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THE EU-ASEAN COMPREHENSIVE AIR TRANSPORT AGREEMENT (2022): FROM REGIONAL TO INTER-REGIONAL TO GLOBAL?

Jae Woon Lee, Antigoni Lykotrafiti & Máté Gergely*

ABSTRACT

The EU-ASEAN Comprehensive Air Transport Agreement (CATA) is the latest example of the EU's effort to set a "global benchmark" in the regulation of international air transport. The EU-ASEAN CATA is an exceptional ASA for its geographic coverage, liberalizing impact, and expanded substantive scope. As the first-ever bloc-to-bloc ATA with 27 EU member states and 10 ASEAN member states respectively and a combined population of 1.1 billion, the EU-ASEAN CATA will make a significant impact not only on stakeholders in the EU and ASEAN, but furthermore on the rest of the world. The article aims to thoroughly examine the landmark EU-ASEAN CATA from its evolutional path to its potential as a global benchmark.

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I. INTRODUCTION

International air transport, i.e., the international carriage of passengers, cargo, and mail by air, is governed by bilateral air services agreements between states.[1] In 1944, a year before the end of World War II, states gathered in Chicago to discuss the principles to be followed for the adoption of a new multilateral regulatory framework for international air transport.[2] Following weeks of intensive discussions, the Diplomatic Conference in Chicago successfully adopted an overarching treaty for international air law, the Convention on International Civil Aviation (Chicago Convention), which also created the International Civil Aviation

[1] *See Bilateral Air Services Agreements*, GlobeAir, https://www.globeair.com/g/bilateral-air-service-agreements [https://perma.cc/R2PB-9XEC].

[2] *See* David Mackenzie, ICAO: A History of the International Civil Aviation Organization 24 (2010).

Organization (ICAO), a United Nations specialized agency.[3] However, the states failed to agree on how to govern the multilateral exchange of commercial traffic rights for international air transport.[4] Instead, Article 6 of the Chicago Convention specifically left the establishment of commercial traffic rights to be negotiated by governments on a country-by-country basis.[5]

At the Diplomatic Conference in Chicago, the most noticeable conflict of interests occurred between the United States (US), which favored maximum flexibility and minimal regulation of air transport, and the United Kingdom (UK), "which wished to protect its vast colonial air spaces all around the globe."[6] Despite their conflicting views at the Chicago Diplomatic Conference in 1944, the US and the UK managed to reach a bilateral air services agreement (ASA), which was negotiated in Bermuda in 1946.[7] For the next few decades, this bilateral ASA, consisting of fourteen relatively short articles,[8] became the prototype for several bilateral ASAs throughout the world. These Bermuda-type agreements tightly and protectively regulate matters related to market access, including the designation of airlines by the other contracting state (how many and which airlines may operate the agreed-upon services); the nationality requirements of designated airlines (foreign ownership and control requirements); the routes which designated airlines are entitled to fly; the frequency of air services that may be operated (caps on the number of flights flown in a given time period); and capacity (predetermined limits on the number of passengers and/or the amount of cargo carried).[9] The Bermuda-type bilateral ASAs, called the first generation of ASAs, dominated the regulation of international air transport for the first fifty years of commercial aviation (mid-1940s to mid-1990s).[10] Over time, the number of ASAs gradually increased.[11] In the early

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[3] *See id.*

[4] *See id.* at 58.

[5] *See* Convention on International Civil Aviation art. 6, Dec. 7, 1944, 15 U.N.T.S. 295 [hereinafter Chicago Convention] ("No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.").

[6] *See* MICHAEL MILDE, INTERNATIONAL AIR LAW AND ICAO 15 (3d ed. 2018).

[7] *See* Air Service Agreement, U.K.–U.S., Feb. 11, 1946, 60 Stat. 1499, https://2009-2017.state.gov/e/eb/rls/othr/ata/g/gy/114284.htm [https://perma.cc/Q9YY-LXRK] [hereinafter Bermuda Agreement].

[8] *See generally id.*

[9] *See* PAUL STEPHEN DEMPSEY, PUBLIC INTERNATIONAL AIR LAW 80 (2008).

[10] *See id.*

[11] *See id.* at 521.

1990s, there were approximately 1,200 bilateral ASAs around the world[12] and the vast majority of them were protectively written Bermuda-type agreements.[13]

The second generation of ASAs began to appear in the early 1990s, when a new perspective on bilateral ASAs was introduced through the so-called "open skies" agreements.[14] The first open skies agreement was concluded between the US and the Netherlands in 1992.[15] The basic elements that constitute the essential components of open skies bilateral ASAs are, inter alia: (1) open entry on all routes; (2) unrestricted capacity and frequency on all routes; and (3) unrestricted route and traffic rights.[16] From the 1990s onwards, many states started to change their aviation policies from a protectionist to a more liberal stance, and the liberalization of market access in international air transport spread across the world through open skies ASAs.[17] Between 1992 and 2012, "more than 400 open skies agreements had been concluded involving 145 states, representing 76 percent of the ICAO membership."[18]

Since the dawn of the 21st century, a small number of ASAs have begun to expand the traditional scope of ASAs.[19] From exclusively dealing with the exchange of commercial rights for international air transport, the third generation of ASAs started to cover new issues, including the environment, government subsidies, and consumer protection.[20] The starting point was the historic Air Transport Agreement (ATA) between the United States and the European Union (EU) in 2007.[21] Similarly, among others, the Canada–EU ATA of 2009, EU–Jordan of 2012, EU–Israel of 2013, UK–Switzerland of 2019, UK–Iceland ASA of 2020, and EU–Qatar ASA of 2021 have addressed similar issues.[22] More re-

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[12] *See id.*

[13] *See id.* A notable exception is the U.S.–Netherland ASA in 1978. *See id.* at 580–81.

[14] *See id.* at 543.

[15] *See id.* at 544.

[16] *See id.* at 544–45.

[17] *See id.* at 546.

[18] Worldwide Air Transport Conference, *Expanding Market Access For International Air Transport* (ICAO Secretariat, Working Paper No. 13, 2012), http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp013_en.pdf [https://perma.cc/BW5W-5XUN].

[19] *See* DEMPSEY, *supra* note 9, at 552–53.

[20] *See generally id.*

[21] *See id.* at 578.

[22] Press and Information Team of the Delegation to ASEAN, *Aviation: Landmark EU-ASEAN agreement to connect 1.1 billion people*, EUROPEAN UNION EXTERNAL ACTION

cently, the EU and the Association of Southeast Asian Nations (ASEAN) signed the Comprehensive Air Transport Agreement (EU–ASEAN CATA) in 2022, which addressed climate change, enforcement mechanisms ensuring financial transparency, and high labor standards in the airline industry.[23]

The EU–ASEAN CATA is the latest example of the EU's effort to set a "global benchmark" in the regulation of international air transport.[24] When the EU–Qatar ASA of 2021 was signed, the European Commission made a bold statement: "[T]he agreement sets a new global benchmark by committing both sides to fair competition, and by including social and environmental protection."[25] Similarly, after signing the EU–ASEAN CATA in 2022, the European Commission stated that "by setting global benchmarks that commit all 37 countries in the two regions to fair competition and to improving social and environmental conditions, it [the EU–ASEAN CATA] is the latest example of a new generation of international air transport agreements."[26]

Indeed, the EU–ASEAN CATA is an exceptional ASA for its geographic coverage, liberalizing impact, and expanded substantive scope. As the first-ever bloc-to-bloc ATA with twenty-seven EU member states and ten ASEAN member states respectively and a combined population of 1.1 billion, the EU-ASEAN CATA will make a significant impact not only on stakeholders in the EU and ASEAN, but on the rest of the world.[27]

(Oct. 17, 2022), https://www.eeas.europa.eu/delegations/association-southeast-asian-nations-asean/aviation-landmark-eu%E2%80%93asean-agreement-connect-11-billion-people_en [https://perma.cc/78Q4-XJYK].

[23] *See id.*

[24] *See id.*

[25] When the EU–Qatar ATA was signed, the meaning of "a new generation of international air transport agreements" was explained by the European Commission's Directorate General for Mobility and Transport (DG MOVE) as follows. *See* Press Release, European Commission, *Aviation: EU and Qatar sign landmark aviation agreement* (Oct. 18, 2021), https://transport.ec.europa.eu/news-events/news/aviation-eu-and-qatar-sign-landmark-aviation-agreement-2021-10-18_en [https://perma.cc/78WL-BZND] ("The agreements that the European Commission negotiates on behalf of the EU and its Member States do not limit themselves to the so-called 'open skies' models entailing mere opening up of markets: the EU model also seeks the establishment of a process of liberalisation of ownership of airlines and a process of regulatory convergence in matters of safety and security, competition, environment, passengers protection, labour, etc. - which could not be obtained at national levels."). *See also Global Partners*, EUR. COMM'N, https://transport.ec.europa.eu/transport-modes/air/international-aviation/external-aviation-policy/global-partners_en [https://perma.cc/5XEB-K3L2] (introducing the general information on global partners on the website of DG MOVE).

[26] Press and Information Team of the Delegation to ASEAN, *supra* note 22.

[27] *See id.*

This paper aims to examine the landmark EU–ASEAN CATA from its evolutional path to its potential as a global benchmark. In Section II, we will discuss how the EU and ASEAN achieved regional integration of their respective air transport markets.[28] Clearly, intra-regional integration was a prerequisite for inter-regional integration.[29] In Section III, we will review key features of the EU–ASEAN CATA.[30] Consisting of thirty-four articles, the EU–ASEAN CATA is arguably one of the most comprehensive and sophisticated ATAs in the world.[31] In Section IV, we will examine how the EU has been acting as a norm entrepreneur in international air transport.[32] Section V concludes with observations.[33]

II. REGIONAL AIR TRANSPORT LIBERALISATION AND EXTERNAL AVIATION POLICY

A. European Union

1. Development of the EU Single Aviation Market

The Treaty of Rome (1957) (the Treaty), which gave birth to the European Economic Community,[34] saw a common transport policy as a *sine qua non* of a common market.[35] However, air (and sea) transport was excluded from the relevant part of the Treaty that governed transport.[36] Instead, a common policy in the area of air (and sea) transport was contingent on prior action by the Council, i.e., the Member States.[37] With the passage of time, the Council's inaction gave rise to a controversy as to whether air transport was excluded from the part of the Treaty governing a common transport policy or from the Treaty as a whole.[38] The European Court of Justice's contribution to answering this question has been catalytic for the establishment of the EU single aviation market (SAM).[39]

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28 *See infra* Section II.
29 *See id.*
30 *See infra* Section III.
31 *See id.*
32 *See infra* Section IV.
33 *See infra* Section V.
34 *See* Treaty Establishing the European Economic Community art. 1, Mar. 25, 1957, 298 U.N.T.S. 3, https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11957E/TXT [https://perma.cc/F323-8JT3].
35 *See id.* arts. 2, 3(e).
36 *See id.* arts. 74–84.
37 *See id.* art. 84(2).
38 *See* Commission v. France, Case C-167/73, [1974] E.C.R. I-00359, 361.
39 *See generally id.*

In the 1974 *French Sailors* case, the European Court of Justice was called upon to decide whether the provisions of the Treaty concerning the free movement of workers applied to sea transport (and by extension also to air transport) so long as the Council had not decided so.[40] In its crisp answer—a signature feature of its early rulings—the Court examined the place of the transport provisions in the general system of the Treaty.[41] The Court found that the overarching objective of establishing a common market referred to the whole of the economic activities in the Community and that the free movement of goods, persons, services, and capital was the basis of the common market.[42] The Court interpreted the wording of the transport provisions themselves that tie a common transport policy to the objectives of the Treaty[43] as validation of its analysis and did not hesitate to assess the special exemption (in the Title of the Treaty that regulates Services) that "freedom to provide services in the field of transport shall be governed by the provision of the Title relating to transport"[44] in the same light, proclaiming that "the general rules of the Treaty must be applied insofar as they are not excluded."[45] By the same token, the Court found that while the Council's inertia in the areas of sea and air transport excluded them from the Treaty rules relating to the common transport policy, they remained "on the same basis as the other modes of transport, subject to the general rules of the Treaty."[46]

Despite the Court's ruling and the activism of the European Commission, which had been calling upon the Council to adopt its proposals in the area of air transport since the early 1970s,[47] the latter's reticence to move decisively in the direction of a common transport policy generally (and not solely in air transport) resulted in an action for failure to act against it by the European Parliament before the Court. In the 1985 *Obligations of the Council*

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[40] *Id.*

[41] *Id.* ¶ 17.

[42] *Id.* ¶ 18–19.

[43] Consolidated Version of the Treaty on the Functioning of the European Union arts. 90, 91(1), 2012, O.J. 326/47, at 85 [hereinafter TFEU] (opening Article of Title VI of the Treaty governing Transport) ("The objectives of the Treaties shall, in matters governed by this Title, be pursued within the framework of a common transport policy.").

[44] *See id.* art. 58(1), at 70; Commission v. France, E.C.R. I-*359*, ¶ 28.

[45] Commission v. France, E.C.R. I-*359*, ¶ *28.*

[46] *Id.* ¶ 32.

[47] *See* Memorandum of the Commission: Contributions of the European Communities to the Development of Air Transport Service, COM (79) 311 Final (Jul. 1979) [hereinafter 1979 Memorandum]; Parliament v. Council, Case C-13/83, [1985] E.C.R. I-1513, ¶ 66.

case, the Court found that the freedom to provide services, which the Treaty required to be established before the end of the year 1969, had been frustrated by the Council's failure to devise a common transport policy.[48] In particular, the Court declared that "the Council ha[d] failed to ensure freedom to provide services in the sphere of international transport and to lay down the conditions under which non-resident carriers may operate transport services in a Member State."[49]

A year later, in *Nouvelles Frontières*, the Court had the opportunity to clarify the scope of "the general rules of the Treaty" by ruling that the competition provisions fall squarely therein.[50] When called upon to decide whether the member states had violated the competition provisions of the Treaty by approving, through means of domestic law and procedures, the tariff-fixing apparatus established by bilateral ASAs that appeared to be in violation of Article 101 of TFEU,[51] the Court did not hesitate to proclaim that "air transport remains, on the same basis as other modes of transport, subject to the general rules of the Treaty, including the competition rules."[52] Even though the Court did not find Article 101 of TFEU to be directly applicable to the air transport sector in the absence of implementing legislation, it highlighted the member states' obligation not to deprive the competition rules of their *effet utile*.[53] The Court further validated the Commission's investigation and enforcement powers in air transport, offering in effect its seal of approval to the statement made a few months earlier by the Commission in its White Paper "Completing the Internal Market"[54] that, if the Council failed to make the competition rules applicable to air transport, the Commission would take Decisions recording existing infringements and determining the measures that Member States should take.[55]

The fusion of the Court's incrementalism and the Commission's proactivity was energized by the coming into force of the Single

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[48] *See* Parliament v. Council, E.C.R. I-1513, ¶ 62.

[49] *See id.* ¶ 70.

[50] Ministère Public v. Asjes, Case C-209-213/84, [1986] E.C.R. I-1425, ¶ 45.

[51] TFEU, *supra* note 43, art. 101, 2012, O.J. 326/47, at 88 (prohibiting, in principle, anti-competitive agreements between undertakings).

[52] *See Asjes*, [1986] E.C.R. I-1425, ¶ 45.

[53] *Id.* ¶ 5.

[54] *See generally id.*; Commission of the European Communities, Completing the Internal Market: White Paper from the Commission to the European Council, COM (85) 310 Final (June 1985) [hereinafter White Paper].

[55] White Paper, *supra* note 54, at 30, ¶ 111.

European Act (SEA) on July 1, 1987.[56] The creation of a single European aviation market was tied to the political objective of establishing an internal market by December 31, 1992. By establishing the co-decision procedure, the SEA allocated the task of drafting legislation—and proposing it to the Council for adoption—to the Commission.[57] The waterfall of air liberalization measures that followed took the form of three packages that defragmented the national aviation markets over a period of ten years and consolidated them into a single European aviation market.[58] Unlike the United States, where the process of domestic air transport deregulation was simpler politically, economically, and legally (in the US, only fares and routes had been regulated, with capacity and scheduling always devolved to airline management discretion), in Europe, comprehensive liberalization was needed.[59]

The choice of phased liberalization was justified by the magnitude of the venture.[60] The liberalization of market access climaxed in 1997 with the granting of pure cabotage rights, a necessary condition for the exercise of the EU freedom of establishment.[61] Common rules on the licensing of air carriers substituted the concept of an EU air carrier, which was majority-owned and effectively controlled by EU interests, from that of a national air carrier of a member state, which was majority-owned and effectively controlled by national interests.[62] By the end of the liberalization process, the bilateral ASAs between the EU member states had been corroded to the point of redundancy.[63] With national markets now decabotaged—fares and capacity liberalized and air

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[56] *See* Mariusz Maciejewski and Rudolfs Verdins, *Developments up to the Single European Act*, European Parliament (Apr. 2024), https://www.europarl.europa.eu/erpl-app-public/factsheets/pdf/en/FTU_1.1.2.pdf [https://perma.cc/V8VX-4AU7].

[57] *See id.* (describing the ordinary legislative procedure of the EU, used for adopting EU legislation in most policy areas). *See also* Eurofound, Co-decision procedure, European Industrial Relations Directory (2012), https://www.eurofound.europa.eu/en/european-industrial-relations-dictionary/co-decision-procedure [https://perma.cc/98ZJ-8VRJ].

[58] *See* Brian F. Havel, In Search of Open Skies: Law and Policy for a New Era in International Aviation 302–38 (1997) (a thorough analysis of the three packages of air liberalisation measures).

[59] *Id.* at 303.

[60] *See* David Pernice and Olena Kuzhym, *International and Cabotage Road Transport*, European Parliament (May 2024), https://www.europarl.europa.eu/erpl-app-public/factsheets/pdf/en/FTU_3.4.2.pdf [https://perma.cc/7TSJ-4C22].

[61] *See id.*

[62] *See* Council Regulation No. 1008/2008/EC on Common Rules For the Operation of Air Services in the Community (Recast), 2008 O.J. L 293/3, arts. 2(11), 4, [hereinafter Regulation No. 1008/2008] (defining a "Community air carrier").

[63] *See* Pernice and Kuzhym, *supra* note 60.

carriers free to explore intra-European mergers—the full-blown application of EU competition law to air transport became imperative.[64] The Court's ruling in the 1989 *Ahmed Saeed* case offered the final impetus thereto by declaring that the prohibition on abuse of dominance, laid down in Article 102 of TFEU, was fully applicable to the whole of the air transport sector.[65]

The tectonic changes of European integration reached the domain of state aid law.[66] State aid control is a prerequisite for a functioning internal market.[67] Subsidy races between member states and industrial policies unlevel the playing field and distort competition in the market.[68] Until the late 1980s, European airlines were seen as public utilities; owned and controlled by their governments, over time they developed into symbols of national pride and prestige.[69] The legitimate mission of air connectivity became intermingled with the political ambition of carrying the flag in the air, such that airline profitability was almost an afterthought.[70] Political expediency further ballooned airlines into lavish employers.[71] Air transport liberalization exposed these pathologies and inaugurated the control of subsidies in European air transport.[72]

The Commission's contribution to the reorganization of the European airlines has been critical. Aware of the need to operationalize the state aid provisions of the Treaty, the Commission first set out its state aid policy for the sector in its 1984 Civil Aviation Memorandum.[73] Much like air transport liberalization, EU state aid law was phased in to offer the member states the necessary time and space to restructure their airlines before letting

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[64] *See id.*

[65] Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs, Case C-66/86, [1989] E.C.R. I-803, ¶ 33.

[66] *See* TFEU, *supra* note 43, arts. 107–09, 2012, O.J. 326/47, at 91–93.

[67] *See generally id.*

[68] Paul Stephen Dempsey, *Competition in the Air: European Union Regulation of Commercial Aviation*, 66 J. Air L. & Com. 979, 1003 (2001).

[69] *See id.* at 983–84.

[70] *See id.*

[71] *See* Comitè Des Sages For Air Transport, *Expanding Horizons: Civil Aviation in Europe, An Action Programme for the Future*, 29 J. L. & Econ. 135, 137 (1994), https://bib.kuleuven.be/rbib/collectie/archieven/etl/1994-2.pdf [https://perma.cc/73JL-K7QK] (describing the root of the problem by the Chairman) ("Almost regularly, these [national] carriers were used by governments as an instrument to promote trade, or their [own] aeronautical industry, or foreign political links or domestic employment – all without regard to the economic implications or commercial significance.").

[72] *See generally id.* at 145.

[73] Commission of the European Communities, Civil Aviation Memorandum No. 2: Progress Towards the Development of a Community Air Transport Policy, COM (84) 72 Final (Mar. 1984) [hereinafter 1984 Memorandum].

them compete on the merits.[74] The first airline restructuring cases notified to the Commission (i.e., Sabena,[75] Air France,[76] and Iberia[77]) were assessed under the 1984 Memorandum somewhat lightly. Over time, state aid control tightened.[78] The 1984 Memorandum was superseded by the 1994 Aviation Guidelines, an instrument that became synonymous with the high-profile rescue and restructuring operations of the mid-1990s and mid-2000s.[79]

Oscillating between strictness and leniency, the 1994 Aviation Guidelines reflected the tension between EU integrationist forces and national political pressure.[80] Thus, while the "one time, last time" principle was established to guarantee that restructuring aid would only be granted once, "exceptional circumstances, unforeseeable and external to the company" provided a justificatory basis for further aid.[81] Moreover, while the "market economy investor" principle was meant to filter out cases where there was no state aid because the state had invested in the airline the way a private investor would have done under similar circumstances, in practice, it was used as an excuse to avoid the operation of the "one time, last time" principle.[82]

By 2005, when a new set of Aviation Guidelines were adopted, the landscape had changed.[83] Airline privatization, a taboo issue in the 1990s, given the EU principle of neutrality with respect to the system of property ownership, had become a natural outcome of restructuring.[84] Low-cost airlines were making inroads into

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74 *See id.* at 29, ¶ 46.

75 *See* Commission Decision No. 91/555/EEC (Sabena), 1991 O.J. L 300/48.

76 *See* Commission Press Release, IP/91/1024 (Nov. 20, 1991).

77 *See* Commission Decision No. 92/294/EEC (Iberia), 1992 O.J. L 156/17.

78 *See* Commission Communication to Member States on Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State Aids In the Aviation Sector, 1994 O.J. C 350/5, 7 [hereinafter 1994 Guidelines].

79 *See id.* at 7.

80 *See id.* at 6.

81 *See id.* at 6–7.

82 *See* Antigoni Lykotrafiti, *The Intersection between the Market Economy Investor Principle and the One Time-Last Time Principle in the Context of Airline Restructuring Operations*, Research Handbook on State Aid Law, 105–23 (Erika Szyszczak ed., 2011).

83 Commission Communication on Community Guidelines on Financing of Airports and Start-up Aid to Airlines Departing from Regional Airports, 2005 O.J. C 312/01, 5.

84 *See* TFEU, *supra* note 43, art. 345 ("The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership."); *see also* 1994 Guidelines, *supra* note 78, ¶ 39 ("The Commission cannot follow the recommendation of the Comité des Sages that the restructuring has to lead to privatization. This would be contrary to Article 222 of the EC Treaty which is neutral with regard to property ownership.").

