

2004

Aviation and Aerospace Law and Policy Developments

Angeline G. Chen

Michael Francesconi

Lorraine B. Halloway

Recommended Citation

Angeline G. Chen et al., *Aviation and Aerospace Law and Policy Developments*, 38 INT'L L. 405 (2004)
<https://scholar.smu.edu/til/vol38/iss2/18>

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 *International Lawyer* by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Aviation and Aerospace Law and Policy Developments

ANGELINE G. CHEN, MICHAEL FRANCESCONI, AND LORRAINE B. HALLOWAY*

The year 2003 marked the 100th anniversary of the Wright Brothers' flight at Kitty Hawk, North Carolina, and the 200th anniversary of Lewis and Clark's expedition. The year was likewise filled with significant events and developments in aviation and aerospace law and policy ranging from the Shuttle *Columbia* tragedy to the introduction of the Computer Assisted Passenger Pre-Screening System (CAPPS II).

I. Aviation Law

A. LEGISLATIVE BRANCH

1. *Amendments to the Federal Aviation Act*

In 2003, there were two significant legislative acts that affected the Federal Aviation Act.¹ The first was H.R. 1559, signed into law as the Emergency Wartime Supplemental Appropriations Act. This legislation, *inter alia*, provides that for the purposes of Department of Defense (DOD) airlift services contracts, a contracting air carrier must be effectively controlled by citizens of the United States. That means such a carrier cannot derive “[fifty] percent or more of its operating revenue over the most recent [three]-year period” from foreign sources that either have a direct or indirect voting interest in the carrier or are owned by foreign states.²

The second was H.R. 2115 signed into law as the Vision 100—Century of Aviation Reauthorization Act (Vision 100). It was designed to strengthen America's aviation sector,

*Angeline G. Chen is Associate General Counsel for International Launch Services, Inc., a business unit of Lockheed Martin Space Systems Company, and is an adjunct professor at George Mason University School of Law. Michael J. Francesconi is an associate with the D.C. office of Kelley Drye & Warren LLP, where he practices aviation law with an emphasis on industry-related federal regulatory and transactional matters. Lorraine B. Halloway is a partner at Crowell & Moring LLP, where she specializes in aviation regulatory and export control/embargo issues. Ms. Halloway acknowledges the assistance of Gerald Murphy of Crowell & Moring LLP.

The statements and opinions expressed herein constitute solely those of the authors and do not necessarily reflect the positions or opinions of the ABA, their respective employers, or affiliated entities.

1. 49 U.S.C. §§ 40101 *et seq.* (2004).

2. War-Related Appropriations, Pub. L. No. 108–11, sec. 2710, § 41743, 117 Stat. 559, 600 (2003).

grant new authority to the Federal Aviation Administration (FAA), and enhance the safety of the traveling public. Vision 100 provides the means to pursue important safety and capacity projects at airports around the nation, including \$500 million annually for security improvement projects. Additionally, it abolishes the Air Traffic Services Subcommittee of the Federal Aviation Management Advisory Council (FAMAC) and creates an Air Traffic Services Committee (ATSC), which is independent from FAMAC. Furthermore, it vests the ATSC with substantial governmental authority, including approval power over the FAA's strategic plan for the air traffic control system, certain large FAA procurements, major FAA reorganizations, appointment and pay of the FAA Chief Operating Officer, and the FAA cost accounting and financial management structure. Finally, it amends the definition of a U. S. citizen to impose the requirement that an air carrier also be "under the actual control of citizens of the United States."³

2. *Ratification of the Montreal Convention*

On July 31, 2003, the U. S. Senate ratified the Convention for the Unification of Certain Rules for International Carriage by Air Treaty in Montreal on May 28, 1999 (Montreal Convention).⁴ With that action, the United States became the thirtieth state to consent to be bound by the Montreal Convention, bringing it into force sixty days later on November 5, 2003.⁵ The Senate's ratification is the culmination of over forty years of U.S. efforts to eliminate the unconscionably low limits of liability provided under the outdated 1929 Warsaw Convention when passengers are killed or injured in international air carrier accidents. Prior to U.S. ratification of the treaty, the Montreal Convention was signed by seventy-one countries and ratified by twenty-nine, only one short of the number required to bring it into effect.

