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“EXCESS BAGGAGE” AT THE F.A.A.: ANALYZING THE TENSION BETWEEN “OPEN SKIES” AND SAFETY POLICING IN U.S. INTERNATIONAL CIVIL AVIATION POLICY

INTRODUCTION

Ever since the advent of a discrete international civil aviation industry, the United States has emerged as a preeminent leader in the call for maximized freedom of routing across national boundaries—an advocate of what is often labeled the “Open Skies” doctrine. During a somewhat shorter time span, the United States has, through the Federal Aviation Administration (FAA),¹ likewise taken the lead in policing individual nations’ air safety standards. By applying the criteria of the International Civil Aviation Organization (ICAO),² the U.S. government has imposed many restrictions regarding routing access on numerous nations.

The end of the Cold War, in this context, could have ostensibly meant two things. First, the general collapse of economic isolation associated with statist economies might have signalled a total embrace of unrestricted aviation routing policy. Second, in the absence of a Soviet bloc, the use of routing sanctions as a tool of U.S. foreign policy could have been drastically reduced or obviated. Yet, neither of these circumstances has come to pass. The conflicting U.S. and international civil aviation objectives of Open Skies and the sanctioning of foreign nations’ access based on assessments of their domestic safety standards remain very much apparent. This Note seeks, first,

1. The Federal Aviation Administration (FAA), an agency within the Department of Transportation, was established in accordance with the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958) (codified as amended at 49 U.S.C. §§ 40101-49105 (1994)).

2. The International Civil Aviation Organization (ICAO), as created by treaty, was envisioned to be the world’s effective authority on civil aviation. *See* Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention]. As one scholar points out, “ICAO became a Specialised Agency of the United Nations soon after its creation.” I.H.PH. DIEDERIKS-VERSCHOOR, *AN INTRODUCTION TO AIR LAW* 7 (4th ed. 1991).

to evaluate the implications of continuing U.S. adherence to such a contradictory policy and, second, to propose alternatives which would make the U.S. goal of access-oriented routing and trustworthy safety precautions a more realistic prospect of achievement.

Part I of this Note traces the origins of the U.S. Open Skies emphasis with a particular focus on the Convention on International Civil Aviation³ (Chicago Convention) and the so-called "Five Freedoms" of the air, which the United States has continued to vigorously assert. Part II discusses the regime of ICAO in regulating international air safety, the development of U.S. policy in this area, and the use of sanctions against foreign nations' civil aviation access as a tool of foreign policy during the Cold War. The second half of this Note moves the clock forward to the present: Part III highlights the unbending Open Skies advocacy that the United States continues to assert, whereas Part IV details the inherently contradictory reality of continued frequent sanctioning of international routes from the United States abroad, based on the Department of Transportation's judgments of inadequate or poor civil aviation safeguards in target countries. This Note goes on to argue that the dual goals of Open Skies and the assurance of air safety under the Chicago Convention model are unattainable without either: (a) placing ICAO—and not the FAA—in its contemplated role of policeman of the air, by giving it a purely "transnational" character by opening its membership not simply to signatory states, but to other major players in the civil aviation industry; or (b) moving the United States toward revisiting the General Agreement on Trade Services⁴ (GATS) to more broadly include civil aviation in its regime—to which it is currently only partly applicable. This Note concludes that the latter proposal is the more probable option, given that a radical restructuring of a U.N. organization is clearly contrary to both the spirit and the text of the Chicago Convention, whereas the underlying basis for excluding civil aviation from GATS constitutes a sincerely-held policy dispute between the United

3. See *supra* note 2.

4. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 28; 33 I.L.M. 1167 (1994) [hereinafter GATS].

States and the European Union (EU), thus subject to a more conventional means of resolution.

I. THE CHICAGO CONVENTION, BERMUDA I AND DOMESTIC DEREGULATION: THE ROOTS OF THE U.S. OPEN SKIES APPROACH

Although the question of regulating international civil aviation appears to have found expression as early as 1919,⁵ the first multilateral accord in this area was the Chicago Convention, signed in Chicago on December 7, 1944.⁶ This convention "has as one of its fundamental principles the premise that all states should be able to participate in air transport on the basis of equality of opportunity."⁷ At the Chicago Convention, the U.S. delegation pushed for adoption of what it and its Canadian counterparts labeled as a recognition of five "freedoms of the air."⁸ These Five Freedoms were defined as: (1) the right to fly over foreign sovereign territory without landing; (2) the right to land on foreign soil for technical reasons; (3) the right to discharge passengers or cargo from the country of origin abroad; (4) the reciprocal right to pick up traffic abroad, headed for the bound party; and (5) the right to direct traffic to or from the bound nation with an intermediate stop and loading in a third nation.⁹

The Chicago Convention's lasting contribution, however, to the regulation of international civil aviation was the creation of ICAO.¹⁰ ICAO was charged with "[p]revent[ing] economic waste caused by unreasonable competition"¹¹ and "promot[ing]

5. Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173. See also Bruce Stockfish, *Opening Closed Skies: The Prospects for Further Liberalization of Trade in International Air Transport Services*, 57 J. AIR L. & COM. 599, 602 (1992).

6. Chicago Convention, *supra* note 2, Signature of Convention, 61 Stat. 1180, 1207, 15 U.N.T.S. 295, 360.

7. Stockfish, *supra* note 5, at 603.

8. *Id.* at 603 n.12 (observing that the Canadian delegation at Chicago is actually given credit for formulating the Five Freedoms concept).

9. See *id.* The Five Freedoms, however, were not actually adopted by the delegates to the Chicago Convention. See *id.* at 604.

10. Chicago Convention, *supra* note 2, art. 43, 61 Stat. 1180, 1192, 15 U.N.T.S. 295, 324. ICAO, now an independent agency within the United Nations, is headquartered in Montreal. For a discussion of ICAO, see Ruwantissa I.R. Abeyratne, *Would Competition in Commercial Aviation Ever Fit into the World Trade Organization?*, 61 J. AIR L. & COM. 793, 808-09 and *passim* (1996).

11. Chicago Convention, *supra* note 2, art. 44(e) 61 Stat. 1180, 1193, 15

safety of flight in international air navigation."¹²

ICAO's structure is quasi-legislative and bicameral in nature. ICAO convenes an annual assembly,¹³ which is comprised of the membership of contracting states (signatories of the Chicago Convention) wishing to be present.¹⁴ The ICAO Assembly is responsible for the organization's financial and budgetary policy, as well as for amending the Convention.¹⁵ A component of the ICAO Assembly is the ICAO Council. That body is made up of representatives from twenty-one contracting states, elected by the Assembly every three years.¹⁶ The Council submits annual reports to the Assembly,¹⁷ "[r]equest[s], collect[s], examine[s] and publish[es] information relating to the advancement of air navigation and the operation of international air services,"¹⁸ and, of importance to the issue examined in this Note, is responsible for the operations and recommendations of the Air Navigation Commission, created by Article 56,¹⁹ which is empowered to "[c]onsider, and recommend . . . modifications of the Annexes to [the] Convention."²⁰

While the Five Freedoms outlined above were not adopted at the Chicago Convention, Article 5 of the Convention did permit contracting states to "make flights into" each others'

U.N.T.S. 295, 326.

12. *Id.* art. 44(h), 61 Stat. 1180, 1193, 15 U.N.T.S. 295, 326. While ICAO survives today as the Chicago Convention's sole lasting contribution to the field of civil aviation law, its creation was not the Convention's sole intent. One commentator notes that "[d]espite its vast ambitions, the Chicago Convention essentially consists of the statement of general principles . . . and the *skeleton* of a code of conduct which *could* govern international air transport." JACQUES NAVEAU, *INTERNATIONAL AIR TRANSPORT IN A CHANGING WORLD* 34 (1989) (emphasis added). For a more detailed discussion of ICAO's safety criteria and the U.S. application of these, see *infra* Parts II and IV.

13. See Chicago Convention, *supra* note 2, arts. 48, 49, 61 Stat. 1180, 1193-94, 15 U.N.T.S. 295, 328-29 (outlining the composition and duties of the ICAO Assembly).

14. Action by the ICAO Assembly cannot be taken unless a quorum, defined as a majority of the contracting states, is present. See *id.* art. 48(b), (c) 61 Stat. 1180, 1193-94, 15 U.N.T.S. 295, 328.

15. See *id.* art. 49(e), (f), (j), 61 Stat. 1180, 1194, 15 U.N.T.S. 295, 330.

16. See *id.* art. 50(a), 61 Stat. 1180, 1195, 15 U.N.T.S. 295, 330.

17. See *id.* art. 54(a), 61 Stat. 1180, 1196, 15 U.N.T.S. 295, 334.

18. *Id.* art. 54(i) 61 Stat. 1180, 1196, 15 U.N.T.S. 295, 334.

