

2003

Myths of International Aviation

Allan I. Mendelsohn

Recommended Citation

Allan I. Mendelsohn, *Myths of International Aviation*, 68 J. AIR L. & COM. 519 (2003)
<https://scholar.smu.edu/jalc/vol68/iss3/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

MYTHS OF INTERNATIONAL AVIATION

ALLAN I. MENDELSON*†

I. INTRODUCTION.....	519
II. THE MYTH THAT U.S. FIFTH FREEDOM RIGHTS BETWEEN E.U. MEMBER STATES IS THE FUNCTIONAL EQUIVALENT OF CABOTAGE WITHIN THE UNITED STATES.....	520
III. THE MYTH THAT THE UNITED STATES IS THE OBSTACLE TO CROSS-BORDER MERGERS OR CONSOLIDATIONS AMONG E.U. MEMBER STATE AIR CARRIERS	523
IV. THE MYTH THAT THE EUROPEAN COMMISSION HAS ARTICULATED AN ACCEPTABLE THEORY OF RIGHT OF ESTABLISHMENT IN INTERNATIONAL AVIATION	527
V. MINI-MYTHS IN INTERNATIONAL AVIATION...	532
VI. CONCLUSION.....	534

I. INTRODUCTION

THERE ARE an unusual number of fascinating issues that are floating around the international aviation community today and that seem to have no quick answers. One thinks, for example, of whether the airline alliances of today have stimulated competition or have been a bad substitute for the mergers that might have occurred with or without the regulations that govern the antiquated international rules of ownership and control?

* Allan I. Mendelsohn, former U.S. Deputy Assistant Secretary of State for Transportation Affairs, chaired the U.S. delegation that led to the APEC multilateral open skies agreement. Currently an Adjunct Professor of International Transportation Law and Conflicts of Law at Georgetown University Law Center, Mr. Mendelsohn practices law with the firm of Sher & Blackwell in Washington, D.C. He also serves on the Advisory Board of this Journal.

† This article is intended to convey Mr. Mendelsohn's personal opinions and observations.

Alternatively, might a world with those rules but without alliances have worked out better for U.S. carriers that today seem to play less of an international role, and more of a trans-ocean shuttle role, than was true before the alliance era? Is there or should there be an exit strategy from the world of alliances, or is that what the upcoming E.U.-U.S. negotiations are all about?

This article does not explore any of these mega questions. Its purpose is the more limited one of simply debunking a number of myths that seem to have taken root in the world of international aviation over the past several years. These myths have become especially vogueish since the decision of the European Court of Justice provided the European Commission with a limited mandate to negotiate aviation issues with the United States.¹

This article focuses principally on the current thinking in the international aviation community about such issues as U.S. cabotage vs. European fifth freedom, whether multinational ownership of airlines is indeed an achievable goal of negotiations in today's aviation world, and how the world's aviation community should best adjust to the concept of "Right of Establishment."

II. THE MYTH THAT U.S. FIFTH FREEDOM RIGHTS BETWEEN E.U. MEMBER STATES IS THE FUNCTIONAL EQUIVALENT OF CABOTAGE WITHIN THE UNITED STATES

All of us have repeatedly heard European spokesmen and self-styled globalists argue – no, it's more of a casual observation – that, of course, if U.S. airlines are to continue to enjoy their fifth freedom rights (currently in all U.S. bilaterals with E.U. Member States) to operate between E.U. Member States, then E.U. Member State airlines should enjoy the functional equivalent in the U.S. of being able to operate cabotage services within the U.S. To be precise, if as part of their services to or from the U.S., U.S. airlines can pick up London origin passengers in London destined for Rome, then as a matter of reciprocity, E.U. airlines, on their services to and from the U.S., should be able to pick up, for example, Boston origin passengers destined for Denver.

There are several flaws in this analysis - indeed, so many that it is hard to decide where to begin. First, no one can ignore that

¹ See Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, *Commission v. United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany* [Nov. 5, 2002] O.J. (C232/1), available at <http://europa.eu.int>.

the fifth freedom rights enjoyed by U.S. carriers between E.U. points are rights that are incorporated and specifically provided for in bilateral agreements.² To curtail these rights, therefore, would require either denunciation of the bilaterals by the E.U. Member States, or voluntary surrender of these rights by the U.S. Government. Though not required by the ECJ decision, the European Commission has repeatedly called for denunciation by the E.U. Member States.³ Thus far, these requests have been diplomatically ignored. Further, it is very doubtful whether the U.S. would ever voluntarily forego these rights.

