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**COMPETITION AND SUBSIDIES  
IN AIR TRANSPORT LIBERALIZATION—  
THE UAE-NORTH AMERICA DISPUTE**

RACHID TIROUAL\*

ABSTRACT

Subsidy allegations against the three major Middle-Eastern carriers—Emirates Airlines, Etihad Airways, and Qatar Airways—have been brought by the three major U.S. carriers—American Airlines, Delta Air Lines, and United Airlines. The latter claim that the Gulf trio receive letters of credit and subsidies from their governments. They claim also that their rivals take passengers and revenues from U.S. carriers and force them to reduce, terminate, or forego services on international routes.

This article rationalizes the ongoing debate without arguing whether the subsidy allegations are founded or not. It seeks to understand the basic rationale behind any findings and conclusions drawn by the different stakeholders that are involved or concerned by the subject. It is important to shed light on the conflicts of interests that might harm air transport development as a whole, and hence the fundamental right of the people: freedom of movement and, more specifically, the needs of the people for “efficient and economical air transport” prescribed by Article 44 of the Convention on International Civil Aviation.<sup>1</sup>

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<sup>1</sup> Int’l Civ. Aviation Org. [ICAO], Convention on International Civil Aviation, art. 44, ICAO Doc. 7300/8, (8th ed. 2000) [hereinafter Chicago Convention]. The Convention came into force Apr. 4, 1947. *Id.* at 1, n.1.

The focus is on the North American region. The air transport policies and competitive issues are addressed from different national and international perspectives, specifically, the International Civil Aviation Organization (ICAO), the World Trade Organization (WTO), national civil aviation authorities, and for-profit organizations. The analysis is based mainly on scientific data and legal and regulatory aspects, which are discussed through a case study of the United States and Canada on the one hand and the United Arab Emirates (UAE) on the other.

## I. INTRODUCTION

**T**HE POLICIES AND regulations which have governed the air transport industry for several decades have various motivations to each country. However, unnecessarily restrictive regulations may have led to significant losses of economic efficiency, and thereby a failure to safeguard an efficient and viable air transportation to the largest possible proportion of the population. In other words, a failure to “[m]eet the needs of the peoples of the world for . . . efficient and economical air transport.”<sup>2</sup>

Economic and social benefits have been pointed out as the very essence of air transport liberalization, which has been an engine and a catalytic tool of socioeconomic development within the aviation industry.<sup>3</sup> Connectivity has been identified as a social benefit and considered a secondary effect of liberalization.<sup>4</sup>

What is considered by some stakeholders as a benefit occurring from liberalization might be perceived by others as a threat. Not everyone is convinced of the effects or side effects of competition in air transport, which is the driving force of liberalization.

One of the fundamental rules of air transport regulation is to make sure that international air transport services are established “on the basis of equality of opportunity and operated soundly and economically.”<sup>5</sup> More specifically, every contracting State *should* have “a fair opportunity to operate international air-

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<sup>2</sup> *Id.* at 20.

<sup>3</sup> Air Transp. Res. Soc’y, Air Transportation Liberalization & the Economic Development of the Countries 3 (ICAO, Working Paper No. 189, 2016), [http://www.icao.int/Meetings/a39/Documents/WP/wp\\_189\\_en.pdf](http://www.icao.int/Meetings/a39/Documents/WP/wp_189_en.pdf) [<https://perma.cc/Y7YC-C5Z2>].

<sup>4</sup> *Id.* at 4.

<sup>5</sup> Chicago Convention, *supra* note 1, at 1.

lines.”<sup>6</sup> Article 44 of the Chicago Convention explains the objectives of ICAO, built upon the message of peace and harmony among nations mentioned in the preamble.<sup>7</sup>

According to ICAO,

The liberalization of international air transport regulation continued to evolve at various levels since the 1980s. It is estimated that, in 2012, this involved about 35 [percent] of country-pairs with non-stop scheduled passenger air services and about 58 [percent] of the frequencies offered, through either bilateral “open skies” air services agreements (ASAs) or regional/plurilateral liberalized agreements and arrangements.<sup>8</sup>

In order to assist Member States in liberalizing their air services, ICAO has set up a Template Air Services Agreement (TASA) as a comprehensive framework for optional use by States.<sup>9</sup> TASA provides proposals of provisions for bilateral and regional/plurilateral ASAs based on the model clauses developed by ICAO and the practice of States in their agreements.<sup>10</sup> The template provides explicit explanations of many clauses throughout its Articles. Likewise, similarities and differences between various wordings are pointed out depending on the desired degree of liberalization (i.e. traditional, transitional, or full liberalization).<sup>11</sup>

Every ten years, ICAO holds a worldwide air transport conference (ATConf) to examine the key issues and related regulatory framework governing the development of air transport. In 2003, the fifth such event (ATConf/5) “gave widespread support for the concept and contents of the TASA, its optional use by States in their air services relationships and its further development

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<sup>6</sup> *Id.* at 20.

<sup>7</sup> *Id.* at 1, 20. These objectives include: (1) encouraging the arts of aircraft design and operation for peaceful purposes; (2) meeting the needs of the people of the world through the development of safe, regular, efficient, and economical air transport; and (3) ensuring that the rights of contracting States are respected, and avoiding discrimination between States.

<sup>8</sup> ICAO SECRETARIAT, REGULATORY & INDUSTRY OVERVIEW 1 (2013), <http://www.icao.int/Meetings/a38/Documents/REGULATORY%20AND%20INDUSTRY%20OVERVIEW.pdf> [<https://perma.cc/T3FB-CBN2>].

<sup>9</sup> ICAO SECRETARIAT, WORLDWIDE AIR TRANSPORTATION CONFERENCE: CHALLENGES AND OPPORTUNITIES OF LIBERALIZATION 2 (2003), [http://www.icao.int/Meetings/ATConf5/Documents/atconf5\\_wp017\\_en.pdf](http://www.icao.int/Meetings/ATConf5/Documents/atconf5_wp017_en.pdf) [<https://perma.cc/78DG-9GRS>].

<sup>10</sup> ICAO, ICAO TEMPLATE AIR SERVICES AGREEMENTS 1 (2009), <http://www.icao.int/Meetings/AMC/MA/ICAN2009/templateairservicesagreements.pdf> [<https://perma.cc/X6SW-JKJ8>].

<sup>11</sup> *Id.* at 1–2.

over time by ICAO as ‘living documents.’”<sup>12</sup> One decade later, 1,000 delegates and observers from 131 Member States and thirty-nine international organizations attended the most recent conference (ATConf/6) held in Montreal from March 18–22, 2013. Among other things, this conference decided that ICAO should continue to update TASA to keep pace with regulatory evolution.<sup>13</sup>

The main outcomes of ATConf/6 are summarized on the basis of four important points: (1) highlighting air transport policy as an integral element of a sustainable civil aviation system; (2) reaffirming the objective of enhanced liberalization and ICAO’s leadership role in developing related policies and tools; (3) opening up new perspectives for the modernization of the global regulatory framework; and (4) providing a basis for concrete actions by ICAO.<sup>14</sup>

In 2014, experts from twenty-seven Member States and eighteen observer States and international organizations participated in the twelfth meeting of the Air Transport Regulation Panel (ATRP/12) in order to assist ICAO Secretariat in the ATConf/6 follow-up work.<sup>15</sup> It was noted that the work of the ATRP will take into consideration the interests of all stakeholders, including an effective and sustained participation of States in international air transport and the ICAO Strategic Objectives for 2014-2016. In that regard, the ATRP has committed to undertake several actions and measures, including further development of ICAO’s policy and guidance material on international air transport regulation and liberalization. Accordingly, ATRP/12 considered strategic issues relating to air transport liberalization, which include: (1) a long-term vision for international air transport liberalization; (2) an international agreement for Members States to liberalize market access and air carrier ownership and control; (3) regulatory approaches for fair competition; and (4) a set of core principles on consumer protection.<sup>16</sup>

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<sup>12</sup> *Id.* at 1.

<sup>13</sup> Council of ICAO, Outcome of the Sixth Worldwide Air Transportation Conference 2, 11 (ICAO, Working Paper No. 56, 2013), [http://www.icao.int/Meetings/a38/Documents/WP/wp056\\_en.pdf](http://www.icao.int/Meetings/a38/Documents/WP/wp056_en.pdf) [<https://perma.cc/C3V9-P29L>].

<sup>14</sup> *Id.* at 4.

<sup>15</sup> ICAO, REPORT OF THE TWELFTH MEETING OF THE AIR TRANSPORT REGULATORY PANEL (ATRP/12), ii-1, A1–A4 (June 19, 2014), [http://www.icao.int/Sustainability/Compendium/Documents/ReferenceDocuments/ATRP12\\_Report\\_en.pdf](http://www.icao.int/Sustainability/Compendium/Documents/ReferenceDocuments/ATRP12_Report_en.pdf) [<https://perma.cc/C5SQ-P4EA>].

<sup>16</sup> *See id.* at ii-1–ii-2.

The International Air Transport Association (IATA)<sup>17</sup> advocates that, as a global industry, aviation liberalization “can provide greater benefits for passengers and allow airlines to operate on a fully commercial basis.”<sup>18</sup> According to IATA, modern, commercial, and global rules are required to achieve further—and fuller—liberalization of the global airline industry.<sup>19</sup> IATA believes that the liberalization of operational (i.e. product market) and ownership (i.e. capital market) restrictions can be a very beneficial process despite the difficulty inherent in such process. In that regard, IATA has analyzed the impact of operational and ownership liberalization in four other industries—retail banking, energy, telecoms, and media—which share close parallels with the air transport industry; all are strategically important, network oriented, and customer-focused. The results showed that further liberalization will have positive impact for both consumers and producers.<sup>20</sup>

IATA points out the existing restrictive bilateral ASAs as an impediment to the sustainable growth of air transport industry including air traffic services and airline ownership and control by foreign nationals.<sup>21</sup> IATA notes that the airline industry is “safer, more accessible and more efficient than ever before” thanks to airlines.<sup>22</sup> IATA urges governments to bring policy in line with these achievements: “The future success of our industry rests on greater commercial freedom to serve markets where they exist and to merge and consolidate where it makes business sense.”<sup>23</sup>

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<sup>17</sup> “was founded in Havana, Cuba, in April 1945 . . . . At its founding, IATA had 57 members from 31 nations, mostly in Europe and North America. Today it has some 265 members from 117 nations in every part of the globe.” *The Founding of IATA*, IATA, <http://www.iata.org/about/Pages/history.aspx> [<https://perma.cc/L5FM-2EHC>]. IATA is the trade association for the world’s airlines, representing 83% of total air traffic. It supports airline activity and helps formulate industry policy and standards. *About Us*, IATA, <http://www.iata.org/about/Pages/index.aspx> [<https://perma.cc/CMG3-S8AA>]. It is headquartered in Montreal, Canada with Executive Offices in Geneva, Switzerland. *IATA Office Addresses*, IATA, <http://www.iata.org/about/Pages/offices.aspx> [<https://perma.cc/6A9Z-NRW2>].

<sup>18</sup> MARK SMYTH & BRIAN PEARCE, IATA, IATA ECONOMIC BRIEFING NO. 7: AIRLINE LIBERALISATION 6 (2007).

<sup>19</sup> *Id.* at 4, 14.

<sup>20</sup> *Id.* at 3–4.

<sup>21</sup> *Id.* at 7.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.*

Air transport services, which are governed by the WTO,<sup>24</sup> are defined in the General Agreement on Trade in Services (GATS), the WTO's multilateral agreement on trade in services.<sup>25</sup> These services are set out in the annex of the GATS on air transport services, which excludes from the scope of the GATS: (1) traffic rights, however granted; or (2) services related to the exercise of traffic rights, except aircraft repair and maintenance services, selling and marketing of air transport services, and computer reservation system services.<sup>26</sup>

However, these services are subject to a regular review by the Council of Trade in Services, with a view to considering the possible further application of the GATS to the sector.<sup>27</sup> In that regard, a first review took place from 2000 to 2003, and the second one is ongoing.<sup>28</sup> The WTO works in coordination with the ICAO and other stakeholders on various aspects, specifically those related to liberalization of air transport. On that note, the WTO has developed, in preparation for the second review, the Quantitative Air Services Agreements Review (QUASAR) database and methodology, which aims to assess the degree of liberalization of the air transport.<sup>29</sup> Moreover, a study was conducted by the ICAO and the WTO in 2005 to develop the Essential Service and Tourism Development Route Scheme (ESTDR), and hence institutional mechanisms to support airlines willing

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<sup>24</sup> The WTO is a global international organization that deals with the rules of trade between its 159 member states. See *What is the WTO?*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm) [<https://perma.cc/YS7U-FMGZ>]. The WTO acts as conductor of negotiations of trade agreements, a tribunal for dispute settlement, a monitor of trade policies, and a trainer to build trade capacity. See *The Four Roles of the WTO*, WTO, [https://www.wto.org/english/news\\_e/infocenter\\_e/brief\\_roles\\_e.doc](https://www.wto.org/english/news_e/infocenter_e/brief_roles_e.doc) [<https://perma.cc/PB5Q-LT75>].

The WTO acts as a global police. Between 1995 and 2013, the organization received more than 400 trade disputes between member states. 75% of these cases have been resolved by informal consultations between the plaintiffs and defendants. Countries concerned have generally adopted the recommendations of the WTO. See CHARLES W. L. HILL ET AL., *GLOBAL BUSINESS TODAY* 211 (9th ed. 2016).

<sup>25</sup> *Air Transport Services*, WTO, [https://www.wto.org/english/tratop\\_e/serv\\_e/transport\\_e/transport\\_air\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/transport_e/transport_air_e.htm) [<https://perma.cc/TL8X-RSX6>].

<sup>26</sup> Marrakesh Agreement Establishing the World Trade Organization, Annex 1B: Annex on Air Transport Services, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement, Annex 1B].

<sup>27</sup> *Id.*

<sup>28</sup> *Air Transport Services*, *supra* note 25.

<sup>29</sup> *Id.*

to provide certain services of a public service nature.<sup>30</sup> The QUASAR methodology and the role of the WTO in regard to competition issues and commercial disputes are discussed later in this Article.

Unlike the international organizations, the objectives and principles of the air transport liberalization from the perspectives of national authorities and airlines, considered separately, might vary drastically at large, depending upon the interests of each stakeholder. What is considered by one as a great benefit might be perceived by another as a threat. This is more evident when conflicts occur between parties, which can be either national authorities (e.g. political disputes, conflicts with other departments within the same State) or airlines (e.g. disputes on competition). Neither ICAO nor IATA have authority over the national civil aviation authorities and airlines when it is a matter of the level of market access.

## II. AIR TRANSPORT LANDSCAPE IN THE UNITED STATES, CANADA, AND THE UNITED ARAB EMIRATES

### A. UNITED STATES

The United States is one of the best examples of market liberalization. It has high quality statistics on air travel because of its size and the relatively lengthy period since it deregulated its domestic market in the late 1970s. Moreover, its “airports have been most active in pursuing new services, and in evaluating the economic impacts of aviation.”<sup>31</sup>

Over the past decade, the United States has been a nexus for economic growth and air transport development. Between 1996 and 2010, “[U.S.] gross domestic product (GDP) per capita [grew] by approximately 27% [and] [U.S.] air passenger-miles for international and domestic travels . . . increased by 52% and 32%, respectively.”<sup>32</sup> According to the World Economic Forum

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<sup>30</sup> ICAO, *A Study of an Essential Service and Tourism Development Route Scheme 2* (2005), [http://www.icao.int/sustainability/EssentialServicesStudy/EssentialServicesStudy\\_en.pdf](http://www.icao.int/sustainability/EssentialServicesStudy/EssentialServicesStudy_en.pdf) [<https://perma.cc/8MP3-PANG>].

<sup>31</sup> INTERVISTAS CONSULTING, *ECONOMIC IMPACT OF AIR SERVICE LIBERALIZATION 10* (2006), [http://www.intervistas.com/downloads/Economic\\_Impact\\_of\\_Air\\_Service\\_Liberalization\\_Final\\_Report.pdf](http://www.intervistas.com/downloads/Economic_Impact_of_Air_Service_Liberalization_Final_Report.pdf) [<https://perma.cc/YG6B-6623>].

<sup>32</sup> Junwook Chi & Jungho Baek, *Dynamic Relationship Between Air Transport Demand and Economic Growth in the United States: A New Look*, 29 *TRANSPORT POL'Y* 257, 257 (2013).



