[Journal of Air Law and Commerce](https://scholar.smu.edu/jalc)

Volume 72 | Issue 4 Article 5

2007

# Aviation Relations between the United States and China: Are Open Skies on the Horizons

Ashley Renee Beane

# AVIATION RELATIONS BETWEEN THE UNITED STATES AND CHINA: ARE OPEN SKIES ON THE HORIZON?

ASHLEY RENEE BEANE*

## I. INTRODUCTION

IMAGINE YOU ARE a product safety inspector for a pharmaceutical company in the Dallas-Fort Worth area, and you need to travel to Shanghai to ensure that the labeling plant is being properly maintained and report back to your U.S. superiors. You will end up paying in excess of $2,000 for a round-trip, economy class airline ticket and a small bag of nuts; and, if you are lucky, the airline might also offer a soda. It is likely that your flight will have to stop at least once before arriving in China, probably in Chicago, Newark, or San Francisco, depending on your very limited choice of airline.[1] Due to the detailed bilateral aviation agreement currently in force between the United States and China, you must make your choice from the *only* four U.S. airlines currently permitted to service international passenger flights from the United States to China: American Airlines, United Airlines, Continental Airlines, and Northwest Airlines.[2] Or imagine that you need to ship court documents and evi-

* Ashley Beane is a 2008 J.D. Candidate at Southern Methodist University. Ashley holds a Bachelor of Arts degree in Legal Studies from the University of Texas at Arlington. Ashley wishes to thank her husband, Randall Beane, for his loving support and understanding.

[1] *AMR Unit's Web Site Seeks Support for Bid*, WALL ST. J., Aug. 23, 2006, at D5.

[2] Currently, American Airlines connects Chicago and Shanghai; Continental Airlines flies from Newark, New Jersey to Beijing; United Airlines connects Chicago and San Francisco to Beijing and Shanghai; and Northwest Airlines offers flights to China with a stop in Tokyo. *AMR Unit's Web Site Seeks Support for Bid*, *supra* note 1, at D5. Pending final approval from the U.S. Department of Transportation, United Airlines will begin a new nonstop route from Washington-Dulles International Airport and Beijing Capital International Airport on March 25, 2007, which will mark the first flight from Washington, D.C. to China, and significantly, will connect the two capitals with direct flights just in time for the 2008 Olympic Games to be held in Beijing. Laura Meckler and Susan Carey, *United Wins Bid for First Nonstop Washington-China Route*, WALL ST. J., Jan. 10, 2007, at A2.

dence exhibits overnight from Washington, D.C. to Beijing in time for an important case to be handled by a partner in your law firm tomorrow. According to the current bilateral agreement between the United States and China, your choices for shipping goods to China are Federal Express Corporation or United Postal Service (UPS).[3]

Currently, more than forty percent of goods and services in international trade, by value, travel by air, and in excess of forty percent of people who cross national borders do so by air.[4] But, while most international trade is becoming increasingly deregulated, many nations, including China,[5] have remained fiercely protective of their air transportation industries that facilitate international trade by carrying those goods and services across the globe.[6] Presently, bilateral aviation agreements made between nations regulate much of the international aviation industry.[7] No aircraft can conduct a single international flight unless the two nations involved have reached a bilateral agreement, and that agreement is complied with to the letter.[8] It does not matter if all aircraft and airports involved are privately owned.[9] Often, bilateral agreements explicitly state the number of air carriers from each nation party to the agreement that may fly between the two countries, along with a process by which the nations may authorize new carriers to begin operation.[10] Also, the routes that designated carriers are permitted to fly and the frequency with which they may fly along the designated route(s) are usually embodied in the bilateral agreement.[11] There are

---

[3] Michael K. Fung et al., *The Air Cargo Industry in China: Implications of Globalization and WTO Accession*, TRANSP. J., Fall 2005, at 44, 56. The Department of Transportation granted UPS the right to operate six weekly cargo flights to China beginning in 2001. Rick Brooks and Stephen Power, *UPS is Winner in Fierce Fight to Serve China*, WALL ST. J., Nov. 22, 2000, at A3. Even with its improved position in providing parcel-delivery service to China, UPS still trails Federal Express, which has been operating direct cargo flights to China since 1995. *Id.*

[4] Gerald L. Baliles, *Fear of Flying: Aviation Protectionism and Global Growth*, FOREIGN AFF., May/June 1997, at 8. Gerald L. Baliles served during the early months of the Clinton Administration as chairman of the National Airline Commission. Gabriel S. Meyer, Note, *U.S.-China Aviation Relations: Flight Path Toward Open Skies?*, 35 CORNELL INT'L L. J. 427, 435 (2002).

[5] Editorial, *Slow Plane to China*, WALL ST. J., Dec. 16, 2006, at A16.

[6] Baliles, *supra* note 4, at 8.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

more than 1,200 such bilateral aviation agreements in force around the globe today.[12]

In 1946, the United States and Great Britain entered into the first bilateral aviation agreement, which became a model agreement that many other countries would use in formulating their own air services agreements.[13] Most early bilateral aviation agreements were built on a *quid pro quo* basis, with nations seeking to equalize the benefits accorded to each nation involved,[14] such as veto rights over designated routes and airlines and influence over pricing schemes.[15] Once Congress deregulated all U.S. commercial airlines in 1978 pursuant to the Airline Deregulation Act,[16] American air carriers had the freedom to service any domestic market they chose.[17] Since the deregulation in 1978, U.S. commercial carriers have had to become increasingly more innovative and efficient in order to compete for customers with discount airlines' quality of service and low fares.[18]

The current system of gradual advancement through individual nation-to-nation bilateral agreements must be overhauled in favor of broader "open skies" agreements to accommodate the

---

12 *Id.*

13 *Id.* at 9.

14 *Id.* Unlike the scheme adopted by the United States in an effort to increase economic competition and therefore increase the benefits to consumers by way of lower fares and higher-quality service, most bilateral aviation agreements only involved a nation's single, government-sponsored (and usually heavily subsidized) "flag carrier." *Id.*

15 Richard A. Snape, Productivity Comm'n, Austl., Regulating Services Trade: Matching Policies to Objectives, Address Before the Eleventh Annual National Bureau of Economic Research East Asian Seminar (June 22–24, 2000), *available at* http://www.sitrends.org/images/articles/regulating%20services%20trade.pdf.

16 Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified as amended at 49 U.S.C.A. §§ 40101 et seq. (West 2007)).

17 Baliles, *supra* note 4, at 9.

18 *Id.* To promote greater efficiency, airlines began utilizing the hub-and-spoke model of air travel and transport. The hub-and-spoke system gathers passengers from various destinations and flies them to a centralized hub airport, where they can then board connecting flights to their ultimate destination. *See* Seth Schiesel, *In Frayed Networks, Common Threads*, N.Y. TIMES, Aug. 21, 2003, at G1. Porter Elliott, *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. & ECON. 185, 192–93 (1998). Advantages of the hub-and-spoke model include the ability to provide air transportation to a large number of cities, to funnel passengers onto larger aircraft for longer flights, and to dominate a hub airport, creating considerable market power and the capability to charge higher ticket fares. Jesse Hercules, Comment, *Mixed Optimization: Diagnosis and Proposed Solution for Several Problems in the Airline Industry*, 71 J. AIR L. & COM. 691, 695 (2006).

rapidly growing needs of global aviation transportation. As nations with deregulated airline industries have experienced significantly increased productivity,[19] nations which still regulate their airline industries remain rather ineffectual by comparison and are struggling to keep afloat in the global market, sacrificing efficient commerce and international trade strategies in the name of protecting their domestic airline industries and workforces.[20]

The possibility of a liberal open skies agreement between the United States and China in the near future is becoming more likely. In recent years, the Chinese airline industry has made significant gains in strength and efficiency.[21] China has become increasingly open to topics ranging from personal freedoms to international trade and cooperation,[22] gradually adopting more liberal trade and aviation agreements with the United States and other nations. The Chinese government is becoming more comfortable with opening itself up to free-market competition with a national airline industry as powerful as that of the United States.[23]

The purpose of this Comment is to explore the likelihood of the United States and China entering into an open skies agreement and the political and economic consequences and benefits that such an agreement would have, or, in the alternative, the likelihood of the United States and China expanding their current bilateral aviation agreement to include fewer restrictions and allow for more free competition between the two nations. Trade and tourism between the United States and China depend on successful air transportation relations between the two nations. Part II gives a brief history of the Chinese aviation industry and the current trend toward deregulation. Part III explores the history of regulation and deregulation of the U.S. airline industry, and the United States' attempt to spread the trend of liberalization and deregulation in the international airline industry through bilateral open skies agreements. Part IV discusses prior aviation agreements between the United States

---

19 In the eight years following the deregulation of the U.S. airlines, it is estimated that consumers saved $6 billion due to increased competition among the airlines, and it is estimated that the U.S. economy gains $15 billion per year as a result of airline deregulation. Elliott, *supra* note 18, at 195.