Second, no one should ignore that the fifth freedom rights currently in all the bilaterals the U.S. has with E.U. Member States did not appear because of any beneficence on the part of E.U. Member States. Rather, they came out of the intensive bargaining process that used to be so characteristic of bilateral negotiations before the days of open skies.⁴ When the U.S. obtained the right from Italy to be able to carry U.K. originating passengers to Rome, it was only because Italy insisted that, in return, the U.S. give Italy the right for Alitalia to operate, for example, to three new U.S. gateway points such as Washington, D.C., San Francisco, and Los Angeles, in addition, of course, to Boston and New York.⁵

Moreover, after the negotiation was concluded with Italy, (often a two to three week process), the U.S. then had to negotiate independently with the U.K. for the right to board those passengers in the U.K. destined for Rome. In return for this, the

² The U.S.-German Bilateral Air Transport Agreement, for example, provides that U.S. air carriers have the right to operate "from points behind the United States via the United States and intermediate points to a point or points in Germany and beyond." Air Transport Agreement Between the United States of America and the Federal Republic of Germany, July 7, 1955, U.S.-F.R.G., 7 U.S.T. 527. The terms "intermediate points" and "beyond" both encompass points in other EU Member States.

³ See Allan I. Mendelsohn, *The United States, the European Union, and the Ownership and Control of Airlines*, ISSUES IN AVIATION LAW & POLICY 13171 (Gerald L. Baliles ed.) (2003) (quoting pertinent portions of Letter from Francois Lemoureux, EC Director General for Transport to E.U. Member States (Jan. 29, 2003)).

⁴ See, e.g., Agreement Between the United States of America and France Respecting Air Transport Services, Mar. 27, 1946, U.S.-Fr., 61 Stat. 3445, as amended on Apr. 5, 1960, May 29, 1969, and May 6, 1985; U.S.-German Bilateral Air Transport Agreement, as amended on Apr. 5, 1968, *supra* note 2.

⁵ See, e.g., Air Transport Agreement Between the Government of the United States of America and the Government of the Italian Republic, June 22, 1970, and Sept. 27, 1990, U.S.-Italy, 21 U.S.T. 2096.

U.K. demanded additional gateway points in the U.S. (for what was then BOAC). Nor was it at all unusual for the U.S. to be whipsawed between the two congenial European negotiating teams.

Those who came to participate in the world of international aviation only after the advent of "open skies" have no knowledge of, let alone appreciation for, this history. There are not many in the world of aviation today who were there in those "olden"—some would say "golden"—days. But for those of us who were there, the task was arduous for the U.S. Government, yet very important for U.S. carriers with the short range aircraft of the day. Today, of course, those fifth freedom rights are hardly ever used by U.S. passenger carriers, which mostly rely on their code share partners to provide services behind the first E.U. gateway point. It is essential, however, for the international aviation community to know this history, especially those who so glibly equate fifth freedom within the E.U. to cabotage within the U.S.

Third, even if we decide to blithely ignore this history—because, some would say, it is based on old-time value analysis rather than new-time opportunity analysis—there is still the impossible-to-ignore fact that the E.U. is not yet an institutionally recognized federal entity. Despite the forward-looking third package adopted in 1992,⁶ and the more recent admirable adoption of the Euro, the E.U. is still very much a collection of sovereign, very nationally oriented States, each with individual foreign policies, and each with individual votes in both the United Nations and in the ICAO Council—where eight E.U. nation-States now enjoy eight individual votes.

Can an entity of this type really deem itself to be like the United States or as the equivalent of a cabotage zone vis-à-vis the rest of the world? One may be willing to indefinitely tolerate individual votes among the E.U. Member States in the United Nations itself. However, one cannot rationally view the E.U. as a cabotage zone for aviation purposes, while allowing the E.U. to continue to cast its eight votes in the ICAO Council.

Until the Euro-federalists prevail and the E.U. opts to forego its quintessentially nationalist approach to the ICAO, it is highly doubtful that E.U. Member States can or should be internationally viewed as a single state entity for purposes of air traffic cabotage. This is not to say that the United States and others may

⁶ See Rene Fennes, *The European Court of Justice Decision on Bilateral Agreements – the Future of Relations*, 17 AIR & SPACE LAW 14, 14-19 (2003).

not ultimately decide otherwise at some future point, perhaps when the E.U. enjoys a single air traffic safety agency or a single designating authority, or perhaps even sooner than that. Until that time comes, however, any demand by the E.U. that fifth freedom rights within the E.U. be equated to cabotage within the U.S. will fall on deaf ears. In short, the parties are best advised to turn their attention to other issues, at least until the E.U.'s groundwork for unification is far better embedded than it is today.

