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Everybody Wants to Go to Heaven, but Nobody Wants to Die: The Story of the Transatlantic Common Aviation Area

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EVERYBODY WANTS TO GO TO HEAVEN, BUT NOBODY WANTS TO DIE:

THE STORY OF THE TRANSATLANTIC COMMON AVIATION AREA*

*Stephen D. Rynerson***

The Transatlantic Common Aviation Area (TCAA, also known as the Common Transatlantic Aviation Area, CTAA, or simply the Common Aviation Area, CAA)[1] is a revolutionary idea in the field of international aviation, seeking to move beyond the framework that has dominated the industry for over half a century.[2] Yet despite the significance of the TCAA in the realm of international transportation law, it has been virtually ignored by the American legal community.[3] The purpose of this article is to bring this important new

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*Editor's Note: On February 8, 2003, shortly before this issue was sent to the publisher, the U.S. Department of Defense activated the passenger aircraft component of Stage I of the Civil Reserve Air Fleet (CRAF) for the second time in the program's history. *See DOD Activates Commercial Airlift Reserves for Troops*, REGULATORY INTELLIGENCE DATA, Feb. 10, 2003. This consisted of forty-seven aircraft, or approximately five percent of the CRAF's total capacity under current enrollment in the program. *See Defense Dept. Activates First Stage of Civil Reserve Fleet*, AVIATION DAILY, Feb. 11, 2003, at 3. The author would like to state that this event does not materially affect the portion of his article concerning the U.S. military's objections to the Transatlantic Common Aviation Area.

** Juris Doctor expected May 2003, University of Denver College of Law. B.S. Economics and B.A. History, Regis University, 1997. The author would like to thank Dr. Paul Stephen Dempsey, Director of the Institute of Air & Space Law, McGill University, for his encouragement and advice on this project.

1. Paul Stephen Dempsey, *Competition in the Air: European Union Regulation of Commercial Aviation*, 66 J.Air L. & Com. 979, 1076 (2001) [hereinafter *Competition in the Air*]. "TCAA" appears to have become the preferred abbreviation. *See* Vice President of the European Commission and Commissioner for Transport and Energy Loyola de Palacio, Beyond Open Skies, Address to Aviation in the 21st Century, Beyond Open Skies Conference (Dec. 6, 1999) (transcript available at http://www.eurunion.org/news/speeches/1999/991206ldp.htm) (using the term "TCAA" exclusively) [hereinafter Beyond Open Skies].

2. *See* Beyond Open Skies, *supra* note 1.

3. Only five law review articles provide any discussion of the subject under any of its names. *See* Paul V. Misfud et al., *International Legal Developments in Review: 1999 Public International Law, Aviation and Aerospace* Law, 34 INT'L LAW. 625, 631-34 (2000); Competition *in the Air*, *supra* note 1, at 1076-78; Eli A. Friedman, Comment, *Airline Antitrust: Getting Past the Oligopoly Problem*, 9 U. MIAMI BUS. L. REV. 121, 136-37 (2001); Ulrich Schulte-Strathaus, *Common Aviation Areas: The Next Step Toward International Air Liberalization*, 16 Air & Space Law. 4 (2001); Yu-Chun Chang & George Williams, *Prospects for Changing Airline Ownership Rules*, 67 J. AIR L. & COM. 233 (2002). One law review article discusses the prospects of a "Free Fly Zone" which would be similar to the TCAA. *See* G. Porter Elliot, *Antitrust at 35,000 Feet: The Extraterritorial Application of United States and European Community Competition Law in the Air Transport Sector*, 31 GEO. WASH. J. INT'L L. &

development the recognition it merits. Part I will explain the history of the TCAA's development, from the Convention on International Civil Aviation of 1944 (Chicago Convention) through the European Court of Justice's 2002 decision on the ability of E.U. Member States to set their own aviation policies. Part II will examine what the TCAA might look like if it came to fruition. Finally, Part III will identify obstacles to the establishment of the TCAA.

PART I: THE PAST IS PROLOGUE

The Bilateral Regime in 15 Minutes or Less[4]

The legal structure of modern international aviation was established by the Chicago Convention of 1944.[5] Created for the purpose of establishing a multilateral framework for "openness, trade, and mutual co-operation," the Chicago Convention instead gave rise to a system largely based on individual national interests,[6] embodied in treaties, executive agreements, and other documents collectively referred to as bilateral air services agreements,[7] bilateral air transport agreements,[8] or, just simply, "bilaterals."[9] The conventional wisdom is that the United States intended to push for a "laissez-faire, free market philosophy" in international aviation as part of the Chicago Convention.[10] However, it could be argued that the path to restrictive bilaterals was set down from the very beginning,

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ECON. 185, 227-31 (1997). Another article analyzes the E.U. Commission's claims in its suit against the Member States over their bilateral air service agreements (see discussion *infra*), but does not directly discuss the TCAA. *See* John Balfour, *A Question of Competence: The Battle for Control of European Aviation Agreements with the United* States, 16 AIR & SPACE LAW. 7 (2001). The American Bar Association has only mentioned the TCAA twice in its official publications, both times merely in passing. *See* American Bar Association, Section of Public Utility, Communications and Transportation Law, *Report of the Aviation Committee*, Spring 2000, at 5, *at* http://www.zsrlaw.com/publications/articles/PDF/FJC0006.pdf; American Bar Association, Air and Space Law Forum Special Committee on Cross-Border Investment and Right of Establishment in the International Airline Industry, *Cross-border Investment in International Airlines: Presenting the Issues*, Oct. 19, 2000, *at* http://www.abanet.org/forums/airspace/prelimreport.html (last visited Jan. 12, 2002) [hereinafter *Cross-border Investment*].

4. Numerous books and articles have been written which discuss the development of the bilateral regime in the wake of the Chicago Convention. *See, e.g.*, PAUL STEPHEN DEMPSEY, LAW AND FOREIGN POLICY IN INTERNATIONAL AVIATION 7-76 (1987) [hereinafter LAW AND FOREIGN POLICY]; Ruwantissa I.R. Abeyratne, *Would Competition in Commercial Aviation Ever Fit Into the World Trade Organization?*, 61 J. AIR L. & COM. 793 (1996); Romina Polley, *Aviation Defense Strategies of National Carriers*, 23 FORDHAM INT'L L.J. 170 (2000); Friedman, *supra* note 3. The author's purpose here is to briefly summarize the development for readers not otherwise familiar with the legacy of the Chicago Convention.

5. *See* Polley, *supra* note 4, at 170-71.

6. *See* Beyond Open Skies, *supra* note 1.

7. *See* Abeyratne, *supra* note 4, at 794.

8. *See* Seth M. Warner, Comment, *Liberalize Open Skies: Foreign Investment and Cabotage Restrictions Keep Noncitizens in Second Class*, 43 AM. U. L. REV. 277, 285 (1993).

9. *See Competition in the Air*, *supra* note 1, at 1070.

10. Warner, *supra* note 8, at 283. *See also* Adam L. Schless, *Open Skies: Loosening the Protectionist Grip on International Civil Aviation*, 8 EMORY INT'L L. REV. 435, 438 (1994).

when in his opening statement the U.S. representative to the International Civil Aviation Conference, where the Chicago Convention was drafted,[11] analogized international aviation to railroading,[12] which was already being crippled domestically by heavy regulation at the time of the conference.[13]

Regardless of whether the possibilities of a liberal multilateral regime were defeated before drafting even began, the structure of the Chicago Convention shows it clearly was not designed to easily facilitate such a system, as several articles in the final document gave national governments broad powers to regulate international air traffic that crossed their borders.[14] Yet the Chicago Convention did not compel the formation of bilateral agreements, either.[15] The reasons for the historical dominance of bilateral agreements are open to debate, but most commentators suggest that this resulted from a combination of security concerns,[16] a desire to ensure that benefits resulting from governmental negotiations would be reaped primarily by the negotiating states,[17] and/or a desire to protect existing national airlines.[18] Ultimately, the conjunction of the Chicago Convention framework and national interests gave rise to a situation where "the mission of every country with an airline capable and desirous of handling transnational

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11. *See* Troy A. Rolf, Comment, *International Aircraft Noise Certification*, 65 J. AIR LAW & COM. 383, 387 (2000).

12. *See* 1 U.S. DEP'T OF STATE, PROCEEDINGS OF THE INTERNATIONAL CIVIL AVIATION CONFERENCE, NOVEMBER 1 – DECEMBER 7, 1944 57 (1948).

13. *See* CLARENCE B. CARSON, THROTTLING THE RAILROADS 78-83 (1971). Aside from this telling reference, the U.S. had prepared drafts for the Chicago Convention that would have limited carrier capacity and also sought cabotage restrictions that would have had the effect of limiting foreign access to the U.S. domestic air market. *See* Paul Stephen Dempsey, *Turbulence in the "Open Skies": The Deregulation of International Air Transport*, 15 TRANSP. L.J. 305, 311 n.12 (1987) [hereinafter *Turbulence*]. "Cabotage" is generally defined as "trade or transport in coastal waters or airspace or between two points within a country." Webster's Ninth New Collegiate Dictionary 194 (1991). In air transport it is defined as "the transportation of passengers, cargo, or mail by a foreign airline between two points in the same nation—the foreign carriage of domestic traffic." Paul Stephen Dempsey, *The Disintegration of the U.S. Airline Industry*, 20 TRANSP. L.J. 9, 29 (1991) [hereinafter *Disintegration*].

14. *See, e.g.*, Convention on International Civil Aviation, Dec. 7, 1944, arts. 1, 6, 7, 17, 18, 61 Stat. 1180, 1182, 1185, *available at* http://www.iasl.mcgill.ca/airlaw/public/chicago1944a.pdf (last visited July 8, 2002) [hereinafter Chicago Convention]. Article 1: "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory." Article 6: "No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization." Article 7: "Each contracting State shall have the right to refuse permission to the aircraft of other contracting states to take on in its territory passenger, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline from any other State, and not to obtain any such exclusive privilege from any other State." Article 17: "Aircraft have the nationality of the State in which they are registered." Article 18: "An aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another."

15. *See* Chris Thornton & Chris Lyle, *Freedom's Paths*, AIRLINE BUS., Mar. 2000, at 74 [hereinafter *Freedom's Paths*].

16. *See, e.g.*, Polley, *supra* note 4, at 193.

17. *See, e.g.*, *id.*

18. *See, e.g.*, Elliot, *supra* note 3, at 209-10.

services [was] to facilitate its airlines access to foreign markets, while simultaneously protecting its own market from an influx of foreign carriers."[19]

Only a few traces of multilateralism emerged from the International Civil Aviation Conference.[20] The first was the creation of the International Civil Aviation Organization (ICAO) by the Chicago Convention itself.[21] The ICAO was tasked with developing the "principles and techniques" of international air transportation,[22] but it was also obligated to do such things as "[p]revent economic waste caused by unreasonable competition" and to make sure "every contracting State has a fair opportunity to operate international airlines."[23] Two side-agreements did more to promote a nascent multilateral framework, however, and began the process of establishing the spectrum of aviation freedoms known today.[24] Of the fifty-two states that signed the Chicago Convention, thirty-two signed the "Two Freedoms Agreement,"[25] while a further twenty signed the "Five Freedoms Agreement,"[26] which together came to define the basic premises of modern international aviation.[27] Yet only the "Two Freedoms Agreement" attained the required number of signatories to enter into force, thus obligating nations to separately negotiate agreements to gain additional international traffic rights.[28]

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19. *See, e.g.*, Elliot, *supra* note 3, at 186 (footnotes omitted).

20. *See* Abeyratne, *supra* note 4, at 800-02.

21. Chicago Convention, art. 43, at 1192.

22. *See id.*, art. 44, at 1192.

23. *See id.*, art. 44(e), (f), at 1193.

24. *See* Abeyratne, *supra* note 4, at 801-02. There are now eight generally recognized freedoms. They are as follows:

First Freedom: The right to overfly a territory.

Second Freedom: The right to land in another country for a non-commercial purpose (e.g., refueling).

Third Freedom: The right to load passengers, cargo and mail in the carrier's country of origin and unload them in another country (e.g., a U.S. carrier loads passengers in New York and unloads them in London).

Fourth Freedom: The right to load passengers, cargo and mail in another country and bring them back to the country of origin (e.g., a U.S. carrier loads passengers in London and unloads them in New York).

Fifth Freedom: The right to load passengers, cargo and mail in one country and then fly to another country (e.g., a U.S. carrier flying from New York to Helsinki stops in Paris and loads passengers bound for Helsinki).

Sixth Freedom: The right to load passengers, cargo and mail in another country and unload them in a third, after a stopover in the country of origin (e.g., on a flight from London to Paris to Rome, a French carrier loads passengers in London bound for Rome).

Seventh Freedom: The right to carry passengers, cargo or mail between two countries on a stand-alone service, where the flight does not go via the carrier's country of origin (e.g., a German carrier operates a route from London to Madrid).

Eighth Freedom: Cabotage, the right to carry passengers, cargo or mail within the borders of another country (e.g., a Greek carrier operates a route from Copenhagen to Torshavn, Faeroe Islands).

Adapted from European Union Commission, Air Transport, The Eight Freedoms of Air Traffic, *at* http://www.europa.eu.int/comm/transport/themes/air/english/at_3_en.html (last visited Dec. 31, 2001).