(WEF), “economic growth plays a crucial role in the expansion of both air passenger and freight services.”<sup>33</sup>

In 2014, the U.S. aviation industry generated a total of 5.7 million jobs, of which 2.2 million were direct.<sup>34</sup> It also had an impact of \$561.7 billion on GDP, of which \$118 billion were in the tourism industry.<sup>35</sup> Moreover, according to the U.S. Travel Association, domestic and international travelers spent \$927.9 billion directly and spurred an additional \$1.2 trillion in other industries.<sup>36</sup>

Open Skies agreements have vastly expanded international passenger and cargo flights to and from the United States. According to the Department of Transportation, Open Skies agreements with over 100 partners have been achieved from every region of the world and at every level of economic development: “America’s Open Skies policy has gone hand-in-hand with U.S. airline globalization. By allowing U.S. air carriers unlimited market access to our partners’ markets and the right to fly to all intermediate and beyond points, Open Skies agreements provide maximum operational flexibility for airline alliances.”<sup>37</sup>

However, with the rise of the Middle Eastern carriers and other foreign carriers (e.g. Norwegian Air Shuttle), Open Skies agreements “are under attack from an unlikely alliance of domestic airlines and unions.”<sup>38</sup> Legacy airlines, “which have traditionally backed open-skies policies to expand their markets,” are now claiming the re-evaluation of the objectives of these agreements because of alleged unfair competition from some major foreign carriers.<sup>39</sup>

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<sup>33</sup> *Id.* at 260.

<sup>34</sup> AIR TRANSPORT ACTION GROUP, AVIATION BENEFITS BEYOND BORDERS 56 (2014), [http://aviationbenefits.org/media/26786/ATAG\\_AviationBenefits2014\\_FULL\\_LowRes.pdf](http://aviationbenefits.org/media/26786/ATAG_AviationBenefits2014_FULL_LowRes.pdf) [<https://perma.cc/VQ4E-9TC2>].

<sup>35</sup> *Id.*

<sup>36</sup> U.S. TRAVEL ASS’N, *U.S. Travel Answer Sheet—Facts About a Leading American Industry That’s More Than Just Fun* (2014), [https://www.ustravel.org/sites/default/files/Media%20Root/Document/US\\_Travel\\_AnswerSheet\\_DEC2015\\_final%20\(2\).pdf](https://www.ustravel.org/sites/default/files/Media%20Root/Document/US_Travel_AnswerSheet_DEC2015_final%20(2).pdf) [<https://perma.cc/YD2F-N7RD>].

<sup>37</sup> *Open Skies Agreements*, U.S. DEP’T OF STATE, <http://www.state.gov/e/eb/tra/ata/> [<https://perma.cc/H4NF-VVJN>].

<sup>38</sup> Jad Mouawad, *Open-Skies Agreements Challenged*, N.Y. TIMES, Feb. 6, 2015, [https://www.nytimes.com/2015/02/07/business/us-airlines-challenge-open-skies-agreements.html?\\_r=0](https://www.nytimes.com/2015/02/07/business/us-airlines-challenge-open-skies-agreements.html?_r=0) [<https://perma.cc/U8M9-QQVS>].

<sup>39</sup> *Id.*

Operation of airports by municipal and quasi-municipal governments is unique to the United States. The airport workers are government employees and the airport's budget is subject to city or municipal approval.<sup>40</sup> Generally speaking, airports are subject to a heavy regulatory framework dating back to the Nixon era.<sup>41</sup> Also, U.S. airports have traditionally been heavily "influenced by competitive private interests, particularly by airlines that have had the power . . . to shape virtually all the major aspects of airport development and management."<sup>42</sup>

Long-haul travel experienced a 40% growth from 2000 to 2010, while the domestic market showed just a 2% growth during the same period.<sup>43</sup> In 2014, the United States held the top rank regarding the number of operating airlines, which was 223. It ranked second in overall air transport infrastructure, and ninth in terms of quality. However, it ranked 128th out of 141 countries in price competitiveness related to ticket taxes and airport charges, being among the highest in the world.<sup>44</sup>

Even though U.S. airports are essential for the country's development, they suffer from heavy government controls and frameworks and lack of revenues. This is due to the Federal Aviation Administration (FAA) regulated fares. According to the WEF Report, this has caused the United States to fall to the thirty-first position in airport development.<sup>45</sup> The United States restricts foreign ownership of domestic and international airlines to 25%, though it "has allowed up to 49% foreign ownership on a case-by-case basis."<sup>46</sup>

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<sup>40</sup> MIKE TRETAWAY, AIRPORT OWNERSHIP, MANAGEMENT & PRICE REGULATION 4-6 (2001), [http://www.intervistas.com/downloads/Airport\\_Ownership\\_Management\\_and\\_Price\\_Regulation.pdf](http://www.intervistas.com/downloads/Airport_Ownership_Management_and_Price_Regulation.pdf) [<https://perma.cc/KCZ4-5L3L>].

<sup>41</sup> See generally THERESA L. KRAUS, U.S. DEP'T OF TRANSP., FEDERAL AVIATION ADMINISTRATION: A HISTORICAL PERSPECTIVE, 1903-2008 25-44 (2008), [https://www.faa.gov/about/history/historical\\_perspective/media/historical\\_perspective\\_ch4.pdf](https://www.faa.gov/about/history/historical_perspective/media/historical_perspective_ch4.pdf) [<https://perma.cc/3YDA-VK9P>].

<sup>42</sup> RICHARD DE NEUFVILLE, AIRPORT PRIVATIZATION ISSUES FOR THE UNITED STATES 5 (1999).

<sup>43</sup> Kate Rice, *U.S. Travel Associations Dow Details Impact of 9/11 on Travel Business*, TRAVEL PULSE, Aug. 24, 2011, <http://www.travelpulse.com/news/features/us-travel-associations-dow-details-impact-of-911-on-travel-business.html> [<https://perma.cc/ZB2T-D8VS>].

<sup>44</sup> WORLD ECON. FORUM, THE TRAVEL & TOURISM COMPETITIVENESS REPORT 2015 339 (Roberto Crotti & Tiffany Misrahi, eds., 2015), [http://www3.weforum.org/docs/TT15/WEF\\_Global\\_Travel&Tourism\\_Report\\_2015.pdf](http://www3.weforum.org/docs/TT15/WEF_Global_Travel&Tourism_Report_2015.pdf) [<https://perma.cc/S9UR-QJWQ>].

<sup>45</sup> *Id.* at 43.

<sup>46</sup> DAVID GILLEN, COMPETITION POLICY REVIEW PANEL, FOREIGN OWNERSHIP RESTRICTIONS IN THE CANADIAN AVIATION INDUSTRY: A REVIEW AND ASSESSMENT 2

During the period between 2011 and 2015, as the economy was returning from the 2008 economic crisis, the financial results of U.S. airlines continued to show improvement as the industry was being restructured. In 2015, the industry recorded one of the strongest profitability reports; “the top 10 U.S. scheduled passenger airlines, based on operating revenue, reported an after-tax net profit of \$24.2 billion . . . up from a profit of \$7.3 billion in 2014.”<sup>47</sup> These airlines included American Airlines, Delta, United, Southwest, JetBlue, Alaska, Hawaiian, Spirit, SkyWest, and Frontier.<sup>48</sup> They “carried 81.9 percent of U.S. airlines’ scheduled service passengers in 2015 and accounted for 94.6 percent of the scheduled passenger airline after-tax net profit.”<sup>49</sup>

It is expected that in the next twenty years, due to a long-term nationwide economic recovery, passenger and cargo traffic will experience annual growths of 2.7% and 3.8%, respectively.<sup>50</sup> On the other hand, some of the major issues looming include (1) allegations by U.S. airlines that the three major Middle Eastern carriers are violating competition rules; and (2) labor claims by workers at Southwest and Delta that demand better pay and reject recent labor contracts.<sup>51</sup>

Chapter 11 of the United States Bankruptcy Code describes the requirements and process of reorganization of the business affairs and assets of debtors, in this case financially troubled corporations. In that sense, a reorganization plan is set to assess the debtor’s fulfillment of its obligations. Chapter 11 presents an opportunity for the company to avoid bankruptcy and allows the

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(2008), [https://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/David\\_Gillen.pdf/\\$FILE/David\\_Gillen.pdf](https://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/David_Gillen.pdf/$FILE/David_Gillen.pdf) (“In May 2003, the [U.S.] government proposed raising the allowable percentage of total foreign voting stock ownership to 49%, but this is still being debated.”) [<https://perma.cc/3VUW-N6FE>].

<sup>47</sup> U.S. DEP’T OF TRANSP., BUREAU OF TRANSP. STATISTICS (BTS), BTS RELEASES 2015 AIRLINE FINANCIAL DATA 2 (2016), [http://www.rita.dot.gov/bts/press\\_releases/bts026\\_16](http://www.rita.dot.gov/bts/press_releases/bts026_16) [<https://perma.cc/3TEY-L8B9>].

<sup>48</sup> *Id.* at 6.

<sup>49</sup> *Id.* at 2.

<sup>50</sup> U.S. DEP’T OF COMMERCE, OFFICE OF TRAVEL AND TOURISM INDUS., *National Travel & Tourism Strategy Task Force on Travel & Competitiveness* (2012), <http://travel.trade.gov/pdf/national-travel-and-tourism-strategy.pdf> [<https://perma.cc/24MX-KLWA>]; FED. AVIATION ADMIN., *FAA Aerospace Forecast: Fiscal Years 2016–2036*, at 9, 19 (2016) [https://www.faa.gov/data\\_research/aviation/aero\\_space\\_forecasts/media/FY2016-36\\_FAA\\_Aerospace\\_Forecast.pdf](https://www.faa.gov/data_research/aviation/aero_space_forecasts/media/FY2016-36_FAA_Aerospace_Forecast.pdf).

<sup>51</sup> Susan Carey, *Three Big U.S. Airlines Allege Additional State Subsidies to Qatar Airways*, WALL ST. J., June 29, 2016; Susan Carey, *Dark Clouds Loom for Airlines Even as Their Profits Take Off*, WALL ST. J., Aug. 18, 2015, at A1.

creditors to receive some form of payment for amounts owed to them by the debtors.<sup>52</sup> However, it is worth noting that debtors need not be “insolvent” to file a voluntary Chapter 11 petition.<sup>53</sup>

It is deemed to be in debtor-company’s interest to file early for Chapter 11 because it provides it with “wide-ranging and valuable powers.”<sup>54</sup> These include the right to “disclaim, adopt or assign contracts,” and most importantly, “the ability to sell assets and borrow money.”<sup>55</sup> In fact, the directors of these debtor-companies remain responsible to all constituents; they “may act to maximize the values for all, including negotiating on behalf of existing equity-holders.”<sup>56</sup> Therefore, the debtor is enabled to “address its business and operational issues, including its relationship with unions and its pensions.”<sup>57</sup> In contrast, in the United Kingdom for instance, debtors do not have such powers under its administration procedure.<sup>58</sup> On top of that, it is argued in large Chapter 11 cases that existing management have benefited from generous compensation and severance incentives in order to remain with the company during the reorganization process. In another vein, it is claimed that debtors could use Chapter 11 as a delaying tactic when dealing with creditors and opponents in litigation.<sup>59</sup> Perhaps that is the reason why the Bankruptcy Code was amended in 2005 to “include an 18 month ‘drop-dead date’ for exclusivity in Chapter 11 cases,” and “restrict significantly the circumstances under which incentives can be granted.”<sup>60</sup>

According to the United States Government Accountability Office (GAO), airline bankruptcies’ overall duration averages

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<sup>52</sup> *Ch. 11 – Bankruptcy Basics*, U.S. COURTS, <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> [https://perma.cc/E6XP-JE4Z].

<sup>53</sup> JONES DAY, *COMPARISON OF CH. 11 OF THE U. S. BANKRUPTCY CODE WITH THE SYSTEM OF ADMINISTRATION IN THE U. K., THE RESCUE PROCEDURE IN FRANCE, INSOLVENCY PROCEEDINGS IN GERMANY, AND THE EXTRAORDINARY ADMINISTRATION FOR LARGE INSOLVENT COMPANIES IN ITALY* 8 (2007), <http://goo.gl/In4tb9> [https://perma.cc/5FMA-VXBX] [hereinafter *COMPARISON OF CH. 11*].

<sup>54</sup> *Id.* at 14.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 13.

<sup>57</sup> *Id.* at 14.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 10.

<sup>60</sup> *Id.* at 10, 13.

714 days. This duration is higher than the average of all industries, which was 518 days.<sup>61</sup>

The longest and costliest bankruptcy in aviation history was United Airlines, which reemerged in 2006 after 1,150 days in bankruptcy.<sup>62</sup> The airline was able to slash costs by \$7 billion per year and cut out \$8 billion of its debt, but it still had to deal with \$17 billion of the remaining debt. Furthermore, a new management incentive plan was adopted following the period of reorganization despite the “angry” opposition of the union; the disputed plan “reward[ed] 400 executives with a total of 10 million stock shares, 8% of the reorganized company.”<sup>63</sup>

## B. CANADA

“Historically, Transport Canada approached the issue of bilateral air service negotiations on an ad hoc basis that featured incremental negotiations.”<sup>64</sup> In November 2006, Canada adopted a new approach to international air access named Blue Sky by Transport Canada.<sup>65</sup> The criteria to be considered in determining Canada’s negotiating priorities include the following factors:

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<sup>61</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-945, COMMERCIAL AVIATION: BANKRUPTCY AND PENSION PROBLEMS ARE SYMPTOMS OF UNDERLYING STRUCTURAL ISSUES 23–24 (2005).

<sup>62</sup> PAUL STEPHEN DEMPSEY, AIRLINE BANKRUPTCY: THE POST-DEREGULATION EPIDEMIC 33 (2012), [https://www.mcgill.ca/iasl/files/iasl/aspl613\\_paul\\_dempsey-airlinebankruptcies2012.pdf](https://www.mcgill.ca/iasl/files/iasl/aspl613_paul_dempsey-airlinebankruptcies2012.pdf) [<https://perma.cc/Z4WM-G8Q4>].

<sup>63</sup> Marilyn Adams, *Has United Changed Enough?*, USA TODAY, Jan. 23, 2006, [http://usatoday30.usatoday.com/money/biztravel/2006-01-22-united-cover-usat\\_x.htm](http://usatoday30.usatoday.com/money/biztravel/2006-01-22-united-cover-usat_x.htm) [<https://perma.cc/BD5D-WQZ2>].

<sup>64</sup> LIBERALIZATION IN AVIATION: COMPETITION, COOPERATION AND PUBLIC POLICY 446 (PETER FORSYTH ET AL. eds., 2013).

<sup>65</sup> *Id.* Blue Sky policy has the following objectives:

“[p]rovide a framework that encourages competition and the development of new and expanded international air services to benefit travellers, shippers, and the tourism and business sectors[;] [p]rovide opportunities for Canadian airlines to grow and compete successfully in a more liberalized global environment[;] [e]nable airports to market themselves in a manner that is unhindered by bilateral constraints to the greatest extent possible[;] [s]upport and facilitate Canada’s international trade objectives[;] [s]upport a safe, secure, efficient, economically healthy and viable Canadian air transportation industry.”

The following principles guide the approach of the Blue Sky policy: “[r]ecognize that air transportation is a direct contributor to a dynamic economy and is a leading trade and tourism facilitator[;] [m]arket forces should determine the price, quality, frequency and range of air services options[;] Canadian carriers should have the opportunity to compete in international markets on a reasonably

Canadian airline and airport priorities and interests; [l]ikelihood and extent of new Canadian and foreign carrier services, giving preference where early start-up of air services is planned; [s]ize and maturity of the air transportation markets and potential for future growth; [f]oreign government requests; Canada's international trade objectives; [s]afety and security issues; [f]oreign relations; and [b]ilateral irritants and disputes.<sup>66</sup>

The Blue Sky policy emphasizes that “[a]s a primary objective, Canada will seek to negotiate reciprocal ‘Open Skies’-type agreements, similar to the one negotiated with the [United States] in November 2005, where it is deemed to be in Canada’s overall interest.”<sup>67</sup>

“Until the early 1990s [Canadian] airports were managed by the federal government.”<sup>68</sup> Since then, Canadian airports have been corporatized. The government still maintains ownership of the airports through emphyteutic leases however, which “set out the governance and consultation mechanisms under which the airports are run” by not-for-profit entities.<sup>69</sup> Thus, these entities bare the operating and funding responsibilities under the long-term leases.<sup>70</sup>

According to Daniel-Robert Gooch, president of the Canadian Airports Council (CAC): “Canada essentially has a ‘user pay PLUS’ system for aviation in which users pay for airport infrastructure, security screening and air traffic control, plus a little extra to the federal government.”<sup>71</sup>

Gooch noted that over \$19 billion have been invested in airport improvements under this system since 1992.<sup>72</sup> As a result, the WEF in 2015 ranked Canada’s overall air transport infrastructures first worldwide ahead of the United States and the

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level playing field[;] [a]ir liberalization initiatives will continue to be guided by safety and security considerations.”