Europe's regional airports, creating suspicion of illegal subsidization from local authorities and publicly owned airports for the purposes of promoting regional development.[85] The adoption of the 2005 Aviation Guidelines marked the second phase of EU state aid control, which was concerned with low-cost carriers and their affairs with regional airports.[86] The Commission's zeal to unveil illegal subsidies, allegedly hidden in low airport charges, did not yield spectacular results.[87] However, it introduced the airport into the state aid equation, leading naturally to the current 2014 Aviation Guidelines, which were concerned in principle with the financing of airport infrastructure.[88] Airport privatization is now the epicenter of EU state aid control.[89]

The gradual development of European air transport law, combined with the application of EU competition and state aid law in air transport, completed the Single Aviation Market (SAM). However, in industries as global as aviation, a level playing field in domestic markets, even of the EU size, can easily be tilted unless combined with conditions of fair competition internationally.[90] The next section examines the external dimension of the EU SAM.

2. The external dimension of the EU Single Aviation Market

The US external aviation policy has had unintended consequences for the completion of the EU SAM.[91] The competitiveness of US airlines since the dawn of civil aviation has enabled the US to pursue a liberal policy in international air transportation.[92] However, the bilateral regulation of market access in air transport by means of bilateral ASAs restricted the operations of American airlines in foreign markets.[93] In the late 1970s, the US deregulated its domestic market and passed legislation to address "unjustifiable or unreasonable restrictions on access of a US air carrier to foreign markets."[94] What followed was a renegotiation of

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[85] Commission Decision No. 2004/393/EEC (Charleroi), 2004 O.J. L 137/1.

[86] Commission Communication on Guidelines on State Aid to Airports and Airlines, *2014 O.J. C 99/3, ¶ 10.*

[87] *See generally id.* at 4, ¶ 2.

[88] *See id.* at 6, *¶ 11.*

[89] *See id.* at 11, *¶ 28.*

[90] *See infra* Section II.A.2.

[91] *See discussion id.*

[92] Paul Stephen Dempsey, *The Evolution of Air Transport Agreements*, 33 ANNALS AIR & SPACE L. 127, 131 (2008).

[93] *See id.*

[94] *See* 49 U.S.C. § 41310 (c)(B).

its bilateral ASAs with like-minded states that culminated in the first generation of open skies agreements.[95] A few years later, when air transport liberalization in the EU was in full swing, the US allowed foreign airlines to serve underserved US airports extra-bilaterally.[96] This initiative provided the impetus for the 1992 US open skies policy, "designed to liberalize, to the maximum extent, the aviation markets between and beyond the US and Europe."[97]

The European Commission has been vocal about the need for an EU external aviation policy since its 1979 Memorandum, where it put forward a general argument in favor of concertation of the Member States' negotiating positions toward international organizations and third countries.[98] However, the Council did not agree to *ex-ante* consultations on the conclusion of bilateral ASAs, with the Commission reiterating the need for coherence in the actions of Member States in its 1984 Memorandum.[99] In 1990, the Commission expressed the view that market access in air transport fell within the ambit of the common commercial policy, where the Community had exclusive competence, and called upon the Council to mandate it to negotiate air transport agreements with third countries on behalf of the Member States.[100] The Council rejected the Commission's proposals in 1993, by which time the Netherlands had already entered into an open skies agreement with the US,[101] containing, *inter alia*, a traditional nationality clause that the Commission had labelled as discriminatory in its

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95 *See* Dempsey, *supra* note 92, at 142.

96 *See id.* at 157–58 (analyzing the US "Cities Program").

97 *See generally id.*

98 *See* 1979 Memorandum, *supra* note 47, at 16, ¶ 42 ("It is therefore indispensable to ensure a continuous concertation at Community level on international issues, which influence or are influenced by actions in air transport in the Community."); *id.* at 16, ¶ 43 ("Although it may be correct to say that some advantages obtained by Member States in individual bilateral negotiations, e.g., with the USA, could be prejudiced by the introduction of the Community dimension, and even if the interests of Member States and European airlines may sometimes diverge, a general argument in favour of concertation of negotiating positions remains.").

99 *See* 1984 Memorandum, *supra* note 73, at 13, ¶ 21.

100 *See* Commission of the European Communities, Proposal for a Council Decision on a Consultation and Authorization Procedure for Agreements Concerning Commercial Aviation Relations Between Member States and Third Countries, COM (90) 17 Final, at 13–14, ¶ 44–48 (Feb. 1990); *see also* Commission of the European Communities, Proposal from the Commission to Amend the Proposal for a Council Decision on a Consultation and Authorization Procedure for Agreements Concerning Commercial Aviation Relations Between Member States and Third Countries, COM (92) 434 Final (Nov. 1993).

101 *See* Pablo Mendes de Leon, *Before and After the Tenth Anniversary of the Open Skies Agreement Netherlands-US of 1992*, 27 Air & Space L. 280 (2002) (analyzing the Council's decision and the open skies agreement).

1992 Communication to the Council on "Air Transport Relations with Third Countries."[102]

In defiance of the Commission's vision for an EU external aviation policy, and despite its request to the member states to eliminate the incompatibilities in their bilateral ASAs with non-member countries with the *acquis communautaire*, by 1996 another six EU member states had concluded open skies agreements with the US, containing national designation clauses.[103] Under pressure from the growing momentum of the US open skies policy and the Commission's threat of legal action, the Council gave the latter a limited mandate to initiate preliminary talks with the US on a multilateral air transport agreement.[104] However, the limited scope of the mandate was deemed insufficient by the US as a basis for negotiations, setting the Commission back to square one.[105] With four additional Member States now negotiating open skies agreements with the US and the Council unwilling to consent to a comprehensive mandate, the Commission reached a tipping point, resulting in infringement proceedings by the Commission against the member states.[106]

Called upon to delineate the Union's competence in external aviation relations, in its landmark 2002 *Open Skies* judgments,[107] the Court ruled that while the EU does not have exclusive external competence to conclude ASAs with third countries (the Member States having retained their sovereignty in this area), it does have such exclusive competence whenever it has adopted internal rules relating to the treatment of third-country nationals or has achieved complete harmonization in a certain area.[108] The latter

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[102] Commission of the European Communities, Communication from the Commission to the Council: Air Transport Relations with Third Countries, COM (92) 434 Final, at 19, ¶ 43 (Oct. 1992).

[103] *Id.* at 33, ¶ 5; *see* Mendes de Leon *supra* note 101, at 295.

[104] *See* Antigoni Lykotrafiti, *Consolidation and Rationalization in the Transatlantic Air Transport Market - Prospects and Challenges for Competition and Consumer Welfare*, 76 J. Air L. & Com. 661, 683 (2011).

[105] *See id.* at 684.

[106] *See id.* at 683–84 (detailing the sequence of events).

[107] *See generally* Commission v. Denmark, Case C-467/98, [2002] E.C.R. I-9519; Commission v. Sweden, Case C-468/98, [2002] E.C.R. I-9575; Commission v. Finland, Case C-469/98, [2002] E.C.R. I-9627; Commission v. Belgium, Case C-471/98, [2002] E.C.R I-9681; Commission v. Luxembourg, Case C-472/98, [2002] E.C.R. I-9741; Commission v. Austria, Case C-475/98, [2002] E.C.R. I-9797; Commission v. Germany, Case C-476/98, [2002] E.C.R. I-9855; Commission v. United Kingdom, Case C-466/98, [2002] E.C.R. I-9427.

[108] Belgium, [2002] E.C.R I-9681, ¶ 96–97.

is not the case in the area of external aviation relations.[109] However, the former has materialized in certain areas,[110] where the EU is solely competent, and the Member States, when negotiating bilateral ASAs with non-member countries, should cooperate closely with the EU institutions to fulfil the requirement of unity in the international representation of the EU.[111] In addition, the Court pronounced that whenever the EU expressly confers on its institutions powers to negotiate with non-member countries, it acquires exclusive competence.[112]

Called upon to decide on the compatibility of the nationality clauses in bilateral ASAs between the Member States and the US with the EU freedom of establishment, the Court found such clauses to be discriminatory, since they entitled the US to demand the designation of nationally owned and controlled airlines, defying the concept of an EU air carrier and frustrating the effective exercise of the EU freedom of establishment.[113]

The *Open Skies* rulings constitute an inflection point in the EU external aviation policy. By delineating the Union's external competence in air transport and establishing the obligation of the Member States to ensure that commitments assumed in bilateral ASAs are in harmony with EU law, they ended the long taxiing of the EU external aviation policy, signaling the initiation of the take-off.[114] The Court's rulings propelled integration forward by changing the dynamics within the institutional architecture of

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[109] *See* TFEU, *supra* note 43, art. 3 (listing the areas where the EU has exclusive competence); TFEU, *supra* note 43, art. 4 (listing the areas where the EU and the Member States have shared competence, one of these areas is transport); *see also* Belgium, [2002] E.C.R I-9681, ¶ 106.

[110] Council Regulation 2409/92/EEC on Fares and Rates for Air Services, *1992 O.J. L 240/15, art. 1(3)*, (prohibiting third-country airlines from price leading when exercising fifth freedom rights within the Community, but this prohibition is no longer applicable) ("Only Community air carriers shall be entitled to introduce new products or lower fares than the ones existing for identical products."); *see* Common Rules For the Operation of Air Services in the Community Regulation, *supra* note 62, art. 22(1), at 18 ("Community air carriers and, on the basis of reciprocity, air carriers of third countries shall freely set air fares and air rates for intra-Community air services.").

[111] Council Regulation 847/2004/EC on the Negotiation and Implementation of Air Services Agreements Between Member States and Third Countries, 2004 O.J. L 157/7, 1.

[112] *See* Belgium, [2002] E.C.R I-9681, ¶ 96.

[113] *Id.* ¶ 131–44 (summarizing the judgment of the Court).

[114] *See* Commission of the European Communities, Developing the Agenda for the Community's External Aviation Policy, COM (2005) 79, 2, ¶ 2 Final (Mar. 2005) [hereinafter External Agenda].

the EU.[115] The Council's resistance to a comprehensive mandate was curbed and the Commission was finally authorized to negotiate an air transport agreement with the US.[116] At the same time, the shared competence between the Member States and the EU in external aviation relations ruled out the idea of a *carte blanche* for the Commission to negotiate air transport agreements on behalf of the EU and its Member States.[117] Instead, the Council agreed to individual mandates provided that "the added value" of any EU-level agreement is clearly demonstrated in each case.[118]

The most important dimension of the EU external aviation policy concerns the reconceptualization of bilateral ASAs.[119] The model of bilateral ASAs pivots around the principle of national sovereignty, which is the cornerstone of the 1944 Chicago Convention.[120] Supranationalism pursued by the EU substitutes the Union interest for the national interests of the Member States and requires harmonized rules domestically and the assumption of uniform obligations internationally.[121] In addition, nesting between the national and the international, supranationalism is an intermediary stage of regulatory globalization.[122]

The creation of a single European aviation market necessitated the succession of bilateral ASAs by EU–level air transport agreements (ATAs) with non-member countries and the broadening of

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115 *See generally id.*

116 Commission Press Release IP/03/806 (June 5, 2003).

117 External Agenda, *supra* note 114, at 3.

118 Commission of the European Communities, Communication from the Commission On Relations Between the Community and Third Countries in the Field of Air Transport, COM (2003) 94 Final, ¶ 71 (Feb. 2003).

119 *See generally* Commission of the European Communities, The EU's External Aviation Policy – Addressing Future Challenges, COM (2012) 556 Final, para 6, 35-37, (Sept. 2012). The EU external aviation policy is based on three pillars. The first pillar has by and large fulfilled its mission, i.e., the replacement of discriminatory nationality clauses in member states bilateral ASAs with third countries with EU clauses. This was achieved either by means of individual negotiations between the member states and their bilateral partners or by means of EU horizontal agreements with third countries, negotiated by the Commission on behalf of the member states. The second pillar is concerned with air services agreements between the EU (and its member states) and its neighboring countries with a view to forming a Common Aviation Area. The third pillar is concerned with comprehensive air transport agreements between the EU (and its member states) and key partners. *See id.* at 35–37, ¶ 6.

120 *See* Chicago Convention, *supra* note 5, art. 1, at 2 ("The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.").

121 *See* Andrew R. Goetz & Brian Graham, *Air Transport Globalization, Liberalization and Sustainability: Post 2001 Policy Dynamics in the United States and Europe*, 12 J. TRANSP. GEOGR. 265, 267–69.

122 *See generally id.*

the scope of such agreements to cover, besides the typical commercial issues of market access, capacity and pricing, issues to do with fair competition and subsidies, environmental and consumer protection, and social dumping.[123] The EU model to address these challenges is based on comprehensive ATAs between the EU and its Member States, of the one part, and non-member countries or blocs of countries, of the other part.[124] These so-called mixed agreements ("mixing" EU and Member States' competences) are characterized as "comprehensive" because they purport to regulate as many aspects of air transport as is feasible.[125]

So far, the EU has signed comprehensive ATAs with the US (2007, 2010),[126] Canada (2009),[127] Qatar (2021)[128] and ASEAN (2022),[129] as well as with a number of neighboring countries, namely Tunisia, Morocco, Israel, and Jordan (in the name of "Euro-Mediterranean Aviation Agreements"), and the Western Balkans States, Moldova, Georgia, Armenia, and Ukraine (in the name of "Common Aviation Area Agreements").[130]

B. ASEAN

1. ASEAN Single Aviation Market - Overview

The ASEAN consists of ten countries in Southeast Asia, namely, Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the

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123 *See generally id.* at 267–68.

124 *See generally* Valentina Morandi, et al., *EU-US Open Skies Agreement: What is Changed in the North Transatlantic Skies?* 53 TRANSP. J. 305, 306 (2014).

125 *See id.* (stating these agreements had rules regarding "routes, airlines, capacity, frequency, and pricing restrictions.").

126 Commission Decision No. 2007/339/EC (Air Transport Agreement, European Community and its Member States-U.S.), 2007 O.J. L 134/1, art. 1, ¶1 [hereinafter U.S.–EU ATA].

127 Commission Decision No. 2010/417/EC (Agreement on Air Transport between Canada–European Community and its Member States) 2009 O.J. L 207/32, art. 1, ¶ 1 [hereinafter EU–Canada ATA].

128 Council Decision No. 2021/1920 (Agreement on Air Transport Between the European Union and its Member States–Qatar), 2021 O.J. L 391/1, art. 1, ¶1 [hereinafter EU–Qatar].

129 *See* European Commission, Proposal for a Council Decision on the signing, on behalf of the Union, of the Comprehensive Air Transport Agreement between the Member States of the Association of Southeast Asian Nations, and the European Union and its Member States, COM (2022) 194 Final (May 2022) [hereinafter ASEAN].

130 *See* European Commission, Proposal for a Council Decision on the Conclusion, on Behalf of the European Union, of the Euro–Mediterranean Aviation Agreement between the European Union and its Member States, of the one part, and the Republic of Tunisia, of the other part, COM (2021) 153 Final (Apr. 2021).

Philippines, Singapore, Thailand, and Vietnam.[131] The idea of an ASEAN Single Aviation Market was first conceived in 2004.[132] Members of ASEAN shared the view that air transport would be an integral component of the ASEAN Economic Community (AEC) that they were seeking to establish.[133] Accordingly, ASEAN designated air travel (or air transport) as one of the 12 priority sectors for economic integration in November 2004.[134] Simultaneously, "the Action Plan for ASEAN Air Transport Integration and Liberalization" 2005–2015 and the Roadmap for Integration of the Air Travel Sector (RIATS) were adopted by the ASEAN transport ministers in November 2004.[135] The Action Plan defined the long-term goal of ASEAN regional liberalization as concluding "an ASEAN Multilateral Agreement on Air Services by 2015 by significantly removing restrictions on market access so as to achieve a single air transport market."[136] RIATS also identified the following specific goals and target dates:

Deadline	Passenger	Cargo
2005	- Unlimited 3rd and 4th freedom flights for all designated points within ASEAN sub-regions	
2006	- At least two designated points in each country in the ASEAN sub-regions - Unlimited 5th freedom traffic between designated points in the ASEAN sub-regions	- Unlimited 3rd and 4th freedom flights
2008	- At least two designated points in each country in the ASEAN sub-regions - Unlimited 3rd and 4th freedom flights between capital cities	- Unlimited 3rd, 4th, and 5th freedom flights
2010	- Unlimited 5th freedom flights between capital cities by 2010	

Table 1—2004 ASEAN Roadmap for Integration of the Air Travel Sector[137]

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131 ASEAN, *supra* note 129, art. A.

132 *See ASEAN Framework Agreement for the Integration of Priority Sectors*, ASEAN (Nov. 29, 2004), https://ftacenter.kemendag.go.id/cfind/source/files/atiga/asean-framework-agreement-for-the-integration-of-priority-sectors.pdf [https://perma.cc/L9FL-P9G4].

133 *See id.*

134 *See id.* art. 2, ¶ 1(a)(ii).

135 *See* ASEAN Secretariat, *Action Plan for ASEAN Air Transport Integration and Liberalization*, in ASEAN Documents Series 2004 221 (2005), https://asean.org/wp-content/uploads/images/archive/ADS-2004.pdf [https://perma.cc/7LGQ-PAW6].

136 *Id.* at 223.

137 *See generally id.* at 221–26.

Based on the roadmap and expanded goals, three legal agreements were adopted by ASEAN member states, namely, the 2009 Multilateral Agreement on Air Services (MAAS),[138] the 2009 Multilateral Agreement for Full Liberalization of Air Freight Services (MAFLAFS),[139] and the 2010 Multilateral Agreement for Full Liberalization of Passenger Air Services (MAFLPAS).[140] The three agreements and their implementing protocols have fostered connectivity within ASEAN.[141]

2. Market Access Liberalization

Given ASEAN's lack of supranational institutions (in contrast with the EU), its approach has been gradual and incremental. Whereas aviation is only part of the larger EU project of regional integration, ASEAN's single aviation market objective is entirely voluntary in that individual member states can accept liberalization commitments as and when they feel ready.[142] As a result, reluctant states can hold up the project if they do not see participation as being in their interest.[143]

"Indeed, [there have been] two different voices [among] ASEAN member states. One camp advocates that ASEAN should speed up air transport integration and liberalization. Essentially, this camp thinks that the ASEAN SAM should be as integrated and comprehensive as the EU SAM and criticizes its slow progress.[144] The other camp is not fully convinced about what are, in its view, radical developments."[145] Regardless, ASEAN has "successfully completed the basic integration of the aviation market by providing the 3rd, 4th, and 5th freedoms of the air for both

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[138] ASEAN Multilateral Agreement on Air Services, May 20, 2009, https://cil.nus.edu.sg/databasecil/2009-asean-multilateral-agreement-on-air-services/ [https://perma.cc/5SEU-P7GB] [hereinafter 2009 MAAS].

[139] ASEAN Multilateral Agreement on the Full Liberalisation of Air Freight Services, May 20, 2009, https://cil.nus.edu.sg/databasecil/2009-asean-multilateral-agreement-on-the-full-liberalisation-of-air-freight-services/ [https://perma.cc/SK4Z-7Q37] [hereinafter 2009 MAFLAS].

[140] ASEAN Multilateral Agreement on Full Liberalisation of Passenger Air Services, Nov. 12, 2010, https://cil.nus.edu.sg/wp-content/uploads/2017/07/2010-ASEAN-Multilateral-Agreement-on-Full-Liberalisation-of-Passenger-Air-Services.pdf [https://perma.cc/SK4Z-7Q37].

[141] *See* 2009 MAAS, *supra* note 138; 2009 MAFLAS, *supra* note 139; Passenger Air Services, *supra* note 140.

[142] Jae Woon Lee, *Strengthening the ASEAN Single Aviation Market: Implementing the AEC Blueprint 2025 for Air Transport*, 52 POL'Y IDEAS 1, 9 (2018).

[143] *Id.* at 12.

[144] *Id.* at 5.

[145] *Id.*

passenger and cargo services" through the legal instruments listed in the table below.[146]

Parent Agreement	Protocol	Ratification
2009 MAAS	Protocols 1 to 4 (secondary cities in sub-regions)	All states
	Protocol 5 (Unlimited 3rd and 4th freedoms between capital cities)	
	Protocol 6 (Unlimited 5th freedom between capital cities)	
2010 MAFLPAS	Protocol 1 (2010) (Unlimited 3rd and 4th freedoms between all cities)	All 10 member states (For Indonesia, only five international airports are included: namely, Jakarta, Surabaya, Medan, Bali, and Makassar)
	Protocol 2 (2010) (Unlimited 5th freedom between all cities)	
	Protocol 3 (2017) (Domestic code-share rights between points within the territory of any other ASEAN member states)	All 10 member states except Indonesia
	Protocol 4 (2018) (Co-terminal rights between points within the territory of any other ASEAN member state)	All 10 member states except Indonesia
2009 MAFLAFS	Protocol 1 (Unlimited 3rd, 4th, and 5th freedoms between designated points)	All states
	Protocol 2 (Unlimited 3rd, 4th, and 5th freedom between all points with international airports)	All states

Table 2—Legal Instruments of ASEAN Single Aviation Market

[146] *Id.* at 15.

It is worth mentioning that Indonesia included significant reservations to Protocol 1 and Protocol 2 of the 2010 MAFLPAS when it implemented them through domestic legislation.[147] According to Indonesian Presidential Regulation No.12/2016, "only five Indonesian airports are part of the agreement: Soekarno–Hatta International Airport (Jakarta), Kualanamu International Airport (Medan), Juanda International Airport (Surabaya), Ngurah Rai International Airport (Bali), and Sultan Hasanuddin International Airport (Makassar)."[148] This limited approach also applies to the EU–ASEAN CATA, which will be further discussed in Section 3.[149]

ASEAN's diversity is key to understanding the competitive dynamic in its aviation market. Member States differ significantly in such areas as demographics, economic development, political system, and religion.[150] By way of example, Table 3 below shows key indicators related to the ASEAN aviation sector.

Country	Total land area (km^2)	Total population (millions)	Number of airports	Domestic air passenger traffic (thousands)	International air passenger traffic (millions)
Brunei	5,769	0.437	1	0	1.845
Cambodia	181,035	16.700	8	699	10.326
Indonesia	1,860,360	273.500	297	79,466	37.278
Laos	236,800	7.300	13	1,156	2.312
Malaysia	330,290	32.400	41	55,522	53.840
Myanmar	676,577	54.400	34	2,981	5.538
Philippines	300,000	109.600	87	59,281	29.363
Singapore	715	5.700	2	0	67.601
Thailand	513,120	69.800	36	72,293	81.427
Vietnam	330,951	97.300	22	37,453	41.747

Table 3—Basic ASEAN Indicators[151]

[147] *Id.* at 15.

[148] James Jordan, *ASEAN Liberalisation: Open Skies Achieves Full Ratification*, HFW (May 2016), https://www.hfw.com/ASEAN-liberalisation-open-skies-achieves-full-ratification-May-2016 [https://perma.cc/8S48-ZF4T].

[149] *See infra* Section III.