25. International Air Services Transit Agreement, Dec. 7, 1944, 59 Stat. 1693, 84 U.N.T.S. 389.

26. International Air Transport Agreement, Dec. 7, 1944, 59 Stat. 1701, 171 U.N.T.S. 387.

27. *See* Abeyratne, *supra* note 4, at 801-02.

28. *See id.* at 802; F. Allen Bliss, *Rethinking Restrictions on Cabotage*, 17 SUFFOLK TRANSNAT'L

Soon after the Chicago Convention, the United States and the United Kingdom entered into the first major bilateral in what was commonly termed the Bermuda Agreement.[29] The Bermuda Agreement represented a compromise between U.S. and British interests.[30] The key elements of the Bermuda Agreement were its relatively liberal capacity restrictions[31] and its elaborate rate restrictions that relied on the International Air Transport Association (IATA)[32] to impartially establish fares.[33] Liberal Fifth Freedom rights were also granted to both parties.[34] The Bermuda Agreement (later known as Bermuda I) became the rough model for most other bilaterals for over three decades.[35] The late 1970s, however, saw the first major cracks appear in the bilateral regime.[36]

Following a dispute about whether the United States was abusing Bermuda I's loose capacity limits by authorizing too many carriers on U.S.-U.K. routes,[37] the United States and United Kingdom entered into the Bermuda II Agreement (Bermuda II) in 1977.[38] Bermuda II was significantly more restrictive than its predecessor:[39] limiting the number of carriers that could serve routes between the two nations,[40] giving the parties' respective governments considerable control over capacity,[41] and noticeably diminishing U.S. Fifth Freedom rights beyond the U.K. market.[42]

L. REV. 382, 388-89 (1994).

29. Air Services Agreement, Feb. 11, 1946, U.S.-U.K., 60 Stat. 1499 [hereinafter Bermuda I]. It is often now called the Bermuda I Agreement to distinguish it from the Bermuda II Agreement of 1977 (Agreement Concerning Air Services, July 23, 1977, U.S.-U.K., 28 U.S.T. 5367, 1977 U.S.T. LEXIS 351 [hereinafter Bermuda II]).

30. *See* Elliot, *supra* note 3, at 210.

31. Bermuda I did not establish any numeric targets for capacity, but instead required that "the air transport facilities available . . . should bear a close relationship to the requirements of the public for such transport," and that the parties provide "a fair and equal opportunity" for their respective carriers to operate on any routes permitted by the agreement. Bermuda I, *supra* note 29, at 1515.

32. IATA was, and is, the worldwide trade group for air carriers. It was established in April 1945, with an initial membership of 57 carriers. IATA, About Us, History, *at* http://www.iata.org/history.htm (last visited Jan. 19, 2002).

33. *See* Bermuda I, Annex II, at 1504-06. The parties could block fares they considered unreasonable. *Id.* at Annex II (e), (f), at 1505. IATA was permitted, under antitrust immunity granted by the U.S. government, to establish fares for U.S.-based international aviation. *See Turbulence*, *supra* note 13, at 347-48.

34. *See* Bermuda I, Annex IV (a), (b), at 1510.

35. *See Turbulence*, *supra* note 13, at 316

36. *See id.* at 325. It should be noted that some commentators argue the bilateral regime was doomed by the 1960s, when charter operations and a proliferation of airlines in the developing world undermined IATA's rate-making authority. *See* José A. Gomez-Ibanez & Ivor P. Morgan, *Deregulating International Markets: The Examples of Aviation and Ocean Shipping*, 2 YALE J. ON REG. 107, 111-12 (1984).

37. *See* Angela Edwards, Note & Comment, *Foreign Investment in the U.S. Airline Industry: Friend or Foe?*, 9 EMORY INT'L L. REV. 595, 601-02 (1995).

38. *See* Bermuda II, *supra* note 29.

39. *See* Edwards, *supra* note 37, at 601-02.

40. *See* Bermuda II, art. 3, 1977 U.S.T. LEXIS 351, at 7-12.

41. *See id.* at art. 11 and Annex 2, 1977 U.S.T. LEXIS at 23-27, 70-76.

42. *Compare* Bermuda I, Annex III, at 1507-10 *with* Bermuda II, Annex 1, 1977 U.S.T. LEXIS at 52-70.

Following the disappointment of Bermuda II, the United States launched an aggressive campaign to liberalize international aviation, for the purpose of both improving the market choices for consumers and to punish the United Kingdom by dealing more directly with other European nations.[43] The United States succeeded in completing eleven new bilaterals between 1978 and 1980 with nations including Belgium, the Netherlands, the Federal Republic of Germany, Iceland, and Finland,[44] which particularly resulted in gains for Belgian and Dutch carriers to the detriment of U.K. carriers.[45] Although the sheer number of bilaterals completed in so short a span was impressive in and of itself, of more significance was that these bilaterals were qualitatively different than the earlier Bermuda I-type.[46] Popularly called "Open Skies" agreements, these bilaterals:

1. Permitted flexible pricing;
2. Banned capacity restrictions;
3. Permitted multiple designations, i.e., different carriers operating the same route;
4. Gave access to secondary U.S. markets, e.g., Atlanta, Dallas, etc.;
5. Granted new Fifth Freedom rights for U.S. carriers;
6. Allowed charter operations under the rules of the charter's country of origin; and
7. Banned discriminatory and unfair methods of competition.[47]

The final blow against the bilateral regime came in 1978 when the United States menaced IATA with removal of its antitrust protection.[48] While the threatened action was never carried out,[49] IATA was sufficiently intimidated that in 1979 it divided itself into a two-tiered structure: a trade association, to which all member carriers belong, and a voluntary tariff coordinating body.[50] Today, somewhat less than forty percent of IATA's members participate in tariff coordination.[51] Yet at what seemed to be its moment of triumph, the United States turned away from the aggressive path of liberalization,[52] although some suggested that this was because there were no more victories to be won from reticence.[53] The

43. *See Turbulence*, *supra* note 13, at 333-35.

44. *See* Edwards, *supra* note 37, at 605.

45. *See Turbulence*, *supra* note 13, at 334-36, 336 n.101.

46. *See id.* at 334-36, 338-39.

47. *See id.* at 338-39 nn. 108-11, 113.

48. *See id.* at 349-51.

49. *See id.* at 353-54.

50. *See* IATA, About Us, History, *at* http://www.iata.org/history3.htm (last visited Jan. 19, 2002).

51. *Compare id.* (noting "some 100" carriers engage in tariff coordination) *with* IATA, Membership, *at* http://www.iata.org/membership (noting 272 members) (last visited Jan. 19, 2002).

52. *See Turbulence*, *supra* note 13, at 382.

53. A U.S. negotiator told Aviation Week & Space Technology that there were "very few new routes to trade, so the negotiations tend to be focused on details of carrying out agreements .... We can't just create a new Chicago-Zurich route." James K. Gordon, *U.S. Negotiators Face Complex*

legacy of this liberalization drive, however, lived on as U.S. deregulation increased the competitive pressure on trans-Atlantic routes, prompting the European nations to begin examining intra-European liberalization more closely.[54]

As American liberalization efforts were tapering off, northern European governments began to lead a gradual shift away from bilaterals calculated to protect national air carriers from open competition toward a system more closely resembling the U.S. Open Skies bilaterals of 1978-80.[55] The United Kingdom and the Netherlands formed the vanguard of this movement, believing that consumers and air carriers alike would benefit from a more laissez-faire market.[56] In June 1984, the United Kingdom completed a new bilateral with the Netherlands that allowed carriers to serve any route between the two countries, set their own capacities, frequencies, and schedules, and set fares subject only to disapproval by the country of origin.[57] Hailed as a "bilateral revolution," the U.K.-Netherlands bilateral was accompanied by predictions that it "could have a domino effect."[58] This prognostication was proven partially correct when the United Kingdom developed other, more limited, bilaterals soon thereafter with the Federal Republic of Germany, France, Finland, Greece, Italy, Portugal, Spain, and Switzerland.[59]

In the spring of 1985, the United Kingdom completed a new bilateral with Luxembourg, which liberalized route access, capacity controls and fare approval procedures.[60] The agreement provided for unrestricted market entry and capacity, while fares could ordinarily be rejected only by the agreement of both governments,[61] although the country of origin could unilaterally reject a fare it found predatory or excessive.[62] This agreement became the United Kingdom's desired model for subsequent bilaterals.[63]

Not all parties were happy with the United Kingdom's bilateral-mania, with such aviation noteworthies as Lufthansa's deputy general manager for international relations arguing the U.K.-Netherlands bilateral and others were harming separate deregulation efforts by the European Economic Community.[64] British Airways' general manager for pricing, while conceding that bilaterals were likely to persist,

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Schedule of Bilateral Talks, AVIATION WK. & SPACE TECH., Feb. 11, 1985, at 43.

54. *See Liberal Regulatory Environment Alters IATA's Fare Setting Role*, AVIATION WK. & SPACE TECH., Nov. 11, 1985, at 102.

55. *See id.*

56. *See* Michael Feazel, *European Civil Aviation Leaders Commit to Increased Liberalization*, AVIATION WK. & SPACE TECH., June 24, 1985, at 36.

57. *See* Michael Feazel, *British, Dutch Aim at Deregulation*, AVIATION WK. & SPACE TECH., June 25, 1984, at 29.

58. *Id.*

59. *See New Agreements Spur European Liberalization*, AVIATION WK. & SPACE TECH., Nov. 12, 1984, at 71 [hereinafter *New Agreements*].

60. *See* STEPHEN WHEATCROFT & GEOFFREY LIPMAN, AIR TRANSPORT IN A COMPETITIVE EUROPEAN MARKET: PROBLEMS, PROSPECTS, AND STRATEGIES 213 (1986).

61. *See* David A. Brown, *Britain Urges Deregulation Effort in 1986*, AVIATION WK. & SPACE TECH., Dec. 2, 1985, at 36.

62. *See* WHEATCROFT & LIPMAN, *supra* note 60, at 213.

63. *See* Brown, *supra* note 61.

64. *See New Agreements*, *supra* note 59.

suggested, "The EEC is a benchmark. It forces people to think about these issues and keep them in the public attention."[65] However, other airline officials argued the advancements in bilaterals reduced the need for the European Economic Community to involve itself in the matter.[66]

Despite the United Kingdom's initiatives, many carriers declined to lower rates.[67] Furthermore, like the United States before it, the United Kingdom began to find that it was running out of nations that were interested in entering into new bilaterals.[68] By the late 1980s, the prospects for additional liberal bilaterals in Europe appeared bleak.[69] However, those that had been completed offered a glimpse of what services might result if a liberal multilateral agreement was reached.[70]

If It's Tuesday, This Must be Brussels

By 1993, the Member States of the European Community (or Community)[71] had entered into roughly 800 separate bilaterals.[72] January 1 of that year had seen the implementation of the "Third Package" of aviation reforms by the European Community, which largely replaced the bilaterals between the Member States, making it possible for citizens or governments of Member States to establish carriers anywhere in the European Community and fly between Community airports under one set of regulations.[73] Eager to parlay this new internal unity into external leverage, the E.C. Commission (Commission)[74] began a campaign to take

65. *See New Agreements*, *supra* note 59.

66. *See id.*

67. *See* LAW AND FOREIGN POLICY, *supra* note 4, at 103.

68. *See* WHEATCROFT & LIPMAN, *supra* note 60, at 68-69.

69. *See* LAW AND FOREIGN POLICY, *supra* note 4, at 103-04.

70. *See, e.g.*, *Airline Observer*, AVIATION WK. & SPACE TECH., Nov. 17, 1986, at 33 (noting that two years after the U.K.-Netherlands bilateral was introduced the Amsterdam-London city-pair had become Europe's most heavily trafficked route with 210 flights weekly by seven scheduled carriers).

71. The Member States at that time were Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. *See* European Union, The European Union at a Glance, *at* http://www.europa.eu.int/abc-en.htm (last visited Jan. 21, 2002).

72. Bruce Barnard, *EC Ministers Reject Pooling of Air Traffic Agreements*, J. COM., Mar. 16, 1993, at 3B [hereinafter *EC Ministers Reject Pooling*].

73. *See* Michael Niejahr & Giuseppe Abbamonte, *Liberalization Policy and State Aid in the Air Transport Sector*, EC COMPETITION POL'Y NEWSL. (European Community), Summer 1996, *at* http://europa.eu.int/comm/competition/speeches/text/sp1996_024_en.html (last visited Jan. 21, 2002). For a complete discussion of E.C. aviation reform, *see generally*, *Competition in the Air*, *supra* note 1.