III. THE MYTH THAT THE UNITED STATES IS THE OBSTACLE TO CROSS-BORDER MERGERS OR CONSOLIDATIONS AMONG E.U. MEMBER STATE AIR CARRIERS

It seems to be almost conventional wisdom among European commentators nowadays that it is the outmoded but selectively enforced ownership and control ("O&C") policies of the United States that explain the failure of E.U. Member State airlines to merge or consolidate in any numbers to date, as well as the failure of the BA/KLM effort to consolidate in the fall of 2000. Nothing could be further from the truth.

While the U.S. has not been able to amend the O&C clauses that are present in all the bilaterals with E.U. Member States, the U.S. Government, I believe, would welcome and put no roadblocks, bilateral or otherwise, in the way of E.U. airline consolidations, at least among airlines of E.U. Member States with which the U.S. maintains open skies agreements. For example, I do not recall the U.S. standing in the way of the ill-fated Swissair purchase of 49% of Sabena.⁷ Nor do I recall the U.S. objecting to, or in any way thwarting, the multinationally-owned Cargo Lion Airlines that was designated and effectively regulated by Luxembourg though owned largely by German and Swiss nationals (with no Luxembourg ownership interest at all).⁸

The U. S. Department of Transportation gave Cargo Lion a foreign air carrier license in 1998,⁹ and in doing so, demonstrated to what seems to have been a totally unobservant Euro-

⁷ Both Swissair and Sabena have since gone bankrupt and have disappeared from the international aviation community. See AVIATION DAILY, Nov. 27, 2001, at 1.

⁸ See Translux International Airlines SA d/b/a CargoLion, DOT Docket 98-4329, NOAT Order of Nov. 25, 1998, at <http://dms.cot.gov/general/orders/19994qtr./nov.99/n984329.pdf>.

⁹ *Id.*

pean aviation community that the U.S. had no objection to multinationally-owned foreign airlines, so long as they were incorporated in and effectively regulated (i.e., proper aviation safety oversight) by states that were in the FAA's Category I and that enjoyed open skies bilateral arrangements with the U.S.¹⁰

Nor did the U.S. have any serious negative impact on the aborted BA/KLM merger effort. It is often convenient for European observers and others to fault the U.S. and to suggest that the merger failed because KLM discovered that, in a merger, the Netherlands would lose the benefits of its open skies agreement with the U.S. That is not correct. I was in the U.S. Government when that merger was undertaken, and I know that its failure was not attributable to any official position taken or not taken by the U.S. Government, but rather because, as was later openly reported, these were simply incompatible merger partners. KLM did not want to lose its independent identity and apparently concluded that it would be shortchanged by BA in a merger.¹¹

The BA/KLM merger effort provides an excellent example of how the U.S. can adjust its policy to accommodate mergers between or among airlines of E.U. Member States, one or more of which do not have an open skies bilateral with the U.S. (such as the U.K., Ireland, Greece and Spain). A little-noticed, but very important example of U.S. policy towards the issue of a merger or consolidation of an airline from an open skies country with an airline from a "closed" skies country appeared in the short-lived U.S. proposal to the E.U. open skies countries in December 2002, following the ECJ opinion.¹²

In that U.S. proposal, which is certainly worth resurrection, the U.S. implicitly indicated that it would have no problem with the airlines of two or more open skies countries continuing to operate under their open skies agreements regardless of the survivor(s) of any merger or consolidation. But if one of the airlines is from a "closed sky" country, there would be a problem, though not an insurmountable one.

¹⁰ See Mendelsohn, *supra* note 3, at 13,173-74.

¹¹ See Adrienne Larsen, *Cost, Control Issues Terminate British Airways-KLM Merger Plans*, AVIATION DAILY, Sept. 22, 2000, at 11; *European Consolidation in Question after KLM/BA Talks End*, AVIATION DAILY, Sept. 26, 2000, at 5. See also Suzanne Kapner, *British Airways and KLM End Merger Talks*, N.Y. TIMES, Sept. 22, 2000, at C4.

¹² The text of the U.S. proposal was reprinted as an Appendix to Mendelsohn, *supra* note 3, at 13,187-89. For a discussion of the ECJ decision, which was issued on Nov. 5, 2002, see Fennes, *supra* note 6.

To use the example of the aborted BA/KLM consolidation, the U.S. would not have objected to or thwarted the consolidation or merger itself. If only one merged entity had survived, it would have enjoyed open skies operating between Holland and the U.S., but closed skies under Bermuda II between the U.K. and the U.S. If two entities had survived (especially if each retained its respective national identity), there would have been few if any changes: open skies to or from Holland, but not to or from the U.K.