See TRANSP. CAN., BLUE SKY: CANADA’S NEW INTERNATIONAL POLICY 2 (2006), <https://www.tc.gc.ca/media/documents/policy/bluesky.pdf> [<https://perma.cc/Y74U-Q9CL>].

<sup>66</sup> *Id.* at 3.

<sup>67</sup> *Id.*

<sup>68</sup> Daniel-Robert Gooch, *Why Canada’s Airport Model is Working for Taxpayers*, THE GLOBE AND MAIL (Mar. 7, 2014), <http://www.theglobeandmail.com/globe-debate/why-canadas-airport-model-is-working-for-taxpayers/article17368507/> [<https://perma.cc/7ETR-8CKY>].

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

UAE, respectively.<sup>73</sup> Canadian airports ranked sixteenth in terms of quality.<sup>74</sup> However, the same report ranked Canada 130th out of 141 countries, among the highest in the world, in terms of price competitiveness related to ticket taxes and airport charges.<sup>75</sup>

“Canada limits foreign ownership of Canadian air carriers to 25%.”<sup>76</sup> In the current aviation market, Air Canada, Air Transat, WestJet, and Porter Airlines, which operate scheduled and charter services domestically and abroad, represent the main air carriers in Canada.<sup>77</sup> “Air Canada is extending its global reach through its membership in Star Alliance and through its participation in a transatlantic revenue sharing joint venture with United Airlines and Deutsche Lufthansa AG, referred to as A++.”<sup>78</sup> Furthermore, the flag carrier often considers code-sharing as a “preliminary step to either achieve more comprehensive Joint Ventures . . . or in some cases, to introducing [its] own aircraft on a new route.”<sup>79</sup> It is worthy to note that in 2003, the biggest issue looming was the financial difficulties faced by Air Canada.<sup>80</sup> At that time, the national carrier managed to keep its membership in Star Alliance thanks to its partner United Airlines, though airlines are required to meet certain financial obligations to maintain their membership.

Similar to Chapter 11 in the United States, the Companies’ Creditors Arrangement Act (CCAA) allows financially troubled Canadian corporations to restructure their financial affairs

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<sup>73</sup> THE TRAVEL & TOURISM COMPETITIVENESS REPORT 2015, *supra* note 44, at 113, 335, 339.

<sup>74</sup> *Id.* at 113.

<sup>75</sup> *Id.*

<sup>76</sup> GILLEN, *supra* note 46, at 1.

<sup>77</sup> Brian Spiegel, *List of Canadian Airlines*, USA TODAY, <http://traveltips.usatoday.com/list-canadian-airlines-63316.html> [<https://perma.cc/7DU4-RE46>].

<sup>78</sup> AIR CANADA, 2013 MANAGEMENT’S DISCUSSION AND ANALYSIS OF RESULTS OF OPERATIONS AND FINANCIAL CONDITION 4 (2014), [https://www.aircanada.com/content/dam/aircanada/portal/documents/PDF/en/quarterly-result/2013/2013\\_MDA\\_q4.pdf](https://www.aircanada.com/content/dam/aircanada/portal/documents/PDF/en/quarterly-result/2013/2013_MDA_q4.pdf) [<https://perma.cc/HS8K-HG5J>].

<sup>79</sup> Calin Rovinescu, CEO, Air Canada, Remarks to the Vancouver Board of Trade 12 (Nov. 13, 2013), [https://www.aircanada.com/content/dam/aircanada/portal/documents/PDF/speeches-presentations/en/vancouverBoard\\_2013.pdf](https://www.aircanada.com/content/dam/aircanada/portal/documents/PDF/speeches-presentations/en/vancouverBoard_2013.pdf) [<https://perma.cc/K4TH-AFEK>].

<sup>80</sup> Keith McArthur, *How Creditors Saved Air Canada*, THE GLOBE AND MAIL (May 3, 2004), <http://www.theglobeandmail.com/report-on-business/how-creditors-saved-air-canada/article1137095/> [<https://perma.cc/WRU6-EFVS>].

through a formal Plan of Arrangement.<sup>81</sup> In contrast with Chapter 11, among other things, a Canadian debtor must be “insolvent” and “have in excess of C\$5-million in liabilities” to be able to make a voluntary application for relief under the CCAA.<sup>82</sup> Canadian “[c]orporations that do not reach this \$5 million threshold can utilize the Division I Proposal under the Bankruptcy and Insolvency Act.”<sup>83</sup> Moreover, “the stay of proceedings is not automatic” in Canada.<sup>84</sup> Nevertheless, “a broad initial stay up to a maximum of 30 days” can be issued by courts, typically exercising their discretion.<sup>85</sup> In addition, while there is no time limit on the stay under Chapter 11, an extension of the initial stay can be granted upon application to the Court under the CCAA. The “debtor must demonstrate that it is acting in good faith and with due diligence.”<sup>86</sup> Another point concerns the legal bankruptcy estate, which is created upon the filing of a Chapter 11 petition, but is not under the CCAA.<sup>87</sup>

“Air Canada entered bankruptcy in April 2003, emerging in September 2004.”<sup>88</sup> Among the benefits gained from CCAA Protection, the carrier was able to cut its costs by \$2 billion, which included “\$1 billion labour and benefits; \$0.6 billion in aircraft lease rentals (49% cut in cash rent from 2003 to 2009); and \$0.4 billion in supplier contracts and other.”<sup>89</sup>

### C. UNITED ARAB EMIRATES (UAE)

According to the International Monetary Fund (IMF), UAE’s non-oil GDP was expected to grow at 4.4% in 2015,<sup>90</sup> and it grew

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<sup>81</sup> *What is CCAA?*, PRICEWATERHOUSE COOPERS CANADA, <http://www.pwc.com/ca/en/services/insolvency-assignments/what-is-ccaa.html> [https://perma.cc/3ND2-FS2C].

<sup>82</sup> BLAKE, CASSELS & GRAYDON LLP, CHAPTER 11 AND CCAA: A CROSS-BORDER COMPARISON 1 (2013), [http://www.blakesfiles.com/Guides/Blakes\\_Restructuring\\_and\\_Insolvency\\_Canada.pdf](http://www.blakesfiles.com/Guides/Blakes_Restructuring_and_Insolvency_Canada.pdf) [https://perma.cc/D8DG-9Z23] [hereinafter Ch. 11 & CCAA].

<sup>83</sup> *What is CCAA?*, *supra* note 81.

<sup>84</sup> CHAPTER 11 AND CCAA, *supra* note 82, at 2.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 3.

<sup>88</sup> DEMPSEY, *supra* note 62, at 20.

<sup>89</sup> Aircraft Commerce, *Air Canada’s Post-Bankruptcy Re-Organisation*, 38 AIRCRAFT ANALYSIS & FLEET PLANNING 24 (December 2004/January 2005).

<sup>90</sup> Waheed Abbas, *UAE’s Non-Oil GDP to Grow at 4.4% in 2015: IMF*, EMIRATES 24/7 (May 5, 2015), <http://www.emirates247.com/business/economy-finance/uae-s-non-oil-gdp-to-grow-at-4-4-in-2015-imf-2015-05-05-1.589693> [https://perma.cc/C9HU-ZPD9].



by 2.5% in 2016.<sup>91</sup> Transport and tourism are fundamental sectors driving the UAE economy in that perspective. Aviation has established itself as a vital contributor to the UAE's economy contributing more than AED 145 billion (\$39.47 billion) or 14.7% of the national GDP.<sup>92</sup> It is expected to contribute 32% to Dubai's GDP by 2020, according to government estimates.<sup>93</sup> Carla Slim, the Middle East and North Africa economist at Standard Chartered bank, explained: "This announcement reflects the success of Dubai's economic strategy. . . . It cements Dubai's position as a major tourist destination in the region but also as a gateway for trade, logistics and regional services."<sup>94</sup>

"The UAE has signed more than 160 [bilateral] . . . ASAs, of which [the] majority are Open Skies arrangements."<sup>95</sup> Despite this liberal approach, the UAE still has some restrictive ASAs with "limits on capacity, designated airports and, in some cases, approved airlines and pricing."<sup>96</sup> According to a study conducted by InterVISTAS Consulting, "it is possible that restrictions within an ASA are not due to the policies of the UAE government but due to the policies of the opposite [signatory] country."<sup>97</sup> Generally, governments require reciprocity when negotiating the terms of a bilateral Air Service Agreement.<sup>98</sup>

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<sup>91</sup> *Solid Profitability Seen for Top UAE Banks*, TRADEARABIA (Feb. 14, 2017), [http://www.tradearabia.com/news/BANK\\_320726.html](http://www.tradearabia.com/news/BANK_320726.html) [<https://perma.cc/PB9Q-UNG3>].

<sup>92</sup> OXFORD ECON., *ECONOMIC BENEFITS FROM AIR TRANSPORT IN THE UAE* 4, 14 (2011), <https://www.iata.org/policy/Documents/Benefits-of-Aviation-UAE-2011.pdf>

<sup>93</sup> *UAE Economy*, UAE EMBASSY, <http://www.uae-embassy.org/about-uae/uae-economy> [<https://perma.cc/ZBE8-GS8D>].

<sup>94</sup> Mahmoud Kassem, *Aviation Expansion to Give Some Lift to UAE Economic Growth*, THE NATIONAL (Jan. 27, 2015), <http://www.thenational.ae/business/aviation/aviation-expansion-to-give-some-lift-to-uae-economic-growth> [<https://perma.cc/32AG-KXU3>].

<sup>95</sup> Press Release, Reed Exhibitions, *Open Skies Remains in the Frontline of UAE's Winning Aviation Strategy* (May 14, 2014), <http://www.reedexpo.com/fr/Press-Releases/2014-Press-Releases/Open-Skies-remains-in-the-frontline-of-UAEs-winning-aviation-strategy/> [<https://perma.cc/E6EU-499C>] [hereinafter *Open Skies Remains in the Frontline*].

<sup>96</sup> INTERVISTAS-EU CONSULTING, *THE IMPACT OF INTERNATIONAL AIR SERVICE LIBERALIZATION ON THE UNITED ARAB EMIRATES (UAE)* iii (2009), <https://www.iata.org/policy/promoting-aviation/liberalization/agenda-freedom/Documents/uae-report.pdf> [<https://perma.cc/X8P6-RWT4>].

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

Dubai is a long-term supporter of Open Skies with over 100 international airlines flying to its international airport.<sup>99</sup> In fact, the government of Dubai considers the Open Skies policy as a “key component of its economic and trade policy.”<sup>100</sup> According to Mohammed Ahli, Director General of Dubai Civil Aviation Authority:

Dubai is one of the true pioneers of aviation liberalisation having adopted an open skies policy as one of the cornerstones of its economy ever since late Sheikh Saeed bin Maktoum Al Maktoum O.B.E signed the Dubai Commercial Air Agreement with His Majesty’s Government in July 1937, long before Emirates was established in 1985. Access to Dubai, one of the world’s largest and fastest-growing hubs, allows carriers of the world to grow their services and also boost exports and trade to their own markets. For Dubai it gives consumers more choice, stimulates traffic growth and is good for business. Considering that ICAO predicts there will be 6 billion people travelling by air in 2030 compared to 3 billion today. Dubai is well-placed to capitalise on this growth. I am confident that Dubai’s steadfast commitment to Open Skies is a source of inspiration for other countries.<sup>101</sup>

As a result of the government policy, it is “estimated that \$82 billion have been invested in aviation infrastructure development in the Emirate of Dubai alone since the formation of the UAE in 1971.”<sup>102</sup> The country has six international airports.<sup>103</sup> Since 2014, Dubai International Airport has “become the world’s busiest in terms of international passenger traffic ahead of London-Heathrow.”<sup>104</sup> With almost 70 million international

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<sup>99</sup> *International and Government Affairs: Connectivity, Competition and Consumer Choice*, EMIRATES, <http://www.emirates.com/english/about/int-and-gov-affairs/international-and-government-affairs-new.aspx> [https://perma.cc/8KZ6-WURZ].

<sup>100</sup> *78 Years with . . . an Open Skies Policy*, 21 INT’L & GOV’T AFF. J. OF EMIRATES 1, 6 (2015), [https://cdn.ek.aero/downloads/ek/pdfs/open\\_sky/OpenSky\\_21\\_v3.pdf](https://cdn.ek.aero/downloads/ek/pdfs/open_sky/OpenSky_21_v3.pdf) [https://perma.cc/7NA6-6XRW].

<sup>101</sup> *Id.*

<sup>102</sup> Open Skies Remains in the Frontline of UAE’s Winning Aviation Strategy, *supra* note 95.

<sup>103</sup> *Planning a Trip*, EMBASSY OF THE U.A.E. IN WASHINGTON, D.C., <http://www.uae-embassy.org/about-uae/travel-culture/planning-trip> [https://perma.cc/VL4U-89VF].

<sup>104</sup> Press Release, Airport Council International, ACI World Releases Preliminary World Airport Traffic and Rankings for 2014 - DXB Becomes Busiest Airport for International Passenger Traffic, (Mar. 26, 2015), <http://www.aci.aero/News/Releases/Most-Recent/2015/03/26/ACI—World-releases-preliminary-world-airport-traffic-and-rankings-for-2014—DXB-becomes-busiest-airport-for-international-passenger-traffic-> [https://perma.cc/4CEG-KBT4].

passengers in 2014, Dubai International Airport was ranked the “sixth busiest airport in the world in overall passenger traffic.”<sup>105</sup>

The overall air transport infrastructures in the UAE were ranked third worldwide by the WEF, and second in terms of quality.<sup>106</sup> In addition, the UAE ranked twenty-fifth out of 141 countries, among the highest in the world in terms of the price competitiveness related to ticket taxes and airport charges.<sup>107</sup> This is attributed mostly to its world-class international hubs for global air travel.<sup>108</sup>

“Foreign ownership and control of airlines in the UAE is restricted to a 49% equity stake.”<sup>109</sup> Four of the UAE’s five national airlines are 100% state-owned: Emirates Airlines, Etihad Airways, Air Arabia, and Fly Dubai.<sup>110</sup> Rotana Jet is owned jointly by Amiri Flight (50%) and Abu Dhabi Aviation (50%).<sup>111</sup> Emirates, followed by Etihad, are by and large the biggest national carriers and two of the major players in the international airlines industry.<sup>112</sup> Besides, it is worth noting that the two airlines have different strategic approaches: while Emirates’ strategy is based on the liberalized bilateral ASAs, Etihad favors equity minority interests. Unlike Qatar Airways, Emirates does not belong to an alliance. The airline emphasizes its concerns about the anti-competitiveness of some traditional alliance arrangements.<sup>113</sup> Emirates instead prefers codeshare agreements with potential partners to “reinforce Dubai’s standing as a global hub.”<sup>114</sup>

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<sup>105</sup> *Id.*

<sup>106</sup> THE TRAVEL & TOURISM COMPETITIVENESS REPORT 2015, *supra* note 44, at 335.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 18.

<sup>109</sup> THE IMPACT OF INTERNATIONAL AIR SERVICE ON LIBERALIZATION OF THE UNITED ARAB EMIRATES (UAE), *supra* note 96, at iii.

<sup>110</sup> *Id.*; *Company History*, FLYDUBAI, <https://www.flydubai.com/en/information/about-flydubai/company-history> [<https://perma.cc/J55C-BQ4J>].

<sup>111</sup> *Your Abu Dhabi Guide*, UAE AIRLINES, <http://www.yourabudhabiguide.com/uae-airlines.html> (last visited Jun. 19, 2017); *About Us*, ROTANA JET, <http://www.rotanajet.com/About-us> (last visited Jun. 19, 2017).

<sup>112</sup> THE IMPACT OF INTERNATIONAL AIR SERVICE ON LIBERALIZATION OF THE UNITED ARAB EMIRATES (UAE), *supra* note 96, at 13.

<sup>113</sup> Ben Flanagan, *Etihad and Emirates Show Airline Alliances are Outdated*, THE NATIONAL, Sept. 1, 2015, <http://www.thenational.ae/business/aviation/etihad-and-emirates-show-airline-alliances-are-outdated> [<https://perma.cc/YF8R-W678>].

