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*The Skies the Limit!**

Collaborating to Open the Skies with CHINA – *Challenges and Opportunities*

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Abstract

The research focuses on aviation collaboration from the perspective of two regional unities – the European Union (EU) and Association of Southeast Asian Nations (ASEAN). The aspirations of each regional entity are considered alongside the mechanism to facilitate talks and developments with respect to aviation and specifically opening up the skies, so as to create more liberalised air service agreements with China.

This paper explores the strategy and framework mechanism of both the EU and ASEAN and the research questions the effectiveness of both frameworks as well

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Also see: S. J. Fox and R. Ismail, 'The skies the limit! – Open Skies with limitations', *European Journal of Comparative Law and Governance* 4(4) (2017) 7-42.

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as the political motivations for opening air service markets with China.

The research findings identify and discuss the developments, challenges and successes within the global aviation sector in terms of partnerships and progression with China to open up the skies.

Keywords

policy & regulation – open skies – regionalism – aero-politics – liberalisation –
China-EU-ASEAN

Classification

Air Transport Policy & Regulation, Aviation and Economic Development, Market
Outlook & Future Development of Air Transport

1. Introduction

1.1. Overview of the Research

The focus of the overall research relates to the exploration of the liberalisation of air services, as viewed through open-skies agreements. This paper critically discusses both the European Union (EU) and Association of South-East Asian Nation's (ASEAN) initiatives to open the skies up further with China, whilst providing contextualisation and comment as to the relevance of the historical background and

the influence of adjacent policies and respective framework. Air travel ultimately extends beyond just a transport service.

The research is undertaken through the discipline of law – and soft-law (otherwise referred to as policy) and given the fact that the research relates to aviation transport policy development between nations, arguably politics and humanities for historical contextualisation. The method utilised is expository research combined with substantiated reasoning, opinions and discussions. This mixed method approach utilises deductive, inductive and analogical reasoning.

1.2. *Contextualisation – History and Politics!*

Liberalising air transport services is less about the physical journey and more about politics and historic legacies. It is also about nations' (governments') willingness to let go of control, of what was originally viewed as national airlines and a country's asset. The terms 'country' and 'nation' are words frequently used for what political scientists call a 'sovereign' State and thus defining a sovereign State in itself remains controversial.¹ The concept of sovereignty has its origins traceable back to an era of warfare and was a critical factor in achieving the Peace Treaty of Westphalia (1648),² which transpired after a 30-year period of war in Europe. The Treaty legitimised the rights of sovereigns to govern their people without external interference of foreign or international powers. There was therefore a presumption that independence and isolation of each State would prevent future wars.³ This concept was considered the

¹ J. Bartelson, 'The Concept of Law – Revisited', *European Journal of International Law* 17 (2) (2006) 463-474.

² Treaty of Westphalia 1648. Retrieved 30 January 2015
www.avalon.law.yale.edu/17th_century/westphal.asp.

³ E. Engle, 'The Transformation of the International Legal System: The Post-Westphalian Legal Order', *Queensland Law Reporter* 23 (2004).

traditional approach to sovereignty and is ‘the cornerstone of the modern system of international relations’⁴ whereby, the current system of States is established as the ‘dominant world order framework.’⁵

Fox⁶ describes a symbiosis relation between aviation and war due to this inextricable linkage to warfare, expressing the opinion that ‘[a]viation has always stood at a crossroads, where air transport has been used as a means to take life, save life, and balance sovereign demands for control with security and trade’, the latter extending into the realms of civil aviation.

The very nature of aviation is to cross boundaries and borders and to facilitate international transport, which ultimately shrinks the world. Inevitably, the world has evolved and is noticeably different to that of the 17th century. But achieving borderless skies and liberalising air services remains arguably problematic, mostly due to a legacy lacking trust which recognises, in part, the vulnerability from the skies. Whilst commercial air transport is little more than 100-years old, it continues to battle an inheritance stemming back centuries.⁷

That said, in an ever-increasing globalised world, nations need to be able to overlook past differences and to enter into dialogue with other perspective nations and regions – which thus will allow further opening up of the aviation market; and which, ultimately, has the objective of increasing the overall prosperity of the nations concerned.

Regional cooperation is seen as an important step and ‘key factor’ in

⁴ K. J. Holsti, *Peace and War – Armed Conflicts and International Order* (Cambridge: Cambridge University Press, 1991). See also the 350th anniversary of the Peace of Westphalia: K. Bussmann and H. Schilling (eds), *1648: War and Peace in Europe* (Vol. 1, München: Bruckmann 1998).

⁵ R. A. Falk, *Law in an Emerging Global Village: A Post-Westphalian Perspective* (New York: Transnational Publishers, 1998).

⁶ S. J. Fox, ‘The evolution of aviation in times of war and peace: blood, tears, and salvation’, *International Journal of World Peace* 31(4) (2014) 49-79.

⁷ *ibid.*

achieving the goal of a world without borders, where human mobilisation is significant in realising global economic prosperity and where nations co-exist in peace and tolerance.

The EU and ASEAN have adopted very different approaches to the formulation of regional groups yet both have the objective of undertaking continuing dialogue with the People's Republic of China (hereafter, China) in order to develop more open skies through the liberalisation of air services. However, whilst aviation scholars and legal practitioners may well be accustomed to the terminology 'open skies', there is no one accepted definition as to the meaning of this phrase.⁸ The rationale is, however, 'to democratise aviation', but interpretation and practice translate through into variances and divisions as to just how liberal nations are willing to be in granting freedom of the air above their country's airspace. The principle nevertheless remains less disputed, namely, to translate market opportunities, where possible and acceptable, through multilateral exchanges, and whilst this may have inconsistently been achieved, there have however been some noticeable successes in terms of more liberalised regional and sub-regional agreements. The EU, for example, clearly showing that as well as creating an open internal market, the united union of Member States is willing to geographically extend this development with external partners to the extent of opening up skies and creating open aviation areas in many instances.

2. Collaboration: with China

⁸ S. J. Fox and R. Ismail, 'The skies the limit! – Open Skies with limitations', *European Journal of Comparative Law and Governance* 4 (2017) 7-42.

The research scope and design of this research relates to the investigation of the strategy and framework mechanism of both the EU and ASEAN in terms of their respective policies to work internationally with collaborative partners in achieving regional agreements in aviation. The primary focus is accorded, in this instance, to both regions' development talks with China and, specifically, the ongoing dialogue, which aims to see the negotiation of comprehensive aviation agreements with China being concluded and/or developed. The aim of the talks is to further liberalise air services between the EU-China and ASEAN-China.

The research discusses the potential of the Chinese aviation market, which in comparison with the EU is currently a fledgling industry, but where, along with Asia, enormous growth is predicted by 2020. The research discusses the challenges and difficulties in translating the concept of open skies into a reality.

2.1. *Globalising dialogue*

Invariably international relationships remain problematic – historically many nations have pitted their forces against each other, and whilst peace may largely be said to exist today (save a few areas) disagreement may manifest itself in other ways – such as through trade wars, embargoes, restrictions etc.⁹ Competition is both a curse and a blessing, stimulating growth in countries and regions whilst also leading to protective mechanisms designed to maintain sovereign control and dominance. However, globally it is recognised that strong partnerships make economic sense and when successful, create stability and unity.

⁹ Fox, 'The evolution of aviation in times of war and peace' (n 6).

A globalised world necessitates the interaction of nations through effective communications and hence requires diplomacy as an integral part of building firm foundations and establishing workable relations. As Mansbach and Rafferty¹⁰ remarked, globalisation has linked the fates of people around the world as never before. Hence, global politics is about ‘change and continuity’.¹¹ However, it is heavily influenced by the past events of nations, which inevitably stand to impact upon future developments.

China in particular should be viewed as a nation that is continually changing and evolving. International politics and international relations have predominately been ‘State-centric’ – wherein national governments have made authoritative decisions, but within the last 70 years there has been the constant emergence of regional and international organisations and supranational bodies. Whilst China represents a commonly held view of now being a State-centric nation,¹² the EU is viewed as a supranational entity. The materialisation of supranational bodies inevitably aids the advancement of the concept of multilateralism, which is based upon the premise of consultation and coordination with partners and allies, but in this case from a regional united perspective. ASEAN, on the other hand, may be viewed as taking somewhat of a middle stance in respect of its formulation as a regional entity.

3. China

¹⁰ R. W. Mansbach and K. L. Refferty, *Introduction to Global Politics* (Abingdon: Routledge, 2008).

¹¹ *ibid.*

¹² A view also shared by V. H. Ho, ‘Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China’ *Vanderbilt Journal of Transnational Law* 46 (2013) 395.

China is, by population, the largest country in the world. With a population of 1.392,080 (billion)¹³ a GDP of USD10.35 trillion and a GDP growth of 7.3 percent – China represents an ideal trading partner (based on 2014 data).¹⁴ China is now said to be the second largest economy¹⁵ and is increasingly playing an important and influential role in global economics. It is the biggest exporter in the global economy. However, reports in 2015-2016¹⁶ indicated that the growth was slowing from an average annual rate of about 10 percent in the 2000's to an estimated 6.9 percent in 2015.¹⁷ In the fourth quarter of 2016 China's economy expanded 6.8 percent, which, for the full year, translates to a GDP growth of 6.7 percent, the slowest in 26 years, however, still remaining within the government's target range of 6.5 percent to 7 percent.¹⁸

Since market reforms initiated in 1978, China has shifted from a centrally planned to a market-based economy which has resulted in the rapid economic and social development. That said, despite this advancement and change of tact, China is still regarded as a developing country. It is estimated that 98.99 million people still live below the national poverty line and the per capita income still represents a fraction of that in advanced countries.¹⁹ China has the second largest number of poor

¹³ See Table 1.