74. The Commission "embodies and upholds the general interest of the [Community]. The President and Members of the Commission are appointed by the Member States after they have been approved by the European Parliament." European Union, Institutions of the European Union, *at* http://www.europa.eu.int/inst-en.htm (last visited Jan. 21, 2002). The Commission: (1) has the right to initiate draft legislation and present legislative proposals to the European Parliament and Council; (2) is responsible for implementing the legislation (directives, regulations, decisions), budget and programs adopted by Parliament and the Council; (3) acts as guardian of the treaties and, together with the Court of Justice, ensures that [Community] law is properly applied; and (4) represents the [Community] on the international stage and negotiates international agreements, such as in trade. *See id.*

over the negotiation of bilaterals on behalf of the Member States.[75]

At a meeting of the Member States' transport ministers in March 1993, the Commission requested that the Member States pool their bilaterals and grant negotiating powers for future bilaterals to the Commission based on its earlier successful completion of a multilateral agreement with Sweden, Norway, and Switzerland to bring their regulations into conformity with the Third Package.[76] While at least one national representative suggested that joint negotiations would be to the Member States' advantage, another claimed bilaterals were "sacrosanct."[77] The transport ministers ultimately rejected the Commission's proposal, stating that they would only confer negotiating authority if they agreed that the Commission would achieve better results than state-to-state negotiations.[78] The Commission denied claims that it would bring suit against the Member States over the matter.[79]

Less than a year later, bilaterals were once again placed in the spotlight of scrutiny by the newly-renamed European Union,[80] this time via the Comité des Sages (Comité)[81] in a report on international aviation. The Comité observed that most E.U.-based carriers relied on extra-European routes for half or more of their activity.[82] Consequently, bilaterals "have a substantial competitive impact" on the intra-E.U. air transport market.[83] The Comité argued that bilaterals "ignore the new realities of the Single European Aviation Market" and should be replaced by a multilateral regime under the European Union's control rather than the individual Member States'.[84] A strategy of negotiating external aviation agreements in common would "dispel concerns about discriminatory treatment," while creating increased potential for reciprocity on market access.[85] In the Comité's opinion there was no debate about whether a multilateral negotiating framework should be established, only how.[86] The report concluded by recommending that the Commission be given appropriate negotiating powers before June 30, 1995.[87]

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75. *See EC Ministers Reject Pooling, supra* note 72.

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

80. The name change was effective January 1, 1994. *See* European Union, The History of the European Union - 1993, *at* http://www.europa.eu.int/abc/history/1993/1993_en.htm (last visited Jan. 21, 2002).

81. Popularly called the "Committee of Wise Men" in English-language sources. *See, e.g., Wise Men: Bilaterals Ignore "New Realities" of Single Market*, AVIATION DAILY, Feb. 17, 1994, at 7 [hereinafter *Wise Men*].

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.*

86. *See id.*

87. *See id.*

One Man Fights for the Future

The Commission's struggle for negotiating authority took a leap forward when former British Labour Party leader[88] Neil Kinnock became E.U. Transport Commissioner in January 1995.[89] Less than a month after taking office, Kinnock was confronted with a report by the European Parliament accusing the Commission of being "too timid" in the wake of the Comité's findings and engaging in activities that amounted to "little more than a consultation exercise."[90] Seemingly prompted by both the Parliament's harsh criticism and a sudden renewal of interest by the United States in obtaining Open Skies bilaterals with European nations,[91] in March 1995 the Commission issued what Aviation Daily characterized as a "strong . . .warning."[92] Member States were not permitted to negotiate individual bilaterals, particularly with the United States and they could be brought before the European Court of Justice if they pursued such a course of action.[93]

The United States protested its innocence, arguing, "We have been trying to negotiate an open skies deal for a long time. We have been pushing for negotiations in a multilateral forum with the E.U."[94] Meanwhile, six Member States that had been approached by the United States for talks on Open Skies bilaterals,[95] along with the United Kingdom and the Netherlands, rejected a proposal by Kinnock for granting the Commission the authority to negotiate a

88. *See* Joe Murphy, *Anger at Euro-flag on Driving Licenses*, MAIL ON SUNDAY (London), Jan. 15, 1995, at 15.

89. *See* Press Release, European Union, New Commission Portfolios Distributed and Working Groups Set Up (Jan. 25, 1995), DN: IP/95/60, *at* http://www.europa.eu.int. It should also be noted that in 1995 three new Member States were added to the European Union: Austria, Finland, and Sweden. *See* European Union, The European Union at a Glance, *at* http://www.europa.eu.int/abc-en.htm (last visited Jan. 21, 2002).

90. *See Report To European Parliament Criticises 'Timid' Commission*, AVIATION EUR., Feb. 16, 1995, at 1.

91. *See EC Goal: All-Or-Nothing Bilaterals with U.S.*, AVIATION DAILY, Mar. 6, 1995, at 26 [hereinafter *EC Goal*]. U.S. Open Skies policy sprang back to life in 1992, with an announcement by the Secretary of Transportation that the U.S. "will now offer to negotiate open skies agreements with all European countries willing to permit U.S. carriers essentially free access to their markets." Defining "Open Skies", Order Requesting Comments, 57 Fed. Reg. 19,323 (May 5, 1992). The U.S. completed an Open Skies bilateral with the Netherlands almost immediately thereafter. *See* Warner, *supra* note 8, at 300. This was followed by an announcement in 1994 that the U.S. intended to negotiate Open Skies bilaterals with nine other European nations (three were non-E.U. Member States). *See EC Goal*, *supra*. The Commission was probably particularly stung by a U.S. announcement in late February 1994 (i.e., after the Parliament's criticism of the Commission) that it would begin negotiations with Belgium, an E.U. Member State. *See id.* U.S.-German bilateral negotiations, opened in October 1993, fell through. *Compare EC Goal*, *supra* (noting that the United States was completing an Open Skies agreement with Germany) *with* Caroline Southey, *Kinnock Still Airborne Over Open Skies: Commissioner Ready for Long Battle Over EU Airline Deals*, FINANCIAL TIMES (London), Mar. 24, 1995, at 2 (noting that "Germany did not want to talk about open skies deals").

92. *EC Goal*, *supra* note 91.

93. *See id.*

94. *See* Southey, *supra* note 91.

95. Austria, Belgium, Denmark, Finland, Luxembourg, and Sweden. *Id.*

multilateral agreement.[96] An unnamed aviation official told the Financial Times, "Mr. Kinnock should have known he was going to be ignored by member states. If he had been less gung-ho he would have stood a better chance of getting what he wants."[97] An aide to Kinnock was equally blunt in rebuttal, "Doing something was better than doing nothing .... [The Commission's] job is to protect the broader interests of the [European Union]. That is just what he is doing."[98]

In anticipation of the next E.U. transport ministers' meeting in late June,[99] Kinnock stated that U.S. Open Skies negotiations "could put in peril the whole of European deregulation."[100] Kinnock contrasted his "comprehensive, balanced alternative" with U.S. efforts "to divide Europe in setting the ground rules for civil-aviation relations."[101] This was followed by a declaration that bilaterals were "the most serious obstacle to competition,"[102] while a senior aide to the Commission stated that the Commission was "duty bound under European law to carry out infringement proceedings" against Member States negotiating new bilaterals.[103] Another Commission official added, "I am very concerned at the cumulative effect of [bilaterals] on the [European Union's] interests."[104] Yet most of the Member States were not so pessimistic and the transport ministers asked the Commission to refine its proposals, which had been hastily formulated in the wake of the U.S. Open Skies offensive.[105] Meanwhile, the Commission began to quietly advance possible legal action against the more recalcitrant Member States that were already negotiating (or had even signed) Open Skies bilaterals with the United States.[106]

Thus the transport ministers were somewhat suspicious at their meeting the following year, although Kinnock approached the matter more optimistically by claiming "considerable progress" on the subject of shifting negotiating powers to the Commission.[107] Despite initial sharp opposition from France and Britain,[108] the transport ministers did agree on a draft mandate for conferring negotiating powers to the Commission, [109] but the Commission paid a high cost for obtaining them.

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96. *See* Southey, *supra* note 91.

97. *Id.*

98. *Id.*

99. *See* Julian Moxon, *EC Sets Open-Skies Schedule*, FLIGHT INT'L, June 14, 1995 [hereinafter *Open-Skies Schedule*].

100. *See* Julian Moxon, *US/EU Tensions Build Up Over Open Skies*, FLIGHT INT'L, June 7, 1995 [hereinafter *US/EU Tensions*].

101. *See id.*

102. *See Open-Skies Schedule*, *supra* note 99.

103. *See id.*

104. *Kinnock Pursues Air Deals to Thwart US Agreements*, TRADE TRAVEL GAZETTE UK & IRELAND, Apr. 5, 1995, at 16.

105. Julian Moxon, *EC Moves Nearer to Open Skies*, FLIGHT INT'L, June 28, 1995 [hereinafter *EC Moves Nearer*].

106. *See US/EU Tensions*, *supra* note 100; *EC Moves Nearer*, *supra* note 105.

107. *See France Rejects Traffic Rights as Issue in Multilateral Talks*, AVIATION DAILY, Mar. 14, 1996, at 1.

108. *See id.*

109. Press Release, European Union, European Union Approves Commission Mandate to Negotiate a Common Aviation Area with the United States (June 17, 1996), No. 35/96, *at*

The Member States demanded that the Commission conduct negotiations in two phases, the first phase would concern "soft issues," such as computer reservation systems, slot allocation,[110] ground handling, and air carrier ownership, while the second phase would deal with "hard issues," such as traffic rights and pricing.[111] The Commission would not be permitted to negotiate agreements on the "hard issues" unless it could demonstrate "substantial results in the first phase."[112] Finally, the Member States kept the right to negotiate their own bilaterals with other nations.[113]

While the Commission declared the concessions represented a "true victory," the U.S. government said that it rejected limited negotiations, arguing that "soft" and "hard" issues were "inextricably linked."[114] Yet even with U.S. criticism, Kinnock felt enough had been obtained to be generous with the Member States, announcing there would be "no roll-back on any bilateral agreement in existence or under negotiation."[115] The Commission's complaint against Member States who had signed bilaterals was thus effectively "defused."[116]

However, by late 1997 the Commission's patience with the Member States was growing short again as Member States continued to independently negotiate bilaterals.[117] At the October E.U. transport ministers' meeting, Kinnock vowed there would be a role for the Member States in Commission-led negotiations, yet his aides suggested that legal action might be reinitiated against Member States that had completed new bilaterals.[118] But despite what one commentator called Kinnock's "nice guy/nasty guy routine,"[119] the transport ministers would not be swayed and again rejected granting the Commission full negotiating powers.[120] This led Kinnock to acknowledge that the Member States were "resistant" to turning over negotiations to the Commission, but he promised to return to the issue at the next transport ministers' meeting.[121]

Frustrated by the continued intransigence of the Member States, in March 1998 the Commission announced that it would open legal proceedings against seven Member States that had signed Open Skies bilaterals with the United States

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http://www.eurunion.org/news/press/1996-2/pr35-96 (last visited Dec. 31, 2001).

110. A "slot" is the right to take-off and land a single aircraft per day. PAUL STEPHEN DEMPSEY & LAURENCE E. GESELL, AIRLINE MANAGEMENT: STRATEGIES FOR THE 21ST CENTURY 252 (1997) [hereinafter AIRLINE MANAGEMENT].

111. *See Commission's Multilateralism Mandate Comes in Phases, May be Too Late*, AVIATION DAILY, June 20, 1996, at 1.

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.*

116. *See id.*

117. *See* Chris Johnstone, *Brussels Cajoles and Threatens in Bid for United EU Air Front*, J. OF COM., Oct. 8, 1997, at 20A.

118. *See id.*

119. *See id.*

120. *See European Union Denies Kinnock Authority to Negotiate 'Hard Issues' With U.S.*, AVIATION DAILY, Oct. 10, 1997, at 63.

121. *See id.*

and against the United Kingdom, which, with the United States, had amended Bermuda II.[122] In its press release, the Commission said that it was "not motivated simply by the legal breach of E.U. rules," but it acted because the bilaterals "do not safeguard the long-term interests of the European air transport industry."[123] By giving access to national markets on different terms, the Commission argued that bilaterals "not only distort the competition between airlines but also between airports."[124] Despite the Commission's careful phrasing, its frustration with the Member States was still apparent, "Member States are not only failing to comply with E.U. law, but are also not co-operating to adopt, within a reasonable time, an E.U. approach making it possible to remedy the legal infringements and ensure equivalent regulatory conditions . . . ."[125] A public statement by Kinnock's official spokesperson was even more astonishingly blunt, "The cozy negotiations are over and the gloves have now been taken off. If this does rattle some governments – so be it."[126]

The Member States did not respond well to the Commission's threats, with Britain and France declaring the following day that they would continue negotiating with the United States regardless.[127] The German transport minister characterized the threat as "unacceptable" and warned that it would "endanger European jobs," while others called it "counterproductive."[128] Portugal and Italy proceeded with their talks with the United States,[129] apparently unconcerned with claims by "top EC officials" that such behavior was "a shortsighted policy based on nationality."[130] Yet Kinnock still offered that the Member States had a "final chance" at the October 1998 transport ministers' meeting to give the Commission full negotiating powers.[131]

Ignoring the Commission's pleas and threats, the transport ministers once more refused the Commission's request.[132] This prompted the Commission to step up its actions against the Member States by reopening legal proceedings.[133] As part of announcing the move, Kinnock conceded that the Member States had given

122. The Member States that had signed bilaterals were Austria, Belgium, Denmark, Finland, Germany, Luxembourg, and Sweden. *See* Press Release, European Union, European Commission Takes Legal Action Against EU Member States' "Open Skies" Agreements with the United States (Mar. 11, 1998), No. 16/1998, *at* http://www.eurunion.org/news/press/1998-1/pr16-98 (last visited Dec. 31, 2001).

123. *See id.*

124. *See id.*

125. *See id.*

126. *See* Chris Johnstone, *Kinnock Challenges Open-Skies Pact*, J. of Com., Mar. 12, 1998, at 12A.

127. *See id.*

128. *See* Kevin O'Toole, *Open Skies Hostility*, FLIGHT INT'L, Mar. 25, 1998, at 28.

129. *See* Lois Jones, *Caught in the Loop*, AIRLINE BUS., June 1998, at 24.