<sup>114</sup> *International and Government Affairs: Connectivity, Competition, and Consumer Choice*, *supra* note 99.

D. ALLEGATIONS AGAINST THE MAJOR MIDDLE-EASTERN  
CARRIERS IN THE UNITED STATES

The three major U.S. carriers—American Airlines, Delta Air Lines, and United Airlines—claim that their rivals from the Middle East—Qatar Airways, Emirates Airlines, and Etihad Airways—receive letters of credit and subsidies from their governments (in the form of assumption of fuel hedging losses).<sup>115</sup> They also claim that the Middle Eastern carriers take passengers and revenues from U.S. carriers, and force them to reduce, terminate, or forego services on international routes.<sup>116</sup> Therefore, a fifty-five-page white paper was addressed to the U.S. government by the three U.S. major airlines in January 2015.<sup>117</sup>

William S. Swelbar, a researcher at Massachusetts Institute of Technology (MIT) and a member of the OneJet Advisory Team, studied in a position paper the impacts of the alleged subsidies at different levels. His analysis was based on the fifty-five-page white paper. According to Swelbar, the first results expected include: (1) the reduction of the U.S. network carriers' [and their alliance partners'] share in key markets (notably, the Middle East and Indian subcontinent); and (2) the shifting of connecting passengers to the Middle-East-traffic diversion.<sup>118</sup>

Swelbar explained that the Middle Eastern carriers' services threaten the viability of nonstop flights with greater economic impact than connecting flights at the three major airports—Dubai, Abu Dhabi, or Doha. He added: “routes with strong local markets need to rely less on connecting passengers to reach route profitability, enhancing the economic benefits of such service to both communities.”<sup>119</sup> Another argument is that small- and medium-sized airports in the United States are negatively impacted by the Middle Eastern carriers, which operate in

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<sup>115</sup> PARTNERSHIP FOR FAIR AND OPEN SKIES, RESTORING OPEN SKIES: THE NEED TO ADDRESS SUBSIDIZED COMPETITION FROM STATE-OWNED AIRLINES IN QATAR AND THE UAE 1, 27, 28 (2015), <http://www.openandfairskies.com/wp-content/themes/custom/media/White.Paper.pdf> [https://perma.cc/U7MT-3JVV] [hereinafter RESTORING OPEN SKIES].

<sup>116</sup> *Id.* at 46.

<sup>117</sup> *See generally id.*

<sup>118</sup> WILLIAM SWELBAR, VIOLATIONS OF “FAIR AND EQUAL” OPEN SKIES AGREEMENTS THREATEN LARGE AND SMALL AMERICAN COMMUNITIES AND THEIR ACCESS TO THE GLOBAL AIR TRANSPORTATION NETWORK 2 (2015), <http://www.openandfairskies.com/wp-content/uploads/2015/07/Open-Skies-Violations-Threaten-American-Communities.pdf> [https://perma.cc/S7LW-6Y3Z].

<sup>119</sup> *Id.* at 6.

nearby hubs and therefore “threaten[ ] the viability of existing domestic flights.”<sup>120</sup>

Swelbar’s analysis is based on data that certainly show the strong growing position of the Middle Eastern carriers in the U.S. market, yet the alleged subsidies were rather considered as an upheld hypothesis of the study. To the contrary, the veracity of these allegations should have been questioned. In fact, the same reasoning would apply and the same conclusions would be drawn if other competitors of the U.S. airlines were considered as being subsidized. For instance, Ethiopian Airlines, Cathay Pacific, Singapore Airlines, and Kuwait Airways<sup>121</sup> operate fifth freedom routes from some U.S. airports, but so does Emirates, since 2013, by flying from New York to Milan and continuing on to Dubai.

Therefore, Swelbar’s approach is misleading the reader by assuming the allegations against the Middle Eastern carriers are true on the basis of the white paper drawn by the complainants. In fact, Swelbar advocates for the Partnership for Open & Fair Skies, which is a coalition composed of American Airlines, Delta Air Lines, and United Airlines, along with some associations of pilots and flight attendants.<sup>122</sup>

On the other hand, the fifty-five-page white paper pointed out some alleged anti-competitive financial advantages and irregularities contained in the released financial statements of the Middle Eastern carriers.<sup>123</sup> Moreover, the focus was laid on some

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<sup>120</sup> *Id.* at 10.

<sup>121</sup> Kuwait Airways dropped its New York City-to-London route in December 2015 after a discrimination complaint was filed by the U.S. Department of Transportation, which threatened legal action over the carrier’s refusal to sell tickets to Israelis. However, the carrier has since started operating the same route again. Ben Schlappig, *Kuwait Airlines’ Controversial London to N.Y. Flight is Still Operating (Sort Of)*, ONE MILE AT A TIME (Mar. 21, 2016), <http://onemileatatime.boardingarea.com/2016/03/21/kuwait-airways-jfk/> [<https://perma.cc/3BYA-9KSC>].

<sup>122</sup> *New Report: Violations of Open Skies Threaten Small and Large Communities Across the Nation*, PARTNERSHIP FOR FAIR & OPEN SKIES (July 23, 2015), <http://www.openandfairskies.com/press-releases/violations-of-open-skies-threaten-small-and-large-communities/> [<https://perma.cc/2HXC-GA2L>]. The associations of pilots and flight attendants include the Air Line Pilots Association International, the Allied Pilots Association, the Airline Division of the International Brotherhood of Teamsters, the Association of Flight Attendants-CWA, the Association of Professional Flight Attendants, the Communications Workers of America, and the Southwest Airlines Pilots’ Association. *Who We Are*, PARTNERSHIP FOR OPEN & FAIR SKIES, <http://www.openandfairskies.com/about-us/> [<https://perma.cc/U4S7-LS9C>].

<sup>123</sup> RESTORING OPEN SKIES, *supra* note 115, at 12.

local regulation advantages that benefit the Gulf trio. These include, for instance, the labour rights management.<sup>124</sup> According to this paper, John O'Connell, Senior Lecturer at Cranfield University, has observed that: "Emirates has the advantage that labour laws in the UAE forbid strikes and there are no trade unions, thus ensuring smooth flight operations and continuous services."<sup>125</sup>

However, it should be noted that Swelbar did not consider the complexity and multidimensionality of global regulatory frameworks. It is true that the three major U.S. carriers are unionized, yet their ability to reconsider the terms of their employees' contracts is more flexible than that of their competitors in Europe (e.g. Air France, Lufthansa). The latter are, in fact, bound by strict regional and national (read: social) regulations. For instance, in October 2015, Air France executives faced rabid reactions from furious striking staff after the airline cut 2,900 jobs.<sup>126</sup> Subsequently, this number was reduced to 1,000 jobs by 2016.<sup>127</sup> Though such a reaction would not be conceivable in the U.S. context, Delta Air Lines, perhaps coincidentally, announced at the same time its plan to cut an unspecified number of jobs from its administrative workforce.<sup>128</sup>

Another argument has been raised by Delta Air Lines, which is leading a U.S./EU fight for action against the Middle Eastern carriers' "alleged predatory pricing and capacity dumping practices."<sup>129</sup> However, Kevin Mitchell, the Founder and President of the Business Travel Coalition, claimed that dumping is "a prac-

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<sup>124</sup> *Id.* at 36.

<sup>125</sup> John F. O'Connell, *The Rise of the Arabian Gulf Carriers: An Insight into the Business Model of Emirates Airline*, 17 J. OF AIR TRANSP. MGMT. 339, 344 (2011).

<sup>126</sup> Kim Willsher, *Air France Workers Rip Shirts From Executives After Airline Cuts 2,900 Jobs*, THE GUARDIAN, Oct. 6, 2015, <http://www.theguardian.com/world/2015/oct/05/air-france-workers-storm-meeting-protest-executives-job-losses-paris> [<https://perma.cc/JH56-EJJK>].

<sup>127</sup> *Air France Supprimera Près d'un Millier d'Emplois en 2016*, LE MONDE, Oct. 18, 2015, [http://www.lemonde.fr/economie/article/2015/10/18/air-france-supprimera-un-millier-d-emplois-en-2016\\_4791841\\_3234.html#](http://www.lemonde.fr/economie/article/2015/10/18/air-france-supprimera-un-millier-d-emplois-en-2016_4791841_3234.html#) [<https://perma.cc/E86R-WU75>].

<sup>128</sup> Michael Sasso, *Delta Air Plans Cuts in Office Workforce to Boost Productivity*, BLOOMBERG, Oct. 2, 2015, <http://www.bloomberg.com/news/articles/2015-10-02/delta-air-plans-cuts-in-office-workforce-to-boost-productivity> [<https://perma.cc/686R-838L>].

<sup>129</sup> Kevin Mitchell, *Why Are The BIG 3 Silent On Consumer Harm From Gulf Carriers?*, LINKEDIN (Apr. 21, 2015), [https://www.linkedin.com/pulse/why-big-3-silent-consumer-harm-from-gulf-carriers-kevin-mitchell?trkInfo=VSRPsearchId:426008341442901933796,VSRPtargetId:5996380206972092416,VSRPcmpt:primary&trk=vsrp\\_influencer\\_content\\_res\\_name](https://www.linkedin.com/pulse/why-big-3-silent-consumer-harm-from-gulf-carriers-kevin-mitchell?trkInfo=VSRPsearchId:426008341442901933796,VSRPtargetId:5996380206972092416,VSRPcmpt:primary&trk=vsrp_influencer_content_res_name) [<https://perma.cc/GP3G-N96A>].

tice used and perfected by U.S. major network airlines over decades in their domestic market against low-cost new entrant airlines.”<sup>130</sup> For instance, on November 10, 2015, the Department of Justice sued “to block a proposed deal between United and Delta airlines to swap access between their New York City-area hubs, in an effort to preserve competition at Newark Liberty International Airport.”<sup>131</sup> On the whole, the aforementioned white paper raises arguments or hypotheses on alleged subsidies, which require a technical and global analysis based on internal data from the alleged Middle Eastern carriers. This process makes the verification of any information somewhat impossible to fulfill from one side.

In that sense, Emirates has clarified that its accounts are audited by PricewaterhouseCoopers (PwC) in compliance with international standards and are publicly available.<sup>132</sup> Emirates denies receiving State subsidies other than the start-up seed capital in 1985 and claims, rather, that it provides financing to the government of Dubai through dividend payments:

In 1985 Emirates received US\$10 million from the Government of Dubai in start-up seed capital and US\$88 million invested in infrastructure, which included two Boeing 727 aircraft and the Emirates Training College building. This has been more than repaid by dividend payments to the Government of Dubai, which have totalled US\$2.3 billion to date. The Dubai Government and the management of Emirates have consistently made it clear that Emirates is required to be self-sustainable and profitable.<sup>133</sup>

Unlike Emirates, Etihad and Qatar Airways do not release detailed financial reports, which makes it difficult to establish any finding and, more importantly, to determine the exact size of eventual subsidies.<sup>134</sup> Yet this cannot be considered in any way as an illegal matter since it is entirely within the right of [non-pub-

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<sup>130</sup> *Id.*

<sup>131</sup> Bart Jansen, *DOJ Seeks to Block United and Delta Deal for Newark Access*, USA TODAY, Nov. 10, 2015, <http://www.usatoday.com/story/travel/flights/2015/11/10/doj-seeks-block-united-and-delta-deal-newark-access/75511350/> [https://perma.cc/BE59-QH9N].

<sup>132</sup> EMIRATES AIRLINES, AIRLINES AND SUBSIDY: OUR POSITION 10 (2012), [http://content.emirates.com/downloads/ek/pdfs/int\\_gov\\_affairs/airlines\\_and\\_subsidy\\_our\\_position.pdf](http://content.emirates.com/downloads/ek/pdfs/int_gov_affairs/airlines_and_subsidy_our_position.pdf) [https://perma.cc/8243-8V3Z].

<sup>133</sup> *Id.* at 8.

<sup>134</sup> Ted Reed, *Etihad and Qatar Airways Report Earnings, So to Speak—But Are They for Real?*, FORBES, June 20, 2015, <https://www.forbes.com/sites/tedreed/2015/06/20/etihad-and-qatar-airways-report-earnings-so-to-speak-but-are-they-for-real/#50a3d3e376a1> [https://perma.cc/9W3S-K2XE].

lically traded] companies to publish or not their financial reports.<sup>135</sup>

On an academic level, a recent paper from the University of Maryland examined direct and secondary impacts of Middle Eastern carriers' competition on U.S. airlines' international traffic and fare levels. The analysis concluded that this competition is associated with (1) direct impacts: significant growth in U.S.–Middle East traffic volumes; and (2) secondary effect: small but statistically significant traffic losses and fare reductions for U.S. carriers in route markets connecting the United States with Africa, Asia, Australia, and Europe.<sup>136</sup>

According to this study, relatively few academic papers have examined the impacts of the Middle Eastern carriers on the air travel market. Nevertheless, Jay Squalli's work is considered as a notable exception in that regard.<sup>137</sup> Squalli studied the relationship between the performance of Emirates and the air transport liberalization. He analyzed 155 route markets originating in Dubai and concluded that: "further liberalization of the UAE market (and, by extension, other Gulf carriers' markets) leads to greater passenger volumes, lower fares and, ultimately, welfare gains."<sup>138</sup>

So far, the analysis of the aforesaid studies shows that there is a conflict of interest between different stakeholders in the United States. Two main groups have been identified in regard to the ongoing debate on fair competition and the allegedly subsidized Middle Eastern carriers: (1) the three major U.S. airlines and more than six associations representing together the group Partnership for Open & Fair Skies;<sup>139</sup> and (2) the Business Travel Coalition (BTC), a U.S. advocacy organization, whose ob-

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<sup>135</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), *International Transport Forum: Interview with Alain Lumbroso* (Mar. 2016); *Private Company Research*, LIBRARY OF CONGRESS, <http://www.loc.gov/rr/business/company/private.html> [<https://perma.cc/3PS9-76JA>].

<sup>136</sup> Martin Dresner et al., *The Impact of Gulf Carrier Competition on U.S. Airlines*, 79 *TRANSP. RES. PART A: POL'Y AND PRAC.* 2–3 (2015), <http://www.businesstravelcoalition.com/documents/theimpactofgulfcarriercompe.pdf> [<https://perma.cc/7LT5-854T>].

<sup>137</sup> *Id.* at 3.

<sup>138</sup> *Id.*; see also Jay Squalli, *Airline Passenger Traffic Openness and the Performance of Emirates Airline*, 54 *QUARTERLY REV. OF ECON. & FIN.* 138 (2014).

<sup>139</sup> See *Who We Are*, *supra* note 122.



jective is to “bring transparency to industry and government policies and practices.”<sup>140</sup>

From a trade and global development perspective, the U.S.-UAE commercial-aviation relationship generated in 2012 more than \$16 billion in benefit to the United States (direct spending and spinoffs), more than 100,000 jobs, and over \$1.6 billion in tax revenue, according to the U.S.-UAE Business Council.<sup>141</sup>

Based in Washington, D.C., the U.S.-UAE Business Council promotes and advocates trade and commercial opportunities between the two countries. It counts almost 100 members, ranging from public and private corporations, which represent the interests of both countries. In that regard, Emirates, Etihad, Boeing, and Lockheed Martin count among thirty-four founding members. Additionally, FedEx is a corporate member, and the American Business Council of Dubai and the Northern Emirates is an honorary member.<sup>142</sup>

From a manufacturer perspective, Boeing (and Airbus as well) is benefiting hugely from the continuing growth of the Middle Eastern carriers at spectacular rates (i.e. expansion of the fleets). For instance, Emirates is currently the world’s largest operator of the 777 and the only airline that operates all the variants of this aircraft. During the Dubai Air Show, in 2013, Emirates announced an order for one-hundred fifty 777Xs, which is considered a record for the single largest airplane order ever in the world.<sup>143</sup>

From a consumer perspective, the Middle Eastern carriers stimulate demand, offer passengers more choice, and pressure the U.S. airlines to improve their product and service offerings. As a matter of fact, the Middle Eastern carriers have adopted a competitive strategy based on an aggressive head-to-head competition with their rivals worldwide. In response to the alleged subsidies, Emirates clarified that it “filled a gap in the market by taking travelers to new destinations not served by [others], and

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<sup>140</sup> *About*, BUS. TRAVEL COAL., <http://www.businesstravelcoalition.com/about/untitled.html> [<https://perma.cc/R2TH-M6LP>].