[150] *See infra* Table 3.

[151] CFR.org Editors, *What Is ASEAN?*, Council on Foreign Relations (Sept. 18, 2023), https://www.cfr.org/backgrounder/what-asean [https://perma.cc/6SL3-BTCS].

In brief, the five largest countries in ASEAN (Indonesia, Malaysia, the Philippines, Thailand, and Vietnam) have sizeable domestic markets.[152] In fact, the domestic markets of Indonesia and the Philippines are much bigger than their international markets.[153] It is also important to note that the international market of Singapore (which does not have a domestic market) is smaller than the domestic market of Indonesia.[154] A list of the top ten airlines in ASEAN by number of seats, as seen below in Table 4, also illustrates the size of the market.

Country	Airline	Seats
Indonesia	Lion Air	3,238,564
Malaysia	AirAsia	2,473,620
Vietnam	Vietnam Airlines	2,312,428
Vietnam	Vietjet	1,982,010
Indonesia	Batik Air	1,854,240
Philippines	Cebu Pacific Air	1,832,365
Thailand	Thai AirAsia	1,781,998
Singapore	Singapore Airlines	1,632,672
Philippines	Philippine Airlines	1,448,397
Malaysia	Malaysian Airlines	1,356,966

Table 4—Top 10 Airlines by Seats (December 2023)[155]

While airlines from Indonesia (and to a lesser degree, airlines from Vietnam and the Philippines) focus on their large domestic markets, airlines from Singapore depend on the international market.[156] Unlike the EU, which is well-connected by train and road transportation, aviation is virtually the only mode of transportation that connects ASEAN.[157] This competitive dynamic has greatly affected the negotiation and implementation of the ASEAN single aviation market.[158] Understandably, Singapore has been on the liberal wing of the spectrum, while Indonesia has

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[152] *See id.*

[153] *See id.*

[154] *See id.*

[155] *Discover the Busiest Airports, Airlines and Flight Routes in South East Asia This Month*, OAG, https://www.oag.com/south-east-asia-aviation-flight-data [https://perma.cc/LVN9-D7VB].

[156] *See id.*

[157] *See generally id.*

[158] *See generally id.*

been on the conservative wing.[159] Indonesia essentially believes that ASEAN has already achieved sufficient integration and liberalization in the air transport sector.[160]

Now that the third, fourth, and fifth freedoms of the air have been granted within ASEAN, the next logical step toward liberalizing market access would be opening up the seventh freedom—an airline's right to carry traffic between two foreign countries without a service to its home country.[161] But since the seventh freedom is viewed as a serious threat to local air carriers, most ASEAN states would not move toward relaxing it without a tangible benefit for their national carriers or people.[162] Furthermore, any discussion of the eighth or ninth freedoms, which involve domestic cabotage, would be opposed by countries with sizable domestic markets.

3. "ASEAN Community Carrier" and Collateral Benefits

Along with market access restrictions, ownership and control requirements are the other legal barrier to air transport liberalization. As noted, the EU was the first to introduce the concept of the "community carrier," under which national ownership and control of air carriers was replaced by EU ownership and control.

2009 MAAS and 2009 MALFAS provide the groundwork for what can be termed an "ASEAN community carrier."[163] Article 3(2)(a)(ii) of MAAS and MALFAS provides that the ownership and control requirement can be met by "one or more ASEAN Member States and/or its nationals."[164] Hence, an airline that is substantially owned and effectively controlled by ASEAN interests in the aggregate would fulfill the ownership and control requirement.[165]

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159 *The Impact of International Air Service Liberalization on Singapore*, IATA (July 2009) https://www.iata.org/en/iata-repository/publications/economic-reports/singapore-benefits-from-further-liberalization/ [https://perma.cc/RD2S-LWWN].

160 *See* Batari Saraswati and Shinya Hanaoka, *Aviation Policy in Indonesia and Its Relation to ASEAN Single Aviation Market*, 10 J. E. Asia Soc'y Transp. Stud. 2161, 2169 (2013).

161 Jae Woon Lee, *ASEAN Air Transport Integration and Liberalization: A Slow but Practical Model*, in Asean Law in the New Regional Economic Order: Global Trends and Shifting Paradigms 186, 202 (Pasha Hsieh & Bryan Mercurio eds., 2019).

162 *See id.*

163 *See* 2009 MAAS, *supra* note 138; 2009 MAFLAS, *supra* note 139.

164 *See* 2009 MAAS, *supra* note 138, art. 3(2)(a)(ii); 2009 MAFLAS, *supra* note 139, art. 3(2)(a)(ii).

165 *See id.*

The problem with the ASEAN community carrier concept is that there is a risk that a contracting state will reject an application from an ASEAN community carrier, even if the airline is substantially owned and effectively controlled by ASEAN interests.[166] That is because Article 3(2)(a)(ii) of 2009 MAAS and 2009 MALFAS starts with the prerequisite that a community carrier is "subject to acceptance by a Contracting Party receiving such application."[167] Thus, there is no guarantee that an ASEAN community carrier will have access to all countries in ASEAN, producing uncertainty, which is an obvious disadvantage for any investor planning to establish an ASEAN community carrier.[168]

Having said that, it is important to note that joint venture airlines formed by two different ASEAN nationalities are commonplace in ASEAN.[169] These joint venture airlines typically use the 51/49 model.[170] Pioneered by AirAsia, the joint venture model works as follows: the local owners hold a majority share, while the parent airline group only has a minority share.[171] Although this clearly adheres to the traditional ownership requirement, it is less clear whether the requirement of "effective control" is met since the local majority shareholders often have no experience with aviation.[172] While ownership restrictions are applied rigorously, government officials are given greater leeway in how they apply effective control restrictions.[173] Essentially, ASEAN governments relaxed the effective control test for other ASEAN companies that invest in LCC joint ventures in the region because ASEAN integration and liberalization were underway.[174]

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166 *See id.*

167 *See id.*

168 Alan Khee-Jin Tan, *Toward a Single Aviation Market in ASEAN: Regulatory Reform and Industry Challenges*, 22 Econ. Rsch. Inst. for Asean & E. Asia Discussion Paper Series 1, 20 (2013).

169 *See* Jae Woon Lee & Michelle Dy, *Mitigating "Effective Control" Restriction on Joint Venture Airlines in Asia: Philippine AirAsia Case*, 40 Air & Space L. 231, 232 (2015).

170 *See* Jae Woon Lee, *ASEAN Air Transport Integration and Liberalization: A Slow but Practical Model*, in ASEAN Law in the New Regional Economic Order: Global Trends and Shifting Paradigms 186, 198–99 (Pasha Hsieh & Bryan Mercurio eds., 2019) (listing the ASEAN joint venture airlines).

171 *See* Lee & Dy, *supra* note 169 at 232.

172 *See id.* at 234–53.

173 *See id.*

174 *See id.* at 234–53.

4. External Relations

The ASEAN single aviation market has attempted to establish a common strategy for the group's external relations.[175] Although ASEAN does not have as strong of institutions with the power of enforcement as the EU does, its Member States "have been aware of the need to establish a common external strategy vis-à-vis third countries and regions."[176] China was the first partner with which ASEAN hoped to reach an air transport agreement.[177] ASEAN and China agreed to work toward an ASEAN–China Regional Air Services Agreement in 2007.[178] The negotiations led to the adoption of the 2007 ASEAN–China Aviation Cooperation Framework, which stipulates the "gradual liberalization of cargo and passenger services."[179] Notably, the ASEAN–China Free Trade Agreement was the explicit justification for the ASEAN–China Regional Air Services Agreement, which was subsequently adopted in 2010.[180] The 2007 ASEAN–China Aviation Cooperation Framework states that the ASEAN–China Regional Air Services Agreement should be concluded by 2010 "to support the realization of the ASEAN–China Free Trade Agreement in 2010" and "to implement the agreement thereafter in line with the establishment of the ASEAN–China FTA."[181]

The ASEAN–China Free Trade Area came into effect on January 1, 2010,[182] and the ASEAN–China Air Transport Agreement was subsequently adopted in November 2010.[183] The ASEAN–China Air Transport Agreement and its Protocol 1 provide for unlimited third and fourth freedom access for airlines on both sides, and effectively supersede capacity restrictions in bilateral

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175 *See* Alan Khee-Jin Tan, *Aviation Policy in the Philippines and the Impact of the Proposed Southeast Asian Single Aviation Market*, 34 Air & Space L. 285, 303 (2009).

176 *See id.*

177 *See* 2007 ASEAN–China Aviation Cooperation Framework, ASEAN–CHINA para. 6 (Nov. 2, 2007).

178 *See id.* at *para 1.*

179 *Id.* at *para 6.*

180 *Id.* at *para 1,5.*

181 *See id.; see also ASEAN Transport Instruments and Status of Ratification*, ASEAN (July 2022), https://asean.org/wp-content/uploads/2022/07/Ratification-Status-of-Air-Transport-Agreements-as-of-July-2022.pdf [https://perma.cc/DC2B-7WXX].

182 *See e.g.*, Sarah Y. Tong & Catherine Chong, *CHINA-ASEAN Free Trade Area in 2010: A Regional Perspective*, Nat'l Univ. of Sing. E. Asia Inst., para. 1.1 (Apr. 12, 2010) (discussing the ASEAN–China FTA).

183 *See* Alan Khee-Jin Tan, *The 2010 ASEAN-China Air Transport Agreement: Placing the Cart before the Horse?*, 37 Air & Space L. 35, 35 (2012) (detailing the ASEAN-China Air Transport Agreement).

ASAs between individual ASEAN states and China.[184] The two sides also concluded a Protocol 2 on fifth freedom rights that would take the Air Transport Agreement beyond third and fourth freedom liberalization.[185] However, Protocol 2 offers only a finite list of secondary cities through which fifth freedom rights can be exercised.[186] Nevertheless, it is worth remembering that Protocol 1 is one of the very few open skies agreements that China has signed. ASEAN carriers have unlimited penetration into China, which would not have been possible if the ten ASEAN member states had negotiated with China separately.[187]

The EU became the second partner to sign an air transport agreement with ASEAN, which is currently discussing similar agreements with India, Japan, and Korea.[188] ASEAN has long hoped to secure an open skies agreement with India, but despite a promise to work toward concluding an Air Transport Agreement based on "open skies" principles covering both air freight and passenger services,[189] there has been no substantial progress thus far. As for the negotiations with Japan and Korea, the question of fifth freedom traffic rights is the largest obstacle.[190] While ASEAN wants unlimited fifth freedom, neither Japan nor Korea wants to open their respective capital cities as a fifth freedom point, which would allow ASEAN carriers to carry traffic on lucrative routes (e.g., Tokyo to New York and Seoul to Los Angeles).[191]

As noted, the EU and the ASEAN Single Aviation Markets have achieved different degrees of internal integration. The EU freedom of establishment, which enabled the EU to develop its external aviation policy in the aftermath of the open skies judgments, is not yet established in ASEAN.[192] Nonetheless, this asymmetry

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184 *See* Air Transport Agreement Between The Governments of The Member States Of The Association Of Southeast Asian Nations And The Government of The People's Republic of China, ASEAN–CHINA, art. 23, ANNEX III (Nov. 12, 2010).

185 Protocol 2 on Fifth Freedom Traffic Rights, ASEAN–CHINA (Dec. 19, 2014).

186 *See id.*

187 *See id.*

188 *See* Press and Information Team of the Delegation to ASEAN, *supra* note 22.

189 *Plan of Action to Implement the ASEAN–India Partnership for Peace, Progress and Shared Prosperity*, ASEAN (May 9, 2012), http://asean.org/?static_post=plan-of-action-to-implement-the-asean-india-partnership-for-peace-progress-and-shared-prosperity-2010-2015 [https://perma.cc/J7F5-6XYC].

190 *Singapore Airlines Promotes ASEAN–EU/Japan/Korea Open Skies to Gain More USA Fifth Freedom Flights*, CAPA (Aug. 18, 2016), https://centreforaviation.com/analysis/reports/singapore-airlines-promotes-asean-eujapankorea-open-skies-to-gain-more-usa-fifth-freedom-flights-296183.

191 *See id.*

192 *See generally id.*

does not cancel out the isomorphic relationship between the two markets, which is what has enabled the two blocs to transition from regional integration to interregional integration.

III. KEY FEATURES OF THE EU–ASEAN CATA

The EU–ASEAN CATA (CATA) follows an approach that is similar to previous CATAs that the EU has negotiated with key partners by combining the (conditional) liberalization of air services with a high level of regulatory cooperation.[193] Where the CATA contains innovative elements, we will indicate them as such to draw attention. For easier access to this text—which is highly complex—we explain key features along the following structure: (1) route and traffic rights; (2) air carrier designation; (3) air carrier ownership and control; (4) fair competition; (5) procedural provisions; and (6) regulatory cooperation and the Joint Committee.

Regarding the structure of the CATA, it is to be noted that besides the main text, the Annex (Articles A to O) also contains substantive provisions, which are provisional or permanent in nature and complement or adjust the provisions in the main text.[194] The Annex covers several issues, including route and traffic rights through designation, fair competition, doing business, non-discrimination, reciprocity, and a special review process for the Annex.[195] The Annex reflects special arrangements that have been negotiated to take into account the specific needs or interests of certain ASEAN States.[196] We will highlight relevant provisions in the Annex when concisely discussing the key features of the CATA below.

A. Route and traffic rights

Like any other EU CATA, the EU–ASEAN CATA reflects an ambitious agenda for the liberalization of air services, subject to the actual interests and willingness of EU and ASEAN Member

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193 *See* Joint Press Release on the Signing of the ASEAN–EU Comprehensive Air Transport Agreement, ASEAN (Oct. 17, 2022), https://asean.org/joint-press-release-on-the-signing-of-the-asean-eu-comprehensive-air-transport-agreement/ [https://perma.cc/AVD2-SL9V].

194 European Commission, Comprehensive Air Transport Agreement Between the Member States of the Association of Southeast Asian Nations, and the European Union and its Member States, COM (2022) 194 Final (Oct. 2022), Annex, [hereinafter ASEAN–EU CATA].

195 *Id.*

196 *See id.*

States.[197] The outcome is the result of sometimes rather differing interests and may therefore be regarded as a success, taking into account the significant weight of the two blocs in the global air transport market.[198]

Starting with the route rights set out in the *Route schedule* under Article 3, we can note that the text follows previous EU CATAs by being fully open except for behind points.[199] One notable exception to this openness may be found in Article A of the Annex, pursuant to which serviceable destinations in Indonesia, in relation to passenger and combination air services, are restricted to five points.[200]

The traffic rights regime under Article 3 is clearly the outcome of extensive negotiations reflecting a balance of interests and the shared objective of moving toward an ambitious level of liberalization.[201] Third and fourth freedom traffic rights[202]—whether scheduled or non-scheduled, passenger, cargo, or combination services—are fully liberalized between each EU Member State and each ASEAN State as of the entry into force (in practice, as of the administrative application) of the CATA, which is already an important step forward given the high number of partner states.

The exercise of fifth freedom traffic rights, on the other hand, is subject to limitations in relation to passenger and combination services.[203] Paragraphs 4 and 5 contain similar restrictions for EU and ASEAN air carriers, respectively, including: (1) Upon the entry into force of the CATA, air carriers may operate seven weekly passenger and combination flights serving intermediate and/or beyond points in accordance with the route schedule;[204] (2) Two years after the entry into force of the CATA, another seven weekly

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197 *See id.* at 5.

198 *See id.*

199 *See Current Model Open Skies Agreement Text*, U.S. DEP'T OF STATE (Jan. 12, 2012), https://2009-2017.state.gov/documents/organization/114970.pdf [https://perma.cc/XC2Q-TUJA] (stating that the U.S.–EU ATA does include behind points just as bilateral air services agreements negotiated by the US in the US Open Skies model agreement).

200 These points being Denpasar, Jakarta, Makassar, Medan, and Surabaya. Air cargo services are not subject to these limitations. *See* ASEAN–EU CATA, *supra* note 194.

201 *See id.* at 16.

202 *See Freedom of Air*, ICAO, https://www.icao.int/pages/freedomsair.aspx [https://perma.cc/9GEM-ZWS5] (explaining traffic rights or freedoms of the air).

203 *See* ASEAN–EU CATA, *supra* note 194, at art. 3, ¶3(f)–4.

204 *See id.*

flights may be operated;[205] (3) The additional seven frequencies added after two years may not be operated on routes between an ASEAN/EU State and a third country where such routes are already being served by an air carrier of that ASEAN/EU State through providing scheduled services, including, in the case of non-stop services, by means of code-sharing;[206] and (4) Article B of the Annex includes further limitations in relation to fifth freedom traffic rights between the EU and Myanmar (until July 1, 2024) and Vietnam, respectively.[207]

While these limitations of fifth freedom services may be seen as rather restrictive at first sight, they should be considered against the baseline: the patchwork of several bilateral ASAs between individual EU and ASEAN States, with some being more or less liberal than others.[208] Furthermore, these limitations do not apply to air cargo services, which are fully liberalized by the CATA, not only between the two blocs but with regard to third countries as well. This is an important achievement given the need for a flexible global framework for air cargo services, as confirmed by the Covid-19 pandemic.[209]

In order to facilitate the exercise of route and traffic rights, the last section of Article 3, *Operational flexibility*, provides high flexibility and extensive operational freedom to air carriers of both sides, as is already the practice in other EU CATAs.[210] These options include: free determination of frequency and capacity; flexible routing; the right to carry transfer, transit and stopover traffic; co-terminalization, and more.[211] At the same time, cabotage is excluded in paragraph 9 in line with established international practice.[212]

B. Air carrier designation

Articles 4 and 5, *Operating authorizations and technical permissions*, eliminate the requirement of airline designation as opposed to traditional bilateral ASAs.[213] This is a regular feature of EU CATAs, and has its roots in the EU internal market

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205 *See id.*
206 *Id.*
207 *Id.* annex, art. B.
208 *See supra* notes 203–07.
209 *See id.*
210 ASEAN–EU CATA, *supra* note 194, at art. 3, ¶ 6.
211 *See id.*
212 *See id.* art. 3, ¶9.
213 *See id.* art. 4.

developed on the basis of a free market approach, which includes the dissociation of air carriers from the State as commercial entities free to make business decisions, where the State maintains oversight responsibilities, but is not supposed to intervene in the management of air carriers.[214] Under this approach, air carriers are free to serve air transport markets as they see fit; thus, there is no need for designation—an administrative or diplomatic act traditionally linking a "flag carrier" to the designating State.[215] The "flag carrier" concept—now obsolete in many countries—views national air carriers as part of the national image or even representative of sovereignty.[216] Within the EU, few would argue that Ryanair—the largest EU air carrier in terms of passenger numbers— is the flag carrier of Ireland simply because its operating license has been granted by Ireland.[217] In practice, doing away with designation simplifies the authorization process and better reflects free market principles.

The following requirements apply to any ASEAN or EU air carrier operating under the CATA: its principal place of business is in the licensing ASEAN or EU State; its effective regulatory control is exercised and maintained by the same State; and it is owned and effectively controlled by the same ASEAN State or, in case of an EU air carrier, by any EU or EEA Member States or Switzerland,[218] or the nationals of such State(s), or both.[219] It is interesting to note that the definitions of "principal place of business" and "effective control" in Article 2[220] follow the wording in EU Regulation 1008/2008,[221] which is the central instrument of the economic regulatory framework for the EU internal air transport market.

C. Air Carrier Ownership and Control

The liberalization of air carrier ownership and control has been on the agenda of the international aviation community for decades at bilateral, regional, and multilateral levels.[222] Some

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214 *See id.*

215 *See id.*

216 *See id.*

217 *See generally id.*

218 Member States of the European Economic Area are EU Member States, Norway, Iceland and Liechtenstein. *See id.* art. 4, ¶ 1(a)(i–iii).

219 *See id.*

220 *See id.* art. 2.

221 Regulation No. 1008/2008, *supra* note 62.

222 *See* Assembly–41st Session, *Resolution A41-27: Consolidated Statement of Continuing ICAO Policies In the Air Transport Field*, ICAO, app. A, § II (Oct. 2022),

progress has been made at the bilateral level, but most noteworthy is the full internal liberalization of air carrier ownership and control within the EU and its external expression in the form of "EU designation."[223] EU designation entails the acceptance by a partner country—in this case the ASEAN States—of the eligibility of any EU air carrier wishing to operate to that partner country from any EU Member State, not only from the one that has granted its operating license.[224] EU designation has been a key element of EU aviation law, and its acceptance by non-EU countries a fundamental objective of EU external aviation policy.[225] As seen in Articles 4 and 5, EU designation has been included in the CATA without a reciprocal recognition of the concept of "ASEAN air carriers" and "ASEAN designation."[226] This is because the integration of the ASEAN Single Aviation Market, in economic regulation but also aviation safety and security, has not yet reached the level of that in the EU.

However, the CATA could have served as the basis for more ambitious interregional liberalization of airline ownership and control between the EU and ASEAN, even if only gradually.[227] For the time being, this is not the case, as Article 6, *Liberalization of ownership and control*, has been carefully drafted without creating any commitment to pursuing liberalization in this area.[228] But at least the door remains open—through the Joint Committee—to future efforts when the right time comes.[229]

There are several provisions in the CATA[230] that follow well-established practices in bilateral ASAs.[231] As important as they may be in regulating specific matters, we do not analyze them in detail, except to highlight a few features that contribute to the exploitation by air carriers of the high level of commercial freedom

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https://www.icao.int/Meetings/a41/Documents/Resolutions/a41_res_prov_en.pdf [https://perma.cc/85BN-9TJK] (explaining the ICAO's policy on the liberalisation of air carrier ownership and control).

223 Peter Van Fenema, *EU Horizontal Agreements: Community Designation and the 'Free Rider' Clause*, 31 AIR & SPACE L. 172, 172–95 (2006).

224 *See id.* at 175.

225 *EU external aviation policy*, EUR. UNION (Oct. 2019); *see also External Aviation Policy*, EUR. COMM'N, https://transport.ec.europa.eu/transport-modes/air/international-aviation/external-aviation-policy_en [https://perma.cc/R3EA-2VJ8].

226 ASEAN–EU CATA, *supra* note 194, at art. 3, ¶ 4–5.

227 *See generally* ASEAN–EU CATA, *supra* note 194.

228 *See id.* art. 6.

229 *See id.*

230 ASEAN–EU CATA, *supra* note 194, at art. 7, 10–16.

231 *See Policy and Guidance Material on the Economic Regulation of International Air Transport*, ICAO, Doc. No. 9587 (2008).

offered by the CATA. Article 9, *Doing business*, is unusual in traditional ASAs as a separate article.[232] Its objective is to underline the importance of the rights of air carriers set out in Article 10, *Commercial operations*.[233] Furthermore, it means that obstacles to "doing business" should be removed not only in the context of Article 10, but also "where such obstacles . . . create distortions to competition, or affect equal opportunities to compete," which seems to extend the applicability of Article 8, *Fair competition*, to "doing business" issues.[234] Article 10, *Commercial operations*, contains modern, liberal clauses allowing air carriers to take advantage of the commercial freedoms in line with their own business decisions, for instance, by having access to the necessary infrastructure, setting up local structures and entering into cooperative marketing arrangements with other air carriers or transport providers.[235] Article 13, *Tariffs*, follows a full liberalization approach whereby air carriers are completely free to set tariffs subject only to the competition laws of the parties.[236]

D. Fair competition

Fair competition has been a contentious issue in the context of the liberalization of international air transport whether bilaterally, regionally or multilaterally.[237] Based on the experience with the establishment and overall functioning of the EU internal air transport market, the EU and its Member States have been among the main advocates on the international scene for fair competition as a fundamental principle, arguing that it should be part of the core issues to be considered in any effort of air transport liberalization.[238]

Probably the most significant instrument that the EU has used to promote the practical application of the fair competition principle is the clauses it has negotiated with its partner States in CATAs.[239] In particular, the EU–Qatar CATA was a reference

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[232] *See* ASEAN–EU CATA, *supra* note 194, at art. 9.