I know of no evidence in any way suggesting that the U.S. has ever opposed foreign carrier consolidation. While the U.S. might well be reluctant to reduce the 75% U.S. ownership requirement for its own airlines—and the recent U.N. debates over Iraq surely helped reinforce the thinking of those who believe that requirement should be strictly enforced—the U.S. seems to openly welcome mergers and consolidations among foreign carriers.¹³

In the negotiations leading to the APEC multilateral agreement,¹⁴ the U.S. did not hesitate acknowledging its belief that its own capital markets provided a sufficient base for it to be able to maintain the 75% U.S. ownership requirement. That may or may not continue to be the case, given the economic distress of U.S. airlines at the moment and their seeming inability to attract substantial capital from anywhere, U.S. or abroad. But however that situation resolves itself, there has never been, and hopefully never will be, any reluctance among U.S. authorities to acknowledge that foreign airlines coming from much smaller countries face far more difficult problems attracting the levels of capital needed to operate world-wide airlines.

In short, the U.S. does not really care about nationality requirements for the ownership of foreign carriers and has regu-

¹³ The 75% U.S. ownership requirement appears in the Federal Aviation Act, 49 U.S.C. § 40102(a)(2)(15) (2000).

¹⁴ The Multilateral Agreement on the Liberalization of International Air Transportation (colloquially known as the “APEC Agreement” - as it was negotiated under the auspices of the Asia Pacific Economic Cooperation forum) was concluded on Nov. 15, 2000, and signed by the original five Contracting States (Brunei, Chile, New Zealand, Singapore, and the U.S.) on May 1, 2001. Multilateral Agreement on the Liberalization of International Air Transportation, Nov. 15, 2000, *available at* <http://www.state.gov/e/r/5/othr12573pf.htm> [hereinafter APEC]. A list of all the countries with which the U.S. has “open skies” agreement is available at <http://www.state.gov/e/eb/r/5/othr/22281pf.htm> (last visited Oct. 1, 2003).

larly waived them in the past.¹⁵ Just as the U.S. DOT licensed the multinationally-owned Cargo Lion years ago,¹⁶ and just as the U.S. agreed to a multinational ownership clause in the APEC multilateral,¹⁷ I believe the U.S. would welcome (with, of course, appropriate security and other exceptions) relaxing, if not definitively ending, ownership requirements among foreign airlines.

The fact that E.U. carriers have not become far more multinationally-owned than they are today—especially in the face of the multinationally-oriented provisions of Article 4 of EU Council Regulation 2407/92¹⁸—only suggests that, whether acknowledged by the European Commission or not, entrenched nationalism and national chosen instrument policies continue to dominate European aviation today.

Italian Transport Minister Lunardi recently warned Alitalia against an alliance with Air France, stating that “all possible efforts should be made” to keep Alitalia as a national flag carrier.¹⁹ Despite its precarious financial condition, Swiss International reportedly continues to resist substantial investment by Lufthansa.²⁰ To be sure, small amounts of stock may be exchanged, if only so as to promote the appearance of multinationalism in aviation. But that is a far cry from the absorption or disappearance of a prized national carrier, even one that is veritably hanging on the financial ropes.

Moreover, even among those European airlines that pride themselves on a substantial amount of privatized ownership, it is no secret that their governments continue to hold so-called “golden shares” which they could always use to prevent a merger or consolidation not to their liking. A very recent ECJ opinion has cast some doubt on the validity of these largely undiscussed

¹⁵ For an in-depth discussion of the U.S. waiver policy, see Mendelsohn, *supra* note 3, at 13,172-73.

¹⁶ See Translux International Airlines, *supra* note 8.

¹⁷ See APEC, *supra* note 14, at art. 3(2).

¹⁸ Council Regulation 2407/92, on Licensing of Air Carriers, 1992 O.J. (L240) 1. For the full text of this regulation and the others that comprised the so-called third phase of liberalization that created the unified European aviation market in 1992, see <http://europa.eu.int/comm/transport/air> (last visited Oct. 1, 2003).

¹⁹ Martial Tardy, *Italian Minister Wants Alitalia to Stay Away from Air France*, AVIATION DAILY, Aug. 12, 2003, at 2.

