

⁷⁷ The ECJ decision in the Transport Cases emphasizes this point, by observing that the Member States have routinely tried to limit the Commission's power to regulate European aviation. See *id.*; Transport Cases, *supra* note 2, at §§ 118-32.

⁷⁸ Swinnen, *supra* note 56, at 274.

⁷⁹ Mergers allow cost-cutting through economies of scale and the elimination of route redundancies, making the surviving airline more efficient. Jens Flottau, *Europeans Mull Consolidation*, AVIATION WEEK & SPACE TECHNOLOGY, Jun. 16, 2003, at 1.

⁸⁰ Kirsten Bohmann, *The Ownership and Control Requirement in U.S. and European Union Air Law and U.S. Maritime Law-Policy: Consideration; Comparison*, 66 J. AIR L. & COM. 689 (2001).

⁸¹ See Scharpenseel, *supra* note 26, at 106.

⁸² Duchene, *supra* note 36, at 154. The financial fitness standard requires the airline to prove that it can meet its financial obligations for the next two years, and that it can meet its fixed and operation costs for the next three months. Both of these are heavy standards for airlines, given the instability of the industry. See *id.*; Dempsey II, *supra* note 43, at 20.

⁸³ Duchene, *supra* note 36, at 154; Scharpenseel, *supra* note 26, at 106.

⁸⁴ Scharpenseel, *supra* note 26, at 106; Dempsey, *supra* note 26, at 1124; Duchene, *supra* note 36, at 154.

⁸⁵ Article 87(1) reads: "Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market." EC TREATY, *supra* note 25, at Article 87(1).

rier is operating under a "public service obligation" (serving the underserved) or otherwise using the subsidies for "social aid" (to benefit individual customers rather than to benefit the carrier itself).⁸⁶ Other forms of state aid—such as capital injection, loan financing, or loan guarantees—are evaluated under the "Market Economy Investor Principle" ("MEIP"), which essentially evaluates whether a reasonable investor would make such an investment.⁸⁷ If the aid qualifies under MEIP, the Commission will then perform an Article 87(3) analysis, to determine if the state aid may be an exempt activity.⁸⁸ All three of these tests are too vague to protect against well-disguised subsidies, however, making it difficult for the Commission to fully enforce government ownership.⁸⁹

Throughout the integration process, collectivism has proven to be the European Union's greatest strength and biggest weakness.⁹⁰ The collective economic might of the Member States is equal or greater than that of the United States, yet the Member States can only realize this power when their national interests are merged into common goals. The aviation industry epitomizes this problem, as cacophony among the Member States routinely impedes the common good.⁹¹ Collective inaction has thus far led to U.S. domination, yet collective action should allow Europe to gain the upper hand.

III. THE TRANSPORT CASES: A VICTORY FOR EUROPE?

The roots of the Transport Cases trace back to 1990, when the Commission first voiced its desire to achieve full competence over the European Union's external aviation policy. In 1990, and again in 1992, the Commission published memoranda arguing that the "common commercial policy" outlined in Article 113 of the Treaties gave it exclusive authority to negotiate transport agreements with non-E.U. states. However, the ECJ eventually ruled that Article 113 did not apply to international transport agreements, and that the Commission had no authority to conclude aviation or maritime agreements with other countries.⁹²

As *Open Skies* began to give U.S. carriers quasi-cabotage within the E.U. internal market, the Commission again requested that the Council grant it exclusive authority to conclude a bilateral agreement between the

⁸⁶ Dempsey, *supra* note 26, at 1127.

⁸⁷ *Id.* at 1128.

⁸⁸ *Id.* Article 87(3) lists activities which "may be considered to be compatible with the common market." See EC TREATY, *supra* note 25, at Article 87(3).

⁸⁹ Polley, *supra* note 24, at 178; Dempsey, *supra* note 26, at 1138.

⁹⁰ Richardson, *supra* note 75, at 12.

⁹¹ "[The ECJ] decision paves the way for liberalising the archaic rules that have held back the development of Europe's airline industry," Alistair Osborne, *European Boost for Open Skies*, THE DAILY TELEGRAPH, Nov. 6, 2002, at 33 (quoting Andrew Cahn, BA director of government affairs).

⁹² Balfour, *supra* note 76, at 7.

European Union and the United States (which could protect E.U. carriers from the “divide and conquer” element of Open Skies).⁹³ The Council still refused to grant exclusive competence, but did give the Commission the right to negotiate certain regulatory issues (such as agreements on code-sharing and computerized reservation systems (“CRSs”)).⁹⁴ When this limited mandate proved ineffective, the Commission decided to take legal action against several of the Member States who had signed Open Skies agreements with the United States.⁹⁵

A. Arguments of the Parties

The Commission presented three arguments to support its position. First, it argued that the Member States had violated the Commission’s exclusive authority to conduct external trade agreements by signing commercial pacts with a non-E.U. nation.⁹⁶ Second, the Commission argued that the Council, by implementing deregulation, had given the Commission implied competence within the aviation sector.⁹⁷ Finally, the Commission argued that the so-called “nationality clauses” contained in the Open Skies treaties, which gave the United States the right to deny access to foreign-licensed airlines flying from a signatory nation, violated the comity clauses of the Treaties.⁹⁸