130. *See* Pierre Sparaco, *European Deregulation Still Lacks Substance*, AVIATION WK. & SPACE TECH., Nov. 9, 1998, at 53.

131. *See* Bruce Barnard, *Virgin Set to Challenge US Carriers in US Skies*, J. OF COM., Sept. 24, 1998, at 11A.

132. *See* Chris Kjelgaard, *Commission Takes Eight EU Nations to Court Over US Bilaterals*, AIR TRANSP. INTELLIGENCE, Oct. 30, 1998.

133. *See id.*

the Commission negotiating powers, "[b]ut its scope is not broad enough to make meaningful negotiation possible and until that changes, the Commission . . . has no option but to pursue legal action."[134] He continued to explain that the Commission "sees no other option but to pursue the procedure . . . to the finish."[135] But Kinnock continued to hold out the possibility of reconciliation, stating that the Commission was "willing and available to constructively build a common approach as regards air transport relations . . . and hopes that substantial progress . . . will be made in the coming months."[136]

The Member States were seemingly less than impressed with the Commission's offer of cooperation, as the United Kingdom continued its negotiations with the United States, albeit at a significantly reduced rate,[137] while just weeks after the Commission renewed its legal action, Italy declared that it had completed an Open Skies bilateral with the United States.[138] The Commission responded by opening legal proceedings against the Netherlands over its bilateral with the United States.[139] This was a shock to the Member States, as the Commission had previously indicated the Netherlands/U.S. bilateral would not be challenged since it predated the Third Package.[140] However, what would be perhaps the greatest shock was yet to come.

On May 12, 1999, Kinnock gave a speech to the European Aviation Club entitled *European Air Transport Policy: All Our Tomorrows or "All Our Yesterdays" Replayed?*[141] Kinnock admitted European air transportation was "shaping up to the future," but he cautioned "that restructuring in [the] industry will only be truly successful if it is accompanied and strengthened by an effective and proactive external strategy."[142] He then sharply criticized the Member States for continuing to negotiate bilaterals, referring to the "magical attraction" of bilaterals and stating, "Nostalgia, it seems, still has a big future. Oxymoronism rules."[143] Yet what at first appeared to have been little more than another opportunity for Kinnock to go after his opponents quickly became something more.[144] It was here that Kinnock explicitly developed the concept of the TCAA (referred to as the Common Aviation Area in most of the speech), a plan that he

134. *See* Kjelgaard, *supra* note 132.

135. *See id.*

136. *See id.*

137. *See* John D. Morrocco, *Open Skies Impasse Shifts Alliance Plans*, AVIATION. WK. & SPACE TECH., Nov. 9, 1998, at 45.

138. *See U.S., Italy Agree to Open Skies, Pending Alitalia-Northwest Immunity*, AVIATION DAILY, Nov. 13, 1998 at 275.

139. *See Netherlands/US Bilateral Agreement Focus of EC Proceedings*, AIRLINE INDUSTRY INFO., Feb. 8, 1999.

140. *See id.*

141. Commissioner Neil Kinnock, European Air Transport Policy: All Our Tomorrows or "All Our Yesterdays" Replayed (May 12, 1999) (transcript available at http://europa.eu.int/comm/transport/global/speeches/990512.htm) [hereinafter All Our Tomorrows]. The title is a reference to a line in Shakespeare's *Macbeth*. *See id.*

142. *See id.*

143. *See id.*

144. *See generally id.*

had first suggested shortly after assuming the office of Transport Commissioner but which had lain dormant during the confrontations with the Member States.[145] The TCAA would not simply be an E.U.-wide bilateral, but would be qualitatively different, embracing a number of issues usually not found in bilaterals, such as consumer rights and environmental protections, as well as traditional matters like traffic rights and code-sharing.[146] Ironically, once Kinnock had finally devised a coherent, albeit sketchy, means of implementing the Commission's goals for external aviation policy, the Commission was reorganized and Kinnock removed as Transport Commissioner.[147]

His Truth is Marching On. . .

The new Transport Commissioner, Loyola de Palacio, seemed less interested in the subject of bilaterals and the TCAA,[148] with leadership on the subject of the TCAA passing largely into the hands of the Association of European Airlines (AEA)[149] and its members.[150] Thus, at a 1999 global aviation summit with 90 participating nations, although de Palacio presented the concept of the TCAA, it was the officers of several European carriers who spoke most forcefully on its behalf.[151] The chairman of British Midland Airways expressed dismay that the United States and United Kingdom, both long-time champions of deregulation, were opposed to multilateral agreements.[152] Lufthansa's CEO argued the TCAA was "the only way to make some progress" on the liberalization of international aviation.[153] The president of KLM announced that bilateralism was dead and the air transport industry would be "like a movie industry doomed by its governments to produce only silent movies" if the TCAA, or some other form of multilateral

145. *See* Simon Warburton, *Kinnock Calls Again for Common Transatlantic Pact*, AIR TRANSP. INTELLIGENCE, May 13, 1999.

146. *See* All Our Tomorrows, *supra* note 141.

147. *See De Palacio is Proposed to Take Over As European Transport Commissioner*, ATC MARKET REP., July 22, 1999 at 8.

148. De Palacio's focus was centered on internal European air transportation issues, particularly air traffic control. *See New EU Transport Commissioner Pledges to Fight for 'Single Sky'*, AVIATION DAILY, Aug. 31, 1999, at 1. In a speech given on October 19, 2000, de Palacio restated, "[T]he development of a Single Sky currently ranks amongst my over-riding priorities." *See* Commissioner Loyola de Palacio, Europe's Future Aviation Policy, Address to the General Assembly of the European Cockpit Association (Oct. 19, 2000), *in* WORLD AIRPORT WK., Oct. 31, 2000.

149. The AEA is composed of air carriers (scheduled, chartered, and cargo) registered in, licensed by and with their principal place of business in an European Civil Aviation Conference (ECAC) state and which have been engaged in passenger or cargo air transport operations for at least three years. *See* AEA, Criteria for Membership, *at* http://www.aea.be/SpotlightAEA/AEA_mbrship.htm (last visited Jan. 23, 2002). The AEA has twenty-eight members, including all major E.U. carriers. *See* AEA, AEA Member Airlines, *at* http://www.aea.be/CompLogos/company_content.htm (last visited Jan. 23, 2002). The ECAC includes all E.U. Member States. *See* ECAC, ECAC Member States, *at* http://www.ecac-ceac.org/uk/ecac/ecac-memberstates.htm (last visited Jan. 23, 2002).

150. *See* James Ott, *Aviation Summit Yields EU Plan for Open Market*, AVIATION WK. & SPACE TECH., Dec. 13, 1999, at 43.

151. *See id.*

152. *See id.*

153. *See id.*

accord, was not adopted.[154]

Despite these strong testimonials, the TCAA did not gain many supporters among the assembled transport ministers and no reference to it was included in the conference's final statement.[155] Furthermore, while de Palacio suggested at the conference that the European Union and United States could meet at six-month intervals to prepare for full negotiations on the TCAA,[156] there has been little action on the subject.[157] Thus de Palacio's goal of a TCAA conference by the summer of 2002 was not met.[158]

The year 2000 was one in which the TCAA was much discussed by the international aviation community,[159] but there was little progress on the subject, as the United States continued to refuse negotiations until the Commission received a full mandate from the Member States.[160] Recognizing that something drastic had to be done to advance the possibility of negotiations, the Commission pressed on with its suit against the rebellious Member States.[161] The day of confrontation was May 8, 2001, on which the Commission presented its case against eight Member States[162] before the European Court of Justice (Court of Justice).[163] A decision in the case was predicted first by the end of July,[164] then by "November or December,"[165] and, seemingly in moment of despair, "before spring."[166]

While a full decision was not anticipated until the summer of 2002,[167] the

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154. *See* Ott, *supra* note 150, at 43.

155. *See Freedom's Paths*, *supra* note 15.

156. *See* Graeme Osborn & Karen Walker, *Sans Frontiers?*, AIRLINE BUS., Feb. 2000, at 34 [hereinafter *Sans Frontiers*].

157. *See* Colin Baker, *French Push for TCAA*, AIRLINE BUS., Dec. 2000, Briefing (noting only "informal talks . . . in recent months") [hereinafter *French Push*].

158. *See Sans Frontiers*, *supra* note 156.

159. *See, e.g.*, Jeffery N. Shane, Foreign Ownership and Control of U.S. Airlines: Prospects for Change, Remarks Before the 25th Annual FAA Aviation Forecast Conference (Mar. 7, 2000) (transcript available at http://www.api.faa.gov/conference/procdoc2000/shane.pdf); AEA Secretary General Karl-Heinz Neumeister, Old World, New World – Differing Perspectives and Changing Perspectives on the Airline Industry, Address to the International Aviation Club Luncheon (Apr. 27, 2000) (transcript available at http://www.iacwashington.org/neumeister42700.pdf); Graeme Osborn & Karen Walker, *Worlds Apart*, AIRLINE BUS., July 2000, at 28 [hereinafter *Worlds Apart*].

160. *See US, EU Open Aviation Market Would Require "Political Will," EU Says*, AVIATION DAILY, May 12, 2000, at 3.

161. *See* Head of Air Transport Division, Directorate General for Energy and Transport, Frederik Sorensen, Towards a Consensus View of the Future International Air Transport Regime, Panel Discussion at 26th Annual FAA Commercial Aviation Forecast Conference (Mar. 13-14, 2001) (transcript available at http://api.hq.faa.gov/conference/conference2001/proc2001/transcript.htm).

162. The Member States were Austria, Belgium, Denmark, Finland, Germany, Luxembourg, Sweden, and the United Kingdom. *See* Robin Pomeroy, *Open Skies Hearing*, NATIONAL POST, May 8, 2001, at C10.

163. *See European Court Decision on Multilateral Mandate Expected by Year's End*, WORLD AIRLINE NEWS, June 1, 2001 [hereinafter *European Court Decision*].

164. *See* Sorensen, *supra* note 161.

165. *European Court Decision*, *supra* note 163.

166. *U.S.-U.K. Discussions Could Lead to Open Skies Agreement This Year*, WORLD AIRLINE NEWS, July 6, 2001 [hereinafter *U.S.-U.K. Discussions*].

167. *See* David Morrow, *EC Yet to Determine Extent of Open Skies Overhaul*, AIR TRANSP.

Commission was rewarded with an opinion favoring its stance from the Advocate General of the Court of Justice on January 31, 2002.[168] The opinion addressed matters in all eight cases, and dealt with a number of procedural questions in addition to the central issue,[169] however, the analysis here will focus only on the substantive portion of the case as it relates to bilaterals.[170]

The Commission leveled two complaints against the Member States, first that the terms of seven Member States' bilaterals[171] violated "the external competence" of the European Union and its governing bodies;[172] and second that all eight Member States' bilaterals infringed Article 52 of the E.C. Treaty.[173] Before assessing the merits of the first complaint, the Advocate General examined the grounds for finding that the European Union possessed external competence in the matter.[174] Although declining to find external competence under one theory,[175] the Advocate General did find external competence under another, using a string of earlier decisions that could be read to support such a finding.[176] The Advocate General therefore concluded:

> [T]he Member States may not under any circumstances conclude international agreements, even if these are entirely consistent with the common rules, since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the common market and the uniform application of Community.... Not even the requirement to ensure the full and correct application of Community law could justify unilateral action by Member States.... If... the Community was unable... to conclude such agreements directly, it would then be necessary... for its institutions and the Member States to cooperate with a view to enabling the latter to amend the existing agreements in a manner consistent and in accordance with the Community's interest.[177]

With this principle established, the Advocate General turned to the question of whether the seven bilaterals were in violation of four particular E.U. regulations

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INTELLIGENCE, Jan. 31, 2002 (noting that a final ruling "will follow in a few month's time").

168. *See* Kieran Daly, *Court Strongly Supports EC Bilateral Case*, AIR TRANSP. INTELLIGENCE, Jan. 31, 2002.

169. *See* Opinion of Advocate General Tizzano, Joined Cases C-466, 467, 468, 469, 471, 472, 475, & 476/98, Commission v. United Kingdom, *at* http://europa.eu.int (search for case C-466/98), Table of Contents (last visited July 8, 2002) [hereinafter Opinion of Advocate General].

170. While the procedural aspects are essential to processing of the case, such matters as whether the pre-litigation procedure was unduly prolonged (*see id.* at paras. 31-32) or if the Commission even had the authority to bring the action (*see id.* at paras. 42-77) are tangential to the subject of the TCAA.

171. The United Kingdom's bilateral was excluded from this complaint. *Id.* at para. 41.

172. *See id.* A violation of "external competence" occurs when a Member State enters into an agreement that is within a subject area that is the exclusive domain of the European Union. *See id.* at para. 20.

173. *See id.* at para. 118. It should be noted that the Opinion uses the original numbering of the E.C. Treaty rather than the revised numbering. *See id.* at para. 1 (identifying the relevant original and revised article numbers).

174. *See id.* at paras. 41-77.

175. *See id.* at para. 58.

176. *See id.* at paras. 63, 69-70.