¹⁴ The World Bank. Retrieved 11 February 2016 www.worldbank.org/en/country/china.

¹⁵ With first the US and now the EU recognised as being behind China – according to data from the World Bank (*ibid*). That said, EU data states that it retains this position above China.

¹⁶ In mid-2015 the Chinese markets suffered a major crash with the Shanghai and Shenzhen stock exchanges losing as much as 40 percent of their value. Business and Finance, 2016. 'China's stockmarket crashes – again'. The Economist, January 4. Retrieved 2 September 2017 www.economist.com/news/business-and-finance/21685146-chinas-stocks-and-currency-start-2016-big-tumbles-chinas-stockmarket.

¹⁷ Council on Foreign Affairs. Retrieved 18 February 2016 www.theatlantic.com/magazine/archive/2016/03/what-china-could-learn-from-richard-nixon/426864/.

¹⁸ See National Bureau of Statistics from the People's Republic of China. Retrieved 14 February 2017 www.stats.gov.cn/tjsj/zxfb/201701/t20170120_1455942.html, translated data from: www.qz.com/890084/chinas-official-2016-gdp-growth-was-6-7-and-the-government-promises-its-authentic/.

¹⁹ Council on Foreign Affairs. Retrieved 18 February 2016 www.theatlantic.com/magazine/archive/2016/03/what-china-could-learn-from-richard-nixon/426864/. Data based on the national poverty line of RMB 2,300 per year – the end of 2012.

in the world after India and this rapid growth has only exacerbated the divide between the wealthy and the poor.²⁰

China is increasingly taking a key role in global governance and has become an ever-increasingly important political power, asserting a presence in Asia, whilst continuing development talks with ASEAN collectively, and the European Union (EU). It is also engaging with the EU's Eastern neighbours. China has shown its rate of development, as demonstrated through the advancement of Shanghai, a world city for the 'urbanised economic elite'.²¹ China should be viewed as an ever-developing free-market capitalist State with the rapid movement of investment which has included EU Member States, identifying particularly the eastern fringes such as Poland, Hungary and Bulgaria, and countries that adjoin the EU's borders such as Serbia.

Globally, China is increasingly viewed as an important strategic partner and, whilst China views the US and Japan as the key sources of Foreign Direct Investment (FDI), it nevertheless pursues talks aimed at regional stability through the further establishment of relations with Southeast Asian countries. China has shown support for the integration process within ASEAN. The ASEAN-China Free Trade Area (ACFTA) acts as a major driver for bilateral trade and interdependence between China and ASEAN.

3.1. *China: aviation overview*

Like all nations, aviation is an important asset to China and of key importance in world trade, including tourism. In line with other developments, China's air

²⁰ *ibid.*

²¹ Mansbach and Refferty, *Introduction to Global Politics* (n 10).

transportation has experienced rapid growth.²² Early financial reports in January 2016 referred to a net profit of CNY1.5 billion (USD230 million) for the month, which showed more than a tripled increase compared with the net income of the previous year (CNY485 million), with operating revenue also climbing 18 percent to CNY36.4 billion.²³ By the end of 2016, China's civil aviation industry reported achieving a year-on-year growth of 15.1 percent, with passenger numbers increasing on both domestic and international flights, 14.4 percent and 15.8 percent respectively to 36.11 million and 4.3 million.²⁴

China has the second largest domestic civil aviation market in the world (after the US) and it is anticipated that more than 50 new airports will be built in the next 10 years as air traffic is expected to increase. By 2024, China is predicted to displace the US as the world's largest aviation market (defined by traffic to, from and within the country).²⁵

Alongside this physical growth there have been a series of major reforms spanning the past three decades. Wang, Bonilla and Bannister²⁶ refer to the development within the air deregulation process as divided into four stages:

1. Pre-reform tight regulation (before 1978)

²² J. Shi and W. Han, 'A Study on the Reform of China's General Aviation', *Journal of Transportation Technologies* 2(2) (2012) 189-192; T. H. Zheng, '2008 Report of General Aviation', *Civil Aviation of China* 7 (2008) 39-43.

²³ Katie Cantle, 2016. 'Chinese carriers triple net profits in January'. Air Transport World, February 24. Retrieved 24 February 2016 www.atwonline.com/finance-data/chinese-carriers-triple-net-profits-january. Also see: European Union Chamber of Commerce in China. 2013. 'EU-China Civil Aviation Project'. Journal of the European Union Chamber of Commerce in China. 20 July. Retrieved 3 February 2016 www.eurobiz.com.cn/eu-china-civil-aviation-project/.

²⁴ Civil Aviation Administration of China (CAAC) data. Retrieved 14 February 2017 www.caac.gov.cn/XXGK/XXGK/TJSJ/201702/P020170220499600910678.pdf. See also: Lena Ge, 2017. 'CAAC Reports 15% Passenger Growth in December 2016'. China Aviation Daily, February 20. Retrieved 3 September 2017 www.chinaaviationdaily.com/news/60/60853.html.

²⁵ Press Release No. 59, 2016. 'IATA Forecasts Passenger Demand to Double Over 20 Years'. IATA, October 18. Retrieved 31 December 2016 www.iata.org/pressroom/pr/Pages/2016-10-18-02.aspx.

²⁶ J. Wang, D. Bonilla and D. Banister, 'Air deregulation in China and its impact on airline competition 1994-2012', *Journal of Transport Geography* 50 (2016) 12-23.

2. Transitional stage (1979–1987)
3. State-led consolidation and privatisation (1988–2004)
4. New entrants, market-driven consolidation and deregulated competition (2005–2012)

Founded in the early 1950s, China's airline industry was controlled by the military through the Civil Aviation Administration of China (CAAC), which is a division of the Air Force. In 1980 the CAAC came under the State Council of China, which saw the creation of six regional bureaus. As explained, between '1980 and 1986, the CAAC acted not only as an industry regulator, but also as the owner of the country's sole airline (CAAC) engaged in its day-to-day operations.' As such, the industry was heavily controlled by this agency, which covered aspects such as market entry, route authority, frequencies, fare, aircraft purchasing, funding and even passenger eligibility for taking flights.²⁷ In the period of the mid-1980s, which coincided with the rapid growth of traffic, the industry was decentralised and a number of new airlines were created. In 2002 a consolidation reform led to the nine CAAC-controlled airlines forming three airline groups, namely, Air China, China Eastern and China Southern airlines. After this, the Chinese government gradually deregulated the domestic market.²⁸

As Lei *et al.* state, the entry of the new carriers, particularly low-cost carriers (LCC's), led to increased competition within the domestic market, with airlines domestically appreciating a higher degree of freedom this included in relation to

²⁷ A. Zhang, H. Chen, 'Evolution of China's air transport development and policy towards international liberalisation', *Transportation Journal* 42(3) (2003) 31–49.

²⁸ Z. Lei and J. F. O'Connell, 'The evolving landscape of Chinese aviation policies and impact of a deregulating environment on Chinese carriers', *Journal of Transport Geography* 19(4) (2011) 829–839.

setting fares. And whilst premium fares in China were completely deregulated in 2012, a cap on economy class fares in the domestic market was still in place in 2015. The basis of this restriction was arguably the protection of customers.²⁹

Internationally, China was much more guarded, with the policy aim being more conservation with the intention aimed at protecting its own market and carriers. Lei *et al.* provide the reasoning that this is in part due to the fact that air transport was considered as a political instrument to serve China's diplomatic needs, rather than a strategic sector to support the country's economic development.³⁰

However, in line with the country's economic growth and development this has slowly changed as China has become more involved with external influences and development. The CAAC declared, in 2003, that China now had the objective to liberalise its air transport market in a 'proactive, progressive, orderly and safeguarded' manner, which included a proactive attitude to embracing the trend of international liberalisation.³¹

As Lei *et al.* and Han³² detail, since this 2003 declaration the key focus of the CAAC when negotiating international air transport policy was based upon the principles of:

- Proactively embracing liberalisation;
- Supporting China's overall diplomatic policies;
- Supporting the national Opening-up Strategy and the objectives of social and

²⁹ Z. Lei, M. Yu, R. Chen and J. F. O'Connell, 'Liberalisation of China-US air transport market: Assessing the impacts of the 2004 and 2007 protocols', *Journal of Transport Geography* 50 (2016) 24-32.

³⁰ *ibid.*

³¹ *ibid.*

³² Lei, Yu, Chen and O'Connell, 'Liberalisation of China-US air transport market' (n 29); J. Han, 2014. 'China's approach for its international air cargo transport liberalisation'. ICAO Air Cargo Development Forum, 2-5 September. Retrieved 15 February 2016 www.icao.int/Meetings/AirCargoDevelopmentForum-2014/Documents/Session-2_HanJun.pdf.

economic development;

- Allowing special regard to meet the demand for international air transport required as part of China's foreign trade and tourism;
- Giving special support to the western, northeast and central regions to establish and improve their international air links;
- Striking a balance among national interests, public interests and industry needs;
- Promoting airport hub development within China; and
- Enhancing the overall competitiveness of the whole industry

China's international policy has been adjusted and re-adjusted as part of its ongoing liberalisation process, with one noticeable primary change being the new advanced focus when negotiating Air Service Agreements (ASA's) – which now sees less outward leaning of internal protectionism, with the government's focus being less on protecting its own airlines when discussing and entering into agreements.