The Montreal Convention applies to all round-trip journeys originating in a member country, and to all travel between member countries. Its benefits include:

- complete elimination of the liability limits for death or injury to international passengers, and in those cases, allowing lawsuits to be brought in the courts of the passenger's "principal and permanent residence" where the carrier has a commercial presence in that country;
- retaining the cargo provisions of the Montreal Protocol No. 4, which updated the Warsaw Convention's outdated rules for cargo documentation; and
- clarifying the joint liability of the ticketing and operating carriers in code-share operations that are now widely used in international air transportation.

Allowing passengers to bring lawsuits in the courts of their principal and permanent residence, ensures that U. S. citizens and permanent residents can almost always sue in U.S. courts. The convention requires air carriers to make payments of up to \$141,000 in damages on behalf of accident victims on a strict liability basis, regardless of the airline's alleged negligence.⁶

3. Vision 100—Century of Aviation Reauthorization Act, Pub. L. No. 108-176 sec. 807, § 40102, 117 Stat. 2490, 2588 (2003).

4. Convention for the Unification of Certain Rules for International Carriage by Air done at Montreal on 28 May 1999 [hereinafter Montreal Convention], *available at* <http://www.icao.int/icao/en/leb/mtl99.htm> (last visited June 8, 2004).

5. See CONGRESSIONAL RECORD, DAILY DIGEST, S10869-71 (daily ed. July 31, 2003).

6. The Montreal Convention also preserves established law on aspects of the Warsaw Convention designed to prevent unnecessary litigation, such as those relating to litigation against airline employees.

The United States will benefit in several ways from the Montreal Convention. U.S. consumers will benefit from the modern liability provisions, and U.S. airlines will benefit from a uniform international liability regime. Leveling the playing field equalizes U.S. airlines in relation to foreign airlines, which currently benefit from more limited liability regimes.

B. EXECUTIVE BRANCH

1. *Department of Transportation*

a. Citizenship Examination of DHL Airways, Inc.

The year 2003 saw the administrative adjudication of a dispute regarding the citizenship of DHL Airways, Inc., n/k/a ASTAR Air Cargo, Inc. (DHL). The case began years earlier when United Parcel Service Co. (UPS) and Federal Express Corporation (Fed Ex) requested that the Department of Transportation (DOT or Department) investigate the ownership and control of DHL by a German postal monopoly, Deutsche Post. This case questioned the DOT's *in camera*, continuing fitness review of certificated carriers, as well as decades of DOT precedent defining what is and what is not "control" of U.S. air carriers by foreign interests.⁷

On March 4, 2003, the DOT's Inspector General (IG) issued a letter to a ranking member of Congress noting that the DOT should review the totality of the circumstances to determine whether a carrier is under the actual control of U.S. citizens—both in form and fact. The IG's letter concluded that the Department's informal review of DHL's citizenship following a 2001 reorganization was not appropriate, because it was complex, contentious, and controversial. In turn, Congress, under the Emergency Wartime Supplemental Appropriations Act of 2003,⁸ mandated that the DOT use an administrative law judge in a formal proceeding to examine DHL's citizenship. Accordingly, the Department initiated an oral evidentiary hearing, which lasted throughout the summer and fall of 2003. The proceeding was particularly contentious with respect to the discovery and access to persons and things controlled by Deutsche Post and its international network of companies.⁹

On December 19, 2003, the presiding administrative law judge issued a Recommended Decision finding that DHL was controlled by U.S. citizens. Because other technical aspects of citizenship, such as the equity ownership of DHL, were not contested issues in this proceeding, the administrative law judge concluded that DHL was a U. S. citizen.

b. Complaint against Aerolineas Argentina, S.A.

On May 1, 2003, American Airlines, Fed Ex, United Air Lines, and UPS filed a joint complaint under section 2(b) of the International Air Transportation Fair Competitive Practices Act against Aerolineas Argentina. The complainants maintain that Aerolineas Argentina violated the Air Transport Agreement between the United States and Argentina, because of unreasonable airport charges for landing fees, parking, and air traffic control at Buenos Aires International Airport that were approximately three times higher than those

7. This is a reference to Docket OST-2002-13089.

8. War-Related Appropriations, Pub. L. No. 108-11, sec. 2710, § 41743, 117 Stat. 559, 600 (2003).

9. See DOT Order No. 2003-8-19, United Parcel Service Co. Petition to Institute a Public Inquiry Into the Citizenship and Foreign Control of DHL Airways, Inc., Docket OST-2003-13089 (cataloging nearly 600 pleadings filed in the State Department's docket and in the federal courts).

paid by Aerolineas. The joint complainants requested the DOT to issue a show-cause order providing that, unless the Government of Argentina immediately ended the collection of discriminatory, unjust, and unreasonable airport charges at Ezeiza, the authority held by the Argentine carriers to serve the United States would be curtailed or suspended, and they reserved the right to implement other such countermeasures as the Department found to be in the public interest.