177. *See id.* at paras. 71, 73, 74 (quotation marks and citations omitted).

concerning aspects of aviation[178] and whether the bilaterals distorted competition in the internal E.U. aviation market.[179] (Five bilaterals[180] were also examined in light of a fifth regulation.)[181]

The Commission's first argument was that the inclusion of Fifth Freedom rights in the bilaterals violated regulations both on the licensing of air carriers (Regulation No. 2407/92) and access to intra-E.U. routes (Regulation No. 2408/92) by permitting U.S. carriers to operate on intra-E.U. routes without being licensed as E.U. carriers.[182] The Advocate General rejected this theory,[183] noting:

> [T]here is nothing in Regulation No. 2408/92 from which it may be inferred that it also aims to regulate (still less to prohibit) the granting of traffic rights within the Community to non-Community carriers . . . . The right of Member States to grant access to routes within the Community to non-Community carriers is therefore not in any way curtailed by Regulation 2408/92, nor indeed by Regulation No. 2407/92 . . . .[184]

The Advocate General then considered the Commission's argument that the bilaterals distorted competition, undermining the European Union's internal market.[185] The Commission's claim, however, failed to explain "in a precise and detailed manner what the alleged discrimination and distortions of competition might be . . . .," according to the Advocate General, and could be dismissed for failure to carry the burden of proof.[186] Additionally, the Commission's legal reasoning itself was faulty:

> [I]n the absence of Community legislation governing relations in a given area with third countries, the disparities which could hypothetically result from the conclusion of different international agreements by Member States in that area and the economic consequences that might ensue for the internal market do not *in themselves* suffice to preclude the right of Member States to enter into such agreements.[187]

The third argument of the Commission was that provisions of the bilaterals

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178. *See* Opinion of Advocate General, *supra* note 169, at paras. 81-104. The regulations considered were Council Regulations 2407/92, 1992 O.J. (L 240) 1; 2408/92, 1992 O.J. (L 240) 8; 2409/92, 1992 O.J. (L 240) 15; and 2299/89, 1989 O.J. (L 220) 1. *See id.* at paras. 81, 89, 98. *See also Competition in the Air*, *supra* note 1, at 1039-46, 1049-63, 1078-88 (discussing these and related regulations in detail). For procedural reasons, a transitional agreement held by Germany between 1994 and 1996 was exempted from the case, but Germany's final agreement of 1996 was validly included in the complaint. *See* Opinion of Advocate General, *supra* note 169, at 39-40.

179. *See id.* at para. 85.

180. Those of Belgium, Denmark, Finland, Luxembourg, and Sweden. *Id.* at para. 105.

181. Regulation No. 95/93, 1993 O.J. (L 14) 1. *See id. See also Competition in the Air*, *supra* note 1, at 1063-69 (discussing this regulation and related measures in detail).

182. *See id.* at para. 81.

183. *See id.* at para. 84.

184. *See id.* at para. 82.

185. *See id.* at para. 85.

186. *See id.* at para. 86.

187. *See id.* at para. 87.

which permitted non-E.U. carriers to set fares on Fifth Freedom routes within the European Union were in violation of the regulation concerning airfares on intra-E.U. routes (Regulation No. 2409/92).[188] The Advocate General agreed with the Commission on this count,[189] finding that "Regulation No. 2409/92 indirectly but unequivocally excludes the right for non-Community carriers" to set fares below existing levels.[190] Some Member States protested that they made changes to their bilaterals so as to accommodate Regulation No. 2409/92,[191] but the Advocate General directed them to his earlier finding that Member States could not act unilaterally, even to avoid conflict with E.U. regulations, on matters that were within the European Union's external competence.[192]

The Commission's fourth argument was that the bilaterals were in violation of an E.U.-established code of conduct for computer reservation systems (Regulation No. 2299/89).[193] The regulation stipulated that the operators of computer reservation systems in non-E.U. states were subject to the principle of reciprocity for their treatment of computer reservation systems in Member States.[194] The Member States protested again that the provisions of their bilaterals concerning computer reservation systems had been drafted so as to avoid conflict with the regulation.[195] The Advocate General rebutted this contention by pointing out that Regulation No. 2299/89 gave the European Union external competence and that "Member States no longer had power to assume international obligations in that area, even international obligations consistent with those provisions."[196] Thus the Advocate General found in the Commission's favor on this point as well.[197]

Finally, the Commission alleged that five of the disputed bilaterals affected slot allocation at E.U. airports (a procedure ordinarily covered by Regulation No. 95/93) by promising "fair and equal conditions of competition" for non-E.U. carriers, which the Commission argued typically included slot allocation measures.[198] The Advocate General, however, agreed with the Member States that the Commission had failed to prove the fair and equal competition provision had any application to slot allocation.[199] Furthermore, in most instances the offending provision in the bilaterals antedated the European Union's regulation of slot allocation procedures, so E.U. oversight would not apply even if the provision impinged on the European Union's external competence.[200] The Advocate General

188. *See* Opinion of Advocate General , *supra* note 169, at para. 89.
189. *See id.* at para. 97.
190. *See id.* at para. 91.
191. *See id.* at para. 95.
192. *See id.* at para 96 (citing para. 73).
193. *See id.* at para 98.
194. *See id.*
195. *See id.* at paras. 99, 101.
196. *See id.* at para. 103.
197. *See id.* at para. 104.
198. *See id.* at para. 105.
199. *See id.* at para. 107.
200. *See id.*

therefore found in the Member States' favor on this matter.[201]

Before issuing his final recommendation on the Commission's first complaint, the Advocate General also addressed the Member States' main defense: that their bilaterals should be entirely exempted from E.U. oversight.[202] The Member States claimed the first paragraph of Article 234 of the E.C. Treaty offered such an exemption by providing that "[t]he rights and obligations arising from agreements concluded before the entry into force of this Treaty between . . . Member States . . . and one or more third countries . . ., shall not be affected by the provisions of this Treaty."[203] The Advocate General rejected both this argument and the Commission's inverse theory that even provisions of the bilaterals preceding adoption of E.U. regulations should be invalidated.[204] He explained, "while it is true that the amendments in question did not completely transform the old agreements into new ones, it is also the case that if they were incompatible with Community law they could not be justified by reference to the continuance of the old agreements into which they incorporated."[205] Therefore, the Advocate General concluded in regards to the first complaint that the Member States were in violation of the European Union's external competence in regards to Regulations Nos. 2409/92 and 2299/89, in conjunction with Article 5 of the E.C. Treaty.[206]

The Commission's second complaint was directed against all eight defendants and accused them of violating Article 52 of the E.C. Treaty.[207] Article 52 prohibits Member States from imposing discriminatory regulations against establishment of businesses in their territories by the nationals of any other Member State.[208] The Commission's theory was that the Member States' bilaterals were in conflict with Article 52 because of their inclusion of a nationality clause, which permitted the parties to the bilateral to designate the air carriers they would allow on the routes encompassed by the bilateral and deny those traffic rights to air carriers owned by the nationals of a third-party state.[209] Therefore, the nationality clause would be discriminatory since it expressly allows parties to the bilateral to treat a carrier from another Member State differently than a carrier from the contracting Member State.[210] The defendant Member States parried by suggesting that if discrimination

201. *See* Opinion of Advocate General , *supra* note 169, at para. 108.

202. *See id.* at para. 109.

203. *See id.* (citing EC TREATY art. 234).

204. *See id.* at 111-12.

205. *See id.* at 112.

206. *See id.* at 117. That article of the E.C. Treaty reads:

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measures which could jeopardise the attainment of the objectives of this Treaty.

EC TREATY, art. 5.

207. *See* Opinion of Advocate General, *supra* note 169, at para. 118.

208. *See* EC TREATY art. 52. The term "establishment" includes founding and operating businesses. *See id.*

209. *See* Opinion of Advocate General, *supra* note 169, at para. 118.

210. *See id.* at para. 120.

resulted it would be the fault of the non-Member State (in this instance the United States).[211] This is because the nationality clause does not prevent the contracting Member State from designating carriers from other Member States, it merely allows the non-Member State to reject or limit the access of such carriers.[212]

The defendant Member States also argued that Article 52 would not be applicable because the discriminatory activity would take place outside of the European Union (i.e., on transatlantic routes).[213] Furthermore, some defendants suggested, Article 52 did not apply because of Article 84 of the E.C. Treaty.[214] In addition, Germany claimed that its bilateral had been amended to eliminate the discriminatory effects of the nationality clause.[215]

The Advocate General stated that the Commission's interpretation of the article was preferable, as it was evident that under the nationality clause the defendant Member States were not according air carriers owned by other Member States, or their nationals, the same treatment as carriers owned by the defendants and the defendants' nationals.[216] The defendant Member States could not blame the United States, the Advocate General found, as the discrimination was inherent in the nationality clause itself.[217]

The Advocate General dealt tersely with the other objections to the Commission's claim made by the Member States.[218] He pointed out that the discriminatory conduct concerned the right of establishment, which did occur within the confines of the European Union, thus the fact that the flights were primarily outside of E.U. territory was irrelevant.[219] The Advocate General was similarly unimpressed with the defendant Member States' attempt to rely on Article 84, pointing out that the Commission's claim was made under the establishment provisions of the E.C. Treaty, not the transportation provisions.[220] Finally, the Advocate General reviewed Germany's amended bilateral nationality clause, concluded that it still permitted discrimination against air carriers owned or controlled by the nationals of other Member States, and therefore found that the Commission's claim against Germany could go forward as well.[221]

Having found that the Commission's claim under Article 52 was valid, the Advocate General turned to the defenses raised by the Member States.[222] The first defense offered was that the nationality clause would be permitted under Article 56

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211. *See* Opinion of Advocate General , *supra* note 169, at para. 121.

212. *See id.*

213. *See id.* at para. 122.

214. *See id.* at para. 122. Article 84 (2) specifically exempts sea and air transport from the general provisions of Title IV (concerning transportation) of the E.C. Treaty, making them subject to it only when the Council chooses so. *See* E.C. TREATY, art. 84 (2).

215. *See* Opinion of Advocate General, *supra* note 169, at para. 122.

216. *See id.* at para. 123.

217. *See id.*

218. *See id.* at paras. 124-26.

219. *See id.* at para. 124.

220. *See id.* at para. 125.

221. *See id.* at para. 126.

222. *See id.* at paras 127-140.

of the E.C. Treaty, which allows Member States to retain laws and regulations that have a discriminatory effect on foreign nationals for purposes of public policy, security, or health.[223] The Advocate General found this to be a weak argument, pointing out that the bilaterals contained ample provisions for dealing with security and other public policy concerns besides the nationality clause.[224] Additionally, the nationality clause is not limited to use where there is an "actual threat to a public-policy interest," but can be applied for protectionist purposes, which is not a permissible act under Article 56 according to earlier Court of Justice decisions.[225] However, even if this was not the case, the Advocate General believed that the nationality clause would be in violation of Article 52, as "Article 56 cannot [justify] derogating measures adopted by Member States where the protection of the public interest . . . can be secured by less restrictive means."[226] The Advocate General suggested that the nationality clause would be permissible if drafted so as to give all E.U. carriers equal access but to still permit the United States to exclude non-E.U. carriers.[227] However, as written, the nationality clause was not protected by Article 56.[228]

The other defense offered by the Member States was that their bilaterals were protected by the first paragraph of Article 234 of the E.C. Treaty, which allowed Member States to retain agreements established prior to their accession to the European Community or Union and that their Open Skies bilaterals were simply an extension of earlier bilaterals with the United States.[229] The Advocate General first considered the merits of this defense in regards to Belgium and Luxembourg, concluding that it did not apply, as they completed basic bilaterals containing the nationality clause after their accession to the European Community, so the question of subsequent modification was not relevant.[230] Next, the Advocate General examined the situation of Austria, Denmark, Finland, Germany, and Sweden, all of which had in fact completed basic bilaterals with the United States prior to becoming subject to the E.C. Treaty, and which had not amended their nationality

223. *See* Opinion of Advocate General , *supra* note 169, at para. 127. The first clause of Article 56 states, "The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation, or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security, or public health." EC TREATY, art. 56 (1).

224. *See* Opinion of Advocate General, *supra* note 169, at para. 128.

225. *See id.* (citing Case 352/85, Bond van Adverteerders v. Netherlands, 1988 E.C.R. 2085, para. 34).

226. *See id.* at para. 129 (citing Case C-114/97, Commission v. Spain, 1998 E.C.R. I-6717, para. 47).

227. *See id.* at para. 130. The Advocate General noted that the defendant Member States claimed that they had proposed amendments of that sort to their bilaterals, but that the United States gave a "flat refusal" to such changes. *See id.*

228. *See id.* at para. 132.

229. *See id.* at para. 133. The first paragraph of Article 234 states "[t]he rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand and one or more third countries on the other, shall not be affected by the provisions of this Treaty." EC TREATY, at art. 234.

