



Global Business & Development Law Journal

Volume 6 | Issue 1

Article 14

1-1-1993

Flying The Open Skies: An Analysis and Historical Perspective of the U.S.-Netherlands Bilateral Air Transport Agreement of September 4, 1992.

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Flying The Open Skies: An Analysis and Historical Perspective Of The U.S.-Netherlands Bilateral Air Transport Agreement of September 4, 1992.

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I. INTRODUCTION

On March 31, 1992, the U.S. Secretary of Transportation announced a new policy in negotiating bilateral air transport agreements (BATAs).¹ BATAs describe the rights and privileges through which two countries regulate their international civil aviation relationship.² The first BATA to incorporate the new Open Skies policy is the U.S.-Netherlands Air Service Agreement of September 4, 1992 (Open Skies accord).³

This Comment creates a context for thoroughly analyzing the Open Skies accord. Part I first sketches a brief history of the present BATA regime.⁴ Part II analyzes the terms of the Definition Order, and describes it in the context of the present European aviation market.⁵ Part III considers each provision of the Open Skies accord through the historical development of similar provisions in other significant BATAs.⁶ Among the historically significant agreements discussed below is the U.S.-U.K. Air Service Agreement of February 11, 1946 (*Bermuda I*),⁷ which became the model BATA well into the 1970s.⁸ Another significant BATA to which the Open Skies accord is compared is *Bermuda I*'s 1978 replacement, the Agreement on Air Transport Services, U.S.-U.K., July 23, 1977 (*Bermuda II*).⁹ Finally, Open Skies is compared with the U.S.-Netherlands Air Transport Agreement of April 3, 1957 (the *Agreement*),¹⁰ and its replacement, the Protocol Relating to the Agreement of March 31, 1978 (the *Protocol*).¹¹ Part IV concludes by raising questions regarding the potential ramifications of Open Skies-type agreements with other European countries in light of the denationalization of the European Economic Community (EEC) aviation market.¹²

1. Dept. of Trans. Order No. 92-8-13 (Aug. 5, 1992). In the matter of defining "Open Skies"; Final Order [hereinafter Definition Order], available in LEXIS, Tran Library, Dotcab File.

2. NICHOLAS MATEESCO MATTE, TREATISE ON AIR-AERONAUTICAL LAW 230 (1981).

3. Memorandum of Consultations, September 1-4, 1992, United States-Netherlands (on file with *The Transnational Lawyer*). Throughout this Comment, the terms "Open Skies" or "Open Skies accord" will refer to the U.S.-Netherlands Open Skies accord of September 4, 1992. The terms "Open Skies Definition" or "Open Skies policy" will refer to the Department of Transportation (DOT) Definition Order which established a definition for Open Skies-type BATAs.

4. See *infra* notes 13-40 and accompanying text.

5. See *infra* notes 41-78 and accompanying text.

6. See *infra* notes 79-262 and accompanying text.

7. Agreement Between the Government of the United States of America and the Government of the United Kingdom Relating to Air Services Between Their Respective Territories, Feb. 11, 1946, U.S.-U.K., T.I.A.S. No. 1507 [hereinafter *Bermuda I*]. For an extensive discussion of *Bermuda I*, see generally MATTE, *supra* note 2, at 230-35; PAUL S. DEMPSEY, LAW AND FOREIGN POLICY IN INTERNATIONAL AVIATION 9, 13-17, 53-57 (1987); Barry R. Diamond, *The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements*, 41 J. AIR L. & COM. 419 (1975).

8. DEMPSEY, *supra* note 7, at 15.

9. Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Air Services, Jul. 23, 1977, U.S.-U.K., 28 U.S.T. 5368, T.I.A.S. 8641 [hereinafter *Bermuda II*].

10. Air Transport Agreement, Apr. 3, 1957, U.S.-Neth., 12 U.S.T. 837, T.I.A.S. 4782 [hereinafter the *Agreement*].

11. Protocol Relating to the *Agreement*, Mar. 31, 1978, 29 U.S.T. 3088, T.I.A.S. 8998 [hereinafter the *Protocol*].

12. See *infra* notes 263-83 and accompanying text.

A. *Historical Development of the BATA Regime*

The present BATA regime originated during the Chicago Conference of 1944, where 52 nations created the Convention on International Civil Aviation¹³ (Chicago Convention).¹⁴ As the most powerful aviation nation following World War II, the U.S. wanted the Chicago Convention to create an unrestricted, multilateral regime to govern international air transport.¹⁵ The Chicago Convention drafters initially attempted to govern international aviation on a multilateral basis.¹⁶

The current BATA regime is a result of the Chicago Convention's failure to reach a multilateral exchange of traffic rights.¹⁷ Because of that failure, the Chicago Conference adopted a Form of Standard Agreement of Provisional Air Routes (*Standard Form*) as an essentially structural model for future BATAs.¹⁸ The *Standard Form* never became the model envisioned by the Chicago Conference.¹⁹ Instead, in 1946 the two most powerful aviation nations, the U.S. and the U.K., signed *Bermuda I*, a liberal and unrestrictive BATA, which remained the model agreement for almost thirty years.²⁰ *Bermuda I* contained the Bermuda Principles, which established "fair and equal opportunities" for the carriers of the two nations to "operate" on any route.²¹ In other words, the Bermuda Principles called for equal exchanges of economic benefits between carriers, which required U.S. BATA negotiators to seek exchanges of operating rights having approximately equal market value.²² Once two BATA Contracting Parties agreed on an exchange of operating rights, the Bermuda Principles left most operating decisions to the air carriers, with only minimum ex post facto control by both governments.²³ The Bermuda Principles represented a compromise between a desire for freedom of commercial activity and a desire for the protection of national civil aviation interests.²⁴

13. Convention on International Civil Aviation, Dec. 7, 1944, T.I.A.S. 1591, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

14. DEMPSEY, *supra* note 7. Since the Chicago Convention, over 1,500 BATAs have been signed between each pair of nations exchanging international civil aviation. MATTE, *supra* note 2, at 230 & n.9. Including confidential and other non-reported agreements, the total may be nearer 2,500. *Id.* at n.9.

15. DEMPSEY, *supra* note 7, at 11.

16. For an excellent background of the negotiation and adoption of the Chicago Convention, see generally DEMPSEY, *supra* note 7, at 9-13; MATTE, *supra* note 2, at 125-30.

17. MATTE, *supra* note 2 at 125-30. See DEMPSEY, *supra* note 7, at 12 (noting failure of Chicago Convention to create a comprehensive economic policy or an exchange of air traffic rights).

18. DEMPSEY, *supra* note 7, at 52. Among its provisions were route descriptions, carrier designation, airline ownership and control, and non-discrimination regarding airport charges and customs exemptions. Joseph Z. Gertler, *Obsolescence of Bilateral Air Transport Agreements: A Problem and a Challenge*, 13 ANNALS AIR & SP. L. 39, 43 (1988).

19. DEMPSEY, *supra* note 7, at 52.

20. *Id.* at 15. See *id.* at 57 (stating that part of the reason for extensive adherence to the *Bermuda I* model was that neither the U.S. nor the U.K. was willing to enter BATAs dissimilar to *Bermuda I* for most of the 30 years following 1946).

21. Final Act of *Bermuda I*, sec. 4, quoted in MATTE, *supra* note 2, at 231.

22. DEMPSEY, *supra* note 7, at 30.

23. I. H. PH. DIEDIKKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 41 (1983).

24. Diamond, *supra* note 7, at 446.

Following a long period characterized by liberal, unrestrictive BATAs based upon *Bermuda I*, foreign negotiators began to demand more restrictive BATAs.²⁵ In the context of the U.S.-U.K. market, U.S. interpretation of *Bermuda I*'s liberal principles eventually resulted in strong U.S. carriers far exceeding the traffic share of U.K. British Airways.²⁶ U.K. aviation authorities began feeling that the agreement was no longer serving U.K. interests.²⁷ The eventual response was U.K. denunciation of *Bermuda I* and negotiation of a restrictive new U.S.-U.K. BATA, *Bermuda II*, in 1977.²⁸

In the late 1970s, the Carter administration began to deregulate the U.S. aviation industry, and attempted to deregulate international aviation through the adoption of new, liberal BATAs.²⁹ By signing liberal BATAs, the U.S. unilaterally exported its procompetitive philosophy.³⁰ Among the strategies was a U.S. policy of trading access to lucrative interior U.S. points (hard rights) for vague promises of pricing flexibility and prohibitions against anticompetitive behavior (soft rights).³¹ While the Carter administration treated BATA negotiations as an opportunity to expand its procompetitive philosophy to additional markets, foreign parties were bargaining for economic advantages for their carriers.³² In 1978, the U.S. signed BATAs pursuant to the Carter administration policies with several countries, including the Netherlands.³³ These agreements are called *Benelux-type*³⁴ BATAs.

B. U.S. Advantages Under the Existing BATA Regime

The current BATA regime has actually served U.S. interests quite well.³⁵ In negotiating BATAs, the U.S. has a structural advantage in its numerous attractive aviation

25. See generally, DEMPSEY, *supra* note 7, at 21-22 (noting the expansion of foreign-flag carriers, operating for reasons other than profit, which dramatically increased competition with foreign carriers on transatlantic routes).

26. MATTE, *supra* note 2, at 236.

27. See generally Harriet Oswald Hill, Comment, *Bermuda II: The British Revolution of 1976*, 44 J. AIR L. & COM. 111, 114-16 (1978); Linda A. Mabry, Comment, *Bermuda 2: A New Model For International Air Service Agreements*, 9 LAW & POL'Y INT'L BUS. 1259, 1263-65 (1979) (for a thorough analysis of the *Bermuda II* BATA).

28. Mabry, *supra* note 27, at 1259. "*Bermuda II* is primarily about restricting market access[, and is] far more restrictive than any other BATA to which the U.S. is a party." Andrew H. Card, Jr., Secretary of Transportation, Address to the Wings Club, New York City, New York, at 5 (September 16, 1992) (on file with *The Transnational Lawyer*).

29. See generally DEMPSEY, *supra* note 7, at 23-46, 77-91; Paul S. Dempsey, *Turbulence in the "Open Skies": The Deregulation of International Air Transport*, 15 TRANSP. L. J. 305 (1987) (discussing U.S. aviation deregulation during the Carter administration).

30. DEMPSEY, *supra* note 7, at 31. A contemporary European commentator called U.S. policy "nothing but arrogance on the part of U.S. policymakers who seriously planned to coerce, albeit by passive means, other nations of the world into adoption of the U.S. policy." Dempsey, *supra*, note 29, at 342, quoting Majid, *Recent U.S. Aviation Policy: Need for Multilateralism Emphasized*, 1984 CITY OF LONDON L. REV. 51, 62 (1984).

31. DEMPSEY, *supra* note 7, at 77.

32. *Id.* at 232.

33. *Id.* at 31-32. The U.S.-Netherlands BATA signed in 1978 was the *Protocol*, the immediate precursor to *Open Skies*. The *Protocol*, *supra* note 11.