In June 2003, by Order 2003-6-33, the DOT found that the imposition of higher fees at Ezeiza airport on U.S. carriers violated the Air Transport Agreement. Initially the State Department deferred on the issue of countermeasures; however, in late 2003, by Orders 2003-10-18 and 2003-11-26, the Department found that countermeasures should be imposed. The Department decided to condition Aerolineas' foreign carrier permit to require the carrier to remit into a U.S. escrow account, on a per-flight basis, the difference between what it actually pays for services at Ezeiza airport and the higher amounts it would be paying if it were not benefiting from discriminatorily favorable treatment vis-à-vis U.S. carriers. Under protest, Aerolineas is complying with the departmental orders, but the matter is unresolved and actively disputed on the docket at the end of 2003.

c. New Final Rule on Computer Reservations Systems

After holding a six-year rulemaking proceeding and reviewing 600 comments from interested parties, on December 31, 2003, the Department issued a final rule, which will eliminate rules for Computer Reservations Systems (CRS) by July 31, 2004.¹⁰ CRSs provide travel agents with information on airfares, schedules, and seat availability. They are used by agents to book seats and issue tickets. Four CRSs currently operate in the United States: Amadeus, Galileo, Sabre and Worldspan. Departing from its originally proposed rule, the DOT discontinued most of the current rules governing CRSs as of January 31, retaining limited rules for a six-month transition period ending July 31.¹¹

The CRS rules were originally promulgated in the mid 1980s, when all four CRSs were owned and operated by airlines. These rules prevent any air carrier or airline owner from using its CRS to unfairly favor its own flights over its competitor's flights. Today, U.S. airlines have completely divested themselves of CRS ownership, and consumers have several alternatives to CRSs, including air carrier websites and independent Internet travel sites. These significant changes in airline ticket distribution persuaded the DOT that the CRS rules are no longer necessary.

To give the industry time to adjust, however, the DOT is retaining three rules for a six-month transition. The first of these rules prohibits CRSs from using their screen displays to favor the flights of one airline to the detriment of other airlines.¹² The other two rules prohibit contract clauses that unreasonably restrict the ability of participating airlines to choose how to distribute their services. One of these rules prohibits so-called "parity clauses."¹³ Parity clauses require a participating carrier to buy the same level of service from each CRS. The other rule prohibits a CRS from requiring a participating airline to provide

10. See Computer Reservations System (CRS) Regulations, 69 Fed. Reg. 976 (Jan. 7, 2004) (to be codified at 14 C.F.R. pt. 255).

11. *Id.*

12. See *supra* note 10, at 977.

13. See *id.*

all of its published fares, including web-fares, as a condition to having its flights listed in a CRS.

The European Commission's Directorate General for Energy and Transport along with the Canadian Transport Agency have also proposed similar changes to their rules governing CRSs, which are currently under review.

d. U.S.-Vietnam Aviation Agreement

In 2001, based on a March 2000 Memorandum of Discussion (MOD), the DOT awarded U.S.-Vietnam code-sharing rights to American Airlines, Delta Air Lines, Northwest Airlines, and United Airlines.¹⁴ Code sharing is a common airline industry practice in which one airline offers service in its own name to a particular destination, but some or all of the transportation is provided by another carrier, which carries the designator code of the airline that sold the transportation.

On December 4, 2003, Secretary of Transportation, Norman Mineta, signed the U.S.-Vietnam Air Transport Agreement under which the United States and Vietnam agreed to eliminate the limitations on code-share frequencies and on code-share arrangements that the parties had previously included in the 2000 Memorandum of Understanding.¹⁵ Also under the agreement, two passenger carriers from each country may provide scheduled direct services immediately, and a third passenger carrier may begin services in the third year of the agreement. The agreement prohibits passenger airlines from serving intermediate points in France and Korea in their direct routing to Vietnam. It also prohibits "fifth-freedom" rights¹⁶ for airlines that want to serve Vietnam from Japan or Taiwan. U.S. airlines will not be permitted to carry "fifth-freedom" traffic between Vietnam and Hong Kong until October 15, 2005. Additionally, the agreement authorizes an unlimited number of scheduled cargo carriers to operate without limits on weekly frequencies. In addition, it grants unlimited rights for cargo charters, which allow carriers from each side to operate up to fifty-two chartered passenger flights per year. The United States and Vietnam plan to meet in four years to consider liberalizing the current arrangement.