230. *See* Opinion of Advocate General, *supra* note 169, at para. 134.

clauses in subsequent Open Skies bilaterals.[231] The Advocate General agreed with those five defendants that the nationality clauses in their bilaterals predated their accession, but "while it is true that in the formal sense the clause was not amended by [their Open Skies] agreements . . . , it is also the case that, following their conclusion, the content of the clause has none the less been profoundly altered."[232]

The Advocate General found that the scope of the nationality clause was extended as a byproduct of the amendments that created Open Skies bilaterals between those defendant Member States and the United States.[233] Open Skies bilaterals gave rise to this situation by granting full Fifth Freedom rights to U.S. carriers, thus "the parties implicitly agreed to extend the scope of the clause in question, by modifying the rights and obligations flowing from it."[234] Therefore, while the text of the nationality clause had remained unchanged, the Member States had, in effect, amended it by permitting substantial increases in traffic on affected routes and the nationality clause could not be saved by appealing to the first paragraph of Article 234.[235]

Finally, the Advocate General examined the situation of the United Kingdom, which had signed Bermuda I with the United States prior to joining the European Community, but had subsequently adopted Bermuda II.[236] Unlike the previous Member States' bilaterals, which were created by amending earlier agreements, the Advocate General found that when the United States and United Kingdom entered into Bermuda II a new agreement was created.[237] The Advocate General therefore concluded, "By virtue of this new manifestation of intention, there is no doubt that the clause in question was incorporated into Bermuda II: in other words, into an agreement which was concluded after the Member State's accession to the Community."[238] With this established, the Advocate General thus found that none of the nationality clauses in question enjoyed protection under the first paragraph of Article 234.[239]

Before summarizing his findings and his conclusion, the Advocate General also turned to an alternative complaint offered by the Commission.[240] The Commission asked that, in the event the Court of Justice found that the first paragraph of Article 234 did, in fact, protect the nationality clauses of Austria, Denmark, Finland, Germany, and Sweden, the Court of Justice consider whether the nationality clauses infringed the second paragraph of Article 234.[241] The second paragraph of the article requires Member States to remove any

231. *See* Opinion of Advocate General , *supra* note 169, at paras. 134-38.
232. *See id.* at para. 136.
233. *See id.* at para. 138.
234. *See id.*
235. *See id.*
236. *See id.* at para. 139.
237. *See id.*
238. *See id.*
239. *See id.* at para. 140.
240. *See id.* at para. 141.
241. *See id.* at para. 142.

incompatibilities between a prior agreement and provisions of the E.C. Treaty.[242] The Advocate General noted, "that the Court has recently given quite a strict interpretation of that provision, . . . Member States have even [had] to go so far as denouncing such agreements if the contracting third [-party] states do not intend to renegotiate them."[243] While the defendant Member States claimed they asked the United States to renegotiate the nationality clause, the Advocate General rejected that as inadequate.[244] Instead, "the Member States concerned must show that they made every effort to remove the incompatibility; and it does not seem to me that . . . they did so" as required by the second paragraph of Article 234.[245] Therefore, in the cases of those five Member States, the Commission's alternative complaint would also succeed.[246]

The Advocate General's final recommendation to the Court of Justice was to find that all defendant Member States had violated Article 52 of the E.C. Treaty by the inclusion of nationality clauses in their bilaterals.[247] The Advocate General also determined that seven defendants (the United Kingdom excluded), should further be found to have violated regulations concerning fare setting and computer reservation systems by including certain provisions in their bilaterals.[248] Finally, the Commission's alternative complaint should be upheld against five of the defendant Member States.[249]

As this article was going to press, the Court of Justice found in favor of the Commission.[250] The final text of the Court's decision is not available yet, but preliminary reports indicate that the opinion follows the outline of the Advocate General's Opinion.[251] Loyola de Palacio hailed the Court's ruling, saying, "Today's judgment is a major step towards developing a new coherent and dynamic European policy for international aviation . . . . From now on, it is clear from the Court's ruling that we will all have to work together in Europe to identify and pursue our objectives jointly."[252] The Commission observed that under the

242. *See* Opinion of Advocate General , *supra* note 169., at para. 142. The full text of the second paragraph reads: "To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude." EC TREATY, art. 234.

243. *See* Opinion of Advocate General, *supra* note 169, at para. 143 (citing Joined Cases C-62/98 & C-84/98, Commission v. Portugal, 2000 E.C.R. I-5171).

244. *See id.* at para. 144.

245. *See id.*

246. *See id.* at para. 145.

247. *See id.* at para. 150.

248. *See id.*

249. *See id.*

250. *EU Court Rules Against "Open Skies" Accords With US*, AGENCE FRANCE PRESSE, Nov. 5, 2002 [hereinafter *EU Court Rules Against "Open Skies"*].

251. *See* Press Release, European Court of Justice, The Court of Justice Explains, by These Judgments, the Distribution of Competence as Regards the Conclusion of International Air Transport Agreements (Nov. 5, 2002), No. 89/02, *available at* http://curia.eu.int/en/cp/aff/cp0289en.htm (last visited Nov. 5, 2002).

252. Press Release, European Union, Open Sky Agreements: Commission Welcomes European Court of Justice Ruling (Nov. 5, 2002), No. IP/02/1609, *available at* http://www.europa.eu.int/

terms of the Court's ruling, "Member States may no longer make commitments to other countries on [aviation] matters. Member States that conclude bilateral deals risk creating conflicts in between their commitments at [the] international level and their obligations under EC law."[253] To avoid these conflicts, the Commission stated there was an "urgent need" for negotiations on the TCAA and promised to issue a communication in the near future that would further articulate its position on the subject.[254]

PART II: FACE OF THE FUTURE

With the Commission victorious in the Court of Justice, the question becomes, what would the TCAA look like?

Birth of a Notion

Although not referred to as the TCAA, or any of its other commonly used names, the first guide to what form the TCAA could take was delivered by the Comité in 1994.[255] The Comité offered eleven specific recommendations for a "common external policy" on aviation to be adopted by the European Union's Council of Ministers (Council).[256] The Comité suggested that the Council should develop a liberal aviation policy to "send a clear signal to non-European States and air carriers that E.U. external aviation policy will be consistent and will encourage reciprocal growth and expansion of services."[257] The system would be phased in over several years, "but with a clearly defined timetable," and use the leverage of the "whole European market" to its advantage.[258] The system would establish uniform regulations for computer reservation systems and promote cooperation on the use of competition laws.[259] Carriers licensed by Member States would be given "non-discriminatory opportunities" to engage in Fifth, Sixth, and Seventh Freedom flights from any point in the European Union to extra-E.U. destinations.[260] Limits on ownership, control, and investment by foreign nationals would be lifted on a reciprocal basis.[261] A single authority would be established to allocate traffic rights and carrier designations in a fair and transparent manner.[262] The policy would make allowances for the limits of infrastructure and regional

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comm/energy_transport/mm_dg/newsletter/n1026-2002-11-08_en.html (last visited Nov. 8, 2002) [hereinafter Open Sky Agreements].

253. *Id.*

254. *Id.*

255. *See Wise Men, supra* note 81.

256. *See* Recommendations from the report by the Comité des Sages for Air Transport to the European Commission (Jan. 1994) [hereinafter Recommendations], *in* 2 EUROPEAN AIR LAW [E I] 1.3 – 1, 9-10 (Elmar Giemulla et al. eds., 1992 & Supp. June 1994).

257. *See id.* at 9.

258. *See id.*

259. *See id.* at 9-10.

260. *See id.* at 10.

261. *See id.*

262. *See id.*

development, while permitting E.U.-based carriers "to restructure as global competitors."[263] Finally, "all existing traffic rights," with non-Member States, i.e., bilaterals, should be preserved, at least to the extent they "benefit . . . all Community carriers."[264]

The Scottish Play

In his speech *All Our Tomorrows or "All Our Yesterdays" Replayed?*, Kinnock did not reference the Comité's recommendations of five years earlier.[265] However, traces of those earlier recommendations can be seen running through Kinnock's account of what the TCAA would entail. The TCAA, in Kinnock's view, "would not simply include the standard exchange of rights under conventional 'open skies' deals."[266] The TCAA would include "essential issues beyond traffic rights," for the purpose of "securing change at the core of the restrictive bilateral system – the prevailing rules on ownership and control."[267] Regulatory matters concerning computer reservation systems, "code-sharing, slots management and trading, state aid, bankruptcy protection, leasing, and dispute settlement" would also be a part of the TCAA.[268] Kinnock considered harmonization of competition laws to be a "major issue" in the TCAA because it

263. *See* Recommendations, *supra* note 256, at 10.

264. *See id.*

265. *See generally* All Our Tomorrows, *supra* note 141.

266. *Id.* Assuming that Kinnock was referring to the model Open Skies bilateral used by the U.S., a "conventional" Open Skies bilateral includes:

1. Open entry on all routes;
2. Unrestricted capacity and frequency on all routes;
3. Unrestricted route and traffic rights (includes the right to operate service between any point in the U.S. 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 (1) in intra-E.U. markets: price matching rights in third-country markets, (2) in extra-E.U. 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;
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 that 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.

See In the matter of defining "Open Skies", Department of Transportation, Order 92-8-13, August 5, 1992, *available at* 1992 DOT Av. LEXIS 568, at 14-16.

267. *See* All Our Tomorrows, *supra* note 141.

268. *See id.*

would create a situation that would facilitate industry consolidation.[269] Kinnock concluded by arguing that transnational convergence of regulation on safety, security, environmental matters, and customer service was necessary as well.[270] Perhaps the most significant difference apparent between the Comité's recommendations and Kinnock's proposal was Kinnock's complete omission of any possibility for a remnant of the existing bilateral regime to survive in the TCAA.[271]

Diogenes Speaks

In September 1999, the AEA released a policy statement entitled *Towards a Transatlantic Common Aviation Area.*[272] Although the AEA is a private organization,[273] its vision of the TCAA appears to have become the prevailing one.[274] The AEA's policy statement is not cast as a comprehensive guide to the establishment of the TCAA, noting that its establishment "need not and should not be delayed until each and every detail of regulatory convergence has been settled."[275] However, "it is essential to define the basic principles, the overall structure, and the initial level of convergence that should apply at the outset."[276] Significantly, the AEA envisions the TCAA as simply an "essential first step" towards a "new, modern regulatory framework for international air transport"[277] that will be "suitable for gradual application worldwide."[278] To achieve this, "it will be necessary to create a single set of aviation rules under which European and U.S. air carriers would operate."[279]

The AEA explained the goal of the TCAA as follows:

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269. *See* All Our Tomorrows, *supra* note 141.

270. *See id.*

271. *See generally id.* This is understandable, however, given that Kinnock called the continuing existence of bilaterals, "[T]he continuation of narrow and short-term policy stances which prevent or inhibit advances in the general and – crucially – the individual interest of Member States and the E.U. aviation industry." *See id.*

272. ASSOCIATION OF EUROPEAN AIRLINES, TOWARDS A TRANSATLANTIC COMMON AVIATION AREA (1999) [hereinafter TOWARDS A TCAA], *available at* http://www.aviationtoday.com/reports/aeapolicystatement.pdf.

273. *See* COMMISSION ON AIR TRANSPORT, INTERNATIONAL CHAMBER OF COMMERCE, THE NEED FOR GREATER LIBERALIZATION OF INTERNATIONAL AIR TRANSPORT (2000), *at* http://www.iccwbo.org/home/statements_rules/statements/2000/need_for_greater_liberalization.asp (last visited Jan. 25, 2002).

274. The Vice-President of Government and Legal Affairs for KLM characterized the AEA's version of the TCAA as "the basis for negotiations" between the European Union and United States. *See FAA Predicts Golden Future for Aviation, But Offers Some Caveats*, WORLD AIRLINE NEWS, Mar. 10, 2000. The AEA itself is more modest, however, noting in the policy statement itself, "The purpose of the present paper is to clarify what the AEA airlines believe are key aspects and elements of the TCAA . . . . The paper lays no claim to be complete or to have identified in each area the only or best possible solution." TOWARDS A TCAA, *supra* note 272, at 16-17.

275. *See* TOWARDS A TCAA, *supra* note 272, at 1-2.

276. *Id.* at 2.

277. *Id.* at 1.

278. *Id.* at 3.

279. *Id.* at 4.

> The concept of a TCAA is intrinsically different from that underlying conventional aviation bilaterals. The latter are based on independent action by two sovereign authorities and the continuance of separate policies and separate powers. The creation of a TCAA is of course itself the result of negotiation between sovereign authorities; but the objective is gradually to reduce the differences and to achieve unified policies and rules.... Moreover, unlike a conventional air agreement, the establishment of a TCAA is necessarily a dynamic on-going process since regulatory standards continue to evolve over time.... In particular, it is essential that the parties to the TCAA can agree and implement changes in their own rules as required for convergence purposes. This means that the agreement establishing the TCAA should be in the form of a treaty, so that it would override national rules that are inconsistent with its provisions.[280]

Four principal subjects for the TCAA to initially focus on were identified by the AEA:

> 1. Rules governing market entry and access, pricing and selling/purchase of air transport;
>
> 2. Rules governing airline ownership and the right of establishment;
>
> 3. Rules governing airline competitive behavior and co-operative arrangements; and
>
> 4. Rules governing the use of leased aircraft.[281]

On the first subject, the AEA argued that all carriers of TCAA signatories should have "unrestricted commercial opportunities" to fly to any point within the TCAA.[282] In the absence of any countervailing "competition enforcement action," carriers would be given the right to choose their routes, set capacity, and set fares.[283] Discriminatory public procurements would be barred and air cargo services would be fully liberalized, including in the fields of intermodal transport and indirect services.[284] As for extra-TCAA routes, those would remain covered by existing bilaterals between the individual TCAA signatories and the third-party nation, however all TCAA carriers would enjoy access on the same terms of the bilateral for flights originating in the TCAA signatory.[285] This avoids giving carriers based in different signatories "dissimilar opportunities" in operations to third-party nations.[286]

With the second subject, ownership and establishment, the AEA confronted

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280. TOWARDS A TCAA, *supra* note 272, at 5.

281. *Id.* at 6.

282. *See id.* at 7.

283. *See id.* at 8.