²⁰ *Lufthansa, Swiss International in Investment Talks*, AVIATION DAILY, July 1, 2003, at 1.

and undisclosed “golden shares.”²¹ But there seems to be no evidence that the ECJ decision has caused them to disappear among any of the E.U. Member States, whether their airlines enjoy lesser or greater degrees of government ownership. It may well be that European airline managements, especially within the few airlines that are largely privatized, might welcome mergers or consolidations that tend to blur or even blot out national identities. But is this true also of their air ministries whose *raison d’être* over the past five decades has been not only to nourish and encourage, but even to justify their very existence as a ministry, on the basis of their national airline?

IV. THE MYTH THAT THE EUROPEAN COMMISSION HAS ARTICULATED AN ACCEPTABLE THEORY OF RIGHT OF ESTABLISHMENT IN INTERNATIONAL AVIATION

European commentators have thus far been almost uniformly silent about the European Commission’s unique approach to the theory of Right of Establishment as though suggesting that it comports totally with accepted practice. Again, nothing could be further from the truth.

To the extent that the Right of Establishment theory emerged and was accepted in international legal thinking in the past two decades, it always assumed a company from one country establishing a largely separate and independent entity in another country. Thus, Nissan or Honda, though foreign owned and controlled, became U.S. corporations by incorporating subsidiaries in the U.S., abiding by U.S. labor, tax and other laws, and in all respects operating in the U.S. in much the same manner and under much the same conditions as General Motors or Ford.

Similar thinking prevailed at the Organisation for Economic Co-operation and Development (OECD) in its recent efforts to fashion a draft open skies all-cargo bilateral or multilateral template.²² The OECD discussions over the Right of Establishment

²¹ See Case C-98/01, Comm’n of the European Communities v. United Kingdom of Great Britain and Northern Ireland [2003] E.C.R. 00, 2 C.M.L.R. 19; Case 4631000, Comm’n of the European Community v. Kingdom of Spain [2003].

²² Between 1999 and 2002, the OECD undertook extensive work on the subject of “Regulatory Reform in International Air Cargo Transportation.” The results of these efforts appeared in 2002, when the OECD widely circulated a finalized draft open skies all-cargo multilateral agreement as well as a substantively comparable template for amending bilateral agreements. See *Liberalization of Air Cargo*

took place in the context of the effort to alter and broaden the ownership and control clauses traditionally incorporated in bilateral air agreements. In those discussions, the participants made exactly the same assumption: no matter the nationality of the majority owner(s) of a particular multinationally-owned airline, that airline would incorporate itself in a particular country, receive its license to conduct air services and its safety oversight from the authorities of that country, and in all respects operate in much the same manner and under much the same conditions as any other airline incorporated in and licensed by that country. The OECD participants expressly provided that a “contracting party” may be “a group of states” (thus contemplating designations by the E.U. or the European Commission), but still assumed some sort of “national” scheme of oversight or regulation.²³

This assumption, while totally ignoring ownership, rests on a fairly healthy amount of “national” input or regulation by the state (or multinational entity) of incorporation. But how else could the air operator’s certificate (AOC), safety oversight, minimum insurance mandates and all those other requirements that had made aviation so internationally accepted, while so safe and reliable, be assured as they had been when the airline was both regulated by, and substantially owned and controlled by nationals of, that country?

What the thinkers and formulators of the OECD ownership and control articles had set out to do in their draft text was precisely to preserve the scheme and concept of effective national regulation, while eliminating the aspect of national ownership. When the International Civil Aviation Organization (ICAO) later convened a similar group of international experts to focus on similar issues, their conclusions reflected much the same traditional scheme of preserving some form of effective, presumably national, regulation.²⁴ That approach clearly would have worked and may still work, provided that it is not made irrelevant by the recent ECJ decision and its interpretation by the European Commission.²⁵

Transport, OECD Doc. DSTI/DOT (2002), 1/REVI (May 2, 2002) available at <http://www.oecd.org>.

²³ *Id.* at Part III, art. 1.

²⁴ See *Consolidated Conclusions, Model Clauses, Recommendations and Declarations*, Agenda Item 2.1, ICAO Doc. ATConf/5 (Mar. 31, 2003).

²⁵ See *supra* notes 1, 3.

While not experts on the provisions of the Treaty of Rome, the OECD and ICAO draftsmen, like those in the U.S. who thought about the Right of Establishment as it could be adopted and applied in aviation, started from the same premise. This premise was that the Right of Establishment provision in the Treaty of Rome (original Article 52), like generally accepted international thinking on the subject, expressly allowed companies from one Community country to establish themselves (or wholly owned subsidiaries) in other Community countries, in the words of Article 52, "under the conditions laid down for its own nationals by the law of the country where such establishment is effected."²⁶ Thus, if France required Air France to maintain its main place of business in France, hold a French AOC, and be subject to French safety oversight and all other French laws and regulations relating to international aviation, a Greek or other community airline seeking to "establish" in France and to operate directly between France and the U.S. would have to do likewise.