20 Baliles, *supra* note 4, at 9.

21 *See, infra* text accompanying notes 48–69.

22 Thomas L. Friedman, *The Five Myths*, N.Y. TIMES, Oct. 27, 2000, at A31.

23 *See infra* text accompanying notes 53–62.

and China, with a specific focus on the recent decision to allow United Airlines to begin international service from Washington, D.C. to Beijing—the first time the two capitals will be connected by a non-stop flight. Finally, Part V discusses the likelihood of China and the United States agreeing to the terms of an open skies treaty, and the consequences such a decision would have for each nation's airline industry.

## II. BRIEF HISTORY OF CHINESE AVIATION

In 1949, the Chinese government created the Civil Aviation Administration of China (CAAC) in order to facilitate the newly formed country's enforcement of political, trade, and tourism policies.[24] The CAAC initially operated as the nation's air force department,[25] and continued to operate in this capacity until the late 1970s.[26] The CAAC regulated every facet of the airline industry—from safety, pilot training, and airworthiness, to aircraft purchases and the ticket fares that could be charged.[27] At present, the CAAC only operates over the General Administration of Civil Aviation of China, which is in turn regulated by the State Council of China (State Council).[28] For almost thirty years, the CAAC functioned as both a regulatory body and a commercial aviation entity, overseeing airline operation.[29] The Chinese government overhauled the CAAC during the late 1970s, reforming its structure and clarifying its functions and responsibilities.[30]

---

[24] Wu Jianduan & Xu Lining, *Corporate Takeovers: Legal Aspects of Takeovers Among Chinese Airlines*, 68 J. AIR L. & COM. 583, 606 (2003); Anming Zhang & Hongmin Chen, *Evolution of China's Air Transport Development and Policy Towards International Liberalization*, TRANSP. J., Spring 2003, at 31.

[25] Jianduan & Lining, *supra* note 24, at 606.

[26] Zhang & Chen, *supra* note 24, at 32. As originally designed, the CAAC was a four-tier administrative body, consisting of the "CAAC, six regional civil aviation bureaus, twenty-three provincial civil aviation bureaus, and seventy-eight civil aviation stations." *Id.*

[27] Paul Lewis, *China Demands CAAC Shake-Up*, FLIGHT INT'L, Apr. 29, 1998, at 14. The CAAC also directly supervised all air transportation services, including in-flight procedures, air traffic control, and airport management. Zhang & Chen, *supra* note 24, at 32. All subordinate civil aviation entities were unable to exercise independence in their managerial or logistical changes without prior approval from the higher tiers of the CAAC body. *Id.* Each lower-level entity was not held responsible for its individual profits or losses, but rather served as a single cog in the overarching CAAC wheel. *Id.*

[28] Jianduan & Lining, *supra* note 24, at 606.

[29] *Id.* at 606–07.

[30] *Id.* at 607; Zhang & Chen, *supra* note 24, at 32–33.

Chinese airline industry reform occurred in three major phases over the course of more than twenty-five years.[31] The initial phase occurred between 1979 and 1986, as the Chinese government sought to instill more business sense into the airline industry and to gradually reduce the prior centralized governmental control over all facets of the industry.[32] In 1982, the CAAC administrative body was restructured, isolating the civil aviation industry and its business concerns from the militaristic focus of the air force.[33] The Chinese government divided the civil aviation sector into nine airlines, each of which was authorized to fly domestic, international, or regional routes to Hong Kong.[34] Each airline incorporated under its own business license and began independently managing all facets of its operation.[35] Consequently, the government began to hold each of the airlines responsible for its own losses and profits.[36] The CAAC transformed the duties of the regional, and later the provincial, civil aviation bureaus into entities primarily accountable to the CAAC for reporting the profits and losses within their respective sectors.[37] The CAAC began to allow the bureaus greater autonomy in strategic decision-making in view of the twin goals of maximizing profits and minimizing losses in the airline business.[38]

The second phase of China's airline reform began in 1987, when the State Council passed an airline reform program designed to separate the authority to regulate the air industry from the authority to directly operate all aspects of air transportation

---

[31] *See* Zhang & Chen, *supra* note 24, at 32–33.

[32] *Id.*

[33] *Id.*

[34] Jianduan & Lining, *supra* note 24, at 607.

[35] *Id.*

[36] Zhang & Chen, *supra* note 24, at 31.

[37] *Id.*

[38] *Id.* Prior to these reforms, the Chinese airline industry was well-known for its under-usage of aircraft, with Chinese airlines using their airplanes at usage levels less than half of comparable airlines in other nations. Murray Bailey, *IATA Report Gives Alternative Insight into Mainland Aviation*, S. CHINA MORNING POST, Dec. 8, 1994, at 6. Most national airlines strive for efficient flight times and high usage levels to generate high revenue levels. *Id.* Such efficiency is strongly correlated to regular and preventive maintenance of aircraft. *Id.* In recent years there has been some improvement in overall usage levels, but the Chinese airlines still operate at usage levels ten to twenty percent lower than the airlines of other Asian nations. *Id.*

service.[39] The State Council sought to streamline the four-tier CAAC system into a two-tier system, establish six government-sponsored regional airlines, and to encourage the entry of new carriers into the domestic market.[40] In an effort to facilitate new market entry, the CAAC also simplified the existing procedural requirements for route approval, and quickly approved many airlines' requests for routes and aircraft.[41] As a result, the number of routes more than tripled during the period from 1980 to 1992.[42]

China's third phase of airline reform came in 1993, when the Chinese government decided to shift its focus to consolidating the airline industry rather than its previous focus of easing market entry and increasing competition.[43] As a result of the second phase of reform, which encouraged newcomer air carriers to enter the market, the Chinese airline industry became inundated with forty-one air carriers, most of which were small, local, and ultimately unprofitable.[44] The CAAC ceased approving applications for new airlines to begin service and also re-examined the qualifications and profitability of existing carriers.[45] This process eventually led to extensive mergers throughout the industry, most notably the consolidation of the CAAC airlines into the "big three," led by Air China, China Eastern, and China Southern.[46]

On October 30, 1995, at the Sixteenth Meeting of the Standing Committee of the Eighth National People's Congress, the Civil Aviation Law of the People's Republic of China (Civil Avia-

---

39 Zhang & Chen, *supra* note 24, at 33. This division of authority was necessary in order to break up the monopoly possessed by the CAAC over both the national regulations for the air industry and the day-to-day operations of each individual air carrier. *Id.*

40 *Id.* Most new carriers entering the market as a result of this reform were not directly affiliated with the CAAC, and in general, enjoyed greater growth and overall productivity in subsequent years than CAAC carriers, especially with regard to the domestic market. *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.* Many such airlines were losing money very quickly and remained in operation solely by virtue of generous government subsidies, primarily on the local level. *Id.*

45 *Id.*

46 *Id.* These three major carriers were subsequently given greater autonomy and flexibility in such areas as the appointment of managerial officials, the fixing and changing of prices in response to market conditions, and the ability to buy or lease aircraft (although still subject to relatively arduous CAAC approval procedures). *Id.*

tion Law) was adopted, effective March 1, 1996.[47] The purpose of the Civil Aviation Law was to protect the rights of those parties involved in the Chinese civil aviation industry, to ensure the safety of civil aviation operations both within and outside of China, and to promote China's civil aviation industry within the country itself.[48] Unlike many market-driven developed nations, China's aviation industry is still largely in the process of developing. A major goal for the industry is a smooth transition that will be beneficial to the entire Chinese society.[49]

In an effort to expand national and international business endeavors, China has increasingly opened its airline industry to the rest of the world.[50] In May 1994, China began allowing foreign air carriers to invest in Chinese airlines and to cooperate with the Chinese in creating joint-enterprise airline companies.[51]

Prior to the Civil Aviation Law, China's civil aviation industry operated under an amalgamation of hundreds of administrative, economic, and technical regulations promulgated by the CAAC and China's State Council.[52] However, these regulations were ill-suited to accommodate the growing needs of the civil aviation industry—both within China and internationally—due to their narrow scope and poor implementation.[53] The recent Civil Aviation Law was enacted to provide a flexible system of rules and

---

[47] Wu Jianduan, *A Milestone of Air Legislation in China—Some Thoughts, on the Civil Aviation Law of the People's Republic of China*, 62 J. AIR L. & COM. 823, 823 (1997). This Civil Aviation Law is the first national legislation concerning China's civil aviation industry in forty-six years. *Id.* at 824. In essence, this Civil Aviation Law codifies and summarizes the advancements and practices put into force in China over the last forty-six years. *Id.*

[48] *Id.* at 823.

[49] *Id.* at 839–40.