The Member States countered these arguments by firmly asserting their right to negotiate aviation agreements with the United States or any non-E.U. nation. First, the Member States urged the ECJ to uphold its earlier rulings that the Commission had only limited competence to regulate service industries (including air transport).⁹⁹ Second, the Member States argued that external competence could only be granted to the Commission at the Council’s discretion, and the Council had yet to grant the Commission any power to negotiate full-scale commercial aviation agreements.¹⁰⁰ Finally, the Member States argued that the Open Skies nationality clauses were not discriminatory, because each Member State retained the power to license any carrier as a “national carrier,” and could theoretically allow other E.U. carriers to fly under the Member State’s flag.¹⁰¹

⁹³ *Id.*

⁹⁴ Swinnen, *supra* note 56, at 276.

⁹⁵ Balfour, *supra* note 76, at 7.

⁹⁶ Transport Cases, *supra* note 2, at §§ 45-49.

⁹⁷ *Id.* at §§ 66-71.

⁹⁸ *Id.* at §§ 114-15.

⁹⁹ *Id.* at §§ 50-54.

¹⁰⁰ *Id.* at §§ 72-74.

¹⁰¹ Transport Cases, *supra* note 2, at §§ 116-117.

B. Findings of the Court

First, the ECJ held that Article 84(2) of the Treaty did not itself grant the Commission competence over external aviation agreements, because the Commission generally only has authority where the Council has specifically granted a mandate. Although the Council had granted mandates allowing the Commission to negotiate aviation agreements with Norway and Sweden in the past, this did not automatically create a mandate for the Commission to negotiate with the United States. The ECJ found that the Council's express decision not to negotiate with the United States during the implementation of the third package further demonstrated that the Council did not recognize the Commission's authority over external aviation agreements. By signing agreements with the United States, therefore, the Member States had not violated the Commission's expressed competence, because no such authority existed.¹⁰²

Second, the ECJ discussed the issue of implied competence. The ECJ recognized that implied competence could exist, such that once the Council chose to make rules in a particular area, the Commission could assume the power to conclude individual agreements within that area. Because the Council had only created rules for the internal E.U. aviation market, though, implied competence did not yet exist for the external aviation market. This would necessarily preclude the Commission from negotiating an Open Skies agreement with the United States. However, because the Commission was given a limited mandate to discuss regulatory issues with the United States, agreements which interfered with those regulatory matters were a violation of the Treaties.¹⁰³

Finally, the ECJ held that the so-called "nationality clauses" contained within the Open Skies agreements inherently violated the comity provisions of the Treaties. Nationality clauses allow the United States to deny access to carriers whose home nation has not signed an agreement, which potentially grants some carriers a privileged right of access over others (for example, the advantage KLM currently has over British Midland). However, Articles 52 and 58 of the Treaties guarantee that nationals of one Member State must receive the same treatment in another Member State as that state's nationals. Signing such discriminatory agreements, therefore, clearly violated E.U. law.¹⁰⁴

Based on these findings, the ECJ ruled that provisions in the Open Skies treaties which contradicted either the Commission's previously granted authority or general E.U. law would be voided.¹⁰⁵ This effectively suspends the Open Skies agreements, as well as the Bermuda II treaty (which contains a nationality clause), until they are renegotiated under ac-

¹⁰² *Id.* at §§ 55-65.

¹⁰³ *Id.* at §§ 75-113.

¹⁰⁴ *Id.* at §§ 118-132.

¹⁰⁵ *Id.* at § 135.

ceptable terms.¹⁰⁶ Although unwilling to grant the Commission power to conduct this renegotiation, the ECJ suggested that an agreement between the European Union and the United States would be the most efficient way to satisfy E.U. law.¹⁰⁷

IV. EUROPE'S NEXT STEP: STATUS QUO OR TCAA

The European reaction to the ECJ decision was initially mixed. Although the Commission hailed the judgment as "a historic decision that [would] have some enormously positive consequences for the consolidation of the European aviation industry," several of the Member States pledged that the status quo would prevail.¹⁰⁸ The Member States' reluctance to grant further sovereignty to the Commission was not surprising, given the increasingly choppy history of European integration. However, the Member States ultimately realized that a renegotiation of the status quo would merely preserve U.S. domination in the transatlantic market, and decided to give the Commission its long-awaited mandate. Now that the mandate has been granted, the Member States hope to exercise their Open Skies termination rights, close the E.U. market to U.S. carriers, and force the United States to acquiesce to the TCAA.¹⁰⁹

A. Victory for the United States: Keeping the Status Quo

Following the ECJ decision, the United States declared that "the current agreements [would] remain in force as the legal basis for air services between the United States and individual Member States," and that the agreements could be renegotiated to accommodate the court's framework without giving the Commission a mandate.¹¹⁰ To some extent, these statements were diplomatic wishful thinking, as U.S. policymakers knew (or should have known) that an agreement between the European Union and the United States would destroy U.S. carriers' privileged status within the transatlantic market. Given the discord among the Member States, though,

¹⁰⁶ *A Break in the Clouds: The European Court's "Open-Skies" Ruling Undermines the Protection of Europe's Flag Carriers*, THE ECONOMIST, Nov. 9, 2002, at 14.