[233] *See id.* art. 10.

[234] *See id.* art. 8, 10.

[235] *See id.* art. 10.

[236] *See id.* art. 13.

[237] *See* Máté Gergely, *Fair Competition in International Air Transport*, 45 Air & Space L. 1, 1–28 (2020).

[238] *See id.* at 7.

[239] *See* Antigoni Lykotrafiti, *What does Europe do about Fair Competition in International Air Transport? A Critique of Recent Actions*, 57 Common Mkt. L. Rev. 831, 845–46 (2020).

point for the EU–ASEAN negotiations.[240] Indeed, Article 8, *Fair competition*, of the EU–ASEAN CATA, continues this trend and offers the latest and most comprehensive EU model of legal texts addressing fair competition issues.[241]

Article 8, *Fair competition*, has a comprehensive scope.[242] First, it includes traditional concepts of ASAs in their most liberal forms, such as fair and equal opportunities to compete and the elimination of discrimination and unfair competitive practices.[243] Then, it moves on to add state-of-the-art concepts of the application of competition law (defined in paragraph (g) of Article 2) to be enforced by independent competition authorities as well as a general prohibition of state subsidies (defined in paragraph (x) of Article 2), all in line with EU legislation.[244] It is unprecedented that an air transport agreement obliges the parties to establish or maintain an independent competition authority and even requires it to be "equipped with all necessary powers and resources."[245] Third, air carriers are obliged to publish independently audited annual financial reports to ensure the transparency of any State subsidies and material transactions between air carriers and State-owned enterprises.[246] Finally, the actual enforcement of these strict substantive requirements to ensure fair competition is supported by detailed procedural safeguards, namely the obligation of the parties to provide information relevant for enforcement, a specific, more stringent dispute resolution procedure, and the possibility of taking countermeasures against air carriers engaged in or benefitting from discrimination, unfair practices, or subsidies.[247]

Indeed, the EU's efforts to put in place effective regulatory mechanisms to ensure fair competition in international air transport have seen an important achievement with the inclusion of Article 8 in the CATA.[248] This text has the potential to become a new reference and perhaps to open another chapter in international air transport competition. It remains to be seen how, in practice, its application will have an impact on the development of the EU–ASEAN air transport market, and perhaps beyond.

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240 *See generally* EU–Qatar, *supra* note 128.
241 *See* ASEAN–EU CATA, *supra* note 194, art. 8.
242 *See id.*
243 *See id.*
244 *See id.*
245 *See id.*
246 *See id.* art. 8, ¶ 4.
247 *See id.* art. 8.
248 *See id.*

Nevertheless, the fact that the EU, including its twenty-seven Member States, and the ten ASEAN States were able to agree on detailed rules to regulate competition conditions is in itself an important achievement.[249] The EU–ASEAN fair competition rules provide a comprehensive framework for the air transport market covered, comparable to the legislative framework applicable to the EU internal market.[250] Further development of this huge market, therefore, has a sound regulatory basis to rely upon.

E. Procedural Provisions

The CATA has traditional clauses on institutional and procedural matters like any international agreement—*Dispute resolution* (Article 25), *Amendments* (Article 28), *Termination* (Article 29), and *Entry into force* (Article 33)—which are adapted to take into account the region-to-region setup of the CATA.[251] A few specific provisions have been included to account for the EU and its Member States being one Party: paragraphs 1 to 4 of Article 26, *Relationship to other agreements*, Article 32, *Accession by new EU Member States*, and paragraph 1 of Article 14, *Authentic texts*.[252]

It is worth noting one sensitive issue regarding the application of the CATA. Article 33 follows established practices on entry into force but remains silent on provisional application.[253] Indeed, the provisional application of international agreements has been an issue for some EU Member States in the past and may be a concern for some ASEAN States as well, where their constitutional systems do not recognize this concept. Instead of a provisional application, the Record of Statement signed upon the signature of the CATA contains a statement by EU and ASEAN States that they will "extend favorable consideration to applications for air services and operating authorizations by each other's air carriers on terms equivalent to those of the Agreement,[254] on the basis of comity and reciprocity, as from the date of signature of the Agreement and until its entry into force." This statement seems to have no direct legal value and may be understood as an expression of "administrative" application, an instrument frequently used in

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[249] *See generally* ASEAN–EU CATA, *supra* note 194.

[250] *See id.*

[251] *See* ASEAN–EU CATA, *supra* note 194, art. 25, 28, 29, 33.

[252] *See id.* art. 26, ¶ 1–4; *id.* art. 32; *id.* art. 14, ¶ 1.

[253] *See id.* art. 33.

[254] *Record of Statement Made on the Occasion of the Signature of the ASEAN–EU Comprehensive Air Transport Agreement*, Eur. Union–ASEAN (June 2, 2021), https://transport.ec.europa.eu/system/files/2022-12/2022_EU-ASEAN_ROS.pdf [https://perma.cc/B9PH-XMBL].

the context of bilaterals to give immediate effect to agreements, arrangements, or amendments thereof, without the need to await the completion of the national procedures of the parties necessary for provisional application or entry into force.[255] This same instrument has been applied for previous EU CATAs.

F. Regulatory Cooperation and the Joint Committee

Unlike traditional bilateral ASAs (including U.S.-type open skies agreements) that regulate air services *stricto sensu*, the EU–ASEAN CATA (like all EU ATAs) regulates air transport *lato sensu*.[256] The title of the CATA signals this change, as does its extensive length.[257] The substantive scope of the CATA is broadened by means of a new generation of provisions on regulatory cooperation that purports to regulate the prerequisites of a level playing field.[258] The ambition of this venture necessitated the establishment of a new body, namely the parties' Joint Committee, which is responsible for inducing regulatory convergence on sensitive issues that have not been uniformly regulated at the international level.[259] The Joint Committee constitutes the key institutional innovation of comprehensive ATAs, and even though it is responsible for overseeing the administration of the relevant agreement and ensuring its proper implementation,[260] it is precisely the provisions on regulatory cooperation that necessitated its establishment. In this sense, the substantive provisions on regulatory cooperation in the ASEAN–EU CATA (Articles 15–22) and the novel institutional provisions (Articles 23–24) are intertwined and must be examined in tandem.[261]

The provisions on regulatory cooperation cover the areas of aviation safety, aviation security, air traffic management, the environment, air carrier liability, consumer protection, computer reservation systems, and social aspects.[262] Some of these areas

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[255] *See id.*

[256] *Compare* ASEAN–EU CATA, *supra* note 194 (containing 34 Articles and two Annexes and extends to 51 pages), *with Current Model Open Skies Agreement Text*, *supra* note 201 (containing 17 Articles and extends to 14 pages).

[257] *See id.*

[258] *See* ASEAN–EU CATA, *supra* note 194.

[259] *See generally id.*

[260] *See* EU–Qatar, *supra* note 128, art. 22(1); ASEAN–EU CATA, *supra* note 194, art. 23(1); *cf.* U.S.–EU ATA, *supra* note 126, arts. 18(1), (3) (amended by the 2010 Protocol) (wording is somewhat different); Canada–EU ATA, *supra* note 127, art. 17(4) (wording is somewhat different).

[261] *See* ASEAN–EU CATA, *supra* note 196, art. 15–22; *id.* art. 23–24.

[262] *See id.* art. 15–21.

have been regulated uniformly at the international level and featured in traditional bilateral ASAs.[263] In particular, aviation safety is a sensitive area linked to technology that is regulated by the Chicago Convention and its Annexes and falls within the remit of ICAO in terms of standard setting at the global level.[264] Aviation security goes to the core of national sovereignty and has been regulated by several international conventions, besides the Chicago Convention and its Annexes.[265] Computer reservation systems have been used in the airline industry since the mid-1970s and raised competition issues since their early days, hence the adoption of the ICAO Code of Conduct for the Regulation and Operation of Computer Reservation Systems.[266] Air carrier liability is not governed by traditional ASAs.[267] However, it has been regulated by means of several international instruments, most notably the 1929 Warsaw Convention and the 1999 Montreal Convention.[268] The remaining areas constitute innovations of comprehensive ATAs and share a common characteristic, i.e., they are crafted with hortatory language.

"Hortatory language in Treaties" has been defined as aspirational, non-binding language that "refers to events or determinations that may or may not take place in the future" and that "can be interpreted as setting agendas – in other words, that is oriented only toward future reserved areas for negotiations rather than present obligations."[269] Indeed, the language used in

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263 U.S. Mission to the International Civil Aviation Organization, https://icao.usmission.gov/mission/icao/ [https://perma.cc/LE87-X2EA].

264 *See id.*

265 *See generally id.*

266 *See* United Air Lines, Inc. v. Civil Aeronautics Bd., 766 F.2d 1107, 1109–11 (7th Cir. 1985). *See also* Larry G. Locke, *Flying the Unfriendly Skies: The Legal Fallout Over the Use of Computerized Reservation Systems as a Competitive Weapon in the Airline Industry*, 2 HARV. J. L. & TECH. 219, 219–37 (1989).

267 *See* Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter 1929 Unification Rules]. *See also* Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, 2242 U.N.T.S. 309 [hereinafter 1999 Unification Rules].

268 *See* 1929 Unification Rules, *supra* note 267; *see also* 1999 Unification Rules, *supra* note 267.

269 "Whether we call agenda-setting language hortatory, precatory, contingent, facultative, or optative (or even political or propagandistic), our view is that it should not be allowed to destabilise the normative force of the treaty." *See* Brian F. Havel & Iva Savic, *Against Hortatory Language in Treaties: Lessons for International Law from the Battle Over Article 17 bis of the U.S.–EU Air Transport Agreement*, 44 ANNALS AIR & SPACE L. 1, 5 (2019) (offering a number of synonyms in expressing their position against hortatory language).

the provisions on air traffic management, the environment, consumer protection, and social aspects is of this kind.[270] Except for air traffic management, which is a technical area driven by technology and where the parties' cooperation is necessary to ensure, first and foremost, the safety of air navigation, the remaining areas are controversial or sensitive. The hortatory nature of the relevant provisions reflects the absence of regulatory convergence in these areas and thus the reluctance of the contracting parties to assume concrete obligations couched in binding language.[271] However, it also denotes the willingness of the parties to work toward this direction.[272]

In particular, the environmental externalities of aviation have caused controversy not only with respect to their real contribution to climate change, but also with respect to their regulation.[273] The decision of the European Union to subject international aviation to its regional emissions trading scheme (ETS) as of January 2012, in response to ICAO's failure to devise a global market-based measure for international aviation, outraged the international community and the industry, obliging the EU to suspend the application of its measures.[274] At the same time, it catalyzed action within ICAO at a moment of stagnation and defeatism, leading to the adoption of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) in 2016.[275] While CORSIA is a step in the right direction, it does not tackle the environmental externalities of aviation holistically, hence the provisions on regulatory cooperation in the area of the environment in comprehensive ATAs.[276]

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[270] *See id.* at 43 n. 140.

[271] *Id.* at 43.

[272] *See generally id.*

[273] Brian F. Havel & John Q. Mulligan, *The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion of Non-EU Airlines in the Emissions Trading Scheme*, 37 Air & Space L. 3, 3–5 (2012) (criticizing the judgment and the opinion of the European Unition in Case c-366/10).

[274] *See* Directive 2008/101/EC of Nov. 19, 2008, Amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, 2009 O.J. (L 8) 3; *see also* Case C-366/10, Air Transp. Ass'n of Am. v. Sec'y of State for Energy and Climate Change, 2011 E.C.R. I-13755 (preliminary ruling of the Court of Justice of the European Committees); Havel & Mulligan, *supra* note 273 at 3–33 (2012) (criticizing the judgment and opinion of the European Union).

[275] *See Assembly Resolution A39-3: Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection – Global Market-based Measure (MBM) Scheme*, ICAO (2016), para. 5, https://www.icao.int/environmental-protection/Documents/Resolution_A39_3.pdf [https://perma.cc/J8QH-HLEA].

[276] *See generally id.*

Consumer protection is another area where the EU has caused commotion with its controversial Regulation 261/2004 on air passenger rights.[277] The European Court of Justice has been called upon to interpret Regulation 261/2004 on numerous occasions, causing controversy with its creative way of reconciling the provisions on delay with the Montreal Convention, which also regulates flight delays.[278] Despite the litigation frenzy caused by this instrument, copycat legislation has started to proliferate in foreign jurisdictions.[279] Regulatory cooperation in the area of consumer protection is an innovation of comprehensive ATAs aimed at regulatory convergence.[280]

Last but not least, disparate national laws on labor matters in a global industry employing mobile workers, such as the airline industry, can distort the playing field.[281] The case of Norwegian Air International (NAI), an Irish subsidiary of a Norwegian air carrier, which applied to the U.S. DOT for a foreign air carrier permit to operate on the transatlantic routes and was accused of being a flag of convenience engaging in social dumping, underscored the need for regulatory cooperation and convergence in the area of employment.[282] What is more, it highlighted the interpretative hurdles posed by the hortatory language of Article 17 *bis* of the U.S.–EU ATA (to which Norway is a party), which reads "The Parties recognise the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards."[283] The interpretation

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[277] Council Regulation No 261/2004/EC on Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights, and Repealing Regulation, 2004 *O.J. L* 295/91.

[278] *See* Paul S. Dempsey & Svante O. Johansson, Montreal v. Brussels: *The Conflict of Laws on the Issue of Delay in International Air Carriage*, 35 Air & Space L. 207, 207–24 (2010); *see also* Olena Bokareva, *Air Passengers' Rights in the EU: International Uniformity versus Regional Harmonization*, 41 Air & Space L. 3, 3–24 (2016).

[279] *See* Brian F. Havel & John Q. Mulligan, *Extraterritorial Application: Exporting European Consumer Protection Standards, in* Air Passenger Rights – Ten Years On 239 (Michal Bobek & Jeremias Prassl eds., 2016); *see also* Vincent Correia & Noura Rouissi, *Global, Regional and National Air Passenger Rights – Does the Patchwork work?*, 40 Air & Space L. 123, 123–46 (2015); *Assistance to Passengers in case of Airport/Airline Disruptions* 3 (ICAO, Working Paper No. 14804, 2018), https://www.icao.int/sustainability/pages/eap_ep_consumerinterests.aspx [https://perma.cc/K58R-X26U].

[280] Correia & Rouissi, *supra* note 279, at 130–31.

[281] *See* U.S. Dep't of Transp., Order 2016-4-12, Order to Show Cause (2016).

[282] *Id.*

[283] *See* Karl R. Thompson, *Memorandum Opinion for the General Counsel Department of Transportation, Interpretation of Article 17 Bis of the U.S.–EU Air Transport Agreement*,

of this provision implicated the U.S. DOT,[284] the European Commission,[285] the U.S. Department of State, the U.S. Department of Justice,[286] and the U.S. Court of Appeals,[287] with the labor unions not only playing an active role in the orchestration of the allegations against NAI, but also challenging the DOT's award of a foreign air carrier permit to NAI before the U.S. Court of Appeals.[288]

The NAI saga revealed the Achilles' heel of comprehensive ATAs as far as the hortatory provisions are concerned, namely their openness to private litigation. In fact, that was not the first case when the U.S.–EU ATA in particular was invoked before national courts by private parties.[289] In *Air Transport Association of America et al v. Secretary of State for Energy and Climate Change*, the Court of Justice of the EU was called upon by an English Court, in an action brought by U.S. airlines and their association against the measures adopted by the United Kingdom to implement the EU Directive subjecting international aviation to the EU ETS, to issue a preliminary ruling on the validity of the Directive.[290] The Court confirmed the airlines' *locus standi*, finding that the "Agreement establishes certain rules that are designed to apply directly and immediately to airlines and thereby to confer upon them rights and freedoms which are capable of being relied upon against the parties to that agreement, and the nature and the broad logic of the agreement do not so preclude" this.[291]

The ASEAN–EU CATA addressed the challenges created by private litigation by ruling out this option in the most unequivocal way. Article 24(1) thereof reads: "Nothing in this Agreement shall be construed as intending to confer rights or to impose obligations which can be directly invoked by the nationals of a Party

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U.S. Dep't of Just. (Apr. 14, 2016) (Brian Egan, Legal Adviser for the U.S. Department of State, and Karl R. Thompson, Principal Deputy Assistant Attorney General in the Office of Legal Counsel at the U.S. Department of Justice, provided opinions to the DOT, at DOT's request, addressing the interpretation of art. 17 *bis* of the U.S.–EU ATA on April 14, 2016).

284 *See* U.S. Dep't of Transp., Order 2016-4-12, Order to Show Cause (2016).

285 *See* Letter from Violeta Bulc, Eur. Comm'r for Transp., to Anthony Foxx, Sec'y of Transp., U.S. Dep't of Transp. (July 22, 2010).

286 *See* Thompson, *supra* note 283.

287 Air Line Pilots Ass'n, Int'l v. Chao, 889 F.3d 785, 786 (D.C. Cir. 2018).

288 *See* Havel & Savic, *supra* note 273, at 9.

289 Case C-366/10, Air Transp. Ass'n of Am. v. Sec'y of State for Energy and Climate Change, 2011 E.C.R. I-13755.

290 *See id.* at para 1–2.

291 *Id.* at para. 84.

before the courts or tribunals of any Party."[292] Closing the door to the private enforcement of the Agreement is important because it strengthens the role of the Joint Committee in inducing regulatory convergence through regulatory cooperation.[293] This is especially so concerning the hortatory provisions, which may not create binding obligations, but do communicate the parties' acknowledgement that the relevant areas affect the playing field and should be regulated uniformly.[294]

Analyzing the institutional provisions of the Agreement (especially Articles 23–25) reveals the pivotal role of the Joint Committee in the gradual hardening of the soft provisions of the CATA.[295] In the first place, the Joint Committee "shall be responsible for overseeing the administration of this Agreement and ensuring its proper implementation."[296] What is meant by "proper implementation" has been defined as an obligation of the Joint Committee to "exchange information," "make recommendations and take decisions," "develop cooperation, including on regulatory matters," "hold consultations," and "consider potential areas for further development of the Agreement."[297] In second place, the Joint Committee is prescribed as the first port of call if a dispute arises which cannot be solved by the parties themselves.[298] Only if consultations within the Joint Committee fail may the parties resort to dispute resolution or arbitration.[299] However, where the dispute is about the proper interpretation or implementation of a hortatory provision, resorting especially to arbitration is highly unlikely since it amounts to gambling. This is because hortatory language can be interpreted either way by an arbitral tribunal,

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[292] *See* EU-Qatar, *supra* note 128, art. 21(1) (similar provision features on "Interpretation and Implementation") ("The rights laid down in this Agreement are granted by the Parties to one another. Any reference in this Agreement to rights granted to the air carriers of a Party shall be construed only as a reference to rights granted to that Party. Nothing in this Agreement shall be construed as intended to confer rights or to impose obligations which can be directly invoked by nationals of one Party before the courts or tribunals of the other Party.").

[293] EU Monitor, Explanatory Memorandum to Signing of the Comprehensive Air Transport Agreement with the Member States of ASEAN, COM(2022) 194 (June 2022), https://www.eumonitor.eu/9353000/1/j4nvhdfdk3hydzq_j9vvik7m-1c3gyxp/vlspjmbu0bxy [https://perma.cc/6S78-ATPR] [hereinafter CATA Memo].

[294] *See supra* text accompanying note 269.

[295] *See generally* ASEAN–EU CATA, *supra* note 194.

[296] *See id.* art. 23, ¶ 1.

[297] *See id.* ¶ 4.

[298] *See id.* art. 25, ¶ 2.

[299] *See id.* ¶ 3.

offering no guarantee of victory to the initiating party.[300] What is more, it can set a binding precedent on the merits of the dispute, amounting to a *de facto* amendment of the Agreement to the detriment of the initiating party. Therefore, the Joint Committee seems to be the only port of call if a dispute regarding a hortatory provision arises.

The insulation of the CATA against private litigation is an innovation that strengthens the role of the Joint Committee in inducing regulatory convergence on the prerequisites of the level playing field.[301] This can only be achieved through the "proper implementation" of the Agreement, a concept that, as already mentioned, has been defined by the CATA itself.[302]

IV. THE EU AS A NORM ENTREPRENEUR IN INTERNATIONAL AIR TRANSPORT

The EU–ASEAN CATA is the fourth "pillar 3" comprehensive ATA between the EU and a key partner, preceded by the Agreements with the U.S., Canada, and Qatar.[303] These four Agreements combined form an axis that stretches from the North Atlantic to Southeast Asia.[304] While each of these Agreements has its peculiarities, they are all broader in scope than traditional ASAs, including open skies.[305] In fact, they purport to safeguard fair competition by regulating the prerequisites of a level playing field.[306] This is a unique feature of EU-type comprehensive ATAs that reconceptualizes the economic regulation of international air transport, an issue that sovereign States chose not to regulate multilaterally by means of the 1944 Chicago Convention, but to

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300 *See* Havel & Savic, *supra* note 269.

301 *See* CATA Memo, *supra* note 293 and accompanying text.

302 *See* ASEAN–EU CATA, *supra* note 194, art. 23, ¶ 4.

303 *See generally supra* notes 126–129.

304 *See* Eur. Comm'n, Joint Statement EU-Republic of Korea Summit 2023, para. 43 (May 22, 2023), https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_23_2863 [https://perma.cc/53H2-PC2Q] (Republic of Korea may become the fifth State to ink a comprehensive ATA with the EU) ("[W]e will facilitate closer cooperation in the aviation sector, to boost its recovery from the COVID 19 and enhance connectivity between the two regions, including by exploring the potential benefits of negotiating an EU–ROK comprehensive Air Transport Agreement.").

305 Directorate-General for Internal Policies, An Overview of the Air Services Agreements Concluded by the EU, European Parliament (2013).