[50] *Id.* at 835. In December of 1995, George Soros, an international investor, became the first foreign investor in the Chinese airline market when he purchased a twenty-five percent stake in Hainan Airlines, a small regional airline in southern China, for $25 million. *China Opens Its Airlines to Foreign Investment*, WALL ST. J., Dec. 4, 1995. China Eastern Airlines, based in Shanghai, and China Southern Airlines, based in Guangzhou, began listing shares on the New York Stock Exchange in 1997. *Id.*; Press Release, PR Newswire, Trading of H Shares of China Eastern Airlines Corporation Limited in Hong Kong is Suspended (Nov. 8, 2007) (on file with author), *available at* http://money.cnn.com/news/newsfeeds/articles/prnewswire/CLTH06108112007-1.htm.

[51] Jianduan, *supra* note 47, at 835. Foreign investment in Chinese airlines and in the joint enterprises is capped at thirty-five percent of the airline's total capital and twenty-five percent of the voting rights in any particular airline. *Id.*

[52] *Id.* at 840.

[53] *Id.*

regulations to comprehensively accommodate the dynamic and continuing needs of China's civil aviation industry and to facilitate trade with other nations and further assimilate the Chinese economy into the international scheme.[54]

Until 1997, all Chinese airline carriers were government-owned.[55] However, in 1997, China Southern and China Eastern became publicly traded companies on the New York and Hong Kong stock exchanges.[56] Air China followed suit and went public in 2004, with listings on the London and Hong Kong exchanges.[57]

Prior to 2002, the CAAC controlled the majority of the Chinese aviation industry through ten major carriers under its direct control.[58] However, in April of 2001, the CAAC decided to direct a consolidation of the ten carriers under its control into three large groups,[59] headed by China Southern, China Eastern, and China's unofficial flag carrier, Air China.[60] Prior to consolidation, most of China's aviation industry consisted of small-scale airlines which cost more to operate than they were able to make in profit.[61] In order for China's aviation industry to compete at a level on par with the rest of the world, the Chinese government decided to consolidate the industry into a few large airlines and direct a reallocation of resources, with the goal of

---

54 *Id.*

55 *Air China Serves Up Lucrative Deal for Four U.S. Carriers*, WORLD AIRLINE NEWS, May 15, 1998, at 1.

56 *Id.*

57 Press Release, London Stock Exch., The London Stock Exchange is Delighted to Welcome Air China to the Main Market (Dec. 15, 2004), *available at* http://www.londonstockexchange.com/en-gb/about/cooverview/thesource/thesourcenewsarchive/15122004airchina.html.

58 Nicholas Ionides, *China Confirms Final Approval for Mammoth Restructuring*, AIR TRANSP. INTELLIGENCE, Feb. 6, 2002.

59 *Id.*; *Mergers Between Chinese Carriers to Take About Two Years*, AIRLINE INDUS. INFO., May 14, 2001.

60 *Tighter Formations: Civil Aviation Administration to Merge Services*, CHINAONLINE, Jan. 8, 2001. Pursuant to the consolidation plan, China Southern merged with China Northern and Xinjiang Airlines, forming the largest fleet of 180 aircraft; Air China merged with China Southwest Airlines and China National Aviation Corporation, resulting in a 118-aircraft fleet; and China Eastern merged with Northwest Airlines and Yunnan Airlines, resulting in a fleet 118 aircraft strong. *China's "Big Three" Ready for Airline Mergers*, CNN.COM, http://archives.cnn.com/2002/BUSINESS/asia/02/05/china.aviation.biz/index.html (last visited Oct. 24, 2007). *See also Mergers Between Chinese Carriers*, *supra* note 59.

61 *China to Launch Strategic Reshuffle of Aviation Sector*, ASIA PULSE, Aug. 21, 2000.

lowering overall operating costs and increasing the industry's profitability.[62]

In recent years, the Chinese government has attempted to bolster the aviation industry through deregulation of the nation's three government-sponsored air carriers—Air China, China Eastern Airlines, and China Southern Airlines.[63] The Chinese government's stated goal in deregulating the airlines is to foster a more efficient airline industry, one that will be able to successfully compete in the ever-growing international air transportation market.[64] However, some Chinese airline executives are not quite so confident, fearing that the lack of a government support-cushion may result in the same fate that has recently befallen the deregulated airlines of the United States and many European nations—bankruptcy.[65] China's "big three" airlines are already walking a tight-rope in an effort to balance their ambitions to increase domestic and international operations while simultaneously being forced by the government to merge with smaller regional air carriers in an effort to consolidate and strengthen the airline industry.[66]

Since 2002, China's airline industry has experienced a transformation from numerous regional state-owned carriers to a national industry with a tremendous presence in the global aviation market.[67] The three major air carriers have submitted initial public offerings and have placed heavy emphasis on the

---

62 *Id.* Also, the Chinese government stated that it hoped the merger would foster competition among the three largest domestic airlines and place enough power behind these consolidated airlines so that China could truly compete in the international aviation market. Ionides, *supra* note 58; *Choice of Partners Puts Brake on Airline Shake-up*, S. CHINA MORNING POST, Dec. 26, 2001, at 1.

63 Bruce Stanley, *China's Airlines Take Test Flight—Beijing Sees Carrier's Deregulation as Bellwether of Life in WTO*, WALL ST. J., Mar. 18, 2005, at A11. As of 2003, China Southern Airlines controlled 33.6 percent of the shares of China's air-passenger market, with Air China controlling 26.8 percent of the market and China Eastern Airlines controlling 21.8 percent of the market. *Id.*

64 *See* Robert Thomson, *China Revamps Its Creaking National Airline*, FIN. TIMES, July 1, 1988, at 4. China's air-passenger traffic has increased dramatically in the past twenty-five years, growing from 3.4 million passengers per year in 1980 to in excess of 120 million passengers by 2004. Stanley, *supra* note 63, at A11.

65 Stanley, *supra* note 63, at A11.

66 *Id.*

67 *Id.* Despite recent advancements, remnants of government control still remain in place. Chinese airlines still must purchase their fuel at prices set by a government agency; the Chinese military continues to place restrictions on domestic air space; and Chinese air carriers must fly both international and domestic flights at predetermined altitudes, even if another altitude would be more fuel-efficient. *Id.*

safety, age, and reliability of their aircraft, which were sources of international and domestic concern in prior years.[68] To stay viable in the international passenger market, China's airlines have been forced to modernize both the in-flight accommodations they provide for their first- and business-class passengers and the quality of aircraft they choose to purchase and employ.[69] Because of the Chinese government's ban on importation of petroleum products, the high cost of petroleum within mainland China, which averages some fifty percent higher than the cost in other nations, has been a major setback in international advancement of the Chinese airline industry.[70] Fuel costs alone regularly account for more than nineteen percent of each Chinese airline's operating costs.[71]

Since 2005, Chinese airlines have been permitted much more latitude in controlling the industry than in the past.[72] For example, each Chinese airline may set its own fares and plan its own domestic and international routes, and airlines may sell portions of their stock to foreign investors.[73] However, a major obstacle still stands in the way of the Chinese airline industry becoming a dominant player in the international air passenger market: the inability of Chinese airlines to purchase their own aircraft.[74] Under the current system, in order for a Chinese air carrier to purchase aircraft, the airline must (1) negotiate with an aircraft manufacturer such as Airbus or Boeing, (2) draft a "wish list" of aircraft it wishes to buy, (3) submit the request list to the CAAC, and (4) wait months, or even years, for CAAC officials to approve the request, in whole or in part, or to deny the request altogether.[75] Even when this arduous process is completed, Chinese airlines often do not receive the amount of airplanes requested.[76] Because of the length of the current process, Chinese air carriers are unable to efficiently and appropriately

---

[68] *Id.* China is now considered by many international aircraft manufacturers to be the fastest-growing market for passenger airplanes in the world. *Id.*

[69] *Id.*

[70] Joseph Lo, *Further Consideration on Way for Key Carriers*, S. CHINA MORNING POST, Nov. 16, 1999, at 5.

[71] *Id.*

[72] Bruce Stanley, *China's Not-Quite-Free Skies—Carriers Set Fares, Sell Stock, But Beijing Controls Plane Purchases*, WALL ST. J., June 10, 2005, at A6 [hereinafter *China's Not-Quite-Free Skies*].