2. Federal Aviation Administration

a. Regulation of Fractional Ownership Programs and On-Demand Operations

On September 17, 2003, the FAA issued its Final Rule governing aircraft operation in fractional ownership programs (FOP).¹⁷ These FOPs offer flexibility to individual and corporate aircraft owners, by providing for shared ownership of aircraft with other participating owners, as well as shared management and maintenance of the aircraft by the company managing the FOP. The Final Rule was crafted by the Fractional Ownership Aviation Rulemaking Committee (FOARC), which is comprised of industry and govern-

14. U.S. Dep't of Transp., Press Release, U.S. Carriers Get First Access to Vietnam in Decades As DOT Tentatively Awards Air Service Code-Sharing Rights (Aug. 7, 2001), at <http://usinfo.state.gov/regional/ea/vietnam/vietair2.htm>.

15. U.S. Dep't of Transp., Press Release, United States, Vietnam Sign Historic Air Services Agreement, The First Ever Between the Two Countries (Dec. 4, 2003), at <http://www.dot.gov/affairs/dot13203.htm>.

16. "Fifth freedom" rights are for those flights carrying traffic that originates and terminates in countries other than the carrier's home country, regardless of whether the flight operated via the home country. See 14 C.F.R. § 212.2 (2003).

17. See Regulation of Fractional Aircraft Ownership Programs and On-Demand Operations, 68 Fed. Reg. 54520 (Sept. 17, 2003) (to be codified at 14 C.F.R. pts. 21, 61, 91, 119, 125, 135, & 142).

ment representatives. The FOARC was established by the FAA in 1999 to create a subset of regulations specifically applicable to FOPs.

Under the new regulations, FOPs will continue to be regulated as private operations under Part 91, Subpart K, of the Federal Aviation Regulations (FAR).¹⁸ The major effect of this designation is to exempt FOPs from the more stringent safety and inspection compliance requirements imposed on commercial operators certified under FARs 121 or 135.¹⁹ Thus, the exemption preserves the flexibility and cost structure that is inherent to private aircraft ownership. Additionally, neither FOP managers nor participants must be U.S. citizens.

Maintaining the private nature of FOP operations is expected to facilitate access to foreign landing rights and avoid entanglement in "fifth-freedom" and "cabotage" issues that apply to commercial operations. Because many countries have adopted a "wait-and-see" attitude, the U.S. approach should generate fractional ownership rule-making activity in other countries. The FAA is conducting negotiations with safety regulators throughout the world on the international status of FOPs.

b. Computer Assisted Passenger Prescreening System

In 2003, the Department of Homeland Security's Transportation Security Administration (TSA) began development of a second generation, government-controlled Computer Assisted Passenger Prescreening System (CAPPS II) to replace the original CAPPS I, which is now run by airlines. CAPPS II will authenticate the identity of passengers by checking the passenger name record, including full name, home address, telephone number and date of birth against governmental and commercial databases. The August 1, 2003, Federal Register notice carefully narrowed and clarified the amount of information collected, how it may be used, how long it may be retained, and parties with whom it may be shared. Commercial database operators, who will be conducting the identity authentication, will be prohibited from storing or using passenger name records for commercial purposes. TSA will be required to regularly audit operators to ensure compliance with the new program once implemented.

CAPPS II is designed to reduce passenger wait times by reducing the number of people who undergo secondary screening or who are consistently misidentified as potential terrorists. Further, a Passenger Advocate's Office will be created to work with and on behalf of passengers to identify and correct any erroneous data in the authentication or risk assessment processes. A process for prescreening complaints is also under development. TSA plans to release a final notice regarding CAPPS II in 2004.

c. Ban on Stage-2 Aircraft

On August 25, 2003, the FAA issued a final decision concluding that federal law preempts the ban on Stage-2 aircraft imposed by the City of Naples Airport Authority (NAA) at Naples Municipal Airport, FL.²⁰ Stage-2 aircraft are those aircraft creating maximum noise levels between 104 and 108 EPNdb, on approach and flyover, respectively.²¹ Although most

18. See *id.* at 54526.

19. See *id.* at 54520-1.

20. FAA Order No. 2003-1, *In the Matter of Compliance with Federal Obligations by the Naples Airport Authority, Naples, Florida*, FAA Docket No. 16-01-15 (Aug. 25, 2003).