¹⁰⁷ *Id.*

¹⁰⁸ Daniel Dombey, *Long Haul Ahead in Open Skies Struggle*, FINANCIAL TIMES, Nov. 5, 2002, at 11 (quoting E.U. Transport Commissioner Loyola de Palacio); *AUA Says Court Ruling Will Change Little in Practice*, AUSTRIA TODAY, Nov. 7, 2002, at 5 (quoting Austrian Airlines Group spokesman Johann Jurecka).

¹⁰⁹ The United States cannot stop the Member States from backing out of their Open Skies agreements, because all of the agreements contain a termination clause: "Either Party may, at any time, give notice in writing to the other Party of its decision to terminate this Agreement." Air Services Agreement, June 2, 1989, U.S.-Austria, art. 15, T.I.A.S. No. 11265.

¹¹⁰ *U.S. Says "Open Skies" Pact with E.U. Nations in Force*, AGENCE FRANCE PRESSE, Nov. 5, 2002. (quoting DOT spokesman Leonardo Alcivar).

hope for the status quo had some merit: a bloc of the Member States could have united to vote down the mandate.¹¹¹

If the mandate had been defeated, the Member States would have been forced to renegotiate bilateral agreements with the United States within the confines of the Transport Cases, a process wrought with challenges. Each Member State has a different stake in the aviation market (vis-à-vis the United States), and each would have sought what it deemed an appropriate right of access to the U.S. market. Because the Transport Cases effectively outlaw national-airline favoritism, though, any Open Skies agreement signed by a Member State would have necessarily granted all E.U. carriers the same right of access to the U.S. market from that Member State.¹¹² Economic forum-shopping would have followed, as E.U. carriers began to migrate to airports with the best access to the U.S. market.

Consider, for example, the differences between the United Kingdom and Portugal. Because U.K. airports (e.g., London Heathrow) are more valuable to U.S. carriers than Portuguese airports, the United Kingdom would have demanded higher concessions (e.g., domestic cabotage) from the United States than would Portugal.¹¹³ When the new agreements were signed, Portugal would have received Open Skies access to the United States, whereas the United Kingdom (assuming the United States refuses to accede to its demands) would have received only limited access to the United States. As a result, E.U. carriers would have shifted service from U.K. airports to Portuguese airports (hoping to benefit from full access to the U.S. market), and prices and flight schedules would have been adjusted accordingly. The United Kingdom, threatened with a dramatic loss of access to the United States, eventually would acquiesce to Open Skies.

This scenario illustrates the folly of continued bilateral negotiations between individual Member States and the United States. Although finding common ground may prove difficult, the European Union can only stop

¹¹¹ Although the mandate was granted unanimously, Ireland and the United Kingdom faced considerable political pressure to veto the move. See Andrew Osborn, *U.K. Gives in over "Open Skies"*, THE GUARDIAN, Jun. 6, 2003, at 20; Chris Dooley & Sorchá Crowley, *Politicians and Unions Fearful for Shannon*, IRISH TIMES, Jun. 7, 2003, at 2. If the Member States had attempted to avoid these vetoes via Qualified Majority Vote (QMV), the mandate might still have been blocked. To block approval in the QMV system, 26 votes must vote against the proposal. The four nations who have not concluded Open Skies agreements with the United States could have banded together to block the mandate; the United Kingdom (10), Spain (8), Greece (5), and Ireland (3) collectively have 26 votes. See DELEGATION OF THE EUROPEAN COMMISSION, THE EUROPEAN UNION: A GUIDE FOR AMERICANS 9 (2002).

¹¹² Transport Cases, *supra* note 2, at §§ 130-32; Daniel Dombey & Kevin Done, *Open Skies Deal Hit by European Court Ruling*, FINANCIAL TIMES, Nov. 5, 2002, at 12.

¹¹³ London Heathrow ranks third among the world's airports in passenger volume, fourteenth in cargo volume, and thirteenth by aircraft movement. Portugal's largest airport, in Lisbon, does not rank in the top thirty for any of these categories. See Airports Council International, *ACI Traffic Reports for Twelve Months Ending April 2003*, available at <http://www.airports.org> (last visited Aug. 17, 2003).