19. *Id.* art. 56, 61 Stat. 1180, 1197-98, 15 U.N.T.S. 295, 336-37.

20. *Id.* art. 57(a) 61 Stat. 1180, 1198, 15 U.N.T.S. 295, 338. For an analysis of the Annexes, particularly those surrounding the routing and safety issues studied here, see JAMES R. FOX, *THE REGULATION OF INTERNATIONAL COMMERCIAL AVIATION: THE INTERNATIONAL REGULATORY STRUCTURE*, Booklet No. 8 (1994).

territories "and to make stops for non-traffic purposes without the necessity of obtaining prior permission" ²¹ Furthermore, although the United States for many years strictly regulated its own domestic aviation market, ²² it did press for liberal treatment of routing in the bilateral agreements it pursued with foreign nations. ²³ The agreement struck between the United States and Great Britain at Bermuda in 1946 (Bermuda I) ²⁴ is considered the most notable of these. ²⁵ Bermuda I reflected a compromise among the two signatories, with a view toward restrictive pricing schemes advocated by Britain on the one hand, and toward liberal routing arrangements favored by the United States on the other. ²⁶ Bermuda I's two provisions were especially significant in regard to routing arrangements. First, there is the spirit of the Chicago Convention as expressed in a supplementary document, which mandates a "fair and equal opportunity for the carriers of the two nations to operate on any route between their respective countries," ²⁷ and, second, the text of the accord itself specifically envisioned the emergence of a subsequent multilateral accord which would effectively absorb its own provisions. ²⁸

Bermuda I appears to be the controlling model for the ever-multiplying series of bilateral civil aviation agreements among nations over the next three decades. ²⁹ Its seemingly anticipated descendant, a multilateral regime of regulation,

21. Chicago Convention, *supra* note 2, art. 5, 61 Stat. 1180, 1181, 15 U.N.T.S. 295, 298-99. The term "non-traffic" has been interpreted to mean *non-scheduled* flights. See Stockfish, *supra* note 5, at 605.

22. Section 501(b)(1) of the Federal Aviation Act of 1958, for instance, prohibits foreign citizens from holding a controlling interest in a U.S. air carrier. 49 U.S.C.A. §44102(a)(1)(A). This provision, which remains U.S. law, has been rightly characterized as being "in tension with the evolving landscape of civil aviation." Thomas D. Grant, *Foreign Takeovers of United States Airlines: Free Trade Process, Problems, and Progress*, 31 HARV. J. ON LEGIS. 63, 131 (1994).

23. See Stockfish, *supra* note 5, at 608.

24. Agreement Relating to Air Services Between Their Respective Territories, Feb. 11, 1946, U.S.-U.K., 60 Stat. 1499 [hereinafter Bermuda I].

25. See Abeyratne, *supra* note 10, at 806.

26. See *id.* at 805-06.

27. Resolutions of Committee II (ad hoc), in STAFF OF HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, AIR LAWS AND TREATIES OF THE WORLD at 1442, 1443 (Comm. Print 1961).

28. The treaty would be amended in order to "conform" to any subsequent multilateral agreement. *Id.* art. 11, 60 Stat. 1499, 1502.

29. See Abeyratne, *supra* note 8, at 806.

never did emerge, however.³⁰ This failing, coupled with a growing tendency by increasing numbers of countries to abuse Bermuda I's framework by "adopt[ing] an unduly restrictive stance on their sovereignty in airspace,"³¹ rendered the model of treaty-making contemplated at Bermuda obsolete by the mid-1970s.³² The United States almost instantly responded to the void created by the obsolescence of Bermuda I—not directly by international treaty, but implicitly through domestic industrial reform—by enacting the Airline Deregulation Act of 1978.³³ With this sweeping legislation—which, in many eyes, turned regulation of its domestic aviation industry on its head³⁴—the United States abandoned the restrictive pricing philosophy of Bermuda I, while retaining the prior agreement's permissiveness on routing. By one account, the United States entered into new agreements—or amended existing ones—in eleven instances within the first two years of the statute's passage.³⁵ The U.S. success in fanning the flames of open market routing was limited, however. Although hardly reluctant to entertain free trade initiatives in most, if not all, industries, neither the Reagan nor Bush administrations were able to conclude another "full-scale" bilateral agreement with liberal routing provisions.³⁶ Even the rush of success which followed the Airline Deregulation Act of 1978 carried little geographic diversity.³⁷

30. See generally, E. Tazewell Ellett, *International and U.S. Legal and Policy Impediments to the Growth of the Airline Industry: Time For A Change in the World Order?* AIR & SPACE LAW, Winter 1991, at 3, 3 (observing that "the slowness of progress in the evolution of [the present] international civil aviation legal and policy framework, due in large part to the laborious and time-consuming process of bilateral government-to-government negotiations, stands in stark contrast to the rapid and efficient progress of the airline business community in taking bold steps to adapt to the global marketplace environment and to improve the scope and quality of services to the traveling public.").

31. Abeyratne, *supra* note 10, at 806.

32. See *id.* at 807.

33. Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified as amended in scattered sections of 49 U.S.C.).

34. See generally Paul Stephen Dempsey, *The State of the Airline, Airport & Aviation Industries*, 21 TRANSP. L.J. 129, 152 (1992) (noting that "[w]hatever the truth on whether deregulation has benefitted consumers, its impact on the industry itself has been profound.").

35. See Seth M. Warner, Comment, *Liberalize Open Skies: Foreign Investment and Cabotage Restrictions Keep Noncitizens in Second Class*, 43 AM. U. L. REV. 277, 290 (1993).

36. See Stockfish, *supra* note 5, at 618.

37. The new liberal bilaterals which immediately followed U.S. domestic dereg-

The slowing of such success can reasonably be attributed not to the reluctance of the United States to pursue such a policy, but to "the reduced number of like-minded partners with whom to negotiate liberal bilateral agreements."³⁸ Nevertheless, as the Cold War ended, the generally liberal U.S. view on international civil aviation routing remained largely intact and traceable to its intentions at the Chicago Convention nearly four decades before.

II. THE EMERGENCE OF THE ICAO SAFETY REGIME, THE U.S. APPLICATION THEREOF, AND THE SANCTIONING OF CIVIL AVIATION AS A TOOL OF COLD WAR FOREIGN POLICY

Annexes 1 through 18 of the Chicago Convention outline the safety standards which ICAO is charged with enforcing.³⁹ Within these provisions, Annexes 6⁴⁰ and 8⁴¹ are of special importance.⁴² Annex 6 introduces "basic rules for the operation of aircraft such as the equipment requirements for particular kinds of flight, maintenance requirements and fuel minimums."⁴³ Annex 6, for instance, includes the requirement that passengers be instructed regarding the use of seat belts. Annex 6 also establishes a regime of minimum flight altitudes flown and ensures that all personnel involved in the conduct of an international flight be familiar with the aviation laws of for-

ulation were noticeably concentrated, geographically, with northern European nations. "Serious resistance" was encountered throughout much of the rest of the globe. *Id.* at 617. The political and philosophic underpinnings for such resistance are: (i) the persistence of states in viewing their national carrier or carriers "as essential public utilities deserving of government protection," and (ii) the disproportionate bargaining power between a nation such as the United States and most smaller countries less receptive to Open Skies and who "would have difficulty in matching the large market and powerful airlines of the United States, and would naturally resist the relaxation of restrictions in its bilateral." *Id.* at 635.

38. *Id.* at 618.

39. See NAVEAU, *supra* note 12, at 56. The Annexes do not appear alongside the original text of the Chicago Convention and are "republished from time to time" by ICAO. *Id.* For a summary of the Annexes, see FOX, *supra*, note 20, Booklet No. 8 (1994).

40. See FOX, *supra* note 20, at 18.

41. See *id.* at 20.

42. See also Mark Lee Morrison, Note and Comment, *Navigating the Tumultuous Skies of International Aviation: The Federal Aviation Administration's Response to Non-Compliance with International Safety Standards*, 2 SW. J.L. & TRADE AM. 621, 631 (1995).