34. So named because the Netherlands and Belgium were the first to enter procompetitive BATAs with the U.S. *Id.* at 31.

35. Jeffrey N. Shane, *Challenges in International Civil Aviation Negotiations*, Address Before the Wings Club (Feb. 26, 1988), reprinted in DEP'T ST. BULL., at 28 (Jun. 1988).

destinations.³⁶ Additionally, U.S. deregulation and industry consolidation have resulted in the dominance of only five airlines, called mega-carriers.³⁷ The mega-carriers developed extensive "hub-and-spoke" systems that replaced point-to-point service on low yield routes with service via a few major hubs.³⁸ Passengers fly separate, smaller, aircraft on spoke routes from outlying points, then board wide-body aircraft for service from the hub.³⁹ U.S. carriers can therefore offer service from Europe to an American hub, with further transit via their immense spoke systems, which foreign aircraft are prohibited from doing by U.S. cabotage laws.⁴⁰

II. U.S. DEPARTMENT OF TRANSPORTATION OPEN SKIES POLICY

A. Definition

On March 31, 1992, the U.S. Department of Transportation (DOT) announced "a new Department initiative . . . [that] would liberalize, to the maximum extent, the aviation markets between the U.S. and Europe."⁴¹ On August 5, 1992, the DOT issued the Definition Order, which defined the Open Skies policy and announced a new initiative to negotiate Open Skies agreements with European countries.⁴² In the Definition Order, Secretary of Transportation Andrew H. Card announced U.S. willingness to negotiate Open Skies agreements with all European nations willing to permit U.S. carriers essentially free access to their markets.⁴³ The eleven-point Definition Order calls for: (1) open entry on all routes; (2) unrestricted capacity and frequency on all routes; (3) unrestricted route and traffic

36. See *id.* "[A] system in which market access has to be negotiated on a bilateral reciprocal basis will provide the greatest benefits in the long term to those with the most attractive markets, and that's us." *Id.* Taking advantage of BATAs calling for equal exchange of economic benefits has enabled U.S. negotiators to extract considerable advantages for U.S. carriers. Paul V. Mifsud, *New Proposals for New Directions: 1992 and the GATT Approach to Trade in Air Transport Services*, 13 AIR L. 154, 160 (1988).

U.S. structural negotiating advantages include the unequalled size of the U.S. domestic air transport market, separation of air transport from other trade issues, and seeking an equal balance of benefits with BATA partners on a nation-by-nation basis. *Id.* These advantages have given U.S. airlines the right to serve over 40 European destinations, while no European carrier has similar rights in the U.S. *Id.* Furthermore, the U.S. has negotiated the right to pick up European passengers and transport them within the European market, which European carriers cannot do between destinations in the U.S. market because of cabotage restrictions. *Id.* Cabotage is defined as air transport "between any two points in the territory of a State." DIEDERIKES-VESCHOOR, *supra* note 23, at 17, quoting BIN CHENG, *THE LAW OF INTERNATIONAL AIR TRANSPORT* 314 (1962). Both U.S. law and the Chicago Convention bar foreign carrier cabotage rights in the U.S. See 49 U.S.C.S. Appx. 1508(b) (Law. Co-op. 1990); Chicago Convention, *supra* note 13, art. 7 (prohibiting cabotage).

But see DEMPSEY, *supra* note 7, at 81-82 (describing U.S. carrier structural disadvantages, including governmental ownership or subsidy of foreign-flag carriers, making profitable operation less critical for survival).

37. George Petsikas, "Open Skies" -- North America, 17 ANNALS AIR & SP. L. 281, 284 (1992). The carriers are American Airlines, United Airlines, Delta Airlines, Northwest Airlines and USAir. *Id.*

38. *Id.*

39. *Id.*

40. See generally, H.A. Wassenbergh, *International Air Transport: Regulatory Approaches in the Nineties*, 17 AIR & SP. L. 68, 71 (1992) (describing the advantages created by combining domestic networks and transatlantic trunk routes in the same U.S. carriers).

41. Department of Transportation Order No. 92-4-53 (May 5, 1992) (defining "Open Skies"); Order Requesting Comments, 57 Fed. Reg. 19,323 (1992).

42. Definition Order, *supra* note 1, at 1.

43. *Id.*

rights;⁴⁴ (4) double-disapproval pricing⁴⁵ and price leadership in third country markets;⁴⁶ (5) application of the least restrictive charter regulations of the two governments;⁴⁷ (6) a liberal cargo regime;⁴⁸ (7) conversion and remittance arrangements;⁴⁹ (8) open code-sharing opportunities;⁵⁰ (9) self-handling provisions;⁵¹ (10) procompetitive provisions on commercial opportunities, user charges,⁵² fair competition, and intermodal flights;⁵³ and (11) an explicit commitment for nondiscriminatory operation of and access for computer reservation systems (CRSs).⁵⁴

Many U.S. and European commentators find it significant that the Definition Order does not include a position on cabotage⁵⁵ or ownership and control provisions.⁵⁶ The DOT feels these matters are best discussed in the context of each bilateral exchange on a case-by-case basis.⁵⁷ European critics have addressed U.S. retention of cabotage restrictions.⁵⁸ American criticism, on the other hand, concerns the possibility that the Open Skies policy will weaken U.S. national ownership and control rules.⁵⁹

44. Rights include the right to operate service between any point in the U.S. and any point in the European country, including unrestricted intermediate and beyond points, change of gauge, or the right to carry fifth freedom traffic. Definition Order, *supra* note 1, at 3. *See infra* note 238 (describing the five freedoms of international aviation, and specifically defining the fifth freedom as the right to fly between the territory of the other Contracting Party and third countries).

Change of gauge means using another, usually smaller, aircraft for further transportation along one route. H. A. Wassenbergh, *New Aspects of National Aviation Policies and the Future of International Air Transport Regulation*, 13 AIR L. 18, 24 (1988).

45. Double disapproval pricing means authorities of both nations must disapprove a rate before it will be disallowed. Richard W. Bogosian, *Aviation Negotiations and the U.S. Model Agreement*, 46 J. AIR L. & COM. 1007, 1015 (1981).

46. Price leadership in third country markets means airlines of a third country may set prices independently of the two Contracting Parties. Bogosian, *supra*, note 45, at 1015 n.27. Unconditional price leadership may present legal difficulties with EC nations, and the U.S. is prepared not to insist on it in intra-EC markets. Definition Order, *supra* note 1, at 3.

47. By way of contrast, many charter regulations contain country-of-origin charter rules, where regulations of the country of origin govern the flight. MATTE, *supra* note 2, at 156 n.123.

48. As with charters, the Definition Order notes the importance of liberal charter and cargo air carriage as essential elements of the Open Skies definition. Definition Order, *supra* note 1, at 4.

49. These arrangements enable carriers to convert and remit earnings in hard currency promptly and without restrictions. *Id.* at 5.

50. Code sharing is defined as publishing schedules for connecting flights of two airlines under the code of one airline. Wassenbergh, *supra* note 44, at 24 n.8.

51. The Definition Order defines self-handling provisions as the right of a carrier to perform and/or control the airport functions that support its operations. Definition Order, *supra* note 1, at 5.

52. User charge means a charge made to the airlines for the provision of airport, air navigation, or aviation security property or facilities. U.S. Model Agreement, art. 1, para. (j), *quoted in* Bogosian, *supra*, note 45, at 1023. The Definition Order explicitly leaves out customs clearance provisions, leaving them to be negotiated in individual BATAs. Definition Order, *supra* note 1, at 6.

53. The Open Skies accord defines intermodal flights as combining air transportation services with ground transport. Memorandum of Consultations, *supra* note 3, attachment B, pt. 1, para. (a).

54. Definition Order, *supra* note 1, app.

55. *See* DIEDERIKS-VERSCHOOR, *supra* note 23, at 17 (defining cabotage as air transport between any two points in the territory of a State).

56. Definition Order, *supra* note 1, at 6.

57. *Id.*

58. *See infra* notes 71-73 and accompanying text.

59. *See infra* notes 206-07 and accompanying text.

The Open Skies Definition Order encourages further development of a market-oriented approach to BATA relationships.⁶⁰ The DOT is frankly and firmly committed to freer trade in civil aviation.⁶¹ To that end, the U.S. is willing to pursue BATAs where its bilateral partners may obtain greater economic benefits than the U.S.⁶²

B. *The European Aviation Environment*

The Open Skies accord must also be considered in light of the present European aviation environment. While the Treaty of Rome established the European Economic Community (EEC) in 1957 and called for the free movement of goods, persons, services, and capital, air transport was expressly excluded.⁶³ Only recently has the EEC begun to consider air transportation.⁶⁴ As a result of the Single European Act,⁶⁵ the EEC is moving toward a common internal EEC aviation market.⁶⁶ The EEC plan involves gradually abolishing BATAs between EEC member states and replacing them with a single, liberalized system.⁶⁷ The EEC is also developing an external relations policy between member states and third countries, including the gradual transfer of BATA negotiating power from member states to the European Commission and Council of Ministers.⁶⁸ Commentators suggest that EEC institutions will take over international air transport negotiations gradually, on an ad hoc basis.⁶⁹ EEC relations with third countries would only make sense after the European air transport market has integrated.⁷⁰

EEC reaction to the Open Skies accord includes criticism directed at U.S. retention of cabotage restrictions.⁷¹ The major European nations, in general, want nothing less than

60. Definition Order, *supra* note 1, at 2.

61. *Id.* The Definition Order notes that the U.S. would have been deterred from some of the most successful agreements of the past decade had U.S. policy called for exchange of equivalent economic benefits. *Id.*

62. *Id.* See *supra* notes 21-24 and accompanying text (describing equal accrual of economic benefits in the Bermuda Principles). For further discussion of unequal accrual of economic benefits, see generally *infra* notes 135-36 and accompanying text (describing fair competition provisions in Open Skies). The DOT policy, besides the Open Skies Definition Order, is also reflected in regulatory relief, particularly in deregulating computer reservation systems (CRSs). Card, *supra* note 28, at 8. DOT rules remove barriers to the use of third party hardware and software and enable travel agents to communicate with multiple CRS services. *Id.*

63. David Banowsky, Comment, *Cutting Drag and Increasing Lift: How Well Will A More Competitive EEC Air Transport Industry Fly?*, 24 INT'L LAW. 179, 181, 183 (1990).

64. See, e.g., *id.* at 185-186; Werner F. Ebke & Georg W. Wenglorz, *Liberalizing Scheduled Air Transport Within the European Community: From the First Phase to the Second and Beyond*, 19 TRANSP. L. J. 417, 418-19 (1991); Jeffrey R. Platt, *The Creation of a Community Cabotage Area in the European Community and its Implications for the U.S. Bilateral Aviation System*, 17 AIR & SP. L. 183, 184-85 (1992).

65. Single European Act, 30 O.J. (L 169) 1 (1987).

66. Peter P.C. Haanappel, *Recent Regulatory Developments in Europe*, 16 ANNALS OF AIR & SP. L. 107, 108 (1991).

67. *Id.* The EEC policy also includes harmonization of certain technical and social laws in air transport matters. *Id.*

68. *Id.*

69. *Id.* at 118.

70. *Id.* at 119.