In a period of less than 15 years China has rapidly developed more liberalised agreements which cover multiple designations, and include unlimited capacity entitlements for 3rd and 4th freedom traffic rights for air cargo services, whilst several agreements also have unlimited capacity allowances.³³

The Chinese air traffic market remains one of the fastest growing in the world with an average growth rate of around 10 percent. The developing economy has

³³ Han states, as within Lei *et al.* (n 15), that as of 2012 this was as follows: Han, 'China's approach for its international air cargo transport liberalisation' (n 32).
For an explanation of the freedoms of the air – see Manual on the Regulation of International Air Transport. ICAO Doc. 9626, at 4.1-10. Retrieved 2 September 2017
www.icao.int/Pages/freedomsAir.aspx

shown the propensity for residents to travel. In the period 2015-2034, the Chinese domestic market is expected to grow by 7 percent annually and the international one by 8 percent.³⁴

China has continued to show its willingness to enter into further dialogue with new partners whilst revisiting earlier agreements: including, amongst these partners, the EU and ASEAN.

4. The EU

The EU covers over 4 million km² and has 503 million inhabitants.³⁵ Collectively the EU houses the world's third largest population after China and India. It is one of the most successful examples of regional cooperation, regarded in most instances as a positive and effective supranational entity, which is now also engaged in negotiations within the international stage under a newly recognised legal basis.

4.1. How it works – key players and roles

The EU is a multinational political and economic union, based on an advanced democratic system. The very creation and existence of the EU bears testimony to the ability to achieve dialogue among nations. Now consisting of 28 nations of diverse background, the Union has a commitment to ensuring peace, democracy and a respect for human rights whilst abiding by the rule of law. In the formulation of the EU and

³⁴ DG Move data. Retrieved 18 February 2016

[https://ec.europa.eu/transport/sites/transport/files/2016_eu_air_transport_industry_analyses_report.pdf].

³⁵ European Union, 'Living in the EU'. Retrieved 3 February 2016 www.europa.eu/about-eu/facts-figures/living/index_en.htm#goto_2.

as Members to the united course of peace and regional unity, the Member States have made a momentous decision to transfer part of their individual national sovereignty to EU institutions. This consequently translates to many decisions being made at an EU level where there is competency to undertake this.³⁶ This is exercised according to the principle of proportionality and subsidiarity.³⁷ Whilst transport is a shared competence (Article 4 TFEU),³⁸ the EU has exclusive competence to make an international agreement³⁹ provided that certain conditions are met:

- (i) when its conclusion is provided for in a legislative act of the Union;
- (ii) or, is necessary to enable the union to exercise its internal competence,
- (iii) or, insofar as its conclusion may affect common rules or alter their scope.⁴⁰

The EU has legal personality as stipulated within the Lisbon Treaty.⁴¹ This provides formal standing for the EU to enter into international agreements.

The EU has three main institutions that are involved in the law-making process:

- (i) The EU Commission: This is the executive branch proposing legislation, managing the Union's day-to-day business and budget, enforcing the rules,

³⁶ Article 1 of the Treaty on the European Union (TEU) states that in order to 'establish among themselves a EUROPEAN UNION, hereinafter called "the Union," on which the Member States confer competences to attain objectives they have in common.'

³⁷ Protocol (No. 2) on the application of the principles of subsidiarity and proportionality [2008] OJ C 115/206.

³⁸ Treaty for the Functioning of the European Union. Treaty on the Functioning of the European Union (Consolidated version 2012) [2012] OJ C 326.

³⁹ *ibid*, Article 3(2).

⁴⁰ This should be read in conjunction with Article 216 TFEU.

⁴¹ Article 47 TEU.

and negotiating international trade agreements on behalf of the EU;

- (ii) The Council of the European Union: This is comprised of ministers from the (current) 28 Member State governments. The Council adopts laws in conjunction with the European Parliament, coordinates the Member States' broad economic policies, concludes international agreements between the EU and other countries or international organisations, whilst also approving the EU budget;⁴² and
- (iii) The European Parliament: This is described as the voice of European citizens with Members of the European Parliament being elected for five-year terms. The Parliament also approves the membership of the European Commission and its leadership. The Parliament, jointly with the Council of the EU, passes laws and adopts the EU's annual budget.

Another major EU player in international relations has been the Court of Justice of the European Union (CJEU) which has played an instrumental and active role in determining the scope of the EU's competence to act.

In terms of aviation-specific rulings, it should be noted that the CJEU *Open Skies*⁴³ case, 15 years ago, marked the start of the development of the EU's external aviation policy. The ruling in essence provided clarity in respect of the distribution of powers between the EU and its Member States (MS) within the field of the regulation of international air services. Up until this point bilateral agreements between States had been concluded on an individual (MS) basis. The significance of this judgment

⁴² This is a joint role undertaken with the European Parliament.

⁴³ Case C-466/98 *Commission v. United Kingdom* [2002] ECR I-9427; Case C-467/98 *Commission v. Denmark* [2002] ECR I-9519; Case C-468/98 *Commission v. Sweden* [2002] ECR I-9575; Case C-469/98 *Commission v. Finland* [2002] ECR I-9627; Case-471/98 *Commission v. Belgium* [2002] ECR I-9681; Case C-472/98 *Commission v. Luxembourg* [2002] ECR I-9741; Case C-475/98 *Commission v. Austria* [2002] ECR I-9797. Case C-476/98 *Commission v Germany* [2002] ECR -9855.

was to emphasise to the world the EU's advancement within the arena of international aviation and specifically in the field of liberalised air services, including in particular from an internal market perspective.⁴⁴ This also paved the way for the designation clause, which recognises the concept of an EU carrier as opposed to carriers from each country when negotiating EU Air Services Agreements (ASA's). This is highly significant in terms of the EU's current direction for increasing dialogue and establishing relations with other potential partners. The ruling also brought the area of aviation more within the political arena for the EU (from a joint European perspective) – not that air services could really ever be viewed to be outside of politics. Aviation has been both a tool in political negotiations and a primary protagonist of negotiations which has led to the phrase 'aeropolitics'⁴⁵ aptly being coined, not just in the EU but worldwide. There can be little doubt that air services is a very political area, which adjoins to other relevant discussions on trade and commerce.

4.2. EU External aviation policy

Following the CJEU ruling and since 2005, the EU has applied a three-pillar approach to its external aviation policy 2005.⁴⁶

The three main thrusts remain:

⁴⁴ *ibid.*

⁴⁵ The term being referred to by Patrick V. Murphy, DOT Acting Assistant Secretary for Policy and International Affairs, in his testimony to the Airline Commission, Airline Commission Proceedings (24 May 1993), at 168.

⁴⁶ As defined in 2005 in a Road Map developed by the Council and the European Commission.

- 1) Bringing existing bilateral air services agreements between EU Member States and third countries in line with EU law by developing Horizontal agreements (as per the EU Open Skies court case);⁴⁷
- 2) The creation of a true Common Aviation Area with the neighbouring countries; and
- 3) The conclusion of aviation agreements with key strategic partners.

In the 10-year period there have been developments in all of these areas. And, whilst the EU has sought to strengthen its position internationally, prior to the Lisbon Treaty there was a fragmented structure, which resulted in a complex system when working to develop international relations and achieve agreements. However, the Lisbon Treaty provides further revisions designed to accentuate the EU as a global actor when negotiating agreements in an international setting. The 2015 Aviation Strategy⁴⁸ further reinforces that there remains a need to negotiate EU-level comprehensive aviation agreements with key partner countries, identifying that International Aviation is an opportunity for growth and jobs in the EU aviation sector. The Strategy talks of an ambitious package of proposals which aims to negotiate EU-level comprehensive aviation agreements with the ASEAN States, the Gulf Cooperation Council (GCC) States and the individual countries of Turkey, Mexico, Armenia and China. At the same time, the Strategy further emphasises, in parallel, the intention to negotiate dedicated aviation safety agreements also with China and Japan. Additionally, specific security developments are also identified as a part of this proposal – namely with Canada and Montenegro.

⁴⁷ Patrick V. Murphy's testimony to the Airline Commission (n 45).

⁴⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. An Aviation Strategy for Europe COM(2015) 598 Final (December 2015).

4.3. *The EU and China*

EU diplomatic relations with China were established in 1975 leading to the EU-China Strategic Partnership, which was developed on the basis of the 1985 EU-China trade and cooperation agreement. This has grown to encompass foreign affairs, security matters and other international challenges, such as climate change, security and defence, cyber, high tech, innovation, migration and mobility, tourism, energy, environment, development, disaster risk management, people-to-people exchanges and global economy governance.⁴⁹

The EU-China Comprehensive Partnership was launched in 2001 and in 2003 the EU-China Comprehensive Strategic Partnership was re-launched. This was followed in October 2006 by a communication entitled 'EU-China: closer partners, growing responsibilities'. The policy aim on trade, was to establish a closer and more comprehensive partnership with China, bilaterally and in the multilateral context.