43. FOX, *supra* note 20, at 18.

eign countries over which the flight travels.⁴⁴

Annex 8 sets forth "minimum standards for the design and construction of aircraft so that all Contracting States will recognize the airworthiness certificates of all other Member States having confidence in their design and inspection regimes."⁴⁵ Annex 8 also focuses upon structure and design features of aircraft and defines "anticipated operating conditions" as

"those conditions which are known from experience or which can reasonably be envisaged to occur during the operational life of the aircraft taking into account the operations for which the aircraft is made eligible, the conditions so considered being relative to the meteorological state of the atmosphere, to the configuration of the terrain, to the functioning of the aircraft, to the efficiency of the personnel and to all factors affecting safety in flight."⁴⁶

The Air Navigation Committee of ICAO is responsible for effecting, and in many instances, has implemented, changes in the technical and procedural language of these and other annexes.⁴⁷

Even though the Chicago Convention's vision for ICAO was for it to assume regulatory supremacy in all areas of civil aviation, including trade,⁴⁸ as a practical matter its influence has long been restricted to that of a standard-bearer for signatory nations' air safety.⁴⁹ A large part of the credit (or blame) for this reality lies at the doorstep of the United States, which did not want a centralized, inter-governmental organization imposing economic regulation on civil aviation.⁵⁰ ICAO naturalized a legal bond with the European Civil Aviation Conference in 1956;⁵¹ established a "close liaison" with the African Civil

44. *See id.*

45. *Id.* at 20.

46. *Id.* at 21.

47. Annex 8, for instance, has been amended 95 times in the first 39 years following its original drafting in 1949. *See id.* at 22.

48. ICAO's envisioned role as a stimulus for concluding a multilateral accord on commercial air rights failed not long after the signing of the Chicago Convention in 1947. *See* MAREK ZYLICZ, *INTERNATIONAL AIR TRANSPORT LAW* 85 (1992).

49. *See* NAVEAU, *supra* note 12, at 57.

50. *See* ZYLICZ, *supra* note 48, at 86.

51. *See id.* at 110.

Aviation Commission, created in 1969;⁵² and had its multilateral regulatory objectives embraced by the Latin American Civil Aviation Commission, established in 1973.⁵³

After ICAO became a special agency of the United Nations,⁵⁴ however, its influence waned drastically.⁵⁵ The chief reason for this decline, not surprisingly, was ICAO's lack of an effective enforcement mechanism.⁵⁶ Some sort of an inspection procedure to assure compliance with ICAO standards among its constituent countries is needed.⁵⁷ Ultimately, then, ICAO could reasonably be taken to task for developing a verification system, but it has failed to do so.⁵⁸ Even in the absence of these deficiencies, ICAO would, moreover, still be forced to develop an enforcement regime that would ensure compliance;⁵⁹ this, too, ICAO has failed to do. Although the notion of strengthening ICAO to its envisioned supremacy (not only in the area of technical regulation,⁶⁰ but in the heretofore forbidden area of trade)⁶¹ continues to enjoy support, it has largely remained hamstrung, not simply by the presence of a wary United States, and not because of the enormous task of overseeing a huge worldwide aviation infrastructure,⁶² but by its own administrative deficiency. ICAO has been observed to lack "the statutory power to impose measures on Contracting States in a number of areas where, in fact, the Convention itself has left these States with full authority [sic] of decisions, and subsequent arrangements have established the quasi-discretionary powers of governments in dealing with economic factors."⁶³

52. See *id.* at 111.

53. See *id.* at 112. The Latin American Civil Aviation Commission adopted most of the resolutions made at the "Conferencias Regionales de Aviación Civil" held at Rio de Janeiro (1959), Montevideo (1960) and Bogotá (1962). *Id.* at 111-12.

54. See DIEDERIKS-VERSCHOOR, *supra* note 2, at 7.

55. See Morrison, *supra* note 42, at 631.

56. See *id.* at 623.

57. See *id.* at 632.

58. See *id.*

59. See *id.* at 633.

60. See, e.g., NAVEAU, *supra* note 12, at 57.

61. See Craig Canetti, Note, *Fifty Years after the Chicago Conference: A Proposal for Dispute Settlement Under the Auspices of the International Civil Aviation Organization*, 26 LAW & POL'Y INT'L BUS. 497, 497 (1995).

62. In the area of mapping sophistication, for instance, ICAO "concedes that it's a big job to get the world flying by the same mapping rules." Susan Carey, *New Surveys Needed for World's Airports*, WALL ST. J., May 6, 1996, at B8B.

63. NAVEAU, *supra* note 12, at 57.

Moreover, ICAO's status as the standard forum to resolve disputes under member states' bilateral aviation agreements—a status dating to Bermuda I—has been weakened.⁶⁴ The United States, for example, employs an ad hoc tribunal as the dispute resolution authority in most of its aviation tribunals.⁶⁵ Finally, the International Court of Justice has proven to be of little help in this area, likewise owing to an uncertain enforcement mechanism.⁶⁶

This trend was interrupted, modestly, in 1995 when the ICAO Assembly ratified a limited safety oversight program,⁶⁷ but its mandate was severely constrained. First, assessments were to be conducted only upon the request of a member nation,⁶⁸ and second, it continued to lack enforcement punch.⁶⁹ Al-

64. See PAUL STEPHEN DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION 72, 74 (1987).

65. See *id.* at 74.

66. See John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L.J. 535, 541 (1993). A notable aviation case which came before the International Court of Justice [hereinafter I.C.J.], however, was Aerial Incident of 3 July 1988 (Iran v. U.S.) 1996 I.C.J. 9 (Feb. 22), arising from the shooting down of an Iranian civilian airliner in the Persian Gulf by the U.S. naval carrier *Vincennes*. The United States contended that the *Vincennes*' commander was operating under a good-faith belief that the Iranian aircraft was hostile. See David K. Linnan, *Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility*, 16 YALE J. INT'L L. 245, 260 (1991). Iran, in its application to the I.C.J., cited both the Chicago Convention and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. Application Instituting Proceedings (Iran v. U.S.) (Aerial Incident of 3 July 1988), 28 I.L.M. 843 (1989). In essence, Iran was appealing an ICAO Council decision report that had, *inter alia*, expressed "profound regret over the loss of 290 lives . . ." and "[u]rged all States to take all necessary action for the safety of navigation of civil aircraft, particularly by assuring effective co-ordination of civil and military activities . . ." International Civil Aviation Organization, *Resolution and Report Concerning the Destruction of Iran Air Airbus on July 3, 1988*, 28 I.L.M. 896, 899 (1989). The I.C.J. never ruled in this case, noting only that the parties had agreed to settle the dispute out of court. See Aerial Incident of 3 July 1988, 1996 I.C.J. 9, 10. It was reported that the settlement stipulated that the United States would pay as much as \$300,000 to relatives of each Iranian passenger killed as a result of the incident. See *U.S. and Iran Settle Financial Claims; \$132 Million Agreement Covers 1988 Airbus Downing, Banking Disputes*, WASH. POST, Feb. 23, 1996, at A23. Another problem with the I.C.J.'s jurisdiction in the area of aviation law is the existence of publicists who "tend to argue that the downing of civil aircraft over a state's territory is more properly characterized as a human rights problem." Linnan, *supra*, at 386-87.

67. See David Hughes, *U.S., Europe Back ICAO Safety Oversight Program*, AV. WK. & SPACE TECH., Oct. 30, 1995, at 47 available in 1995 WL 10192974.

68. See *id.*

69. Under the plan ratified by ICAO, "[t]he final safety report will detail any

though ICAO's leadership continues to whisper of building on this concept to the present day,⁷⁰ a revisiting of the program shows that such aspirations should be received with a high degree of skepticism.⁷¹

Since ICAO has been, and, for the foreseeable future probably will be, silent in the area of enforcement, the United States has emerged as the most aggressive enforcer of its own bilateral air accords. Reprisals, as well as other retributive processes, have been "widely applied in the United States where legislation has been enacted providing for a large choice of measures to restrict foreign airlines in response to what the U.S. Administration may see as discriminatory, anti-competitive or restrictive, or simply unreasonable practices affecting U.S. airlines abroad."⁷² Through 1984, Congress had delegated such authority to rulemaking and other administrative procedures conducted by the Civil Aeronautics Board (CAB), an independent Federal agency.⁷³ The following year, most of the CAB's authority was transferred, under Section 403(a) of the Federal Aviation Act, to the Department of Transportation (DOT).⁷⁴ Much of the old CAB's authority today resides within one section of the DOT, the FAA.⁷⁵ During the Cold War, retri-

area in which the member country is not complying with ICAO Standards and Recommended Practices. The member nation *may* then decide whether to take remedial action with ICAO assistance." *Id.* (emphasis added).

70. See James Ott, *Civil Aviation Directors to Explore Expanded Safety Role for ICAO*, AV. WK. & SPACE TECH., Aug. 18, 1997, at 41 available in 1997 WL 8282232 (quoting ICAO Council president Assad Kotaite as previously stating his goal that ICAO "become the worldwide authority of safety and security standards for international civil aviation.").

71. Upon its inception in 1995, the ICAO safety assessment program was expected to cover a broad range of technical standards, "includ[ing] record keeping practices, safety policies and compliance with airworthiness directives." Hughes, *supra* note 67, at 47. But nearly two years later, the project, known as the Safety Oversight Program, remained "restricted to three areas of ICAO annexes: licensing of pilots, aircraft technical operations and airworthiness" and the notion that "audits be expanded to embrace air traffic services and airport infrastructures, facilities and services" has only just been suggested. Ott, *supra* note 70, at 41.