71. EEC transport minister Karel Van Miert claims "Community carriers are [not] going to get cabotage rights [in the U.S.] unless we unite our efforts," quoted in David Gardner, *EC To Propose Common Air Pacts*, FIN. TIMES, Sept. 10, 1992, at 2. Van Miert also desires a mandate from EEC member nations to negotiate for cabotage rights in the U.S. at the EEC level. *Dutch Gain From US Open Skies*, FLIGHT INT'L, Sept. 16, 1992, available in LEXIS, Tran Library, Flight File.

access to the U.S. domestic market in exchange for Open Skies agreements.⁷² Community officials also fear that Open Skies is an attempt to hinder development of a united EEC stance in negotiating future BATAs with the U.S.⁷³

The U.S. acknowledges that one reason for entering the Open Skies accord with the Netherlands is to signal other larger European countries that they, too, can enjoy more freedom to fly to the U.S. in exchange for signing Open Skies-type BATAs.⁷⁴ This U.S. policy is reminiscent of previous efforts to foist liberalization on BATA partners. In the late 1970s, the U.S. attempted to force the U.K. into replacing *Bermuda II* with a *Benelux*-type BATA by forming liberal BATAs with other countries in the region.⁷⁵ The U.S.-Netherlands Open Skies accord may represent a U.S. effort similar to the "divide and conquer" strategy of the late 1970s, where the U.S. attempted to bypass the restrictions of *Bermuda II* by finding another conduit point for traffic heading to further destinations in Europe.⁷⁶

C. The Third U.S. Attempt

The Open Skies Definition Order represents the third U.S. attempt to achieve deregulated, procompetitive air carriage in the international market. First, at the Chicago Conference, the U.S. pushed for multilateral open skies.⁷⁷ Then, following U.S. aviation deregulation in the 1970s, the U.S. pushed for liberalized air traffic on a bilateral basis, concluding several liberal BATAs by dropping insistence on negotiating an equal exchange of economic benefits.⁷⁸ The third attempt was the 1992 Open Skies policy. As in 1978, the first nation to conclude a liberal BATA pursuant to the new U.S. policy was the Netherlands.

III. THE U.S.-NETHERLANDS OPEN SKIES ACCORD

On September 4, 1992, the U.S. and the Netherlands signed the first BATA incorporating the new U.S. Open Skies proposals.⁷⁹ The Open Skies accord amends the existing U.S.-Netherlands BATA⁸⁰ with new provisions relating to: designation and authorization; substantial national ownership and control; safety; commercial operations,

72. *Air Transport: U.S./Dutch Pact Sows the Seeds of Discontent*, Eur. Rep., Sept. 12, 1992, available in LEXIS, Europe Library, Eurprt File.

73. *E.C. Guarded on U.S.-Dutch Aviation Accord*, AGENCE FRANCE PRESSE, Sept. 7, 1992, available in LEXIS, Nexis Library, AFP File.

74. Agis Salpukas, *U.S. and Dutch Agree on a Pact to Aid Airlines*, N.Y. TIMES, Sept. 5, 1992, at A1.

75. DEMPSEY, *supra* note 7, at 32-33. As the U.K. refused to adopt a liberal *Benelux*-type BATA, the chair of the Carter administration Civil Aeronautics Board responded, "Let's stick it to the Brits--let's put pressure on the Germans through Amsterdam." *Id.* at 32, quoting ANTHONY SAMPSON, *EMPIRES OF THE SKY: THE POLITICS, AND CARTELS OF WORLD AIRLINES* (1984).

76. DEMPSEY, *supra* note 7, at 32.

77. MATTE, *supra* note 2, at 128.

78. See *supra* notes 29-32 and accompanying text (describing U.S. policy of exchanging hard rights for soft rights).

79. Memorandum of Consultations, *supra*, note 3.

80. The Agreement, *supra* note 10, as amended by the Protocol, *supra* note 11. This Comment refers to the portions of the previous U.S.-Netherlands BATA where the Protocol of 1978 amended the Agreement of 1957 as the Protocol. Otherwise, the unamended articles from the Agreement will be referred to as the Agreement.

including ground handling and conversion and remittance of currency; airport discrimination, supplies, and user charges; fair competition; dispute resolution; current route schedule; and charter services.⁸¹ The previous U.S.-Netherlands BATA already contained several elements the Open Skies Definition Order considered essential for an Open Skies BATA.⁸² The negotiators agreed to promote a system with minimal governmental regulations to facilitate the unrestricted flow of passengers and goods.⁸³ However, in order to fully liberalize their BATA and create a true Open Skies regime, the parties agreed to permit designated carriers essentially free access to the market of the other.⁸⁴ The spirit of the Open Skies accord is to liberalize, to the maximum extent, the aviation market between the two countries.⁸⁵

A. Air Service

Under Open Skies, the definition of “air service” includes scheduled, charter, and cargo air carriage.⁸⁶ The *Protocol* had first acknowledged charter air service by allowing the Contracting Parties to designate charter airlines.⁸⁷ The *Protocol* had in turn broadened the *Agreement*, which limited its discussion of air service to only scheduled air service.⁸⁸

The Open Skies accord allows carriers to make multiple stops in the territory of the other to pick up passengers, mail, and cargo.⁸⁹ This contrasts with earlier, more restrictive BATAs, where routes, including intermediate and beyond points, were specifically described

81. See Memorandum of Consultations, *supra* note 3, attachment B, pt.1, para (a).

82. *Id.* at 1. For example, see *infra* notes 112-15, 218-21 and accompanying text (discussing capacity and rate provisions of Open Skies).

83. Memorandum of Consultations, *supra* note 3, at 1.

84. *Id.*

85. *Id.*

86. *Id.* attachment B, pt. 1, para. (a). Scheduled and nonscheduled, or charter, aviation were considered separately in the Chicago Convention. MATTE, *supra* note 2, at 144. Article 6 discussed scheduled air traffic, stating simply that there shall be no scheduled international air service without the special permission or other authorization of the state, and in accordance with the terms of the authorization. Chicago Convention, *supra* note 13, art. 6. The authorization requirement made article 6 essentially a “charter” for the modern BATA regime governing scheduled air service. MATTE, *supra* note 2, at 144. Scheduled air service regulations address routes and service points, details of designation of air carriers, the capacity which each party’s carriers may offer, and the method of setting rates and fares. *Id.*

Article 5, which describes the right of nonscheduled flight, was inspired by a relatively liberal spirit and is the basis for a more liberal regulatory regime for nonscheduled flight. *Id.* This relatively liberal provision, in contrast with article 6, has led to the need for BATAs to address other issues in the charter context, including marketing restrictions, geographical and route restrictions, capacity control, and price control. *Id.* at 152.

Because of the distinct sources of authority in the Chicago Convention for scheduled and nonscheduled traffic, BATAs have addressed them with different provisions and limitations, and in some cases even separate BATAs. Martin Dresner et al., *The Canada-U.S. Transport Bilateral: Will It Be Freed?*, 56 TRANSP. PRAC. J. 393, 399 (1989). See *infra* notes 258-69 and accompanying text (discussing treatment of charter air traffic in the Open Skies accord).

87. The *Protocol*, *supra* note 11, art. 2, para. (a).

88. The *Agreement*, *supra* note 10, art. 1, para (D).

89. Memorandum of Consultations, *supra* note 3, attachment B, pt. 2, para (2). This is to be distinguished from cabotage, where air carriers pick up and drop off domestic passengers, mail, and cargo while remaining within the territory of the other country.

and individually granted.⁹⁰ However, Open Skies continues to bar cabotage⁹¹ by airlines of one country in the territory of the other.⁹²

B. Capacity

1. Background

Capacity clauses regulate the size and frequency of air carriers operating on designated routes.⁹³ They are fundamental parts of most BATAs.⁹⁴ They are also particularly subject to criticism leveled at the BATA system as a whole; they allow government officials to impose constraints on economic aspects of airline operations best left to market forces to control.⁹⁵ Consistent with the notion that many matters would be addressed multilaterally when the Chicago Convention was created, there was no capacity clause provision included in the *Standard Form*.⁹⁶

Bermuda I contained no express provision regulating capacity but addressed it in the Bermuda Capacity Principles,⁹⁷ which gave carriers the freedom to operate at the frequency they considered justified.⁹⁸ By the 1970s, the liberal capacity arrangements of *Bermuda I* led to dissatisfaction in the U.K. as U.S. carrier capacity soared.⁹⁹ When the U.S. Civil Aeronautics Board, in 1976, made no effort to limit the capacity of U.S. carriers, the refusal and other U.K. grievances led ultimately to U.K. renunciation of *Bermuda I* and the negotiation of *Bermuda II*.¹⁰⁰

90. See e.g. *Bermuda I*, *supra* note 7, annex III; the *Agreement*, *supra* note 10, schedule annex (listing all permissible routes to be flown by air carriers of both parties, including allowed intermediate and beyond points).

91. See DIEDERIKS-VERSCHOOR, *supra* note 23, at 17 (defining cabotage as barring foreign carriers from operating between any two points in the territory of a State).

92. Memorandum of Consultations, *supra* note 3, attachment B, pt. 2, para. (3). See *supra* notes 76-78 and accompanying text (describing silence regarding cabotage as a source of European criticism of Open Skies).

93. Diamond, *supra* note 7, at 427.

94. *Id.* at 428.

95. See, e.g., Shane, *supra* note 35, at 28 "[G]overnmental regulatory authorities somehow presume to know more about passenger demand and market development than airline management knows". *Id.* See DEMPSEY, *supra* note 7, at 63 (discussing capacity predetermination).

96. Gertler, *supra* note 18, at 43.

97. *Bermuda I*, Final Act, §§ 4-6, quoted in Diamond, *supra* note 7, at 495-96.

98. *Id.* at 446. See *supra* notes 21-24 and accompanying text (describing the competitive implications of the Bermuda Principles).

The Principles included fair and equal opportunity for the carriers of the two nations to operate on any route; that is, as long as operation did not unduly affect the services of the other Contracting Party's carriers. *Bermuda I*, *supra* note 7, Final Act, secs. 4,5. In setting traffic levels, carriers were directed to refer primarily to traffic demands. *Id.* sec. 6. These Principles also applied to traffic destined for and coming from third countries. *Id.* However, the Bermuda Principles related primarily to the requirements between the U.S. and the U.K., and only secondarily to the requirements of fifth freedom Traffic. Dempsey, *supra* note 29, at 315 n.35. In short, the Bermuda Principles did not predetermine capacity, but provided, in a broad and vague manner, liberal and flexible guidelines, subject to ex post facto control. MATTE, *supra* note 2, at 232.

99. DEMPSEY, *supra* note 7, at 64. As U.K. carrier shares declined on *Bermuda I* routes, the U.S. Civil Aeronautics Board made no effort to limit US capacity. *Id.* at 27. Thus, in 1976, U.S. airline revenues reached \$512.8 million, while U.K. carrier revenue was only \$227.5 million. *Id.* quoting Mabry, *supra*, note 27, at 1263-64.