<sup>141</sup> ROB BRITTON, U.S.-U.A.E. COMMERCIAL AVIATION: TAKING FLIGHT – THE WORLD’S FASTEST GROWING BILATERAL AVIATION RELATIONSHIP 1 (2013), [http://usuaebusiness.org/wp-content/uploads/2013/03/US-UAE-aviation-report\\_Published.pdf](http://usuaebusiness.org/wp-content/uploads/2013/03/US-UAE-aviation-report_Published.pdf) [<https://perma.cc/5RXX-GKUW>].

<sup>142</sup> *Membership*, U.S.-U.A.E. BUS. COUNCIL, <http://usuaebusiness.org/membership/> [<https://perma.cc/M4ZG-WHXY>].

<sup>143</sup> *Emirates’ \$76 Billion Boeing Aircraft Order a Boost to US Aviation Industry*, EMIRATES (Nov. 18, 2013) <http://www.emirates.com/us/english/about/news/order-boeing.aspx?intcid=carousel-637518-1443005> [<https://perma.cc/Z43Y-ZDC2>].

helped contribute to [U.S.] economies, trade, and tourism.”<sup>144</sup> Also, Emirates emphasized that it “provides a much-needed competitive alternative to the three airline alliances with anti-trust immunity permitting them to keep fares artificially high.”<sup>145</sup>

The latter point ties in with a similar conclusion of Timothy John Hazledine, Professor at University of Auckland, who studied the impacts of Emirates’ service in Trans-Tasman air markets. Indeed, Hazledine concluded that “Emirates offered significantly lower fares but did not exert much pricing pressure on incumbent carriers Air New Zealand and Qantas.”<sup>146</sup>

That being said, in 2016, Qatar Airways, Emirates, and Etihad were respectively ranked second, first, and sixth out of the 100 best airlines by Skytrax.<sup>147</sup> The rankings are based on the votes from millions of travelers from around the world. Skytrax World Airline Awards are “coveted Quality accolades for the world airline industry.”<sup>148</sup>

#### E. CANADA/UAE RESTRICTIVE BILATERAL ASA

David Gillen, Director of the Centre for Transportation Studies at the University of British Columbia, underlined different metrics to be considered for assessment of the Canadian Blue Sky policy. These include the number and type of treaties, who the treaties are with, and the impact on passengers, cargo, and the economy. With this regard, Gillen highlighted in his analysis important facts vis-à-vis:

- The institutional framework and process: the number of negotiating teams which has not been adjusted (increased) since the adoption of the Blue Sky policy.
- The number of signed ASAs: prior to the Blue Sky policy, between 1949 and 2004, fifty ASAs were signed (over a period of fifty-six years). From 2005 to 2009, fifteen ASAs were signed a

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<sup>144</sup> *American Consumers and Regional State Economies the Ultimate Victims of US Carriers’ Protectionist Campaign*, Cautions Emirates Airline’s President, EMIRATES (Mar. 17, 2015), <https://www.emirates.com/media-centre/american-consumers-and-regional-state-economies-the-ultimate-victims-of-us-carriers-protectionist-campaign-cautions-emirates-airlines-president> [https://perma.cc/HBE6-NDU8].

<sup>145</sup> *Id.*

<sup>146</sup> Dresner et al., *supra* note 136, at 3; see also Tim Hazledine, *Pricing, Competition and Policy in Australasian Air Travel Markets*, 44 J. TRANSP. ECON. & POL’Y 1, 37 (2010).

<sup>147</sup> *The World’s Top 100 Airlines in 2016*, SKYTRAX, [http://www.worldairlineawards.com/awards/world\\_airline\\_rating.html](http://www.worldairlineawards.com/awards/world_airline_rating.html) [https://perma.cc/CW3T-M5EZ].

<sup>148</sup> *Id.*

rate three times that prior to 2005 which may be considered as a huge success; these include the Open Skies Agreements with the European Union (EU) and the United States.<sup>149</sup>

Gillen pointed out other metrics as necessary to assess the impact of the Blue Sky policy in terms of its initiation and facilitation of the negotiation process. However, the lack of available data would not allow him to proceed in that purpose, which is due, according to him, to the secrecy characterizing this process within the institutional framework.<sup>150</sup>

Gillen estimated a mathematical model of total international passengers against numbers of ASAs. Besides the negative effect of the distance on the total number of passengers with an elasticity of -0.67, the impact of the degree of liberalization on total number of passengers was the main result of the study. In fact, countries with an Open Sky agreement with Canada have significantly more passenger flows, followed by liberal ASAs, which also have higher passenger flows. Ultimately, it was noted that: (1) the impact of Open Skies agreements is nearly four times larger than a less liberal ASA; and (2) “the Blue Sky policy introduced in 2005 has had no statistically significant impact on total passenger flows between Canada and its top 50 international passenger destinations.”<sup>151</sup>

Under the UAE-Canada ASA, designated airlines from both parties—Etihad, Emirates, and Air Canada—are permitted to operate three weekly flights between Toronto and Dubai.<sup>152</sup> Emirates began flying the Dubai-Toronto route in October 2007. These flights have been consistently operated at capacity—even after the A380 was put on the route in 2009.<sup>153</sup> Since then, the UAE has been “pushing” for a more liberalized ASA. Nevertheless, the negotiations between the two countries, which lasted several years, resulted in little to no progress.<sup>154</sup> In No-

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<sup>149</sup> Forsyth et al., *supra* note 64, at 447–48.

<sup>150</sup> *Id.* at 448.

<sup>151</sup> *Id.* at 454.

<sup>152</sup> Alexander Cornwell, *Air Canada: We Will Oppose More Flights for Emirates, Etihad*, GULF NEWS (Nov. 5, 2015), <http://gulfnews.com/business/aviation/air-canada-we-will-oppose-more-flights-for-emirates-etihad-1.1614329> [https://perma.cc/PVY7-QSD2].

<sup>153</sup> EMIRATES, EMIRATES & CANADA 1 (2016), [https://cdn.ek.aero/downloads/ek/pdfs/int\\_gov\\_affairs/Emirates\\_and\\_Canada\\_June\\_2016.pdf](https://cdn.ek.aero/downloads/ek/pdfs/int_gov_affairs/Emirates_and_Canada_June_2016.pdf) [https://perma.cc/33HU-G9D3].

<sup>154</sup> The Canadian Press, *Emirates Pushing Canada on Air Travel*, CBC NEWS, Oct. 10, 2010, <http://www.cbc.ca/news/politics/emirates-pushing-canada-on-air-travel-1.925223> [https://perma.cc/63NZ-HUU7].

vember 2010, it was reported that Canada was prepared to offer more landing slots at the Calgary and Vancouver airports despite Air Canada's objection to any increased service for UAE carriers. Air Canada argued that such an expansion of landing rights would harm Air Canada because few passengers fly from the UAE to Canada and that UAE carriers are carrying passengers beyond their hubs (sixth freedom),<sup>155</sup> which will harm Air Canada.

The UAE was not satisfied with anything less than more flights to Toronto.<sup>156</sup> In fact, it was reported that Canada's offers included a capacity cut instead of a capacity increase, meaning that the offers were of little value to the UAE, and so the UAE negotiators were accordingly offended.<sup>157</sup> The dispute over commercial airline landing rights soured relations between the two countries and led to the Canadian Forces getting evicted from a key military transit base near Dubai.<sup>158</sup> Moreover, the UAE decided to pursue visa reciprocity towards Canada, among other countries, by the end of 2010.<sup>159</sup>

Surprisingly, in 2012, some reports indicated that Air Canada had proposed a joint venture with Emirates in 2006 "in which the two airlines would share equally in profits from increased flights between the [UAE and Canada]."<sup>160</sup> Yet Yves Dufresne, Vice President of Alliances and Regulatory Affairs at Air Canada, minimized the relevance of this information.<sup>161</sup> According to Dufresne, this was somehow propaganda circulated as a result of Transport Canada's refusal to increase landing rights for Emirates and Etihad in 2012.

In 2014, Emirates submitted a paper to the Canada Transportation Act Review 2014, in which it considered the UAE-Canada

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<sup>155</sup> *U.A.E. Wanted Only Toronto Air Access: Sources*, CBC NEWS, Nov. 8, 2010, <http://www.cbc.ca/news/politics/u-a-e-wanted-only-toronto-air-access-sources-1.939367> [<https://perma.cc/DS95-VTWP>].

<sup>156</sup> *Id.*

<sup>157</sup> Bruce Cheadle, *UAE Envoy Explains Tit-For-Tat Visa Demand*, THE GLOBE AND MAIL (Nov. 9, 2010), <http://www.theglobeandmail.com/news/politics/uae-envoy-explains-tit-for-tat-visa-demand/article1791860/> [<https://perma.cc/T3JY-AZL7>].

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Air Canada Proposed Emirates Deal in 2006: Documents*, THE GLOBE AND MAIL (Aug. 24 2012), <http://www.theglobeandmail.com/news/politics/air-canada-proposed-emirates-deal-in-2006-documents/article561788/> [<https://perma.cc/T7ZL-KQQ7>].

<sup>161</sup> Yves Dufresne, *Guest Lecturer in CIAM520 – Air Transport Finance & Economics*, MCGILL UNIVERSITY/SCHOOL OF CONTINUING STUDIES (Mar. 11, 2015).

ASA as one of the most restrictive agreements. As shown in Table 1, Emirates explained that Canada is the only country that allows just three weekly flights, among eighty countries to which Emirates operates passenger services.<sup>162</sup>

Table 1: Canada's stance on airline competition from an Emirates perspective compared with other G7 members

| G7 Member | Emirates entitlement        | Frequencies/week |
|-----------|-----------------------------|------------------|
| UK        | Open Sky                    | 112              |
| US        | Open Sky                    | 77               |
| Germany   | Unrestricted to any 4 point | 63               |
| Italy     | 49                          | 49               |
| France    | 32                          | 32               |
| Japan     | 35                          | 21               |
| Canada    | 3                           | 3                |

Source: Emirates Airlines (2014)

The paper emphasized that Emirates is a fully commercial airline operating a transparent and non-subsidized business model, and as mentioned earlier, its accounts are audited by PwC in compliance with international standards, and are publicly available.<sup>163</sup>

In his address to the Standing Committee on International Trade at the House of Commons of Canada, Ian Smith, President of the Air Canada Pilots Association (ACPA), declared in 2015:

I mention this to address two fronts that are concerning our association at this time. One is the continued attempt by Emirates Airline to expand its foothold into Canada . . . . When applying the blue sky policy, it is essential to understand that Emirates Airline operates under a completely different business model and completely different rules. Unlike Air Canada, Emirates Airline is an extension of Dubai's government, whose economic development strategy is to expand its airline market share at other countries' expense. Emirates Airline is a subsidiary of the Emirates

<sup>162</sup> EMIRATES, EMIRATES SUBMISSION TO THE CANADA TRANSPORTATION ACT REVIEW, 3–4 (2014), INTERNATIONAL GOVERNMENT AND ENVIRONMENT AFFAIRS, <https://www.tc.gc.ca/eng/ctareview2014/pdf/Emirates%20Submission.pdf> [<https://perma.cc/R9Z3-GHCL>].

<sup>163</sup> *Id.* at 1.

Group of companies, which integrates the airline into its airport operations in Dubai. With near limitless state capital funding, a tax-free environment, foreign low-cost labour to build infrastructure, and a state-owned airline, Dubai has been transformed into a major collection point, commonly called a hub.<sup>164</sup>

Smith believed that Emirates' move will damage the sustainability of the Canadian aviation sector and, consequently, harm national interests. He noted that the domestic aviation market is presently at its upper saturation limit—with a population of almost 36 million.<sup>165</sup>

Overall, these statements appear to be akin to the allegations of the major U.S. carriers against the Middle Eastern carriers at large.<sup>166</sup> However, unlike the situation in the United States, it is important to note that some stakeholders are not involved in the current debate in Canada. This includes the tourism industry and most importantly the end users—passengers.

In 2013, the Tourism Association Industry of Canada (TAIC) published a paper addressing its position on Open Skies policy in Canada. This paper analyzed the potential impacts and interactions of the Canadian air policy with the tourism industry.<sup>167</sup> It outlined three interrelated perspectives that should be considered in any improvements in air access to Canada: (1) “Cost Structure: [e]ven with a liberal air access agreement, Canada’s prohibitively expensive aviation cost structure will continue to dissuade foreign carriers from doing business with Canada”; (2) “Facilitation: Canada must be able to meet the anticipated increased demand” from a more liberalized ASA by rectifying outstanding immigration issues such as Transit Without Visas, Canada Border Services Agency staffing capacity; and (3) ASAs: “Open Skies policies alone will not increase international visitation. However, with the right aviation policies in place ([points] 1 and 2) Canadian tourism may benefit from more liberalized ASAs in specific cases.”<sup>168</sup>

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<sup>164</sup> Air Canada Pilots Association, House of Commons, Standing Comm. on Int'l Trade, 41st Can. Parl., 2d Sess, No 44 (Feb. 4, 2015) (statement of Ian Smith), <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=7827215&Language=E&Mode=1> [<https://perma.cc/LUW6-DL9C>].

<sup>165</sup> *Id.*

<sup>166</sup> Compare *id.* with RESTORING OPEN SKIES, *supra* note 115.

<sup>167</sup> ADRIENNE FOSTER, TOURISM ASSOCIATION INDUS. OF CAN., GATEWAY TO GROWTH-AIMING HIGH: AIR ACCESS TO CANADA 13 (2013), [http://tiac.travel/\\_Library/TIAC\\_Publications/2013\\_Aviation\\_Paper\\_WEB.pdf](http://tiac.travel/_Library/TIAC_Publications/2013_Aviation_Paper_WEB.pdf) [<https://perma.cc/EAD8-NYA8>].

<sup>168</sup> *Id.*

With regard to the passengers, it seems that the policymakers and airlines do not bother to mention how high air fares are in both the domestic and international markets. Admittedly, Canadian airports have been run by not-for-profit entities since they were corporatized in the 1990s, yet the end users—passengers—have to bear the cost of the investments on airport facilities by paying high fees to ensure a return-on-investment of the airport facilities (“user pay PLUS” system, as explained earlier in this article).<sup>169</sup> Ticket taxes and airport charges are pointed out as real issues facing air transport development in Canada.<sup>170</sup> In 2012, 23% of the total Origin/Destination (O/D) transborder passengers used neighboring U.S. airports. This represents a leakage of traffic of 6.4 million passengers, 5 million of which are Canadian residents.<sup>171</sup> Mary-Jane Bennett concluded, in her study, that leakage of passenger traffic in Canada is due mainly to the lack of competition as a result of the exorbitant costs (base fare and charges) leading to increasingly high fares in the aviation market in Canada.<sup>172</sup>

On the other hand, a recent article by Centre Asia Pacific Aviation (CAPA) examined the recent withdrawal of Delta Air Lines from its Dubai route (announced on October 28, 2015) due to competition with Emirates.<sup>173</sup> The article noted the coincidence of this move with the new service launched by Air Canada to Dubai (on November 3, 2015) and Delhi (on November 1, 2015). The article considered Canada as overtly protectionist and concluded that from a passenger perspective, “open skies in the [U.S.] has delivered extensive benefits while protectionism in Canada is limiting travel options and the economy.”<sup>174</sup>

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<sup>169</sup> Gooch, *supra* note 68.

<sup>170</sup> INTERVISTAS CONSULTING, THE ROLE OF GOVERNMENT POLICY IN THE COST COMPETITIVENESS OF CANADIAN AVIATION: IMPACTS ON AIRPORTS AND AIRLINES 3, 56 (2008), [http://www.intervistas.com/downloads/Aviation\\_Competitiveness\\_Report\\_16Jan2008.pdf](http://www.intervistas.com/downloads/Aviation_Competitiveness_Report_16Jan2008.pdf) [<https://perma.cc/D93T-56ZS>].

<sup>171</sup> CANADIAN AIRPORTS COUNCIL, THE ECONOMIC IMPACT OF THE AIR TRANSPORTATION INDUSTRY IN CANADA 10 (2013), [http://www.cacairports.ca/sites/default/files/Docs\\_2013/CAC\\_Economic-Impact-Study\\_FINAL\\_April-2013.pdf](http://www.cacairports.ca/sites/default/files/Docs_2013/CAC_Economic-Impact-Study_FINAL_April-2013.pdf) [<https://perma.cc/VK29-62MG>].