72. Reprisals, in this context, mean "retaliatory acts that by themselves are contrary to international obligations of a country but are reciprocating illegal acts of another party." ZYLICZ, *supra* note 48, at 43.

73. See generally Bert W. Rein, DOT'S CONTINUING REGULATORY OVERSIGHT OF THE AIRLINE INDUSTRY, at 7, 7 (PLI, Comm. L. & Practice Course Handbook Series No. 425, 1987).

74. Transfer, Removal, and Reissuance of Regulations to Transportation Department, 50 Fed. Reg. 451 (1985).

75. See NAVEAU, *supra* note 12, at 82-83.

sals were implemented by the United States, not merely for trade reasons, but as an exercise of anti-Soviet foreign policy.⁷⁶

When analyzed, it becomes clear that the American imposition of air sanctions against Poland in the early 1980s was implemented "for reasons completely unrelated to the aviation relationship between the two countries."⁷⁷ In 1981, with the Jaruzelski government in Warsaw issuing martial law in order to crack down on a fledgling labor movement and the neighboring Soviets threatening military intervention, President Reagan first expressed an intention to suspend aviation ties with Poland in December of that year.⁷⁸ Not long thereafter, it was the *President*, not the CAB (which was only informed of the action by the State Department, rather than the White House) who ordered the immediate suspension of operating rights for the Polish airline LOT in the United States.⁷⁹ The ultimate re-establishment of a U.S.-Polish aviation relationship was facilitated not through either litigation or arbitration pursuant to a pre-existing accord⁸⁰ but, in fact, was conditioned by the Poles' willingness to forfeit these very types of procedural options which had been under consideration by their government.⁸¹

Air sanctioning by the United States was used as a weapon directly against the Soviet Union as well. Subsequent to the Soviet invasion of Afghanistan in 1979, the United States began to crack down on incoming and outgoing Aeroflot flights, though in much more incremental fashion than in the Poland

76. One commentator observes that the United States imposed aviation sanctions on the Soviet Union for conduct unrelated to aviation, and in so doing, "use[d] the aviation sector as the arrow for the bow." Gary E. Davidson, *United States' Use of Economic Sanctions, Treaty Bending, and Treaty Breaking in International Aviation*, 59 J. AIR L. & COM. 291, 340 (1993).

77. *Id.* at 304. The United States and Poland had concluded a bilateral agreement governing civil aviation in 1972. Air Transport Agreement, July 19, 1972, U.S.-Pol., 23 U.S.T. 4271 [hereinafter U.S.-Poland Air Transport Agreement].

78. *Transcript of Reagan's Remarks on Suspension of Some Ties with Poland*, N.Y. TIMES, Dec. 24, 1981, at A10.

79. Suspension of LOT flights actually took effect December 31, 1981, eight days after Reagan's speech evincing this intent. *U.S. Ban on Aeroflot Formally Takes Effect*, N.Y. TIMES, Jan. 6, 1982, at A7 [hereinafter *Ban on Aeroflot*].

80. U.S.-Poland Air Transport Agreement, *supra* note 77, art. 13, 23 U.S.T. 4271, 4276.

81. See Davidson, *supra* note 76, at 307.

case.⁸² First, weekly round-trips operated by the Soviet carrier in and out of New York and Washington were cut by one-third.⁸³ Secondly, the United States allowed the original 1966 bilateral treaty on aviation with the Soviet Union⁸⁴ to lapse, and despite CAB's assumption that further negotiations would occur, none ever did.⁸⁵ All U.S. bound flights were banned by the CAB, under Presidential edict, in January 1982.⁸⁶ The chokehold became even tighter after a Korean civilian airliner was shot down over Russian airspace in 1983 by Soviet air forces.⁸⁷ This caused the Reagan CAB to suspend Aeroflot's right to vend air services in the United States, to preclude carriage of traffic by American carriers where Aeroflot was on the itinerary, and to prohibit such carriers from accepting Aeroflot tickets or shipping documents.⁸⁸

The profile of U.S. international civil aviation safety regulation at the dawn of the 1990s was somewhat low-key, but nonetheless bore implications for its Five Freedoms ideology. Although there was assuredly some sanction-making on the part of the CAB and the early FAA against foreign countries which could not have been considered to present safety problems, such actions were taken on a nation-by-nation basis when applied to the bilateral accords the United States had struck with a target country. But the CAB, certainly, was a ready resource for more politically "sexy" conflicts and would

82. See *id.* at 297.

83. See *id.*; Bernard Gwertzman, *U.S. Warns of New Responses to Soviet Over Afghanistan as Moscow Defends Its Role*, N.Y. TIMES, Jan. 6, 1980, at A1.

84. Civil Air Transport Agreement, Nov. 4, 1966, U.S.-U.S.S.R., 17 U.S.T. 1909.

85. See Davidson, *supra* note 76, at 298.

86. See *Ban on Aeroflot*, *supra* note 79.

87. See Robert D. McFadden, *U.S. Says Soviet Downed Korean Airliner; 269 Lost; Reagan Denounces 'Wanton' Act*, N.Y. TIMES, Sept. 2, 1983, at A1.

88. See *Text of Reagan's Letter to C.A.B. Chairman*, N.Y. TIMES, Sept. 9, 1983, at A10. Aeroflot did not reintroduce service into the United States until 1986. See Davidson, *supra* note 76, at 300. It is somewhat ironic that despite the no-nonsense foreign policy of the Reagan Administration in the wake of the downing of Korean Air Lines Flight KE 007, a unanimous Supreme Court, in an opinion by Justice Scalia (a Reagan appointee), would later impose severe restrictions on the ability of wrongful death plaintiffs to recover compensatory damages pursuant to the Warsaw Convention. The Court applied municipal U.S. law. See *Zicherman v. Korean Air Lines*, 116 S. Ct. 629, 637 (1996) (concluding that "Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules.").

be utilized in circumstances where there was not even a question (or at least not a raised one) of bilateral violation, and, *ergo*, as a tool of U.S. Cold War foreign policy.⁸⁹

ICAO, for its part, was essentially an unchallenged leader in terms of international regulation, but a decidedly weak one.⁹⁰ Although it did continue to provide organizational linkage to a majority of regions around the world, it failed to supply the stimulus for the long-sought multilateral regime and could not be taken seriously as an enforcer of air safety, for precisely the reason that it could not enforce.

III. FROM THE FIVE FREEDOMS TO OPEN SKIES: THE U.S. CONTINUES TO CHAMPION LIBERAL AIR ROUTING UPON THE DEMISE OF THE COLD WAR

With the sudden collapse of the Soviet Union, and with it, the Cold War, it is hardly surprising that the United States now has further championed the Five Freedoms concept proposed at the Chicago Convention,⁹¹ at this point nearly half a century old.

The precise definition and origin of the phrase "Open Skies" is unclear. It has been interpreted by some to be an antonym of the principle of a state's national sovereignty over its own airspace, and therefore a subservient one under customary international law.⁹² In a more concrete sense, Open Skies has been characterized as representing a specific type of bilateral agreement which "at the minimum includes open entry on routes, unrestricted capacity and frequency on routes, and unrestricted traffic rights."⁹³ Whatever its precise definition, Open Skies has become practically a slogan for current U.S. routing policy—apparently a direct descendant of the

89. See, e.g., Davidson, *supra* note 76, at 297 (discussing role of CAB in curtailing Aeroflot services to the United States).

90. See Morrison, *supra* note 42, at 631 (noting that "[d]espite the ostensibly extensive range of topics covered by the ICAO's standards, in practice the standards have proved to be very generalized and basic.").

91. See Stockfish, *supra* note 5, at 603.

92. See ZYLICZ, *supra* note 48, at 58-59.

93. Daniel C. Hedlund, Note, *Toward Open Skies: Liberalizing Trade in International Airline Services*, 3 MINN. J. GLOBAL TRADE 259, 263 n.22 (1994); see also DEMPSEY, *supra* note 64, at 33 (characterizing the bilateral agreements negotiated between the United States and the Benelux nations during the late 1970s as "open skies.").

