The Decision of the European Court of Justice on Open Skies - How Can We Take Liberalization to the Next Level

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I. INTRODUCTION

MR. JEFFREY N. SHANE, Associate Deputy Secretary of the Department of Transportation, addressing the American Bar Association’s Forum on Air and Space Law on November 8, 2002, gave an *au fait* interpretation of the much awaited but predictable decision of the European Court on the open skies agreements between eight European States and the United States, which had been reported to the Court by the European Commission for adjudication. At the end of his presentation, Mr. Shane asked the pertinent question: “How can we take liberalization to the next level?” He then offered some cohesive and logical scenarios.

There are certain aspects of the European Court’s decision that led to misconception and misinterpretation immediately after the decision. Mr. Shane’s presentation was the clearest and the most accurate interpretation that was given soon after the decision. This article will attempt to pick salient issues from the judgment, analyze them from perspectives of both sides of the Atlantic, and offer the author’s personal insight as to “how we could take liberalization to the next level.”

In December 1998, the European Commission applied to the European Court of Justice for its adjudication of instances where seven European Union (EU) Member States had concluded bilateral “open skies” agreements with the United States in the field of air transport. The court held oral proceedings in

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* The author, who is a senior official at the International Civil Aviation Organization, has written this article in his personal capacity. The opinions expressed are personal to the author and should not be attributed to ICAO.

1 The seven States are Austria, Belgium, Denmark, Finland, Germany, Luxembourg, and Sweden. An eighth case was brought against the United Kingdom.
May 2001 and subsequently considered conclusions of the Advocate-General issued on January 31, 2002.\(^2\) The European Court of Justice issued its judgment on November 5, 2002.\(^3\)

The genesis of contention, insofar as the European Commission was concerned, occurred in 1992 when the Member States of the EU jointly agreed to create a single European market in air transport. Broadly, this meant that air carriers of the EU Member States could carry passengers and freight on an intra-EU basis territorially, using liberalized commercial rights. This decision in limine accorded to European Community airlines equal rights at law to operate air services from their home bases. Furthermore, European Community airlines became ipso facto airlines of the EU with the same rights and on the same terms as local airlines in any given EU territory.

A natural corollary to this agreement was the Commission's belief that such a broad initiative to remove trade barriers in market access would encourage competition among EU carriers within the Union, particularly because European carriers could take the benefit of servicing from their home base and establish commercial operations anywhere in the EU on an equal basis, regardless of who the carrier may be. More importantly, one can ascribe to the European Commission a reasonable expectation that the initiative to liberalize would bear the importance of a common EU external policy toward countries outside the Union.

Based on the above logic, the Commission took the position that it would be inconsistent with the aims of liberalization initiatives if Member States were to negotiate and finalize bilateral agreements pertaining to air transport services with countries outside the EU. The Commission believed that a concerted sin-

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\(^2\) At the time of writing, the Commission was considering the scope of legal action against the Netherlands, France, Italy, and Portugal, all of which have since concluded bilateral agreements with the United States.

single market approach to bilateral negotiations by the EU against non-EU countries would ensure the pristine equity of a single European market and effectively preclude unfair competition from non-EU carriers who may not meet the stringent criteria that EU airlines must satisfy to gain EU carrier status. Therefore, it was the contention of the Commission that non-EU carriers should be granted market access to territories in the EU only if such carriers satisfied criteria that were acceptable to the Union as a whole and not on an individual State-by-State basis.

Another argument adduced by the Commission in support of the principle that bilateral air services agreements should be negotiated with non-EU States only by the EU and not by individual EU Member States was anchored by the reasoning that if EU States were to individually allocate air traffic rights in the traditional manner to foreign destinations based on nationality, discrimination against national flag carriers of separate EU Member State carriers would result, vitiating the treaty provisions that governed the liberalization initiative. The Commission argued cogently that any negotiation based on individual nationality may hinder competition between EU airlines who will be constrained to defend and safeguard their national interests. Such a constraint would have far reaching consequences adversely affecting the overall progress of the European economy and industry. In pursuance of its strong views on individual bilateral negotiations against an EU-based common approach, the Commission requested EU Member States to refrain from entering into any new agreements, particularly with the United States.

The United States in 1994, issued an "International Aviation Policy Statement" which advocated a global open aviation system and committed the United States to an "open skies" approach. The United States open skies policy consisted of a liberalized bilateral and multilateral structure that would enable carriers to continue onwards to a third country from a destination (usually called "Fifth Freedom" rights). For example, in the context of the United States and Europe, a carrier could operate air services from New York to Paris and onwards to London.

Although the Commission requested EU Member States to desist from entering into bilateral agreements individually, all Members States signed open skies agreements with the United States.

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States except the UK. Although agreeing to nationality principles, the US/UK bilateral agreement did not go so far as to conclude an open skies agreement with the US. The major contention of the Commission against the open skies agreements was that such agreements eroded the fundamental premise that the EU was one large liberalized market. Although the Commission conceded that open skies agreements may accord benefits to consumers, it believed that the open skies agreements between the United States and EU Member States would provide the United States carriers with significant operational benefits in Europe without according reciprocal benefits to European carriers in the United States. In practical terms, the Commission claimed that under the agreements, although American carriers could operate air services from any point in the United States to any point in Europe, the European carriers were restricted to operating services to the United States only from their home bases. Additionally, it was argued that nationality restrictions incorporated in the open skies agreements would stultify intra-European investment and rationalization.

Therefore, it was the Commission’s submission to the European Court that the only reasonable manner in which negotiations with the United States could be carried out was to approach negotiations as a block so that the leverage of the EU States could be pooled. The Commission claimed that the pooling approach was being used by EU States in other areas of commercial interaction with non-EU States and that air transport should be no exception. Thus, the Commission claimed that only they could negotiate air transport agreements on behalf of all EU States.

II. THE DECISION OF THE EUROPEAN COURT

The principles enunciated by the European Court in support of its judgments in the case of all eight EU States were similar. Therefore, this article refers to general observations and conclusions of the court, applicable to all eight respondent States. However, for purposes of analysis and clarity of reference, specific reference will be made throughout the article to the response of the Kingdom of Belgium, the court’s approach to the specific instance of Belgium and the court’s decision in the case of Belgium.

The finding of the court in all cases was that, having negotiated an open skies agreement with the United States, the concerned EU States failed to fulfill the obligations imposed by the
treaty.\footnote{Case C-466/98, Commission v. United Kingdom [2002] E.C.R. I-9427, at para. 150.} What is important to note, in order to remove any doubt or confusion, is that the European Court did not render invalid the bilateral agreements in question. Nor did the court admonish the EU States and prohibit them from conducting bilateral negotiations with the United States in the future. The court, as the Commission claimed, did not have the jurisdiction to confer competence, on the Commission to conduct air transport negotiations with the United States. Rather this is a right which only the EU Council of Ministers can confer on the Commission. The court did decide, however, that certain specific provisions and areas covered in the questioned bilateral agreements were contrary to EU law since they encroached upon internal EU regulations pertaining to non-EU nationals. These provisions are:

a) provisions pertaining to the allocation of airport slots;

b) provisions governing pricing, or fares and rates of intra-European air services;

c) agreements on computer reservation systems insofar as they appear as provisions of the open skies agreements in question; and

d) provisions which reserved the right to grant permission under the open skies agreements only to airlines substantially owned and effectively controlled by nationals of the EU Member States that are party to a particular agreement.\footnote{\textit{Id.} at para. 146.}

The most interesting aspect of the decisions is that the core element of the bilateral air services agreement—market access involving the award of air traffic rights—was untouched by the court except in instances where an EU Member had, in its agreement with the United States, explicitly precluded another EU Member from operating air services from that Member’s territory. For example, Belgium would not be permitted to agree that Air France would not or could not operate services between Brussels and New York. This prohibition is entrenched in the Treaty of Rome, which forms the substance of legislative legitimacy of the EU and incorporates the right of equal national treatment for all EU Member States. Therefore, if one EU Member State were to preclude the right of another Member State’s airline from having the right to operate air services to the United States from the territory of the first EU State, it would
result in discrimination by the first State against the second State.