284. *See id.*

285. *See id.* This would be the case if, say, the United States and France were both TCAA signatories and both had separate bilaterals with Japan, which was not a TCAA signatory. A U.S. carrier flying from New York to Tokyo would operate subject to the U.S.-Japanese bilateral, as under the current system. However, a U.S. carrier flying from Paris to Tokyo would operate subject to the French-Japanese bilateral.

286. *See* TOWARDS A TCAA, *supra* note 272, at 8.

"one of the core elements of the traditional international air transport regulatory system."[287] The TCAA should "permit cross-border mergers, acquisitions, and new entry."[288] Failure to grant such rights "would run counter to the basic objectives of the TCAA," while their inclusion "would help to balance out natural disparities in market opportunities" by permitting carriers to migrate to where "sufficient opportunities are available."[289] While recognizing that there are multiple possible bases for defining a TCAA carrier, the AEA recommended defining them as carriers which "are majority owned/controlled by nationals of the [signatories] or their respective governments."[290] The AEA conceded that third-party nations might object to such freedoms, however it was of the opinion that the risk was minimal, particularly since the ICAO had come out in support of liberalizing ownership/control requirements.[291] The TCAA should collectively seek resolutions to objections by third parties on this subject, although if that fails then the interests of carriers based in the individual TCAA signatory involved in the dispute would take priority.[292]

The third subject, competition policy, presented "one of the most important, and difficult, aspects of the TCAA."[293] The AEA observed that "the parameters used and the procedures followed to determine anti-competitive behavior are of major importance for the airline industry," because in a liberalized system "the enforcement of competition standards becomes the principal means of regulatory control."[294] Consequently, the AEA argued that the TCAA should produce common standards in:

1. Basic criteria for granting antitrust exemptions;

2. The definition of "relevant market" for examining anticompetitive behavior;

3. The concept of "market power" versus "market share";

4. The concept of "predatory" behavior;

5. The issue of what "essential facilities" carriers would be obliged to share;

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287. *See* TOWARDS A TCAA, *supra* note 272, at 8.

288. *Id.*

289. *See id.* at 8-9.

290. *See id.* at 9.

291. *See id.* at 9-10. The following year, the president of the ICAO reiterated his support for such changes, "In my view, the evolution of ownership and control provisions on a global basis would be a key economic regulatory development towards ensuring the safe, secure and orderly growth of civil aviation. . . . It would bring our industry in line with others and produce substantial economic benefits." *See Worlds Apart*, *supra* note 159.

292. *See* TOWARDS A TCAA, *supra* note 272, at 10.

293. *See id.* For more detailed examination of U.S. and E.U. antitrust and competition law, *see generally* Brian Peck, Comment, *Extraterritorial Application of Antitrust Laws and the U.S.-E.U. Dispute Over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution*, 35 SAN DIEGO L. REV. 1163 (1998); Amy Ann Karpel, Comment, *The European Commission's Decision on the Boeing-McDonnell Douglas Merger and the Need for Greater U.S.-E.U. Cooperation in the Merger Field*, 47 AM. U. L. REV. 1029 (1998).

294. *See* TOWARDS A TCAA, *supra* note 272, at 10.

6. The treatment of carrier alliances; and

7. The nature of punishments and remedies that could be applied.[295]

The AEA allowed that a convergence of policies on such matters "cannot be achieved overnight," but "substantive discussions" between E.U. and U.S. officials would be vital.[296] The AEA claimed the mere extension of existing competition procedures could not be contemplated.[297] Instead, it argued, "The very concept of the TCAA and the major importance for the airline industry of harmonised competition policy in such a common area mean that it is not enough for the E.U. and the U.S. to agree simply to co-operate in the application of their two sets of rules."[298] The AEA was of the opinion that the most important areas for convergence of competition policies were those concerning strategic alliances, and other restructuring arrangements, along with code sharing, franchising, and related agreements.[299]

On the final subject, the leasing of aircraft, the AEA considered the current regulations of both the European Union and the United States to be "unduly restrictive," making it all but impossible for a domestic carrier to "wet lease"[300] aircraft from foreign carriers.[301] The AEA argued, "Essentially, safety should be the only legitimate concern with respect to the use of leased aircraft by TCAA-based airlines for operations within the TCAA."[302] The only other restriction the AEA would be willing to admit on this matter would be a reasonable limit to the percentage of a TCAA carrier's fleet that could be wet-leased from third-party carriers, to avoid having those carriers circumvent access restrictions to the TCAA market.[303]

Having established what it considered to be the most important areas for preliminary negotiations, the AEA proceeded to set out a rough sketch of the institutional structures that would be necessary for the TCAA's operation.[304] Three principal "mechanisms" would be required, one for the adoption of common regulations, one for the uniform application of those regulations, and one for dispute resolution under those regulations.[305] The former two functions would be combined into one body.[306] The AEA proposed that this body would be composed of individuals nominated by the TCAA signatories, but empowered with "a degree of independence," which would report to a joint committee of the signatories.[307]

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295. *See* TOWARDS A TCAA, *supra* note 272, at 11.

296. *See id.*

297. *See id.* at 11-12.

298. *See id.* at 12.

299. *See id.*

300. A "wet lease" is a lease for an aircraft and a crew as a unit, as opposed to a "dry lease," which is a lease for an aircraft only. *See* AIRLINE MANAGEMENT, *supra* note 110, at 421.

301. *See* TOWARDS A TCAA, *supra* note 272, at 12.

302. *Id.* at 13.

303. *See id.*

304. *See id.* at 13-15.

305. *See id.* at 13.

306. *See id.*

307. *See id.* at 14.

The new body would "ensure effective commonality in the application of the agreed rules and a dynamic development of the TCAA by refining the common rules and developing an authoritative body of precedents . . . and by working out detailed proposals for new rules and modifications of the existing ones."[308]

The AEA noted that dispute resolution procedures in existing bilaterals leave much to be desired.[309] Indeed, because the procedures are so faulty, or even nonexistent, the disputing nations often resort to unilateral measures, which can lead to an escalating spiral of retaliation.[310] To avoid this, the AEA has proposed a two-phase system of dispute resolution for the TCAA.[311] The first phase would require parties to negotiate for a fixed period of time, with a mediator if necessary, in an effort to reach a mutually acceptable solution.[312] In the event that the parties were unable to reach a solution, the matter would move to phase two, which would be a type of formal adjudication.[313] The rulings of the adjudicatory body should be binding on the parties, possibly through a mechanism similar to the WTO's, where, if the bad actor does not pay compensation or otherwise comply with the ruling, the winning party is entitled to impose sanctions equal to its losses.[314]

The AEA recognized, based on the different bilaterals and regulatory environments existing among the potential signatories, there were several different categories of transition that would be necessary to implement the TCAA.[315] However, the AEA declined to set out transition guidelines, arguing that it is the transition *qua* transition that is important rather than procedural details.[316] Indeed, the AEA stated, "The modalities of transition should therefore essentially be left to be negotiated by the E.U. Member States in question, without burdensome preconditions other than some basic minimum requirements."[317] Regardless of the "modalities," the duration of the transition should be held to a reasonable period and the transition should be done on a reciprocal basis between the signatories to prevent discrimination against carriers.[318] Finally, the AEA cautions that these proposals are not "a set of independent entries on an 'à la carte' list of proposals," but instead must be handled as a unified work.[319]

Interestingly, although de Palacio has used almost all of the AEA's proposals

308. *See* TOWARDS A TCAA, *supra* note 272, at 14.

309. *See id.* A recent example of this sort of problem is a dispute between El Salvador and the United States over alleged predatory pricing and "capacity dumping," i.e., excessive empty space on flights, by Continental Airlines. The U.S.-El Salvador bilateral has no provision for an enforcement mechanism, nor does Salvadoran law. Consequently, El Salvador's major carrier, Grupo TACA, may be forced to sue in U.S. courts under U.S. antitrust laws. *See* David Knibb, *Play by the Rules*, AIRLINE BUS., Apr. 2000, at 72.

310. *See* TOWARDS A TCAA, *supra* note 272, at 15.

311. *See id.*

312. *See id.*

313. *See id.*

314. *See id.*

315. *See id.* at 15-16.

316. *See id.* at 16.

317. *Id.*

318. *See id.*

319. *See id.* at 17.

in her own speeches on the TCAA subsequent to the publication of the policy statement,[320] the AEA rejected two of the Commission's main tactics in attempting to establish the TCAA. The AEA argued that existing bilaterals and bilateral negotiations "should remain unimpaired" during the transition to the TCAA and that the Commission should halt its legal action against the Member States because it is "inconsistent with the objective of creating a new framework for E.U.-U.S. air services and detrimental to Community trade interests."[321] With the Commission's case against the Member States having received a favorable opinion from the Advocate General and now awaiting the Court of Justice's decision,[322] it appears unlikely that the Commission will adopt those recommendations.

PART III: THE TCAA AND THE DEADLY SINS

The inevitable question now arises, "Why hasn't the TCAA been adopted?" Although the Commission has employed a veritable scorched earth policy against the Member States, almost all of them support the TCAA, at least in principle.[323] Only the United Kingdom and Ireland are flatly opposed to the TCAA,[324] while even France, long a holdout, has been warming to the idea.[325] In a twist worthy of O. Henry, most opposition to the TCAA is now found in the United States,[326] although there are pockets of resistance remaining in Europe as well.[327] Once a U.S. official could claim, "We have been pushing for negotiations in a multilateral forum with the E.U."[328] Yet more recently a commentator has observed, "International aviation policy has stalled as [the U.S. Department of Transportation] and Congress let labor unions' knee-jerk opposition and unimaginative airlines imprison them in a time warp. The U.S. long ago lost its desire for big changes."[329] Upon hearing about the liberalization of foreign ownership limits by New Zealand, one U.S. government official lamented, "New Zealand, like the Dutch, sings our song better than we do."[330]

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320. *See, e.g.*, Beyond Open Skies, *supra* note 2.

321. *See* TOWARDS A TCAA, *supra* note 272, at cover letter.

322. *See* Dunn, *supra* note 254.

323. *See* Pomeroy, *supra* note 162, at C10.

324. *See id.* The United Kingdom may be softening its position on the TCAA as well. Recently, the head of international aviation policy for the U.K. Civil Aviation Authority stated, "The TCAA is the only way of delivering full liberalisation on the North Atlantic." *See* Mark Pilling, *Only a Call Away*, AIRLINE BUS., Mar. 2001, at 38.

325. *See French Push*, *supra* note 157.

326. *See* Joan M. Feldman, *Holes in the Dike: Market Forces Dissatisfied with Star Alliance*, AIR TRANSPORT WORLD, Aug. 1, 2000, at 43 [hereinafter *Holes in the Dike*].

327. *See, e.g.*, Assistant General Secretary, European Transport Workers' Federation, Brenda O'Brien, International Air Services Agreements: The Concerns of Workers, Address to the French Civil Aviation Authority (DGAC) Conference (Mar. 27, 2001), *at* http://www.itf.org.uk/ETF/e140801.htm.

328. Southey, *supra* note 91.

329. Joan M. Feldman, *Drip, Drip, Drip*, AIR TRANSPORT WORLD, Mar. 1, 2001, at 42 [hereinafter *Drip*].

330. *See id.*

Sloth . . .

As indicated above, at least part of the responsibility for progress on the TCAA grinding to a halt can be laid on the lack of excitement for the proposal on the part of U.S. carriers.[331] An industry observer stated, "The [U.S.] carriers won't derail an ownership/control change but they won't lead the charge."[332] Indeed, U.S. carriers almost flaunt their apathy, with such industry figures as Will Ris, the Vice-President of Government Affairs for American Airlines, openly remarking that the carriers "don't spend a lot of time thinking" about the TCAA or related matters, and that the emphasis is "gaming the current system."[333]

Northwest Airlines' Vice-President of International and Regulatory Affairs, David Mishkin, offered, "We are in favor of [the TCAA], but when it comes I'm not so sure."[334] CEO of Continental, Gordon Bethune, has said that the United States should liberalize its restrictions on ownership, but not to the extent suggested by the AEA's proposal.[335] Delta Airlines is somewhat more supportive; its general manager for finance and planning on Atlantic routes having stated that there is "no need to keep things off the table. Let true competition exist."[336] However, he added that he did not see "foreign carriers flocking to take advantage of cabotage rights."[337] Herb Kelleher, CEO of Southwest Airlines, offered a similar mixed response to the possibility of cabotage, "I don't think it will ever happen. It does not make any difference to Southwest one way or another . . . . But if they want to do that, it's fine with me."[338] Among the major U.S. passenger carriers, only United Airlines appears eager about the possibility, Shelley Longmuir, its Senior Vice-President of International and Regulatory Affairs having recently made the enthusiastic, if grim, statement that "[United] is ready to compete. Our customers are demanding it. We want to see progress because in the coming world one will either acquire or be acquired."[339]

Cargo carriers, such as Federal Express, UPS and DHL, are more enthusiastic about the idea of further liberalizing international aviation.[340] However, their concern seems to be that the TCAA does not do enough to reduce barriers to international aviation.[341] Federal Express' Vice-President for Regulatory Affairs has complained that the TCAA as proposed is "too narrow" because of its failure

331. *See Drip, supra* note 329, at 42.

332. *Holes in the Dike, supra* note 326, at 43.

333. *See id.*

334. *European Carriers Favor TCAA; Americans are More Cautious*, AVIATION DAILY, May 16, 2000, at 5.

335. *See Holes in the Dike, supra* note 326, at 43.