U.S. domination if it speaks with one voice.¹¹⁴ By granting the Commission its mandate, the Member States can obtain an agreement both addressing their national concerns and advancing the process of integration.¹¹⁵

B. Victory for Europe: Creating the TCAA

Recognizing the problems posed by bilateral negotiations with the United States, the fifteen Member States unanimously granted the Commission authority to conclude a new aviation agreement between the United States and the European Union in June 2003.¹¹⁶ Their goal in doing so was simple: to rectify the imbalance between U.S. and E.U. carriers, and "to change the archaic restrictions on competition in air travel across the North Atlantic."¹¹⁷ From the European perspective, a TCAA is the best means to this end, as ownership and cabotage restrictions would be lifted on both sides of the Atlantic, and TCAA-member carriers would be granted all eight freedoms within a common aviation market.¹¹⁸ Government subsidization also would be eliminated, allowing weaker carriers to dissolve or be absorbed by healthier rivals.¹¹⁹ Finally, the TCAA necessarily would require the harmonization of U.S. and E.U. aviation competition policy, to ensure that the TCAA internal market does not become too oligopolistic.¹²⁰

Theory suggests that the TCAA, once implemented, would resemble the modern U.S. domestic market. International routes would be dominated by a few carriers, as larger E.U. and U.S. carriers would quickly move forward with currently dormant plans to absorb smaller national carriers.¹²¹

¹¹⁴ Russell Hotten, *EU Ruling Heralds New Aviation Era*, THE TIMES OF LONDON, Nov. 6, 2002, at 25.

¹¹⁵ *The EU Gets a New Flight Plan- A Saner Transatlantic Market Edges a Little Closer*, FINANCIAL TIMES, Nov. 6, 2002, at 22.

¹¹⁶ Andrew Osborn, *U.K. Gives in over Open Skies*, THE GUARDIAN, Jun. 6, 2003, at 20.

¹¹⁷ Russell Hotten, *Lords Back E.U. over Open Skies Deal*, THE TIMES OF LONDON, May 10, 2003, at 48 (quoting Lord Woolmer of Leeds, chairman of the U.K. House of Lords E.U. Committee). See also Dempsey II, *supra* note 43, at 27.

¹¹⁸ Ulrich Schulte-Strathaus, *Common Aviation Areas: The Next Step Toward International Air Liberalization*, 16-SUM AIR & SPACE LAW 4 (2001).

¹¹⁹ *Id.*

¹²⁰ Even pro-TCAA advocates concede that consolidation will necessarily follow implementation: "The logical trend on the market will mean that there will have to be a reduction in the number of airlines with a global vocation. I don't know whether there will be six, seven, or five, the market will decide that." Stephen Castle & Michael Harrison, *Judgment Opens Door to E.U. Airline Mergers*, THE INDEPENDENT, Nov. 6, 2002, at 17 (quoting Commissioner de Palacio).

¹²¹ Several hurdles have thus far prevented consolidation from truly taking hold within Europe. First, until the Commission is better able to prevent government subsidization, national carriers can only fail in the most dire of circumstances (e.g., Sabena). Second, the Open Skies system prevents carriers flying under an Open Skies treaty from merging with those flying under a limited bilateral, because the Open Skies airline would lose Open Skies access. Third, ownership and antitrust restrictions would prevent a cross-border merger from

These mega-carriers would then form alliances with regional airlines and railroads to create a hub-and-spoke system across Europe and North America. Eventually, Southwest-style discount carriers would cluster around major city pairs, helping to preserve competition and lower fares.¹²² The TCAA, in final form, would connect the entire transatlantic market in a seamless aviation network.¹²³

V. PROSPECTS FOR COMPROMISE: THE CASE FOR A THIRD WAY

The most belligerent E.U. policymakers have used the Transport Cases to draw a line in the sand over transatlantic aviation, demanding that the Member States bar U.S. carriers from the European Union until the TCAA is ratified.¹²⁴ Before dragging U.S. and E.U. consumers through a protracted economic cold war, though, E.U. policymakers must recognize that the TCAA is an impossible goal. Aside from the structural differences between the European Union and United States, the United States has legitimate reasons for protecting access to its domestic market. Knowing this, E.U. leaders would be well-served to find a compromise with the United States, by developing an agreement that fairly exchanges routes between the two sides, and improving supranational monitoring in the aviation industry.

A. Why the TCAA Must Fail

Though a noble goal for E.U. policymakers, the TCAA ignores the realities of the current aviation relationship between the European Union and the United States and thus is doomed to fail. Unlike the Member States, who have developed a common aviation market as part of a broader economic harmonization, there is little foundation for a common aviation market between the European Union and the United States. Even if cooperation were greater between the European Union and the United States, U.S. policymakers likely would object to a TCAA because of the impact the pro-

happening. One such merger which might proceed under the TCAA is a long-rumored BALKL deal. See Schulte-Strathaus, *supra* note 118, at 5.

¹²² Southwest and other discount carriers rely on a city-to-city route structure (the so-called "Southwest model") rather than a hub-and-spoke system. This is often facilitated by serving secondary airports within larger markets (such as Baltimore, MD, rather than Washington DC, or Paris Orly, rather than Charles De Gaulle). See Whitaker, *supra* note 71, at 330.

¹²³ See Schulte-Strathaus, *supra* note 117, at 4. Optimistic supporters of the TCAA, such as Virgin Atlantic Airways Chairman Richard Branson, believe that a TCAA should one day encompass the entire world. See Richard Branson, *Fair Competition: A True Revolution in Flight*, AVIATION WEEK & SPACE TECHNOLOGY, Dec. 2, 2002, at 78.