With regard to the ruling of the court on the four elements mentioned above, the court held that where the allocation of airport slots is a consideration in a bilateral agreement, provisions pertaining to slot allocation would be contrary to EU law and therefore invalid.\(^7\) It must be noted, however, that this issue was academic since none of the eight bilateral agreements examined by the court contained provisions pertaining to slot allocation. The court also held that provisions laying down fares and rates concerning intra-European routes were inconsistent with EU law, which solely governed pricing of air services within the EU.\(^8\) Similarly, the Court found computer reservation systems (CRS) provisions in bilateral agreements between the United States and EU Member States unacceptable.\(^9\)

A. Arguments of the Commission

The European Commission argued that the exclusive jurisdiction of the Commission was based on the doctrine of implied powers, enshrined in Article 80 of the EC Treaty.\(^10\) The fundamental principle of implied powers is that the existence of Community law on a particular issue would exclude individual States from deciding separately on the issue. Embodied in the doctrine of implied powers is the notion that Member States would lose their right to assume obligations with non-Member countries when common rules which could be affected by those obligations come into being. The Commission recalled that the EU introduced three packages of liberalization of air services, and that the third package, which came into effect in 1992, was essentially geared toward liberalizing and establishing an internal European market of air services, calculated to form a complete deal with regard to market access of air services to EU carriers on an intra-EU basis.\(^11\) Based on this argument, the Commission contended that negotiation of open skies agreements by EU Member States with the United States was far beyond the scope of competence of those States and repugnant to the letter

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\(^7\) See id. at para. 150.
\(^8\) See id. at paras. 96-97.
\(^9\) Id. at para. 104.
\(^11\) Treaty Establishing the European Community, Aug. 31, 1992, O.J. (C244), art. 80.
and spirit of the "third package" of liberalization. The Commission concluded its arguments that allocation of traffic rights by nationality effectively prevented competition between EU airlines and unduly restricted aspirant EU airlines from establishing bases in EU States other than their own.

B. SUBSTANCE OF THE DECISIONS

The decisions of the European Court regarding the various States were rendered separately, however, they were consistent in substance. The court observed that, by application lodged at the Court Registry on December 18, 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by having individually negotiated, initialed, and concluded, in 1995, and applied an "open skies" agreement with the United States of America in the field of transport, the respondent States had failed to fulfill their obligations under the EC Treaty. In particular, it was argued that the respondent States failed to fulfill their obligations under Articles 5 (now Article 10 EC) and 52 (after amendment, Article 43 EC) thereof, and also under secondary law adopted pursuant to that Treaty. The Commission claimed in the alternative that, insofar as the 1995 agreement could not be regarded as having radically amended and, thus, replaced the agreements previously concluded, the respondent States had failed to comply with its obligations under Article 5 of the treaty and under secondary law. The Commission's claim was based on the idea that this failure occurred because the States did not rescind those provisions of the previously concluded agreements that were incompatible with the EC Treaty, especially Article 52 thereof, and the States failed to comply with

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12 The "third Package" of liberalization is discussed later in this article.
13 See United Kingdom, E.C.R. I-9427, at paras. 78-84, 89-97.
14 See id. at paras. 23-24.
primary law, or had failed to take all legally possible steps to that end.

Article 84(1) of the EC Treaty (as amended Article 80(1) EC) provides that the provisions of Title IV, relating to transport, of Part Three of the Treaty are only applicable to transport by rail, road, and inland waterway.\(^{17}\) Paragraph 2 of that article provides:

The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.

The procedural provisions of Article 75(1) and (3) shall apply.\(^{18}\)

Pursuant to that provision and with a view to the gradual establishment of the internal market in air transport, the Council adopted three “packages” of measures in 1987, 1990, and 1992, which were designed to ensure the freedom to provide services in the air transport sector and to apply the Community’s competition rules in that sector. The “third package,” adopted in 1992, comprises Regulation Nos. 2407/92, 2408/92, and 2409/92. Article 1 of Regulation No. 2407/92 concerns requirements for the granting and maintenance of operating licenses by Member States in relation to air carriers established in the Community.\(^{19}\) In that respect, Article 3(3) provides that no undertaking established in the Community is to be permitted within the territory of the Community to carry by air passengers, mail and/or cargo for remuneration and/or hire, unless the undertaking has been granted the appropriate operating license.\(^{20}\) Under Article 4(1) and (2), a Member State may grant that license only to undertakings which have their principal place of business and registered office, if any, in that Member State and, without prejudice to agreements and conventions to which the Community is a contracting party, which are majority owned and effectively controlled by Member States and/or their nationals.\(^{21}\)

Regulation No. 2408/92 concerns access for Community air carriers to intra-Community air routes. According to the definition given in Article 2(b) of this regulation, a Community air carrier is an air carrier with a valid operating license granted in

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\(^{17}\) EC Treaty, supra note 10, at art. 84(1).

\(^{18}\) Id. at art. 84(2).

\(^{19}\) Council Regulation 2407/92 on Licensing of Air Carriers, 1992, O.J. (L240) 1, art. 1.

\(^{20}\) Id. at art. 3.3.

\(^{21}\) Id. at arts. 4(1), (2).
accordance with Regulation No. 2407/92.\textsuperscript{22} Article 3(1) of Regulation No. 2408/92 provides that Community air carriers are to be permitted by the Member State(s) concerned about exercising traffic rights on routes within the Community.\textsuperscript{23} Article 3(2), however, introduces the possibility for Member States to make an exception to that provision in relation to the exercise of cabotage rights until April 1, 1997.\textsuperscript{24}

Articles 4 to 7 of Regulation No. 2408/92 govern the possibility of Member States imposing public-service obligations on given routes.\textsuperscript{25} Article 8 permits Member States to regulate the distribution of traffic between the airports within an airport system without discrimination on grounds of nationality or identity of the air carrier.\textsuperscript{26} Finally, Article 9 permits the Member State responsible to impose conditions on, limit, or refuse the exercise of traffic rights, in particular when other modes of transport can provide satisfactory levels of service when serious congestion and/or environmental problems exist.\textsuperscript{27}

Article 1(1) of Regulation No. 2409/92 sets the criteria and procedures to be applied for the establishment of fares and rates on air services for carriage wholly within the Community. Article 1(2) and (3) of that regulation provide:

Without prejudice to paragraph 3, this Regulation shall not apply:

a) to fares and rates charged by air carriers other than Community air carriers; and

b) to fares and rates established by public service obligation, in accordance with Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes.