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

respond to dynamic market conditions.[77] The productivity of the Chinese airlines is also hampered by government-sponsored monopolies on jet fuel and ticket sales.[78] By retaining control over these segments of the airline industry, the government prevents carriers from increasing their capacity beyond the demand for their passenger services.[79] Safety is also a factor in government retention of control.[80] During the rapid expansion of the industry in the 1980s and 1990s, many Chinese airlines could not adequately train pilots fast enough to keep pace, and the consequence was a horrific string of aircraft crashes resulting in hundreds of deaths.[81]

The Chinese government also intends to retain control over these segments of the airline industry in order to maximize the bargaining power of all the nation's airlines in negotiating with aircraft manufacturers and foreign governments.[82] According to Joseph Massey, assistant U.S. trade representative for Japan and China from 1985 to 1992, and current director of the Center for International Business at the Dartmouth College Tuck School of Business, "[f]rom the [Chinese] government's perspective, one of the levers that they have with the United States and with Europe is the contest between Airbus and Boeing . . . . If they were to let the individual airlines make all the

---

[77] *Id.*

[78] *Id.* The Chinese government's control over three significant components of the airline industry—fuel price, ticket price, and aircraft purchasing—leaves the airlines with no measurable control over the amount of greater than half of their total overhead and operating costs. *Id.*

[79] *Id.* As Li Wei Jian, former executive president of China's Hainan Airlines stated, "The airlines order more than they need, and the government knows that. It's like a game." *Id.* Xiamen Airlines President Wu Rongnan agrees: "Even though I have the discipline not to order too many aircraft at a time, I don't trust others to show the same discipline." *Id.*

[80] *Id.*

[81] *Id.* The CAAC was often accused of being more interested in profit from airline services than in passenger safety; for many years, aircraft crews did not give any safety briefings on flights and no oxygen masks, life jackets, or emergency procedure pamphlets were provided, and many airlines do not follow maintenance and servicing schedules that would be acceptable to foreign nations. Michael Weisskopf, *China's No Frills Airline; Flying Fossils Fray Nerves of the Intrepid*, WASH. POST, June 13, 1983, at A1. At Beijing Capital International Airport, ground crews are notorious for refusing to put out their cigarettes during refueling, and Chinese airlines are well-known for losing luggage, so many Chinese passengers refuse to check any of their bags, resulting in clogged aisles on the airplanes which would make a quick and safe exit impossible. Patrick E. Tyler, *Eye on Olympics, China Pursues Air Safety*, N.Y. TIMES, Sept. 16, 1993, at A13.

[82] *China's Not-Quite-Free Skies*, *supra* note 72, at A6.

purchasing decisions, think of the negotiating leverage they would lose."[83]

## III. U.S. AVIATION HISTORY: FROM THE CIVIL AERONAUTICS BOARD TO DEREGULATION AND OPEN SKIES

The U.S. air transportation industry owes its initial technological advancement opportunities, and indeed its survival during its early years, to profits and subsidies earned from carrying and delivering the U.S. mail.[84] Beginning in 1925, the United States adopted the European model of extensive government regulation of the airline industry, from control over ticket fares, mergers, and acquisitions, to the screening of applicant airlines who wished to enter the domestic and international markets.[85] The Air Commerce Act of 1926[86] granted jurisdiction over aviation safety to the Secretary of Commerce, gave the Secretary the authority to investigate any accidents associated with the airlines, and restricted the percentage of foreign ownership of U.S. air carriers.[87]

From its inception pursuant to the Civil Aeronautics Act of 1938, until the deregulation of the U.S. airline industry in 1978, the Civil Aeronautics Authority,[88] later renamed the Civil Aeronautics Board (CAB), regulated all essential aspects of the interstate air transportation industry—supervising mergers and acquisitions, setting ticket fares and permissible flight routes, and screening new air carriers who wished to enter the U.S. market.[89] Government subsidies and centralized regulation pro-

---

83 *Id.*

84 Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L. J. 235, 276–77 (2003). These first airmail contracts determined the routes that airlines continued to follow for decades. *Id.*

85 Elliott, *supra* note 18, at 190.

86 Air Commerce Act of 1926, ch. 344, 44 Stat. 568 (codified as amended at 49 U.S.C.A. §§ 171–184 (West 2007)).

87 Dempsey, *supra* note 84, at 278.

88 *Id.* at 280. Congress established the Civil Aeronautics Authority during the Great Depression to regulate and subsidize the suffering air transportation industry as part of an overall effort to strengthen the national infrastructure. *Id.* at 280–81, 288. "Transportation is of such vital importance to the public welfare . . . that some measure of government regulation is . . . necessary." *Id.* at 289.

89 Elliott, *supra* note 18, at 190. The CAB, as an agency created by the federal government, had no authority to regulate *intrastate* air transportation, resulting in intrastate air commerce being regulated, if at all, by each state in its individual discretion. *Id.* Neither did the CAB have jurisdiction over frequency of flights, type of aircraft, or scheduling. Dempsey, *supra* note 84, at 290.

vided the airline industry with greater stability and allowed the industry to survive the Great Depression and to recover from major economic losses.[90] Under this adaptable system of economic regulation, the U.S. airline industry simultaneously enhanced its efficiency, cost-effectiveness, safety record, and overall productivity, generating an air transportation industry unsurpassed at that time.[91] Positive outlooks for the industry began to turn dismal by the 1970s—a result of extensive investment and aircraft capacity outstripping passenger demand coupled with the fuel crisis emerging out of the Arab Oil Embargo of 1973.[92] In response, the CAB asserted greater regulatory involvement in the airline industry to prevent its feared collapse,[93] and successfully rescued the airline industry from its eventual demise[94] once again.

During the late 1970s, the political tides turned as airlines became increasingly frustrated with the complicated and time-consuming process of complying with the CAB's regulations. Consumers were generally dissatisfied with the consequential increases in ticket prices and lack of efficiency and service options.[95] Many Americans began to feel that an unregulated airline industry, which would foster competition in pricing, service, and safety, would better serve both the airlines and the American public.[96]

The outrageously high fares and generally inefficient operation of U.S. airlines during the 1970s made deregulation of the airline industry a lively topic of political debate.[97] Supporters of regulation voiced the fear that lack of government regulation of the airline industry would lead to somewhat cheaper fares at the unreasonably high cost of passenger safety.[98] Proponents of deregulation argued that the auspices of the CAB were far too intrusive and that deregulation would greatly increase

90 Dempsey, *supra* note 84, at 291–92.

91 *Id.* at 312.

92 *Id.* at 313.

93 *Id.* The CAB ceased reviewing new route proposals, instituted aircraft capacity limitations to reduce traffic in major regional and national markets, and permitted the airlines to pass a portion of their increased fuel costs on to the passengers through raised fares. *Id.*

94 *See* Richard D. Cudahy, *The Airlines: Destined to Fail?*, 71 J. AIR L. & COM. 3, 8–9 (2006).

95 Dempsey, *supra* note 84, at 329.

96 *Id.* at 330.

97 Elliott, *supra* note 18, at 190–91.

98 *Id.*

competition and provide the dominant airlines with the incentives to lower fares, increase efficiency, and make an effort to enhance overall passenger satisfaction.[99]

A major milestone in the history of the U.S. aviation industry occurred when Congress passed the Airline Deregulation Act of 1978,[100] allowing U.S. airlines to begin directly competing with one another with minimal government intervention.[101] The Airline Deregulation Act provided for the termination of the CAB,[102] making the CAB the first major federal agency to be extinguished in U.S. history.[103] The American public now had the power to decide which airlines would succeed and which would fail based on each airline's characteristics, most notably the convenience of routes, both domestic and international, and ticket prices.[104]

In the first few years following deregulation, the number of passenger air carriers in the United States nearly tripled.[105] The increased competition among the airlines provided passengers not only with greater choices in air service, but also fares at substantially lower prices than those previously offered through airlines touting "no frills" service.[106] Initially, offering lower fares allowed newcomer air carriers to compete with the more established incumbent carriers, but the resilient larger airlines adapted to the increase in competition by retaining their added amenities while simultaneously matching the lower fares of smaller airlines with regard to certain routes and flight times.[107] As a result, many of the smaller carriers were unable to realize a

---

99 *Id.* This view eventually led to the endorsement of the further liberalization of the aviation industry across the globe—the "open skies" view. *Id.*

100 Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705.

101 Chuck Y. Gee, *Aviation and Tourism: The Traveling Public,* 20 TRANSP. L. J. 1, 3 (1991).

102 Dempsey, *supra* note 84, at 336. While the Act eventually received extensive support from both major political parties and a majority of the American public, one airline executive admitted that forty years of CAB regulation had produced an efficient, productive, and profitable aviation industry envied by the rest of the world. *Id.* at 337.

103 *Id.* at 336. The Act transferred the limited remaining responsibilities of the CAB to the U.S. Department of Transportation, effective January 1, 1985. *Id.* at 339–400.

104 Gee, *supra* note 101, at 3.

105 *Id.*

106 *Id.* It is estimated that deregulation resulted in passenger savings of more than six billion dollars, even taking into account the yearly cost to passengers attributable to increased flight delays. *Id.*

107 *Id.* at 4.

profit, and they had little choice other than to allow the more established carriers to take over their routes or to file for bankruptcy.[108] Consequently, the U.S. airline industry was left even more consolidated than it had been prior to the Airline Deregulation Act of 1978.[109]

Following deregulation, major airlines strengthened their operations through refinement of the "hub-and-spoke" model.[110] Within this model, airlines establish various "hubs" at central airports which are fed by a network of "spokes" that span the airline's coverage area.[111] If expanded to global proportions, this method of networking, combined with airline liberalization and deregulation, could provide enormous benefits for producers and consumers in the international air transportation market.[112]

The success of U.S. airline deregulation from the perspective of the American consumer is widely accepted, but the benefits of deregulation for the industry, especially the smaller air carriers, are debatable.[113] While deregulation stimulated the creation of new jobs, a rise in the wages of airline employees, and decreased passenger air fares,[114] critics argue that the increased competition and domination of the industry by the handful of major airlines has replaced the arduous regulations of the CAB, and the barriers to entry into the airline transportation market are now more apparent than ever.[115]

Since U.S. airline deregulation has been perceived as an overall success, the United States has attempted to extend its airline liberalization ideals on an international level, discouraging the use of restrictive, bilateral agreements in favor of broader, less regulatory open skies agreements.[116] However, many nations have been reluctant to enter into such agreements with a market force as powerful as the U.S. airline industry, fearing that their

---

108 Elliott, *supra* note 18, at 192.

109 Gee, *supra* note 101, at 4. Currently, the largest airlines control ninety-five percent of the entire U.S. aviation industry, resulting in a resurgence of higher prices and little choice for consumers. *Id.*

110 Daniel C. Hedlund, *Toward Open Skies: Liberalizing Trade in International Airline Services*, 3 MINN. J. GLOBAL TRADE 259, 282–83 (1994).