As one of its participants, I can fairly say that no one in the OECD group that drafted the OECD's proposed O&C clause had any idea that we would all shortly be confronted with a totally radical departure from the traditional approach to the Right of Establishment in international aviation. No one could have thought at that time that a Greek or other community-owned airline seeking to operate a turn-around service between Paris and New York, in competition with Air France, United, American, and other third and fourth freedom carriers, would not be required to have a French AOC, or be at all subject to French safety oversight or other French laws and regulations normally applied to Air France. That was not an approach that seemed at all consistent with the terms of Article 52 of the Treaty of Rome. Nor did any of the European Community participants in the OECD deliberations, despite repeated opportunities to do so, ever suggest otherwise.

Yet, within only a short time following the ECJ's decision, the European Commission let it be known that, whether required under the terms of the ECJ's decision or not, the Commission's accepted interpretation of the ECJ's decision was precisely that: for all practical purposes, the only thing a Community carrier

²⁶ Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, art. 52. This treaty was later amended by the Treaty Establishing the European Community, [1997] O.J. (C340) 3. Also, Article 52 is now Article 49.

would apparently need in order to be able to operate a turn-around (also known as seventh freedom) service between Paris and New York is a third floor, part-time staffed, walk-up ticket office, say, on Rue Jacob with little or nothing more by way of oversight or other regulation by the French Government.²⁷

Moreover, given this purported “mandate” by the ECJ, so the Commission reasoned, it was necessarily incumbent on the U.S. and all other non-Community countries to adjust their policies and practices accordingly.²⁸ What were formally deemed to be seventh freedom rights (i.e., Paris – New York) by a carrier such as Olympic (or, after May 2004, a carrier from Poland or Malta), were, henceforth, under new Right of Establishment thinking within the Commission, to become third and fourth freedom rights as part of the grand effort to unify European aviation and presumably to jump start the long-delayed movement towards the consolidation of European airlines.

There is no one, on either side of the ocean, who wishes to impede European Community progress towards unification. Whether advance notice of this quite remarkable interpretation of Right of Establishment would have been helpful is beside the point. Likewise, whether the mere third floor Olympic or Air Malta ticket office on Rue Jacob will be sufficient for the European Commission or, for that matter, the Government of France (not to mention officials of Air France), remains to be seen.

No one on the European side of the ocean has yet articulated how far the Right of Establishment interpretation will be carried. Nor, for that matter, has there been any public discussion among any of the industry participants in this fascinating global enigma as to its ramifications or consequences. Surely, it need not go as far as the Rue Jacob example. If the past is any guide to the future, moreover, the French Government and Air France will almost certainly argue that much more should be required in the interests of assuring proper and continued regulatory and safety oversight in international aviation.

On the other hand, it is not all that difficult for those involved in international aviation to envision the emergence someday of a central European authority, of which the already existing European Aviation Safety Agency (EASA) is but one healthy exam-

²⁷ See Mendelsohn, *supra* note 3 (quoting Letter from Francois Lemoureux); Fennes, *supra* note 7.

²⁸ *Id.*

ple,²⁹ that will either supervise national authorities or will be responsible for issuing AOCs and crew licenses, for assuring airworthiness, for providing safety oversight, for the task of designating airlines, and for carrying out the myriad of obligations and responsibilities that are being administered in international aviation today by national authorities. That is some distance down the road, however, and the questions of what will happen next in European aviation seem to be upon us today. For example, has Olympic already advised the French Government and Air France that its Paris ticket office, whether on Rue Jacob or elsewhere, entitles it to operate Paris - New York, as it now intends? Or has it decided that its existing ticket office in London, or one it intends to open there shortly, entitles it to operate—of course, with readily available slots promptly provided by the U.K. Government or British Airways—what are now deemed (for all Community Member State carriers) to be third and fourth freedom services between Heathrow and JFK?