Only Community air carriers shall be entitled to introduce new products or lower fares than the ones existing for identical products.\textsuperscript{28}

The court observed that, in addition to Regulations 2407/92, 2408/92, and 2409/92, enacted in 1992, the Community legislature adopted other measures in relation to air transport, in par-

\textsuperscript{22} Council Regulation 2408/92 on Access for Community Air Carriers to Intra-Community Air Routes, 1992, O.J. (L240) 8, art. 2(b).
\textsuperscript{23} Id. at art. 3(1).
\textsuperscript{24} Id. at art. 3(2).
\textsuperscript{25} Id. at arts. 4-7.
\textsuperscript{26} Id. at art. 8.
\textsuperscript{27} Id. at art. 9.
The court ruled that, in accordance with Article 1, Regulation No. 2299/89 applies to the CRSs to the extent that they contain air transport products when offered for use and/or used in the territory of the Community, regardless of the status or nationality of the system vendor, the source of the information used, the location of the relevant central data processing unit, or the geographical location of the airports between which air carriage takes place. However, Article 7(1) and (2) of the same regulation provides:

a) The obligations of a system vendor under Articles 3 and 4 to 6 shall not apply in respect of a parent carrier of a third country to the extent that its CRS outside the territory of the Community does not offer Community air carriers equivalent treatment to that provided under this Regulation and under Commission Regulation (EEC) No 83/91.

b) The obligations of parent or participating carriers under Articles 3a, 4 and 8 shall not apply in respect of a CRS controlled by (an) air carrier(s) of one or more third country (countries) to the extent that outside the territory of the Community the parent or participating carrier(s) is (are) not accorded equivalent treatment to that provided under this Regulation and under Commission Regulation (EEC) No. 83/91.

Finally, the court observed that it was undisputed that Regulation No. 95/93 also applies to air carriers from non-Member countries. However, Article 12 of that regulation provides:

Whenever it appears that a third country, with respect to the allocation of slots at airports:

a) does not grant Community air carriers treatment comparable to that granted by Member States to air carriers from that country; or

b) does not grant Community air carriers de facto national treatment; or

c) grants air carriers from other third countries more favourable treatment than Community air carriers, appropriate action may be taken to remedy the situation in respect of the airport or airports concerned, including the suspension wholly or partially of the obligations of this Regulation in respect of an air carrier of that third country, in accordance with Community law.

31 Id. at arts. 7(1), (2).
Member States shall inform the Commission of any serious difficulties encountered, in law or in fact, by Community air carriers in obtaining slots at airports in third countries.\(^{32}\)

The court also noted that the documents before the court indicated that, in 1992, the United States had taken the initiative to offer various European States the possibility of concluding a bilateral “open skies” agreement. Such an agreement was intended to facilitate alliances between American and European carriers and conform to a number of criteria set out by the American Government. The criteria included free access to all routes, the granting of unlimited route and traffic rights, the fixing of prices in accordance with a system of “mutual disapproval” for air routes between the parties to the agreement, and the possibility of sharing codes.\(^{33}\)

During 1993 and 1994, the United States intensified its efforts to conclude bilateral air transport agreements under the “open skies” policy with European States. In a letter sent to Member States on November 17, 1994, the Commission drew their attention to the negative effects that such bilateral agreements could have on the Community, and stated its position that bilateral agreements were likely to affect internal Community legislation.\(^{34}\) It added that negotiation of such agreements could be carried out effectively, and in a legally valid manner, only at Community level.

In the case of the Kingdom of Belgium, during the negotiations held on February 28 and March 1, 1995, representatives of the Belgian and American governments reached a consensus on a new amendment of the 1980 Agreement, which was subsequently confirmed by an exchange of diplomatic notes. The following amendments were made (“the 1995 amendments”) to the body of the text to the 1980 Agreement: Articles 1 (Definitions), 3 (Designation and Authorization), 6 (Safety), 7 (Aviation Security), 8 (Commercial Opportunities), 9 (Customs Duties and Taxes), 10 (User Charges), 11 (Fair Competition), 12 (Pricing), 13 (Surface Transportation/Intermodal Services), 14 (Commissions), 15 (Enforcement), 17 (Settlement of Disputes) and 20 (Multilateral Agreement). These provisions amended or revoked the old provisions in order to make the

\(^{32}\) Council Regulation 95/93 on Common Rules for the Allocation of Slots at Community Airports, 1993, O.J. (L14) 1, at art. 12.

\(^{33}\) United Kingdom, E.C.R. I-9427, at para. 16.

\(^{34}\) Id. at para. 19.
agreement comply with the American open skies model agreement. In addition, Annexes I and II to the 1980 Agreement, containing schedules of routes and opportunities for their use, were amended to bring them into line with the model agreement (for example, to routes, operational flexibility, charter flights, etc.).

Article 3 of the 1980 Agreement makes the granting by each contracting party of the appropriate operating authorizations and the necessary technical permissions to airlines designated by the other party subject to the condition that a substantial part of the ownership and effective control of that airline be vested in the party designating the airline, nationals of that party, or both. According to Article 4, those authorizations and permissions may be revoked, suspended, or limited where the above condition is not fulfilled.

Based on the above information, the court found that governments submit that the bringing of the present action constitutes a misuse of procedure because the Commission is attempting to secure a Community competence for which it was unable to obtain recognition at the Council level, and which it can secure only by taking action against that institution. In the alternative, in the case of Belgium, the Belgian Government submitted in its rejoinder that the present action infringes the legitimate expectation which the Kingdom of Belgium derived from the common declaration of 1996. That declaration was made after the sending of the letter of formal notice of June 2, 1995, and it was clear that the procedure for failure to fulfill its obligations, which had been initiated against it, would not be pursued.

The court noted that the action by the European Commission was for a declaration that the eight respondent States had failed to fulfill their obligations under Community law by concluding bilateral agreements separately with the United States in the field of air transport. On a preliminary finding, the court observed that, by bringing this action for failure to fulfill obligations in accordance with Article 169 of the Treaty, the Commission had properly applied the Treaty rules, since it had chosen the proceedings specifically envisaged by the Treaty for cases where it considers that a Member State has failed to fulfill one of its obligations under Community law.

In regard to the Belgian Government’s argument concerning the Commission’s motives in choosing to bring the present action, the court reminded itself that, in its role as guardian of the Treaty, the Commission alone is competent to decide whether it
is appropriate to bring proceedings against a Member State for a declaration that it has failed to fulfill its obligations.\textsuperscript{35} The court subsequently held that this plea must therefore be rejected. In the plea submitted in the alternative by the Belgian Government, it should be pointed out that, pursuant to Article 42(2) of the Court's Rules of Procedure, no new plea in law may be introduced in the course of proceedings, unless it is based on matters of law or of fact which come to light in the course of the procedure. The plea alleging breach of the principle of the protection of legitimate expectations was first raised in the rejoinder and is not based on matters of law or of fact which came to light in the course of the proceeding. Therefore, this plea should not proceed.