<sup>172</sup> Mary-Jane Bennett, *A New Policy is Required for Air Transportation*, 104 BACKGROUND (FRONTIER CTR. FOR PUB. POLICY) 1, 4 (2013), [https://www.fcpc.org/files/1/FB104\\_AirTransport\\_JA06F5.pdf](https://www.fcpc.org/files/1/FB104_AirTransport_JA06F5.pdf) [<https://perma.cc/HX5C-7WXA>].

<sup>173</sup> *Delta Air Lines Exits Dubai as Air Canada Arrives. The Impact of Open Skies vs Protectionism*, CAPA – CENTRE FOR AVIATION (Nov. 2, 2015), <http://centreforaviation.com/analysis/delta-air-lines-exits-dubai-as-air-canada-arrives-the-impact-of-open-skies-vs-protectionism-250724> [<https://perma.cc/JK8G-HDVH>].

<sup>174</sup> *Id.*

### III. APPLICATION OF CASE STUDIES TO PRINCIPLES OF COMPETITION IN AIR TRANSPORT

The definition of a level playing field in the international trade is often a source of confusion. In fact, a conflict of interest is most likely to occur when various stakeholders are involved in complex processes within different environments, and hence, different conditions of operation (e.g. labor standards, taxes). An equilibrium is not easy to achieve when potential benefits for a party are more of threats for others. In that regard, Appelman et al. explained:

Pleas for a level playing field, for instance in international trade, are often not well-founded. This is because it is not exactly clear what a “level playing field” means. But even if it would be clear what the plea would imply, a level playing field is not always desirable from an economic perspective.<sup>175</sup>

Appelman et al. defined the concept of “level playing field” according to two approaches: First, “a rules-based level playing field, which suggests that all players in a market are treated the same in equal circumstances” regarding various criteria such as labour standards, taxes, and subsidies.<sup>176</sup> In other words, all firms compete under symmetric rules in an international market.<sup>177</sup> Second, “an outcome-based level playing field, which means that all firms in a market have the same expected profit,” therefore, disadvantaged firms are compensated by the government.<sup>178</sup> In that case, asymmetric rules are adopted to level the playing field; that is, corrective measures are designed to address the distortions caused by unfair advantages.<sup>179</sup> Appelman et al. pointed out two fundamental points with regard to the applicability of both approaches: (1) “a rules-based level playing field is desirable, although there are reasons to deviate from this assumption”; and (2) “it is never desirable to pursue a fully outcome-based level playing field, but that it may be desirable to

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<sup>175</sup> MARJA APPELMAN ET AL., CPB NETHERLANDS BUREAU FOR ECONOMIC POLICY ANALYSIS, EQUAL RULES OR EQUAL OPPORTUNITIES? DEMYSTIFYING LEVEL PLAYING FIELD 89 (2003), <http://www.cpb.nl/sites/default/files/publicaties/download/equal-rules-or-equal-opportunities-demystifying-level-playing-field.pdf> [https://perma.cc/FN3X-UEBS].

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 18.

<sup>178</sup> *Id.* at 89.

<sup>179</sup> *Id.* at 22.



level the playing field to a certain extent in the case of market failure.”<sup>180</sup>

Based on the above, the definition of the level playing field and the applicability of the concept rely on the appreciation of the mechanisms governing international markets. That is to say, interpretations from different perspectives hence different interests depending on the specifics and complexity of each industry.

In that sense, the definition will be even more complex for the aviation system, which is based by definition on the international market mechanisms from regulatory, legal, and operational perspectives. For instance, as mentioned earlier, ICAO developed, conjointly with WTO, the Essential Service and Tourism Development Route Scheme (ESTDR), which was “a mechanism whereby a support, in the form of a financial subsidy and/or an exclusive concession, can be provided to airlines for the provision of certain services of a public service nature.”<sup>181</sup> The experience of route support schemes has raised many questions regarding the appropriate manner by which the process of subsidy allocation should be set so that any distortion of market and unfair competition are avoided, i.e., the playing field has to be leveled.<sup>182</sup>

Jaap G. de Wit, Professor of Transport Economics at University of Amsterdam, clarified that even with equal rules for international trade and identical economic and institutional policies (i.e. rules-based level playing field), trading partners may still benefit from comparative advantages. As a result, the playing field is unlevel, yet De Wit noted that this “cannot be qualified as unfair competition.”<sup>183</sup>

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<sup>180</sup> *Id.* at 89.

<sup>181</sup> *A Study of an Essential Service and Tourism Development Route Scheme*, *supra* note 30, at 1.

<sup>182</sup> Jon Woolf, Dir. & Principal Consultant at ASM, Address to the ICAO Glob. Symposium on Air Transp. Liberalization: Air Service Development for Developing Countries 23 (Sept. 18–19, 2006), <http://www.icao.int/Meetings/LiberalizationSymposium/Documents/2006-Symposium-Dubai/Woolf.pdf> [https://perma.cc/CF89-BVNX].

<sup>183</sup> Jaap G. de Wit, *Unlevel Playing Field? Ah Yes, You Mean Protectionism*, 41 J. OF AIR TRANSP. MGMT. 22, 24 (2014); *see also* Ian Fletcher, *Time to Quit Pining for a “Level Playing Field” in International Trade*, GLOB. GEOPOLITICS & POLITICAL ECON. (Mar. 18, 2011), <http://globalgeopolitics.net/wordpress/2011/03/18/time-to-quit-pining-for-a-level-playing-field-in-international-trade/> [https://perma.cc/6TVS-H8BR]; Samuel Bostaph, *The Myth of the Level Playing Field*, LEWROCKWELL.COM (May 12, 2005), <https://www.lewrockwell.com/2005/05/samuel-bostaph/the-myth-of-the-level-playing-field/> [https://perma.cc/V9YQ-QVVU].

The theory of comparative advantage suggests that free trade stimulates economic growth within a country. That is based on the trading of goods that can be produced most efficiently in such a way as to offset the disadvantages in areas where goods are produced less efficiently compared to other countries. As a whole, trade is a positive-sum game, according to the theory of comparative advantage.<sup>184</sup>

Theoretically, comparative advantages and disadvantages are supposed to be assessed by the negotiating parties on an individual basis throughout the negotiation process. The outcome of such assessment permits each party to compare the consistency of its own endogenous and exogenous parameters (e.g. economic measures; institutional policies vs. geographic location) to that of the other parties. This process allows, at the same time, parties to determine the Best Alternatives to a Negotiated Agreement (BATNA), which is the most valuable alternative course of action to be considered if negotiations fail and an agreement cannot be reached.<sup>185</sup>

As for aviation, the comparative advantage/disadvantage approach is more difficult to achieve given “that aviation has been separated from general trade negotiations.”<sup>186</sup> As a result, “the issue of the level playing field plays an inordinately larger role in aviation than in other sectors.”<sup>187</sup> Nevertheless, many aspects in aviation remain consistent with this perspective. For instance, as explained earlier in this article, Dubai considers the Open Skies policy “a key component of its economic and trade policy.”<sup>188</sup> Overall, the national institutional policies play in favor of the aviation system as a whole in the UAE and Qatar.<sup>189</sup> In addition, the geographic location is pointed out as a major advantage for the Middle Eastern carriers; that is, international hubs enable carriers to benefit from operations between the United States and Asia Pacific, as well as Europe and South Asia/East Africa.<sup>190</sup> On the other hand, Boeing and Airbus benefit in return from

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<sup>184</sup> de Wit, *supra* note 183, at 24.

<sup>185</sup> ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 51–52 (1992).

<sup>186</sup> MIKE TRETHERWAY & ROBERT ANDRIULAITIS, INTERVISTAS CONSULTING, WHAT DO WE MEAN BY A LEVEL PLAYING FIELD IN INTERNATIONAL AVIATION? 5 (2015), <http://www.itf-oecd.org/sites/default/files/docs/dp201506.pdf> [<https://perma.cc/N8QG-VZ28>].

<sup>187</sup> *Id.*

<sup>188</sup> 78 Years with . . . an Open Skies Policy, *supra* note 102, at 6.

<sup>189</sup> *Id.*

<sup>190</sup> TRETHERWAY & ANDRIULAITIS, *supra* note 186, at 5.

the rapid growth of the Middle Eastern carriers as discussed earlier in this article; this is due to the comparative advantage of the United States and Europe in high tech manufacturing and skilled labor for the production of the largest aircraft tailored to the Gulf trio, i.e. the A380 and B777.<sup>191</sup> Besides, the U.S. approach in air transport liberalization has been advocating for competition rules by reducing the burden of regulation that is to ensure equality of opportunity for the different players.<sup>192</sup> In fact, the United States was the first country to start pursuing Open Skies agreements following the “International Air Transportation Negotiations Statement of U.S. Policy for the Conduct of the Negotiations,” which was issued by President Carter in 1978.<sup>193</sup> According to this statement:

The guiding principle of U.S. aviation negotiation policy will be to trade competitive opportunities, rather than restrictions, with our negotiating partners. We will aggressively pursue our interests in expanded air transportation and reduced prices rather than accept the self-defeating accommodation of protectionism. Our concessions in negotiations will be given in return for progress toward competitive objectives, and these concessions themselves will be of a liberalizing character.<sup>194</sup>

One of the fundamental rules of air transport regulation is to make sure that international air transport services are established “on the basis of equality of opportunity and operated soundly and economically.”<sup>195</sup> Hence as discussed earlier, the objective of ICAO is to “[i]nsure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines.”<sup>196</sup>

On another note, Annex 1B of the GATS does not cover the “largest part of air transport services: traffic rights and services directly related to traffic.”<sup>197</sup> However, it is worthy to note that “traffic rights” include, by definition, “tariffs to be charged and

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Adam L. Schless, *Open Skies: Loosening the Protectionist Grip on International Civil Aviation*, 8 EMORY INT'L L. REV. 435, 435, 441–42 (1994).

<sup>194</sup> Jimmy Carter, *International Air Transportation Negotiations Statement of U.S. Policy for the Conduct of the Negotiations*, AM. PRESIDENCY PROJECT (Aug. 21, 1978), <http://www.presidency.ucsb.edu/ws/?pid=31218> [https://perma.cc/LSP3-ML7M].

<sup>195</sup> Chicago Convention, *supra* note 1, at 1.

<sup>196</sup> *Id.* at 20.

<sup>197</sup> *Air Transport Services*, *supra* note 25.

their conditions.”<sup>198</sup> Likewise, commercial disputes related to the subject of paragraph 3 of the Annex are not covered by the GATS (i.e., aircraft repair and maintenance services, the selling and marketing of air transport services, and Computer Reservation System (CRS) services).<sup>199</sup>

Therefore, the GATS’ procedures of dispute settlement can be applied to air transport services other than the above issues such as unfair competition caused by “unlawful” subsidies. Even though these procedures can only be invoked when certain conditions are met and as a last resort to be relied upon only after other alternatives (i.e. clauses of bilateral ASAs). In fact, paragraph 4 of the GATS’ Annex on air transport services, specifies that “[t]he dispute settlement procedures of the Agreement may be invoked only where obligations or specific commitments have been assumed by the concerned Members and where dispute settlement procedures in bilateral and other multilateral agreements or arrangements have been exhausted.”<sup>200</sup>

From a regulatory perspective, it should be noted that there is almost no comprehensive descriptive clause referring to anti-competition or unlawful subsidies in the existing bilateral ASAs. For instance, the Open Sky agreement between the United States and the UAE has a very vague referral to competition issues. Article 11 of this agreement states that “[e]ach Party shall allow a fair and equal opportunity for the designated airlines of both Parties to compete in providing the international air transportation governed by this Agreement.”<sup>201</sup>

Moreover, it is specified on the first page of the agreement that, among other things, both countries “[d]esire to promote an international aviation system based on competition among airlines in the marketplace with minimum government interference and regulation.”<sup>202</sup> The word “minimum” is vague and subjective, which opens the door to different interpretations of how a “minimum government interference and regulation” should or shall be defined.<sup>203</sup>

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<sup>198</sup> Marrakesh Agreement, Annex 1B, *supra* note 26, at 307.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Air Transport Agreement between the Government of the United States of America and the Government of the United Arab Emirates U.A.E.-U.S., 8, Mar. 11, 2002, T.I.A.S. No. 02-1211, <http://www.state.gov/documents/organization/125743.pdf> [<https://perma.cc/R9Q6-DQNZ>] [hereinafter US-UAE Agreement].

<sup>202</sup> *Id.* at 1.

<sup>203</sup> *Id.*

On the other hand, settlement of disputes is discussed under Article 14 of this agreement, which includes disputes on competition issues.<sup>204</sup> Likewise, Article 14 explains the process of formal consultations and arbitration by a tribunal of three arbitrators.<sup>205</sup> A comparison of Article 14 of the U.S.-UAE agreement with Article 34 of the ICAO TASA<sup>206</sup> mainly shows the following:

- Article 14 of the US-UAE Open sky agreement is somehow based on the second arbitration approach defined by ICAO.
- The wording of paragraph 7 of Article 14 complies with the first option of the paragraph 8 of Article 34, which limits the enforcement of the decision or award of the arbitral tribunal: “[e]ach Party shall, to the degree consistent with its national law, give full effect to any decision or award of the arbitral tribunal.”
- The use of commas instead of square brackets in the ICAO proposal may modify the meaning or the scope of the foregoing paragraph.<sup>207</sup>

It should be noted that under the provision of the second option of paragraph 8 in Article 34, “the decision of the tribunal shall be binding on the Parties.”<sup>208</sup>

Consequently, the U.S.-UAE Open Sky agreement does not provide explicit information or examples that answer the following questions: How should an accepted level of government interference and regulation be defined? How should the playing field be leveled so that any distortions of market and unfair competition are avoided? And, more importantly, how shall the contracting parties proceed when commercial disputes occur?

As for the United States’ allegations of capacity dumping, tariffs to be charged and their conditions, or any other matter re-

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<sup>204</sup> *Id.* at 10.

<sup>205</sup> *Id.*

<sup>206</sup> ICAO TEMPLATE AIR SERVICES AGREEMENT, *supra* note 10, at 75–83. Article 34 on settlement of disputes provides an explicit description of the dispute resolution process, which depends on whether the ASA is traditional or fully liberalized. *Id.* Article 34 may exclude disputes on competition issues if the contracting parties decide to include a separate consultation process under Article 15 on fair competition. *See id.* at 75.

<sup>207</sup> Compare ICAO TEMPLATE AIR SERVICES AGREEMENT, *supra* note 10, at 80–82, with US-UAE Agreement, *supra* note 201, at 10. “Parenthetic expressions may be set off by parentheses or dashes instead of commas, depending on the degree of emphasis or pause desired, or the length of the expression.” *Punctuation*, BUREAU DE LA TRADUCTION (2017), <http://www.btb.termiumplus.gc.ca/tcdnstyl-chap?lang=eng&lettr=chapsect7&info0=7> [<https://perma.cc/H54F-E53C>].

<sup>208</sup> ICAO TEMPLATE AIR SERVICES AGREEMENT, *supra* note 10, at 80.

lated to traffic rights, the plaintiff should invoke Article 14 (Settlement of Disputes) and Article 12 (Pricing) in the current US-UAE Open Sky agreement.<sup>209</sup> Given that commercial disputes cannot be resolved based on the vague provisions of Article 14, parties cannot take any legal actions, per allegations of financial subsidies, under the current bilateral ASA. Thus, unless airlines involved in that issue foresee their future growth through partnerships when possible instead of exchanging useless allegations, the only recourse should be a specialized jurisdiction based on views of experts in the subject matter of the dispute. In that sense, the WTO is the international body empowered to examine questions that bear on commercial disputes (as explained previously in the GATS' Annex on Air Transport Services).

Consequently, based on foregoing analysis, and given the ASAs' limited scope, plaintiffs should request the intervention of the WTO in cases of commercial disputes related more specifically to alleged financial subsidies, which may distort the market. Even though there is no mention to the WTO in the overall existing bilateral ASAs in case of a dispute relating to unfair competition, perhaps it is the will of civil aviation regulators to maintain the status quo by resolving possible disputes under the bilateral ASAs without any referral to an organization outside the aviation sphere or diplomatic channels of both parties—in the worst scenario.

#### IV. CONNECTIVITY AND DISRUPTIVE INNOVATION IN AIR TRANSPORT

Air transport connectivity is defined in line with the Chicago Convention as inter alia Preamble and paragraph D of Article 44: “[m]eet[ing] the needs of the peoples of the world for . . . efficient and economical air transport.”<sup>210</sup> Accordingly, connectivity in air transport is defined by ICAO as the “[m]ovement of passengers, mail and cargo involving the minimum of transit points, which: makes the trip as short as possible, with optimal user satisfaction; [and] at the minimum price possible.”<sup>211</sup>

In 2015, a commentator said:

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<sup>209</sup> See US-UAE Agreement, *supra* note 201, at 9–10.