Chicago Convention's Five Freedoms. The inability of the United States to obtain liberal bilateral agreements was ended in 1992 when it entered into an agreement amending the 1957 accord with the Netherlands,⁹⁴ which set no limitations on routing.⁹⁵ The Clinton Administration followed suit by introducing a plan entitled "Initiative to Promote a Strong Competitive Aviation Industry" in early 1994.⁹⁶ That plan cited, as one of its objectives, the "pursu[it of] liberal multilateral agreements."⁹⁷ Federico Peña, Secretary of Transportation during President Clinton's first term, stated baldly in a 1995 Congressional hearing that "[o]ur ultimate goal is complete liberalization of the international aviation market."⁹⁸ Also that year, the DOT published the Model Bilateral Air Transport Agreement (hereinafter Open Skies Agreement),⁹⁹ which specifically identified thirteen Open Skies agreements concluded by the United States during the last two years alone, all of these with European nations, except for one concluded with Jordan.¹⁰⁰ The features of the Open Skies Agreement include market regulation of pricing, freedom of carriers to establish sales offices and unlimited personnel related to air service in a foreign country; and, according to each party, the right of overflight.¹⁰¹

94. Agreement Amending the Agreement of April 3, 1957, as Amended and the Protocol of March 31, 1978, as Amended, Oct. 14, 1992, U.S.-Neth., T.I.A.S. No. 11976.

95. *Id.* para. 3(1).

96. *Administration Unveils Sweeping Aviation Initiatives*, INSIDE D.O.T. & TRANSP. WK., Jan. 7, 1994, available in 1994 WL 2696611. See also U.S. DEP'T OF TRANSP., NEWS RELEASE, PENA, TYSON UNVEIL ADMINISTRATION AVIATION INITIATIVE, Jan. 6, 1994, available in 1994 WL 3170 [hereinafter PENA, TYSON UNVEIL].

97. See PENA, TYSON UNVEIL, *supra* note 96.

98. *International Aviation Policy: Hearing Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transportation*, 104th Cong. 14 (1995) [hereinafter *Hearings*] (statement of Federico Peña, Secretary of Transportation).

99. U.S. DEP'T OF TRANSP., UNITED STATES: MODEL BILATERAL AIR TRANSPORT AGREEMENT (1995), reprinted in 35 I.L.M. 1479 (1996) [hereinafter OPEN SKIES AGREEMENT].

100. Commentary to the OPEN SKIES AGREEMENT identifies the following countries as having signed Open Skies treaties with the United States between 1992 and 1995: Austria, Belgium, Czech Republic, Denmark, Finland, Germany, Iceland, Jordan, Luxembourg, the Netherlands, Norway, Sweden, and Switzerland. See *id.* at 1479.

101. A good overview of the Open Skies agreement can be obtained by examining its Content Summary as printed in the International Legal Materials. This

This policy initiative commanded much bipartisan support in the United States; the Open Skies concept was welcomed not only by the White House, but also by the Republican dominated 104th Congress.¹⁰² Even with the election resulting in an executive and a legislature of different political parties in 1996,¹⁰³ (notwithstanding the appointment of a new Transportation Secretary),¹⁰⁴ the U.S. course in international civil aviation shows no signs of change.¹⁰⁵

Nevertheless, Open Skies in international civil aviation cannot yet be considered conceptually dominant. The evidence on this point cannot be made more bare than by the limited application of international air services to the GATS. While the GATS does contain an Annex on Air Transport Services,¹⁰⁶ its application is restricted to computer reservations systems, selling/marketing of air transport services, and aircraft maintenance.¹⁰⁷

One likely reason why negotiators to the World Trade Organization—and, ultimately, the GATS—were forced to scuttle comprehensive treatment of civil aviation within the GATS,¹⁰⁸ was the failure of the United States and the EU to come to terms on a dispute involving subsidies.¹⁰⁹ Whereas the United States insisted on the inclusion of language reflecting its longstanding reluctance to government intervention in domestic aviation industries, the Europeans wanted such an option preserved.¹¹⁰ An important recent illustration of the ongoing impasse is the recent merger of the U.S. aircraft manufacturers Boeing and McDonnell Douglas, who were prime

Content Summary is reproduced in an appendix to this Note at p. 993.

102. See *Hearings*, *supra* note 98, at 1 (statement of Sen. McCain). See also 142 CONG. REC. S5376-77 (daily ed. May 20, 1996) (statement of Sen. Lott).

103. See, e.g., Dan Balz, *Clinton Wins by Wide Margin; GOP Holding Edge in Congress; President Beats Dole 2-1 in Electoral Tally*, WASH. POST, Nov. 6, 1996, at A01.

104. See, e.g., David Stout, *Senate Easily Confirms Slater as Transportation Secretary*, N.Y. TIMES, Feb. 7, 1997, at A3.

105. See Christopher Fotos, *The Long and Winding Road to Open Skies*, AV. DAILY, Jan. 6, 1997, at 23.

106. See GATS Annex on Air Transport Services.

107. *Id.* para. 3(a)-(c).

108. See U.S., *Europe Set Aside Aviation Dispute to Speed Uruguay Round*, AV. DAILY, Dec. 14, 1993, at 398.

109. *Id.*

110. See James Mathews, *1994 Outlook After Uruguay Round, Bilateral Negotiators Seek New Basis for Trust*, AV. DAILY, Jan. 4, 1994, at 13.

competitors of the leading European manufacturer, Airbus Industrie.¹¹¹ Eleventh-hour negotiations had to be completed before the European Commission backed off from formally rejecting the joinder.¹¹²

The standoff in the GATS drafting negotiations only reinforces the important point that Open Skies, however noble a theory, remains far from omnipresent.¹¹³ The subsidy stalemate raised real concerns not only of the possibility of reaching closure in the area of international aviation trade, but about the workability of the General Agreement on Tariffs and Trade¹¹⁴ (GATT) if such a vital industry as civil aviation were exempted from its provisions.¹¹⁵

The subsidy issue, however unrelated to the subject of access addressed here, nonetheless reveals a cold, hard fact to Open Skies proponents: obstacles to this ideal have yet to be overcome.¹¹⁶ And the counsel of one recent commentator is clearly on point in addressing the status of Open Skies internationally; the omission of the Five Freedoms, coupled with a general freedom to sell services, "creates a dichotomy that must be resolved."¹¹⁷ Since the GATS Annex on Air Transportation Services does explicitly provide for the freedom to vend

111. See John D. Morrocco, *Boeing, EU Resolve Dispute Over Merger Airbus Restructuring to Improve Competitiveness Looms Larger as it Squares Off Against New U.S. Heavyweight*, AV. WK. & SPACE TECH., July 28, 1997, at 22, available in 1997 WL 8281969. The EU expressed deep concerns that a merged Boeing would parlay McDonnell Douglas' longstanding ties to U.S. defense projects. Boeing, in response, agreed to license patents obtained via government contracts to commercial manufacturers on a "nonexclusive, royalty-only basis." Boeing further withdrew its status as "exclusive supplier" to U.S. carriers American, Delta and Continental airlines. *Id.*

112. See *id.*

113. As far back as the Carter administration, there is evidence of European opposition to Open Skies. CAB Chairman Alfred Kahn's response to this opposition was "let's stick it to the Brits—let's put pressure on the Germans through Amsterdam." DEMPSEY, *supra* note 64, at 33.

114. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

115. See Shane Spradlin, Comment, *The Aircraft Subsidies Dispute in the GATT's Uruguay Round*, 60 J. AIR L. & COM. 1191, 1216-17 (1995).

116. See Abeyratne, *supra* note 10, at 836 (observing that "[s]ince GATS cannot sustain air transport services within a bilateral framework, it now remains to be seen whether the aviation community will move toward placing air traffic rights in a multilateral or plurilateral system.").

117. *Id.* at 835.

air services,¹¹⁸ the civil aviation portion therein begs the question of how much regulation, if any, should be placed upon the freedom of those services to operate internationally; an issue already addressed by the Chicago Convention.¹¹⁹

IV. ICAO STANDARDS AND U.S. ENFORCEMENT: THE FAA AS AVIATION POLICEMAN

The direction of internationalization of civil aviation standards was altered sharply in 1992 with the FAA's creation of the Foreign Aviation Safety Assessment Program (FASAP).¹²⁰ The FAA was authorized therein to conduct safety assessments of foreign countries carriers through inspection, with a tripartite mechanism subsequently put in place to evaluate compliance: Category I (acceptable; the target country's carrier(s) is/are allowed access to the United States); Category II (conditional; the target country's carrier(s) is/are subject to sanctions); and Category III (unacceptable; access is denied).¹²¹ A more confusing aspect of FASAP was that for the first two years of its application, lists of countries not in compliance were not published on a regular basis.¹²² But, of even more import was the fact that under the new FASAP regime assessments of target countries would be grounded not on U.S. safety standards, but on those of ICAO.¹²³

From the emergence of FASAP, and the gleaning of ICAO standards onto its procedures, the implication is clear: the

118. See GATS Annex on Air Transport Services.

119. See Abeyratne, *supra* note 10, at 835.

120. See Morrison, *supra* note 42, at 621. See also Information Concerning FAA Procedures for Examining and Monitoring Foreign Air Carriers, 57 Fed. Reg. 38,342 (1992).

121. See Public Disclosure of the Results of Foreign Civil Aviation Authority Assessments, 59 Fed. Reg. 46,332-33 (1994).