C. FINDINGS OF THE COURT

The court found that, in relation to air transport, Article 84(2) of the Treaty merely provides for a power for the Community to take action.\textsuperscript{36} This power is dependent upon a prior decision of the Council. Accordingly, although that provision may be used by the Council as a legal basis for conferring on the Community the power to conclude an international agreement in the field of air transport, the court found that the provision could not be regarded as establishing, by itself, an external Community competence in that field.\textsuperscript{37}

The court conceded that it had previously held that the Community's competence to enter into international commitments may arise not only from express conferment by the Treaty, but also by implication from provisions of the Treaty.\textsuperscript{38} Nonetheless, such an implied external competence existed not only whenever the internal competence had already been used in order to adopt measures for implementing common policies, but also if the internal Community measures were adopted only on the occasion of the conclusion and implementation of the international agreement. Thus, the competence to bind the Community in relation to non-Member countries may arise by implication from the Treaty provisions establishing internal competence, provided that participation of the Community in


\textsuperscript{36} See United Kingdom, E.C.R. I-9427, at paras. 46-52.

\textsuperscript{37} Id. at para. 52.

\textsuperscript{38} Id. at para. 47.
the international agreement is necessary for attaining one of the Community's objectives.\textsuperscript{39}

In a subsequent opinion, the court stated that the hypothesis envisaged in Opinion 1/76 is that where the internal competence may be effectively exercised only at the same time as the external competence,\textsuperscript{40} the conclusion of the international agreement is necessary to attain objectives of the Treaty that cannot be attained by establishing autonomous rules. However, it was the opinion of the court that this was not the situation in the case at bar. There was nothing in the Treaty to prevent the institutions from arranging, in the common rules laid down by them, concerted action in relation to the United States. Nor was there anything to prevent the institution from prescribing the approach to be taken by the Member States in their external dealings, which would mitigate any discrimination or distortions of competition which might result from the implementation of the commitments entered into by certain Member States with the United States under "open skies" agreements. It has, therefore, not been established that, by reason of such discrimination or distortions of competition, the aims of the Treaty in the area of air transport cannot be achieved by establishing autonomous rules.

The Court also observed that, in 1992, the Council had been able to adopt the 'third package,' which, according to the Commission, achieved the internal market in air transport based on the freedom to provide services, without it having appeared necessary at the time to have recourse.\textsuperscript{41} On the contrary, the documents before the court showed that the Council, which the Treaty entrusts with the task of deciding whether it is appropriate to take action in the field of air transport and to define the extent of Community intervention in that area, did not consider it necessary to conduct negotiations with the United States at Community level.\textsuperscript{42} It was not until June 1996, and therefore subsequent to the exercise of the internal competence, that the Council authorized the Commission to negotiate an air transport agreement with the United States. The Council granted a restricted mandate, while ensuring that in its joint declaration with the Commission of 1996, the system of bilateral agreements

\textsuperscript{39} See Opinion 1/76, paras. 3, 4.
\textsuperscript{40} Opinion 1/76 (citing Opinion 1/94, para. 89).
\textsuperscript{41} See United Kingdom, E.C.R. I-9427, at paras. 4-5.
\textsuperscript{42} See Opinion 1/76, at para. 18.
with that country would be maintained until the conclusion of a new agreement binding the Community.\textsuperscript{43}

The court, therefore, concluded that the finding with regard to internal competence cannot be called into question based on the fact that the measures adopted by the Council in relation to the internal market in air transport contain a number of provisions concerning nationals of non-Member countries.\textsuperscript{44} Contrary to what the Commission maintains, the relatively limited character of those provisions precludes the inference that the freedom to provide services in the field of air transport in favour of nationals of the Member States is inextricably linked to the Community treatment of nationals of non-Member countries, or in non-Member countries to nationals of the Member States.

In the opinion of the court, this case, did not disclose a situation in which internal competence could effectively be exercised only at the same time as external competence. In light of the foregoing considerations, it was the court’s view that the Community could not validly claim that there was an exclusive external competence to conclude an air transport agreement with that country.\textsuperscript{45}

The court next considered the Commission’s submission that the clause on the ownership and control of airlines is contrary to Article 52 of the Treaty. The States do not accord to the nationals of other Member States, and in particular to airlines and undertakings of those Member States established in the case concerning the Kingdom of Belgium. An example of this lack of accordance is the treatment reserved for Belgian nationals.

The Belgian Government had submitted that the clause on the ownership and control of airlines did not fall within the scope of Article 52 of the Treaty. Belgium contended that the clause did not relate to the freedom of establishment, but instead to the right of air carriers to offer services in non-Member countries since it regulated the exercise of traffic rights to points situated in non-Member countries. Moreover, by virtue of that clause, refusal of an airline designated by the Kingdom of Belgium would be an act of the United States.

All respondent States are of the view that, whereas Article 61 of the EC Treaty (after amendment Article 51 EC) precluded the Treaty provisions on the freedom to provide services from

\textsuperscript{43} Id. at paras. 19-20.

\textsuperscript{44} See, e.g., id. at paras. 12-14.

\textsuperscript{45} United Kingdom, E.C.R. 1-9427, at paras. 55-58.
applying to transport services, the latter being governed by the provisions of the title concerning transport, there was no article in the Treaty that precluded its provisions on freedom of establishment from applying to transport.\(^\text{46}\)

Article 52 of the Treaty, in particular, applies to airline companies established in a Member State which supply air transport services between a Member State and a non-Member country.\(^\text{47}\) All companies established in a Member State within the meaning of Article 52 of the Treaty are covered by that provision, even if its business in that State consists of services directed to non-Member countries.\(^\text{48}\)

In regard to the question whether the Kingdom of Belgium has infringed on Article 52 of the Treaty, it should be borne in mind that, under that article, freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings. Such undertakings include companies or firms within the meaning of the second paragraph of Article 58 of the EC Treaty (now the second paragraph of Article 48 EC) under the conditions laid down for its own nationals by the legislation of the Member State in which establishment is effected.

Articles 52 and 58 of the Treaty guarantee nationals of Member States of the Community who have exercised their freedom of establishment, and companies or firms which are assimilated to them, the same treatment in the host Member State as that accorded to nations of that Member State.\(^\text{49}\) This includes access to an occupational activity on first establishment and the exercise of that activity by the person established in the host Member State.

The court recognized that it has held that the principle of national treatment requires a Member State which is a party to a bilateral international treaty with a non-Member country, to avoid double taxation by granting to permanent establishments of companies resident in another Member State the advantages provided for by that treaty on the same conditions as those

\(^{46}\) Id. at para. 122.

\(^{47}\) See id. at para. 118.

\(^{48}\) See id.

which apply to companies resident in the Member State that is party to the treaty.\(^50\)

The court, therefore, viewed the clause on the ownership and control of airlines as, amongst other things, permitting the United States to withdraw, suspend, or limit the operating licenses or technical authorizations of an airline designated by a Member of the EU, but of which a substantial part of the ownership and effective control is not vested in that Member State or its nationals.\(^51\) The court also stated that there can be no doubt that airlines established in an EU Member State of which a substantial part of the ownership and effective control is vested, either in a Member State other than that State or in nationals of that State ("Community airlines"), are capable of being affected by that clause.\(^52\) By contrast, the formulation of that clause shows that the United States is, in principle, under an obligation to grant the appropriate operating licenses and required technical authorizations to airlines of which a substantial part of the ownership and effective control is vested in the EU States concerned.