100. DEMPSEY, *supra* note 7, at 27.

Fundamental problems arise as large and small nations attempt to distribute capacity between their carriers.¹⁰¹ As weaker and stronger traffic-generating countries competed for traffic, the former commonly did so by exchanging *Bermuda I*-type ex post facto capacity review with capacity predetermination.¹⁰² Capacity predetermination requires governments to approve capacity before air service on those routes may begin.¹⁰³

Bermuda II imposed restrictive governmental control of capacity.¹⁰⁴ It restricted capacity levels and virtually abolished U.S. fifth freedom rights.¹⁰⁵ *Bermuda II* addressed capacity in terms of efficiency and preventing wasted resources, reflecting the presence of new, low fare airlines in the mature U.S.-U.K. market.¹⁰⁶ *Bermuda II*'s approach to capacity contrasts with that of *Bermuda I*, which allowed the airlines to choose the capacity they considered justified.¹⁰⁷ Commentators have called the *Bermuda II* system one which stops just short of involving predetermination.¹⁰⁸

U.S. policy returned to its Chicago Convention negotiating stance following U.S. aviation deregulation, with abandoned demands for equal operating opportunities for the carriers of each country and an equivalent exchange of traffic rights, in favor of procompetitive policies aimed at enhancing consumer benefits.¹⁰⁹ Pursuant to these policies, *Benelux*-type BATAs included free determination by the designated airlines of capacity and frequency.¹¹⁰ Among those BATAs was the 1978 U.S.-Netherlands Protocol.¹¹¹

2. Capacity in Open Skies

Air carriers make the primary capacity allocation decisions under the Open Skies accord.¹¹² Open Skies recognizes that several elements defined by the DOT Open Skies Definition Order already exist in U.S.-Netherlands air traffic.¹¹³ Both parties must allow "fair, equal, and nondiscriminatory opportunities" for airlines of the other Contracting Party to compete with its own carriers.¹¹⁴ Contracting Parties are forbidden to limit traffic,

101. MATTE, *supra* note 2 at 145. Nations differ in their attitudes as to the value of commercial rights. *Id.* Those who view the traffic they generate as "belonging" to them generally favor predetermining capacity based on the proportion of traffic which originates in their territory. *Id.*

102. DEMPSEY, *supra* note 7, at 63. Capacity predetermination comes in two forms: (1) general *Bermuda I*-like capacity principles, but subject to prior, rather than ex post facto review; and (2) provisions calling for reciprocity or equal sharing of capacity. *Id.*

103. *Id.* BATAs employing capacity predetermination often require capacity between Contracting Parties to be distributed on a 50/50, or occasionally 60/40, basis. MATTE, *supra* note 2, at 146.

104. DEMPSEY, *supra* note 7, at 28. See generally Mabry, *supra* note 27, at 1273-74 (detailing specific mechanisms by which *Bermuda II* restricted capacity between the U.S. and U.K.).

105. DEMPSEY, *supra* note 7, at 28.

106. MATTE, *supra* note 2, at 243.

107. See *supra* note 103 and accompanying text.

108. MATTE, *supra* note 2, at 244.

109. DEMPSEY, *supra* note 7, at 31. See *infra* notes 126-29 (describing the anticompetitive environment created by *Bermuda II*'s emphasis on equal operating opportunities).

110. *Id.* at 31-33.

111. *Id.* at 32.

112. Memorandum of Consultations, *supra* note 3, attachment B, pt. 9.

113. *Id.* at 1.

114. *Id.*, attachment B, pt. 9, para. (1). See *infra* notes 135-36 and accompanying text (discussing how the Open Skies Contracting Parties define their competitive philosophy in the fair competition and discrimination provision of the Open Skies accord).

frequency, regularity of service, or types of aircraft used by designated airlines of the other Contracting Party on a unilateral basis.¹¹⁵ This provision, however, seems to leave open the possibility for both Contracting Parties, acting together, to limit capacity.

The Contracting Parties may not impose a first-refusal requirement,¹¹⁶ up-lift ratio,¹¹⁷ no-objection fee,¹¹⁸ or any other requirement with respect to capacity, frequency, or traffic inconsistent with purposes of the Open Skies philosophy.¹¹⁹ Finally, neither Contracting Party can require air carriers to file schedules, charter flight programs, or operational plans beyond those required for uniform enforcement of regulations.¹²⁰

C. Fair Competition and Discrimination

1. Historical Development

Fair competition and discrimination provisions are designed to combat discriminatory and anticompetitive conduct.¹²¹ The *Standard Form* mentioned fair competition and discrimination only briefly, calling for non-discriminatory application of airport charges and customs exceptions.¹²² Fair competition was addressed thoroughly in the Bermuda Principles portion of *Bermuda I*.¹²³ In *Bermuda I* and other BATAs formed before 1977, fair competition provisions related primarily to capacity provisions.¹²⁴

In contrast to the liberal spirit of *Bermuda I*, which left most operating decisions to the air carriers,¹²⁵ *Bermuda II* created a far less competitive environment.¹²⁶ The language of *Bermuda II*'s fair competition and discrimination provision emphasized safe, adequate, and efficient international air transport.¹²⁷ *Bermuda II* addressed fair competition by calling for a "fair and equal opportunity to compete, instead of operate."¹²⁸ *Bermuda II* mandated a maximum two-year period during which carriers of one country may not increase

115. *Id.*, attachment B, pt. 9, para. (2).

116. A first-refusal agreement is a requirement that a national airline be given first opportunity to have a particular business, before a foreign carrier may have it. Bogosian, *supra*, note 45, at 1014 n.24.

117. An up-lift ratio defines the traffic of one airline in terms of the traffic of another. *Id.* at 1014 n.25.

118. A no objection fee is a fixed fee paid to a national airline before a foreign airline may operate. *Id.* at 1014 n.26.

119. Memorandum of Consultations, *supra* note 3, attachment B, pt. 9, para. (3).

120. *Id.* at para (4).

121. DEMPSEY, *supra*, note 7, at 69.

122. Gertler, *supra* note 18, at 43.

123. MATTE, *supra* note 2, at 231-232. The Bermuda Principles are widely regarded as among the most significant aspects of *Bermuda I*. See *id.* at 231 (describing the Final Act as the most important part because it contains the Bermuda Principles); DEMPSEY, *supra* note 7 at 54 (describing Bermuda Principles as the hallmark of *Bermuda I*).

124. DEMPSEY, *supra* note 7, at 71.

125. See *supra* note 23 and accompanying text.

126. See generally DEMPSEY, *supra* note 7, at 28 (describing restrictive provisions of *Bermuda II*). A Congressional critic called *Bermuda II* "the greatest step backward in forty years of attempting to bring market-oriented competition to international aviation." *Id.* at 29, quoting 124 CONG. REC. S12264 (daily ed. Aug. 1, 1978)(remarks of Sen. Commerce Committee Chariman Howard Cannon (D-Nev.)).

127. MATTE, *supra* note 2, at 236.

128. *Id.* at 238, quoting *Bermuda II*, *supra* note 9, art. 11, para. 1.

their frequency, in order to guarantee to the carrier of the other country an equal opportunity to compete.¹²⁹

While deregulating aviation during the Carter era, Congress legislated for fair competition, empowering the DOT to suspend or cancel a foreign carrier's fares or suspend its operating permit for anticompetitive practices.¹³⁰ The U.S. also adopted the U.S. Model Agreement to replace the former de facto model, *Bermuda I*.¹³¹ The Model Agreement reflected a negotiating strategy designed to counteract foreign discriminatory practices.¹³² In BATAs signed after *Bermuda II*, the U.S. included a new type of provision which explicitly regulated the activities prone to discriminatory conduct.¹³³ Among these post-*Bermuda II* BATAs were numerous *Benelux*-types BATAs, including the U.S.-Netherlands *Protocol*, which explicitly called for an elimination of discriminatory and unfair methods of competition.¹³⁴

2. Fair Competition and Discrimination in Open Skies

Open Skies addresses fair competition and discrimination as described in the Open Skies policy: the Open Skies accord will "permit . . . carriers essentially free access to their respective markets, and . . . allow these carriers the greatest flexibility to conduct their business without undue government intervention, in order to benefit the travelling and the shipping public."¹³⁵ Under Open Skies the parties must allow "fair, equal, and nondiscriminatory opportunit[ies]" for the other party's airlines to compete with domestic carriers.¹³⁶

3. Criticisms of Fair Competition and Discrimination Provisions of Open Skies

Criticisms of the Definition Order, forwarded to the DOT pursuant to DOT Order 92-4-53, included the fact that Open Skies-type BATAs will not guarantee benefits of equal

129. *Bermuda II*, *supra* note 9, art. 11, para. 1. Thus *Bermuda II*'s ironically named fair competition provisions actually created an anti-competitive environment designed to force an even distribution of capacity between U.S. and U.K. carriers. See Hill, *supra* note 27, at 115 (noting U.K. negotiators desire to bring the balance of earnings to a more favorable position for U.K. carriers); Mabry, *supra* note 27, at 1279 (noting British Airways estimate that it will gain approximately 15 million pounds as a result of *Bermuda II*).

130. DEMPSEY, *supra* note 7, at 70.

131. Bogosian, *supra* note 45, at 1012-13 (describing U.S. efforts to determine the direction of U.S. international air transport policy following adoption of *Bermuda II*). The new liberalized aviation policy was also reflected in Congress adopting the International Air Transportation Competition Act of 1979, Pub. L. No 96-192, 94 Stat. 35, and the U.S. Model Agreement. *Id.*

132. DEMPSEY, *supra* note 7, at 71. See generally Bogosian, *supra* note 45, at 1014 (describing the U.S. Model Agreement as granting fair and equal opportunity to compete, and stating unfair competition practices and discriminations should be removed). See *infra* text accompanying note 160-61 (giving examples of anticompetitive conduct such as unequal airport and user charges, preferential customs and immigration services for the national carrier, ticket taxes only applicable to foreign carriers, restrictions on the carriage of outgoing mail and cargo by foreign carriers, restrictions upon foreign carrier advertising, national carrier monopolies in check-in and boarding facilities, ticket stocks, and computer reservation systems).

133. DEMPSEY, *supra* note 7, at 72.

134. *Id.* at 35.

135. Memorandum of Consultations, *supra* note 3, at 1.

136. *Id.* at attachment B, pt. 9, para. (1). See *supra* notes 21-24 (describing the liberal interpretation of *Bermuda I*'s "fair and equal opportunities to operate"). Cf. *supra* notes 128-29 (describing the restrictive interpretation of *Bermuda II*'s "fair and equal opportunity to compete").

economic value for U.S. carriers.¹³⁷ Open Skies reflects a market-oriented philosophy designed to minimize governmental interference.¹³⁸ As free competition under *Bermuda I* eventually allowed U.S. carriers to carry more than fifty percent of transatlantic traffic in the 1970s,¹³⁹ Open Skies also creates a system where some carriers may succeed at the expense of others.