21. See Noise Standards: Aircraft Type and Airworthiness Certification, 14 C.F.R. § 36.5 (2003).

airports in noise-sensitive areas typically have some form of noise abatement policy, such as nighttime operating restrictions, the NAA's outright ban on Stage-2 operations was unprecedented. Despite the fact that the NAA had prevailed in a lawsuit filed in late 2001 challenging the constitutionality of the ban, the FAA determined that it was not bound by the Federal Court's decision.²²

The FAA concluded that by imposing the ban, the NAA violated its contractual and statutory obligations as a federal grant recipient to make its airport available for public use without unjust discrimination to all types, kinds, and classes of aeronautical activities. As long as the ban remains in effect, Naples Municipal Airport will be restricted from receiving federal airport grant money and unable to collect passenger facilities charges (PFCs); however, the controversy is far from settled. The ban on Stage-2 aircraft remains in place pending the NAA's September 2003 appeal to the D.C. Circuit.

II. Aerospace and Space Law and Policy

A. THE COLUMBIA TRAGEDY

On the morning of February 1, 2003, a mere fifteen minutes before its scheduled landing, the Space Shuttle *Columbia* broke apart in the lower atmosphere between California and Texas. All seven of the shuttle's STS-107 crew members were lost when the left wing failed. Within two hours after the loss of the shuttle's signal, an accident investigation board was formed, following procedures that had been established by NASA subsequent to the *Challenger* tragedy in 1986. The Columbia Accident Investigation Board (CAIB) was chaired by retired U.S. Navy Admiral Harold W. Gehman, Jr., and took seven months to complete its investigation. The investigation ultimately resulted in a number of findings and recommendations "grouped into three categories: (1) the physical failures that led directly to *Columbia's* destruction; (2) underlying weaknesses revealed in NASA's organization and history, that can pave the way to catastrophic failure; and (3) other significant observations made during the course of the investigation."²³

Columbia was the first space shuttle to become space-rated, making the Space Shuttle Program's first four orbital test flights. Designed slightly differently than the other shuttles—*Challenger*, *Discovery*, *Atlantis*, and *Endeavor*—*Columbia* was not equipped with a docking system and was generally used for science missions, including service of the Hubble Space Telescope. STS-107, launched from Launch Complex 39A at Cape Canaveral Air Force Station in Florida on January 16, 2003, was *Columbia's* twenty-eighth flight, and the 113th flight of the Space Shuttle Program. Launch occurred at 10:30 A.M. EST. Approximately eighty-two seconds after lift-off, a large chunk of the handcrafted insulating foam broke off from where the shuttle attached to its external tank and struck the leading edge of *Columbia's* left wing.²⁴ The resulting breach allowed superheated air to enter and even-

22. See *supra* note 20.

23. COLUMBIA ACCIDENT INVESTIGATION BOARD, CAIB REPORT VOL. 1 (2003), available at <http://www.nasa.gov/columbia/caib/html/start.html> (last visited May 21, 2004). Volumes 2 through 6 of the Report were released on Oct. 28, 2003, and consisted of three volumes of technical documents (Vols. 2-4), other significant documents (Vol. 5) and transcripts of public hearings held by the Board (Vol. 6). All volumes of the entire report can be found on CAIB's website.

24. Craig Covault, *Air Force Imagery Confirms Columbia Wing Damaged*, AVIATION WEEK & SPACE TECH. (Feb. 7, 2003), available at <http://spaceflightnow.com/shuttle/sts107/030207avweek/>.

tually destroy the left wing of the shuttle. Almost immediately following the tragedy, speculation on the cause of the failure focused on the left wing—conjecture that was subsequently borne out by the CAIB’s investigation.²⁵

The CAIB Report noted, however, that as much responsibility lay with NASA’s organizational culture as with the damage done by the foam. The board based this finding upon its extensive examination of NASA’s organizational structures, safety history, practices and procedures, and concluded that significant changes needed to be made to NASA’s organizational culture in order for the agency to succeed.²⁶

While long-term implications for the International Space Station (ISS) still lay in uncertainty, and with the shuttle’s return-to-flight in limbo, NASA worked closely with its ISS partners to reach an agreement regarding continued operation of ISS for the period during which the shuttle remained grounded. Russia agreed to increase the number of cargo flights to ISS using an accelerated progress schedule.²⁷

B. COMMERCIAL SPACE

The commercial space sector remained in an economic downturn, with 2003 being marked by a number of space entities filing for or remaining in Chapter 11 bankruptcy, including Globalstar, Kistler Aerospace, and Space Systems/Loral.