122. The first regular publication of a list of FASAP violators by the DOT emerged during the late summer of 1994. See U.S. DEP'T OF TRANSP., NEWS RELEASE, DOT ANNOUNCES ASSESSMENT OF FOREIGN COMPLIANCE WITH INTERNATIONAL SAFETY STANDARDS, available in 1994 WL 474689. Prior to that time, notice was given indirectly, through the General Accounting Office. See, e.g., Glenn Kessler, *FAA Safety Checks Found Lax, GAO Cites Poor Oversight of Foreign Airlines*, NEWSDAY, Dec. 23, 1992, at 7.

123. See Morrison, *supra* note 42, at 636. In a rare nod to ICAO, the United States has not exercised its option to differ with the Montreal organization on safety standards, though had it done so, it would have been required to notify ICAO of the discrepancy and "provide full information on the differences and explanation of its reasons" NAVEAU, *supra* note 12, at 55.

United States is today seeking to exert itself as the world's policeman in civil aviation safety. Though it is true that Category II (conditional) or Category III (unacceptable) status and their attendant penalties attach only to U.S. airspace,¹²⁴ no other country has taken regulation of a foreign carrier's access—in terms of safety—to such an extreme.¹²⁵ Another clear implication of the change from prior international civil aviation policy being conducted by the United States is that the country is no longer conducting such policy on an extrinsic treaty-bound basis.¹²⁶ Put another way, the inevitable legal thrust of a negative FASAP finding is that the United States is emphasizing treaty language which subjects foreign carriers to U.S. laws; and not a “new law” being created in a bilateral textual setting.¹²⁷ In essence, the emergence of FASAP shows that the United States today has an inclination toward enjoying the fruits of its own victory—determined to keep ICAO weak in the area of enforcement, FASAP has become roughly its operational equivalent without changing its benchmarks one bit. But this “success” may prove to be short-lived. The traditional nemesis of the United States in civil aviation, the

124. See Morrison, *supra* note 42, at 635-36. A proponent of the FASAP model nonetheless concedes that for its ultimate goal—the universalization of ICAO standards—to be truly effectuated, “the international community must join the United States in developing and implementing programs similar to FASAP.” *Id.* at 654-55.

125. See *id.* at 644 (contending that “[t]he United States should not be alone in enforcing standards that are obligations of more than 180 countries.”).

126. See Davidson, *supra* note 76, at 353 (pointing out that “[t]he United States undermines the primacy of international law and the underlying purposes of aviation bilateral agreements when it acts in contravention of those agreements in the absence of substantial legal cause.”). See also Morrison, *supra* note 42, at 635 (arguing that “[i]n lieu of the bilateral agreement, some enforcement mechanism is needed to ensure compliance with ICAO standards in those countries lacking any effective civil aviation authority.”).

127. There is, however, a clear legal basis for the validity of FASAP under Article 6 of the Chicago Convention which provides that “[n]o scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.” Chicago Convention, *supra* note 2, art. 6, 61 Stat. 1180, 1182, 15 U.N.T.S. 295, 300. Nonetheless, it would be proper for observers of civil aviation law to approach the question of whether a FASAP-affected party might withdraw from a pre-1992 bilateral with the United States by characterizing the implementation of FASAP as a “fundamental change of circumstances . . . the effect of [which] is radically to transform the extent of obligations still to be performed under the treaty.” See Vienna Convention on the Law of Treaties, *done* May 23, 1969, art. 62(1)(b), 1155 U.N.T.S. 331, 347 (entered into force Jan. 27, 1980).

EU, is launching its own inspection program.¹²⁸

While the importance of placing an emphasis on air safety cannot be denied and should not be overlooked, the effective transfer, at least in terms of enforcement, of world air safety policing from ICAO to the FAA presents political problems. As can be seen from two examples, there can at least be questions asked as to whether, given the foreign policy history governing the Polish and Soviet experience, the United States is conducting FASAP assessments and rendering conclusions therefrom in a manner consistent with the detached vision of ICAO contemplated at Chicago, or merely as an ongoing extension of its foreign policy interests.

A principal controversy surrounding negative FASAP assessments is that they are geographically concentrated in specific areas of the globe. In Latin America and the Caribbean alone, seventeen countries are classified as either Category II or III.¹²⁹ The problem with such concentration may well not be substantive, but with such authority being exerted by the world's pre-eminent superpower nation-state, it could well be one of appearance. While poor economic conditions and unsophisticated technical infrastructure in these regions of the world can undoubtedly increase the probability of an adverse FASAP finding,¹³⁰ the FAA is nevertheless vulnerable to, and has indeed been attacked on, the charge that its assessments are, at least in part, politically motivated.¹³¹ And, unlike the

128. In a plan presented to the representative transport ministers at Luxembourg on June 17, 1996, it was proposed that the European Commission (EC) would "work with the European Civil Aviation Conference and the Joint Aviation Authorities to define a comprehensive 'safety assessment procedure.'" *EC Advocates Improvements in Safety Information Sharing*, AV. EUR., June 20, 1996, at 2, available in 1996 WL 10773246. This new oversight proposal is part of the EC's larger scheme to unify its Joint Aviation Authorities (JAA) into a unified, FAA-style agency. See Michael A. Taverna, *Europe Pushes Broader Oversight Role for JAA*, AV. WK. & SPACE TECH., Aug. 18, 1997, at 44, available in 1997 WL 8282231. The envisioned safety regulator, now styled as the European Aviation Safety Authority (EASA), came one step closer to birth last June upon approval by the European Council of Ministers. See *id.*

129. See Stephen Fidler, *Air Travel Safety Gap Widens in Latin America*, FIN. POST, May 8, 1996, at 50.

130. See *id.* (finding that "there is strong evidence that even countries in the FAA's top category have air traffic control and monitoring systems that are out of date, inadequate rescue services, non-existent airport security and sometimes air traffic controllers with only rudimentary command of the English language.").

131. The 1994 FAA ratings caused an uproar with Latin American governments. Notably both Russia and China were not on the list, while Israel and Jor-

Cold War activities discussed above,¹³² where the CAB acted as a mere puppet of the Reagan Administration, the FAA has been given a freer hand in shaping presidential directives involving the use of economic sanctions.¹³³ A sharper focus of the political motivation issue lies in recent aviation disputes between the United States and both Colombia and Venezuela.

In August 1996, the Colombian government backed down from its initial threats to thwart American Airlines from reinstituting service between New York, Miami and Bogota, and thus enter into a full-scale dispute over the terms of the two countries' Civil Aviation Agreement.¹³⁴ But while American Airlines was allowed to resume operations, Colombia's carriers were barred from being able to reciprocate, based on that country's Category II rating.¹³⁵ At least one observer has pointed out the possible connection between the American Airlines access dispute and broader overtones lying at the heart of recent tensions between the two countries on the subject of narcotics trafficking.¹³⁶

At just about the time a "full-scale" tussle between the United States and Colombia was being averted, Venezuela was dropped from Category II to Category III, based upon the FAA's conclusion that it had failed to "fix" the deficiencies

dan were rapidly upgraded from Category II. *See id.*

132. *See discussion supra* Part II.

133. A good example is found in the matter of Yugoslavia, where civil war erupted during the Bush Administration. Following the announcement by the president of economic sanctions against the disintegrating Balkan nation, the DOT determined independently that a total prohibition of air service between the two countries was warranted. *DOT Order Published Shutting Off U.S. Air Commerce with Yugoslavia*, AIR SAFETY WK., June 15, 1992, available in 1992 WL 2252364.

134. Air Transport Agreement, Oct. 24, 1956, U.S.-Col., 14 U.S.T. 429. The crux of the dispute is based upon Colombia's insistence that American Airlines could not automatically re-start a run that had been discontinued three years earlier without submitting to public hearings pursuant to Colombian law. The DOT, which backed American Airlines, contended that the 1956 accord contemplated no such requirement. *See id.*; Dan Reed, *Air Route Sanctions Threatened, Colombia Prohibits American Airlines Flight*, FT. WORTH STAR-TELEGRAM, July 6, 1996 (Business), at 1, available in 1996 WL 5549503.

135. U.S. DEPT OF TRANSPORTATION, NEWS RELEASE, COLOMBIA AND UNITED STATES CONCLUDE AVIATION TALKS, Aug. 23, 1996, available in 1996 WL 479574.