¹²⁴ Stephen Castle & Michael Harrison, *Judgment Opens Door to EU Airline Mergers*, THE INDEPENDENT, Nov. 6, 2002, at 17. This leverage will only increase with E.U. expansion, and U.S. carriers might eventually be left with whatever countries hold out from E.U. membership.

posal would have on other policy areas.¹²⁵ Although the TCAA would fully deregulate international routes within the transatlantic market, it would also require the United States to eliminate its foreign ownership rules and otherwise open its domestic market.¹²⁶ This is an unacceptable sacrifice for U.S. leaders, as both national security and labor protection would be threatened too greatly.

1. Structural Differences

The level of integration adopted by the Member States over the past fifty years has been unprecedented and commendable. The Member States have gradually erased their national borders, merged their national economies and currencies, and have laid the foundation for common defense and law enforcement programs.¹²⁷ National policies are being replaced by E.U. policies, and work or life in one Member State should be no different from work or life in another Member State. Assuming competence exists, when the European Union sets its agenda, every Member State should accept that agenda as its own. Domestic aviation policy has been no different, as the Member States have blended their home markets into an E.U. market, and are slowly shifting formerly "national" airlines into the "community" mold.¹²⁸ To Europeans, the TCAA seems to be the logical next step in global deregulation, as it would draw more states into their open aviation market.

However, there is far too little cohesion between the United States and the European Union for the TCAA to exist in full. Despite the similarities of the U.S. and E.U. aviation markets, many differences exist between the two sides, divisions which are sufficient to paralyze a transatlantic open market. The European Union must streamline its airline antitrust policy, and a host of E.U. and U.S. corporate regulations (e.g., bankruptcy and lease laws) must be internationalized, to keep all corners of the TCAA under the same rules.¹²⁹ TCAA member nations also must align their foreign policies, or TCAA expansion and administration will be greatly hampered.

¹²⁵ Kevin Done, "Stark" Rebuff Could Mark Watershed: Collapse of "Open Skies" Talks Between U.S. and U.K. Ends Years of Effort, NATIONAL POST, Sept. 12, 2002, at 12.

¹²⁶ Ved P. Nanda, *Substantial Ownership and Control of International Airlines in the United States*, 50 AM. J. COMP. L. 357, 366 (2001). Currently, the United States limits foreign parties to 49-percent equity ownership, or 25-percent voting interest, in a licensed U.S. carrier. These limitations may be increased if the foreign party exercises significant personal influence over domestic owners, such that it maintains de facto control over the carrier. *Id.*

¹²⁷ See EC TREATY, *supra* note 25, at pmbl.

¹²⁸ See Schulte-Strathaus, *supra* note 118, at 4.

¹²⁹ Schulte-Strathaus, *supra* note 118, at 4. E.U. antitrust policy toward international airline mergers is extremely complex. Articles 81 and 82 grant the Commission broad power to regulate domestic cooperation, but Regulation 3975/87 bars the Commission from regulating external aviation mergers. If the international airline merger is large enough, the Merger Regulation applies, but Article 88 of the Treaties allows individual Member States to grant

Furthermore, although E.U. leaders claim that the TCAA would remedy the harm done by U.S. domination, the TCAA actually would be too heavy a penalty for U.S. carriers to pay for their perceived transgressions. U.S. carriers have enhanced their competitive advantage under Open Skies, but this advantage existed long before the Open Skies agreements were signed.¹³⁰ Quasi-cabotage rights are solely the product of European geography; an Open Skies agreement grants U.S. carriers no greater right of access to the signing state than foreign carriers are given in return. Instead of creating a balance between Europe and the United States, the TCAA would overly benefit E.U. carriers: exchanging access to the vast U.S. market for access to the tiny internal markets of the Member States.¹³¹

2. U.S. National Security

The foremost reason for barring foreign parties from owning or controlling U.S. airlines is the continued importance of the Civil Reserve Air Fleet Program ("CRAF"), which allows the U.S. military to demand access to a selected percentage of an airline's commercial fleet during times of need.¹³² Together with the Merchant Marine, CRAF enables the U.S. military to deliver troops and equipment to the battlefield far more quickly than through military transport alone.¹³³ Although some analysts have questioned whether the United States should reduce its reliance on civilian air crews,¹³⁴ CRAF has become an increasingly important part of the U.S. mili-

limited antitrust immunity within their jurisdiction. This confusion has led to mixed results. The 1995 Swissair-Sabena investigation went smoothly, as the Commission's authority to dictate terms for the deal was unchallenged. However, the ongoing BA-AA investigation was challenged by U.K. authorities, which led to the so-called "clash of confidences" political nightmare. See Stephen McShea, *The "Dominant Position" Doctrine and the European Union's Response to the British Airways/American Airlines Alliance*, 23 B.C. INT'L & COMP. L. REV. 71, 76 (1999); G. Porter Elliott, *Learning to Fly: The European Commission Enters Unfamiliar Skies in its Review of the British Airways-American Airlines Alliance*, 64 J. AIR L. & COM. 157, 207 (1998); Per Jebsen & Robert Stevens, *Assumptions, Goals, and Dominant Undertakings: The Regulation of Competition under Article 86 of the European Union*, 64 ANTITRUST L.J. 443, 459 (1996).