306 *External Aviation*, European Trans. Workers' Fed'n, https://www.etf-europe.org/activity/external-aviation/ [https://perma.cc/FZP5-BPCG].

reserve for their bilateral relations.[307] However, traditional bilateral ASAs, including open skies, are primarily concerned with market access and the degree of the airlines' commercial freedom to operate air services, rather than with fair competition.[308]

Forging a common understanding of the definition of a level playing field is a prerequisite for international air transport liberalization. The EU-type comprehensive ATAs do not simply liberalize market access.[309] They contain hard obligations regarding compliance with competition law and the control of subsidies and soft commitments regarding environmental protection, consumer protection, and labor standards, along with a mechanism to induce regulatory convergence, namely the joint work of the parties through the Joint Committee.[310]

In pursuing EU-type comprehensive ATAs, the EU is acting as a "norm entrepreneur" in international air transport.[311] Over the years, the term "norm entrepreneur" has taken on a life of its own and depending on the context within which it is examined, various definitions have been put forward. As per Havel and Mulligan, the term "has come to be used in international law to describe a state or entity that attempts to elevate a particular principle or policy change from a national to a universal objective by persuading or mobilizing popular or elite opinion in foreign states on the issue."[312]

It appears that what enabled the EU to act as a norm entrepreneur was the simple reality, highlighted by the EU air carriers from the outset, that if States open up their skies without levelling the playing field, competition will be distorted. This point is missed in the U.S. open skies model, which focuses disproportionately

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[307] Jeffrey N. Shane, *Diplomacy and Drama: The Making of the Chicago Convention*, 32 AIR & SPACE L. 4 (2019).

[308] Fair Competition in International Air Transport 2 (ICAO, Working Paper No. 004.2, 2012).

[309] *See generally supra* notes 126–29.

[310] *See id.*

[311] Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) (The term "norm entrepreneur" is coined by Cass Sunstein) ("[E]xisting social conditions are often more fragile than might be supposed, because they depend on social norms to which—and this is the key point—people may not have much allegiance. What I will call norm entrepreneurs—people interested in changing social norms—can exploit this fact. If successful, they produce what I will call norm bandwagons and norm cascades. Norm bandwagons occur when small shifts lead to large ones, as people join the 'bandwagon'; norm cascades occur when there are rapid shifts in norms. Successful law and policy try to take advantage of learning about norms and norm change.").

[312] *See* Havel & Mulligan, *supra* note 273, at 251.

on market access. What is interesting is that the U.S. was the first key partner to join the EU comprehensive ATA bandwagon. The reasons why the U.S. added its horsepower to the EU bandwagon are well-documented.[313] Herein it suffices to mention that the U.S.–EU ATA offered the hallmark of the U.S. open skies policy, namely market access, without discomfiting the U.S. with its broadened scope since the U.S. and the EU share similar standards on fair competition and the prerequisites of a level playing field. What should be emphasized is the tremendous pull effect that an international agreement has when the U.S. is on board. This last point is reinforced by the fact that the U.S. and the EU have analogous negotiating power, suggesting that the prototypical U.S.–EU ATA is balanced, and thus a good model to follow. This suggestion brings to mind the normative force that the 1946 U.S.–UK Bermuda I Agreement exerted on bilateral air transport relations for decades.

Answering the question of why third countries opt in or out of a comprehensive ATA with the EU requires an examination of the dynamic of each aero-political relationship, which is beyond the scope of this paper. Epigrammatically, the EU–Canada ATA was signed on the heels of the U.S.–EU ATA,[314] validating the pull effect of the latter, but also reflecting the parties' concurrence on fair competition and the prerequisites of the level playing field. By contrast, the 2021 EU–Qatar ATA was a breakthrough because the parties do not share the same values.[315] Leaving aside Qatar's controversial stance in international politics, circumstance played a role in the conclusion of this Agreement since the latter was negotiated and initialed during the 2017-2021 air blockade of Qatar by Bahrain, Egypt, Saudi Arabia, and the United Arab Emirates (UAE) on accusations of supporting terrorism, i.e., when Qatar's

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313 *See e.g.*, Brian F. Havel, Beyond Open Skies – A New Regime for International Aviation (2009).

314 *See generally supra* notes 126–29.

315 *See Restoring Open Skies: The Need to Address Subsidized Competition from State-owned airlines in Qatar and the UAE*, Delta Airlines, American Airlines & United Airlines, 2–3 (Jan. 28 2015). The climate turned chillier for the Gulf States in 2015, when a White Paper by the major US airlines accused the State-owned Gulf carriers, including Qatar Airways, of having benefited from $40 billion in subsidies and other unfair government-conferred advantages in the last decade alone. The European Commission expressed its doubts about "whether the transparency in the financial performance reporting of some Gulf carriers meets international standards," and criticized "some Gulf States for remaining reluctant to accept or even discuss 'fair competition' clauses with EU Member States individually." *See* External Agenda, *supra* note 114, at ¶ 50.

aero-political and diplomatic position was weak.[316] Lastly, ASEAN must have seen, besides economic value, political value in the alliance with the EU, considering the latter's experience in regional integration and clout in international relations and ASEAN's integration and regional security challenges. At the other end of the spectrum, Brazil initialed a comprehensive ATA with the EU in 2011, but never signed it due to the EU's refusal to grant fifth freedom traffic rights, which Brazil was subsequently able to safeguard bilaterally with individual EU Member States.[317] By the same token, the United Arab Emirates saw no value in committing to fair competition clauses without obtaining the desired market access into the EU and beyond, especially when it could obtain it bilaterally.[318] Fifth freedom rights were a sticking point in the negotiation of the ASEAN-EU ATA as well.[319]

The extant and aborted comprehensive ATAs point to the importance of market access for the conclusion of the deal, but also illustrate the appeal of the EU bandwagon. Fair competition is the mantra of EU comprehensive ATAs (and the EU external aviation policy more broadly), and so market access is only granted in exchange for: (1) concrete commitments regarding the application of competition law and the control of subsidies and (2) the obligation to cooperate within the Joint Committee to achieve regulatory convergence on the prerequisites of a level

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316 *See* Pablo Mendes de Leon, *The End of Closed Airspace in the Middle East: A Final Move on the Regional Chess Board?*, 46 AIR & SPACE L. 299, 299–308 (2021); *see also* Luping Zhang, *The Middle East Air Blockade: Revisiting the Jurisdictional Inquiry of the ICAO Council*, 46 AIR & SPACE L. 135, 143–50 (2021).

317 *See* Lykotrafiti, *supra* note 239, at 845.

318 *See* Cathy Buyck, *UAE Rebuffs Open Skies Talks With the EU*, AIN ONLINE (Jan. 16, 2019), https://www.ainonline.com/aviation-news/air-transport/2019-01-16/uae-rebuffs-open-skies-talks-eu [https://perma.cc/8WCS-S7UT] (The UAE pointed out expectations of a potential agreement) ("[P]rovide for full and immediate liberalization going beyond what already exists – specifically including full and immediate liberalization of third, fourth, and fifth-freedom traffic rights."). *See also* Mari Eccles, *Commission tells Parliament there's no reason to scrap EU–Qatar aviation deal*, POLITICO (Jan. 31, 2023), https://www.politico.eu/article/qatargate-europe-aviation-scrap-deal-commission-parliament/ [https://perma.cc/3TMB-SPB5] (statement by a European Commission official before the European Parliament, revealing that the UAE backed away from the negotiations because it could achieve the desired market access bilaterally without committing to fair competition clauses).

319 Jennifer Meszaros, *ASEAN–EU Air Transport Deal Near Completion*, AIN ONLINE (Dec. 6, 2018), https://www.ainonline.com/aviation-news/air-transport/2018-12-06/asean-eu-air-transport-deal-near-completion [https://perma.cc/9P3N-X7DR].

playing field.[320] If we accept that fair competition can only exist on a level playing field, the hardening of the soft provisions on regulatory cooperation in comprehensive ATAs is preordained. Whether this outcome will take the form of a "norm cascade" as more states join the EU bandwagon or whether it will happen gradually and incrementally remains to be seen. What is beyond doubt is that the EU norm entrepreneurship especially in the areas of the environment and air passenger rights catalyzed ICAO's CORSIA and copycat legislation on air passenger rights in several jurisdictions respectively.[321]

V. CONCLUSION

The EU–ASEAN Comprehensive Air Transport Agreement (CATA) is an agreement that is worthy of attention in terms of its structure alone. As the first bloc-to-bloc ATA, it has various implications at the international level. Two decades after ICAO cautiously predicted that "[f]uture bilateral negotiations could even occur between two groups of States,"[322] that became a reality. What is more important, however, is the comprehensiveness of its content. While previous ASAs were fundamentally about traffic rights, EU-type CATAs, including the EU–ASEAN CATA, expand the scope of ASAs by including and specifying competition law and subsidies, the environment, consumer protection, and labor standards. Essentially, the EU has been promoting its core values not only through internal laws but furthermore through international agreements, i.e., CATAs. The so-called Brussels Effect that includes "the diffusion of EU norms through international treaties and institutions"[323] is becoming commonplace in international air transport.

At the same time, the EU–ASEAN CATA will not necessarily lead to the adoption of a global multilateral approach to the liberalization of international air transport. Since 1944, there have been various efforts to adopt multilateral rules on the economic aspects of international air transport.[324] Examples include the

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[320] *Fair Competition*, European Comm'n, https://transport.ec.europa.eu/transport-modes/air/international-aviation/external-aviation-policy/fair-competition_en [https://perma.cc/274J-MLSG].

[321] *See* Havel & Mulligan, *supra* note 273.

[322] *Manual on the Regulation of International Air Transport*, ICAO 2.4-1 (2016).

[323] Anu Bradford, The Brussels Effect: How the European Union Rules the World 3 (2020).

[324] *See* Multilateral Agreement on the Liberalization of International Air Transportation, U.S. Dep't of State (May 1, 2001) [hereinafter MALIAT]; News Release, ICAO, Worldwide Air Transp. Conf. to Dev. Framework for the Liberalization of

Multilateral Agreement on the Liberalization of Air Transport (MALIAT) in 2001 and work carried out by ICAO starting with ICAO's International Air Transport Conference in 2003.[325] However, none of them have been successful. Although the ICAO is working on a "Convention on Foreign Investment in Airlines to help support the multilateral approach," its scope is limited, and it remains uncertain as to whether a proposal for such a Convention will receive global support.[326] Clearly, states want to keep control of international air transport and remain flexible in their negotiating positions on that, which is why the bilateral approach is still the principal instrument for negotiating international air services.

Changes will come in the mode of transnational law rather than international law. Although a detailed analysis of transnational law is beyond the scope of this paper, the transnational law approach generally refers to extensions of jurisdiction across boundaries based on the idea that a country's laws can spill out beyond its borders.[327] What remains to be seen is whether newly signed ASAs between non-EU states will include new issues (i.e., subsidies, the environment, consumer protection, and labor standards). In particular, the questions of whether and to what extent ASEAN's new ASAs with other States will include these new issues deserve close attention. Currently, ASEAN is in negotiations with Japan[328] and Korea.[329] At the global level, ICAO could promote—including the new issues in newly negotiated ASAs—through developing guidance or best practices. While these potential wider effects will have to be confirmed in the future, the EU-type CATA has the full potential to become a global benchmark.

Glob. Air Transp. (March 2002) (on file with author) [hereinafter ICAO News Release].

325 *See* MALIAT, *supra* note 324; ICAO News Release, *supra* note 324.

326 *See ICAO Air Services Negotiation Event in Abuja Hosts 63 Country Delegations, Delivers 212 New Agreements*, ICAO (Dec. 15, 2022), https://www.icao.int/Newsroom/Pages/ICAO-Air-Services-Negotiation-event-in-Abuja-hosts-63-country-delegations-delivers-212-new-agreements.aspx [https://perma.cc/B9HB-TPC7].

327 Roger Cotterrell, *What Is Transnational Law?*, 37 L. Soc. Inquiry 500, 500–01 (2012).

328 *The Twenty-first ASEAN and Japan Transport Ministers Meeting (21st ATM+Japan) Joint Ministerial Statement on the 21st ATM+JAPAN*, ATM+JAPAN (Nov. 10, 2023).

329 *The Fourteenth ASEAN and Republic of Korea Transport Ministers Meeting (14th ATM+ROK) Joint Ministerial Statement on the 14th ATM+ROK*, ATM+ROK (Nov. 10, 2023).

SPACE '*TOURISM*' A FRAMEWORK FOR ENSURING '*SAFE AND ORDERLY DEVELOPMENT*' *LESSONS LEARNT FROM THE U.S. AND AVIATION*

Dr. Sarah Jane Fox*

ABSTRACT

In August 2023, following its successful mission, Virgin Galactic announced the intention to provide scheduled services into space. Yet, this paper sets out to present evidence to argue that, from an international (U.N.) perspective, there has been a lack of activity to establish safeguards and to ensure a fit for purpose governance and oversight mechanism is in place for this new and growing sector—*space tourism*. The research is undertaken by way of a comparison law/policy analysis which factors in key historic events across both aviation and space. The main focus is given to the developments and approach of the U.S.

The research finds that there remains a number of areas where clarity and advancement is needed both nationally (U.S.) and internationally; and that, without suitable governance and frameworks being established—safety is compromised, and equitability is not ensured for space tourists. It is advocated that there are clear lessons to be learnt from aviation developments and practices and that one solution would be a governance and oversight

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system as has been established by the International Civil Aviation Organization (ICAO).

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I. INTRODUCTION

The Space Market comprises of many sub-sectors and undertakings both on Earth and above us, in space.[1] One of the fundamental aspects remains transport, which ultimately provides the means to get into space and facilitate other activities[2]—including, depositing items (such as satellites) within various orbits.[3] It is also essential to the developing *space tourism* sector.

Humankind has always had a "thirst for adventures,"[4] and it is not surprising perhaps that the opportunities of space pursuits have extended into the realms of tourism, including a protracted

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[1] Alina Orlova, Roberto Nogueira & Paula Chimenti. *The Present and Future of the Space Sector: A Business Ecosystem Approach*, 52 Space Pol'y 1, 1 (2020).

[2] Sam Spector, James E.S. Higham & Stefan Gössling, *Extraterrestrial transitions, Desirable transport futures on earth and in outer space*, 68 Energy Rsch. & Soc. Sci., 1, 1 (2020).

[3] *See generally* Sarah Jane Fox, *The evolving 'Space' in the EU: A Circular Journey*, 48 Annals of Air and Space L. (2024).

[4] Sarah Jane Fox, *SPACE: The race for mineral rights 'The sky is no longer the limit' Lessons from Earth!*, 49 Res. Pol'y, 165, 165–78 (2016); Sarah Jane Fox, '*Exploiting – land, sea and space: Mineral Superpower' In the name of peace: A critical race to protect the depths and heights*, 79 Res. Pol'y, 103066, (2022); Ayşe Meriç Yazicia, Satyam Tiwarib, *Space tourism: An initiative pushing limits*, 3 Tol. J. Tourism, Leisure, & Hosp., 38, 38–46 (2021).

stay at the International Space Station (ISS) and a short trip into space.[5]

It is often cited that Barron Hilton—the former president of the Hilton Hotel chain—was futuristic in terms of planning a hotel on the Moon, even before Neil Armstrong had set foot on the Moon. In 1967, speaking at an American Astronomical Society Conference, Hilton commented, "[s]carcely a day goes by when someone doesn't ask me, jovially, when the Lunar Hilton is going to be opened. They're joking, of course—but I don't see it as a joke at all."[6]

That said, it remains questionable as to whether there are limitations or prohibitions in regarding actually putting a physical structure on the Moon (or a planet or other 'celestial body') in terms of international agreements to allow this. And, hence, while there are some international treaties governing space pursuits these remain both subject to interpretation and ultimately agreement. In other areas relating to space, it could also be said, that no regulations or governance exist.

While, in Europe it was as early as 1954 that Thomas Cook had sought to provide tickets for a commercial flight to the Moon.[7] The Cook "Moon Register" was a list created for enthusiasts to sign-up for a commercial trip to the Moon, with the company—Thomas Cook—guaranteeing to provide tickets at the earliest possible date.[8] Today it is not only feasible but achievable to reach the Moon and hence, to undertake a flight into space.

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[5] *See* Yazicia & Tiwarib, *supra* note 4, at 40. There have been a number of Russian and other wealthy persons who visit the ISS for a number of years, including, in 2001, Dennis Tito who became the first American space tourist, reportedly paying Russia $20 million (£16 million) to fly to the International Space Station, where he spent a week. *See* Ankit Kumar et al., *Legal conundrums of space tourism*, 184 Acta Astronautica, 269, 269–73 (2021). On October 11, 2008, Richard Garriott, an American computer game millionaire, boarded a Russian *Soyuz* spacecraft for a ten-day trip to the International Space Station. *See id.* And, a year later, Guy Laliberté, a Canadian billionaire and owner of the famous *Cirque du Soleil*, also travelled on board a Russian *Soyuz TMA 16* spacecraft to the International Space Station, where he spent eleven days in orbit. *See id.*

[6] Jacopo Prisco, *Hilton's bizarre 1967 plan for a space hotel*, CNN (June 7, 2021), https://edition.cnn.com/travel/article/hilton-hotel-on-moon-scn-cmd/index.html [https://perma.cc/E66X-B2Z2].

[7] *See* Fabian Eilingsfeld & Sven Abitzsch, *Space Tourism for Europe: a Case Study*, Space Future (Oct. 1993).

[8] *See id.*; *see also* Yi-Wei Chang & Jeng-Shing Chern, *Ups and downs of space tourism development in 60 years from moon register to spaceshiptwo crash*, 127 Acta Astronautica, 533, 533–41 (2016).

Invariably, from day one—humankind's first flight into space—it could be postulated that the development of the space tourism segment should have been viewed as inevitable.

On Thursday, August 10, 2023, this therefore expected development took a further step forward when Virgin Galactic announced that it had taken its "first [paying] tourists to [the] edge of space."[9] Following the success, the Virgin group was reported to have joined the ranks of Jeff Bezos' Blue Origin and Elon Musk's SpaceX in the space tourism business. Maximizing on the achievement, the Virgin group also announced its intention to offer monthly (scheduled) trips to space in the not-too-distant future.[10]

Yet, this paper sets out to present evidence to argue that, from an international (U.N.) perspective, there has been a lack of activity to establish safeguards and to ensure a fit for purpose governance and oversight mechanism is in place for this new, and set to be growing, sector—*space tourism*. This is hampered, furthermore, due to the lack of definitions and agreements in respect of operational domains and jurisdictions.

Presently, for now, the space tourism segment is largely contained within the United States (U.S.), which has slowly been putting national scaffolding and mechanisms in place to strengthen the shortfalls that exist at an international level. In doing so, it has utilized or adapted legislation and procedures from the aviation domain. However, this, by and large, relates to national sovereignty measures, and therefore, it remains questionable whether this national approach is adequate and sufficient and, whether there are lessons and practices that should be built on from both an international, and even national perspective—in terms of ensuring a safe and sustainable mode and sector, as has occurred within the aviation sector.

A. Research Design–The Approach

This article is an analysis and comparative study reviewing the present position regarding space tourism, particularly considering the national and international regime that exists. Nationally, the primary focus of this research is the approach of the U.S., with the focal point being on the development and position of

[9] *See* Niamh Lynch, *Virgin Galactic takes first tourists to edge of space - as British ex-Olympian calls flight 'most exciting day of my life'*, Sky News (Aug. 10, 2023), https://news.sky.com/story/virgin-galactic-takes-first-tourists-to-edge-of-space-12937379 [https://perma.cc/SQZ2-VVUD].

[10] *See id.*

the Federal Aviation Administration (FAA) across aviation and space. This will be done predominately from a legal and policy perspective, which intersects with historical coverage that charts the legal developments and overlaps with the aviation and space sector from a chronological perspective. In so doing, it factors in the best practices from both the U.S. and the national and international aviation sector.

Analytical commentary is provided, which draws conclusions and advocates needs for the future regarding the developing space tourism sector. Summarized, the flight path for this commentary is as follows. Section II considers space tourism, the opportunities alongside the challenges. It discusses some of the early visions for space tourism, while factoring in the projected market opportunities before identifying some of the risks associated with new travel and tourism ventures. Section III factors in the U.N. framework for space and considers the Outer Space Treaty—the Magna Carta of Space—before discussing the legal Subcommittee Working Groups, whilst providing commentary as to the challenges faced and the future needs for the space tourism sector. Section IV discusses the developments and approach of the U.S. in terms of both the aviation and the space sector. This includes historical contextualization relating to aviation alongside identifying the U.N. framework for aviation and key timelines and advancement of the U.S. Section V further considers and analyzes the U.S. advancements for space alongside related legislation and limitations applied for the fledgling space (tourism) sector—particularly relating to the liabilities regime for tourists. In doing so it also considers the needs for the future. Section VI presents a conclusion, drawing together the findings with summary discussions alongside advocating a possible way forward for advancement of the sector.

II. SPACE TOURISM: THE POTENTIAL–OPPORTUNITIES AND RISKS!

One of the primary challenges in regulating space tourism is the lack of a clear definition of what constitutes a 'space tourist,' which complicates establishing international agreements, alongside guidelines and standards for the industry. Furthermore, arguably, the separation between 'astronauts' and 'tourists' is also becoming complex[11]—given that all tourists going to space

[11] Francis Lyall, *Who is an astronaut? The inadequacy of current international law*, 66 Acta Astronautica, 1613, 1615 (2010).

could be deemed astronauts, while the likes of companies such as SpaceX are contracted to transport government-astronauts and commercial tourists to the International Space Station. However, even defining space, also, remains contentious.[12]

The U.S. Congress has been undeniably reticent to openly use the phrase space tourists, instead referring to such passengers as "space flight participants" perhaps to draw a parallel with that of a research subject—whereby one accepts the associated risks of such new forms of transport and tourism.[13]

The Cambridge dictionary defines space tourism as, "the activity of travelling into space for pleasure and interest, rather than as a job."[14] However, it has also been expanded to show the synergy to the air transport sector in terms of "space tourism [being viewed as] another niche segment of the aviation industry that seeks to give tourists the ability to become astronauts and experience space travel for recreational, leisure, or business purposes."[15] Certainly, it is a sector that is set to expand, however it is defined.[16]

Space tourism is presently available to a limited market due to the current high costs associated with this travel mode.[17] Hence, it is utilized by wealthy adventure seekers who are able to select from one of the limited service providers and provisions on offer. This said, the industry is expanding at a tremendous growth rate, largely due to technological innovations, coupled with users' disposition toward space adventures.[18]

"In 2022, the global space tourism market was valued at USD 695.1 million" and is expected to expand at a compound "annual growth rate [(CAGR)] of 40.2% from 2023 to 2030."[19] This said, predictions do vary significantly in terms of forecasting

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[12] Sarah Jane Fox, *Securing the "Space" Above Us: Reflections on the Past – to Consider Tomorrow's Challenges . . . Today*, 22 ISSUES IN AVIATION L. & POL'Y 35, 35 (2022).

[13] Commercial Space Launch Act of 1984, 51 U.S.C. § 50902(20). *See infra* note 90.

[14] *Space Tourism*, CAMBRIDGE DICTIONARY ONLINE, https://dictionary.cambridge.org/dictionary/english/space-tourism [https://perma.cc/D4CP-N9EC].

[15] ISAAC LEVI HENDERSON & WAI HONG KAN TSUI, THE ROLE OF NICHE AVIATION OPERATIONS AS TOURIST ATTRACTIONS 239 (2019).

[16] Derek Webber, *Space Tourism: Its History, Future and Importance*, 92 ACTA ASTRONAUTICA, 138, 140–42 (2013).

[17] *See* Webber, *supra* note 16, at 140.