The court followed its argument that Community airlines may always be excluded from the benefit of the air transport agreement between an EU Member State and the United States while that benefit is assured to airlines of that State. Consequently, Community airlines suffer discrimination which prevents them from benefiting from the treatment which the host Member State accords to its own nationals. Contrary to what a respondent State of the EU may maintain, the court found that the direct source of that discrimination was not the possible conduct of the United States, but instead the clause on the ownership and control of airlines, which specifically acknowledges the right of the United States to act in that way.\(^53\)

III. LEGAL ISSUES

A. Europe

Air transport in the European Community is fundamentally regulated by two treaties, the Treaty which establishes the Euro-

\(^{50}\) See id. at para. 59; Case C-55/00 Gottardo v. INPS, [2002] E.C.R. I-413, at para. 32 (judgment of Jan. 15, 2002).

\(^{51}\) United Kingdom, E.C.R. I-9427, at para. 121.

\(^{52}\) Id. at para. 124.

\(^{53}\) Id. at para. 123.
pean Coal and Steel Community ("ECSC Treaty") and the Treaty which establishes the European Economic Community ("EEC Treaty"). The ECSC Treaty, which was signed in Paris in 1951, addresses issues related to the carriage of coal and steel through the media of rail, road, and inland waterways and, therefore, is not directly relevant to aviation. The EEC Treaty on the other hand, concerns issues relating to all modes of transport in the carriage of persons and goods and is, therefore, of some relevance to aviation.

The EEC Treaty, which was signed in Rome on March 25, 1957, has at its core a Common Transport Policy (CTP) concept which is calculated to achieve the fundamental purposes of the European Community. One of the most salient features of the EEC Treaty is that the tasks of the Community are set out succinctly in Article 2 of the Treaty, which provides for the adoption of a CTP as provided for in Article 3(1) of the Treaty. This provision is linked to Article 74, which in turn provides that the objectives of the Treaty in relation to issues of transportation would be pursued by State parties within the parameters of the CTP, which is established by the Council of Europe through secondary legislation.

The rights and duties of the Council of Europe in establishing the CTP, particularly in the fields of air and maritime transport can be attributed to a 1986 case and to Article 189 of the EEC Treaty. Article 189 admits the Council to adopt measures such as common rules attributable to the following: (1) international transport to or from the territory of a Member State or passing across the territory of one or more Member States; (2) the conditions under which non-resident carriers may operate transport services within a Member State; and (3) any other appropriate provisions.

Under Article 84(1) of the EEC Treaty, the provisions of the title of the section relating to transport apply to railroad and

56 The word "Community" alludes to the European Economic Community, which is now called the European Community consequent to the signing of the Treaty of the European Union on November 1, 1993.
57 EEC TREATY, supra note 55, at art. 2.
58 Id. at art. 74.
60 EEC TREATY, supra note 55, at art. 189.
Article 84(2) gives discretion to the Council to decide whether, to what extent, and by what procedure, appropriate provisions may be laid down for sea and air transport. Although explicit mention of air and maritime transport is made in Article 84, implicit in the Treaty is the understanding that the transport title will not apply to the two modes of transport. The applicability of the Treaty to air and maritime transport was examined in some detail in the 1974 case of Commission v. France. In that case the court observed:

Whilst under Article 84(2), therefore, sea and air transport, so long as the Council has not decided otherwise, is excluded from the rules of Title IV Part Two of the Treaty relating to the CTP, it remains, on the same basis as other modes of transport, subject to the general rules of the Treaty.

The court subsequently confirmed this view in a later case decided in 1977. Both the 1974 and 1977 decisions make it incontrovertible that the general rules of the Treaty apply to transportation. This is provided that the Council, acting under Article 84(2), does not decide to the contrary. This essentially means that the Commission has upon it a legal duty as well as a political duty to ensure that the general provisions of the Treaty are applied to air and maritime transportation.

The Treaty on European Union (TEU) is a supplemental treaty which embellishes the provisions of the EEC Treaty, particularly by adding that the Council shall lay down measures to improve transport policy, in addition to its duties under Article 75(1). The TEU also laid down the principle that the Council is obligated in all instances to act on proposals from the Commission, consequent to obtaining the opinion of the European Parliament. The TEU merely enforced the need for the Council to act according to the provision. The TEU also requires that the European Community should contribute to the establish-

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61 Id. at art. 84(1).
62 Id. at art. 84(2).
64 Id. at 367.
66 Article 175 of the EEC Treaty addresses issues pertaining to recourse for failure to act. See EEC Treaty, supra note 55, at art. 175.
67 As per the powers of the European Parliament provided for in Articles 137 to 144 of the EEC Treaty. Id. at arts. 137-44.
69 This procedure is laid out in Article 189C of the EEC Treaty.
ment and development of trans-European networks in the fields of transport, telecommunications, and energy infrastructures.\textsuperscript{70}

In October 1997, the Joint European Council confirmed the creation of a European Common Aviation Area (ECAA), which would encompass the European Community States, Member States of the European Economic Area (EEA), and the Associated States of Central Europe. The common aviation area is based on the Acquis Communautaire in air transport and is founded in a multilateral agreement which contains transitional provisions on market access and environmental protection with particular emphasis on noise. European Community legislation is extended by the ECAA Agreement in areas relating to market access and ancillary issues, competition rules, air traffic management, safety, environmental protection, social aspects, and consumer protection.

The perceived dichotomy of wide ranging powers of the European Union in terms of its external relations in air transport and the inhibitions cast upon the Union by the seminal legislative instrument, the Treaty of Rome,\textsuperscript{71} (EEC Treaty) by not explicitly granting the Union competence, has led to sustained examination by the adjudicatory process. The European Court of Justice (ECJ) in 1971 decided that the Community has both external competence and internal competence on an intra-Europe basis. This judgment gave implicit external competence to the European Union to take over control of negotiations on behalf of European Member States in matters relating to international air transport agreements. Although this implicit right has not been used by the European Union extensively, it was indeed used in the 1990s when the European Community adopted internal rules pertaining to computer reservations systems (CRSs) on an intra-Europe basis. This right does not, however, extend to trade in services, on the basis of a 1994 ECJ judgment which decided that trade in services, including trade relating to air transport services, is beyond the jurisdiction of the Union.

With the advent of the Maastricht Treaty of 1992,\textsuperscript{72} which provided that the European Community could decide to cooperate with third countries to promote projects of mutual interest, it was possible to encompass the countries of Central and Eastern Europe within the purview of the European Union. This Treaty

\textsuperscript{70} Treaty on European Union, February 7, 1992, 1 C.M.L.R. 719, art. 129b(1).

\textsuperscript{71} See EEC Treaty, supra note 55.

\textsuperscript{72} Treaty on European Union, February 7, 1992, 1 C.M.L.R. 719.
extended some flexibility to the rigid treaty law governing Europe, particularly in relation to trade in services and commercial competition in air transport. In January 1993, when the third and final phase (third package) of European Community air transportation liberalization took effect, regulations were in place covering areas such as market access, slot allocation, and scheduling.

I. Competition Within Europe

The tightly woven Pan European legislation on competition reflects the desire of the European nations to band together as a collective force, rather than compete individually with other nations or among themselves, in the field of air transport. The combined European markets rank third worldwide and, from 1996 to 2000 it was expected that European air carriers would be responsible for approximately 8% of world aviation in passenger kilometers. Although a combined Europe is more populated than North America, airlines of the European Union countries have not optimized this potential market primarily due to their high operating costs. A few airlines were on top, such as British Airways, KLM, and Lufthansa in the mid-1990s, while most other European carriers were operating at below break-even levels. However, as a result of the rapidly evolving collectiveness of the European States and their competitive banding together, particularly in the liberalization of intra-European markets, European Union carriers have now entered more intra-European routes, and several airlines of European States have established subsidiaries in other Union Member States.