In 2003 there were a number of significant industry successes as well as failures. The first military launch under the Air Force’s Evolved Expendable Launch Vehicle (EELV) program was executed by Boeing in March, with the Delta 4’s launch of a \$210M Lockheed Martin-built military communications satellite the Defense Satellite Communications System 3-A3 spacecraft. A successful launch from Cape Canaveral of the last Milstar military communications satellite aboard a Titan IVB launch vehicle occurred in April, 2003. In May, Lockheed Martin successfully launched its second Atlas V launch vehicle, carrying a commercial payload and making history by facilitating Greece’s first presence in space. In June, the successful 300th flight of the Russian Proton launch vehicle carried the Alcatel-built AMC-9 communications satellite aloft for SES Americom. July saw the spectacular maiden flight of the 521 configuration of the Atlas launch vehicle, which carried the Rainbow 1 communications satellite for Cablevision.

Also in July, the Air Force transferred seven launches from Boeing’s Delta 4 program to Lockheed Martin’s Atlas V program, as punishment for Boeing’s misappropriation of rival Lockheed Martin’s proprietary data during the DOD’s procurement of launch services under the EELV. The investigation, which began in February, resulted in the Air Force finding that Boeing’s wrongful acquisition of Lockheed Martin’s proprietary data was material. Therefore, the Air Force revoked launches worth approximately \$1 billion. Boeing

25. See, e.g., *id.*; William Harwood, *Latest Test Release of Emails Show Wing Concern Lingered*, CBS NEWS “SPACE PLACE” (Feb. 26, 2003), available at <http://www.spaceflightnow.com/shuttle/sts107/030226email/>.

26. Michel Alberganti, *Le NASA sévèrement mise en cause dans le drame de Columbia*, LE MONDE, (Aug. 27, 2003), available at http://www.lemonde.fr/web/recherche_resumedoc/1,13-0,37-816501,0.html?message=redi.

27. O’Keefe, *ISS Partners Reach Agreement On Station Plan* (Feb. 27, 2003), available at <http://www.spacetoday.net/Summary/1531>.

was also suspended from bidding on any other U.S. Government procurements in March. Because of the findings Lockheed Martin filed a civil lawsuit in U.S. District Court against Boeing. The issues shook up Boeing sufficiently that its President and CEO, Phil Condit, abruptly resigned. He was replaced in December by Harry Stonecipher.²⁸

In August, the Air Force launched its last DSCS satellite into orbit by a Delta 4 launcher. In October 2003, Lockheed Martin launched the last Titan 2 rocket—a modified intercontinental ballistic missile converted into a benign delivery system for its government payload. That same month, China executed its first manned voyage into space, sending its first *taikonaut* into space aboard a Long March 2F launch vehicle for a twenty-one-hour orbit around the Earth.²⁹

At the end of 2002, the first Ariane 5ECA launch (V517) failed when the first stage Vulcan 2 engine nozzle failed approximately three minutes after launch. Reaching an apogee of roughly 140km, the launch vehicle was destroyed by the range seven minutes after launch. The failure represented a significant setback for Arianespace, as well as the loss of its two payloads: Stentor and Hotbird 7. The Stentor was an experimental French communications satellite built upon Alcatel's Spacebus 3000 bus and Eurostar 3000 components. Hotbird 7, a commercial communications satellite, was built for Eutelsat with a Ka-band communications payload. The devastating loss of the maiden Ariane 5ECA launcher became clearer to Arianespace when its final Ariane 4 was launched from French Guiana, Kourou on February 15, placing the Intelsat 907 communications satellite into geosynchronous orbit and leaving Arianespace grounded with no alternative launch vehicle configurations to maintain its manifest. The Ariane 1/2/3/4 series launched 144 times from Kourou, including 7 launch failures. The Ariane failure was concurrently devastating to the European Space Agency's Rosetta mission, which was intended to explore the Comet Wirtanen. The mission was planned for ten years, but missed its small launch window, forcing its scientists to re-configure the mission for a later launch date.