[18] *See id.*

[19] *See The Future of Space Tourism*, EVONA, https://perma.cc/VGP8-DQV3; *see also Space Tourism Market Size, Share & Trends Analysis Report By Type (Orbital, Sub-orbital), By End Use (Government, Commercial), By Region, And Segment Forecasts 2023–2030*, RSCH. & MKTS., https://www.researchandmarkets.com/reports/5644945/global-space-tourism-market-size-share-and-trends [https://perma.cc/7MDR-2HBX].

the rate of growth and therefore potential, with one estimate identifying that the global space tourism market will "surpass around USD 3,884.18 million by 2032,"[20] as compared to another identifying that multi-billions could be achieved by 2030.[21] The development and growth would likely be down to the lowering of costs and the competition between new market entrants, which would certainly see an expansion, not only in the U.S. but across the globe.

Ironically, Thomas Cook and Virgin are quintessentially identified as British brands. Although the Virgin Group is extensive and consists of a number of enterprises owned through a complicated series of offshore trusts and overseas holding companies,[22] Virgin Galactic is the space tourism company founded by British billionaire businessman Richard Branson in 2004, although the name was registered even earlier.[23] It is, however, not a British but rather an American company, with its headquarters in California, and the operation largely being undertaken in New Mexico.[24] This, no doubt, reflecting the infrastructure and the experience the U.S. has in terms of space exploration and launches.

The Virgin brand (like Thomas Cook) is certainly no stranger to tourism and air travel, however, unlike aviation, from an international level, the space sector noticeably lacks governance and oversight that is needed to commence regular and frequent services.[25] And, whilst this may be perhaps manageable at the present time, largely due to national provisions put in place (within the U.S.), it will likely be unsustainable with more market entrants and hence competitors, from across the globe, joining the arena. This will also see variable crafts and vehicles competing to operate in space. The choice of a launch vehicle, ultimately, affects any profit, whilst also being significantly dependent upon

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[20] *See Space Tourism Market*, Precedence Rsch., (Jun. 2023), https://perma.cc/UE83-DJWY; Sarah Jane Fox, *Blueprint for the Carriage of Passengers . . . into Space: Lessons Learnt! (A comparative analysis)*, 23 Issues Aviation L. & Pol'y, 123–53 (2023).

[21] *See* Michael Sheetz, *How SpaceX, Virgin Galactic, Blue Origin and others compete in the growing space tourism market*, CNBC (Sept. 26, 2020), https://www.cnbc.com/2020/09/26/space-tourism-how-spacex-virgin-galactic-blue-origin-axiom-compete.html [https://perma.cc/AT59-FYMD].

[22] *Virgin Group Corporate Structure*, Federal Court of Australia.

[23] *Sir Richard Branson*, Concordia, https://www.concordia.net/community/sir-richard-branson/#:~:text=Space%20travel%20has%20been%20a,on%20the%20first%20space%20flight. [https://perma.cc/CZE4-MC4R].

[24] *Virgin Galactic*, Visit Las Cruces, https://www.visitlascruces.com/listing/virgin-galactic/294/ [https://perma.cc/74ZW-L7EV].

[25] Molly M. McCue, *A Regulatory Scheme for the Dawn of Space Tourism*, 55 Vand. J. Transnat'l L. 1087, 1099 (2022).

the operation, for example, the mass of the payload, and, also, on how far from Earth it intends to venture. A heavy payload or a higher altitude requires more power to battle Earth's gravity than would be required for lighter payload at a lower altitude.[26]

Presently, several recognized markets exist in terms of space travel and the height of operations, which are normally said to operate either within the suborbital or orbital domains. Moving forward, trips to the Moon and even to Mars are anticipated, which would see extensive travel within the orbital domain.[27] "The main difference between orbital and suborbital flight is the [power and, hence,] speed at which a vehicle" is able to and needs to travel, and, therefore, the ability to be able to undertake a chosen orbit.[28] "An orbital spacecraft must be able to achieve what is known as 'orbital velocity,'" "the speed that an object must maintain to remain in orbit around" an object (normally, in this case, a planet—Earth); whereas, "a suborbital rocket flies at a speed below that"—they also normally operate therefore at a lower altitude, and do not undertake an orbit.[29]

It is suborbital tourism[30] which is first likely to experience the market growth in space tourism in the short term and is therefore the main focus of this paper.[31] A spacecraft in the suborbital domain follows a parabolic trajectory, wherein microgravity is experienced before returning to Earth. Operators use various craft and utilize various altitudes for suborbital tourism.[32] For example, Virgin Galactic uses a vehicle called a spaceplane that is launched in mid-air from a more traditional carrier-based plane at an altitude of about 9.4 miles (15km). Its rocket then fires the craft and its crew into sub-orbital space at least 50 miles (80km) above

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[26] *See Types of orbits*, European Space Agency (Mar. 3, 2020), https://www.esa.int/Enabling_Support/Space_Transportation/Types_of_orbits [https://perma.cc/G57Q-SZPY].

[27] Patrick Collins, *Space tourism: From Earth orbit to the Moon*, 37 Advances Space Rsch., 116, 116–18 (2006).

[28] Comm. on the Peaceful Uses of Outer Space, The definition and delimitation of outer space, U.N. Doc. A/AC.105/C.2/L.303 at 4 (2018).

[29] *See* Adam Mann, *What's the difference between orbital and suborbital spaceflight*, Space (Feb. 10, 2020), https://www.space.com/suborbital-orbital-flight.html# [https://perma.cc/T47C-WTCQ].

[30] Derek Webber, *Point-to-point sub-orbital space tourism: Some initial considerations*, 66 Acta Astronautica, 1645, 1645 (2010).

[31] William A. Gaubatz, *Sub-orbital flights, a starting point for space tourism*, 51 Acta Astronautica, 647, 647 (2002).

[32] Edd Gent, *What is suborbital flight? (And why do we care)*, Live Science, https://www.livescience.com/what-is-suborbital-flight.html [https://perma.cc/A897-J7KK].

Earth.[33] This allows passengers to experience approximately five minutes of weightlessness.[34] Blue Origin, on the other hand, uses a more traditional rocket system called the *New Shepard* which ascends vertically and takes its passengers approximately 62 miles above Earth.[35] Travelers also enjoy a few minutes of weightlessness, while part of the unique selling point (USP) for this mode and operator is said to be the opportunity of looking out their own windows which is the largest of all providers on the market.[36] The capsule then glides back down to Earth.[37]

The ability to get into orbit and remain there is both far more challenging and therefore costly. Space X, for example, is one of the few operators providing this service currently in terms of space tourism.[38] It uses a powerful, traditional rocket system, its Falcon 9 rocket and Crew Dragon capsule, which has previously shuttled NASA astronauts to the ISS.

However, all operations have the similarity of starting from the terrestrial domain, which is where Earth-based infrastructure and systems are utilized at the commencement of the space operations. The journey is also further supported by space systems and technology, such as satellites. Invariably, terrestrial operations are critical for the success of all space-based activities, as they enable the launch, the control, and the monitoring of the space vehicle. Likewise, the journey into space necessitates going through the airspace.

All travel modes carry a significant number of risks, and this is certainly so, in terms of new and evolving systems such as spacecraft, and other vehicles, that enter space.[39] Shortly before Virgin Galactic's August 2023 success, tragedy struck at the other end of the spectrum, when Titan—a submersible—imploded the Atlantic Ocean when it too was looking to enter into a new area

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[33] *Virgin Galactic*, WIKIPEDIA, https://en.wikipedia.org/wiki/Virgin_Galactic#:~:text=The%20company%20develops%20commercial%20spacecraft,with%20its%20VSS%20Unity%20spaceship [https://perma.cc/F2V8-HVXG].

[34] *See* Fox, *supra* note 20 at 123–53.

[35] *Blue Origin*, WIKIPEDIA, https://en.wikipedia.org/wiki/Blue_Origin [https://perma.cc/E2P9-AK99].

[36] *Id.*

[37] *See id.*

[38] *Falcon 9 First Orbital Class Rocket Capable of Reflight*, SPACEX, https://www.spacex.com/vehicles/falcon-9/ [https://perma.cc/CQD7-ANMQ].

[39] *See id.; see also* Jonathan Clark & Scott Parazynski, *194 Disasters in Space Travel: From Earth to Orbit, and Beyond*, CIOTTONES DISASTER MEDICINE, 1002, 1002–05 (Gregory Ciottone ed., 3rd ed. 2024);

of tourism—visiting the Titanic on the seabed.[40] Invariably, all it would take is one similar accident where fee-paying passengers are being carried to affect the potential growth of the space tourism sector.[41] Accidents will happen, but it is known that there are various methods to mitigate risks through the application of robust systems, practices and processes, which frequently necessitate legislation.[42] For transport modes this often requires international input to ensure consistent safety approaches are in place, as is the case in the civilian aviation sector. Yet, internationally, the U.N. has not adopted a similar approach to space (and space tourism) and advanced the original framework from a similar transport perspective.[43] This includes agreements and consensus in terms of do's and don'ts and operational procedures and practices requirements, including even the simplest concept of defining similarities and differences between modes and uses.

III. THE U.N. FRAMEWORK–*OOSA AND COPUOS*

The history of the Office for Outer Space Affairs (UNOOSA) is linked to the first space race; and, in 1959, the Committee on the Peaceful Uses of Outer Space (COPUOS) was set up by the General Assembly to govern the exploration and use of space for the benefit of all humanity with a focus on "peace, development and security."[44] While UNOOSA was initially created as a small expert unit within the United Nations Secretariat to service the ad-hoc Committee on the Peaceful Uses of Outer Space,[45] it has since undergone a number of developments, including, in 1993, being relocated to the U.N. in Vienna.[46] At that time, the Office also assumed responsibility for substantive secretariat services to the Legal Subcommittee, which had previously been provided by the Office of Legal Affairs in New York.

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[40] *See id.* at 1002–05; Fox, *supra* note 20, at 123–53.

[41] *See* Fox, *supra* note 20, at 123.

[42] *See id.*; *see also* J.W. Seastrom et al., *Risk management in international manned space program operations*, 54 ACTA ASTRONAUTICA, 273, 273–79 (2004).

[43] *See* Qijia Zhou, *The U.N.'s Role in Interplanetary Protection*, HARV. INT'L REV. (Jan. 31, 2022), https://hir.harvard.edu/the-uns-role-in-planetary-protection/ [https://perma.cc/SW9J-DGJT].

[44] J.W. Seastrom et al., *Risk management in international manned space program operations*, 54 ACTA ASTRONAUTICA, 273, 273–79 (2004).

[45] G.A. Res. 1348 (XIII), ¶ 1 (Dec. 13, 1958).

[46] *History*, U.N. OFF. OUTER SPACE AFFS., https://www.unoosa.org/oosa/en/aboutus/history/index.html#:~:text=The%20unit%20was%20moved%20to,the%20Department%20for%20Political%20Affairs [https://perma.cc/TG8K-7HBZ].

A. The Magna Carta of Space

It was COPUOS which was instrumental in the creation of the five treaties and five principles of outer space.[47] The first, the 1967 Outer Space Treaty (OST),[48] has often been referred to the "Magna Carta" for space, setting down key principles.[49] In this regard, COPUOS could be deemed to have been proactive, as well as responsive to the competitive nature and associated risks, in what was the Cold War period of tension between the U.S. and (the then) USSR.[50] There was the far-sightedness to ensure that certain protections regarding space were put in place. Whilst, conversely, it could also be viewed from the contrary perspective, namely, in terms of being very limited. Since the OST only served to provide a basic framework, applicable only to the formative years of space; and therefore, it lacked the foresight to predict or anticipate certain (perhaps even obvious) developments—such as more frequent travel, or even tourism into space.

In terms of principles enshrined within the OST, and relevant to the scope of this paper, it was stated that "the exploration and use of outer space shall be carried out for the benefit and in the interests of all countries and shall be the province of all mankind" and that "outer space shall be free for exploration and use by all States."[51] In terms of international relations, more specifically, staking a claim it is identified that, "outer space is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means," while "the Moon and other celestial bodies shall be used exclusively for peaceful

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[47] *See Space Law Treaties and Principles*, U.N. Off. Outer Space Affs., https://www.unoosa.org/oosa/en/aboutus/history/index.html#:~:text=The%20unit%20was%20moved%20to,the%20Department%20for%20Political%20Affairs [https://perma.cc/J3ZU-YZ8M].

[48] *See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty]. The Treaty was considered by the Legal Subcommittee in 1966 and agreement was reached in the General Assembly in the same year (resolution 2222 (XXI)). *See* G.A. Res. 2222 (XXI) (Dec. 19, 1966). The Treaty was largely based on the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, which had been adopted by the General Assembly in its resolution 1962 (XVIII) in 1963, but added a few new provisions. *See id.*

[49] *See, e.g.*, E.R. Finch, *Magna Charta of Outer Space for all nations*, 11 Acta Astronautica 337, 337 (1984); He Qizhi, *The Outer Space Treaty in Perspective*, 25 J. Space L. 93, 93 (1997).

[50] *See Space Law Treaties and Principles, supra* note 47.

[51] Outer Space Treaty, *supra* note 48, at art. I.

purposes.[52] Liability attaches to States as well, insomuch as it is identified that "[s]tates shall be responsible for national space activities whether carried out by governmental or non-governmental entities" and "[s]tates shall be liable for damage caused by their space objects."[53] Finally, "[s]tates shall avoid harmful contamination of space and celestial bodies."[54]

Outside of the OST, there are another four principal U.N. space treaties.[55] These include: the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space 1968 (Rescue Agreement);[56] the Convention on International Liability for Damage Caused by Space Objects 1972 (Liability Convention);[57] the Convention on Registration of Objects Launched into Outer Space 1975 (Registration Convention);[58] and the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies 1979 (Moon Agreement).[59]

Today, COPUOS identifies that part of its role is to aid countries to understand the fundamentals of international space law and to increase their capacity to draft or revise national space law and policy in line with international normative frameworks on space, which UNOOSA stresses is a significant aspect, since more and more actors are entering the space arena.[60] Alongside this, the Committee acknowledges that there are rapid advances in space technology, and that the space agenda is

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[52] *Id.* at art. II, IV.

[53] *Id.* at art. VI.

[54] *Id.* at art. IX.

[55] *See Space Law Treaties and Principles*, *supra* note 47.

[56] The "Rescue Agreement" (RA) opened for signature on 22 April 1968, entered into force on 3 December 1968. Adopted by the General Assembly in its resolution 2345 (XXII). *See id.*

[57] The "Liability Convention" (LC) opened for signature on 29 March 1972, entered into force on 1 September 1972. Adopted by the General Assembly in its resolution 2777 (XXVI). *See id.*

[58] The "Registration Convention" (RC) opened for signature on 14 January 1975, entered into force on 15 September 1976. Adopted by the General Assembly in its resolution 3235 (XXIX). *See id.*

[59] The "Moon Agreement" (MA) opened for signature on 18 December 1979, entered into force on 11 July 1984. Adopted by the General Assembly in its resolution 34/68. *See id.*

[60] The scope is to "assist any United Nations Member States to establish legal and regulatory frameworks to govern space activities," alongside, "strength[ening] the capacity of developing countries to use space science technology and applications for development by helping to integrate space capabilities into national development programmes." *About Us*, U.N. Off. Outer Space Affs., https://www.unoosa.org/oosa/en/aboutus/index.html [https://perma.cc/6DCP-MHAZ].

constantly evolving.[61] This said, it is debatable whether COPUOS has kept pace legally with the technology advancements that have occurred, in particular, relating to the development of craft/vessels (that are to be used for space travel) alongside the regulations needed for (space) travel/tourism at an international level, including in terms of customer safeguards and other protective mechanisms.

In essence, commentators contend that space governance is now failing the safe development of space, and that the existing multilateral conventions and treaties have repeatedly proven ineffective at managing today's international space activities.[62] This could be argued from various stances, not least either the reluctance to refine and even define the existing structure, and/or extend the current space governance framework. Invariably, there has been a lack of pro-activity in advancing certain sectors—such as space tourism, that is, from the perspective of ensuring consistency and putting safety at the forefront of expeditions.

Arguably, UNOOSA has applied a detrimental approach of allowing "States [to] be [overly] responsible for national space activities (whether carried out by governmental or non-governmental entities)" and thus leading to an internationally unregulated and insufficiently protected space—certainly from the perspective of civilian passengers (tourists) which are set to become part of this evolving market.[63] Ultimately, this stands to compromise the safety and equity of space tourism.

B. Legal Subcommittee–Working Groups

This said, COPUOS has both a Legal Subcommittee and a Scientific and Technical Subcommittee and under both sit various working groups (WGs).[64] Part of their role is to consider studies that can be undertaken connected to space-related activities, with no doubt the intention of advancing space pursuits and ensuring that the correct support is put in place.[65]

In this regard, naturally, there remains considerable overlap across both the Legal and Scientific and Technical Subcommittees, and across the various working group.[66] Hence, this could be

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[61] *See id.*

[62] *See* Fox, *supra* note 20, at 123–53.

[63] *See infra* note 75.

[64] *Working Groups*, U.N. Off. Outer Space Affs., https://www.unoosa.org/oosa/en/ourwork/copuos/working-groups.html [https://perma.cc/VWZ2-CHGH].

[65] *See id.*

[66] *See id.*

seen as both an enabler, or an inhibitor to progress, depending upon the communications and actions taken between the Subcommittees and various WGs.

COPUOS Legal Subcommittee WGs address a broad range of areas, where advancements are needed.[67] These groups include: (1) the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space;[68] (2) the Working Group on the Definition and Delimitation of Outer Space;[69] (3) and the Working Group on Legal Aspects of Space Resource Activities.[70] Analysis of the three working groups would tend to indicate that there is still considerable work to be achieved, which could manifest to significant challenges for space tourism, unless addressed.

In relation to the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space, it should be noted that reference is made to the States and to existing U.N. instruments, whilst it is clear that there has been a lack of advancement in ensuring specific U.N. provisions are in place—for example, provisions that specifically address the current realms of passengers' traveling into space as tourists, alongside the standards and safety requirements relating to the various crafts that can be used by private entities for this purpose.[71] Likewise, the reference to fault and damage relates, again, only to existing instruments, which arguably lack the precision needed for travel/tourism activities as occurs in other transport areas—such as aviation.[72]

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[67] *See id.*

[68] Part of this working group's role is to consider the application and implementation of the concept of the launching State; including, issues relating to the implementation of the mechanisms for responsibility and liability of States parties to the U.N. treaties on outer space activities, including the notions of fault and damage under the U.N. instruments; and on issues related to the registration of space objects, including their ownership, jurisdiction, and control. *Working Group on the Status and Application of the Five United Nations Treaties on Outer Space*, U.N. Off. Outer Space Affs., https://www.unoosa.org/oosa/en/ourwork/copuos/lsc/wg-tre/working-group-on-tre.html [https://perma.cc/C63Y-NHUA].

[69] Part of this working group's scope is to consider various matters relating to defining aspects such as outer space and, hence its limits. It considers factors such as information on national legislation and practices relating to the definition and delimitation of outer space. It also deliberates on issues relating to suborbital flights for scientific missions and/or for human spaceflight. *Id.*

[70] This working group was established under the Legal Subcommittee agenda item "*General exchange of views on potential legal models for activities in the exploration, exploitation and utilization of space resources*" and, hence, the group covers this remit. *Id.*

[71] *See* Fox, *supra* note 20, at 123–53.

[72] *See id.*

While, considering the Working Group on the Definition and Delimitation of Outer Space, there still remains various interpretations of space, in particular, where it begins—which affects not only jurisdictions but associated legislation also.[73] This lack of consensus and ambiguity has been identified for a number of years, and will become more problematic moving forward, particularly if the transport mode (however defined) increasingly operates not only in the (sub)orbital domains but in the airspace too. Hence, there remains the need to denote the boundary between sovereign territory and territory deemed to be the "common heritage of [hu]mankind."[74]

Advocating more applications and direction to national laws is questionably not the way forward, it is notably thwart with challenges that could arise, particularly given the ambiguity in identifying where 'international space' begins and what countries are nationally able to legislate for in such a space.[75] This will also lead to variable approaches and standards being adopted by Member States, and, particularly so, in respect to suborbital flights involving (human) tourism, where there is due to be significant growth in a matter of years. This therefore equates to an urgency to address some of these matters. The almost total lack of a legal framework to regulate space traffic and movements creates physical risks and, also, the risk of disputes.

Space activities require geographical control to enter space—which is currently interpreted as coming within national/sovereign controls and hence is subject to differing interpretations.[76] The definition and delimitation of space is hence needed to clarify each user's rights and obligations, while legal stability would also aid to ensure that economic opportunities are managed in a safe and consistent manner. In essence, from an international perspective, space remains insufficiently regulated (and even defined) at the present time, which hinders the development and aspirations for regular-scheduled movements into space.

The Working Group on Legal Aspects of Space Resource Activities remains key, as there needs to be ongoing and heightened discussions that seek to achieve a resolution in terms of

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[73] Fox, *supra* note 12, at 35.

[74] G.A. Res. 34/68, annex, Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Dec. 5, 1979).

[75] *See* Comm. Peaceful Uses of Outer Space, Matters related to the definition and delimitation of outer space, U.N. Doc. A/AC.105/C.2/2022/CRP.24 at 3 (2022).

[76] *Id.*

regulating more specific space activities—such as space tourism. This will need to include related factors and allied sectors, such as aviation, and the management of space. While the scope will need to include limitations and controls that will perhaps need to be applied as more traffic inevitably is set to go into space. And of course, this stands to have continued implications to airspace (even when a spacecraft is not engaged in a tourism activity). If, as has been proposed, these two sectors—space travel and air travel—potentially merge in the future, with long-distance air travel utilizing higher sub-orbital realms[77] there could be even more challenges to address in terms of jurisdictions and control of operations.

It is therefore contended that the U.N., in the form of OOSA/COPUOS, has debatably been slow to build on its 1950's origins in terms of a proactive start to space, and, it has not kept pace with sector advancements—such as the growing area of space tourism. No doubt, this is due to the reluctancy (or even inability) of national States to collectively address such issues, and to agree on the approach needed. Arguably, as a consequence, there remains a need for the UNOOSA/COPUOS to intensify discussions, whilst working more closely with adjacent sectors, in particular aviation, and key players, such as the International Civil Aviation Organization (ICAO). This approach should also factor in the policies, practices, and legislation, already being implemented by nations such as the U.S. who have additionally recognized the synergy to aviation and the need to adapt, many of the established practices emanating from this mode of travel.

This would necessitate the UNOOSA taking onboard States' evolving approaches and considering the best practices of nations in order to achieve a more sustainable and safe future, which will invariably also require a more uniform approach being adapted. In terms of space vehicles, it is argued that the U.N. has not factored in technological changes and the pace of the advancements—namely, the fact that space tourism is now a reality. Likewise, it has not considered the protections that need to be put in place for passengers.

There can be little doubt that the U.S., in particular, has been proactive, and, at times, reactive in putting practices, procedures and legislation into place.[78] Whilst there are also clearly lessons to be learnt from ICAO, which is a U.N. specialized agency (or

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[77] *See* Fox, *supra* note 12, at 35.