China also released a white paper on relations with the EU in 2003, noticeably its first ever white paper on relations with a foreign partner.⁵⁰

Negotiations in 2007 led to the launch of a new EU-China partnership and cooperation agreement, intended to show the increasing development of the EU-China comprehensive strategic partnership.⁵¹

⁴⁹ The 40-year-old relationship initially developed in the framework of economic cooperation, with the EC-China agreement on trade and economic cooperation adopted in 1985. 'Cooperation in this area was consolidated by the High Level Economic and Trade Dialogue in 2009. This first pillar of the relationship was complemented in 2010 by an enhanced political dialogue on both bilateral and global issues - the High Level Strategic Dialogue. These two pillars of the EU-China relationship were completed by a third one in 2012, with the establishment of the EU-China High Level People-to-people Dialogue.' Delegation of the European Union to China, 'EU-China relations (03/02/2015)'. Retrieved 3 September 2017

www.eeas.europa.eu/delegations/china/press_corner/all_news/news/2015/political_relations_en.htm.

⁵⁰ See the EU-China chronology document. Retrieved 18 February 2016

www.eeas.europa.eu/china/docs/chronology_2014_en.pdf; EU briefing paper: EU-China Summit Background Information. Retrieved 18 February 2016 www.eeas.europa.eu/china/docs.

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In 2013, three new EU-China dialogues were launched on: (i) innovation; (ii) international development; and (iii) sustainable tourism.

The EU-China 2020 Agenda for Cooperation⁵² was adopted at the 16th EU-China Summit in November 2013.⁵³ This is the framework for EU-China relations until 2020. The identified areas of engagement relate to: (i) peace; (ii) prosperity; (iii) sustainable development; and (iv) people-to-people exchanges.

The EU-China 2020 Agenda for Cooperation is based upon documents each nation put forward;

- China's two centenary goals and the 12th Five Year Plan; and,
- The EU 2020 Strategy

The agreed Strategy of cooperation is based upon the synergy of each side's goals and promotes the commitment of the EU and China to achieve a Comprehensive Strategic Partnership in the next decade.

June 2015 marked the 17th EU-China, summit which reinforced the commitment to forge ever increasing links for the prosperity of the two.⁵⁴

Since the development of China EU relations, trade between the two has dramatically increased, particularly within the last few decades. Since bilateral ties between the EU and China were established approximately forty years ago, trade

⁵¹ *ibid.*

⁵² European External Action Service, 2013. 'EU-China 2020 Strategies Agenda for Cooperation'. Retrieved 12 February 2016 www.eeas.europa.eu/china/docs/20131123_agenda_2020-en.pdf.

⁵³ Delegation of the European Union to China, 'EU-China relations (03/02/2015)' (n 49).

⁵⁴ 'EU-China Summit joint statement: The way forward after forty years of EU-China cooperation' 29 June 2015.

relations have expanded from EUR4 billion in 1978, to trade in goods for 2014 having a worth of EUR467 billion, whilst trade in services reached EUR54 billion.⁵⁵

The EU is now China's biggest trading partner, while China is now close to becoming the EU's largest trading partner as well.⁵⁶ The EU-China 2020 Agenda reinforces that both are determined to enhance further trade and investment relationship and opportunities towards 2020 'in a spirit of mutual benefit, by promoting open, transparent markets and a level-playing field'.⁵⁷

The EU and China recognise the need to further develop exchanges on legal affairs and connectivity, which could lead to the establishment of new dialogue mechanisms. And aviation is a key factor in this development, facilitating physical connectivity and exchange.

4.3.1. *EU-China Aviation*

Tourism is important to a country and region's GDP, contributing to the overall economic growth whilst also being a good way of promoting cultural understanding between nations through dialogue not only at a governmental level but also between its citizens.

Tourism between the EU and China is increasing. In 2013 approximately 2 million Chinese travelled to Europe.⁵⁸ And in 2014, China reported that the number of travellers to Europe rose to 4.3 million.⁵⁹ The EU predication is that by 2020, 100

⁵⁵ **EU-China chronology document** and **EU briefing paper** (n 50). Also see: Mission of China to the EU, 2015. 'Securing a bright trading future'. Politico, February 2. Retrieved 18 February 2016 www.politico.eu/sponsored-content/securing-a-bright-trading-future/.

⁵⁶ Delegation of the European Union to China, 'EU-China relations (03/02/2015)' (n 49).

⁵⁷ European External Action Service, 'EU-China 2020 Strategies Agenda for Cooperation' (n 52).

⁵⁸ Eurostat: http://ec.europa.eu/eurostat/statistics-explained/index.php/Main_Page. Retrieved 1 February, 2016 (http://ec.europa.eu/eurostat/statistics-explained/index.php/Tourism_statistics_at_regional_level). Retrieved 8 Sept. 2017

⁵⁹ Travel China Guide, 'China Outbound Tourism in 2014'. Retrieved 2 February 2016 www.travelchinaguide.com/tourism/2014statistics/outbound.htm.

million Chinese tourists could be travelling every year, many of whom are anticipated to visit Europe. That said, China states that the number of outbound Chinese tourists have already reached 117 million, with Europe seen increasingly as a destination for the discerning globe-trotting Chinese.⁶⁰ In line with this, there has been a constant growth of air services with over 70 direct flights daily between European and Chinese cities. Hence, the EU recognises that there is much to be gained from building on the existing commercial ties in both aviation and aerospace, which will also lead to safety, security and cost-efficiency savings and improvements for citizens. The EU-China Civil Aviation Partnership Project (APP) is seen as an important tool in facilitating cooperation in these more technical areas. The basis of the Project is that the EU, as a Partner, provides institutional and regulatory support, together with training in airworthiness, aircraft maintenance, air traffic control and airport management, enabling the CAAC to develop a reliable, structured domestic aviation infrastructure.⁶¹ This will inevitably assist with the predicted growth over the next 10 years.

The development of the Chinese economy and the liberalisation of aviation offers an increased potential for European growth for EU airlines, aircraft manufacturers and other service providers.

The EU-China 2020 Agenda for Cooperation is specific in stating that a key priority is to '[i]mplement, as early as possible, the Letter of Intent on cooperation in the field of civil aviation between CAAC and DG MOVE,⁶² signed on 23 August

⁶⁰ *ibid.*

⁶¹ See European Union Chamber of Commerce in China, 'EU-China Civil Aviation Project' (n 23).

⁶² DG Move is the EU Commission Directorate General responsible for transport.

2013'.⁶³ Additionally, another factor particularly highlighted in the Agenda relates to connectivity in terms of general transport and the need to

strengthen cooperation in developing smart, upgraded and fully interconnected infrastructure systems. Expand cooperation in interoperability of seamless supply chain logistics networks between Asia and Europe, maritime markets and routes, rail services, logistics, safety, and energy efficiency.⁶⁴

Under the section on technology and innovation emphasis is also accorded to the need

to under take joint research and innovation initiatives in particular in the areas.... aviation... by developing joint funding programmes and promoting enhanced mutual participation of Chinese and EU researchers and innovators into respective programmes.⁶⁵

The Letter of Intent is viewed as providing a strong foundation for cooperation in the field of civil aviation in the future. In February 2016, there was clear indication of the intent to progress this further when it was announced that another advanced cooperation initiative between China and the EU had been launched, in the form of a EUR10 million (USD11 million) aviation project. This builds upon the previous cooperation initiatives between the EU and China that initially began in 1999 and is a new five-year EU-China APP. This project is jointly being implemented by the

⁶³ Under the Prosperity chapter (Chapter II) section (IV) Transport and Infrastructure, at para. 1.

⁶⁴ *ibid*, para. 2

⁶⁵ Chapter III Sustainable Development, (I) Science, Technology and Innovation, at para. 3.

European Aviation Safety Agency (EASA) and the CAAC, with the funding being provided by the Partnership Instrument of the European Union (also supported by the CAAC). The initiative, to be managed by the European Aviation Safety Agency (EASA) and other partners, is linked specifically, however, to the aspect of technical cooperation. The focus again builds upon a number of areas of mutual interest, such as aviation safety and security; general aviation; air traffic management/air navigation services; airports; airworthiness; environmental protection; economic policy and regulation; and legislation and law enforcement.⁶⁶ This will also include regulatory cooperation, through safety promotion exercises, workshops, training and technical exchanges. The proposed work plan will be systematically revisited and reviewed with the intention to update and revise, including by way of adding new activities. However, this will only be related to the technical aspect which both bodies (China and the EU) seem happy to progress.

At the launch ceremony in Beijing, the CAAC administrator Feng Zhenglin said the project marked the start of ‘a new era of broader and deeper cooperation in civil aviation’ which would ‘promote the development of *all aspects* of the EU-China civil aviation relationship on the basis of mutual benefit’.⁶⁷

The ‘*all aspects*’ is questionable, however, for whilst noticeable advancement is occurring in the technical areas this pace has not been so reflected in terms of the more contentious area of opening up the skies in a more liberalised manner.

For converse to the above developments, one key aim remaining noticeably outstanding is the finalisation of consultations on a EU-China ‘horizontal agreement’. This will ultimately restore legal certainty to all bilateral air services agreements that

⁶⁶ Katie Cantle, ‘Chinese carriers triple net profits in January’ (n 23).