The even more pressing question is what can or should be accomplished in the upcoming U.S.-E.U. negotiations that started in early October and are scheduled to continue in the months ahead. Well before any Commission proposal is even placed on a negotiating table, it would seem that the E.U. must do some very serious thinking and provide some definitive answers to these questions. For example, were the U.S. willing to accept this once seventh, now third, freedom service from both Paris and London, who will designate the Greek or Maltese airline operating the turn-around services from these cities? Who will provide the necessary oversight to assure proper safety? And whose tax and other laws will apply? Indeed, will the U.K. aviation authority sit by supinely and simply agree when these airlines invoke the Commission's interpretation of Right of Establishment and demand to operate these newly created third freedom services from London? Or will the European Commission be forced, as before,³⁰ to bring another prolonged lawsuit against these non-compliant governments before anything can be done? It is not surprising that when European airline and government officials have been informally asked about how far Right of Establishment can, should, or must be extended, the

²⁹ The EASA was scheduled to begin operations in September 2003. For detailed information, see <http://europa.eu.int/agencies/easa/index-en.htm> (last visited Oct. 1, 2003).

³⁰ See Fennes, *supra* note 7. The decision of the European Court of Justice involved seven EU Member States and the U.K.

interesting answer has been—as far as possible in the upcoming negotiations with the U.S.

V. MINI-MYTHS IN INTERNATIONAL AVIATION

One could go on interminably with other myths that circulate throughout the international aviation community but to do so would suggest that myths outweigh reality. It would not be fair, however, if I did not allude to at least three other mini-myths, all relating directly to the United States, that seem to enjoy a place in current thinking: (a) that the U.S. would be making a step forward if it adopted the E.U. approach and allowed foreigners to own up to 49% of a U.S. airline; (b) that the U.S. Department of Defense can logically oppose a Right of Establishment law in the U.S. that allowed foreigners to own 100% of a U.S. airline on national security grounds; and (c) that the U.S. Government is implacably opposed to allowing foreign airlines to wet lease their aircraft to U.S. operators. The following briefly addresses each mini-myth:

(a) The majority E.U. ownership requirement (or 49% limit on foreign ownership) that appears in Article 4(2) of E.U. Council Regulation 2407/92³¹ is a sham, and is not persuasive precedent for the U.S. to move forward with identical numbers. Unless a foreign investor can exercise control over an airline, he or she is not very likely to invest up to 49% or any other significant percent. Moreover, both Article 4(2) and its U.S. policy counterpart provide that “effective control” must remain in local (i.e., national or E.U. Member State) hands, which means that to the extent that a 49% ownership interest might or could amount to “effective control” (which would surely be the case with any widely traded public company), an inquiry would need to be undertaken to determine if it violated the limitation. All of this is enormously wasteful and time consuming, and done for no particular reason. The U.S. and the E.U. should consider adopting either an open traditional Right of Establishment approach, allowing full ownership and control by foreigners, or simply toss in the towel on the issue until both sides have matured to the point where that is possible.

(b) The U.S. Department of Defense is in no position to oppose in aviation almost precisely the same system as currently

³¹ See Council Regulation 2407/92, *supra* note 18, at art. 4(2).

exists in maritime, namely, total (i.e., 100%) foreign ownership of almost every U.S. flag vessel that the DOT relies on in the event of activation of the maritime counterpart program (VISA) to the CRAF program in aviation.³² Indeed, the Department of Defense has never voiced even the slightest complaint or apprehension about the reliability of the foreign owners of these U.S. flag vessels in the event of a call-up.

To be sure, the U.S. flag but foreign-owned vessels are all crewed by U.S. seamen. But, were the U.S. to adopt a traditional Right of Establishment approach in aviation, the foreign company owning the U.S. flag airline would be incorporated in the U.S. and working under the same labor, tax and other laws as all U.S. owned, U.S. flag carriers. Moreover, U.S. flag but foreign-owned carriers would be on notice that to participate in Fly America and other allegedly preferential federal programs would require participation in CRAF.

European aviation spokesmen have frequently criticized the U.S. policy of not allowing their carriers to participate or compete in what they believe to be the discriminatory and financially preferential Fly America and City Pairs programs.³³ This seems to be still another myth, as two recent developments have worked to reduce, if not eliminate, most or perhaps even all of the alleged financial advantages of these programs. First, the extensive code share arrangements between foreign and U.S. carriers have opened the Fly America program for every foreign carrier code share participant by allowing that foreign carrier participant to enjoy the benefits of the program. Second, the administrators of the City Pairs program have been so successful in negotiating low fares that most informed observers now seem to agree that the current fares are hardly advantageous or even financially attractive.

In any event, by joining CRAF, a foreign-owned U.S. flag carrier would be automatically able to participate in both programs. And if that is insufficient incentive for the foreign

³² CRAF is an acronym for the Civil Reserve Air Fleet, which is authorized under 49 U.S.C. § 41106 (2000). VISA is an acronym for the Voluntary Intermodal Sealift Agreement, which appears to be authorized under 50 U.S.C. § 2158 (2000).

