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Alliances, Immunity, and the Future of Aviation

By Warren L. Dean, Jr. and Jeffrey N. Shane



Seventeen years after the U.S. Department of Transportation (DOT) granted antitrust immunity (ATI) to an innovative KLM-Northwest joint venture, ATI has become one of the most controversial issues in current aviation law and policy. This article reviews the history of ATI and its statu-

tory foundation and attempts to place airline alliances in a more contemporary perspective. Criticism of the

alliance/ATI development appears to be predicated on a misunderstanding of both the role of alliances as an essential element in the liberalization of international air services and the importance of ATI as a factor in that success. The article suggests that the criticism of DOT's handling of alliances and ATI fails to understand the evolution of the international air transportation networks and puts at risk a major aviation policy success story. DOT's approach to international airline alliances and ATI, the article concludes, has been prescient and insightful, has benefited both the industry and its customers, and should not be disturbed.¹

In 1992, the United States and the Netherlands entered into the world's first Open Skies agreement,² predicated on a new DOT policy initiative.³ The agreement eliminated most of the regulatory constraints on entry, capacity, and pricing that had characterized bilateral air transport agreements since the first U.S.-U.K. Bermuda accord in 1946.⁴ The Carter administration had launched the quest for more liberal bilateral aviation arrangements in 1977. Fifteen years later, by eliminating all regulatory constraints on carriers' access to all gateway cities, the Open Skies model took liberalization to an entirely new level.

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Lessor, Financier, and Manufacturer Perspectives on the New Third-Party Liability Conventions

By Jeffrey Wool

In the previous edition of this publication, my learned colleagues Sean Gates and George Leloudas reviewed, from the perspective of the air transport and insurance industries, the proposed new third-party liability conventions adopted at the International Conference on Air Law in Montreal in April and May 2009.¹ This article provides a lessor, financier, and manufacturer perspective on the new conventions, primarily the Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft (the UIC). This anodyne abbreviation veils the actual subject matter of this convention: terrorism, and the unique legal challenges that pertain to terrorism. The article also assesses the Convention on Compensation for Damage Caused by Aircraft to Third Parties (covering general risks, thus referred to as "the GRC")—that is, damages from ordinary course operational incidents.

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Chair's Message

Greetings!

The *Air & Space Lawyer* is bringing you yet another outstanding issue, which Ken Quinn will describe in more detail in his Editor's Column. Ken and his team have consistently delivered a product that is comparable to the very best publications in its quality and the timeliness of its topics. We're sure you will agree that our journal is one of the finest benefits of your Forum membership.

Speaking of benefits, those of you who joined us in Chicago were treated to a spectacular conference, with a top-notch group of speakers giving us their perspectives on everything from airline alliances to orbital space debris to current labor issues to appellate advocacy. Keynoters John Luth from Seabury Group and Glenn Tilton from United Airlines provided great insights into the state of the industry from financial and operational perspectives.

Once again, we proved that that Forum is indeed the one-stop shop for cutting-edge issues in aviation and space law. The social event at the new Modern Wing of the Art Institute of Chicago presented an unparalleled networking opportunity before a breathtaking skyline, amidst gorgeous paintings, sculpture, and other objets d'art. The success of the conference was due in large part to the tireless efforts of the effervescent program chair Julie Ellis and our wonderful ABA staff liaison Dawn Holiday. Many thanks to them, the program committee, the moderators, panelists, and all attendees for your time and energies.

We hope that you will join us for one or both of the next two conferences. The annual Update Conference will be held at the Ritz-Carlton in Washington on January 27, 2010, and will have panels on new developments in legislation, aviation regulation, airline alliances, satellite navigation, and aircraft accident litigation. We are grateful to Nancy Sparks and Andy Steinberg for serving as co-chairs of this conference. For the annual fall conference we'll go to the West Coast and gather at the Fairmont Hotel in Seattle on September 30 and October 1, 2010. Bob Span has agreed to chair this conference, and we've already begun the planning process. Watch your e-mails and check our website at www.abanet.org/forums/airspace for more information as we get closer.