⁶⁷ EEAS website. Retrieved 28 February 2016

www.eeas.europa.eu/archives/delegations/china/press_corner/all_news/news/2016/2016022402_en.htm.

are ongoing and arguably would be of mutual benefit to the EU and China, particularly to the end user. Currently there remain individual bilateral ASA's between Member States and China. This revision would apply the concept under one agreement in relation to all EU States by recognising the notion of an EU carrier, as within the designation clause, albeit that the current intention of the UK to exit the EU, following the referendum vote in June 2016, will undoubtedly result in the UK retaining its own standalone agreements with China. Importantly, China remains the UK's second largest partner outside of the EU; and, in October 2016 there was in fact an increased impetus from the UK to 'get in quick' and to secure more flights between the two nations, whereby a new deal was secured for passenger flights – which resulted in an increase of numbers, from the current maximum of 40 per week for each nation to up to 100. Whereas, from a cargo perspective, there was no such limitation imposed, clearly opening up opportunities for UK trade and business development – post Brexit.⁶⁸

Another important part of the newly-revised ASA between China and the UK is the removal of the restriction on the number of destinations that airlines are able to serve, meaning that services can now be operated between any point in the UK and any point in China. Up until this revision, airlines could only serve six destinations in each country. Only time will inevitably show the full impact of these revisions but at a stage when Britain remains on the cusp of separating its partnership with the EU this must be viewed as an essential leap to prospering from a Chinese-UK union, albeit not to the level previously shared with the other 27 Members States of the EU. On the signing of the revised ASA, Chris Graylings (the Transport Secretary) clearly stated the importance of such, saying,

⁶⁸ For further discussions on the effect of Brexit see S. J. Fox, 'BREXIT: A bolt from the blue! – Red sky in the morning?', *Issues in Aviation Law and Policy* 16(1) (2016) 83-119.

This deal is a big moment for the UK. Strong connections with emerging markets like China are vital for us if we are to continue competing on the global economic stage. Hundreds of thousands of Chinese people visit the UK every year, spending hundreds of millions of pounds. Raising the number of permitted flights between the 2 countries will provide massive opportunities for our businesses, helping increase trade, create jobs and boost our economy up and down the country.⁶⁹

The UK has openly acknowledged the full potential to be gained from a more open ASA recognising that visits from the Chinese population are on the increase, with visits recorded in 2015 up by 46 percent compared with those in 2014 to almost 270,000. This transpired to an increase spend by 18 percent to GBP586 million during this period. This means that China is now within the UK's top 10 most valuable inbound markets.⁷⁰

On the other hand, whilst China and the EU collectively have agreed to explore the prospect of a developed and further comprehensive EU-China air transport arrangement, there has of yet been little progress. This would nonetheless fit in with pillars 1 and 3 of the EU external aviation policy, which, it should be recalled, goes back to 2005.⁷¹

⁶⁹ UK Government website. Retrieved 23 November 2016 www.gov.uk/government/news/uk-and-china-to-increase-flights-between-both-countries-in-boost-for-global-britain.

⁷⁰ *ibid.*

⁷¹ As defined in 2005 in a Road Map developed by the Council and the European Commission.

In this respect, it should be noted that Hong Kong has been agreeing (bilaterally) with EU Member States through recognition of the EU designation clause, whereby all EU airlines established in the territory of the EU Member State in question are eligible for available traffic rights. The region of Macao has additionally signed a horizontal aviation agreement with the EU.⁷² Although this agreement does not replace the existing bilateral agreements in place between Macao and EU Member States it does bring all these agreements (15 as at the date of signing) in line with EU law. The horizontal agreement removes nationality restrictions in the bilateral agreements and will thereby allow any EU airline to operate flights between Macao and any EU Member State where it is established if traffic rights under the relevant bilateral agreement are available.

At the current time the status really remains unchanged in terms of ASA's and could therefore be summed up as an intention to further cooperate, certainly in terms of more liberalised skies. And, in this regard, perhaps the following points are significant to consider:

- (i) The EU Open-Skies ruling was made in 2002 and so far, whether due to a failing by the EU or China, the bilateral agreements made with each Member State and China still, in most cases, remain. In a period of over 13 years there has been slow progress in translating these agreements into an agreement which recognises the EU concept of an EU carrier as opposed to those of each Member State. This ultimately translates through to a myriad of different agreements between China and each Member State which ultimately means that despite the CJEU ruling, Member States are

⁷² See Council Decision of 10 May 2012 on behalf of the Union, and provisional application of the Agreement between the European Union and the Government of the Macao Special Administrative Region of the People's Republic of China on certain aspects of air services [2014] OJ L 021.

not treated fairly and equally by China and that there remains a disparity of opportunity for operating to and from China due to individual Member States' respective bilateral agreements.

- (ii) For the EU-China intention (as per the letter) to fully translate into a reality, there needs to be a united/collective willingness by China to appreciate the position of the EU and the advancement it has made in liberalising aviation within the internal market. This will be of paramount importance to then advancing the cooperative arrangements with respect to connectivity and openness in air transport operations services between China and the EU.

There is no doubting the potential of the market but in many ways it could be observed that China has more to be gained from the fact that potentially, it could have full market access to the 'current' 28 Member States. Perhaps the emphasis on progress development talks may also be said to have been influenced by the stand-alone negotiations of the UK (in 2016 – as above) and the revised ASA's (for passenger and freight movements).

From the EU perspective, the predicted numbers of Chinese tourists over the next four years is enormous and stands to translate into significant opportunities for most service/tourism industries (including other transport service providers), which will inevitably lead to further market integration of the two communities. However, China has a record of not always advancing talks in a quick and progressive manner. It should be recalled that it took 15 years of arduous talks and negotiations before China was formally admitted to the World Trade Organisation (WTO) on 11 December 2001. In many ways, this was a trigger and initiator for China's full-scale entry onto the global economic scene and whilst the EU may not be quite the same

supranational organisation in international standing as the WTO, it does hold an ever-establishing position in world events. China has not made the full leap that has been expected onto the international arena – in terms of emerging as a superpower to rival the US. But in reality, this should be viewed as an embryonic process – which has taken longer to mature and develop than perhaps was unrealistically envisaged. That said, ‘*when*,’ rather than ‘*if*,’ it transpires, a more liberalised and cooperative aviation system between China and the EU will surely be advantageous to Europe and the economic community. In the meantime, however, progress is being made in terms of technical cooperation between the two parties with the first scheduled CAAC-EASA Aviation Safety Conference being held in April 2017. This is viewed as an opportunity to continue to broaden the existing bilateral dialogue by offering the wider European and Chinese aviation industry the opportunity to discuss issues and challenges that affect the aviation industry.

The progress of China should not be overlooked or taken lightly – it has gone from a Maoist Communist society to challenging as a capitalist competitor, and, like the EU, ASEAN realises the advantage of undertaking more cooperative arrangements in air transport services with what is its closer geographical neighbour – China.

5. ASEAN

ASEAN consists of ten Member States: Brunei (BNR), Cambodia (CAM), Indonesia (INA), Laos (Lao PDR), Malaysia (MAL), Myanmar (MYM), the Philippines (PHI), Singapore (SIN), Thailand (THA) and Vietnam (VNM). The population was recorded

as 633 million people in 2015, with reports that by 2030 this would have arisen to 717 million, a rate of 0.85 percent per annum (See Table 1).

The ASEAN Economic Community (AEC) also appreciates the importance of a single market and production base as a significant factor in a competitive region. As part of this equation, ASEAN also appreciates the significance of aviation as an important asset and driver to achieving regional prosperity.

5.1. *How it works*

Unlike the EU, centralised power is absent within ASEAN. ASEAN was established based on the spirit of recognising the differences of each Member State and decisions are therefore made based on mutual consensus. This means that ASEAN Member States are not legally-bound by any of the ASEAN initiatives. The motivation for ASEAN success is based upon regional prosperity within an increasingly globalised society. ASEAN is based around the concept of 'good faith', therefore *political willingness* is a significant part of succeeding, or ultimately failing. Hence this mechanism is a significant limiter to concluding agreements.

5.2. *Development of ASEAN-China relations*

Recent years have seen rapid growth of political relations and economic cooperation between China and ASEAN countries. At the height of the 1997-1998 Asian financial crisis, China and ASEAN forged a closer relationship, which led to a currency swap initiative (the Chiang-Mai Initiative). China and ASEAN, have an estimated combined population of 2,025,228 billion (see Table 1). Bilateral trade between China

and ASEAN totalled USD480 billion in 2014, which equated to an 8.3 percent rise from the previous year and was a six-fold growth from USD78 billion, in 2003.⁷³ Tourism between China and ASEAN also continues to rise.⁷⁴ The combination of ASEAN and China continues to offer significant opportunity in trade and investments, including within the tourism market. Today, China is a full dialogue partner with ASEAN, and ASEAN-China relations have entered a new stage of cooperation through the establishment of ASEAN-China Free Trade Agreement (ACFTA) in 2010. Last year, 2016, marked the 25th anniversary of China-ASEAN dialogue relations and ASEAN and Beijing are looking to boost cooperation as they look to capitalise on this association.⁷⁵

Table 1: Population Forecast 2015-2035 (unit – thousand)

Country	2015	2020	2025	2030	2035	Avg. Annual growth rate - %
BNR	437	470	501	530	560	1.40

⁷³ China Briefing data. Retrieved 2 February 2016 www.china-briefing.com/news/2015/08/07/chinas-growing-ties-with-asean-opens-up-new-opportunities-for-foreign-investment.html.