³³ Under the Fly America program, U.S. government employees on official travel are required to use U.S. air carriers when reasonably available 49 U.S.C.A. § 340118 (1998). Under the City Pairs program, the General Services Administration (GSA) negotiates city pair fares with U.S. airlines for use by U.S. government employees.

owners to join CRAF, nothing would preclude the DOT from notifying these carriers, when issuing their U.S. carrier operating authority, that were they ever to fail to participate fully in a CRAF call-up, they would risk the continuing validity of their DOT operating authority. The incentive for continuing active participation in CRAF could hardly be more persuasive. Likewise, the national security concerns that have always discouraged a Right of Establishment approach in U.S. aviation policy should be largely, if not totally, dissipated.

(c) As was thoroughly discussed when the OECD debated and adopted its very forward-looking draft article on wet leasing,³⁴ it ill behoves the U.S. to oppose wet leasing-in by U.S. carriers (at least in certain circumstances) when U.S. carriers are so actively involved in wet leasing-out their aircraft to foreign carriers. Wet leasing is a phenomenon that is here to stay; it is a simple and not excessively expensive method for airlines to be able to test a marketplace, or to serve an existing but temporarily burgeoning marketplace, without purchasing new equipment to do so. Opposition within the U.S. Government to wet leasing-in by U.S. carriers should be on the wane except, of course, for foreign crewed aircraft that might be wet leased-in by a U.S. carrier to operate cabotage routes in the U.S. Wet leasing-in to operate third and fourth freedom flights to and from the U.S. may well raise eyebrows, but would clearly seem susceptible to resolution by the parties involved in the transaction. Wet leasing-in to provide services abroad should raise no problems at all. Nor should there be issues of adequate safety oversight for any foreign carriers from countries enjoying Category 1 status with the FAA.³⁵

VI. CONCLUSION

The international aviation community has now heard so much hype and hoopla about the TCAA,³⁶ open access, and free

³⁴ See *supra* note 22.

³⁵ For a list of the countries the FAA has assessed under its International Aviation Safety Assessment Program (IASA), see The Federal Aviation Administration, International Aviation Safety Assessment, available at www2.faa.gov/avr/iasa/index.cfm (last visited Oct. 6, 2003).

³⁶ TCAA is an acronym for Transatlantic Common Aviation Area. It is not a template of any type of agreement and appears merely to be an E.U. wish list of European aviation goals. See Towards a Transatlantic Common Aviation Area: AEA Policy Statement, Association of European Airlines (Sept. 1999), available at <http://www.aviationtoday.com/reports/aeapolicystatement.pdf>.

trade in aviation that it is hard to imagine anything emerging from the upcoming E.U.-U.S. negotiations that would meet advance billing. The latest buzz-word of an "early harvest" may suggest that far less weighty subjects than most of those discussed in this article might be on the opening agenda and might well be susceptible to some useful, even if modest, resolution.

The panoply of problems facing the E.U., however, is far more daunting than those it faces when it negotiates with the U.S. Even if the U.S. were to agree with the E.U. on an ownership and control provision that allows multinational E.U. Member State ownership of E.U. carriers or that even contemplates some "seventh" freedom flexibility, the E.U. is still required to negotiate comparable provisions with the rest of the world. Nor does an agreement with the U.S. necessarily signal agreement by any, let alone most, third countries. In short, for the E.U., an agreement with the U.S. on an O&C clause and its impact is merely the first step in a lengthy process.

Perhaps the better or more prudent approach would be for the larger aviation community, perhaps through the OECD or ICAO, to think in terms of drafting an agreement that is multilaterally rather than bilaterally oriented. Countries could then, if and when they decide to do so, simply sign on to an agreement that has an acceptable O&C clause, allowing for recognition of multinational ownership, whether by E.U. Member State airlines or by airlines from other multi-state groupings that may emerge in the future.

A country like the U.S., for example, could sign onto Protocol 1, which accepts multinational airline designations by and from other countries, while reserving for the time being on signing onto Protocol 2, which would terminate restrictions on national ownership (i.e., adopt the Right of Establishment approach and allow foreign ownership of nationally flagged carriers). A similar multilateral effort might work equally well for an approach that allows seventh freedom flights by Member State airlines so long as there are appropriate guarantees of effective national or multinational regulatory oversight.

The originality and inventiveness of legal thinking in the international aviation law community borders on the boundless when the intent or need is properly defined. That means, however, that even the most cherished of myths, and especially those discussed in the preceding pages, must first be debunked.