<sup>210</sup> Chicago Convention, *supra* note 1, at 20.

<sup>211</sup> A. Sainarayan, Chief, Aviation Data & Analysis Sec., ATB, Workshop at the ICAO's 39th Assembly: Air Connectivity and Competition (Sept. 27, 2016), <http://www.icao.int/Meetings/a39/workshops/Documents/Air%20Connectivity%20and%20Competition.pdf> [<https://perma.cc/2L9F-4JPG>].

“Connectivity” which is the most compelling need in aviation, and embodied in the Chicago Convention as *inter alia* “meeting the needs of the people of the world for efficient and economical air transport” is stultified by interests of commercial and national policy . . . . The [U.S. position]<sup>212</sup> makes one wonder whether the fate of air transport lies in internal job creation and not in connecting the world which is the main intent and purpose of the Chicago Convention.<sup>213</sup>

In 2012, the numbers of cities served from twenty-four major hub airports across the globe were ranked according to three different measures with different outcomes. In terms of domestic and international flights (i.e., total cities served and total international destinations), Frankfurt—FRA with 313 cities served, is the largest, followed by Paris—CDG with 268. For the United States, Atlanta—ATL ranked third (228) and Chicago O’Hare—ORD ranked fifth (210). In Canada, Toronto—YYZ ranked eighth (183) in a tie with New York—JFK (183) and London—LHR. Finally, Dubai—DXB ranked fifth with 313 cities served.<sup>214</sup>

In the context of international flights only, the geographical location of the hub airports must be considered when “examining how airport rate as international hubs on connectivity.”<sup>215</sup> In that regard, European hubs rate well since they have “a majority of their service within Europe that is included as international.”<sup>216</sup> For similar reasons, Dubai Airport also scores well in terms of the number of international destinations served, coming in third behind Paris—CDG and Frankfurt—FRA.<sup>217</sup>

As for outside the region, an alternative measure considers the “number[ ] of cities served outside the hub airport’s local region.”<sup>218</sup> “Dubai[—DXB] is the largest international hub airport on this measure, followed by Frankfurt—FRA, Paris—CDG and New York—JFK.”<sup>219</sup> Toronto—YYZ and Montréal—YUL also fare well on this measure; Toronto ranked sixth just behind New

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<sup>212</sup> The author refers to the recent allegations of the three major U.S. airlines against the Gulf carriers.

<sup>213</sup> Ruwantissa Abeyratne, *What in the World is Happening to Air Transport?*, SRI LANKA GUARDIAN, May 5, 2015, <http://www.sguardian.org/2015/05/what-in-the-world-is-happening-to-air-transport/> [<https://perma.cc/Z9PV-7VYQ>].

<sup>214</sup> THE ECONOMIC IMPACT OF THE AIR TRANSPORTATION INDUSTRY IN CANADA, *supra* note 171, at 16–17.

<sup>215</sup> *Id.* at 16.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 17.

<sup>218</sup> *Id.* at 16.

<sup>219</sup> *Id.* at 16–17.

York—JFK and London—LHR, and Montréal ranked tenth.”<sup>220</sup> “The Asian hub airports don’t rate highly on this measure as much of their service is to airports within the region.”<sup>221</sup> “Canadian hub airports are relatively small compared to major world hub airports considering total passenger traffic, but in terms of connectivity they fare better.”<sup>222</sup>

According to Clayton M. Christensen, professor at Harvard Business School and pioneer of the disruptive innovation theory, “disruptive innovation . . . [is] a process by which a product or service takes root initially in simple applications at the bottom of a market and then relentlessly moves up market, eventually displacing established competitors.”<sup>223</sup> As a result of that process, disrupted products or services become more accessible and affordable to a large population instead of a specific segment willing to pay higher prices.<sup>224</sup>

In a recent article of Harvard Business Review, Christensen et al. explained the concept and basic tenets of disruptive innovation theory. The process of disruption describes how a disrupter enters a market or creates a new one and how it evolves from a business oriented toward new customers or low-end to high-end customers, while passing through the mainstream customers.<sup>225</sup>

Christensen et al. pointed out the confusion surrounding the application of the concept of disruptive innovation when it is used by many researchers, writers, and consultants. In that regard, “disruptive innovation” is different from “sustaining innovations,” which focuses on improving the products or services offered to an incumbent’s existing customers—notably, the most profitable ones.<sup>226</sup> By contrast:

Disruptive innovations . . . are initially considered inferior by most of an incumbent’s customers. Typically, customers are not willing to switch to the new offering merely because it is less expensive. Instead, they wait until its quality rises enough to satisfy

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<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 16.

<sup>222</sup> *Id.*

<sup>223</sup> *What is Disruptive Health Technology?*, CARNEGIE MELLON UNIV., DISRUPTIVE HEALTH TECHNOLOGY INSTITUTE, <http://www.dhti.cmu.edu/dhti/definition.asp> [<https://perma.cc/LLT4-FN4N>].

<sup>224</sup> *Id.*

<sup>225</sup> Clayton M. Christensen et al., “*What is Disruptive Innovation?*”, 93 HARV. BUS. REV. 44, 46 (2015).

<sup>226</sup> *Id.* at 46–47.



them. Once that's happened, they adopt the new product and happily accept its lower price.<sup>227</sup>

Christensen et al. explained that “[d]isruptive innovations originate in low-end or new-market footholds.”<sup>228</sup> New-market disruption occurs where a new market is created where none previously existed, hence a new segment of customers is targeted by a disrupter. Second, low-end disruption refers to the situation where low-end and less-demanding customers of an established business (incumbent) are attracted by progressive enhanced product/service offerings of a new entrant (disrupter). The disrupter will later adapt its business strategy to the evolution of the market, whereas the incumbents will focus rather on the most profitable and demanding customers by providing them with “ever-improving products and services.”<sup>229</sup>

Based on the above reasoning, it appears that the business model of the low-cost carriers (LCCs) fits overall into the new-market disruption. This resulted in the emergence of a new segment of passengers who could not afford traveling by air before, due to exorbitant airfares.<sup>230</sup> Yet it is also true that the low-end and mainstream passengers are attracted by the affordable prices and improving service offerings of the low cost model (i.e. low-end disruption).<sup>231</sup> This dynamic of disruption and the evolution of performance over time is continuously changing at different paces, depending on the business models of the disrupters and the incumbents, but also on the evolution of the cyclic airline industry as a whole (i.e. Ultra LCCs, LCCs, hybrid carriers, and legacy carriers).

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<sup>227</sup> *Id.* at 48.

<sup>228</sup> *Id.* at 47.

<sup>229</sup> *Id.*

<sup>230</sup> See John F. O’Connell & George Williams, *Passengers’ Perceptions of Low Cost Airlines and Full Service Carriers – A Case Study Involving Ryanair, Aer Lingus, Air Asia and Malaysia Airlines*, 11 J. OF AIR TRANSP. MGMT. 259 (2015), [https://dspace.lib.cranfield.ac.uk/bitstream/1826/1453/4/Passengers\\_perceptions\\_of\\_low\\_cost\\_airlines\\_and\\_full\\_service\\_carriers-TEXT-OConnell-Elsevier-2005.pdf](https://dspace.lib.cranfield.ac.uk/bitstream/1826/1453/4/Passengers_perceptions_of_low_cost_airlines_and_full_service_carriers-TEXT-OConnell-Elsevier-2005.pdf) [<https://perma.cc/V3VL-MDQS>].

<sup>231</sup> See *LCCs Playing Important Role in Driving Onboard Passenger Experience Improvements*, FUTURE TRAVEL EXPERIENCE (June 2014), <http://www.futuretravelexperience.com/2014/06/lccs-playing-important-role-driving-onboard-passenger-experience-improvements/> [<https://perma.cc/6MZ8-FJ9U>]. For instance, “[a]s Ryanair improved in quality, and as people started noticing Ryanair’s low prices, a new standard in the air travel market was created.” Sujith Nair et al., *Flexibility in Airline Business Models with Core Competence as an Indicator*, Article Presented to the 15th Air Transport Research Society World Conference 7 (2011), [http://oa.upm.es/12480/2/INVE\\_MEM\\_2011\\_105228.pdf](http://oa.upm.es/12480/2/INVE_MEM_2011_105228.pdf) [<https://perma.cc/MBY3-G7W9>].

Another point worth mentioning is that a process of action and reaction emerges from the dynamic of disruptive innovation given that this concept can profoundly affect the functioning of established companies.<sup>232</sup> This leads to what Christensen called the “innovator’s dilemma,” which refers to the mindset of an established company when it has to decide whether it should maintain its products or services with the current high-value offerings or create a new product or service similar to the one offered by a disrupter.<sup>233</sup> That said, the new product or service must be designed with basic or less sophisticated attributes to be able to compete with the new entrant, which targets mainstream customers (e.g., Legacy carriers versus LCCs, Ford versus Toyota).

The traditional airlines have been facing two types of disruptions concurrently, which is “unusual in the story of disruption,” according to Christensen.<sup>234</sup> Thus, unlike incumbents in other industries, traditional carriers cannot move to more profitable upmarket tiers to maintain a certain competitive advantage over the new entrants. Christensen explained that incumbents in other industries have more options when disrupted, whereas “[t]he high fixed-cost structure of hub-and-spoke airlines means they can’t run away from the volume in the lower tiers of the market.”<sup>235</sup> In fact, with the growing competition from LCCs on short-haul routes, traditional carriers in the United States and Europe have been trying to focus on flowing passengers through their hubs on longer routes.<sup>236</sup> However, they are no longer in a position of supremacy due to the fierce competition from the Middle Eastern carriers on long-haul.<sup>237</sup> Basically, the margins of the traditional U.S. and European airlines are getting squeezed on both sides—short- and long-haul.

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<sup>232</sup> *Disruptive Innovation-Policy Implications*, VISIONARY ANALYTICS (Jan. 2016), <http://www.visionary.lt/disruptive-innovation-policy-implications> [https://perma.cc/97Q3-7GHH].

<sup>233</sup> A.W., *What Disruptive Innovation Means*, THE ECONOMIST, Jan. 25, 2015, <http://www.economist.com/blogs/economist-explains/2015/01/economist-explains-15> [https://perma.cc/EM24-5E8V].

<sup>234</sup> Jeremy Dann, *Disruption: Flying the Not-So-Friendly Skies*, HARV. BUS. SCHOOL (Oct. 20, 2003), <http://hbswk.hbs.edu/archive/3736.html> [https://perma.cc/7QF9-6G8E].

<sup>235</sup> *Id.*

<sup>236</sup> *See id.*

<sup>237</sup> *See EU Carriers Battle Gulf Airlines’ Expansion*, DEUTCHE WELLE (May 28, 2015), <http://www.dw.com/en/eu-carriers-battle-gulf-airlines-expansion/a-18482670> [https://perma.cc/5M4L-YYD7].

Nevertheless, contrary to LCCs, the major Middle Eastern carriers operate through a different business model that does not necessarily target, at the very beginning, their operations, the mainstream passengers, or a new-market segment. In fact, another aspect that distinguishes the airline industry from other industries is its dependency on different components of the global air transport system; these include airport infrastructures, geographic location, and national institutional policies. These components combined would facilitate the process of disruption when acting in an international market with different comparative advantages. That said, favorable conditions, to a certain extent, might create an uneven playing field without being illegal, as discussed earlier.

Within that perspective, many major airlines have benefited from favorable conditions, which cannot be ignored in their development history. Perhaps the time frame of these advantages and the cyclic characteristic of the airline industry are the main parameters that make it challenging to conduct a reasonable comparison between the beneficiaries. For instance, as mentioned earlier, Emirates reported that it benefited from the government investment in infrastructure, plus start-up seed capital in 1985.<sup>238</sup> Other airlines have been rescued, either directly through subsidies, or indirectly by application of bankruptcy laws (e.g. United Airlines in 2006).<sup>239</sup>

Airlines adopt an aggressive strategy to leverage the comparative advantages of a global disparate air transport system. However, the success of a new carrier relies above all on its ability to seize new opportunities and meet an eventual pent-up demand through a solid product offering in terms of quality and pricing.<sup>240</sup> In a similar approach, Abeyratne briefly explained his definition of disruptive innovation in the airline industry based on the constraints raised by Christensen:

Disruptive innovation in the air transport industry is based on two strategies: service strategy and pricing strategy. These two combined justify the three basic features of a successful business strategy which displaces an existing market: availability of goods and services; good price and quality; and value for money. When

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<sup>238</sup> AIRLINES AND SUBSIDY: OUR POSITION, *supra* note 132, at 8.

<sup>239</sup> Adams, *supra* note 63.

<sup>240</sup> See *LCCs Playing Important Role in Driving Onboard Passenger Experience Improvements*, FUTURE TRAVEL EXPERIENCE (June 2014), <http://www.futuretravelexperience.com/2014/06/lccs-playing-important-role-driving-onboard-passenger-experience-improvements/> [<https://perma.cc/5QWK-7RHT>].

these practices are applied to the airline industry, one finds that an established carrier is much more vulnerable to disruptive innovation than most other industries.<sup>241</sup>

Abeyratne explained a common misconception that considers a decrease in innovation as an adverse effect of increased competition. He clarified that, contrary to this erroneous assumption, “[c]ompetition and innovation are mutually endogenous.”<sup>242</sup> Aghion et al. further described the relationship:

First, an increase in competition leads to a significant increase in R&D investments by neck-and-neck firms. Second, an increase in competition decreases R&D investments by laggard firms. Moreover, this Schumpeterian effect<sup>243</sup> is significantly stronger the shorter the time horizon. Third, increased competition affects industry composition by reducing the fraction of neck-and-neck sectors, and overall, competition increases aggregate innovation.<sup>244</sup>

Edwards and Day identified innovation as a crucial indicator that enables a company to build an emotional brand connection with its customers. They identified lack of real innovation as one of the five symptoms of malaise of consumer-led brands.<sup>245</sup> These are: (1) an increased similarity between brands; (2) an inconsistent brand image and offer; (3) a lack of real innovation and surprise; (4) an increasing gulf between brand offer and brand capability; and (5) something hollow at the heart of the brand.<sup>246</sup> In that sense, Edwards and Day described Emirates as a company with a record of successful brand innovation; that is, “an example of rapid-fire innovation” offering many on-board

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<sup>241</sup> RUWANTISSA ABEYRATNE, COMPETITION AND INVESTMENT IN AIR TRANSPORT—LEGAL AND ECONOMIC ISSUES 108 (2016).

<sup>242</sup> *Id.* at 107.

<sup>243</sup> “The Schumpeter effect is associated with the notion of creative destruction put forward in the 1930s by the celebrated economist Joseph Schumpeter, which introduced the process by which new innovations replace older technologies. Start-up airlines have to be mindful of being overrun by more established airlines, making creative destruction a common phenomenon in air transport.” *Id.* at n.84.

<sup>244</sup> Philippe Aghion et al., *The Causal Effects of Competition on Innovation: Experimental Evidence* 4 (Harvard University, Working Paper, 2014), [http://scholar.harvard.edu/files/aghion/files/causal\\_effects\\_of\\_competition.pdf?m=1393886457](http://scholar.harvard.edu/files/aghion/files/causal_effects_of_competition.pdf?m=1393886457) [<https://perma.cc/8E4Q-ZWYA>].

<sup>245</sup> HELEN EDWARDS & DEREK DAY, CREATING PASSION BRANDS: HOW TO BUILD EMOTIONAL BRAND CONNECTION WITH CUSTOMERS 23–24, 31 (2005).