The success of the European Union States, in tightening its air transport legislation and in liberalizing air transport intra-Europe, is a classic example of the "cluster" theory which is based on the competitive advantage of a cluster of nations which are geographically proximate to each other. In this case, the air carriers of a cluster of European States, interconnected and linked by commonalities and complementaries, are given the opportunity of forming alliances, sourcing their capital, goods, and technology to locate their operations within the European continent wherever it may be cost effective. The prevalence of clusters in economies, as against isolated competition, brings to bear new concepts about national, municipal, and international

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74 Id. at 15.
economies, and opens a whole new dimension of competition centered around liberalization on an intra-continental legal structure.

Clustering European air transport in areas of slot allocation and market access has created new management agendas for European carriers, giving them a tangible stake in key business areas such as taxation, utility cost sharing, and wages. The European Union States, in their macroeconomic vision, have created a driving force in the European air transport industry, not only by maximizing air transport potential within the continent, but also by creating new types of dialogues between air transport enterprises within Europe.

The essential theory of clustering is founded upon the interaction of economic potential of a group of enterprises. Clusters of European airlines operating within Europe would affect competition by increasing the productivity across the board of constituent partners. This is done by increasing the capacity of commercial partners' innovation and growth in productivity, and by stimulating new business strategies that expand business as well as the dimensions of the cluster. Clusters also effectively maximize economies of agglomeration by promoting proximity of operation while minimizing costs and increasing proximity to markets.

With the overall thrust of the cluster phenomenon in Europe brought about by tight legislation on liberalization, European nations also have the advantage of the immense capacity of their air transport industry to innovate and upgrade. Europe has retained a competition advantage within the continent through a highly localized process.

2. *Competition Outside Europe*

For the European Union nations, the most important market is arguably the North Atlantic air transport market between the United States and Europe. A primary commercial tool which European carriers have used in participating in this market is the air carrier alliance. The North Atlantic market was by far the largest in the world in the mid-1990s, with 34 million passengers carried in 1993. The largest country pair in this market

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link is United States-United Kingdom, which accommodated 43% of all United States-Europe traffic in 1997.\textsuperscript{76}

Although post-war trends of Bermuda I and Bermuda II bilateral understandings, which had certain restrictions on capacity and tariffs, were perceived as inhibiting the hidden potential in air transport between the United States and Europe, the United States external aviation policy of liberalization, which was launched in 1978, paved the way for more competition between the two. The Netherlands, which blazed the trail with the first liberalized bilateral in 1978 with the United States,\textsuperscript{77} was followed by Belgium\textsuperscript{78} and Germany\textsuperscript{79} in quick succession.

One of the most significant commercial considerations, which has sometimes been a contentious issue with regard to trans-Atlantic air transport, has been the extra-territorial application of European Union and United States competition law. Understandably, both the Union and the United States have explicit policy pertaining to air transport, which is carried out by legislation. It is not unusual, therefore, that the laws applicable to trans-national air transport may be questioned by either side as being extra-territorial. Such a contention does not necessarily reflect \textit{mala fides} on the party against whom extra-territoriality is alleged. The question of extra-territorial application of national laws usually arises in instances where in the absence of an international framework of competition rules, the extra-territorial application of national competition laws is perceived to be necessary to patch loopholes emerging from the territorial reach of national jurisdiction.

The United States has, through its courts, applied United States antitrust laws to commercial activities conducted outside the United States if such activities impinged upon the equilibrium of commercial activities within the United States by having a direct, substantial, and reasonably foreseeable effect within the


\textsuperscript{78} U.S.-Belgium Agreement, T.I.A.S. No. 9231.

\textsuperscript{79} See Bartkowski \& Byerly, Forty Years of U.S.-German Relations 46 Zeitschrift Für Luftund Weltraumrecht, \textit{German Journal of Air \& Space Law}, 1, 3, 8 (1997).
country. The Foreign Trade Antitrust Improvement Act of 1982 grants the United States courts jurisdiction over aspects of foreign conduct, and also grants the United States Department of Transportation jurisdiction over air routes between the United States and a foreign country, including routes which are entirely outside the United States, if competition on such routes is reasonably likely to have an adverse effect on the United States. As a result of this legislative possibility, courts in the United States have jurisdiction over antitrust actions brought by private entities in a court in the United States even where such actions may concern foreign entities.

In a laudable and fair attempt to harmoniously balance the stringent application of United States law to foreign conduct with external cooperation, the United States enacted the 1994 International Antitrust Enforcement Assistance Act, which broadly admits to arrangements with foreign authorities to investigate antitrust violations through the exchange of information and through common and reciprocal retrieval of evidence.

European Union rules on extra-territoriality are not explicit and, therefore, are not incorporated in the competition provisions of Articles 85 and 86 of the EEC Treaty. Although, at best an inference may be drawn from an interpretation of these provisions and extra-territoriality may be imputed to the provisions, the European Court of Justice in the 1988 Wood Pulp case applied the principle of lex situs to jurisdiction. The court held that the place where the anti-competitive arrangements take effect determines the jurisdiction of the Union in matters relating to competition.

Since Article 87 of the EEC Treaty requires appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86, it flows logically that implementing legislation is necessary to give effect to Articles 85 and 86 in the instance of issues arising from air transport in routes between the

82 See Weber, supra note 80, at 103.
84 Article 86 of the EEC Treaty provides that in certain circumstances, any abuse by one or more undertakings of a dominant position within the common market, or in a substantial part of it, shall be prohibited as incompatible with the common market, insofar as it may affect trade between Member States.
European Union and a third country, or in routes that are entirely outside the European Community. Mention must be made in this regard to the case of Ahmed Saeed. The German Federal Court of Justice sought the ruling of the European Court of Justice on a matter pertaining to the selling of air tickets to the German public at prices below the approved level by the Federal Minister of Transport, in contravention of local German municipal law. The issue was whether Article 86 of the EEC Treaty had overriding jurisdiction over local laws of Union States. The ECJ held that Article 86 is directly applicable in national courts, even in the absence of implementing legislation.

B. United States

Foreign investment has caused much less political upheaval in the United States than in Europe. The United States had been, until the 1980s, a strong net exporter of capital and had little to fear from foreign influence in trade issues within the country. In the early 1970s, however, with the burgeoning oil crisis, petrodollars were invested in the United States leading to a 38.3% and 22.3% increase in foreign direct investment in 1973 and 1974 respectively. This figure can be contrasted with a 6% increase on average in the decade between 1962 and 1972. This quantum leap in foreign investment caused grave concern in Congress and led to a national inquiry which called for measures affecting foreign investors in the United States. The 27 volume and 9,000 page report, which comprehensively described the regulations facing foreign investors, concluded that a sufficient number of sectors were appropriately regulated, and recommended that substantial change to the existing policy was unnecessary.