¹³⁰ Swinnen, *supra* note 56, at 274.

¹³¹ Schulte-Strathaus, *supra* note 118, at 4.

¹³² *Id.* at 310; Esther Schrader & James F. Peltz, *Inspections in Iraq: Pentagon Readies Plans to Recruit Civilian Aircraft*, LOS ANGELES TIMES, Jan. 17, 2003, at A5. The most notable use of CRAF took place during the 1991 Gulf War. *Id.*

¹³³ National Defense Transportation Assn. (NDTA), *Transportation Security and the War Against Terrorism*, DEFENSE TRANSPORTATION JOURNAL, Aug. 1, 2002, at 6.

¹³⁴ See Major Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111, 113 (2001). As Major Guillory points out, international law does not currently view CRAF crews as combatants. However, if CRAF crews cross the line to "direct participation in hostile acts," (as defined by the Geneva Conventions) they might become combatants. This would then allow an enemy nation to target CRAF crews during war. CRAF crews also face the threat of hostile action from non-state actors, such as shoulder-fired missiles launched by terrorists. See Marc Sellinger, *DOD Studying Anti-Missile Options for Civil Reserve Aircraft*, AEROSPACE DAILY, Aug. 1, 2003, at 1.

tary (with \$2 billion spent during the 2003 conflict in Iraq).¹³⁵ Indeed, the U.S. government recently pledged to restructure the program—both to make CRAF more attractive to domestic airlines, and to shield the program from the airline industry's financial troubles—suggesting that CRAF is here to stay.¹³⁶

Just as the Merchant Marine depends on the continued availability of domestic shipping, though, the viability of CRAF hinges on access to a sizeable aviation fleet.¹³⁷ This access would likely decrease if foreign parties were allowed to own or control domestic airlines, as foreign parties would be unlikely to grant the U.S. military free access to their fleets.¹³⁸ Aside from the obvious conflicts that would result from disagreements between the United States and the foreign country,¹³⁹ CRAF participation is often a losing proposition for the participating airlines—to such an extent that the Pentagon recently has struggled to keep even domestic carriers on board.¹⁴⁰ Therefore, short of passing laws requiring foreign airlines to participate in CRAF (laws which certainly would be reciprocated by foreign countries against U.S. carriers), foreign-owned planes would disappear from the resource pool, increasing the CRAF responsibilities for surviving domestic airlines.¹⁴¹ Given the importance of CRAF for national security,

¹³⁵ Patricia Parmalee, *CRAF Winds Down; Civil Widebodies Troop Service to Iraq Continues*, AVIATION WEEK & SPACE TECHNOLOGY, Jun. 9, 2003, at 13.

¹³⁶ U.S. GENERAL ACCOUNTING OFFICE, *Military Readiness: Civil Reserve Air Fleet Can Respond As Planned, but May Incentives May Need Revamping*, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON MILITARY READINESS, COMMITTEE ON ARMED SERVICES, H.R. REP. NO. 03-278, at 2 (2002) [hereinafter GAO Report]. Some airlines have also lost their predominant incentive to participate in CRAF—the promise of future military business—as over ninety percent of peacetime military operations require the use of B-747s (aircraft which many smaller airlines do not own).

¹³⁷ Victor G. Hanson & John V. Berry, *The Diminution of the Merchant Marine: A National Security Risk*, 74 U. DET. MERCY L. REV. 465, 482 (1997).

¹³⁸ Schrader & Peltz, *supra* note 132, at A5.

¹³⁹ Angela Edwards, Notes and Comments, *Foreign Investment in the U.S. Airline Industry: Friend or Foe?*, 9 EMORY INT'L L. REV. 595, 640 (1995). As an example, the French government might choose to bar Air France from participating in CRAF based on its differences with the United States over the war in Iraq.

¹⁴⁰ Schrader & Peltz, *supra* note 132, at A5. Although participation in CRAF is voluntary, most of the major U.S. airlines (33 total) are members of the program. Some airlines, though, have begun to question the benefits of membership, as they are only compensated by the military for the actual flight-use of aircraft. If planes are called up for CRAF (and therefore taken away from the airlines), but not actually used, the airlines receive little or no compensation.

¹⁴¹ *Id.* When CRAF is enacted, it proceeds in three stages. 78 planes are called up under Stage One, 291 under Stage Two, and 929 under Stage Three (approximately 20% of the total commercial fleet). If the number of participating U.S. airlines dropped considerably, perhaps from 33 to 10, Stage One would place a heavy burden on airlines, while Stage Three would be cataclysmic.

such overdependence would be an unacceptable risk for the United States to take.

3. *Protecting U.S. Workers*

The United States has also defended its foreign ownership restrictions because of the potential effects that opening the domestic market would have on U.S. workers. Labor unions have staunchly opposed granting foreign airlines access to the U.S. market, fearing that many aviation jobs will shift abroad or that foreign carriers will not abide by U.S. labor protection standards.¹⁴² Friendship, Commerce, and Navigation ("FCN") treaties with some of the Member States also may allow foreign companies to discriminate against U.S. workers. Unless these concerns can be addressed, no U.S. leader has enough political capital to support opening the market to E.U. carriers.