336. *See* Colin Baker, *US and UK Remain Apart on Open Skies*, AIRLINE BUS., Dec. 2000, at 19.

337. *See id.*

338. *See* Kevin O'Toole & Karen Walker, *The King of Low-Cost*, AIRLINE BUS., June 1999, at 38.

339. *See* Senior Vice-President, International and Regulatory Affairs, Shelley Longmuir, Towards a Consensus View of the Future International Air Transport Regime, Panel Discussion at 26th Annual FAA Commercial Aviation Forecast Conference (Mar. 13-14, 2001) (transcript available at http://api.hq.faa.gov/conference/conference2001/proc2001/transcript.htm).

340. *See Cargo Will Drive Removal of Trade Barriers*, AVIATION DAILY, May 15, 2000, at 6.

341. *See id.*

to include adequate discussion of ground-handling and related issues.[342] UPS has indicated that it would want uniform noise and environmental regulations included in the TCAA to ensure that traffic rights granted under the agreement would be "fully usable."[343] Thus, while the major cargo carriers find the current bilateral regime overly restrictive,[344] they are not united on what should replace it.[345]

Avarice . . .

Unlike the U.S. carriers, which "don't spend a lot of time thinking" about the TCAA,[346] labor unions, both in the United States and European Union, have considered the significance of the TCAA and similar measures.[347] Duane Woerth, President of the U.S.-based Air Line Pilots Association (ALPA), has stated, "Can a TCAA happen without labor support? Probably not."[348] Soon thereafter, an ALPA spokesman added, in regards to the TCAA, "There has to be a system for employees to have a regulatory framework for their working lives . . . . What labour laws apply to [a wet-leased] aircraft and crew?"[349] At the same event, the General Secretary of the European Cockpit Association, Giancarlo Crivellaro, commented that the TCAA should "not be left . . . entirely to market forces," and it should have "a managing economic framework."[350]

Yet labor unions do not appear to be irrevocably opposed to the general concept of the TCAA, simply to the TCAA as proposed by the AEA.[351] As Brenda O'Brien, Assistant General Secretary for the European Transport Workers' Federation explained:

> But how can International Air Services Agreements, such as the TCAA, guarantee [the unions' interests]? In their current form, they simply do not. Architects of such agreements might be well-advised to listen to those who work in the industry: our checklist . . . is utterly feasible and introduces necessary safeguards that ultimately benefit the industry, consumers, and employees.[352]

Woerth has also recently commented, "ALPA does not object to

342. *See Cargo Will Drive Removal of Trade Barriers*, *supra* note 340, at 6.

343. *See id.*

344. *See* Jo Pearse & Karen Walker, *Transport Ministers From Around the World Joined Airline and Industry Chiefs in Chicago in December to Discuss how to Shed the Bilateralism Legacy of the Historic 1944 Chicago Convention and Also Move Beyond the Current Open Skies Regime to Multilateralism*, AIRLINE BUS., Jan. 2000, at 28.

345. *See Holes in the Dike*, *supra* note 326, at 43.

346. *See id.*

347. *See Labor Participation Key to TCAA Development, Union Leaders Say*, AVIATION DAILY, May 15, 2000, at 2 [hereinafter *Labor Participation*].

348. Simon Warburton, *ALPA Calls for More TCAA Scrutiny*, AIR TRANSPORT INTELLIGENCE, May 12, 2000.

349. Simon Warburton, *Virgin Expresses Irritation at US Status Quo*, AIR TRANSPORT INTELLIGENCE, May 12, 2000.

350. *See Labor Participation*, *supra* note 347.

351. *See* O'Brien, *supra* note 327; *U.S.-U.K. Discussions*, *supra* note 165.

352. O'Brien, *supra* note 327.

multilateralism."[353] However, he qualified this statement by noting that ALPA was still opposed to cabotage, changes in foreign ownership requirements, and other key elements of the AEA's version of the TCAA.[354] Therefore, while not absolutely barring the TCAA, it appears that union opposition will be a key stumbling block in any effort to negotiate using the current proposal.[355]

And Wrath

Cabotage,[356] and all but a scintilla of foreign ownership of U.S. carriers, are prohibited under U.S. law,[357] but are essential to any of the proposed versions of the TCAA.[358] Although this has often been accounted for as protectionism for the benefit of U.S. carriers;[359] that appears to be an inadequate explanation in light of the apathetic view of the matter taken by most U.S. carriers.[360] In fact, the greatest obstacles to the TCAA are elements of the U.S. government itself.[361]

At an aviation symposium in 1999, the Assistant Deputy Undersecretary for the Department of Defense darkly intoned, "As we explore airline ownership issues, we must keep U.S. national security foremost in our minds."[362] This is keeping in character with explicit U.S. national security policy since 1987, when a directive on "national airlift policy" was issued, which concluded, "United States aviation policy, both international and domestic, shall be designed to strengthen the nation's airlift capability and where appropriate promote the global position of the United States aviation industry."[363] The primary reason given for this position is the Civil Reserve Air Fleet (CRAF).[364] Under the CRAF program, U.S. carriers

353. *U.S.-U.K. Discussions*, *supra* note 166.

354. *See id.*

355. *See id.* Early last year, a multilateral agreement between the United States, Brunei, Chile, Singapore, and New Zealand was nearly sunk by provisions that were inserted at the behest of U.S. labor unions. *See* Charles J. Simpson, Jr., *Guest Editorial*, AVNEWS LATIN AMERICA & CARIBBEAN, Feb. 2001, *at* http://www.zsrlaw.com/publications/articles/cjs0103.htm. Therefore, another of Woerth's comments about the TCAA, to the effect that, "If you don't deal with labor's issues, your plan will be dead on arrival," should not be viewed as an idle threat. *See Labor Participation*, *supra* note 347.

356. *See* 49 U.S.C. § 41703(c) (2001) (permitting cabotage only in the case of emergency, under 49 U.S.C. § 40109(g)).

357. To qualify as a domestic carrier, an airline must be owned, directly or indirectly, by a U.S. citizen. *See* 49 U.S.C. § 40102(a)(2) (2001). A U.S. "citizen" is an individual person who is a citizen of the United States, a partnership where all partners are citizens of the United States, or a corporation chartered in the United States, in which at least seventy-five percent of the voting shares are controlled by U.S. citizens, and the president and at least two-thirds of the board of directors and other managing officers are U.S. citizens. *See* 49 U.S.C. § 40102(a)(15) (2001).

358. *See generally* Recommendations, *supra* note 256; All Our Tomorrows, *supra* note 141; TOWARDS A TCAA, *supra* note 271.

359. *See, e.g.*, Schless, *supra* note 10, at 456.

360. *See Holes in the Dike*, *supra* note 326, at 43.

361. *See* Karen Walker, *US DOD Gives Red Light to Ownership Changes*, AIRLINE BUS., June 1, 1999, at 11 [hereinafter *Red Light*].

362. *See id.*

363. *See* Nat'l Sec. Decision Directive No. 280 (June 24, 1987), *at* http://www.acq.osd.mil/log/tp/trans_programs/defense_trans_library/airpolicy/airpolicy.html (last visited July 8, 2002).

364. *See id.*

voluntarily supply aircraft to the U.S. military to greatly increase its airlift capacity.[365] The program has been used once in over fifty years and that was in a situation where U.S. national security was not imminently jeopardized.[366] However, the Department of Defense insists that U.S. security interests would be endangered if foreign citizens were allowed to own greater portions of U.S. carriers because "[d]uring times of crisis we need to know without question there is support."[367] Although some foreign carriers have attempted to assuage the U.S. military's concerns by offering to make their own aircraft available for the CRAF program, the Department of Defense has been dismissive of such proposals.[368]

The CRAF program is generally justified in terms of national security.[369] But when the importance of the program is discussed in detail, the question appears to be more one of cost to the U.S. military than security.[370] Indeed, a U.S. Air Force captain has even directly stated, "the value of the CRAF is the cost that the DOD has avoided by relying on the capability of the commercial aviation industry to maintain [the required transport capacity]."[371] The cost of purchasing an equivalent amount of air capacity would be fifty billion dollars and maintenance costs of one to three billion dollars a year thereafter.[372] Yet this assumes the U.S. military must replace the entire CRAF program capacity.[373] Given that during the 1990-91 Gulf War two-thirds of the aircraft in the CRAF program were deployed at most,[374] and that the CRAF has not been activated since the attacks of

365. *See Freedom's Paths*, *supra* note 15, at 74. *See also* USAF Fact Sheet: Civil Reserve Air Fleet, *at* http://www.af.mil/news/factsheets/Civil_Reserve_Air_Fleet.html (last updated May 1999) [hereinafter USAF Fact Sheet]. The CRAF program was authorized by section 101 of the Defense Production Act of 1950, now 50 U.S.C. Appx. § 2071. *See* 10 U.S.C. § 9511(6) (2002).

366. *See Cross-border Investment*, *supra* note 3 (noting that the CRAF has only been deployed once, for the 1990-91 Gulf War).

367. *See Red Light*, *supra* note 361, at 11.

368. *See Foreign Ownership Issue Divides Panelists at Aviation Symposium*, AVIATION DAILY, May 5, 1999, at 212.

369. *See, e.g.*, USAF Fact Sheet, *supra* note 365.

370. *See, e.g.*, William G. Palmby, *Enhancement of the Civil Reserve Air Fleet: An Alternative for Bridging the Airlift Gap*, 7-8, 26, 53 (June 1995), *at* http://www.Maxwell.af.mil/au/saas/studrsch/palmby.doc; Pamela S. Donovan, *The Value of the Civil Reserve Air Fleet: How Much Could the DOD Spend on Incentives?*, 32-34, 41-48 (Sept. 1996) *at* http://papers.maxwell.af.mil/projects/ay1996/afit/donov_ps.pdf; *Strategic Airlift and Sealift Imperatives for the 21st Century: Hearing Before the Senate Armed Services Seapower Subcommittee*, 107th Cong. (statement of Gen. Charles T. Robertson, U.S.A.F. Commander-in-Chief United States Transportation Command), *available at* 2001 WL 2007359 [hereinafter Robertson Testimony].

371. *See* Donovan, *supra* note 370, at 32.

372. *See* Robertson Testimony, *supra* note 370.

373. *See id.*

374. *See* Palmby, *supra* note 370, at 8, 53-54 (noting that the CRAF is activated in three stages, totaling 80, 238, and 379 at each stage, and that during the Gulf War the third stage aircraft were not activated.) It should also be noted that second stage cargo aircraft were not activated until after hostilities began and the second stage passenger aircraft were only activated on March 23, 1991, for the purpose of withdrawing U.S. troops *after* the conflict. *See* Donovan, *supra* note 370, at 18. Thus it appears that little more than a fifth of the CRAF fleet was used during the build-up to the actual conflict. *Cf.* Palmby, *supra* note 370, at 8 (noting that the first stage consisted of 80 aircraft and the maximum number of aircraft was 379).

September 11, 2001,[375] this appears excessive. The U.S. military's position also does not consider the costs to the U.S. aviation industry of denying it needed capital[376] and costs to consumers by limiting air service.[377]

CONCLUSION

"Open Skies is not good enough 56 years after [the Chicago] Conference," declared Frederik Sorensen a few months prior to his retirement from his position as the head of the European Union's air transport section.[378] And after years of struggle, most of Europe seems to agree, both in government[379] and industry.[380] Yet the United States, once the champion of international liberalization,[381] is now "practically on the sidelines."[382] With the decision of the Court of Justice freshly rendered, and the Commission yet to fully come to grips with its new authority,[383] it remains to be seen whether the TCAA will become the defining institution of a new multilateral regime in aviation agreements. There is still the possibility that one of the other embryonic proposals for a multilateral system will prevail.[384] Regardless of the final outcome, it is evident that the notion of the TCAA or a similar transatlantic multilateral has been decisive in shaping U.S.-E.U. aviation relations over the past decade. Even if the TCAA is stillborn, the bilateral regime will never be the same.

375. *See* Richard Thompson & Bloomberg News, *FedEx Joins Effort to Help Military Keep Materials Flowing*, COM. APPEAL (Memphis), Oct. 10, 2001, at C2. *See also* Mathew Schwartz, *Let's Make a Deal Amid a Season of Uncertainty, Consumers and Retailers Play the Discounting Game*, BOSTON GLOBE, Nov. 28, 2001, at F6 (noting that activation was a "remote possibility"); John Hughes, *American, FedEx, 31 Carriers Commit Planes for War*, BLOOMBERG NEWS, Oct. 15, 2002 (noting that even in the event of a second war with Iraq "only a fraction" or "none at all" of the CRAF would be needed).

376. *See* Press Release, Continental Airlines, Continental Airlines Chairman Calls for Relaxed Foreign Ownership Rules as Airline Industry Faces Global Consolidation (June 19, 2000), *at* http://www.continental.com/press/press_2000-06-19-01.asp.

377. *See* Friedman, *supra* note 3, at 136.

378. *See Holes in the Dike*, *supra* note 326, at 43.

379. *See* Pomeroy, *supra* note 162, at C10.

380. *See* Ott, *supra* note 150.

381. *See Drip*, *supra* note 329, at 42.

382. *See Holes in the Dike*, *supra* note 326, at 43.

383. *See* Open Skies Agreements, *supra* note 252.

384. *See, e.g.*, Abeyratne, *supra* note 4, at 832-856 (discussing GATS or the WTO as alternatives).