Unlike its neighbor, Canada, which has a comparably restrictive foreign investment policy, the United States has a liberal "open door policy" on foreign direct investment and is one of

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87 Id.
the most open economies in this respect. The United States International Investment Policy Statement of 1983 confirmed:

The United States has consistently welcomed foreign direct investment in this country. Such investment provides substantial benefit to the United States. . . We provide foreign investors fair, equitable and non-discriminatory treatment under our laws and regulations. We maintain exceptions to such treatment only as far as necessary to protect our security and related interests which are consistent with our international legal obligations.89

The United States has adopted the approach that the absence of regulation encourages investment and is beneficial to the United States economy.90 The United States has, therefore, generally adopted a non-discriminatory treatment approach for foreign investors.91 A commentator adds:

Foreign nationals and companies are treated as favourably as nationals or companies of the United States with respect to the establishment and operation of enterprises in this country. . . Further, on the basis of the national treatment principal investors from other countries can generally make investments in this country on the same legal terms as American investors.92

The “open door policy” and national treatment principle, however, does not reflect an accurate picture of the status of foreign investment in the United States. In contrast to what the “open door policy” is perceived to be, there are numerous laws that effectively preclude this policy from taking full effect, thus impeding foreign investments in the country. An example of this inhibitive approach is the 1988 “Exon-Florio Amendment” which provided the President with broad powers to review investments of foreign investors on his own initiative for any reason, including those which directly or indirectly affect national

91 The United States is limited by its Constitution and by the treaty provisions governing the country in its capacity to regulate foreign investment. There are built-in guarantees that are offered to foreign investors in the Friendship, Commerce and Navigation Treaties (FCN), and the OECD Code of Liberalization of Capital Movements, which have a direct effect on the United States legal system, and the guarantee of due process and non-discrimination entrenched in the United States Constitution.
security. Additionally, the President may also review a foreign investment following the complaint of a third party.\(^9^3\)

Investors may, by their own volition, serve notice on the Committee on Foreign Investment in the United States (CFIUS). In addition, the CFIUS can also decide to inquire into an investment by itself. The CFIUS then advises the President of its decision with regard to an investment and the President ultimately decides whether the investment is contrary to national security interests. The notion of "national security" is ambivalent in this context, lacking a precise definition. Consequently, the Executive Branch has great discretion in the implementation of the Act. The Act is used infrequently and each case is evaluated individually.\(^9^4\)

In addition, many other sectors which operate through a fixed maximum level of foreign participation are excluded from foreign investor participation entirely or partially. These restrictions are seen at the federal level in the fields of communications,\(^9^5\) transportation,\(^9^6\) aviation,\(^9^7\) energy and national resources,\(^9^8\) banking,\(^9^9\) and defense.\(^1^0^0\) Federal laws such as anti-


\(^{9^5}\) The Federal Communications Commission may refuse to grant a broadcasting license if the corporation applying for the licence is owned by foreigners and if it is in the national interest to refuse the grant of such licence. See Federal Communications Act, 47 U.S.C. § 734 (1976).


trust regulations contained in the Clayton Act of 1981,\textsuperscript{101} which prohibit direct or indirect acquisition of shares of a company when it would affect or lessen competition in such a way as to promote the creation of a monopoly, and the Sherman Act of 1981,\textsuperscript{102} which prohibits monopolies created by contract, conspiracy, or other ways that restrain trade, may also bring to bear serious effects on the foreign investors' investments in the United States.

C. COMPETITION OPTIONS - THE TRANSATLANTIC COMMON AVIATION AREA

As to whether there should be absolute, untrammelled competition within the Americas and between the Americas and Europe is a critical issue for the coming years. One recent suggestion has been to crystallize a "convergence of regulatory principles" between Europe and the United States in competition by establishing a Transatlantic Common Aviation Area (TCAA). This concept, suggested by the Association of European Airlines (AEA) in a policy statement,\textsuperscript{103} puts forward detailed and realistic proposals regarding how to bring about an ideal regulatory convergence between the European region and the United States. The TCAA addresses three areas:

a) matters in which harmonization is necessary;
b) matters in which convergence could take the form of mutual recognition; and
c) matters which could, in principle, be left at the discretion of each party.

The TCAA concept advocates the freedom of the parties to provide services, addresses issues pertaining to airline ownership and the right of establishment, provides recommendations with regard to competition policy, and offers guidelines on the lease-


\textsuperscript{100} One of the most compelling elements of State control of foreign investment in the United States is based on national defense under the Defence Production Act of 1950, 50 U.S.C.A. App. § 2170 (1989).


\textsuperscript{103} Aeropoliitical News, IATA, No. 744-18.11.99.
ing of aircraft. Since the TCAA aims at replacing traditional governmental regulatory control of aspects of competition, such as market entry and pricing, the issues emerging from competition policy are by far the most complex and difficult to deal with, within the parameters of the TCAA. Although the fundamental postulates of competition in Europe (as followed through by European Union regulations) and the United States are broadly similar in intent and both depend to a certain extent on the application of extra-territoriality in their regulations, there are obvious differences, such as those embodied in the different approaches to trans-Atlantic airline alliances. While the United States stringently relies on a principle of "public interest" in its air transportation policy, European competition rules are not as explicit. The basic essence of a TCAA would, therefore, establish the principle that matters of route sharing, capacity, pricing, and frequency of services should be driven by market forces, rather than be determined by governmental intervention. In this regard a certain commonality could be established between air transport of the two regions.

Another option is to allow absolute open competition between Europe and North America. Although globalization of competition in trade is a reality, in the case of air transport it may be premature since the current bilateral air services negotiations structure still seems to work. Additionally, absolute globalization of air transport will involve the question of air transport being encompassed in the General Agreement on Trade in Services (GATS). The GATS contains the Most Favoured Nations (MFN) treatment clause under the General Agreement on Tariffs and Trade (GATT), which later came within the purview of the World Trade Organization (WTO). Under the MFN clause, a GATS Member could be required, immediately and unconditionally, to accord to the services and service suppliers of any other Member treatment no less favourable than it accords to like services and service suppliers of any other country. This is not practical since the application of the MFN principle to international air transport would adversely affect and hold back the ongoing process of liberalization between like-minded States.

IV. CONCLUSION

The decision of the European Court must necessarily be viewed, not for its validity or logicality, both of which are not in question, but for its consequences. The court has clearly ruled
that certain areas of air transport should be strictly within the overall competency of the European Commission through the Council. However, the court clearly ruled that the national prerogative of a EU Member State to initiate, negotiate, and finalize bilateral air services still remains. Issues of market access and air traffic rights could indeed be the subject of individual negotiation of a European Union State, provided they did not discriminate against the equal rights enjoyed by other European carriers. In this regard, the decision of the court was not unexpected and retained the status quo ante. This essentially means that the existing international norms prevailing prior to the decision of the court still stand in these areas, and the market and political forces at play will now be even more relevant.

In the field of air transport, the European Union has shown that national prosperity is created, not inherited, and that, contrary to popular belief, a commercially successful enterprise within a nation does not necessarily grow because of that nation’s natural endowments, its cheap labour force or its currency values, but rather by the capacity of that industry to innovate and upgrade. As the winds of change are sweeping commercial aviation toward the new millennium, European nations have shown that, at least in air transportation, nations have become more, not less, important. They have created competitive advantages for themselves through a highly localized process.