111 *Id.* The airlines attempt to schedule flights arriving at the hub from the various spokes at approximately the same time, so that passengers can transfer easily to their respective connecting flights. *Id.* at 282.

112 *Id.* at 283.

113 *Id.*; Elliot, *supra* note 18, at 194.

114 Hedlund, *supra* note 110, at 283.

115 Elliott, *supra* note 18, at 194.

116 Hedlund, *supra* note 110, at 284.

less powerful air carriers would not be able to compete on a level that would make the agreements beneficial to them.[117] Many nations have expressed concerns that open skies agreements, as opposed to bilateral agreements, would threaten not only the economic viability of their air carriers, but also non-economic factors such as national safety and sovereignty.[118]

## IV. HISTORY OF UNITED STATES-CHINA AVIATION RELATIONS

U.S. airlines began vying for routes to China when diplomatic negotiations resumed between the two nations in January of 1979.[119] Even though the United States and the People's Republic of China had not yet reached a formal bilateral air services agreement, U.S. airlines were already reviewing strategies and preparing to propose arguments for the anticipated U.S.-China routes.[120] In 1979, three U.S. airlines, Pan American, Trans World Airlines, and Northwest Orient Airlines, had the authority to service routes to mainland China, but their authority had been dormant since the CAB decided several years before to delay any action on the authority until the diplomatic situation between the two countries changed.[121] Pan American and Northwest Orient were expected to be the front-runners for the new routes available pursuant to the anticipated agreement, since both offered U.S.-China passenger airline service in 1949, when service ceased due to the establishment of the People's Republic of China by the Communist Party.[122] United Airlines, Trans International Airlines, and World Airways also submitted applications to service China pursuant to the anticipated bilateral aviation agreement.[123] The main focus of each airline's ap-

---

117 *Id.* at 284–88.

118 *Id.* at 284. Many Asian nations also feel that the United States has not yet negotiated more liberal agreements because the terms of the current bilateral agreements are disproportionately favorable to U.S. air carriers. Garrick L.H. Goo, *Deregulation and Liberalization of Air Transport in the Pacific Rim: Are They Ready for America's "Open Skies"?*, 18 U. HAW. L. REV. 541, 552 (1996).

119 Jeffrey M. Lenorovitz, *U.S. Carriers Compete for Routes to China*, AVIATION WK. & SPACE TECH., Jan. 1, 1979, at 25.

120 *Id.*

121 *Id.*

122 Jay Mathews, *1st U.S.-China Flights Since '49 Approved*, WASH. POST, Sept. 12, 1980, at E2. Pan American began operating the first flights from the United States to China in 1935. Wallace Turner, *Scheduled Air Service from China to U.S. Resumes*, N.Y. TIMES, Jan. 8, 1981, at A16.

123 Lenorovitz, *supra* note 119, at 25.

plication seemed to be the construction and operation of international hotel chains in China as an attempt by China to broaden their tourist industry.[124]

In 1980, The People's Republic of China and the United States signed a bilateral aviation agreement,[125] providing for the first direct commercial airline service between the two nations since 1949.[126] The agreement sharply diverged from U.S. practice by initially only allowing one U.S. airline to participate in the first two years of operation under the agreement.[127] While the agreement only provided for one U.S. flight and one Chinese flight per week initially,[128] the agreement provided for a second airline from each country to be allowed to fly the specified routes—and possibly additional routes—in later years.[129] At least seven airlines applied for the initial route.[130] The United States government selected Pan American World Airways as the first U.S. airline to operate under the new aviation agreement, and Pan American began service from New York to Tokyo and Peking on January 28, 1981.[131] Under the agreement, the first ever scheduled U.S.-China flights originating from China began, with the CAAC offering service from Peking to San Francisco and New York.[132]

In 1983, Pan American, the only U.S. carrier flying to China at the time, announced it would begin offering service from Tokyo

124 *Id.*

125 Agreement Between the Government of the United States of America and the Government of the People's Republic of China Relating to Civil Air Transport, U.S.-P.R.C., Sept. 8, 1980, 33 U.S.T. 4559 [hereinafter 1980 Agreement].

126 *International Report: China Flights*, THE GLOBE AND MAIL (Can.), Sept. 9, 1980.

127 Mathews, *supra* note 122, at E2.

128 *Id.*

129 *International Report: China Flights*, *supra* note 126. The 1980 agreement included an amendment process by which new routes could be negotiated by the two nations, and if agreed upon, added to the terms of the agreement. *See* 1980 Agreement, *supra* note 125, art. XVII.

130 Mathews, *supra* note 122, at E2.

131 Turner, *supra* note 122, at A16. Pan Am subsequently began offering flights from San Francisco to Tokyo, Shanghai, and Peking on January 31, 1981, and flights from New York began on April 26, 1981, with stops in Tokyo and Shanghai. *Id.* *See* Fox Butterfield, *China's Majestic Huang Shan*, N.Y. TIMES, Feb. 8, 1981, § 10 at 1; Suzanne Donner, *Vacationing at an Overseas University*, N.Y. TIMES, Jan. 18, 1981, § 10 at 9.

132 Turner, *supra* note 122, at A16.

to Taipei.[133] Pan American was motivated to begin offering Taipei service for two reasons.[134] First, Pan American was experiencing low passenger rates on its San Francisco to Beijing flights, largely due to decreased trade between the United States and China during the early 1980s and increased competition with Air China, China's official airline.[135] Second, Pan American stood to gain an estimated fifteen to twenty million dollars in potential profits from the Tokyo-Taipei route.[136]

Upon learning of Pan American's new Taipei service, Chinese officials demanded that the United States designate another airline that did not service Taiwan to replace Pan American's airline service to China.[137] This demand threatened to disrupt the tenuous alliance between the two nations' airline industries since Pan American's express commitment to discontinue airline service to Taipei was a critical factor in China's approval of Pan American as the first U.S. airline to operate air service to China in nearly thirty years.[138]

The U.S. government refused, accusing China of interfering in U.S. domestic affairs—a claim often made by China against the United States.[139] The United States also argued that the aviation agreement granting Pan American rights to fly to China would require the United States to revoke the air service rights of China's official air carrier if Pan American's landing rights were revoked.[140] This would result in China losing its busy and highly profitable U.S. route and would leave China with expensive equipment that it would be unable to employ elsewhere.[141] In the end, China only imposed one rather minor restriction—Pan American could no longer fly over south China. Pan American, however, continued serving both mainland China and Taiwan.[142]

---

133 JOHN F. COOPER, HERITAGE FOUND., ASIAN STUDIES BACKGROUNDER NO. 4, THE LESSONS OF PLAYING TOUGH WITH CHINA (1983), *available at* http://www.heritage.org/Research/AsiaandthePacific/asb4.cfm.

134 *Id.*

135 *Id.*

136 *Id.*

137 *China Demands Replacement of Pan Am with Another Airline to Fly Sino-U.S. Route*, XINHUA GEN. OVERSEAS NEWS SERVICE, June 16, 1983.