[78] *See, e.g.*, H.R. REP. NO. 104-793, at 6–7 (1996).

organization) that was established to help nations share their skies to the mutual benefit of nations.[79] Hence there are similarities with space in this regard in terms of precedence for the U.N. to be more actively involved—yet, unlike space, the aviation sector has continued to be proactive in terms of ensuring a safe and supportive infrastructure across nations.[80] Inevitably, with the development of space travel, part of the skies will become more saturated territory, as space vehicles will need to pass through this airspace. From an aviation perspective, ICAO has previously expressed concerns as to this growing segment and the lack of governance and oversight, which could, moving forward, stand to compromise their services.[81] The disintegration of the Space Shuttle Columbia on re-entry in 2003 is known to have almost caused an aviation accident, and as ventures into space increase, so does the risk to aircraft.[82]

IV. THE U.S.–PROACTIVITY IN AIR AND SPACE

The U.S. has ratified four out of the five principal U.N. space treaties, with the exception being the Moon Agreement.[83] And, since its early involvement in space ventures, the U.S. has been proactive and forward thinking in terms of developing its own national framework. This noticeably commenced with the 1958 National Aeronautics and Space Act, which, significantly, created the National Aeronautical and Space Administration (NASA).[84]

The long title of the Act relates further to the aims of the U.S. government (at that time), namely, to "provide for research into problems of flight within and outside the earth's atmosphere,

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[79] *Convention on International Civil Aviation*, WIKIPEDIA, https://en.wikipedia.org/wiki/Convention_on_International_Civil_Aviation [https://perma.cc/D35G-SLY9].

[80] *See Current list of parties to multilateral air law treaties*, ICAO, https://www.icao.int/secretariat/legal/Pages/Parties.aspx#InplviewHashb9c18929-1759-4682-b2d0-65a1a524c0c7=Paged%3DTRUE-p_ID%3D259-PageFirstRow%3D31 [https://perma.cc/F7KY-D2PQ].

[81] *See* Fox, *supra* note 20.

[82] *See* COLUMBIA ACCIDENT INVESTIGATION BD., THE CAIB REPORT - VOLUME 1, 6 (2003); William Ailor, Paul Wilde, *Requirements for Warning Aircraft of Reentering Debris*, 3RD INTERNATIONAL ASSOCIATION FOR THE ADVANCEMENT OF SPACE SAFETY CONFERENCE (2008); Russell Patera, *Risk to Commercial Aircraft from Reentering Space Debris*, Atmospheric Flight Mechanics Conference and Exhibit, AM. INST. AERONAUTICS ASTRONAUTICS (Aug. 20, 2006).

[83] *International Space Law: United Nations Instruments*, U.N. OFF. OUTER SPACE SPACE AFFS. (May 2017).

[84] The National Aeronautics and Space Act of 1958, Pub. L. No. 85-668, 72 Stat. 426, 426 (1958).

and for other purposes."[85] Hence, from the early days of space activities, the U.S. significantly acknowledged the linkage to other forms of flight, namely aviation and the use of the airspace. The U.S. also recognized that there would be associated *problems* and, hence, *risks* associated with space flights.[86] In tackling some of these issues, the U.S. sought to build upon its experiences and the guidance and developments occurring internationally in terms of aviation.

A. National and International Unity: A Framework For Aviation

From the outset, the U.S. had been proactive in terms of establishing national mechanisms and a framework, some years earlier, for aviation. In doing so, it worked in unison with the international community, both adopting joint approaches but also being influential in leading in advancements and innovation.

There are several key events and developments to note, firstly, the 1925 Air Mail Act, which was far more expansive than the name suggests—as it charged the Secretary of Commerce with fostering air trade, issuing and enforcing air traffic rules, licensing pilots, certifying aircraft, establishing airways, and operating and maintaining aids to air navigation.[87] It also facilitated the creation of a profitable commercial airline industry, and the establishment of airline companies such as Pan American Airways.[88] Running parallel to this however, there were international conventions and agreements being established for aviation.[89] These stem back to 1919 and the development of the Paris International (Air) Convention,[90] which also created the International Commission for Air Navigation (ICAN)—the forerunner of ICAO.[91] ICAN was tasked to meet at least once a year in relation to technical matters, and, an international committee of jurists was also established, to consider the intricate legal questions created by cross-border aviation.[92]

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[85] *International Space Law: United Nations Instruments*, *supra* note 71.

[86] *See* Pub. L. No. 85-668, § 102(c), 72 Stat. at 427.

[87] *A Brief History of the FAA*, Fed. Aviation Agency (Nov. 15, 2021), https://www.faa.gov/about/history/brief_history [https://perma.cc/Y8XY-V7HY].

[88] *Id.*

[89] *Id.*

[90] Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 297.

[91] *Id.*

[92] *The Postal History of the ICAO*, Int'l Civ. Aviation Org., https://applications.icao.int/postalhistory/international_aviation_organizations_working_alongside_ican_part_1.htm [https://perma.cc/G5Z5-RH6T].

However, the U.S. was further proactive in also considering safety implications, whilst recognizing the value that this growing sector had to the nation. In 1931 a high-profile air crash killed all on board and led to the public call for greater federal oversight of aviation safety.[93] By 1934, the Department of Commerce renamed the Aeronautics Branch the "Bureau of Air Commerce" to reflect the importance of aviation to the nation.[94] One of the first acts undertaken was to charge the airlines with establishing the first air traffic control centers to ensure safe navigations.[95]

By the mid-1930s, the U.S. had four major domestic airlines (United, American, Eastern, and Transcontinental and Western Air (TWA)) that dominated commercial travel for most of the 20th century.[96] In many ways, this is replicated in terms of the dominance of the key U.S. space players, albeit from a noticeably private sector stance.

Within a matter of years, President Franklin Roosevelt signed the Civil Aeronautics Act (1938) which established the independent Civil Aeronautics Authority (CAA).[97] This resulted in the Air Safety Board that would conduct accident investigations and make recommendations for preventing accidents.[98] In 1940, President Roosevelt split the CAA into two agencies, the Civil Aeronautics Administration, which went back to the Department of Commerce, and the Civil Aeronautics Board (CAB).[99]

The war years (1939–1945) led to significant advancements for aviation in terms of the technological developments.[100] It was also key in establishing the present Convention for aviation, which was reached when the war was still not concluded.[101] This was the 1944 Convention on International Civil Aviation (also known as the Chicago Convention).[102]

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[93] Scott Stahl, *The Evolution of Aviation Safety*, Aerocrew News (Dec. 6, 2016), https://aerocrewnews.com/education-2/safetywx/safety-matters/the-evolution-of-aviation-safety/ [https://perma.cc/5Z2D-Z25V].

[94] *Id.*

[95] *A Brief History of the FAA*, *supra* note 87.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *The History of ICAO and the Chicago Convention*, Int'l Civ. Aviation Org, https://www.icao.int/about-icao/History/Pages/default.aspx [https://perma.cc/XDY5-7NMR].

[102] Convention on International Civil Aviation, Dec. 7, 1944, 5 U.N.T.S. 295.

1. The Chicago Convention

The Chicago Convention is over twenty years older than the OST and although it has not been updated since 1944, annexes have been added and refined over time.[103] Presently, there are 193 contracting States to the Convention, who cooperate to adopt standards, practices, and policies for international civilian flights.[104] In comparison there are 114 parties to the OST,[105] with the latest ratifier being Panama as of August 9, 2023.[106]

ICAO was created as a consequence of the Convention—its role is focused on promoting the "safe and orderly" development of international civil aviation throughout the world.[107] Alongside this, industry and civil society groups, as well as relevant multilateral organizations, contribute to the ICAO outcomes as "Invited Organizations."[108]

Today, there are nineteen Annexes to the Chicago Convention, covering multiple safety matters—across a variety of areas, such as personnel, airworthiness of aircraft, aerodromes, air traffic services, etc.[109] While Annex 13—entitled "Aircraft Accident and Incident Investigation"—emphasizes the need for thorough investigations, in order to identify the cause of an accident or incident,[110] it also identifies that the objective of investigating an accident, or incident, is ultimately on future prevention and not on blame.[111] As part of the related obligations, ICAO Member States are required to report accidents and serious incidents in accordance with Annex 13 through the ICAO Accident/Incident Data Reporting (ADREP) system.[112] There are another eighty-

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[103] *Id.*

[104] *Backgrounder - Convention on International Civil Aviation and its annexes*, GOV. CA (Jan. 8, 2024), https://www.canada.ca/en/global-affairs/news/2024/01/backgrounder—convention-on-international-civil-aviation-and-its-annexes.html [https://perma.cc/SX7Z-Q5Z9].

[105] There are another 89 countries that have signed it but have not yet completed ratification. *See Outer Space Treaty*, *supra* note 48.

[106] *Id.*

[107] *Safety*, INT'L CIV. AVIATION ORG, https://www.icao.int/safety/Pages/default.aspx [https://perma.cc/268Z-C36F].

[108] *Invited Organizations*, INT'L CIV. AVIATION ORG., https://www.icao.int/about-icao/Pages/Invited-Organizations.aspx [https://perma.cc/NYV8-2PPR].

[109] *See Convention on International Civil Aviation*, *supra* note 79.

[110] *Annex 13 - Aircraft Accident and Incident Investigation*, INT'L CIV. AVIATION ORG., https://applications.icao.int/postalhistory/annex_13_aircraft_accident_and_incident_investigation.htm [https://perma.cc/TP4Y-FWAM].

[111] *Id.*

[112] *Id.*

nine countries that have signed it but have not yet completed ratification.[113]

ICAO also develops programs, guidance materials, and closely integrated auditing, training, and implementation support initiatives to help countries benefit and prosper from their improved compliance with global norms.[114] Over time, ICAO has adopted a multi-layered system of oversight relating to aviation safety,[115] which includes national, regional and international perspectives. Part of this entails ensuring standardized minimum standards for commercial aviation operations.[116]

In addition to the Chicago Convention, there have been a number of related international developments and agreements for civil aviation covering a whole array of areas. Aviation, by its very nature, is largely international, as the mode crosses boundaries and borders entering foreign territories where different private laws apply. This results in complexity as to which law would be applicable to citizens traveling onboard, or who has liability if a foreign aircraft causes damage to third parties on the surface—for example, if part of the aircraft or the aircraft falls onto the territory below. Hence, it has been established that unification of law is the only method to remove such conflicts.[117] While some of the same approaches have been applied to space pursuits, for example, the 1972 Convention on International Liability for Damage Caused by Space Objects, by comparison with commercial air travel, space remains sorely lacking in terms of international agreements for today's developments and those envisaged for the near future, for example, protections and a compensatory redress mechanism for paying passengers engaging in space tourism.[118] Again, here there are clearly lessons to be learnt from the aviation sector.

During the formative years of cross-border aviation, in the 1920s, the French attempted to adopt national laws relating to

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113 *Id.*

114 *Id.*

115 Sarah Jane Fox, *Aviation: A Risky Business. Green and Level Playing Fields? A Paradox of Virtues 'Dumping' - Anti-Competitiveness!*, *in* Legal Risk Management, Governance and Compliance: Interdisciplinary Case Studies from Leading Experts 4 (Stuart Weinstein & Charles Wild eds., 2016).

116 *Id.*

117 *See, e.g.*, S.A. Bayitch, *Unification of Aviation Law in the Western Hemisphere*, 19 Univ. Miami L. Rev. 535, 537 (1965).

118 *Convention on International Liability for Damage Caused by Space Objects*, U.N. Off. Outer Space, https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introliability-convention.html [https://perma.cc/YQM3-YARK].

a liability regime with respect to carriage by air but soon realized the complexity of doing so—due to the foreign element of travel,[119] leading to the establishment of a body of legal experts appointed by different governments but acting in their individual capacity. The remit was extended beyond the original initiative of the French government, in dealing with not only problems of liability in international carriage by air but the uniform rules regarding the documents of carriage. The subsequent 1929 Warsaw Convention led to the governing of air carriers' liability for death, wounding, and other body injuries to passengers.[120] Liability of the carrier being based on its fault intention or negligence, with the Convention adopting a bold stance by reversing the burden of proof; namely, it is not for the passenger or claimant to prove the fault of the carrier.[121] However, as a nascent industry, a limitation of liability was originally deemed necessary—thus, setting parameters that aided to protect the fledgling industry.[122] Overtime, amendments were passed to increase the limits of liability with respect to passengers, as particularly in the U.S., the set limit was considered to be outdated and unrealistically low.[123] This was a sentiment that continued to surface spasmodically until the 1999 Montreal Convention, which created a new separate and independent instrument.[124]

2. Key U.S. Development–Timelines

Since 1944, and the Chicago Convention, the U.S. has continued to evolve and update its national structure for aviation, whilst applying, if not exceeding, the standards emanating from ICAO.[125] As above, it has been influential in leading and influencing international developments in aviation.

Furthermore, very soon after humankind's first ventures into space—namely the launch and success of the first artificial satellite into space (Sputnik-1), the U.S. was quick to realize the

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119 *The Warsaw System on Air Carriers Liability*, INT'L CIV. AVIATION ORG., https://applications.icao.int/postalhistory/the_warsaw_system_on_air_carriers_liability.htm [https://perma.cc/52VU-NVVT].

120 Convention for the Unification of Certain Rules Relating to International Carriage by Air art. 17, Oct. 12, 1929, 3145 U.N.T.S. 137.

121 *See id.*

122 *See id.*

123 *See id.*

124 *The Montreal Convention 1999 (MC99)*, IATA, https://www.iata.org/en/programs/passenger/mc99/ [https://perma.cc/NHQ3-38QB].

125 *The History of ICAO and the Chicago Convention*, *supra* note 101.

significance of aviation and air space to the realms of further space pursuits.[126] This is evidenced not only through the establishment of NASA, but the restructuring of the administration agency for aviation.[127]

The most significant factor perhaps leading to today's structure for aviation nationally came in 1958, when the CAA functions were transferred to a new independent Federal Aviation Agency responsible for civil aviation safety.[128] However, there was still fragmentation between aviation services and other transportation systems, leading later to the creation of the Department of Transportation (DOT) which "began full operations on April 1, 1967.[129] "On that day, the Federal Aviation Agency became one of several modal organizations within the DOT and received a new name, the Federal Aviation Administration (FAA)—as it is known today."[130] And, "[a]t the same time, CAB's accident investigation function was transferred to the new National Transportation Safety Board (NTSB)."[131]

There can be little doubt that the FAA has continued to have a significant impact, not just nationally but globally, which extends past aviation into space operations also. In 1984, Congress passed the Commercial Space Launch Act (CSLA),[132] establishing a regulatory function within the DOT for commercial space transportation.[133] The original Act assigned to the Secretary of Transportation the role of addressing the safety of commercial launches, and, the Act referred to liability insurance for such launches—stating that it should be as considered "by the Secretary to be necessary for such launch or operations [while] considering the international obligations of the United States."[134] Although, in essence, the Act did not factor in the extent to which the private space sector and tourism would grow; however, in 1985 the FAA assumed some responsibility for this function which has been extended to additionally include re-entry as well.[135]

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126 *Sputnik and The Dawn of the Space Age*, NASA, https://www.nasa.gov/history/sputnik/index.html [https://perma.cc/5Z6F-T42R].

127 *Id.*

128 *A Brief History of the FAA*, *supra* note 87.

129 *Id.*

130 *Id.*

131 *Id.*

132 Commercial Space Launch Act, Pub. L. No. 98-575 (1984) (codified as amended as 51 U.S.C. § 50901).

133 *See id.*

134 49 U.S.C. § 2615 (emphasis added).

135 51 U.S.C. § 50904.

The transferring action to the FAA, no doubt further aided to reinforce the linkage of space with aviation, not least the use of airspace during both the launch and re-entry stages. The CSLA has therefore been "amended several times" since 1984 to reflect the changes and rapid developments across the broader areas of space commercialization—including space tourism.[136]

In 1988, Congress created a three-tiered regime for risk-sharing relating to injuries or losses to third parties from commercial space transportation activities.[137] The first tier required FAA-licensed launch and re-entry operators to purchase insurance or otherwise confirm financial stability in the event of injuries or loss to third parties arising from such launch or re-entry activity.[138] This also had to be sufficient as to protect the Government, with the amount of insurance required called the "maximum probable loss"—capped at $500 million per launch (or an amount available at reasonable costs).[139] The second tier identified that the federal government indemnifies the launch or re-entry operator for third-party claims above the insured amount (at that time of $3 billion) however, noting that the funds were not automatic and subject to congressional approvement: the later 2015 Space Act; extending this indemnification regime until 2025.[140] In the third tier, it was stated that liability reverts back to the launch or re-entry operator in the unlikely event that third party claims exceed $3 billion, plus the insurance obtained by the launch or re-entry operator.[141]

V. SPACE: THE LESSONS OF THE U.S.: *ADVANCEMENTS AND FURTHER NEEDS*

In 2006, a review was undertaken by the U.S. Government Accountability Office as to the current position in the U.S. and future needs for space ventures.[142] This was due to the fact that recognition was being asserted that commercial space launches were likely to be a growing sector, and that the FAA needed to

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136 S. Rep. 114–88, Background and Needs (2015).

137 *See* Andrea Reed, *Space, the Final Frontier for Negligence Suits—Why Commercial Space Operators Should Be Liable for Personal Injuries to Space Flight Participants*, 84 J. AIR L. & COM., 477, 481 (2019); Matthew Schaefer, *The Need for Federal Preemption and International Negotiations Regarding Liability Caps and Waivers of Liability in the U.S. Commercial Space Industry,* 33 BERKELEY J. INT'L. L. 223, 230 (2015).

138 *See* Reed, *supra* note 137, at 480–81.

139 *See id.*

140 *See id.*

141 *Id.*

142 See *infra* note 143.

continually plan and monitor in order to oversee the safety of the emerging space tourism industry.[143]

It was consequently found that that the FAA licensing activities incorporated a reasonable level of safety oversight for space launch vehicles, applying a safety system process, not unlike that found in aviation, while it also supplemented and amalgamated the experiences from the Air Force.[144] Reference was also made as to the transferability of practices from aviation in respect to oversight duties and technical issues.[145] This was particularly seen of relevance to reusable launch vehicles and the procedures for the launch and recovery of vehicles.[146] Further comments noted that the NTSB offered courses on aviation Accident Investigation that would be useful in the event of a space launch incident.[147] However, the findings also identified the industry had raised concerns about the costs of complying with regulations, while the FAA also identified that it, too, faced challenges in regulating space tourism, not least having experienced staff for safety oversight as new technologies emerged.[148] At the time the FAA's experience was limited, as just five launches had taken place, and all had used the same launch vehicle—SpaceShipOne.[149]

No doubt the 2014 fatal accident involving Virgin Galactica's new SpaceShip (*SS2*–being an enlarged version of the SpaceShipOne vehicle), only too clearly reinforced some of challenges identified by the FAA in 2006.[150] In the crash, the reusable suborbital rocket was being operated and tested by Scaled Composites LLC (Scaled). This resulted in both the death of the co-pilot and injury to the pilot—although it was not carrying passengers.[151] The subsequent report[152] identified some of the safety oversight mechanisms in place at the time and while certain revisions had

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143 U.S. Gov't Accountability Off., GAO-07-16, Commercial Space Launches: FAA Needs Continued Planning and Monitoring to Oversee the Safety of the Emerging Space Tourism Industry 35 (2006).

144 *Id.*

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*

149 *See* U.S. Gov't Accountability Off., *supra* note 143, at 35.

150 *In-Flight Breakup During Test Flight Scaled Composites SpaceShipTwo*, Nat'l Transp. Safety Bd. (Oct. 31, 2014).

151 Miriam Kramer, *Virgin Galactic's SpaceShipTwo Crashes in Test Flight: 1 Dead, 1 Injured*, Space (Oct. 31, 2014), https://www.space.com/27618-virgin-galactic-spaceshiptwo-crash-kills-pilot.html [https://perma.cc/PC8G-YPP55].

152 *Id.*

occurred (since 2006 and the time of the report) this has not factored in the need of tourists being carried.[153]

The 2006 review also drew attention to the fact that, whilst in 2004, the Commercial Space Launches Amendments Act[154] gave the FAA specific responsibility of overseeing the safety of space tourism, the act prohibited, through a "moratorium," the FAA from regulating crew and passenger's safety before 2012 (except in response to high-risk incidents serious injuries or fatalities).[155] This would be part of a phased approach to increase the safety role of the FAA, with it initially being set to expire after eight years.[156] However, at the time, the FAA's interpretation was noticeably contrary to this, with it stating that it interpreted that it did have authority to protect the crew because they were part of the flight safety system which overlapped into their broader remit of protecting the general public; and hence, in doing so, the FAA role should naturally, also therefore, extend to passengers. However, this created some nuances in terms of divisions—given that it was largely recognized that the FAA could not regulate crew and passenger safety wherein the public was not implicated.[157] While the 2006 review additionally raised concerns as to the FAA having a dual role—both as a regulator and promoter of the industry—which had been perceived as presenting a possible conflict of interest moving forward. This said, it should also be identified that the moratorium deadline has since been extended through The FAA Modernization and Reform Act of 2012[158] and The Commercial Space Launch Competitiveness Act.[159]

In 2015 the U.S. passed the Commercial Space Launch Competitiveness Act (CSLCA, or Space Act),[160] with the long title perhaps further reiterating the aims of the nation in terms of "facilitat[ing] a pro-growth environment for the developing commercial space industry by encouraging private sector investment and creating more stable and predictable regulatory conditions

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153 *See* Fox, *supra* note 20, at 123.

154 Commercial Space Launch Amendments Act of 2004, Pub. L. No. 108-492, § 2(b), 118 Stat. 3974, 3975 (codified as amended at 49 U.S.C. § 70102 (2004)) (current version at 51 U.S.C. § 50902(20)).

155 *See infra* note 167.

156 *See* Commercial Space Launch Amendments Act, *supra* note 154.

157 *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 143, at 35.

158 The FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 827, 60 Stat. 179 (2012).

159 U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114–90, 129 Stat. 704. (2015).

160 *Id.*

and, for other purposes."[161] The legislation was designed to foster commercial growth in space, in particular, in areas such as mining and tourism whilst streamlining the related regulation and controls.[162] The Act, although identifying that the U.S. does not have sovereignty or jurisdiction over objects in space, as established by the Outer Space Treaty, nevertheless clearly seeks to promote U.S. national interests. This includes arguably extending limiting the liability of commercial space companies, as the Act contains a new provision relating to jurisdiction by providing that "any claim by a third party or space flight participant for death, bodily injury, or property damage or loss resulting from an activity carried out under the license shall be the exclusive jurisdiction of the Federal courts."[163]

In other words, this move is seen "to insulate operators from legal responsibilit[ies]" even further "in the event of bodily injury or the death of a space flight participant."[164] Certainly, there has been criticism of some parts of the Act, while some Democratic members of the Congress, including representative Eddie Bernice Johnson, have been critical also of the Act in terms of the priorities being given to the industry.[165] Representative Alan Grayson was even more vocal however, by stating the provisions were tantamount to "corporate welfare" that creates a "moral hazard" and that limiting liability was equal to inviting an accident or a tragedy.[166]

The current Act noticeably requires operators to inform "space flight participants" of the risks of space flight and thereby allowing them to make informed decisions as to the risks associated with their flights.[167] Commercial space operators are additionally re-

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161 *Id.*

162 *Id.*

163 *See* 51 U.S.C. § 50914 (2015).