The Air Line Pilots Association (ALPA), for example, objects because it views the Open Skies policy as giving disproportionate economic benefits to European airlines.¹⁴⁰ ALPA believes the unilateral extension of U.S. benefits violates the policy objectives of developing "a viable, privately owned United States air transport industry."¹⁴¹ ALPA directs its attention specifically to the Netherlands, noting the disparity between the number of passengers carried by U.S. carriers and by KLM Royal Dutch Airlines.¹⁴²

By contrast, U.S. carriers are ambivalent. According to the DOT, while U.S. carriers favor a less regulated international aviation environment, they also feel that access to the U.S. market is worth more to foreign carriers than access to their markets is worth to U.S. carriers.¹⁴³ Thus, U.S. carriers have not expressed unbridled support for the Open Skies accord.¹⁴⁴ For example, U.S. carriers suggested that the DOT not approve a service integration between KLM and Northwest Airlines¹⁴⁵ unless the Netherlands obligates itself to attempt to secure an Open Skies regime between the U.S. and all EEC member nations.¹⁴⁶

U.S. carriers severely criticized British Airway's proposal to acquire a forty-four percent stake in USAir for \$750 million.¹⁴⁷ U.S. carriers wanted the DOT to link approval of British Airways' proposal with new access to U.K. airports, thereby balancing British Airways' access to U.S. markets through USAir.¹⁴⁸ The DOT hinted at linkage between approval of British Airway's proposal and liberalization of the current U.S.-U.K. BATA.¹⁴⁹ Eventually, however, the DOT did not take a final position on the proposal, because British Airways withdrew its proposal in the face of criticism.¹⁵⁰

137. Definition Order, *supra* note 1, at 2.

138. Memorandum of Consolutions, *supra* note 3, at 1.

139. See *supra* note 99 and accompanying text.

140. Comments of Air Line Pilots Association, June 4, 1992, at 1 (issued in response to Department of Transportation Order No. 92-4-53 (May 5, 1992)) (on file at *The Transnational Lawyer*).

141. *Id.* at 2, quoting 49 U.S.C. § 1502(b)(1).

142. *Id.* at 3. U.S. citizens made up 51.5% of the U.S.-Netherlands passengers in 1990, yet U.S. flag carriers only carried 19.3% of the total passengers. *Id.* Extending additional benefits to the Netherlands, by way of additional intermediate and beyond rights, would also increase the disparity, in all likelihood at the expense of U.S. carriers. *Id.*

143. *Transportation Department Grants Final Approval to KLM/Northwest Link*, Int'l Bus. & Fin. Daily (BNA) (Jan. 13, 1993) available in LEXIS, Nexis Library, Currnt File.

144. See James Ott, *More Skies to Open as U.S. Signs Pacts*, AVIATION WK. & SP. TECH., September 14, 1992, at 32 (describing U.S. reaction as reserved).

145. See *infra* note 200 (describing the integration of services between KLM Royal Dutch Airlines and Northwest Airlines).

146. In the matter of the Acquisition of Northwest Airlines by Wings Holdings, Inc., Order 89-9-51, No. 46371, 1989 DOT Av. LEXIS 643 (Sept. 29, 1989) (consent order), at LEXIS *16.

147. James Ott, *Current Bilateral Issues Buffet British Airways-USAir Decision*, AVIATION WK. & SP. TECH., December 14-21, 1992, at 35.

148. *Id.*

149. *Id.*

150. *British Airways, Facing Likely Disapproval, Drops Proposed USAir Pact*, AIRPORTS, Jan. 5, 1993, available in LEXIS, Tran Library, Airpts File.

Criticism arose the last time the U.S. abandoned demands for equal exchanges of economic benefits in BATA negotiation.¹⁵¹ Criticism came from industry executives and Congress when the Carter administration began its policy of trading hard rights for soft rights.¹⁵² The subsequent Reagan administration, however, heard and responded to the criticism.¹⁵³ Negotiators began pushing for BATA partners to live up to their promises of antidiscriminatory practices and demanding more quid pro quo in BATA negotiations.¹⁵⁴ DOT officials explained the tougher stance by stressing the reality that many foreign trading partners were unwilling to lower constraints to competition, although at least one official noted that there simply were no more routes to the U.S. available to trade for soft rights.¹⁵⁵ Of course, other factors also led to a decline of U.S. willingness to forego quid pro quo bilateral bargaining. Those factors included a continuing trend in the “decline of the U.S. passenger share in international markets, sharply increased fuel prices, and the recession of the late 1970s.”¹⁵⁶

D. Commercial Operations

1. Historical Development

Foreign countries who are dissatisfied with the liberal *Benelux*-type BATAs upon which the U.S. has insisted may respond with restrictive and anticompetitive conduct to favor local-flag carriers at the expense of foreign carriers.¹⁵⁷ To combat these practices, U.S. BATAs signed since 1978 have replaced general statements extolling fair and free opportunities to compete with commercial operations provisions regulating specific trade practices.¹⁵⁸ Generally, anticompetitive conduct means foreign carriers are treated less favorably than local-flag carriers, and therefore have a more difficult time competing for passengers and freight.¹⁵⁹ Examples of discriminatory and anticompetitive conduct include: unequal

151. See DEMPSEY, *supra* note 7, at 231-34 (describing criticism of the Carter administration “open skies” policy). To implement the Carter administration objectives, a strategy aimed at enhancing consumer benefits replaced the previous goal of exchanging equivalent economic benefits. *Id.* at 31.

152. See *supra* text accompanying note 31 (defining “hard rights” as access to interior U.S. points, and “soft rights” as vague promises of pricing flexibility and prohibitions against anticompetitive behavior). A typical industry complaint came from C.E. Meyer, Jr., President of TWA, during Senate hearing on the International Air Transportation Competition Act of 1979: “Foreign governments often negotiate with the primary goal of providing economic advantages for their flag-carriers, while the United States frequently concentrates exclusively on obtaining liberal agreements.” DEMPSEY, *supra* note 7, at 232. Congress criticized the pursuit of agreements without regard to their economic effects on U.S.-flag carriers. *Id.* Congressional criticism was directed specifically at the U.S. policy of trading hard rights for soft rights. *Id.* at 233.

153. DEMPSEY, *supra* note 7 at 234-35 (describing the firmer BATA negotiating stance taken by the Reagan administration).

154. *Id.* at 235.

155. *Id.*

156. *Id.* at 87.

157. *Id.* at 111. Smaller countries with whom the U.S. signed liberal, market oriented BATAs felt that such agreements were thrust upon them, and their dissatisfaction was often manifested in anticompetitive behavior. *Id.* at 112.

158. *Id.* at 71-72.

159. *Id.* at 111.

airport and user charges;¹⁶⁰ preferential customs and immigration services for the national carrier; special tickets available only on the national carrier to the detriment of foreign carriers; ticket taxes applied only to foreign carriers; and various national carrier monopolies.¹⁶¹

2. Commercial Operations Provisions in Open Skies

Open Skies discusses commercial operation in more detail than the *Benelux*-type BATAs. Article 10 of the *Protocol* set user charges at reasonable, non-discriminatory levels.¹⁶² Open Skies replaces article 10, which allowed airlines to perform their own ground handling in the territory of the other, with a provision detailing more commercial operations.¹⁶³ Open Skies allows airlines of one Contracting Party to establish offices in the territory of the other to promote and sell air transportation.¹⁶⁴ Airlines may also bring their own staffs into the territory of the other Contracting Party, subject only to laws and regulations relating to entry, residence, and employment.¹⁶⁵

The *Protocol* provision allowing each airline to perform its own ground-handling operations ("self-handling") remains in the Open Skies accord.¹⁶⁶ While the *Protocol* limited self-handling as subject to the availability of airport facilities, Open Skies narrows self-handling limitations to requirements of airport safety.¹⁶⁷ Open Skies also requires that if self-handling is not authorized, services will be provided equally to all airlines, and service charges and quality must compare with what self-handling would provide.¹⁶⁸

Now that airlines will be free to sell air transportation in the territory of the other directly, or through agents,¹⁶⁹ Open Skies appears to free the way for airlines to sell tickets in the territory of the other Contracting Party for flights not involving the territory of that Contracting Party. Airlines may sell transportation in the currency of that territory or any other freely convertible currency.¹⁷⁰ Other currency regulations allow for airlines to pay for local expenses, including fuel, in local currency or in other freely convertible currency, subject only to local currency regulations.¹⁷¹ Carriers will be able to convert and remit to their country local revenues in excess of sums locally disbursed.¹⁷² Conversion and

160. User charges are defined in the Open Skies accord as aircraft, i.e. landing, charges, and charges for navigation, environmental, and security facilities and services. Memorandum of Consultations, *supra* note 3, attachment B, pt. 8, para. (2).

161. DEMPSEY, *supra* note 7, at 111.

162. The *Protocol*, *supra* note 11, art. 10.

163. Memorandum of Consultations, *supra* note 3, attachment B, pt. 6. However, the Netherlands would not agree to a U.S. proposal that U.S. carriers be allowed to supply ground handling services for other international airlines in the Netherlands. *Id.* at 2.

164. *Id.*, attachment B, pt. 6, para. (1).

165. *Id.* at pt. 6, para. (2).

166. *Id.* at pt. 6, para. (3).

167. *Id.*

168. *Id.* See Definition Order, *supra* note 1, at 5 (noting that the ability to self-handle guards against monopolistic and discriminatory practices at airports). Guarding against discriminatory practices will facilitate airlines in exercising the liberal fifth freedom rights granted under the Open Skies accord. *Id.*

169. Memorandum of Consultations, *supra* note 3, attachment B, pt. 6, para. (4). As a rule, BATAs do not include these provisions, leaving each airline free to sell what it likes. Wassenbergh, *supra* note 44, at 29.

170. Memorandum of Consultations, *supra* note 3, attachment B, pt. 6, para. (4).

171. *Id.* at pt. 6, para. (5).

172. *Id.* at pt. 6, para. (6).

remittance shall be prompt, shall not be restricted or taxed, and shall be exchanged at rates applicable at the time such revenues are presented for conversion and remittance.¹⁷³ Airlines are also able to employ surface transportation of cargo to or from points in third countries, including to airports and airlines may offer combinations of air and surface transport (intermodal rights) at one price.¹⁷⁴

Reciprocity agreements from the *Agreement* remain in Open Skies, exempting equipment, fuel, supplies, spare parts, and aircraft stores¹⁷⁵ from taxes, levies, duties, fees, and charges, except for charges based on costs of services provided.¹⁷⁶ User charges¹⁷⁷ imposed by one Contracting Party must be "just, reasonable, nondiscriminatory, and equitably apportioned among categories of users."¹⁷⁸ They may not be less favorable than the most favorable terms available to any other airline.¹⁷⁹ Lastly, user charges are to be set at a level no greater than an equitable portion of the full cost to the charging authorities.¹⁸⁰ A new provision in Open Skies encourages consultations between charging authorities and the airlines to assure reasonable user charges.¹⁸¹ Thus, in its demand for nondiscriminatory commercial operations, Open Skies demands fair treatment in areas such as air transport sales, ground handling, currency conversion and remittance, user charges, and fee exemptions, where anticompetitive behavior might hinder U.S.-flag carrier operation in the Netherlands.¹⁸²

E. Multiple Designation

1. Historical Development of Designation Provisions

Bermuda I allowed the designation of multiple carriers (multiple designation) to serve its specified routes.¹⁸³ It called for "carrier or carriers," that is, the possibility of more than one carrier operating on a designated route.¹⁸⁴ For many years, though, the Civil Aeronautics Board policy was to designate only enough carriers to maintain a "rough parity"

173. *Id.*

174. *Id.* at pt. 6, para. (7).

175. Stores are specified in Open Skies to include food, beverages, liquor, and tobacco. Memorandum of Consultations, *supra* note 3, attachment B, pt. 7, para. (1).

176. *Id.* at pt. 7., para. (1),(2).

177. See *infra* note 160 (defining user charges as charges made to airlines for the provision of airport, air navigation, or aviation security property or facilities).