138 *Id.*

139 COOPER, *supra* note 133.

140 *Id.*

141 *Id.*

142 *Id.*

After the initial 1980 agreement, expansion of U.S.-China aviation service was very gradual,[143] with significant liberalization occurring in the 1992 amendments to the treaty.[144] The 1992 amendments permitted the U.S. and Chinese airlines to negotiate code-sharing agreements,[145] which stimulated the coordination of flight schedules to aid passengers in connecting flights and improved customer service through simplification of the reservation process and coordination among the airlines' frequent-flyer programs and benefits.[146] The U.S.-China treaty was again amended in 1996 (1996 Agreement),[147] leading to further expansion of code-sharing possibilities and the first authorized nonstop U.S.-China flight operated by Northwest Airlines.[148] The 1996 Agreement allowed code-sharing between U.S. and Chinese airlines to service five cities in each country that were not currently serviced by direct flights.[149] At this time, United Airlines and Northwest Airlines dominated most routes to China, usually via Tokyo or Hong Kong, since they were "the only two U.S. airlines with nearly unlimited access to Tokyo."[150] Through Tokyo, United Airlines already flew fourteen flights

---

143 For many years, arguments for international routes were heard in administrative courts, with the judge making a public recommendation about who should be awarded the route and an official at the Department of Transportation making the final decision, but the airlines and officials claimed that this system was unwieldy and inefficient. Anna Wilde Mathews & Helene Cooper, *"Demand to Land": U.S. Airlines Pull Out the Stops in Lobbying for New China Route—Pitches for Coveted Flights are Intense but Require the Indirect Approach—"Oh, Let's Not Go There,"* WALL ST. J., Apr. 28, 2000, at A1. In the late 1980s, the Department of Transportation, in an attempt to simplify the process, began requiring airlines and other interested parties to submit their arguments through paper exhibits, which are considered by Department officials who make an ultimate decision. *Id.* This decision may be challenged in federal court. *Id.* The entire process is designed to prevent direct lobbying by airlines and to allow Department officials to make a determination conforming to the public interest. *Id.*

144 *See* Agreement Amending the Agreement of September 17, 1980 as amended, U.S.-P.R.C., Feb. 10, 1992, T.I.A.S. No. 12448, *available at* 1992 WL 877265.

145 "Under code-sharing arrangements, one airline sells seats on another airline's flights under its own name." Don Phillips, *U.S., China Sign Pact on Direct Flights; Agreement to Link Detroit and Beijing,* WASH. POST, Dec. 24, 1995, at A19.

146 Meyer, *supra* note 4, at 444–45.

147 Agreement Amending the Air Transport Agreement of September 17, 1980, As Amended, U.S.-P.R.C., Mar. 27, 1996, Temp. State Dep't No. 04-569, *available at* 1996 WL 33670739.

148 Meyer, *supra* note 4, at 445.

149 Phillips, *supra* note 145, at A19.

150 *Id.*

per week to Beijing and Shanghai.[151] Prior to the 1996 agreement, Northwest Airlines flew seven flights per week to China through Tokyo, and the agreement allowed Northwest Airlines three direct flights from Detroit to Beijing the current year, 1997, and two additional direct flights beginning in 1998.[152] Without these advantages in Tokyo, "American Airlines and Delta Air Lines are the U.S. carriers most likely to take advantage of code-sharing arrangements."[153] The 1996 Agreement also allowed Federal Express Corporation (Federal Express) to increase its number of flights per week to China from two to four,[154] and provided for other U.S. airlines to begin talks with the Chinese government to set up additional routes between the United States and China.[155]

Beginning in 1996, Northwest Airlines began direct flights from Detroit to Beijing, and eventually would offer nine nonstop flights per week, the first nonstop service between the United States and China.[156] Federal Express was granted four direct cargo flights per week into China.[157] China Southern Airlines, based in Guangzhou, also began nonstop flights in 1996.[158] At the time, Northwest Airlines already flew to Beijing three times per week and to Shanghai once per week, but all such flights had to stop in Tokyo.[159] The 1996 Agreement gave Northwest Airlines an additional five frequencies from Detroit to Beijing, three to begin in April of 1996, and two to begin in 1998.[160] In May of 1996, Air China and Northwest Airlines also agreed to begin code-sharing and cooperating in future market promotions.[161] Northwest Airlines also planned to become the first U.S. airline to offer service to Guangzhou, replacing Northwest flights currently bound for Shanghai.[162]

---

151 *Northwest and Air China Link*, ASIAN AVIATION NEWS, May 3, 1996.

152 *Id.*

153 Phillips, *supra* note 145, at A19.

154 *U.S. and China Sign Accord on Flights*, N.Y. TIMES, Dec. 25, 1995, at 54.

155 *Id.*

156 Phillips, *supra* note 145, at A19.

157 *Id.*

158 *Id.*

159 Nicholas Ionides, *U.S. and China Agree on More Flights; Accord Sets Up Talks on New Routes*, S. CHINA MORNING POST, May 1, 1996, at 5.

160 *Id.*

161 Nicholas Ionides, *Air China and Northwest Tie Historic Deal*, S. CHINA MORNING POST (H.K.), May 1, 1996, at 5.

162 *Id.*

In 1998, Northwest Airlines and China's largest international air carrier, Air China, signed an exclusive cooperation agreement agreeing that Air China would not sign cooperation agreements with any other U.S. airline.[163] United Airlines had been strongly vying to secure an alliance with Air China, but ultimately lost out to Northwest Airlines.[164] Earlier in 1998, China's second and third largest international carriers, China Southern and China Eastern signed similar, but less extensive, cooperation agreements with Delta Air Lines and American Airlines, respectively.[165] The Delta-China Southern and American-China Eastern agreements only allow for code-sharing between the U.S. and Chinese airlines on specific routes between the two nations.[166] The Air China-Northwest Airlines affiliation will command 65.5 percent of nonstop U.S.-China routes and 98.7 percent of the "one-stop market"[167] due to Air China's anticipated merger with several smaller regional airlines and the combined effort of Northwest Airlines and its three domestic partners, America West Airlines, Continental Airlines, and Alaska Airlines.

In April of 1999, the United States and China signed a new bilateral aviation agreement (1999 Agreement) which increased the flights between the two nations to 108 per week—fifty-four per week per country, double the amount previously allowed—by April of 2001.[168] The 1999 Agreement allowed eight additional frequencies per week for existing U.S. incumbents beginning in April 1999, nine additional frequencies per week for existing U.S. incumbents beginning in April 2000, and ten new weekly frequencies beginning in April 2001, at which time the United States was allowed to designate a fourth passenger or cargo airline to participate in serving the Chinese routes.[169] According to the agreement, additional frequencies must be oper-

---

[163] *Air China Serves Up Lucrative Deal for Four U.S. Carriers*, WORLD AIRLINE NEWS, May 15, 1998.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *U.S.-China Pact*, TRAFFIC WORLD, Apr. 12, 1999, at 38. The April 1999 agreement increased the number of flights between the United States and China from twenty-seven to sixty-four in the short period from April 1999 to April 2000. Joseph Lo, *Further Consolidation on Way for Key Carriers*, S. CHINA MORNING POST, Nov. 16, 1999, at 5.

[169] Chris Kjelgaard, *U.S. Incumbents to China Offered More Opportunities*, AIR TRANSP. INTELLIGENCE, Apr. 15, 1999.

ated on either "Route A" or "Route B."[170] "Route A" allows U.S. airlines to fly passenger/cargo or all-cargo flights from any point in the United States to Beijing, Shanghai, or Guangzhou via Tokyo or any other point in Japan.[171] The more flexible "Route B" allows a U.S. all-cargo carrier to fly from any point in the United States to any point in China via any intermediate points.[172]

The 1999 Agreement restricted U.S. carrier bids for the new frequencies to the three carriers with prior rights to fly to China—Northwest Airlines, United Airlines, and Federal Express.[173] An additional fourth passenger or cargo carrier was to be selected in 2001.[174] In 1999, the Department of Transportation awarded one new weekly flight to Federal Express, two to United Airlines, and one to Northwest Airlines.[175] According to the restrictive agreement, the U.S. government had to designate either a second U.S. cargo carrier or a third U.S. passenger airline to serve the new China route that opened in 2001.[176] The Department of Transportation was forced to make an apples-to-oranges comparison in determining whether the most profitable choice for a new U.S. air carrier to offer service to China would be a passenger carrier or an all-cargo carrier.[177] Delta Air Lines, which lobbied to begin operating daily nonstop flights from New York City to Beijing, and which would have marked the first nonstop service between the United States and China, seemed most likely to be awarded the new route.[178] American Airlines also applied to begin passenger service on the new route, and Polar Air Cargo applied to begin daily cargo service to China.[179] The Department of Transportation ultimately awarded six

---

170 *Id.*

171 *Id.*

172 *Id.*

173 *U.S.-China Pact, supra* note 168, at 38.

174 *Id.*

175 *DOT's Landmark Decision,* J. COM., Dec. 4, 2000, at 4.