On August 22, 2003, an on-pad explosion at the Alcantara launch site in Brazil spoiled that country's attempt to enter the roster of space-faring nations and killed twenty-one workers. The failure review board found that an electrical flaw ignited one of the four solid rocket motors on the VLS-1 booster causing the explosion. It was Brazil's third attempt to put a satellite into orbit on a Brazilian launcher.

November 2003 saw the failure of Japan's H-IIA booster, which failed to separate from the rocket and forced the destruction of both the rocket and its two satellites.³⁰ The failure investigation continues into 2004. The year 2003 was a trying one for Japan, with the launcher's failure following close behind the October failure of JAXA's Midori-2 Earth observation spacecraft and the uncertainty of the agency's Nozomi Mars mission as a result of that spacecraft's on-board electrical short circuit.

28. Sam Silverstein, *Stonecipher Makes Boeing's Credibility His Top Priority*, SPACENEWS INT'L 4, (Dec. 19, 2003), available at http://www.space.com/spacenews/archive03/boeingarch_121903.

29. Stephen Clark, *First Chinese Space Hero Safely Returns to Earth*, SPACEFLIGHT NOW, (Oct. 15, 2003), available at <http://spaceflightnow.com/shenzhou/031015landing.html>.

30. Paul Kallender, *H-2A Failure Deals Blow On Several Fronts To Japanese Space Program*, SPACENEWS INTERNATIONAL, p. 1 (Dec. 23, 2003), available at http://www.space.com/spacenews/archive03/japanarch_122303.html.

C. LEGISLATIVE/REGULATORY ISSUES

In April, the Federal Communications Commission (FCC) released new rules with the intent of speeding up the process for licensing orbital slots and frequencies.³¹ Pursuant to the new regulations, the FCC will grant licenses on a first-come first-served basis, allowing for others to essentially compete for the orbital slot or frequency at issue. Also, new time-lines were established, under which the FCC would handle requests for licenses within 180 days for geostationary satellites, and 270 days for non-geostationary satellites. Additionally, the rules require applicants to post a deposit or bond worth at least \$5 million.

Towards the end of 2003, HR 3245, the Commercial Space Act of 2003, was introduced, seeking to amend the Commercial Space Launch Act (CSLA) by placing authority for governmental regulation of human space flight activities under the jurisdiction of the Office of Commercial Space Transportation (CST) in the DOT. In this regard, the proposed legislation will broaden the existing indemnification regime established under the CSLA to include commercial transportation of people in and through space, and also seeks to extend the indemnification regime (which sunsets in December 2004).

D. SPACE POLICY AND INITIATIVES

President Bush authorized a new national policy on commercial remote sensing (CRS) on April 25, 2003, superseding the existing policy on remote sensing capabilities.³² The CRS policy laid out guidance and implementation actions for the commercial provision of remote sensing space capabilities, including: (1) guidance for the licensing and operation of U.S. commercial remote sensing space systems; (2) U.S. Government use of such commercial capabilities; (3) foreign access to U.S. commercial remote sensing space capabilities; and (4) government to government intelligence, defense and foreign policy relationships involving US commercial remote sensing space capabilities.

In May, the fifteen members of the European Space Agency approved the European alternative to the U.S. Global Positioning System (GPS), Galileo. Galileo is comprised of a network of thirty satellites providing navigation services to the public.

In the first weeks of January 2004, President Bush released a new vision for U. S. space exploration, an initiative charting a new course for NASA.³³ President Bush directed NASA to continue forward with completion of the ISS, retire the shuttle by 2010, and begin development of the means to allow for unmanned missions to the moon by the middle of the next decade, projecting these efforts forward to encompass Mars.

31. Sam Silverstein, *Satellite Industry Reacts To FCC's New Licensing Rules With Hope and Skepticism*, SPACENEWS INTERNATIONAL, p. 8 (May 5, 2003), available at http://www.space.com/spaceneews/archive03/fccarch_050503.html.

32. See Presidential Decision Directive 23, U.S. Policy on Foreign Access to Remote Sensing Capabilities (Mar. 9, 1994).

33. U.S. Dep't of State, *Bush Proposes New U.S. Missions to Moon, Mars*, at <http://usinfo.state.gov/gi/Archive/2004/Jan/15-652941.html> (last visited May 24, 2003).