136. *See* Diana Jean Schemo, *To Punish Colombia, U.S. May Revoke Air Route*, N.Y. TIMES, Aug. 4, 1996, § 1, at 4 (noting that the owner of Avianca, Colombia's national carrier, was a strong supporter of Colombian president Ernesto Samper, who was suspected by the Clinton Administration of accepting \$6 million from drug lords to finance his 1994 election campaign).

which caused the conditional reclassification to the intermediate category nine months earlier.¹³⁷ Here again, an uncomfortable political background exists due to Venezuela's connection, though more indirect, with regional druglords.¹³⁸

A temporary agreement postponing implementation of the Category III finding was signed by Venezuela and the United States on August 10, 1996,¹³⁹ and the following month Transportation Secretary Pena announced (citing "significant" progress by Venezuela in air safety), that air service between the two countries could be continued subject to Venezuela's continued Category II status.¹⁴⁰ Only a month prior to the onset of the U.S.-Venezuela civil aviation dispute and simultaneous with the American Airlines routing tension, a national anti-drug commissioner in Venezuela was quoted as conceding that one region of his country was a "drug traffickers' paradise,"¹⁴¹ and an arrest of four drug traffickers in Venezuela in late July, 1996, revealed a Venezuelan region as a link on a route funneling Colombian drugs abroad.¹⁴²

Thus, two practical problems exist for U.S. civil aviation policy today: How can the United States proceed to encourage a multilateral, or liberal bilateral, Open Skies regime, while at the same time acting as the world's *de facto* aviation safety policeman? And can its legitimacy in performing the latter role—tenuous as it appears to be in some parts of the world—be preserved in case of the emergence of drastic regional conflict? It is contended here that for the present time, the FAA carries "excess baggage," and that GATS should be revis-

137. *Safety Dispute Interrupts Air Service Between U.S. and Venezuela*, AV. DAILY, Aug. 9, 1996, at 227.

138. See, e.g., *Venezuela: Police Await Extradition of Drug Boss From Colombia*, INTER PRESS SERVICE, June 13, 1995, available in 1995 WL 2261720.

139. See *U.S., Venezuela Reach 30-day Agreement*, AIR SAFETY WK., Aug. 19, 1996, available in 1996 WL 6948417. Among other provisions, the 30-day agreement required Venezuela to "provide 100 percent safety oversight of all Venezuelan aircraft flying to the U.S. [and to] develop a plan to meet the highest safety standards under the FAA's assessment program" *Id.*

140. U.S. DEP'T OF TRANSP., NEWS RELEASE, VENEZUELA MAKES PROGRESS ON AIR SAFETY; ITS AIRLINES MAY CONTINUE U.S. OPERATIONS, Sept. 24, 1996, available in 1996 WL 538240.

141. John Wade, *Drug Runners Find El Dorado in Orinoco Delta*, GUARDIAN, July 5, 1996, at 17 (quoting Johan Obdola, director of the regional office of Venezuela's national anti-drug commission).

142. See *FOUR ARRESTED IN VENEZUELAN DRUG BUST*, AGENCE FRANCE-PRESSE, July 29, 1996, available in 1996 WL 3897131.

ited somehow (acknowledging the subsidy difficulty) to take a more inclusive view of both Open Skies and aviation safety.

CONCLUSION

The most casual observer of the academic literature will note an overwhelming emergence of commentary arguing that the vision of Open Skies can be realized only with the collapse of the "outdated and ill-equipped" bilateral regime in international civil aviation.¹⁴³ This scholarly trend is completely understandable, for although there remain conceptual benefits to the idea of bilateralism, particularly the better forum for the achievement of compromise,¹⁴⁴ the anomaly created by the GATS—i.e., the inclusion of freedom of marketing services without the freedom to route them, demands some type of multilateral response. But for the reasons shown here, it is virtually impossible to imagine bilateralism dying a quiet death when: (1) at least in the area of safety, the rest of the world implicitly operates at the pleasure, not of ICAO, but of a signatory to the Chicago Convention, its "birth certificate," and (2) the emergence of a powerful transnational unit such as the European Unit renders the probability that any future dealings between the United States and the Europeans will, though logically multilateral in impact, work legally in a bilateral fashion.¹⁴⁵

In the area of safety, the debate is a bit more robust. Some commentators are quick to highlight the risk of political abuse inherent in FASAP procedures;¹⁴⁶ others not only defend

143. Ellett, *supra* note 30, at 8; see also Hedlund, *supra* note 93, at 296; Howard E. Kass, Note, *Cabotage and Control: Bringing 1938 U.S. Aviation Policy into the Jet Age*, 26 CASE W. RES. J. INT'L. L. 143, 180 (1994) (advocating the use of "plurilateral" agreements in international civil aviation, which are agreements officially ratified by two contracting states but which others can agree to follow).

144. ZYLICZ, *supra* note 48, at 142.

145. One of the major hurdles which the United States and the European Community failed to clear in resolving the Uruguay Round subsidy impasse was to build upon an agreement signed between the two parties in 1992. See Spradlin, *supra* note 115, at 1208-12 (citing Agreement Concerning the Application of the GATT Agreement on Trade in Civil Aircraft on Trade in Large Civil Aircraft, July 17, 1992, U.S.-E.C. (on file with the Office of the United States Trade Representative, available in 1992 WL 466106)).

146. See Irene E. Howie, *The New Aviation Agenda: Spotlight on Safety Panel*, AIR & SPACE LAW., Spring 1995, at 16, 16 (reporting on a panel of experts brought together to debate and discuss issues of aviation safety). See also Theo-

FASAP, but also cite terrorism as a justification for the continued exertion of U.S. administrative and even military muscle in regulating safety.¹⁴⁷ What is utterly astonishing, however, is that the "free traders"¹⁴⁸ and "safety firsters"¹⁴⁹ are talking to themselves, not one another. It is here where alternate proposals are raised to achieve the mutually desirable goals of Open Skies and enhanced safety.

The first alternative is to give ICAO organizational "teeth." Although ICAO does retain great support from many globalists in civil aviation,¹⁵⁰ proposals advanced in the literature to "impose" ICAO on the world community are both naive and impractical. One such proposal is to merge GATT's dispute resolution framework with ICAO's structure.¹⁵¹ Flying in the face of this notion, however, are contrasting realities. On the one hand, there is the GATS vision, wherein panelists are to serve in an individual capacity, and not in the service of governments.¹⁵² This vision, however, runs directly counter to the starkly political composition of ICAO. As a United Nations unit, only states, not organizational entities, are allowed representation in ICAO's Assembly under the Chicago Convention.¹⁵³ Only states, therefore, are eligible to elect members of ICAO Council, the unit's executive body.¹⁵⁴ Nev-

dore Edward Rokita, Comment, *Why U.S.-Enforced International Flight Suspension Due to Deficient Foreign Airport Security Should Be a No-Go*, 5 IND. INT'L & COMP. L. REV. 205, 232 (1994) (criticizing DOT suspension of U.S.-Nigeria flights under the Foreign Airport Security Act of 1958 as "grant[ing] a vague authority to the DOT Secretary that enables he or she to act without accurately gauging the public interest.").

147. See, e.g., Shirleyce Manning, Comment, *The United States' Response to International Air Safety*, 61 J. AIR L. & COM. 505, 537-38 (1995).

148. As used here, the term "free traders" refers to authors and commentators in the field of civil aviation law who advocate overhauling either protectionist hindrances to the Open Skies framework or the longstanding bilateral norm in international civil aviation agreements. See discussion *supra* Part III.

149. As used here, the term "safety firsters" refers to authors and commentators in the field of civil aviation law who advocate the U.S. lead in bargaining routing rights of foreign carriers in exchange for bringing their national civil aviation infrastructure up to ICAO standards as monitored by the FAA through FASAP. See discussion *supra* Part IV.

150. See, e.g., NAVEAU, *supra* note 12, at 57.

151. See Canetti, *supra* note 61, at 515-22.

152. *Id.* at 519.

153. See Chicago Convention, *supra* note 2, art. 48(b), 61 Stat. 1180, 1194, 15 U.N.T.S. 295, 328.

154. *Id.* art. 50, 61 Stat. 1180, 1195, 15 U.N.T.S. 295, 330. A critical oversight in the remedy proposed by Canetti, is the hypothesis that the principle of majority

ertheless, the attractiveness of a revitalized ICAO cannot be denied, especially when considering the universal adherence to its safety edicts, there would be no need to revisit the standards question. These are respected—legally, if not functionally—worldwide,¹⁵⁵ and even critics of the U.S. FASAP model speak only to the procedure, not the benchmark.¹⁵⁶ A better way of reforming ICAO is to “depoliticize” it through amending its membership requirements to cover not simply signatory nation-states, but representatives of the airline and aerospace manufacturing industries, as well as consumer advocates. This broader patchwork of membership would allow ICAO to appear less menacing to reluctant states, even the United States, who would doubtlessly welcome private sector representation alongside administrators, while at the same time gratifying the Europeans and Third World community, who are anxious to see an entity other than the United States dominate international civil aviation. This “partnership” model is, moreover, illustrative of what is really the only way to get past the purported bilateral “menace”—to give the subject matter greater focus and the bargaining parties less, particularly in an area such as civil aviation where the scope of the industry is enormous but the number of central players in the community of nations to the field is few. In addition, by allowing ICAO to speak with the voice not simply of governments, but of industry leaders, it could much better deal with its longstanding resource problem, particularly in ensuring compliance with safety standards. A step in this direction would be to reorganize ICAO by, in part, merging it with the International Air Transport Association (IATA).