176 Editorial, *Airline Competition Over China,* N.Y. TIMES, Sept. 15, 2000, at A34. President Clinton was unable to persuade Chinese negotiators to differentiate between the two types of carriers for the 2001 route. *Id.*

177 *Id.*

178 *Id.*

179 Brooks & Power, *supra* note 3, at A3. The stakes in this bid for American Airlines, Delta Air Lines, and United Postal Service were enormous, since the Chinese historic reluctance to open itself to American airline service had resulted in incumbent carriers enjoying a virtual monopoly over air service to China, and it was unclear how long it would be before the Chinese government would allow another U.S. carrier to begin offering U.S.-China service. Mathews & Cooper, *supra* note 143, at A1.

weekly frequencies along the new route to UPS, ending the monopoly that Federal Express had enjoyed over direct U.S.-China cargo flights.[180] The Department of Transportation chose UPS to begin servicing the new route largely due to support from more than 350 members of Congress, various state governors, and the intense lobbying of the Teamsters union.[181]

Although the 1999 agreement did not create "open skies" between the two nations as the United States had hoped, it did expand the reach of the Chinese air transportation industry and allowed for more cooperation and coordination with the U.S. air industry. In 2004, U.S. and Chinese aviation officials began negotiations to significantly liberalize air service between the two countries.[182] The negotiations "effectively creat[ed] a regional open skies within China."[183] While flights into major Chinese cities would still be limited, the 2004 agreement between the United States and China (2004 Agreement) removed many of the restrictions on landing points outside the major Chinese cities.[184] Both the United States and China also agreed to hold new discussions in 2006 that could possibly result in complete

---

180 *DOT's Landmark Decision*, *supra* note 175, at 4. Although they were not chosen for the new route in 2000, American Airlines and Delta Air Lines negotiated code-sharing arrangements with Chinese airlines, which were made possible under prior bilateral agreements. Rick Brooks, *UPS's Rights to China Flights Aren't Contested*, WALL ST. J., Dec. 20, 2000, at A6. American Airlines subsequently negotiated with China Eastern Airlines, while Delta Air Lines negotiated with China Southern Airlines in order to have access to the China market despite their loss of the opportunity to fly a direct route under their own name. *Id.*

181 Brooks & Power, *supra* note 3, at A3. While the Teamsters Union initially opposed the trade agreement with China altogether, UPS was able to earn their support by arguing that UPS operation of direct cargo flights to China would engender more than 1200 positions for Americans, almost all of which would be filled by members of the Teamsters Union. *Id.* UPS was also the air carrier that made the largest contributions to political candidates during the 2000 elections, donating in excess of $1.2 million, more than three times the amount that American Airlines and Delta Air Lines contributed combined, according to the Center for Responsive Politics. *Id.* UPS argued that the American public would benefit greatly from increased competition with FedEx in the U.S.-China cargo industry and that their route would offer the largest "economic punch" and enhance international trade relations. Mathews & Cooper, *supra* note 143, at A1. American and Delta countered that because they could offer both passenger and cargo services, if awarded the route, they could enhance not only economic ties between the United States and China, but social ties as well. *Id.*

182 Caroline Daniel, *U.S. and China Set for Deal on Air Services*, FIN. TIMES, June 15, 2004, at 1.

183 *Id.* at 2.

184 *Id.*

liberalization.[185] The 2004 agreement allowed five additional Chinese and five additional U.S. airlines to begin servicing the U.S.-China air market directly between 2004 and 2010.[186] As of 2004, U.S. carriers could offer a maximum of fifty-four weekly flights to China.[187] The 2004 Agreement allowed incumbent carriers to operate fourteen additional passenger routes beginning in August 2004 and seven additional frequencies to begin operation in each year from 2005 to 2010.[188] Federal Express and UPS cargo flights were granted twenty-one new flights in 2004, eighteen in 2005, and seventy-two more by 2010.[189]

The U.S. Department of Transportation awarded United Airlines and Northwest Airlines seven additional weekly U.S.-China frequencies each.[190] Beginning August 1, 2004, Northwest Airlines used its frequency to operate a daily flight between Detroit and Guangzhou via Tokyo Narita Airport and United Airlines used its frequency to operate a daily nonstop flight between Chicago and Shanghai.[191] The 2004 Agreement "also eliminates restrictions on destinations and permits unlimited code-sharing between Chinese and U.S. airlines on any China-U.S. route."[192] It also permits all-cargo U.S. carriers to establish hubs in China by negotiating service and cooperation agreements with Chinese airlines and airports.[193]

Five U.S. airlines competed for the 2005 and 2006 routes to China—Delta Air Lines, American Airlines, Continental Airlines, and low-fare carriers Hawaiian Airlines and North American Airlines.[194] United Airlines filed for the opportunity to fly an additional passenger route, while Northwest Airlines only filed for a future all-cargo route.[195] The U.S. airlines competed intensely for the newly available route: American Airlines set up a website, http://flyaatochina.com, where ordinary citizens and

---

185 *Id.*

186 *United States, China Sign Agreement on Expanded Air Services,* M2 PRESSWIRE, July 26, 2004.

187 Daniel, *supra* note 182, at 1.

188 *Id.*

189 *Id.*

190 *United States, China Sign Agreement on Expanded Air Services, supra* note 186.

191 *Id.*

192 William Dennis, *Some Chinese Airlines Wary of New Bilateral with US,* AVIATION DAILY, July 27, 2004, at 4.

193 *Id.*

194 Jeremy W. Peters, *Struggling Airlines Compete Fiercely for China Routes,* N.Y. TIMES, Nov. 22, 2004, at C2.

195 *Id.*

public officials could cite their support of American Airlines' bid by sending supportive letters to the Department of Transportation; Delta Air Lines provided a similar system on its website which allowed the public to e-mail a form letter to the Department of Transportation in support of Delta's bid.[196] Public support for the route bid was enormous, especially in Dallas-Fort Worth, where American Airlines cited the support of twenty-six senators, seventy-eight house representatives, seven governors, twenty-four mayors, and thirty-eight airports[197] in favor of their proposed Dallas-Beijing route. The Department of Transportation received in excess of 10,000 employee letters in support of the bids from both Delta Air Lines and Continental Airlines.[198] Two passengers, however, attacked Continental's plan to fly from Newark, stating that the New York area doesn't need any more nonstop China service.[199]

The most recent bid for the China route to be opened in 2007 was awarded to United Airlines after an intense battle between the four major U.S. carriers all vying for this lucrative route to the fastest-growing business and trade market in Asia.[200] Beginning March 25, 2007, United Airlines will offer daily nonstop service from Washington Dulles International Airport in Washington, D.C., to Beijing Capital International Airport.[201] United Airlines' win will result in the first-ever direct flight between the capitals of the United States and China.[202] American Airlines had proposed flying from Dallas-Fort Worth International Airport to Beijing, Continental Airlines had proposed an additional flight connecting Newark and Shanghai, and Northwest Airlines sought to offer service between Detroit and Shanghai.[203] Ameri-

---

196 *Id.*

197 Caroline Daniel, *U.S. Airlines in for Long Haul to Crack the Chinese Puzzle: Rivals Battle It Out for a Ticket to Provide Flights to a Market That Promises to Boom But Has Yet to Pay*, FIN. TIMES, Dec. 23, 2004, at 22.

198 *Id.*

199 *Id.*

200 Meckler & Carey, *supra* note 2, at A2. The bidding for the new route drew more than 4000 letters and other documents to the Department of Transportation from the airlines, legislators, and even major retailers. Del Quentin Wilber & Kim Hart, *United Airlines Wins Right to Fly to China from Dulles*, WASH. POST, Jan. 10, 2007, at A1. Direct access to the China airline market would give the chosen airline an impressive increase in possible customers, given China's population of more than 1.2 billion people. Mathews & Cooper, *supra* note 143, at A1.

201 Meckler & Carey, *supra* note 2, at A2.

202 *Id.*

203 John Hughes & Jonathan D. Salant, *U.S. Airlines in a Frenzy for Rights to New China Route*, INT'L HERALD TRIB., Dec. 12, 2006, at 19.

can Airlines appeared to be the front-runner in the bid, citing voluminous corporate and consumer support for a direct flight to China from Dallas-Fort Worth,[204] but a pilot dispute forced American to significantly revise its route proposal, resulting in a win for United.[205] The Department of Transportation ultimately chose United Airlines' proposed flight from Washington, D.C., which was the largest U.S. metropolitan area not already served by a nonstop flight to China.[206] The United Airlines' flights would serve the largest segment of the public because of the available seating on its Boeing 747s.[207] Connecting the capitals also offers an opportunity to enhance the political and economic ties between the two countries,[208] which is a very important consideration as China's airline industry becomes stronger and more internationally viable.

## V. PATH TO OPEN SKIES

For sixty years, the United States has encouraged nations to adopt an expansive view of the rights of airlines to conduct international air trade. If adopted, the principles advocated by the United States, known as "freedoms of the air,"[209] would facilitate international trade and tourism by acknowledging the rights of airlines to participate in the air transport industry on the basis of equal opportunity.[210]

While the majority of international airline procedures are governed by typical bilateral aviation agreements, there has been a recent global trend toward liberalization of air services.[211] The United States has been the major promoter of "open skies"

---

204 Wilber & Hart, *supra* note 200, at A1.

205 Meckler & Carey, *supra* note 2, at A2.

206 *Id.*

207 Wilber & Hart, *supra* note 200, at A1.

208 Meckler & Carey, *supra* note 2, at A2.

209 The five "freedoms of the air" were defined as: (1) the right to fly and carry traffic over a foreign nation without landing; (2) the right to land in foreign nations for technical reasons; (3) the right of one nation's airline to land in another nation and discharge passengers or cargo from the nation of origin; (4) the right to board passengers or cargo abroad and fly to the nation of origin, and (5) the right of one nation's airline to land and board passengers in a second nation, then fly to a third nation where the passengers would disembark. Shadrach A. Stanleigh, Note, *"Excess Baggage" at the FAA: Analyzing the Tension Between "Open Skies" and Safety Policing in U.S. International Civil Aviation Policy*, 23 BROOK. J. INT'L L. 965, 967 (1982).