We've been asked by a number of people to provide ways to get more involved in the Forum, and we're open to ideas. At the Chicago conference, Roy Goldberg volunteered to dispatch news about current legal issues and opinions. Contribute to these updates by e-mailing Roy at rgoldberg@sheppardmullin.com. In addition, we have formed four committees that members are invited to join, depending on your interests. Julie Ellis chairs the Outreach Committee, which serves as the Forum's connection with law students, law schools, and young lawyers, including overseeing the scholarship program and establishing a mentoring program. Nancy LoBue chairs the Education Committee, which is charged with keeping our membership updated on pressing issues through webinars, brown bag lunches, e-mail blasts, etc. Franceska Schroeder chairs the Marketing Committee, which will seek liaisons with other like-minded organizations, both domestically and

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Editor's Column

As we approach the end of the decade and close out the “00s” it appears Congress is no closer to passing comprehensive FAA Reauthorization since the agency’s authorization expired two years ago. We were told Congress wanted to wait until the presidential election to put forward its comprehensive plan. It’s now been over a year since the election. Good grief.

Congress is often the first to criticize the FAA. Members rush to issue press releases taking officials to task for “misguided and flawed” environmental reviews, “inability to handle” NextGen, or having “too cozy” of a relationship with industry. Enough already. How about we call a moratorium on congressional criticism of the FAA until Congress does its job? Rather than heaping scorn on distinguished public servants on a near-daily basis, pass a long-overdue FAA reauthorization bill now. Put aside partisanship or personal pride, strip pet projects and highly controversial matters, and give the agency what it sorely needs: a reliable, long-term platform for agency programs.

In this political climate, with ongoing and divisive debates on more universal and media-friendly topics such as health care, climate change, and stimulus packages, FAA reauthorization ought to be an easy one to knock out. With a forecast of 1 billion passengers to be flown on U.S. commercial air carriers in 2015, we cannot continue to wait to fund and update a system that benefits and transports so many. This industry creates over 9 million jobs and contributes \$640 billion to the U.S. economy. If we’re truly serious about safety and jobs, then let’s have fewer press releases, investigations, and hearings, and a lot more focus on passing basic enabling legislation.

Speaking of continuing to improve our industry, we are delighted to begin this issue with an article entitled “Alliances, Immunity, and the Future of Aviation,” by past Forum chair (he has a few other “former” titles) Jeff Shane at Hogan and Warren Dean at Thompson Coburn. Both Jeff and Warren have spent a lifetime, in and out of government, working toward the advancement of international aviation policy. They are dear and longtime friends who possess keen minds, wicked pens, suave diplomatic skills, and twisted humor—all good.

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In the face of withering criticism from the Department of Justice and others regarding DOT grants of antitrust immunity to airline alliances, their article is a tour de force defense of DOT analyses and decision making in this area. Some argue that alliance benefits unquestionably work in favor of the alliance carriers, but question the effect on smaller competitors or consumers facing the combined market power of the alliance carriers. Jeff and Warren forcefully point to the market-opening and consumer-efficiency benefits of immunity grants, and argue that DOT should continue to possess the authority to grant immunity to alliances based on its unique understanding of the dynamic aviation industry. With DOT approval of the SkyTeam and Star alliance immunity requests, but EC investigations ongoing, and the oneworld immunity application facing union, industry, and regulatory opposition, their article is most timely and informative.

Next up is Jeffrey Wool’s “Lessor, Financier, and Manufacturer Perspectives on the New Third-Party Liability Conventions.” Our last issue featured an article on this topic from the insurers’ perspective. As general counsel of the Aviation Working Group and at Freshfields in London, Jeffrey has labored tirelessly for the Cape Town Convention to establish an international aircraft registry, and now presents the manufacturer and lessor perspectives on aviation terrorism protection. He adeptly assesses the terms of the new draft Conventions relating to compensation for damage to third parties. While ratification of the texts is still unclear, the introduction of a legal framework and discussion on aviation terror compensation represents an enormously valuable and informed contribution to the debate.