178. Memorandum of Consultations, *supra* note 3, attachment B, pt. 7, para. (1).

179. *Id.*

180. *Id.* at pt. 7, para. (2).

181. *Id.* at pt. 7, para. (3).

182. Much anticompetitive behavior as described above is prohibited in the U.S. by antitrust laws. DEMPSEY, *supra* note 7, at 112. One commentator notes that foreign countries complain about U.S. practices barring cabotage, U.S. governmental refusal to pay for flights of citizens abroad except aboard U.S.-flag carriers, and U.S. Postal Service policy of tendering mail to U.S.-flag carriers exclusively. *Id.* at 112, n.4.

183. *Id.* at 65. Contracting Parties were free to designate an air carrier or carriers, as long as they fulfill the conditions imposed by each nation's aeronautical authorities. *Bermuda I*, *supra* note 7, art. 2, para. (2). In contrast, single designation allows each Contracting Party to designate only one carrier for each route. MATTE, *supra* note 2, at 233 n.20.

Single designation serves the needs of countries with one national air carrier, whereas the U.S., with numerous international air carriers has traditionally insisted on multiple designation. DEMPSEY, *supra* note 7, at 66.

184. *Bermuda I*, *supra* note 7, art. 2.

with foreign air carriers operating in the market.¹⁸⁵ Then in the late 1970s, the Civil Aeronautics Board began designating large numbers of new U.S. carriers to service routes between interior U.S. points and London, routes which had previously been dormant.¹⁸⁶ The U.S. share of the the U.S.-U.K. transatlantic market soon exceeded the U.K. share.¹⁸⁷ As a result, *Bermuda II* strictly qualified the "carrier or carriers" language of *Bermuda I*.¹⁸⁸

2. Multiple Designation in the U.S.-Netherlands Market

Benelux-type BATAs granted unlimited designation of carriers, which was considered one of their main characteristics.¹⁸⁹ Foreign countries who agreed to grant U.S. carriers unlimited designation often received route authority to serve additional U.S. interior points in return.¹⁹⁰

Open Skies allows multiple designation of carriers providing scheduled or nonscheduled air services, subject only to notification of the other country.¹⁹¹ In Open Skies, the Contracting Parties must grant appropriate authorization to designated airlines of the other country with "minimal procedural delay."¹⁹² In this regard, Open Skies is substantially similar to the *Protocol*, which granted authority without undue delay.¹⁹³

F. Substantial National Ownership and Control in Open Skies

The Chicago Convention considered national ownership and control provisions in articles 17 through 21.¹⁹⁴ *Bermuda I* required that "substantial ownership and effective control of . . . carrier[s] [be] vested in nationals of either Contracting Party."¹⁹⁵ For fifty years, U.S. aviation authorities have required "actual control" and seventy-five percent of the voting shares of U.S. airlines to be in American hands.¹⁹⁶

185. DEMPSEY, *supra* note 7, at 66. For 30 years, the literal language of *Bermuda I*, which allowed multiple designation, was limited to a "general quid pro quo balance" of national carriers on international routes. *Id.* at 26.

186. *Id.* at 27.

187. See *supra* note 99 and accompanying text.

188. *Bermuda II*, *supra* note 9, art. 3 para. (2). Multiple designation was only included in *Bermuda II* on high density routes; low density North Atlantic routes called for single designation until a predetermined demand level was reached, at which time there would become multiple designation on those routes. MATTE, *supra* note 2, at 242-243.

189. DEMPSEY, *supra* note 7, at 68.

190. *Id.* For example, KLM Royal Dutch Airlines received authorization to serve Miami, Boston, Houston, Atlanta and Los Angeles. *Id.*

191. Memorandum of Consultations, *supra* note 3, attachment B, pt. 3, para. (1). See *infra* notes 255-57 and accompanying text (describing previous differences in treatment of scheduled and nonscheduled traffic under the *Agreement* and the *Protocol*).

192. Memorandum of Consultations, *supra*, pt. 3, para. (2).

193. The *Protocol*, *supra* note 11, art. 2, para (d).

194. Chicago Convention, *supra* note 13, art. 17 ("Aircraft have the nationality of the State in which they are registered"). But see Wassenbergh, *supra* note 44, at 22-23 (listing twelve permutations of airplane, crew, charter and lessor and lessee, which cross national boundaries and blur distinctions between aircraft nationality).

195. *Bermuda I*, *supra* note 7, art. 6.

196. Card, *supra* note 28, at 4. See also 49 U.S.C. § 1301(16) (1993) (defining an airline corporation as a citizen only if its president and at least two-thirds of its Board of Directors are U.S. citizens and if at least 75% of the voting interest is owned or controlled by persons who are citizens of the U.S.).

A provision requiring substantial national ownership and control, originally in article 4 of the *Agreement*, remains in the Open Skies accord.¹⁹⁷ It supplements each Contracting Party's right to withhold or revoke privileges, with the additional authority to suspend, limit, or impose conditions on rights under the accord, if it is not satisfied that substantial ownership and effective control of each airline is vested in nationals of the Contracting Party.¹⁹⁸ The additional remedies of suspending, limiting, or conditioning traffic rights leaves open the possibility that a Contracting Party may choose to grant rights under Open Skies even where there is not substantial national ownership and effective control.

The Open Skies policy recognizes a trend noted by commentators: criteria involving national ownership of air carriers are no longer strictly enforced or adhered to in practice.¹⁹⁹ In Open Skies the parties specifically agree to give sympathetic consideration to the concept of commercial cooperation and integration of commercial operations between each country's airlines, within the parameters of their antitrust and competition laws, and "to provide fair and expeditious consideration to any . . . arrangements filed for approval and antitrust immunity."²⁰⁰

This liberal substantial ownership and control requirement has come under attack. In its comments specifically addressed to the Definition Order, ALPA urged that Open Skies benefits be extended only to foreign carriers whose ownership is strictly private, as opposed

197. Memorandum of Consultations, *supra* note 3, attachment B, pt. 4.

198. *Id.*

199. See Wassenbergh, *supra* note 40, at 68. Within the EEC, article 7 of the Treaty of Rome bans "nationality" as a criterion for licensing companies in the EEC countries. *Id.*

200. Memorandum of Consultations, *supra* note 3, at 1. The Open Skies accord thus lessens barriers to Dutch carriers establishing ownership positions in U.S. carriers, and vice versa.

In 1989, the DOT approved a KLM ownership position in Northwest Airlines. Acquisition of Northwest Airlines by Wings Holdings, Inc., *supra* note 146. On November 16, 1992, the DOT granted preliminary approval and antitrust immunity to a service integration between Northwest Airlines and KLM. Joint Application of Northwest Airlines, Inc. and KLM Royal Dutch Airlines for Approval and Antitrust Immunity, Order 92-11-27, No. 48342, 1992 DOT Av. LEXIS 827 (Nov. 16, 1992) (order to show cause). The integration includes a joint marketing operation, coordinated schedules and pricing, a unified travel agency commission program, pooled revenues from joint services, and creation of a joint identity by operating under the same trademarks and branding. *Id.* at *7. The DOT also noted the approval was consistent with the Open Skies accord and may encourage other countries to enter liberal aviation arrangements with the U.S. *Id.* at *26. The DOT concluded that the service integration will not change the ownership structure of Northwest and that Northwest will remain under control of U.S. citizens. *Id.* at *48. The Definition Order notes that some proposals regarding limiting national ownership and control relate to matters governed by statute and are thus beyond DOT control. Definition Order, *supra* note 1, at 6. Policy decisions within DOT control are considered best dealt with on a case by case basis. *Id.* The DOT granted final approval on January 11, 1993. *Transportation Department Grants Final Approval to KLM/Northwest Link*, *supra* note 143.

Other transborder carrier mergers have been proposed outside the context of an Open Skies-type relationship. On January 7, 1993, the DOT approved a \$450 million stake in U.S. Continental Airlines by Air Canada whereby Air Canada acquired 27.5% total equity and 24% voting stock. *Foreign Investment, Super Majority Issues Seen Crucial in DOT Approval of Air Canada/Continental Deal*, Daily Rep. For Executives (BNA) No. 6, at d23 (Jan. 11, 1993), available in LEXIS, Nexis Library, Drexec File. Continental dropped several supermajority voting plans as possibly involving control by Air Canada. *Id.*

Accepted definitions of U.S. control were brought into question by a British Airways proposal to invest \$750 million in USAir in exchange for a 44% stake. See Carole A. Shifrin, *British Airways, USAir Escalate Offensive Against Dissenters*, AVIATION WK. & SP. TECH., Dec. 14-21 1992, at 30 (discussing British Airways proposal to purchase a stake in USAir). The proposal would give British Airways rights to elect 25% of USAir's directors, and thus a veto power on USAir's 80% supermajority requirement for some important issues. James Olt, *Current Bilateral Issues Buffet British Airways--USAir Decision*, AVIATION WK & SP. TECH., Dec. 14-21, 1992, at 35.

to governmentally owned or subsidized foreign carriers.²⁰¹ ALPA urges that benefits should only be extended to carriers who are exclusively under the actual control of citizens of the party to the Open Skies agreement.²⁰²

G. Tariff Clauses

1. Historical Development of Tariff Clauses

The Chicago Convention did not regulate rates or tariffs charged by air carriers in BATAs,²⁰³ nor did the *Standard Form* include a specific tariff provision.²⁰⁴ Instead, the International Air Transport Association (IATA), consisting of airline companies that carry international traffic, was created primarily to set tariffs for international routes.²⁰⁵

Bermuda I allocated tariff-making authority to the carriers, subject to approval of both governments, using the IATA tariff-making machinery whenever possible.²⁰⁶ Tariffs charged by air carriers were subject to "the approval of both Contracting Parties."²⁰⁷ Tariff agreements which originated with the IATA were subject to approval of the U.S. Civil Aeronautics Board.²⁰⁸ *Bermuda I* also provided for procedures in case of disagreement.²⁰⁹

The stable IATA machinery was attacked on two fronts in the 1960s: the U.S. began refusing explicitly to endorse IATA tariffs, and non-IATA charters began providing more low-price competition.²¹⁰ In the 1970s, increases in the price of aviation fuel and overcapacity through the introduction of wide-body aircraft, decreased the ability of IATA to set tariffs and of governments to agree to them.²¹¹ In the face of these factors, *Bermuda*

201. Comments of Air Line Pilots Association, *supra* note 140, at 4.

202. *Id.* For example, without this provision, France, who shares a restrictive BATA with the U.S., could take advantage of a liberal U.S.-Belgium agreement by Air France purchasing effective control of Belgian Sabena Airlines. *Id.* at 5.

203. DEMPSEY, *supra* note 7, at 52. The term "tariff" is used broadly to include the prices paid for the air transportation of passengers, baggage and cargo, and the terms under which those prices will apply. *Id.* at 50 n.20. However, the terms "tariff," "fare," and "rate" are often used interchangeably, as they are in this Comment.

204. Gertler, *supra* note 18, at 51.

205. The IATA was formed in 1945. It was primarily created to set international rates; its membership consists of international air carriers. DEMPSEY, *supra* note 7, at 13.