⁷⁴ ASEAN countries are among the fastest growing destinations in the world for tourism. Between 2007 and 2011 the ASEAN Secretariat statistics show that Chinese tourists visiting ASEAN increased from 3.9 million to 7.3 million. <http://www.webintravel.com/asean-looks-china-tourism-growth/> also see http://asean.org/?static_post=tourism-statistics Retrieved 4 February 2016

In 2012, it was reported that China has caught up with the European Union as the biggest supplier of tourists to ASEAN. [http://www.tourismcambodia.com/news/worldnews/7542/china-tops-asean's-tourism-agenda.htm](http://www.tourismcambodia.com/news/worldnews/7542/china-tops-asean-s-tourism-agenda.htm) Retrieved 5 September 2017

For general and up to date tourism trends see <http://media.unwto.org/press-release/2017-07-14/strong-tourism-results-first-part-2017> (Retrieved 8 September 2017)

Also see China-ASEAN Year of Tourism (2017)

http://www.chinadaily.com.cn/weekend/2017-03/25/content_28675141.htm Retrieved 8 September 2017

⁷⁵ Jeremy Koh, 2016. 'China, ASEAN seek to further boost ties'. Channel News Asia, January 4. Retrieved 3 September 2017 www.channelnewsasia.com/news/asiapacific/china-asean-seek-to-further-boost-ties-8208972.

CAM	15,087	15,978	16,799	17,509	18,100	1.00
INA	254,156	265,558	275,575	284,128	291,686	0.74
Lao PDR	6,666	7,088	7,479	7,815	8,085	1.06
MAL	30,916	33,271	35,549	37,783	39,887	1.45
MYM	50,305	52,115	53,669	54,934	55,926	0.56
PHI	101,938	110,402	118,937	127,428	135,860	1.66
SIN	5,498	5,757	6,008	6,276	6,518	0.93
THA	72,306	73,836	74,866	75,724	76,519	0.29
VNM	93,823	97,904	101,036	103,490	106,038	0.65
ASEAN	633,148	664,399	692,446	717,645	741,214	0.85
China	1,392,080	1,414,082	1,425,626	1,432,149	1,436,685	0.16
ASEAN + CHINA	2,025,228	2,078,481	2,118,072	2,149,794	2,177,899	-

Source: Authors

Predicted growth based on ASEAN+6 Population Forecast⁷⁶

5.2.1. How aviation works for ASEAN

For aviation, ASEAN retains an approach based upon a formulated, and arguably agreed, mechanism for approaching Dialogue Partners. The motivation is to achieve more liberalised agreements in aviation and as a means to open up the skies and develop regional prosperity.

In 2010 a Memorandum of Understanding on the ASEAN Air Service Engagement with Dialogue Partners was signed. ASEAN Member States have consequently agreed the principle of central engagement with identified Dialogue Partners. The principle points out the requirement of Member States to firstly

⁷⁶ *ibid.*

liberalise their respective air services within the region (by ratifying existing relevant implementing protocols of ASEAN liberalisation) prior to extending the same right to Dialogue Partners.

The spirit behind this principle is to ensure and maintain maximum and equal benefits among ASEAN's Member States through the creation and establishment of a fair and sustainable air transport market within the region. This method is therefore dependent upon the ability and willingness of ASEAN States in prioritising the objectives of ASEAN in their own nations political environment, which includes promoting the benefit of an ASEAN single market.⁷⁷

5.3. ASEAN-China's air transport cooperation

To support the realisation of the ASEAN-China Free Trade Agreement, ASEAN and China signed the 2007 ASEAN-China Aviation Cooperation Framework which focuses on establishing and enhancing collaboration on strategic areas of air services arrangements, airlines cooperation, airport infrastructure construction, aviation safety/flight standards, aviation security, human resources development and information exchange.

The Framework also paved the way for the establishment of ASEAN's first open skies with a dialogue partner – ASEAN-China Regional Air Services Agreement, signed in 2011. The Agreement provides for both air freight and air passenger services and was envisaged to support and facilitate the traffic and movement of passengers and cargo in order to increase the trade and economy of ASEAN and China. The Agreement among others granted the following rights:

⁷⁷ S. J. Fox and R. Ismail, 'ASEAN Open Skies – Aviation Development in 2015: "Blue or cloudy skies?"', *Annals of Air and Space Law* 40 (2016) 607-654.

- (i) Multiple designation;
- (ii) Open route schedules (but does not include Hong Kong, Macao and Taiwan);
- (ii) Unlimited third and 4th freedom traffic rights;
- (iii) 5th freedom Traffic Rights to designated points; and
- (iv) Liberal tariff arrangements.

5.3.1. Analysis of the ASEAN-China Regional Air Services Agreement

The Agreement is based upon the elimination of the existing limited market access, particularly on the exercise of 3rd and 4th freedom rights, which was restricted by the existing 10 individual bilateral arrangements between China and the ASEAN Member States. In many ways, this should be viewed as the same intention as the EU under pillar one of the EU's External Aviation Strategy (2005). However, this intention is not supported in such a strong and enforceable manner, as within the EU. It should be recalled that the CJEU gave force to the concept of one EU carrier, which in essence all Member States are bound by – save for the fact that the third country, which has previously negotiated with an individual State, has to also recognise this concept. It should be recalled that China has yet to treat each country the same by renegotiating a horizontal agreement with the EU collectively.

ASEAN-China: Multilateral vs. Bilateral Approach

Article 23 of the ASEAN-China Air Services Agreement⁷⁸ stipulates that the multilateral agreement shall be read together with the existing bilateral arrangements entered by each individual ASEAN Member State with China, whereby the more liberal or less restrictive arrangements shall prevail. Hence, the collective 10 bilateral arrangements between ASEAN Member States and China are still in force, together with the ASEAN-China multilateral agreement. This means that both sides are allowed to continuously enter into future bilateral negotiations and other arrangements. On top of that, the bilateral arrangements may remain confidential between the signatories' parties, without having to declare the agreed new arrangements to other ASEAN Member States.

This inevitably is an issue for ASEAN Member States from a collective perspective; and, whilst, this approach reflects ASEAN's spirit of non-interference of each Member States' affairs, it also means that each Member State can still enjoy freedom in strategising its aviation policy without compromising its commitments to ASEAN. Ultimately it also means that this approach has less bargaining power for ASEAN collectively, as compared to the bilateral Member State's individual position.

Within the EU there is one aviation policy, which is translated and supported nationally. The EU also has more power as a collective unity, including legal personality to act on behalf of the current 28 Member States in negotiating and implementing agreements. That said, with regards to China it should be recalled that an EU horizontal agreement with China has not yet transpired. Whilst the objective of the horizontal agreement would be to bring the bilateral agreements of all EU Member States into line with EU law, the Horizontal Agreements would not affect the

⁷⁸ Article 23 of the Air Transport Agreement between the Government of the Member States of South East Asian Nations and the Government of the People's Republic of China, 12 November 2011. Retrieved 23 February 2016
www.icao.int/sustainability/Compendium/Documents/ASEAN/AirTransportAgreement_ASEAN-China.pdf.

volume of air traffic rights or any other provision of the respective bilateral agreements of EU Member States with a third country.

The ASEAN-China Agreement provides for relaxed ownership requirements for ASEAN carriers, which supports the concept of the possible designation of an ASEAN community carrier, as has occurred within the EU. In the EU, alongside the EU carrier concept, nationals of the EU are freely permitted to have controlling interest in another airline operating in the EU and therefore to fully invest.

However positively, ASEAN has remained strongly focused on the conventional approach when permitting China's carrier to operate within ASEAN. This stance is internally displayed with the development of the concept of ASEAN, which relates to the substantial ownership and effective regulatory control being retained by citizens of that specific country, which minimises the degree of investment and controlling share of a carrier, save to nationals of that country. This failure to liberalise suggests that ownership is still a sensitive issue within ASEAN's aeropolitics; more so, arguably, than in China – which appears to be more liberalised in terms of progressing this aspect. Nonetheless, several ASEAN Member States are more willing than others to develop the concept of a truly open market.

This diversion amongst ASEAN members only too clearly shows the lack of a formalised structure for ASEAN to operate under and remains a clear weakness in terms of negotiating agreements – which is especially problematic for aviation, given the legacy of sovereign control. This is in distinct contrast with the more formulated and formulised system of the EU, which it should be recalled also consists of a Court system which ruled on a significant aspect regarding regional unity and international air transport negotiations in terms of more liberalisation and ASA's.

On the other hand, even though 5th freedom rights were granted this remains limited and can only be exercised on selected points, which mostly are secondary cities. In this respect, China has only named 10 secondary cities for utilisation of 5th freedom beyond points by ASEAN carriers. Noticeably, these exclude Beijing, Shanghai and Guangzhou. Even then, there is a cap of 14 weekly flights per country. The beyond points granted are not as most ASEAN carriers would have wished, hence the chances are that the allocated rights may end up being underutilised, which ultimately dilutes the true potentials and benefits of open skies and further liberalisation within the Chinese market for ASEAN carriers. This also reflects the hesitancy of China to permit several major carriers of ASEAN, such as Singapore Airlines, to utilise the rights in serving the markets from China to Europe and the United States.