210 *Id.*

211 Meyer, *supra* note 4, at 430.

agreements,[212] which contrary to their convoluted bilateral agreements, are almost completely devoid of restrictions on the specifics of flights between the two nation parties to the treaty, except for general safety and capacity guidelines.[213] Under "open skies" agreements, determination of routes, which airlines will fly those routes, and how often airlines may fly those routes, are left to free-market and competitive forces rather than the governments of the nations involved.[214] Essential to the concept of "open skies" is the belief that the forces of the free market and competition should predominate, not the rights of each nation's sovereignty in their air space.[215] While the United States has followed this principle for nearly sixty years,[216] many nations are not quite so willing to forgo sovereignty for the sake of the market.

The main argument in support of "open skies" agreements is that airlines should be permitted to alter their operations in response to dynamic market conditions.[217] By allowing the market to govern airline ticket pricing, flight capacity, and route frequency, airlines will be more responsive to the demands of passengers and will be able to offer more efficient and affordable service.[218] The increased competition resulting from market, rather than government, regulation will also contribute to in-

---

212 On Open Skies, see generally Adam L. Schless, *Open Skies: Loosening the Protectionist Grip on International Civil Aviation*, 8 EMORY INT'L L. REV. 435, 446–451 (1994). While the exact meaning of the term "open skies" is subject to debate, at a minimum it suggests an agreement that "includes open entry on routes, unrestricted capacity and frequency on routes, and unrestricted traffic rights." Hedlund, *supra* note 110, at 263 n.22. More restrictive and regulatory agreements are sometimes termed "closed skies" agreements. *Id.*

213 Meyer, *supra* note 4, at 430.

214 *Id.* The open skies policy of the United States, as defined in an August 1992 Department of Transportation Order, involves, among other things, unrestricted capacity and frequency on all routes between the United States and the other nation parties to the agreement, unrestricted code-sharing opportunities, and no restrictions on intermediate and beyond points for flights between the two nations. *See In re* Defining "Open Skies," Dep't of Transp. Order No. 92-8-13, Docket No. 48130 (Aug. 5, 1992). Ease of negotiating open skies agreements as opposed to bilateral aviation agreements is another selling point for the United States. Under the "open skies" format, specific routes and destination cities could be flexible and responsive, unlike the specifications under bilateral agreements which require renegotiation before airlines from either nation party to the agreement could respond to market forces or passenger preferences. Goo, *supra* note 118, at 552.

215 Goo, *supra* note 118, at 551–52.

216 *Id.* at 552.

217 Meyer, *supra* note 4, at 430.

218 *Id.*

creased industry growth in the nations involved.[219] The U.S. airlines are strong proponents of "open skies" with other nations in general, and with China in particular. In the past decade, the Chinese airline industry has been steadily growing, and, as the second largest trade partner with the United States, the potential for expansive growth is unprecedented.[220]

Nations that oppose "open skies" agreements counter that unregulated competition in the international air transportation industry would lead to great success for efficient foreign air carriers in countries that are currently deregulated (such as the United States) at the expense of obliterating many smaller air carriers currently subsidized by national governments.[221] The major U.S. airlines also oppose "open skies" agreements, but for a very different reason—as it currently stands, four U.S. incumbent air carriers have a veritable oligopoly on the U.S.-China air transport industry, and the competition engendered through the introduction of new carriers into the market could result in more expenses and less profit for the incumbents.[222]

On October 14, 1992, the United States signed its first "open skies" agreement with the Netherlands.[223] The United States subsequently signed similar "open skies" agreements with many other nations, including Austria, Belgium, the Czech Republic, Denmark, Finland, Germany, Luxembourg, Norway, Sweden, Switzerland, and Iceland, with all nation parties agreeing that market conditions would control all aspects of international flights between the nations.[224] The United States has been attempting to secure an "open skies" agreement with the European Union (EU) for several years, but the EU has been reluctant to enter into such an agreement because of a general feeling that the United States is not bargaining openly and fairly with the major European countries.[225] As of 2006, U.S.-E.U. negotiations had progressed more liberally than ever before, but

---

219 *See id.*

220 *Id.* at 430–31.

221 *Id.* at 431.

222 *Id.*

223 Goo, *supra* note 118, at 552.

224 Benoit M.J. Swinnen, Comment, *An Opportunity for Trans-Atlantic Civil Aviation: From Open Skies to Open Markets?*, 63 J. AIR L. & COM. 249, 270 (1997).

225 Derek Lick, *More Turbulence Ahead: A Bumpy Ride During U.S.-Japanese Aviation Talks Exemplifies the Need for a Pragmatic Course in Future Aviation Negotiations*, 31 VAND. J. TRANSNAT'L L. 1207, 1218 (1998). Open skies agreements among European countries are uncommon because of the "protectionist policies implemented by European governments," and the British government has stalled open

reached a stalemate over the United States' refusal to allow foreigners to own more than twenty-five percent of the voting stock in any air carrier or more than forty-nine percent of its total stock.[226] However, once the United States and the European Union are able to resolve this remaining issue, the result will be a major step toward a fully liberalized market. The hope of the U.S. government is that China, and other countries experiencing major growth in international trade, will observe the model agreement set by the United States and the European Union and recognize that economic prosperity can stem from "open skies" agreements.

By 2002, the United States had negotiated "open skies" agreements with fifty-six nations,[227] yet China remains a notable exception. China has expressed the valid fear that an "open skies" agreement, and the subsequent opening of the U.S.-China air transport industry to market forces, would lead to some Chinese airlines being forced out of the industry.[228] Specifically, the Chinese government has pointed to the fact that after U.S. deregulation, a significant number of U.S. airlines, including the major air carriers Pan American and Eastern Airlines, were forced out of business because of their inability to adapt to the new competitive standards in the deregulated market, while the carriers who survived deregulation controlled the industry at a level arguably even more concentrated than when the industry was regulated.[229]

While Chinese airlines have suffered the reputation of having unreliable, unsafe, and poor service in the past, the safety of the Chinese airline industry has greatly improved since the disastrous era of the early 1990s.[230] Although the Chinese government concedes that an "open skies" agreement between the United States and China may be a possibility in the future, they have made it clear that such an agreement will not be formed

skies negotiations in an effort to protect its air carriers from "fierce international competition." *Id.*

[226] Laura Meckler & Daniel Michaels, *Politics & Economics: Airlines "Open Skies" Accord May Not Fly—U.S.-EU Pact is Delayed by Battle in Washington Over Foreign Control of Carriers*, WALL ST. J., Feb. 27, 2006, at A4.

[227] Meyer, *supra* note 4, at 437–38.

[228] *Id.* at 439.

[229] *Id.*

[230] *Id.* at 440. Six hundred forty-two people died in Chinese air carrier crashes during the period from 1989 to 1994, and two major Chinese airline accidents in 2002 have not aided the industry in removing the stigma as "the most dangerous [airline] in the world." *Id.* at 440–41.

until China is sure that the Chinese airlines will be adequately protected and will be able to successfully compete on par with the U.S. airline industry.[231] The gradual approach that the U.S. and Chinese airline industries have taken so far seems practical and safe.[232]

## VI. CONCLUSION

Air transportation between the United States and China is a crucial factor in the success and efficiency of trade and tourism in the two nations. While in decades past, restrictive bilateral aviation agreements may have been preferable, and even beneficial, to many nations, the increasing number of countries adopting "open skies" agreements has dramatically changed the international aviation landscape.[233] Specifically, the current framework of gradual amendments to bilateral aviation agreements cannot sufficiently accommodate the rapidly changing and growing needs of the U.S.-China air transportation industry, and a more liberal and adaptable system of regulating the industry is needed.[234] An "open skies" agreement between China and the United States should provide for market access and airline capacity virtually free from restrictions, subject only to general safety and antitrust principles.[235] Such an arrangement has the potential to greatly benefit both parties through increased airline competition and freedom from governmental interference. If trade and business operations are to continue to expand between the United States and China, the airlines must be free to fly where the market demands, without having to complete the difficult and time-consuming process of negotiating and amending a bilateral agreement. However, acceptance of an open skies agreement by China will only be possible if the U.S. government is sensitive to the qualms and reservations of the protective Chinese government with regard to the airline industry, and if the Chinese government is willing to surrender some of its control over the industry to the forces of the market and free competition.

---

231 Gabriel S. Meyer, Recent Development, *U.S.-China Aviation Relations*, 36 CORNELL INT'L L.J. 227, 227 (2003).

232 *Id.* at 231–32.

233 Meyer, *supra* note 4, at 455–56.

234 Hedlund, *supra* note 110, at 298.

235 *Id.* at 298–99.

SOUTHERN METHODIST UNIVERSITY

VERITAS LIBERABIT VOS

DALLAS, TEXAS