The IATA was one of two multinational bodies were created soon after the end of World War II to help develop international aviation. *Id.* The other body is the International Civil Aviation Organization (ICAO), which was described in articles 7 through 66 of the Chicago Convention and established in 1947. Its primary focus is on matters of aviation safety and navigation. *Id.* at 12-13.

206. *Id.* at 58-59.

207. *Bermuda I*, *supra* note 7, annex II, para. (a). This type of approval mechanism is alternately called "double approval" or "single disapproval."

208. *Id.* annex II, para. (b). The CAB agreed that IATA rate-making machinery would be exempt from US antitrust laws. DEMPSEY, *supra* note 7, at 53.

209. Both nations had 30 days to approve submitted tariffs. *Bermuda I*, *supra* note 7, annex II, para. (c). Tariffs on which there was not agreement would either be provisionally effective or suspended pending resolution of the dispute. DEMPSEY, *supra* note 7, at 53. Finally, any tariffs charged by either party had to be "fixed at reasonable levels, due regard being paid to all relevant factors, such as cost of operation, reasonable profit and the rates charged by any other air carriers." *Bermuda I*, *supra*, note 7, annex II, para. (h).

210. DEMPSEY, *supra* note 7, at 59.

211. *Id.* at 59-60.

II contained more restrictive pricing provisions.²¹² However, Carter administration pressure to liberalize international aviation resulted in the restrictive *Bermuda II* pricing provisions not being widely reproduced in other U.S. BATAs.²¹³

Tariff clauses were liberalized in the 1970s as part of U.S. aviation deregulation.²¹⁴ The *Benelux*-type agreements encouraged low tariffs, set by individual airlines on the basis of market "without reference to the ratemaking machinery of the IATA."²¹⁵ The U.S.-Netherlands *Protocol* incorporated U.S. policy of mostly unrestricted rates.²¹⁶

2. Tariffs in Open Skies

Open Skies does not amend the tariff provisions of the *Protocol*. Under article 6 of the *Protocol*, the Contracting Parties are to facilitate the expansion of international air transportation by setting the lowest fares that are not predatory, discriminatory, or tending to create a monopoly.²¹⁷ Government interference is limited to preventing predatory or discriminatory pricing.²¹⁸ In contrast to *Bermuda I*, IATA rate making is ignored, and individual airlines set tariffs, aiming for the lowest fares.²¹⁹ Open Skies also retains fare disapproval mechanisms from the *Protocol*.²²⁰

H. Dispute Resolution Before and After Open Skies

BATA models usually include dispute resolution procedures.²²¹ The *Standard Form* provided an arbitration option in case of dispute.²²² Later, the multinational International Civil Aviation Organization (ICAO) became a common forum for dispute resolution.²²³

212. *Id.* at 60. *Bermuda II* called for approval 105 days in advance. *Bermuda II*, *supra* note 9, art. 12, para. (4). Basing tariffs on the cost of providing service, instead of on all relevant factors as in *Bermuda I*, encouraged the development of low-fare scheduled services like Laker Airways. MATTE, *supra* note 2, at 245 n.77. Tariffs were to be at the lowest level consistent with a high standard of safety and adequate return to the airlines and to the extent possible, based on the costs of providing such services, assuming reasonable load factors. *Id.* at 245, quoting *Bermuda II*, *supra*, art. 12, para. (2).

213. DEMPSEY, *supra* note 7, at 60.

214. For an excellent description of the effect on air carrier rates due to U.S. aviation deregulation, pricing competition and loss of IATA antitrust immunity in the U.S., see generally DEMPSEY, *supra* note 7, at 38-45.

215. *Id.* at 33-34.

216. See generally H. A. Wassenbergh, *Innovation in International Air Transportation Regulation (The U.S.-Netherlands Agreement of 10 March 1978)*, 3 AIR L. 138, 147-151 (1978) (thoroughly analyzing *Protocol* tariff provisions).

217. *Id.* at 148.

218. *Id.*

219. *Id.*

220. The *Protocol* allows, but does not demand, one Contracting Party to require air carriers of the other to file fares with its aviation authorities. *Protocol*, *supra* note 11, art. 6, para. (b). Objection to such fares must be made within 30 days, and either party may request consultations, which must be held within 30 days of receiving the objection. *Id.* Both Contracting Parties are required to use best efforts to put into effect any new tariffs agreed during the consultations. *Id.*

Dutch negotiators during the drafting of the *Protocol* wished to maintain sole control over tariffs in the Netherlands for air traffic which originated in the Netherlands. Thus, the *Protocol* leaves aviation authorities the ability to prevent institution of fares only where the flight originates in its territory. *Id.* art. 6, para. (c). See also Wassenbergh, *supra* note 216, at 148 (discussing and criticizing art. 6, para. (c)).

221. DEMPSEY, *supra* note 7, at 72-75.

222. Gertler, *supra* note 18, at 43.

223. DEMPSEY, *supra* note 7, at 74. See *id.* at 205 (describing the creation and purpose of the ICAO).

Among the provisions in *Bermuda I* was a system of settling disputes concerning interpretation or application in a non-binding advisory report through the Preliminary ICAO,²²⁴ which became the ICAO.²²⁵

However, since *Bermuda I*, BATAs were more likely to specify an ad hoc arbitration tribunal instead of relying on ICAO dispute resolution.²²⁶ Later agreements have also recognized the need for dispute prevention, including regular consultation between parties to identify potential difficulties.²²⁷ *Bermuda II* contained detailed dispute settlement procedures.²²⁸ Article 16 called for the Contracting Parties to "consult" the other regarding interpretation or application of the agreement, but it stopped short of determining airline schedules.²²⁹ Article 17 provided for referral to "some person or body" for decision, then to binding arbitration.²³⁰

Dispute resolution provisions of Open Skies, besides those relating to price,²³¹ first call for formal consultations between the Contracting Parties, then referral to some person or body agreed to by both Contracting Parties; if the Parties cannot reach an agreement, there are specific procedures for arbitration.²³² These procedures call for quick and binding²³³ arbitration as the sole method of dispute resolution.²³⁴ Open Skies extends the period of time in which the accord shall remain effective in case of dispute between the Contracting Parties from one year to two years.²³⁵

I. Route Restrictions

1. Historical Background and Expansion Under Open Skies

Route restrictions were among the fundamental BATA provisions in the *Standard Form*.²³⁶ *Bermuda I* specifically designated routes in an elaborate route annex which specified international routes and airports.²³⁷ The U.S. also received very liberal, that is, beyond fifth freedom, rights for carriers traveling beyond London into Europe.²³⁸

224. *Bermuda I*, *supra* note 7, art. 9.

225. DEMPSEY, *supra* note 7, at 72.

226. *Id.* at 74.

227. *Id.* at 73.

228. MATTE, *supra* note 2, at 248 n.91.

229. Hill, *supra* note 27, at 119-20.

230. *Id.* at 120.

231. *See supra* note 220 (describing procedures in case of tariff disagreement under Open Skies).

232. Memorandum of Consultations, *supra* note 3, attachment B, pt. 10, para. (1).

233. Full effect shall be given by each Contracting Party, consistent with its national law, to any decision or award of the arbitral tribunal. *Id.* para. (7).

234. *Id.* pt. 10.

235. *Id.* pt. 11. Allowing more time for Contracting Party consultations will likely prevent a repeat of the situation where the U.K. forced negotiations of *Bermuda II* by unilaterally abrogating *Bermuda I*. *See supra* notes 26-28 and accompanying text (describing the *Bermuda II* negotiation process).

236. Gertler, *supra* note 18, at 43.

237. Diamond, *supra* note 7, at 454.

238. The term "fifth freedom" means the right to take on passengers, mail, or cargo in the territory of the other Contracting Party and carry it further to third countries. MATTE, *supra* note 2, at 143.

In addition to the Chicago Convention, two multinational agreements were signed at the Chicago Conference. These two agreements describe what is known as the "five freedoms" of international civil aviation. *Id.* The first was the International Air Services Transit Agreement, December 7, 1944, T.I.A.S. No. 487, 84 U.N.T.S. 389, which provided for the first two, "technical," freedoms for scheduled air service. The two

Bermuda II contained far more restrictive route provisions.²³⁹ While retaining liberal fifth freedom rights in principle, *Bermuda II* considerably restricted U.S. carrier freedom to enjoy fifth freedom rights to beyond points in Europe.²⁴⁰

Route restrictions for Dutch airlines are removed from the *Agreement* and *Protocol*.²⁴¹ Since the 1957 *Agreement*, the U.S. has had the right to fly to Amsterdam from any point in the U.S. via intermediate points and beyond.²⁴² Airlines are allowed to operate without any restriction on changing the number or type²⁴³ of aircraft.²⁴⁴ Combined service flights are subject only to the condition that they continue transportation onward to or from a point in the territory of a Contracting Party.²⁴⁵ Contracting Parties are allowed to enter into cooperative arrangements such as blocked-space,²⁴⁶ code-sharing,²⁴⁷ or leasing arrangements on a reciprocal basis.²⁴⁸ Arrangements that include revenue pooling²⁴⁹ are prohibited unless both Contracting Parties agree, and arrangements which include cabotage are absolutely prohibited.²⁵⁰

freedoms are (1) the privilege to fly across territory without landing and (2) the privilege to land for non-traffic purposes. *Id.* The second multinational agreement was the International Air Transport Agreement, December 7, 1944, T.I.A.S. No. 488, 84 U.N.T.S. 387, which described five freedoms of scheduled air service. In addition to the two freedoms were (3) the privilege to put down passengers, mail, and cargo taken on in the territory of the State whose nationality the aircraft possesses; (4) the privilege to take on passengers, mail, and cargo destined for the territory of the State whose nationality the aircraft possesses; and (5) the privilege to take on passengers, mail, and cargo destined for the territory of any other Contracting State and the privilege to put down passengers, mail, and cargo coming from any such territory. *Id.* While the former agreement enjoys wide acceptance, relatively few nations have signed the latter agreement. *Id.* at 229.

239. *Id.* at 242. U.K. carriers received more routes to more U.S. gateway cities than under the *Bermuda I* route schedule; U.S. carriers received a more limited increase in access to U.K. gateways. *Id.* at 240. *Bermuda II* also introduced special routes exclusively for cargo services. *Id.* at 241.

240. *Id.*

241. Memorandum of Consultations, *supra* note 3, attachment B, pt. 13. Rights granted the Netherlands are via intermediate points in the U.S. and beyond. *Id.* at pt. 12, para. (2A).

242. The *Agreement*, *supra* note 10, Schedule, art. 1, para. (a).

243. See *supra* note 44 (defining change of gauge as using another, usually smaller, aircraft for onward transportation).

244. Memorandum of Consultations, *supra* note 3, attachment B, pt. 12, para (4). Compare this unrestricted language with typical change of gauge limitations in more restrictive BATAs. For example, in *Bermuda II*, change of gauge was limited to aircraft having less capacity after the change of aircraft on outbound flights and more capacity on inbound flights, and which connected within three hours. Wassenbergh, *supra* note 216, at 143.

245. Memorandum of Consultations, *supra* note 3, pt. 12, para. (4).

246. Blocked space arrangements allow a charter tour operator to book blocks of seats on scheduled flights, thereby combining elements of scheduled and charter air service. See *infra* notes 251-62 and accompanying text (describing Open Skies treatment of scheduled and nonscheduled air service).