Similarly, 5th freedom operations are restricted via any ASEAN intermediate point to China or beyond to another ASEAN point. Such operations by an ASEAN carrier must begin from the relevant ASEAN secondary city, and may route through another named ASEAN secondary city, to a list of 28 Chinese secondary cities, then may go beyond China to yet another named ASEAN secondary city. Here, China has offered 28 points for the internal deal, beyond the 10 identified for external 5th freedom. There is no weekly cap. Even then, the list of 28 cities excludes Beijing, Shanghai and Guangzhou, and is essentially an extension of the 10 offered for the external deal.

In return, the ASEAN countries, apart from Singapore⁷⁹ and Brunei, have offered only their secondary points, subject to the same weekly cap. Nevertheless, via this Agreement, the Chinese carriers indirectly have gained ‘cabotage’ rights within

⁷⁹ It should be noted than Singapore only has one primary airport.

ASEAN due to the rights to exercise 5th freedom within the region by connecting ASEAN main cities. ‘Cabotage’⁸⁰ commonly refers to the rules and regulations concerning the carriage of passengers and/or goods for hire or reward that is carried out by non-resident operators (registered in another country, i.e., the nationality of the airline) in a host State/country. And, in respect of this, Article 7 of the Convention, states that, each contracting State has the ‘right’ to refuse permission to the aircraft of other contracting States to carry in its territory passengers, mail or cargo for remuneration to other points within its territory.

Therefore, cabotage is a right or privilege granted to a foreign State or foreign carrier to carry revenue producing traffic from one airport of a State to another in the same territory/State.⁸¹

Based on the agreed rights, the Chinese carriers have high potential to operate as a sixth freedom network as they are geographically strategically placed to service traffic flows from all countries to the south, connecting with North America and Western Europe using the effective north Polar routing, hence breaking the aggressive expansion of Middle East carriers in the region. Additionally, the Chinese carriers have relatively low-cost bases compared to other ASEAN carriers.⁸² However, in so doing, the Chinese carriers need to first address several prominent issues which include the service quality, which is typically not at the standards expected within the

⁸⁰ See Manual on the Regulation of International Air Transport (n 33). See also R. I. C. Bartsch, *International Aviation Law* (Farnham: Ashgate, 2012), wherein a more simplistic definition is found, by providing that, it is ‘[t]he right to transfer passengers or cargo between two points in a foreign country.’ (For further information, please refer to the see Manual on the Regulation of International Air Transport (n 33)).

⁸¹ *ibid.*

⁸² SIA’s CASK ex-fuel is USD9.21 cents whereas China Southern’s is USD7.44 cents in 2012. China Southern’s figure encompasses a predominantly short-haul network, with a resulting higher cost than the long-haul division. That would place China Southern’s long-haul CASK lower than Emirates’ at USD7.29 cents. See Capa Centre for Aviation. 2012. ‘Chinese Airlines’ Sixth Freedom Roles Could Challenge Middle East, Asian, European Hubs This Decade’. 26 January. Retrieved 3 September 2017 www.centreforaviation.com/analysis/chinese-airlines-sixth-freedom-roles-could-challenge-middle-east-asian-european-hubs-this-decade-66664.

Asia Pacific region carriers, marketing and distribution methods and yield management. Of course, this will also be an issue to the European market should progression be made to a more liberalised open-skies environment.

Unlike the EU, there are noticeable differences in ASEAN Member States' regulations on immigration, and other bureaucracies are also other possible challenges that need to be taken up by Chinese carriers in exercising the awarded rights, given the lack of centralised regulatory power of ASEAN as an organisation. For instance, in operating on Shanghai – Manila – Kuala Lumpur vv routes, a Chinese carrier must obtain slots and other approval from the Philippines and Malaysia's civil aviation authority on a separate exercise.⁸³ On top of that, in carrying passengers from Shanghai to Kuala Lumpur, the carriers are subjected to Malaysia's immigration procedures, which are different from those embarking in Manila. There is also no centralised agency within ASEAN which collects fees and charges for all aeronautical services rendered, hence airlines are liable to make these payments to different entities by themselves.

The Agreement also fails to address several key areas being faced by several carriers, namely, in obtaining slots at several congested airports, such as Beijing and Shanghai. Hence, this will serve as a hindrance to effectively use the rights awarded. In addressing this issue, China has suggested one remedy, which was the prohibition of entry into Beijing and Shanghai for all Low-Cost Carriers, which was strongly objected to by ASEAN, as it was viewed as a discriminatory and unfair practice to market players. Moving forward, both parties may wish to adopt the International

⁸³ In exercising the Shanghai – Manila – Kuala Lumpur vv routes, a Chinese carrier is obliged to apply Article 19 (Approval of Schedules) of the ASEAN-China Air Transport Agreement which stipulates the possible requirement for airlines to submit their flight schedules for approval, 60 days prior to the proposed services. Article 19 Air Transport Agreement between the Government of the Member States of South East Asian Nations and the Government of the People's Republic of China, 12 November 2011.

Civil Aviation Organisation's (ICAO) recommendation⁸⁴ made during the Sixth Meeting of Worldwide Air Transport Conference in 2013 which includes any one of three options of Slot Allocation provision developed by ICAO.^{85, 86} This states that

States should give due consideration to the concerns of other States over the issues related to slot allocation and the negative impact on international air services and make every effort to resolve the problems. States should also give due consideration to capacity demands in the planning and development of aviation infrastructure.

Despite concluding an agreement between ASEAN and China, it is arguable whether this was really more of a diplomatic, outward-facing example of compromise aeropolitics, rather than an effective liberalised aviation solution.

⁸⁴ Made during the Sixth Meeting of Worldwide Air Transport Conference in 2013

⁸⁵ Option 1 stipulated as follows: 'Each Party shall ensure that its procedures, guidelines and regulations to manage slots applicable to airports in its territory are applied in a fair, transparent, effective and non-discriminatory manner'. Option 2: '1. Each Party shall facilitate the operation of the agreed services by the designated airlines of the other Party, including granting the necessary landing and take-off slots, subject to the applicable national and international rules and regulations, and in accordance with the principle of fair and equal opportunity, reciprocity, non-discrimination and transparency. 2. Both Parties shall make every effort to resolve any dispute over the issue of slots affecting the operation of the agreed services, through consultation and negotiation in accordance with the provisions of Article X (Consultation) or through the dispute resolution provisions of Article Y (Dispute settlement)'. Option 3: '1. In respect of the allocation and grant of slots at airports in its territory, each Party will, in accordance with local slot allocation rules, procedures or practices which are in effect or otherwise permitted, ensure that the airlines of the other Party: (i) are accorded fair and equal opportunity to secure slots for the operation of the agreed services; and (ii) are afforded no less favourable treatment than any other national or international airlines operating similar services to/from the same airport. The terms of this paragraph are subject to national and international laws and regulations applicable to the allocation and grant of slots at their airports. 2. In case of any dispute over the issue of slot allocation affecting the exercise of the rights granted under the present Agreement, both Parties shall endeavour to resolve the dispute through consultation and negotiation in accordance with the provisions of Article X (Consultation), or through the dispute resolution provisions of Article Y (Dispute settlement)'.

⁸⁶ It is worth noting that in January 2012, the African Union Summit of Heads of State and Government held in Addis Ababa, Ethiopia, endorsed an 'African Civil Aviation Policy'. This policy, *inter alia*, requests African States to use Option 2 of the ICAO model clause on slot allocation in air service agreements.

Importantly, since the signing of the agreement in 2011, only six ASEAN Member States and China have ratified the Agreement and its Implementing Protocol 1.⁸⁷ Meanwhile, only four ASEAN Member States and China have ratified the Implementing Protocol 2,⁸⁸ which entered into force in September 2015 as shown in Table 2 below.

Table 2: Status of Ratification of ASEAN-China arrangements

INSTRUMENT	DATES OF SIGNING	DATES OF RATIFICATION BY MEMBER STATES										DATE OF ENTRY INTO FORCE
		BNR	CAM	INA	LAO	MAL	MYM	PHI	SIN	THA	VN	
Air Transport Agreement between the Governments of the Member States of the Association of Southeast Asian Nations and the Government of the People's Republic of China	13/01/11	08/04/13				24/06/11	4/6/12		27/5/11	13/09/11	09/11/11	China: 09/08/11 Enter Into Force among those ratified
Protocol 1 Unlimited Third and Fourth Freedom Traffic Rights Between Any Points in Contracting Parties	13/01/11	08/04/13				24/06/11	4/6/12		27/5/11	13/09/11	09/11/11	China: 09/08/11 Enter Into Force among those ratified
Protocol 2 Unlimited Fifth Freedom Traffic	19/11/14					11/2/15	25/06/15		21/1/15	05/06/15		China: 30/09/15 Enter Into

⁸⁷ Protocol 1 of the ASEAN-China Regional Air Services Agreement provides for unlimited third and fourth freedom rights between all points in ASEAN and China.