164 *See* Reed, *supra* note 137, at 480.

165 *See* Fox, *supra* note 4, at 177; P.J. Blout, Christian Robinson, *One Small Step: the Impact of the U.S. Commercial Space Launch Competitiveness Act of 2015 on the Exploration of Resources in Outer Space*, 8 N.C. J. L. & Tech., 160, 162 (2016); Jeff Foust, *Congress launches commercial space legislation*, Space Rev. (May 26, 2015), https://www.thespacereview.com/article/2759/1 [https://perma.cc/HBV6-UECS]. *See also* Jeff Foust, *House Science Committee Approves Four Commercial Space Bills*, Space (May 15, 2015), https://www.space.com/29409-commercial-space-bills-house-approval.html [https://perma.cc/JA2H-J423].

166 *See* Foust, *supra* note 165.

167 14 C.F.R. § 460.45 (2020); *see also Human Space Flight*, Fed. Aviation Admin. (May 23, 2024), https://www.faa.gov/space/human_spaceflight#:~:text=Vehicle%20Licensing%20Requirements%20to%20Carry,certified%20the%20vehicle%20as%20safe [https://perma.cc/7CLZ-QCCM].

quired to notify flight crew and spaceflight participants in writing that the U.S. government has not certified the launch or re-entry vehicle "as safe for carrying crew or space flight participants."[168]

The legislation thus requires a licensee to sign reciprocal waivers relating to claims (waivers) with its contractors and its customers—including the flight participants, as well as the U.S. government.[169] In other words, regardless of fault, the space participant (or tourist) must agree to relinquish all claims against the U.S. government for any injuries sustained during the license activity; not hold responsible the U.S. for injury; and, hence—indemnify the U.S. "from and against liability, loss or damage arising out of claims that any of licensee's or permittee's contractors and subcontractors may have for property damage sustained by them and for bodily injury or property damage sustained by their employees, resulting from licensed or permitted activities."[170]

In so many ways, it could be contended that, although the U.S. government recognized the challenges for the new space sector and the need to aid the commercial developments, it overstepped the boundaries in terms of wider implications, which invariably include a failure to put safety first—not just for 'participants' but for all citizens, and therefore to carry a modicum of 'governance-liability' (financial and otherwise) for permitting the operations to go ahead in the first place.

There is little doubt that allowing more commercial operators aids the government pursuits and visions for space; and, hence, actions that limit liabilities speak of government protection for both the fledgling industry and more broadly for a nation. Possibly, this runs parallel to the continued argument regarding the U.S. not being a signatory to the Moon Agreement and advancing its own national interests in terms of Moon developments—including mining and tourism—*even, perhaps, linking back to the extent of building a hotel on the lunar surface!*[171]

As part of the legislative requirements for CSLCA, Congress instructed the FAA to prepare a report with "key industry metrics that might indicate readiness of the commercial space sector and the Department of Transportation to transition to a safety

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[168] *See Human Space Flight*, *supra* note 167. The participants are informed that "the United States Government has *not certified the launch vehicle's safe for carrying crew or Space Flight participants.*" *See* 51 U.S.C. § 50905(4)(b) (2023) (emphasis added).

[169] *See* 14 C.F.R. § 460.45 (2020).

[170] *See* 14 C.F.R. § 440.17(2)(i) (2016).

[171] *See* Moon Agreement, *supra* note 59.

framework that may include regulations . . . that considers space flight participant, government astronaut, and crew safety."[172] In response, the FAA identified that the industry had overseen over "10,000 launches in the eight years following passage of the 2004 amendments."[173] However, quite clearly the expected amount of activity had not been met, either prior to 2015 (or since)—with launches remaining lower than anticipated with passengers on board.[174] Hence, this remains a reason cited for the continuance, or extension to regulatory limitations and, the protection of the sector. As late as 2017, the FAA concluded that the spaceflight industry was still not ready for more regulation (that is, from a national perspective)—although this would have to be questioned in terms of the safety needs to others, particularly given that the initial 8-year delay period (as per the moratorium) was to allow for the establishment of a body of "safety lessons learned"—which presumably also took into account failings.[175]

As of 2021, the Government Accountability Office acknowledged that the FAA continued to have some difficulties regulating and overseeing the evolving space tourism industry,[176] while, in the period 2006–2021, the FAA, through its Office of Commercial Space Transportation (AST), had previously streamlined rules for applicants seeking launches and re-entry licenses.[177] This said, it was still apparent that there was the need to undertake further revisions to other regulations. Not least, the FAA faced continual challenges of whether and when to regulate the safety of crew and other spaceflight participants, with it being identified that the FAA was prohibited from regulating crew and passenger safety before 2023.[178] This aligned to the fact that the moratorium was, thus, due to expire on October 1, 2023.[179] However as

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[172] *See* 51 U.S.C. § 50905(c)(6).

[173] Laura Montgomery, *Should Congress Extend the Moratorium on Regulating Human Spaceflight?*, CTR. GROWTH & OPPORTUNITY, https://www.thecgo.org/research/should-congress-extend-the-moratorium-on-regulating-human-spaceflight/#:~:text=As%20noted%20in%20the%20FAA's,well%20and%20which%20did%20not [https://perma.cc/K4YF-SDU9].

[174] *Id.*

[175] *Id.*

[176] U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-105268, COMMERCIAL SPACE TRANSPORTATION - FAA CONTINUES TO UPDATE REGULATIONS AND FACES CHALLENGE TO OVERSEEING AND EVOLVING INDUSTRY 10 (2021).

[177] *Commercial Space Transportation*, FED. AVIATION ADMIN. (May 18, 2021), https://www.faa.gov/regulations_policies/faa_regulations/commercial_space [https://perma.cc/SA84-LDWQ].

[178] *See Human Space Flight*, *supra* note 167.

[179] *Id.*

of researching, writing and reviewing this paper, the moratorium has continued to be further extended—in October, until January 2024; and then in January, it was extended again into March, and then again, further, into May 2024.[180] And so, the extensions continue, which therefore affects oversight and responsibilities of the FAA.[181]

As of today, the FAA's safety oversight responsibilities, remains only to "protect the safety of the public on the ground and others using the National Airspace System."[182] And, it would have to be questioned whether 2024 will result in any amendments to the role of the FAA, given that this is an election year. Hence, it will likely be postponed, yet again—until after the next U.S. President is in post.[183] Although, in anticipation of the expiration of the statutory moratorium (in 2023), arguably some steps forward have been taken—such as working with its industry advising committee to develop and disseminate human spaceflight best practices alongside planning for future requirements, including legislatively.[184]

In April 2023, the FAA established an Aerospace Rulemaking Committee (SpARC) to collaborate with industry on the development and cost of possible future regulations for commercial human spaceflight occupant safety. Hence the focus of SpARC encompasses safety considerations, and it is expected to submit a recommendation report in the summer of 2024 which consolidates some of its findings.[185] As part of this, comments were invited relating to a proposed rule.[186] In essence, the intention of the rule is to incorporate various changes required by the U.S. CSLC (Space) Act, such as providing regulatory clarity to applicants seeking licenses for space flight operations involving government astronauts by adding two new subparts to the human

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[180] *Id.*

[181] *Id.*

[182] Congress continues to limit the FAA's "authority in specific ways," not least under federal law, the "FAA is prohibited from regulating the safety of individuals on board." *Id.*

[183] It was confirmed that, "This legislative 'moratorium,' originally established in 2004, and extended multiple times by Congress, will now expire January 1, 2025." *See Human Space Flight*, *supra* note 167.

[184] *Legislation & Policies, Regulations & Guidance*, Fed. Aviation Admin. (May 23, 2024), https://www.faa.gov/space/legislation_regulation_guidance [https://perma.cc/DA5T-W849].

[185] *Id.*

[186] U.S. Commercial Space Launch Competitiveness Act Incorporation, 88 Fed. Reg. 159, FAA–2023–1656 (proposed Oct. 17, 2023).

space flight regulations.[187] This proposed requirement therefore aids to enhance public safety by ensuring operators provide mission specific training on safety-critical tasks to government astronauts, as has been done in the NASA Commercial Crew Program.[188] The proposed rule would also update definitions relating to commercial space launch and re-entry vehicles as well as occupants.[189] It also aims to expand applicability of permitted operations for reusable suborbital rockets including reusable launch vehicles, as well as implement clarifications to financial responsibility requirements in accordance with the Act.[190] Finally, this proposed rule would move the templates for waiver of claims to an advisory circular—noting that it does not seek to amend or refine the approach taken regarding the containment of any claim and the waiver mechanism in place.[191] However, there is no clarity in terms of a non-government astronaut or even the separation in terms of a tourist (or fee-paying astronaut), which should arguably also be stated.

Thus, this proposed rule is also likely to be impacted by the decision on whether the moratorium is again extended past 2024. And, linked to this, going forward, the remit of the FAA will no-doubt also be impacted upon whom is in office in the U.S., as there remain noticeable differences in terms of the role the FAA should have and the degree it should develop in terms of other space operations and activities (that is, away from launches and re-entries).

Presently the U.S. is undertaking yet another review, this time at a White House-level looking at its own internal governance.[192] Currently, the FAA's role remains limited by Congress.[193] For the time being at least, nationally, the FAA continues to regulate and license all U.S. commercial space launches and U.S. spacecraft, while it also implements certain registration standards required under the Registration Convention.[194] This applies to the opera-

187 88 F.R. 56546 (2023).

188 *See id.*

189 *See id.*

190 *See id.*

191 *See id.*

192 Theresa Hitchens, *White House nears plan to assign regulatory authorities for 'new' space activities*, Breaking Defense (Feb. 23, 2023), https://breakingdefense.com/2023/02/white-house-nears-plan-to-assign-regulatory-authorities-for-new-space-activities/ [https://perma.cc/3P78-99BX].

193 *See Human Space Flight*, *supra* note 167.

194 Convention on Registration of Objects Launched into Outer Space, Sep. 15, 1976, 1023 U.N.T.S. 15. (noting that the Office of Space Affairs of the Department of State implements other components of the U.S.'s obligations under the

tion and re-entry of tourism flights, that is—"when carried out by U.S. citizens or within the U.S," which have to be authorized by the U.S. Federal Aviation Agency (FAA) (through the AST).[195]

As identified, space operations and linked roles and responsibilities remains subject to political decisions. The divide between the FAA, in terms of an aviation/space regulator and its involvement in more commercial aspects of space continues to remain contentious amongst the other key players involved in space, and, hence, there have been concerns levied in terms of competence creep (particularly an extension of its current role—in terms of the proposed rule developments—as explained above).[196]

There is little doubting that space remains multi-faceted and complicated. This therefore leads one to question jurisdiction and oversight outside the launches and re-entry phases, particularly, when the spacecraft or vehicle is outside the nation's sovereignty, noting that the FAA does not have specific authority over '*in-space*' activities.[197] Hence, operations therefore necessitate that the FAA continues to work closely with other national bodies, while national governance is, or, invariably, stands to be (or arguably should be) impacted upon by international regimes and developments (much in the same way as occurs for civil aviation). That said, as postulated at the commencement of this paper, there remain clear grounds for advocating that there has been insufficient progress internationally in terms of providing the clarity to (or guiding) national structures and related policies relating to space (including from a commercial tourism perspective).

Outside of the FAA (and NASA) in the U.S., there are many other federal agencies that are extensively involved in not only policy developments, but specific space activities, such as the Department of Defense, the National Telecommunications and Information Administration (NTIA—an administrative agency of the Department of Commerce), the Federal Communications Commission (FCC), the National Oceanic and Atmospheric Administration (NOAA), and the Department of State.[198] As an example: in practice, regulatory requirements necessitate, that, depending

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Registration Convention, including maintaining the official US registry of space objects).

[195] *Commercial Space Transportation Activities*, FED. AVIATION ADMIN. (Oct. 4, 2023), https://www.faa.gov/newsroom/commercial-space-transportation-activities#:~:text=Launch%2C%20Reentry%20and%20Spaceport%20Licenses,or%20entity%20within%20the%20U.S [https://perma.cc/2ZFZ-JL5W].

[196] *See Human Space Flight*, *supra* note 167.

[197] *Hitchens*, *supra* note 174.

[198] *See* Convention on International Civil Aviation, *supra* note 90.

on the intended commercial space activities, a commercial operator must obtain an authority from the FCC, NTIA, NOAA (among others) alongside the FAA, before conducting its operations.[199] Such, in essence, is the complexity of space pursuits including commercial space tourism in the United States.

The latest ongoing U.S. space review has therefore reemphasized that determining who is responsible for (what is often called) "mission authorization and supervision," is still highly complicated.[200] Coupled with this, as identified by several government officials, the key agencies, with current legal say over space regulations, continue to jockey for control and, thus, "a piece of the regulatory pie."[201]

Regardless of the findings of the review, and the position adopted by the U.S. in 2024 (and, beyond), the question that ultimately needs asking, and inevitably determining, is the role to be played from an international—U.N.—perspective. That is, the needs and requirements for a coordinated approach and a set of agreed international standards and practices—in terms of both a solid framework and a regulatory approach for space tourism and travel activities, including the standards and requirements for the carriage of passengers into space. Inevitably, it should be concluded that more action is needed internationally, and that there are clear lessons to be learnt from national approaches together with the aviation governance system.

VI. CONCLUSION

The U.S. space framework and governance of space activities is debatably not perfect, and it is also far from being complete or even settled in terms of roles and responsibilities. Whilst it can be seen that the FAA's remit has necessitated becoming involved in 'certain' space activities and licenses, and, while the FAA has therefore extended its role, there remains contention is terms of how far this should be further extended. This has led to national

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199 *See* Anastasia Slivker, *Global Outer Space Guide: United States*, NORTON ROSE FULBRIGHT (Sept. 2023), https://www.nortonrosefulbright.com/en/knowledge/publications/08a2c80a/global-outer-space-guide-us [https://perma.cc/K2BE-KW2R] (both noting, depending upon the operation—a commercial space system operator may additionally be required to comply with export controls and seek regulatory approval from the Bureau of Industry and Security (BIS) of the DOC or the Directorate of Defense Trade Controls (DDTC) of the Department of State, or both.). *See, e.g.*, *Introduction to U.S. Export Controls for the Commercial Space Industry*, DEP'T OF COMMERCE & FED. AVIATION ADMIN. (Oct. 2008).

200 *See* Convention on International Civil Aviation, *supra* note 90.

201 *Hitchens*, *supra* note 174.

divisions in respect to the way forward, particularly relating to extending safety responsibilities for crews, which includes all astronauts and thereby tourists (or fee-paying passengers). This said, although this paper has levied some criticism towards the U.S. approach, there remains little doubt that the U.S. has been the most forward thinking and proactive nation in terms of applying a semi-secure structure, with plenty of supportive scaffolding for various space pursuits, nonetheless.[202]

Whereas, internationally, there remains a flimsy framework in place, as presently, the U.N. approach is built upon a limited foundation that requires some strengthening in order to support the current developments relating to space travel, and particularly the vision for commercial tourism and space travel moving forward.[203] Thus, there remain valuable opportunities to learn from the successes and failures from the U.S. that would aid both consistency and arguably the safety of space travel and tourism from a global perspective, as is befitting for a fledgling growth sector. Yet, the internal wranglings and debates within the U.S. also speak of the political divides and the wider politics associated with space activities.

The U.S. approach has largely been centered around the adoption of best practices and lessons learnt from aviation—including applying the early restriction regime on liabilities to space tourism.[204] However, there remains a number of areas where a more coordinated national, and international, approach is now needed.

New regulations addressing a number of areas, particularly linking to the flight crew and related safety factors, (such as medical requirements for crew that have a critical safety role) have transpired in the U.S. but these relate to a national approach.[205] However, it is suggested that there does need to be further regulatory advancements, including for space-tourists, not only nationally but internationally, who also need to be appropriately defined and catered for.

The argument that safety applied to the crew naturally sees an extension to passengers is far from sufficient, as fee paying tourist should be accorded the similar liability protections as is afforded to others that travel in the airspace. In itself, this could present a challenge given that any suborbital (or orbital) movements

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[202] *See supra* part V.
[203] *See supra* part III.
[204] *See Human Space Flight*, *supra* note 167.
[205] *See supra* part V.

always necessitate being in the airspace (however short a time this is)—so presumably a space traveler (tourist) will be viewed as an air passenger, as well as an astronaut. And again, even the latter is in need of clarification—as an astronaut is defined in many dictionaries only as a person, who is "trained to travel in a spacecraft."[206] This definition is largely consistent with that referred to by NASA—who simplistically identify that "an astronaut trains a long time on Earth before going into space."[207] However, this also calls into consideration the altitude that defines where space begins.[208] Thus, this also gives rise to questions concerning training and the national and international consistency or inconsistencies of such—for 'fee' paying passengers (tourists), or, even otherwise (the pilot/trained astronaut). Furthermore, the same could be argued in terms of the 'craft,' 'ship,' 'vessel,' or 'vehicle' that conveys the passenger and how these are invariably defined. Coupled with this, there arguably also needs to be the foresight to factor in automated transport modes, which may have only passengers (or tourists) on board in the future.

Hence, it is therefore contended that now is the time to consider many of these unanswered questions alongside ensuring that a governance mechanism exists for advancing space tourism. This must include having further oversight and allowing the advancement of regulations relating to the carriage of passengers on board commercial space flights, just as occurred in aviation—and not just nationally, but internationally. The purpose of delaying this, through the national U.S. moratorium, was to grant the industry a learning period, similar to the one that had been given to the aviation industry in the early 1900s. In this instance, aviation was subject to decades of experimental flights, and even commercial flights, before the FAA nationally began to regulate the industry, and internationally ICAO began to develop the overarching safety management system known today. This safety management approach, and more broadly the overarching governance for international aviation, still continues to evolve and

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[206] *See, e.g.*, *Astronaut*, CAMBRIDGE DICTIONARY ONLINE, https://dictionary.cambridge.org/dictionary/english/astronaut [https://perma.cc/8FLL-VFXA] (defining astronaut as "a person who has been trained for travelling in space.").

[207] *Astronauts*, NASA, https://www.nasa.gov/humans-in-space/astronauts/ [https://perma.cc/2VLB-MA8M]. The FAA offers a distinction between a government astronaut and other as: "[a]n individual designated by NASA who is on a launch or re-entry vehicle and is either an employee of the U.S. Government or an international partner astronaut." *See Human Space Flight*, *supra* note 167.

[208] *See* Fox, *supra* note 12.

develop, factoring in, not only the needs of the industry, but the passengers carried and transported.

More recently the FAA has taken a somewhat neutral stance by identifying that it no longer designates anyone as an 'astronaut.'[209] In addition, the FAA does not define where space begins,[210] while noting that it expects the commercial human spaceflight industry to continue to grow and the number of people launching into space to increase dramatically. Despite this, it does state that these modern-day adventurers that reach 50 statute miles above the surface of the Earth will have their name listed on the FAA Commercial Human Spaceflight Recognition webpage.[211] The reluctance to use the word 'tourists' is perhaps also telling in this regard, as it undoubtably necessitates much more legislation and protections being accorded than currently exists. As part of the broader picture, it is also crucial to remove the limited liability regime and waiver scheme, particularly for space participants, travelers or 'tourists' (however defined) who are carried into space and to consider an international approach—as occurs in aviation under the international Montreal Convention, which has unified certain rules for the carriage of air passengers.

Globally, ICAO has played a critical role in ensuring that aviation develops in an equitable and fair manner, and alongside the developments of the U.S., there is still much that could be transposed from this sector into the space tourism/travel sector—both are in effect transport modes. Over the years, the Chicago Convention has been supplemented by Annexes and other governing and oversight means, yet in comparison little has been added to the OST.[212]

From an international perspective some recent recognition has been given by the U.N. Committee (COPUOS) that there is now a need to move forward, with COPUOS considering how to implement the 21 "best practice guidelines" for ensuring the safety and sustainability of future space usage, which were approved in 2019. However, it is questionable whether the pace this is undertaken at is sufficient for the advancement and needs of the space tourism sector. Identifying that, it was only in 2023 that COPUOS established a further follow-on Working Group on the Long-Term Sustainability of Outer Space Activities, which has the aim to delve into how countries should apply such guidelines. It is

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209 *See Human Space Flight*, *supra* note 167.

210 *See id.*

211 *See id.* at 22.

212 *See generally* McCue, *supra* note 25, at 1092–99.

also observed that this working group has a five-year mandate—however, it is not primarily focusing on space tourism *per se*—but the wider use of space.[213]

In terms of aviation—ICAO, with its Member States, has, since the 1970's, factored in environmental protection and the broader approach of climate change for sustainable air travel.[214] This means that ICAO's strategic objectives are now centered across five pillars—namely, safety; capacity and efficiency; security and facilitation; economic development and environmental protection. As part of its stance, ICAO continues to advocate the value of a global approach, calling for better coordination of activities and the elimination of duplication of activities.[215]

Invariably, this leads to the supposition that space and the governance of space needs to be better coordinated from an international perspective, and that this may necessitate the formulation of a specialist entity, for example within UNOOSA, or even separate to it. Such an organization should coordinate best practices to-date, for example, as seen in the U.S., whilst seeking to set and achieve international standards for the safe, orderly and sustainable development of space travel and tourism. Hence, it is proposed that there is the need for the establishment of an 'International Civil Space Organization,' which has a remit relating to the mode and components that facilitates civil space travel (and tourism)—much in the same way that ICAO has for aviation. However, ultimately, such a move would require international willing and agreement, yet ironically the likelihood of achieving this seems even more remote than it was in the midst of World War II (1939–1945) when the 1944 Chicago Convention was achieved, that ultimately laid the foundations for ICAO.

In conclusion, it is contended that the lack of agreements and regulation internationally (and even nationally) has been, and will be, allowed to continue far longer than is appropriate, particularly when taking into account the best practices learnt from aviation (and the U.S.).

The development of space tourism presents an exciting opportunity for humankind to venture beyond the Earth, and, in the

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[213] *Long-term Sustainability of Outer Space Activities*, U.N. Off. Outer Space Affairs, https://www.unoosa.org/oosa/en/ourwork/topics/long-term-sustainability-of-outer-space-activities.html [https://perma.cc/H36G-T4XX].

[214] *See generally State Action Plans and Assistance*, Int'l Civ. Aviation Org., https://www.icao.int/environmental-protection/Pages/ClimateChange_ActionPlan.aspx [https://perma.cc/S7XT-8FJ8].

[215] *Policy on ICAO Implementation Support Provided to States*, Int'l Civ. Aviation Org.

future, to potentially explore the final frontier of outer space. However, the lack of a comprehensive regulatory framework, both nationally and internationally, poses significant challenges to ensuring the safety, sustainability and equitability of this new industry. Moreover, as commercial space travel becomes a reality, and extends beyond the current dominant nations, it becomes ever more critical that, not only State governments, but international organizations, and private companies, work together to establish clear guidelines and standards to ensure that space tourism, and travel, can flourish without compromising safety or, even, international accord. Ultimately, without this, it is argued that there remain unnecessary risks, not only to space occupants (including tourists), but to person on the Earth's surface, and also to aviation.