States of Europe have realized that, unlike large nations such as the United States, Canada, and Russia, individual European States are relatively small in size. The geographic magnitude of a country becomes a relevant consideration in air transport, both in terms of the volume of traffic generated by a particular country and the negotiating leverage it has in bartering air traffic rights and points of departure and landing. If a country is small, it is usual for that country to have fewer airports than a larger country, and the latter would consequently have more opportunity at bargaining. Therefore, incontrovertibly, European States have to band together in order to optimize their collective potential.

Strict European Union legislation is therefore understandable, particularly in areas such as slot allocation, computer reservation systems, fares, and rates in air transport services, which the European Court of Justice addressed. However, this legisla-

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104 See United Kingdom, E.C.R. I-9427, at para. 150.
tion should continue in product performance, product safety, and environmental impact to promote a competitive advantage and stimulate and upgrade domestic demand. The last element, environmental impact, should be particularly addressed in harmony with global regulations as promulgated through the International Civil Aviation Organization. As a future measure, European States should also continue limiting direct cooperation in the air transport field among industry rivals in order to obviate anti-competitive conduct. As a supplemental measure, competition should be deregulated and State monopolies, which are already discouraged in the Union, should be eschewed. Finally, governments should vigorously pursue an open market policy that veers away from managed trade, which has a tendency to deal with the fallout of national competitiveness.

European airlines should continue to seek out pressure and challenge in order to innovate commercially toward more achievements while seeking out their most capable competitors as motivators. More importantly, airlines of European nations should establish early warning systems which would indicate any hint of change in the air transport market, both within and outside Europe. Airlines could find and serve passengers and consignors who have the most anticipating needs, find places whose regulations foreshadow emerging regulations elsewhere, bring outside expertise into their management teams, and constantly conduct research on market access.

In the quest for globalization of European air transport activity, airlines should tap selectively into sources of advantage in other nations’ airlines. However, airline alliances have to be used only selectively in order to minimize costs and obviate relinquishing profits that would accrue to an airline without the alliance concerned. Inevitably, an airline alliance shows the partners’ mediocrity to an extent, particularly if profits are not optimized and alliances are formed on core activities. The central theme for European nations and their airlines for the future is “leadership” which they currently hold in air transport regulation by being second to none and equal to the best.

Regarding North America, it must be stringently maintained that the United States, Canada, or any other country, has not, in its pursuit of open skies, advocated the GATS umbrella. The United States’ approach has been to maintain its policy of “public interest” and to maximize air transport as a service industry to confront the challenges of the upcoming decades. The GATS example served only to show a certain similarity of equal oppor-
tunity and competition under the MFN clause, which would be reflective of the philosophy of an open skies regime, where all States participating in an open skies policy with each other would enjoy equal air traffic rights on a reciprocal basis.

As to the question whether the GATS negotiating scheme should be adopted with regard to international competition policy, the main consideration should be that if such a scheme is ever considered, it should be contemporaneous with the consideration of a scheme within the WTO for negotiating international antitrust principles. Negotiations may be on a total harmonization or a partial harmonization basis. Such an approach would have the advantage of the possibility of introduction by members of a variety of international competition agreements out of which they could select a suitable agreement. Also, if this approach is adopted, it would be important for members to have a firm commitment to promote competition law and policy both internationally and domestically. Such commitment should be clearly declared. Also, it may be necessary to establish, as in GATS, a time schedule within which negotiations should be carried out.

A declaration of fundamental principles of competition would also be necessary. This declaration should contain analogous provisions to the most favoured nation treatment, national treatment and transparency. Consideration should also be given to prohibition of cartels, resale price maintenance, boycotts, and others. At the same time, caution should be given that a wide variety of principles that are followed by Members with regard to other areas, such as mergers and acquisitions, vertical non-price restraint, and predatory pricing, therefore, it may be feasible to merely declare general and abstract principles which require Members to promote competition policy in such areas.

Although admittedly, the WTO is not the only forum in which a scheme of convergence of competition laws can be accommodated (the OECD for example, is for every purpose an appropriate forum) there is compelling reason for such a scheme to be considered under the WTO umbrella due to the volume of membership that the WTO carries. Among the more than 125 States which participated in the Uruguay Round leading to the establishment of the WTO Agreement, not all have competition laws and many are not yet ready for such. When an international competition code is drafted, it is logical to expect a certain degree of universality in its principles and such could be accomplished on a wider scale, given the WTO’s membership.
Professor Petersmann has recommended that an international competition code may be accommodated as an agreement of Annex 4 of the WTO Agreement, which contains optional agreements. Petersmann examines the idea of a smaller number of nations entering into such an agreement initially, such as the United States, Japan, and Members of the European Community, with Canada and Australia joining in. A grace period for developing States to join the agreement has also been addressed. He believes that, at least in the initial stage, an international competition code among a smaller number of members may work more effectively. Such an agreement may, according to Petersmann, address “market access” issues effectively.

Generally, it is felt that the inclusion of an international competition code in the WTO Agreement would have the advantage of coordination between competition policy and other policies embodied in WTO agreements such as TRIPS, the Safeguard Agreement, and the Antidumping Agreement. Such agreements would be accomplished easier than if a competition code was established separately from the WTO. Another envisaged advantage is that the dispute settlement process incorporated in Annex 2 of the WTO Agreement could be utilized when a dispute arises relating to the enforcement of competition laws.

Perhaps the only similarity between the competition rules of the existing bilateral structure relating to the air services agreement and the WTO competition rules is the insistence by both systems on the requirement of fair and equal opportunity. The current bilateral structure of the air services negotiations will remain in force as long as States consider, subjectively, the potential of air traffic that their carriers would have over others, by excluding others from given market segments. This the States can do, not only because of Article 6 of the Chicago Convention, but also by virtue of the underlying principle of sovereignty, which legally entitles a State to prohibit a carrier from flying into or out of its territory without that State’s permission. As the preceding discussion has revealed, the protectionist attitude that pervades commercial air transport is not limited to struggling carriers of developing nations, but also applies to mega carriers who protect what they believe to be a legitimate

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share of their market. In this backdrop, the term “market access” can only be used with the word “reciprocity.” The status quo in commercial aviation is, therefore, by no means consistent with the competition principles advocated by the WTO.

If the concept of “market access” of commercial aviation is to be in consonance with WTO competition rules, the first step that the aviation Community would have to take is to change its overall philosophy and consider all international air traffic as international property rather than national property. This calls for a radical change in international policy regarding air traffic rights, where individual States would be considered as having an overall duty towards their citizens and citizens would be considered units of an international Community of nations, rather than being considered units of that particular State. In other words, States would represent citizens as nationals of an international society. The international traffic market would then be taken as a whole and nations would adapt themselves to an extra-national approach in sharing international air traffic. Once the extra-national philosophy is in place, it would not be difficult to consider extra-territoriality in competition in a manner compatible with WTO competition rules, particularly in the context of the latter’s emphasis on uniformity. The principles of transparency, the most favoured nation treatment, and dispute resolution could then all fall into place.

Theoretically, the above proposal may sound logical and workable. However, in practicality, it cannot be denied that States have jealously guarded their historical rights to air traffic over the past fifty-five years and would, therefore, be reluctant to embrace a multilateral approach to enter into open competition. As to whether this trend would continue between the Member States of the European Union and the United States after the decision of the European Court is a matter for the future.