First, U.S. labor unions have a legitimate fear of discrimination by foreign airlines. Concern for domestic flight and ground crews may be somewhat overstated, as the costs of transferring thousands of employees and their families to the United States would likely prohibit an E.U. carrier from discriminating against Americans.¹⁴³ However, discrimination at the international level is a realistic concern, as foreign carriers routinely seek the cheapest laborers to fill their flight crews (for example, hiring Thai flight attendants instead of Japanese or American workers, because Thai workers can be paid up to 90% less).¹⁴⁴ Although U.S. workers could strike against such discrimination, the foreign airline might well ignore them (choosing to rely on a deep pool of foreign replacement workers until the strike is settled).

Second, U.S. workers must deal with the threat of FCN-treaty discrimination. Although FCN treaties generally require that a company doing business in a foreign country would be governed under the home country's corporate law, the standard FCN treaty contains a provision allowing the foreign company: "to engage, within the territories of the other Party, accountants... technical experts, executive personnel, attorneys, agents, and other specialists of their choice."¹⁴⁵ This clause allows a foreign corpora-

¹⁴² Warner, *supra* note 19, at 310; Edwards, *supra* note 139, at 637.

¹⁴³ Stephen B. Moldof, *The Extent to Which U.S. Labor Laws Apply When Activities of Carriers and Employees Extend Beyond the United States*, SG055 ALI-ABA 753, 760 (2002). E.U. workers living in the United States would certainly demand higher compensation for having to live abroad, either in wages or living expenses. Considering the economic clout of many European labor unions, E.U. flight crews might also demand much higher vacation and leave periods than U.S. workers (requiring E.U. carriers to bring more workers to the United States).

¹⁴⁴ Dempsey II, *supra* note 43, at 45.

¹⁴⁵ See Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, art. VIII, 4 U.S.T. 2063 (the "Standard FCN Treaty"). See also Treaty of Friendship, Commerce

tion, if operating directly in the United States, to legally discriminate against U.S. workers.¹⁴⁶ FCN-treaty discrimination might be limited only to workers fitting the "technical expert" mold (e.g., pilots), but would still give foreign airlines a loophole to shift jobs from the United States to cheaper markets.

B. The Fair Solution: Trading Routes for Routes

U.S. leaders, for the reasons described above, will almost certainly balk at the prospect of totally opening the U.S. domestic market. However, the United States should be able to grant E.U. carriers route-specific access within the U.S. market and still protect its national interests.¹⁴⁷ By trading routes for routes, the two sides can avoid the structural complications of a TCAA, and create a fair system for carriers on both sides of the Atlantic. Neither side would have access to the majority of each other's internal routes, yet each would have enough access to develop hub and spoke operations across Europe and the United States.

First, if E.U. carriers are allowed to fly specific domestic routes, CRAF and cabotage might peaceably coexist. Only a small number of planes would be foreign-owned, and the U.S. military would continue to have a large stockpile of CRAF planes at its disposal.¹⁴⁸ U.S. carriers would also have greater incentive to participate in CRAF, because the military limits nearly all of its air cargo business to CRAF carriers.¹⁴⁹ This steady stream of revenue would inevitably give U.S. carriers a competitive advantage over their E.U. counterparts (assuming E.U. carriers did not participate in CRAF).

Second, trading routes for routes would not greatly threaten U.S. labor interests. Because the domestic market still would be dominated by U.S. carriers, E.U. carriers would be forced to adopt similar working conditions for their workers (or risk losing their employees to U.S. carriers). U.S. workers would also have some legal protection against an E.U. employer, as foreign airlines directly operating in the United States may be subject to

and Navigation, Oct. 29, 1954, U.S.-Germany, art. VIII, 7 U.S.T. 1839; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, U.S.-Netherlands, art. VIII, 8 U.S.T. 2043.

¹⁴⁶ However, if the foreign airline operates a U.S. subsidiary, the subsidiary may not discriminate against U.S. workers. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 189 (1982).

¹⁴⁷ See Edwards, *supra* note 139, at 640; F. Allen Bliss, Note, *Rethinking Restrictions on Cabotage: Moving to Free Trade in Passenger Aviation*, 17 SUFFOLK TRANSNAT'L L. REV. 382, 405 (1994); Warner, *supra* note 19, at 310.

¹⁴⁸ 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, 160 (1993).

¹⁴⁹ GAO Report, *supra* note 136, at 2.

the jurisdiction of U.S. courts.¹⁵⁰ If E.U. carriers form subsidiaries in the United States, this protection would be further increased (as foreign-owned subsidiaries are not covered by the standard FCN treaty).¹⁵¹

Finally, unlike the TCAA, route trading would maintain a fair balance between the United States and European Union. Routes could be valued and traded evenly between the two sides, the most valuable likely long-haul (e.g., Boston-Seattle, Dublin-Vienna) or high-volume (e.g., New York-Washington, London-Paris). Such a system would need constant monitoring to account for E.U. expansion, shifts in flight demand, or changes in airlines. This responsibility could be easily placed in the hands of a supranational organization, removing the need to redraft the entire aviation treaty for minor route changes.