Founded in 1945, IATA is an international organization composed of airlines certified to operate scheduled routes with-

rule embodied in ICAO Council would immunize it from being paralyzed by virtual veto powers. Canetti, *supra* note 61, at 518-19. In fact, a reverse problem analogous to a corporate notion—“tyranny of the majority”—could well obtain. Conceivably the world’s preeminent aviation powers (the United States, Japan and the EU countries) outvoted by coalitions of Third World Chicago Convention signatories, particularly on safety issues where their suspicions of politically-motivated judgments have already become apparent. See Fidler, *supra* note 129, at 50.

155. See ZYLICZ, *supra* note 48, at 84 (observing that the “system of international standards and recommended practices, based on an increasing number of Annexes to the [Chicago] Convention . . . has been very successful in ensuring a steadily higher degree of uniformity of national regulations and practices.”).

156. See Howie, *supra* note 146, at 16.

in nations which are members of ICAO.¹⁵⁷ Its most influential function is its role in fare-setting, a role assigned to it as a consequence of Bermuda I.¹⁵⁸ But even merging the IATA with ICAO would leave important actors in the civil aviation framework without a voice. These include domestic aviation regulators, airport officers, and agents representing civil aviation personnel. This perhaps radical vision of ICAO, simply does not square with the Chicago Convention. While ICAO's Council is within its power, under Article 49(j), to make such a change,¹⁵⁹ it is unlikely to commit this form of structural self-mutilation. A clear reminder of this point is provided by one commentator in referring to ICAO's longstanding weakness as a dispute resolution unit: "it is a political body comprised of governmental representatives appointed for their technical, administrative or diplomatic skills rather than their legal abilities. Hence, they do not possess that measure of independence and autonomy of an unbiased neutral decision maker that one normally expects of a judge."¹⁶⁰ Realistically, therefore, the sort of medicine proposed here is probably too drastic for the parties involved.

A second alternative makes better common sense: reworking GATS through either forcing the United States and EU to return to the bargaining table to work out the subsidy stalemate or at least by getting them to agree to shelve subsidy from the GATS treatment without sacrificing the whole scope of civil aviation to bring Open Skies into line with other service sales. The experience of the GATS, as currently read, may well make academic calls for this revisit simply that. Consider, for example, a Category III country carrier under FASAP claiming the right to sell tickets within the United States which is then sued by a U.S. carrier which flies to that country. This, of course, could finally break the bilateral barrier and make proposals for multilateralism suddenly meaningful. Indeed, forcing civil aviation treatment into the GATS whole-

157. See DEMPSEY, *supra* note 64, at 13.

158. Bermuda I, *supra* note 24, Annex, § II(b). Note that the United States, consistent with its reluctance to cede regulatory controls of any sort to transnational authority, was originally opposed to this provision. See DEMPSEY, *supra* note 64, at 14.

159. Chicago Convention, *supra* note 2, art. 49(j), 61 Stat. 1180, 1194, 15 U.N.T.S. 295, 330.

160. DEMPSEY, *supra* note 64, at 300 (citation omitted).

sale may ultimately come, not in spite of the stubbornness of the United States and EU on subsidy, but because of it. Civil aviation's absence from the most comprehensive free trade compact in history will have at least as much impact on the GATS as it will the health of the industry.¹⁶¹ Skeptics who would contend that neither the United States nor the Europeans will ever budge on this issue need only be reminded of the regime of carrier liability inaugurated by the Warsaw Convention,¹⁶² which "balance[d] the interests of the passenger and the air carrier" by limiting carriers' presumed liability with a fixed ceiling on the amount of such obligations.¹⁶³ Under an Intercarrier Agreement addressing passenger liability, adopted in October, 1995 by representatives of the six regions of IATA,¹⁶⁴ a major breakthrough was accomplished by dropping the damage ceiling while restricting the ability of injured plaintiffs to "forum shop" in the absence of such limits.¹⁶⁵

But this integration must not be the sole remedy. Safety remains a concern—and while safety is grounds for a member nation's exercise of veto power under the GATS,¹⁶⁶—the matter of standards remains solely in ICAO's hands. Allowing the GATS to absorb ICAO standards, as the FAA did in creating FASAP, would be an efficient and probably non-controversial means of truly integrating safety with Open Skies.

In conclusion, the United States can be the world's civil aviation free trade advocate, but it cannot be the world's legitimate air safety policeman simultaneously. Proponents of Open Skies and advocates of enhanced safety must get together to improve on a current global condition which leaves one nation state in charge of meaningful safety enforcement and a splintered trade regime which hampers multilateralism through selective GATS treatment. Through either giving ICAO "teeth" by undertaking a complete upheaval of its structure (and therefore, necessarily, of the Chicago Convention) to make it

161. See Spradlin, *supra* note 115, at 1216-18.

162. International Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 137 L.N.T.S. 11.

163. Francis Lyall, Essay, *The Warsaw Convention—Cutting the Gordian Knot and the 1995 Intercarrier Agreement*, 22 SYRACUSE J. INT'L. L. & COM. 67, 70 (1996).

164. *Id.* at 67.

165. *Id.* at 77.

166. See GATS art. 14(c)(iii).

reflective more of aviation than of member governments, or preferably, by perfecting the GATS to make it speak to civil aviation more comprehensively, the United States can be relieved of the excess baggage which it now carries in regulating a dynamic global industry.

Shadrach A. Stanleigh

Appendix

The I.L.M. Content Summary to the Open Skies Agreement reads as follows:¹

[Preamble]

[To promote an international aviation system based upon competition among airlines with minimal government interference and regulation; to ensure safety and security in international aviation]

Article 1 Definitions

[Aeronautical authorities; Agreement; air transportation; Convention; designated airline; full cost; international air transportation; price; stop for non-traffic purposes; territory; user charge]

Article 2 Grant of Rights

[Each party grants every other party the right of overflight, the right to make stops for non-traffic purposes and other rights set forth below]

Article 3 Designation and Authorization

[The Parties may designate airlines to conduct international air transportation, indicating the type of transportation (see Annexes I & II); the other Party shall grant authorization if the airline and the Party satisfy certain prerequisites]

Article 4 Revocation of Authorization

[Grounds are set forth; to be exercised after consultation with the other Party unless immediate action is required]

1. Reproduced from 35 I.L.M. 1479, 1479-81 (1996) (footnotes omitted).

Article 5 Application of Laws
[The law of the territory where the aircraft is located shall apply]

Article 6 Safety
[Recognition of certificates of airworthiness, certificates of competency and licenses; the parties shall consult over safety concerns]

Article 7 Aviation Security
[Duty to provide assistance to prevent threats to the security of civil aviation; the parties shall consult over security concerns]

Article 8 Commercial Opportunities
[The right of each Party's airlines to establish sales offices in the other Parties' territories and to bring in staff required to provide air transportation; repatriation of profits; freedom to pay local expenses in freely convertible currencies; cooperative marketing arrangements are permitted]

Article 9 Customs Duties and Charges
[Exemptions, based on reciprocity; exceptions]

Article 10 User Charges
[Fair user charges may be imposed on a most-favored airline basis; the competent charging authorities of the parties shall consult and exchange information to permit review of the fairness of charges]

Article 11 Fair Competition

Article 12 Pricing
[Prices should be determined by the market; a party may intervene in certain, limited situations; notification of prices; the parties shall consult when issues arise]

Article 13 Intermodal Services

[Surface transportation arrangements shall be permitted]

Article 14 Consultations

[To be conducted no later than 60 days after a Party's request]

Article 15 Settlement of Disputes

[Disputes not resolved by consultations may be referred to another person or body for decision; failing such a referral agreement, the dispute shall be submitted to arbitration; composition of the arbitral tribunal; authority of the tribunal; procedures; recognition of the award]

Article 16 Termination

[By notification of a party to ICAO]

Article 17 Registration with ICAO

Article 18 Entry into Force

[Place and date done]

[Authentic texts]

[Signature block]

ANNEX I: Scheduled Transportation

Section 1: Routes

Section 2: Operational Flexibility

Section 3: Change of Gauge

ANNEX II: Charter Air Transportation

Section 1: [Right to Carry International Charter Traffic]

Section 2: [Applicable Charter Law, Regulations and Rules]

Section 3: [Submission of a Declaration of Conformity]

ANNEX III: Principles of Non-Discrimination Within and Competition among Computer Reservations Systems