⁸⁸ Protocol 2 of the ASEAN-China Regional Air Services Agreement provide for fifth freedom rights between designated points between ASEAN and China.

highest growing airline at the same airport with an increase of 125.1 percent of total passengers carried as opposed to the previous year.⁹³

Overall though, the Agreement translates to a network imbalance between Chinese and ASEAN carriers. That said, one conclusion to be drawn is that this is inevitably hampered and worsened by ASEAN's failure to develop as a collective unity. This lethargy, plus the arguably weak basis relating to the spirit of ASEAN – ultimately means there is not a firm mechanism, which allows China to select its preferred partners for arguably 'preferential' treatment for additional exchange of rights via bilateral arrangement on top of the benefits gained via multilateral arrangement.

This in essence should be viewed as a clear symptom of ASEAN's individual States' own inability or unwillingness to come together (as the EU has) and consider itself as a true single or common market. This will inevitably hamper further negotiations not only with China but other dialogue aviation partners.

6. Conclusion

Comment has been made throughout this paper of the intention of both regional bodies (ASEAN and the EU) to enter into a more formalised agreement with China, which allows further liberalisation and access to each other skies. And whilst this could be viewed as regional willingness – namely *agreeing an approach*, in truth, there remains a lack of consensus from the negotiating parties collectively. From the perspective of

⁹³ *ibid.*

ASEAN, the 10 States forming ASEAN have clearly shown their reluctance to forge ahead with developing their own internal market, which inevitably hampers negotiations and agreements with other nations. In 2015 ASEAN failed to fully meet the objectives set in terms of liberalising aviation internally amongst the 10 Member States and hence, ASEAN had yet to conclude the full liberalisation processes intra-ASEAN. Among challenges faced by ASEAN in fully achieving the benefit of existing liberalisation initiatives are the non-readiness of several Member States to ratify the implementing protocols and the ASEAN mechanism of less autocracy – wholly based on mutual consensus, which provide for leeway to non-participation to agreed economic initiatives.⁹⁴

However, from the EU perspective, development to accentuate and reinforce the fact that the EU is one body, with a legal personality that speaks for all current 28 Member States, through renegotiation of existing bilateral open skies agreements, has been remarkably slow. Whether it is due to apathy of the EU in pushing for this development, or whether this is ultimately down to acceptance by China, is to a degree, irrelevant. The fact remains that in a period of 15 years (since the *Open Skies* ruling) this progression has been slow. Only in 2015 did the EU reiterate the intention to forge ahead with its 2005 policy objectives, regurgitated in its new 2015 Aviation Strategy – specifically this time identifying China as a key strategic partner. In this regard, the EU also made reference to the 2013 China-EU developments in terms of being an important step in significantly enhancing their aviation relations, through a developing partnership project. The aim of the project was cited as to ‘enhance aviation relations between the second and the third largest domestic aviation markets

⁹⁴ Fox and Ismail, ‘*ASEAN Open Skies – Aviation Development in 2015*’ (n 77).

in the world’ – what the EU refers to as itself and China.⁹⁵ But as has been seen and commented upon previously, an intention does not always become a reality and development of a well-intentioned aim can take many years to achieve. Whilst there have been some noticeable developments in the APP between the EU and China of late, this has clearly been limited to technical aspects, which remain the less contentious strand of aviation.

Although there remain noticeable differences in the approach of the EU and ASEAN, with ASEAN arguably having a weaker mechanism to drive through firm policies that commit all 10 States to regional agreements, there are, however, also noticeable similarities too. In essence, both regions realise the strength of joint negotiations, particularly with such a large partner and a growing market – as is the case of China. This is perhaps significant with the challenges coming from other global regions – such as the Arab States and the potential power of the Gulf Cooperation Council (GCC) collectively to further expand their market across the globe. The Gulf region also has one of the fastest growing aviation markets in the world, clearly showing its effectiveness in terms of airlines, its hub airport operations and its overall strategy. Arguably, the Gulf region could be said to be driving the need to reshape the global aviation market, due to its strategic position that suits operations both to Asia and to Europe. This could indeed be a major driver for ASEAN and the EU to forge effective relations with China and develop meaningful, more liberalised, air service agreements.

There is no denying that the shift of the world’s economic centre is gravitating East, towards Asia, so it is therefore logical for the EU to forge aviation partnerships with China (and also with ASEAN). For the EU to maintain a key role in international

⁹⁵ European Commission, Fact sheet ‘International Aviation: an opportunity for growth and jobs in the EU aviation sector.’ Brussels, 7 December 2015.

aviation it must negotiate competitive ASA's in these areas, as it did with the USA a decade ago. *Now* remains the key time to actively develop relations in these growth areas – with the impetus surely being the predictions indicating that China will become the world's largest air transport market (overtaking the USA) in terms of number of passengers carried.⁹⁶ The EU has much to offer as a partner in terms of its liberalised approach, including internally. The EU still represents the most successful example of regional unity by the joining of (the current) 28 Member States into a collective body. That said, the referendum vote by the UK (in 2016) in terms of voting to exit from the EU questions the acceptance of the populace to some of the respective EU policy areas, and, more importantly, it points to a growing reluctance to enter into areas where there is an opening up across borders in terms of 'unfettered' access.

The UK's exit from the EU invariably calls into question the effects on the current (horizontal) open skies arrangements that have already been negotiated across the globe. The position of the open skies policies remains currently undetermined from the perspective of (i) the UK – not only externally but also internally – within the EU; and (ii) the knock-on effect and potential fall-out to the other Member States.

From the UK viewpoint, it could be argued whether the 'go-it-alone' attitude of the UK could be considered as advantageous, in terms of seeking more favourable bilateral agreements with the ASEAN States collectively, as has arguably occurred with China. That said, it could also be viewed that the UK on leaving the EU will ultimately be sacrificing a more beneficial approach both internally and externally. It should be recalled that at the start of the paper, comment was made as to the fact that

⁹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. An Aviation Strategy for Europe COM(2015) 598 Final (December 2015).

sovereignty was a concept that had its roots in warfare, whereby a 17th century war legitimised the right of nations to govern its people free from the interference of external powers and other nations. However, the Second World War (WWII) was also instrumental two centuries later in proposing the concept of regional unity as a way to prevent war through the development of collective relations and agreements – out of which the European Union was ultimately born, so it is perhaps with some irony that the UK finds itself in the precarious position of withdrawing somewhat from a Union that has been significant in granting such unfettered access internally and collectively seeking more open access as a unity of 28 Member States globally. ASEAN, likewise, owes its development to the same period, whereby post-World War II led to the establishment of new countries within the region, mostly through gaining independence in the 1950s and 1960s. Motivated by the drive to maintain and guarantee security and regional stability whilst enhancing national economic growth, States in the region adopted a more multilateral approach – the ASEAN principle.

Whilst the UK's withdrawal from the EU is an obvious indicator of a changing world and whilst aviation did not influence the UK's voting population's decision, it perhaps serves to show one of the issues that has always stood to affect more openness and development of the skies – *sovereign control*. It also shows the clear connection ultimately between politics and aviation. Collective regional development initiatives remain problematic. The UK has clearly indicated its willingness only to participate to a limited degree in agreements with other nations and so from this viewpoint the approach of ASEAN, in terms of a more mutual consensus approach, could arguably be seen as more favourable. This approach ultimately seeks to respect the differences of each Member State, with the underlying philosophy being that decisions are therefore to be based on mutual consensus.

The EU states that both it and China are committed to establishing a Comprehensive Strategic Partnership – and has specified an anticipated timescale of 10 years for achieving this. However, arguably the timescale clearly recognises and reinforces the magnitude of realising more liberalised ASA's within this well-intentioned aim.

China's position on the world stage of global politics still remains uncertain, particularly from the perspective of established relations (outside of more of a communist regime). China is still viewed as the main political supporter and provider of economic aid to North Korea; and hence, China still has a complex relationship with many countries but particularly within the region and with its close nations. It is also blighted with internal challenges to address, particularly in regard to poverty and the disparity of wealth and opportunity. And, like so many countries, it has a continually ageing population and workforce. Whilst China and ASEAN are seen to be developing closer relations, at times this is marred through underlying tensions that stem back years to past historic events and times. For example, China is often viewed as being an aggressor in the South China Sea, showing a forceful presence with its navy and staking claims to territory and mineral rights, which remain disputed by other regional countries.⁹⁷

There can be little doubt that China ultimately has a critical role to play, not only in the region, in terms of being a primary player through its presence and developing capabilities, but also on a global scale. Regionally, China's rise exerts a powerful pull on various ASEAN economies, such as the banking systems within Singapore and manufacturing in Malaysia. Hence, China has the ability to use its

⁹⁷ S. J. Fox, 'SPACE: The race for mineral rights "The sky is no longer the limit" Lessons from earth!', *Resources Policy* 49 (2016) 165–178.

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development in two ways: to create a structural regional imbalance or to facilitate regional development and prosperity to the benefit of not only itself but to other countries. Only time will tell which path will be taken and invariably negotiations and implementation of ASA's will provide an indicator as to how inclusive this will be with other nations and players. But of course, this is a two-way process (negotiations are dependent upon the agreement of other parties) which regionally means the acceptance, in ASEAN's case, of 10 other nations agreeing, and in the case of the EU, China recognising the EU as representing 28 or questionably 27 nations. Invariably, *the skies the limit – but only when parties agree!*