C. Supranational Regulation: A Necessary Next Step

International relations theory suggests that the purpose of a supranational organization is to "provide a stable environment for mutually beneficial decision-making."¹⁵² Global aviation has no such organization, primarily because commercial aviation has been largely excluded from the World Trade Organization ("WTO"), and the ICAO is too weak to consistently enforce its own regulations.¹⁵³ Once the United States and European Union have resolved their differences over the Open Skies agreements, they would serve themselves (and the rest of the world) well by entrusting a new or existing supranational body with the power to direct global aviation policy. This organization would immediately benefit the transatlantic community, by mediating future market-access disputes and monitoring government subsidization, and could provide much-needed leadership on other aviation issues.

First, a supranational body would be far more effective than bilateral bickering in resolving aviation disputes.¹⁵⁴ If a supranational body had the power to mediate disputes, an arbitrator could have decided whether U.S. carriers are truly dumping their excess capacity on Europe, or what obliga-

¹⁵⁰ This protection is somewhat limited, because an FCN likely would preclude workers from pursuing an anti-discrimination claim against their foreign employer. However, they would still be protected from non-discrimination violations (such as a personal injury suit), as jurisdiction may arise from frequent contacts within a forum state. See *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 414 (1984); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107 (1987).

¹⁵¹ See *Avagliano*, 457 U.S. at 189.

¹⁵² Duncan Snidal, *Political Economy and International Institutions*, 16 INT'L REV. L. & ECON. 121, 127 (1996).

¹⁵³ There has been "sustained interest" in expanding the General Agreement on Trade in Services (GATS) to include international air service, or bolstering the ICAO's role, but neither has yet been given the authority necessary to be a truly supranational enforcement agency. Abeyratne, *supra* note 10, at 832.

¹⁵⁴ *Finding a Voice*, AIRLINE BUSINESS, July 1, 2002, at 7.

tions foreign carriers have toward domestic workers. Should the United States and European Union agree on the route-swapping agreement described above, the supranational body could also designate the routes to be exchanged.

Second, the supranational body would be able to monitor government subsidization, which exists in every nation.¹⁵⁵ Government spending to support the aviation infrastructure may be a necessary part of the industry, given the precarious financial position of most carriers and the high costs of building and maintaining airports, security systems, and the air-traffic control system. However, the direct subsidization of carriers generally undermines the goals of deregulation, and must be eliminated for free markets to take hold. As with market-access disputes, a supranational body would be better equipped to enforce subsidization rules than would individual states.¹⁵⁶

Aside from facilitating the implementation of a new transatlantic aviation regime, the supranational body can also be a stronger advocate for global aviation policy than its predecessors.¹⁵⁷ Many problems plague the world's airlines: fears of terrorism, rising insurance costs, safety issues, and environmental concerns, to name a few. Without an effective supranational organization, consumers around the world are forced to wait for bilateral negotiation to answer their concerns. Yet, as the Commission has demonstrated by rapidly changing the E.U. internal aviation market, appropriately powerful supranational organizations are able to rein in the most maverick of industries.

VI. CONCLUSION

By striking down the Open Skies agreements, the ECJ has placed global aviation at a crossroads. U.S. carriers have long been the dominant force in Europe and the rest of the world, yet the Transport Cases have given the European Union adequate momentum to challenge U.S. control.

¹⁵⁵ Although the United States has generally avoided airline subsidization, the post-9/11 bailout packages are no less anathema to liberalization than the continued state ownership of national airlines in European countries. See Tara Branum & Susanna Dokupil, *Security Takeovers and Bailouts: Aviation and the Return of Big Government*, 6 TEX. REV. L. & POL. 431 (2002). CRAF also presents an interesting case, as it provides domestic carriers with a large cash flow from the U.S. government, and could be considered a subsidy. See Matthew Breilis & Ross Kerber, *A New Take on Military Air Support: Hobbled Airlines Get Lift from U.S. Contracts to Fly Soldiers Overseas*, THE BOSTON GLOBE, Feb. 28, 2003, at E1. However, as long as foreign carriers are eligible to participate in CRAF, the program could be fairly exempted from anti-subsidization rules (given that money would be available to all carriers, rather than just U.S. carriers).

¹⁵⁶ Warner, *supra* note 19, at 310.

¹⁵⁷ See Ruwantissa Abeyratne, *Crisis Management Toward Restoring Confidence in Air Transport—Legal and Commercial Issues*, 67 J. AIR L. & COM. 595 (2002).

Diplomatic conflict looms, and consumers on both sides of the Atlantic should brace themselves for a lengthy struggle. When the dust has settled, though, the transatlantic and global aviation markets should be better off: E.U. and U.S. carriers will have balanced rights within each other's markets, and a more powerful supranational organization will exist to preserve peace within the aviation industry.