247. Code sharing is defined as publishing the schedules of connecting flights between two airlines under the code of one airline. Wassenbergh, *supra* note 44, at 24 n.8.

248. Memorandum of Consultations, *supra* note 3, attachment B, pt. 12, para. (5).

249. Revenue pooling is defined as a cooperative agreement between carriers who combine revenues from a shared route, which they then distribute between themselves. DEMPSEY, *supra* note 7, at 80 n.11. See *supra* text accompanying note 200 (noting that revenue pooling arrangements are included in the KLM/Northwest Airlines service integration).

250. Memorandum of Consultations, *supra* note 3, attachment B, art. 12, para. (5).

2. Scheduled and Charter Air Service

In Open Skies, Contracting Parties are allowed to designate charter carriers for passengers, cargo, or both.²⁵¹ Open Skies rejects previous distinctions between treatment of charter and scheduled air service.²⁵² Charter aircraft may freely operate third and fourth freedom traffic between the Contracting Parties via intermediate points.²⁵³ They may also operate freely in the fifth freedom, provided only that at some point in the journey the territory of the designating country is served.²⁵⁴

The *Protocol* nearly eliminated the distinction between charter and scheduled service.²⁵⁵ However, the *Protocol* called for separate designation of charter airlines.²⁵⁶ Under the *Protocol*, Contracting Parties determined rules for charter air traffic traveling from their territory, in other words, "country of origin" charter rules.²⁵⁷

Open Skies removes the few remaining limitations which the *Protocol* placed on Dutch charter operators.²⁵⁸ As in the *Protocol*, any excluded charter and cargo traffic is to be extended favorable consideration based on comity and reciprocity.²⁵⁹ Open Skies replaces country of origin rules for charter aviation with a provision allowing airlines operating charter air transportation to choose between complying with laws, regulations, and rules of either its home country or the other Contracting Party.²⁶⁰ If a Contracting Party applies different rules to its different airlines or distinguishes between its own airlines and those of other countries, Open Skies calls for the least restrictive rule to be applied to charter traffic covered by Open Skies.²⁶¹ There is an explicit exception made for Contracting Parties to enforce their laws regarding protection of passenger funds, passenger cancellation, and refund rights against airlines of the other Contracting Party.²⁶²

IV. DISCUSSION

The Open Skies accord is a radical new form of BATA. By its terms, it calls for free access to aviation markets, minimal governmental regulation, and great carrier flexibility,

251. *Id.*, pt. 13.

252. See e.g. the *Agreement*, *supra* note 10, art. 1, para. (D) (describing only scheduled air service in its definition of "air services"); the *Protocol*, *supra* note 11, art. 4 (granting separate rights to charter air traffic). See also Wassenbergh, *supra* note 216, at 143-144 (describing the blurring of distinctions between scheduled and charter air service in the *Protocol*).

253. Memorandum of Consultations, *supra* note 3, attachment B, pt. 13. See *supra* note 238 (defining third freedom traffic as the right of an airline to carry traffic from its own territory to another country, and fourth freedom traffic as the right of an airline to carry traffic from other countries to its own territory).

254. *Id.*

255. Wassenbergh, *supra* note 216, at 143. During *Protocol* negotiations, the Netherlands suggested that any distinctions be maintained only for purposes of regulating responsibility and financial risk of carriers, tour operators or freight forwarders. *Id.* U.S. negotiators desired the distinction between scheduled and charter carriers partly to restrict charter carriage to third and fourth freedom traffic. *Id.* at 144.

256. The *Protocol*, *supra* note 11, art. 2, para. (c).

257. *Id.*

258. Memorandum of Consultations, *supra* note 3, attachment B, pt. 13. The *Protocol* limited Dutch charters to third and fourth freedom traffic only. Wassenbergh, *supra* note 216, at 143. Country of origin rules applied to the excluded charter traffic, based on comity and reciprocity between the countries. *Id.* at 144.

259. Memorandum of Consultations, *supra* note 3, attachment B, art. 13, para. (a).

260. *Id.* attachment B, art. 13, para. (b).

261. *Id.*

262. *Id.*

all aimed at facilitating the unrestricted flow of passengers and goods.²⁶³ For the most part, the Open Skies accord creates a free aviation environment. It creates a competitive environment through its capacity,²⁶⁴ fair competition,²⁶⁵ designation of carriers²⁶⁶ and routes,²⁶⁷ and tariff provisions.²⁶⁸ Airlines are now free to sell air service in the territory of the other country and to supply their own ground services.²⁶⁹ Open Skies removes many of the commercial operations barriers which previously hampered competition in international aviation.

The environment created by Open Skies is not totally unregulated. While purporting to create a free aviation environment, the language of Open Skies' fair competition and discrimination provision retains some qualifying language. The accord mentions "essentially free access," and opportunities which are nondiscriminatory, yet "fair [and] equal."²⁷⁰ In particular, the "fair [and] equal" language echoes the language of *Bermuda II*'s restrictive fair competition provision.²⁷¹ Open Skies also leaves open the possibility that the Contracting Parties may act in concert to limit capacity.²⁷²

The most significant restriction left in Open Skies is a restriction on cabotage.²⁷³ Cabotage is forbidden by article 7 of the Chicago Convention and also by U.S. legislation.²⁷⁴ Thus, the U.S. has legitimate and convenient reasons for keeping cabotage out of an Open Skies regime. At the same time, while the U.S. claims to be dropping demands for quid pro quo BATA negotiation, cabotage would be an incredibly valuable right to grant to foreign carriers. It is also certain that U.S. carriers and employee organizations, such as the Airline Pilots Association (ALPA), would object strongly.²⁷⁵

The Open Skies accord affects international civil aviation in two contexts: the U.S.-Netherlands aviation relationship and the U.S. relationship with the EEC as a whole. The Netherlands will be the primary immediate beneficiary of the Open Skies accord. Its national airline, KLM Royal Dutch Airlines, is now able to fly to any point in the U.S. from the Netherlands or intermediary points.²⁷⁶ KLM will be able to decide, free from governmental interference, whether or not to provide service to a new U.S. destination.

Conversely, other U.S. carriers will not be able to gain much in the tiny Dutch market. This is particularly so because U.S. carriers have had access to Amsterdam from any point in the U.S. since 1957.²⁷⁷ Thus, critics who say that the U.S. will not achieve a quid pro quo exchange of benefits with the Netherlands are absolutely correct. The Open Skies policy explicitly disavows bargaining for benefits of equal economic value.²⁷⁸

263. *Id.* at 1.

264. *See supra* notes 112-20 and accompanying text.

265. *See supra* notes 135-36 and accompanying text.

266. *See supra* notes 191-93 and accompanying text.

267. *See supra* notes 241-50 and accompanying text.

268. *See supra* notes 218-20 and accompanying text.

269. *See supra* notes 162-82 and accompanying text.

270. *See supra* notes 135-36 and accompanying text.

271. *See supra* notes 126-29 and accompanying text.

272. *See* text accompanying note 115.

273. *See supra* note 71 and accompanying text.

274. *See supra* note 41.

275. *See* Platt, *supra* note 64, at 188 n. 53 (quoting ALPA president Capt. Randy Babbit, "[I]f you 'are talking about open-skies cabotage, then I would not have trouble gathering support for a strike.'")

276. Memorandum of Consultations, *supra* note 3, art. 12, para. (2A).

277. *See supra* text accompanying note 248.

278. Memorandum of Consultations, *supra* note 3, at 2.

The Open Skies policy will benefit the U.S. in the European aviation market. Today the U.S. is facing a potentially powerful BATA negotiating partner in a united EEC.²⁷⁹ A united EEC aviation market leads to the possibility of intra-EEC cabotage, where air carriers from beyond the EEC are forbidden from operating between EEC member nations.²⁸⁰ While EEC authorities attempt to forge a united front in BATA negotiation with the U.S., Open Skies-type BATAs offer individual European nations the maximum possible access to the U.S. market. The U.S. Open Skies policy essentially offers European nations a choice: sign an Open Skies-type BATA with the U.S. now and receive instant access to the whole U.S. market, or await united EEC BATA negotiations which have the potential to open the U.S. cabotage market to EEC carriers. Open Skies appears to be a U.S. attempt to exploit the conflict between the interests of individual European nations and the interests of the EEC as a unified aviation entity.

U.S. carriers stand to receive benefits of less economic value than each BATA partner, because Open Skies opens the vast U.S. market to European signers of Open Skies-type BATAs. Yet, the U.S. benefits by expanding the network of countries offering unlimited and intermediate rights in Europe. These rights are probably greater than the U.S. could demand negotiating with the united EEC, and the U.S. is in no danger of facing demands for cabotage access to the U.S. market.

The Open Skies accord leaves open the possibility that aviation authorities may grant rights to an airline not controlled by nationals of a Contracting Party.²⁸¹ This raises several issues. For one, national identity of air carriers under the Chicago Convention and almost all BATAs seem to forbid transborder conglomerations. Secondly, such conglomerated airlines will be able to operate hub and spoke operations on both continents. A hypothetical integrated airline would merge a U.S. carrier's hub and spoke system operating in the U.S., with a European country's hub and spoke system. The hypothetical integrated airline also would be able to operate in the U.S. domestic market by virtue of its identity with the U.S. carrier and within any EEC cabotage markets by virtue of its identity with the European carrier. Foreign ownership of domestic air carriers, as illustrated above, is a way around U.S., and potentially EEC, cabotage.

Open Skies was a major factor in the DOT approval of service integration between Northwest Airlines and KLM.²⁸² The new relationship between KLM and Northwest gives travelers on the integrated airlines access to many more U.S. destinations than KLM alone could reach. Travelers arriving from points outside the U.S. on KLM will be able to transfer easily into a hub and spoke network operated by Northwest Airlines.²⁸³ The KLM/Northwest network will be able to reach many more U.S. destinations than will other foreign carriers, who have to do so directly from points outside the United States. Northwest Airlines will benefit from its access to KLM's hub in Amsterdam.

279. See *supra* notes 65-67 and accompanying text (describing unification of the EEC aviation market).

280. See generally Platt, *supra* note 64, at 198 (concluding that the U.S. will probably have to forgo intra-U.S. cabotage to avoid being excluded from intra-EEC air transport).

281. See *supra* note 198 and accompanying text (describing Contracting Party remedies in case it is not satisfied with the national ownership and control of a foreign carrier).

282. See *supra* note 200 and accompanying text (describing the DOT approval of the KLM/Northwest integration).

283. See *supra* notes 38-40 and accompanying text (describing the operation of hub and spoke networks). An unanswered question is whether passengers or cargo will be required to actually physically move from a Dutch-controlled KLM/Northwest airplane to an American-controlled one.

V. CONCLUSION

This Comment describes the dynamics of the last forty years which have created the present BATA system and analyzes and compares the various provisions of the Open Skies accord in an historical context. While a vast network of BATAs regulate international civil aviation, only several BATAs have had additional significance as influential models. The Open Skies accord between the U.S. and the Netherlands represents what the U.S. desires the next model to be. Its significance in the U.S.-European aviation market will depend upon its interrelationship with an eventually unified EEC market. Thus, the full effects of Open Skies in the U.S.-Netherlands market, and in the context of U.S. aviation relations with the EEC, remain to be seen.

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