<sup>246</sup> *Id.* at 24, 28, 31, 34, 37.

options and innovative technologies to the passengers.<sup>247</sup> Besides, it was highlighted that the airline had not tested the introduced innovations before the implementation stage. Tim Clark, Emirates CEO, explained: “We know what consumers want, and we use the experience of our own people to assess new ideas. If we tested innovation every time with a posse of consumers, we would lose the initiative. We prefer to back our judgement.”<sup>248</sup>

From a customer perspective, Emirates, Qatar Airways, and Etihad Airways provide high levels of service, especially for premium passengers. As mentioned earlier, in 2016 these carriers ranked first, second, and sixth, respectively, out of the 100 best airlines by Skytrax World Airline Awards.<sup>249</sup> On the other hand, Delta ranked thirty-fifth, United ranked sixty-eighth, and American ranked seventy-seventh, according to the same Skytrax.<sup>250</sup> That is, the three major U.S. airlines lagged behind the most recognized carriers in terms of customer service, including legacy and low-cost carriers based mostly in Asia (e.g. Singapore Airlines (third), AirAsia (twenty-third)) and Europe (e.g. Lufthansa (tenth), Air France (fourteenth)). Per Canadian carriers, Air Canada ranked thirty-first, ahead of WestJet (fiftieth), Porter Airlines (forty-seventh), and Air Transat (eighty-eighth).<sup>251</sup>

Emirates has been successful in providing high quality service to its passengers flying either economy, business, or first class. According to *Fortune* magazine, the overall quality offered by Emirates outstrips that of its rivals in Europe

>at both the top and bottom ends of the market. Customers in Emirates’ economy class usually pay less compared with competing flights, while still receiving a superior level of service. Upper class customers, meanwhile, usually pay more, but receive greater exclusivity and comfort compared to upper class cabins on European airlines, especially in First Class . . . .<sup>252</sup>

Increasingly, many airlines have replaced first-class accommodations with business-class seats. Some planes are reconfigured to offer more capacity in competitive markets with potential existing and pent-up demand. However, for most airlines, the com-

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<sup>247</sup> *Id.* at 32.

<sup>248</sup> *Id.* at 32–33.

<sup>249</sup> *The World’s Top 100 Airlines in 2016*, *supra* note 147.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> Cyrus Sanati, *Get Ready for Middle-East Airline Domination*, *FORTUNE* (Nov. 22, 2013), <http://fortune.com/2013/11/22/get-ready-for-middle-east-airline-domination/> [<https://perma.cc/Q7RS-27BQ>].

fort differences between business class and first class are shrinking, whereas the huge difference in price has not changed accordingly.<sup>253</sup>

Emirates, the world's largest A380 and Boeing 777 operator, uses Dubai as both a hinterland hub for routes to other cities in the Middle East and an hourglass hub for long-haul traffic.<sup>254</sup> That is, they service global destinations by operating the sixth freedom while connecting Europe to Australia and the United States to Asia in addition to the fifth freedom route from New York City to Milan continuing on to Dubai.<sup>255</sup> According to de Wit, the long-haul hourglass model and fleet composition (new and fuel-efficient aircraft) allows Emirates to significantly lower its cost per available seat-kilometer (CASK) more than its competitors in Europe.<sup>256</sup> In addition to all of the foregoing, Emirates does not compete with the low-cost carriers, which operate rather in short and medium haul, hence its ability to generate high revenue per available seat-kilometer/mile (RASK/RASM).<sup>257</sup>

With the regard to market share, the Gulf trio achieved 11% of the international air market in 2012, as measured by available seat miles.<sup>258</sup> That is way beyond the 2% recorded in 2002. By contrast, the market share of the U.S. airlines has decreased from 14% to 11% during the same period.<sup>259</sup> This upward trend is expected to continue “growing by 12 to 15% annually this decade, according to IATA figures.”<sup>260</sup>

The advancement of Emirates Airlines, Etihad Airways, Qatar Airways, and Turkish Airlines—as “super-connectors” worldwide—has turned the evolution of the airline industry upside down. From 2003 to 2013, these airlines have achieved tremen-

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<sup>253</sup> Joan Voight, *Emirates is the World's Most Glamorous Airline*, ADWEEK (Oct. 12, 2014), <http://www.adweek.com/news/advertising-branding/emirates-worlds-most-glamorous-airline-160714> [<https://perma.cc/8XQH-H3YJ>].

<sup>254</sup> GUILLAUME BURGHOUWT, AIRLINE NETWORK DEVELOPMENT IN EUROPE AND ITS IMPLICATIONS FOR AIRPORT PLANNING 16 (2007).

<sup>255</sup> *Id.*

<sup>256</sup> de Wit, *supra* note 183, at 24–26.

<sup>257</sup> *Id.* at 24.

<sup>258</sup> Sanati, *supra* note 252.

<sup>259</sup> *Id.*

<sup>260</sup> Gwyn Topham, *Gulf Airlines' Success Prompts Hostility from US and European Carriers*, THE GUARDIAN (Apr. 20, 2015), <http://www.theguardian.com/business/2015/apr/20/gulf-airlines-emirates-etihad-qatar-success-hostility-us-european-carriers> [<https://perma.cc/4GRQ-TKGU>]; see also Dresner et al., *supra* note 136, at 2.

dous performance in terms of revenue passenger kilometer (RPK).<sup>261</sup> The Middle Eastern carriers are expanding their networks, taking advantage of their strategic location between Europe, Asia, Africa, and America.<sup>262</sup> This constitutes a highly competitive advantage that allows these carriers to operate the fifth and sixth freedoms using their state-of-the-art hubs. By doing so, it is not a surprise that fares seem to be low on some routes “because of the efficiency of their long-haul-to-long-haul model.”<sup>263</sup>

Overall, the three Middle Eastern carriers seem to achieve common objectives by enhancing the connectivity between the four corners of the world. They operate in different but complementary strategies to ensure the growth of their network: Open Skies for Emirates, equity minority interests for Etihad, and alliances for Qatar Airways.<sup>264</sup> As a result, this strategy is continuously challenging the other legacy carriers, which have traditionally operated direct routes between “strong local markets,” including the local market of the flag carriers.<sup>265</sup> Accordingly, the three Middle Eastern carriers have raised competition to a new level in the international air travel market.

To conclude, as long as the allegations against the major Middle Eastern carriers—Emirates Airlines, Etihad Airways and Qatar Airways—are not proven to distort the market, passengers are left with no choice but to admit that these carriers are disruptive innovators in the air travel industry.

## V. CONCLUSION

In their analysis of Gulf carrier competition with U.S. airlines, Dresner et al. said: “Claims that the Gulf carriers have an unfair competitive advantage and harm local markets and airlines have resulted in ‘a barrage of legal and political challenges to the Gulf carriers’ and calls to restrict further Gulf carrier access to markets in Europe and Canada, for example.”<sup>266</sup> “[T]he West’s legacy airlines have not lacked for state protection of their

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<sup>261</sup> *Super-Connecting the World*, THE ECONOMIST (Apr. 25, 2015), <http://www.economist.com/news/business/21649509-advance-emirates-etihad-and-qatar-latterly-joined-turkish-airlines-looks-set> [<https://perma.cc/QZ4M-HV24>].

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> See Flanagan, *supra* note 113; *International and Government Affairs: Connectivity, Competition and Consumer Choice*, *supra* note 99.

<sup>265</sup> SWELBAR, *supra* note 118, at 5–6.

<sup>266</sup> Dresner et al., *supra* note 136, at 3 (internal citations omitted).

own,”<sup>267</sup> yet it seems that the situation is changing when the Department of Justice has expressed concern over limiting Gulf carrier competition.<sup>268</sup> Perhaps policy makers are concerned about protecting the interests of other stakeholders, such as Boeing and big U.S. airports, which benefit from the tremendous growth of the Middle-Eastern carriers.

In June 2016, the State Department held separate meetings to hear the concerns of two main groups of aviation stakeholders with respect to the alleged subsidies. The first group included players who oppose the position of the three U.S. airlines, including FedEx, Alaska Air Group, JetBlue Airways, Hawaiian Holdings, and the U.S. Travel Association. The second group represented mainly the plaintiff (i.e. the three major U.S. airlines) and several airline labor unions.<sup>269</sup> Thereafter, in July 2016, the State Department held informal meetings with Qatar and UAE government officials.<sup>270</sup> While no official announcements have been made yet, some sources reported a victory for the Middle Eastern carriers and others reported that both sides claimed triumph following the informal meetings.<sup>271</sup> Besides, the State Department is expected not to request official consultations despite the intense lobbying from the three major U.S. airlines.<sup>272</sup> Another meeting is expected “in the coming months” according to UAE Economy Minister Sultan Saeed Al Mansouri.<sup>273</sup>

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<sup>267</sup> *Super-Connecting the World*, *supra* note 261.

<sup>268</sup> *The DOJ Doesn't Think Much of Lobbying Against Gulf Airlines*, FORTUNE (Oct. 13, 2015), <http://fortune.com/2015/10/13/airlines-justice-doj-gulf-trade-dispute/> [<https://perma.cc/L4ZW-U958>].

<sup>269</sup> Susan Carey, *U.S. to Hold Talks with U.A.E., Qatar in Airline Dispute; But the State Department is Unlikely to Take Steps Sought by U.S. Airlines*, WALL ST. J. (June 27, 2016), <http://www.wsj.com/articles/u-s-to-hold-talks-with-u-a-e-qatar-in-airline-dispute-1467062989> [<https://perma.cc/RFA6-YRHX>].

<sup>270</sup> *See id.*

<sup>271</sup> Anthony McAuley, *Victory For Gulf Airlines as US Government Ends Open Skies Row With No Further Action*, THE NATIONAL (July 26, 2016), <http://www.thenational.ae/business/aviation/victory-for-gulf-airlines-as-us-government-ends-open-skies-row-with-no-further-action> [<https://perma.cc/M2U8-N7QL>]; *see also* Brian Sumers, *U.S. Airlines Set to Lose Major Battle Against Gulf Carriers in Open Skies Debate*, SKIFT (June 28, 2016), <https://skift.com/2016/06/28/u-s-airlines-set-to-lose-major-battle-against-gulf-carriers-in-open-skies-debate/> [<https://perma.cc/7C4C-Z4UV>].

<sup>272</sup> Sumers, *supra* note 271.

<sup>273</sup> Fareed Rahman, *Al Mansouri Optimistic About US-Gulf Carriers Spat Outcome*, GULF NEWS (Aug. 31, 2016), <http://gulfnews.com/business/aviation/al-mansouri-optimistic-about-us-gulf-carriers-spat-outcome-1.1888751> [<https://perma.cc/U5GB-UANH>].



In the context of Canada, the current approach toward restrictive bilateral ASAs with countries like the UAE benefits its national carrier Air Canada, but not consumers.<sup>274</sup> Therefore, passengers [and tourists] are left with no choice but to pay high taxes and bear the cost of investments on airports.<sup>275</sup> This situation probably persists because the Canadian company Bombardier has not benefited from the expanding Middle Eastern carriers' large aircraft orders for long-haul flights, as U.S. companies Boeing and Airbus have.<sup>276</sup> Perhaps the new liberal Trudeau-led government may reconsider the merits of maintaining Canada's existing policy settings.

The aforesaid analysis of this article highlighted the conflict of interest with regard to subsidy allegations against the three major Middle Eastern carriers. This conflict might lead to political risks as a result of widely advertised allegations, which are fueled by accusations, counter-accusations, or rebuttals on the basis of analysis conducted separately by both sides. When such accusations persist with no way out, it is also because of a weak regulatory framework with respect to the procedure of settlement of disputes.

It must be noted that competition should not sound like a threat, but instead a driving force of an engine that requires checks on a regular basis. In other words, the process of air transport liberalization must be continuously assessed from both national and international perspectives. In fact, liberalization does not imply a shift toward less or weak regulation, but on the contrary, a milestone on the path towards a comprehensive approach for a strengthened and proactive regulation. That is, an approach by which competent bodies should put more emphasis on the continuous assessment of both effects and counter-effects of global regulatory measures. All of that requires growth-enhancing investments all along the process of liberalization.

The demand stimulation is of interest to global stakeholders, but at different levels; in fact, low fares as a result of the demand stimulation do not necessarily work in favor of airlines whose

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<sup>274</sup> See EMIRATES SUBMISSION TO THE CANADA TRANSPORTATION ACT REVIEW, *supra* note 162, at 3–4.

<sup>275</sup> See *id.* at 5.

<sup>276</sup> See Benjamin Zhang, *This Canadian Giant is Being Haunted by Its Decision to Challenge Airbus and Boeing*, BUS. INSIDER (Oct. 28, 2015), <http://www.businessinsider.com/bombardier-challenge-airbus-boeing-succeed-2015-10> [<https://perma.cc/XHH5-8B5T>].

profit margins are the worst in the air transport chain. Besides, the quality of service and passengers' rights are often compromised in the midst of growing demand. Hence the importance of a proactive and collaborative approach to achieve applicable regulations, to be elaborated and enhanced in concert with diverse stakeholders; the latter must include the passengers who are still very poorly represented in the global air transport system.

On the other hand, in a restricted market, regulations are generally rigid and contain clauses designed to protect the interests of (almost) one major player—the national carriers. Sometimes it is even difficult to tell who these clauses and regulatory texts benefit as a whole: the regulatory bodies or the flag carriers?

That being said, a comprehensive and proactive regulation has to take into consideration the disparate interests of the global community, where the end-users (passengers) are supposed to be the core of the air transport system as a whole (i.e. they are the *raison d'être* of the businesses and, most importantly, the regulators). Yet this is not the part that the main stakeholders would argue about when assessing a certain policy, but rather the weight attributed to different effects and counter-effects. Consequently, a balanced analysis is needed to assess existent and potential impacts of liberalization on each of the various stakeholders, many of which are emphasised in this article. In fact, it is clear that there is often a conflict of interest to be considered when political interests are on the table. In such a case, it would be a conflict in which one of the stakeholders might be considered a secondary player.

In that regard, a cost-benefit analysis should be considered for a balanced assessment of the current and potential impacts of a liberalization policy. The impacts on connectivity, tourism, employment, airlines, and other related industries (e.g. aircraft manufacturers in the United States and Europe) are among the areas that should be assessed in a cost-benefit analysis framework. On the basis of this, eventual corrective measures or regulatory texts, if any, could be recommended. Furthermore, as mentioned earlier, the assessment of air transport liberalization must be conducted on a regular basis. In that sense, the database and methodology of QUASAR is an important tool designed by the WTO to assess the degree of liberalization achieved by using a synthetic universal index, Air Liberalisation

Index (ALI).<sup>277</sup> QUASAR methodology is carried out using four steps. The first is assessing the degree of liberalization of an ASA (i.e. the level of openness of the main market access features of bilateral ASAs) to construct a synthetic universal index, the ALI.<sup>278</sup> For that purpose, the value of an ALI is determined by summing the attributed “points” to various features and their variant ASA provisions (e.g. capacity, withholding, tariffs, and designation).<sup>279</sup> “The value of [an] ALI varies between zero, for very restrictive ASAs, and fifty, for very liberal ones.”<sup>280</sup> The second step is categorizing ASAs by type; seven standard types of ASAs have been identified by combining the different clauses of an ASA relating to freedoms of air, capacity, withholding, tariffs, and designation.<sup>281</sup> The third step is combining the calculated ALIs with traffic data so as to obtain a Weighted ALI (WALI) by contracting state, region, pair of regions, type, level of traffic, etc.<sup>282</sup> For a given contracting State, the WALI provides an aggregate measure of the openness of its aviation policy.<sup>283</sup> The fourth step is comparing the ASA network with the commercial network, which corresponds to the services that are effectively operated by airlines.<sup>284</sup>

Throughout this process, WTO works in concert with other stakeholders such as ICAO and IATA depending upon the data required by this analysis.<sup>285</sup> ICAO has an important role to play in integrating this methodology in its TASA and facilitating its adoption by member States. But beforehand, ICAO should assist, in coordination with WTO, its member States in determining how to evaluate their air transport liberalization policy using QUASAR methodology.

Any concerns are to be resolved in a spirit of cooperation and in accordance with regulations in force, which should not be limited to the provisions of the bilateral ASAs when the subject matter of a mutual dispute is not covered by an existing ASA, as discussed earlier in this article (i.e. WTO and commercial dis-

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<sup>277</sup> WTO Secretariat, *Part A: Introduction to QUASAR*, WTO Doc. S/C/W/270, 12 (Nov. 30, 2006).

<sup>278</sup> *Id.* at 11.

<sup>279</sup> *Id.* at 12.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 16. Over 70% of QUASAR bilateral ASAs fall under one of these seven types. *Id.*

<sup>282</sup> *Id.* at 17.

<sup>283</sup> *See id.*

<sup>284</sup> *Id.* at 18.

<sup>285</sup> *See id.* at 10.

putes). Most importantly, any compromise must not ignore passenger rights. In fact, it is in nations' overall interest to serve the fundamental need of the people in terms of air transport connectivity. This will not be possible without a clear vision and concrete actions through a proactive approach. Clearly, "[v]ision without action is a daydream . . . [and a]ction without vision is a nightmare."<sup>286</sup>

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<sup>286</sup> Japanese Proverb, *Quotes*, QUOTES, <http://quotes.net/quote/8027> [<https://perma.cc/272B-MM8H>].