Across the pond, we’ve also seen new developments in airline consolidation and regulations. We’re pleased to share an article entitled “New Trends in the European Commission’s Review of Airline Mergers,” by Sven B. Völcker, partner at WilmerHale in Brussels. Sven thoroughly analyzes how the European Commission review of airline mergers has evolved since its decision to prohibit the Ryanair/Aer Lingus merger. He argues that the issues and tools that the Commission has been using to investigate and in some cases substantially delay airline mergers

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New Trends in the European Commission's Review of Airline Mergers

By Sven B. Völcker



For many years, the European Commission has explicitly welcomed consolidation of the European airline industry, which remains fragmented notwithstanding the commission's considerable efforts toward removing regulatory obstacles. Consistent with that approach, in 2005 the commission approved the acquisitions by Air France of KLM and by Lufthansa of Swiss without an in-depth, Phase II merger review, albeit subject to remedies (in particular the release of takeoff and landing slots at congested airports) on certain overlap routes.¹ In July 2006, the Court of First Instance confirmed the commission's approach, rejecting easyJet's complaint that the commission should not have authorized the transaction without further-reaching remedies.²

However, the commission's decision to prohibit Ryanair's bid for Aer Lingus in 2007 cast some doubt over its willingness to weigh the loss of competition on individual overlap routes against the general policy objective of consolidation.³ Admittedly, the *Ryanair/Aer Lingus* situation was characterized by a number of unusual circumstances. The transaction would have combined two carriers focused on point-to-point traffic and maintaining their principal base at the same airport (Dublin), rather than the largely complementary networks of two network carriers. The unwilling target (Aer Lingus) and the Irish government (its major shareholder) actively opposed the transaction, whereas most airline transactions proceed with tacit or explicit political support from the Member State governments concerned. Nevertheless, it is well known in the industry that shortly after the *Ryanair/Aer Lingus* decision, the commission conducted an internal review of the effectiveness of remedies in past airline cases, which provided a further indication that future reviews of airline mergers would likely be of a different quality than in those in earlier days.

Indeed, while all of the six airline transactions notified subsequently avoided the fate of *Ryanair/Aer Lingus*, the commission opened Phase II investigations in three of them—*KLM/Martinair*, *Lufthansa/Brussels Airlines*, and *Lufthansa/Austrian Airlines*—in each case investigating for many months before finally granting

clearance.⁴ An analysis of these cases reveals a number of trends that now allow a more informed prediction of how the commission will likely appraise future consolidation than would have been possible 18 months ago. This article describes some of the key changes in the commission's analysis of substantive issues in airline merger cases, the commission's use of investigatory tools, and its remedies policy. It concludes by asking whether the commission's "new approach" is sustainable, especially in light of the current industry crisis.

Analysis of substantive issues

The commission's basic approach toward analyzing airline mergers has not changed fundamentally. It continues to define the relevant markets on a city-pair basis rather than through the lens of network competition. Under the commission's approach, every connection between a point of origin and a point of destination (O&D) is generally viewed as a separate market.⁵ Where the catchment areas of the relevant origin/destination airports overlap to a significant extent, flights departing from different airports located close to each other may be found to belong to one and the same market.⁶ In a second step, the commission determines which airlines and other modes of transport compete on a given O&D pair. On short-haul routes, the commission generally considers that direct and indirect flights belong to separate markets, except where direct flights are offered only infrequently. In contrast, on long-haul routes, the commission considers direct and indirect flights to be substitutable as long as the connecting time of the indirect flights is not unreasonably long.⁷ The commission tends to consider alternative modes of transport, specifically high-speed trains, only when the total travel time by train is similar to the travel time by plane on a city-center-to-city-center basis.⁸

However, within this general framework, the commission's practice has evolved in a number of areas, especially in the aftermath of *Ryanair/Aer Lingus*.

Time-sensitive v. non-time-sensitive passengers

The distinction between "time sensitive" (typically business) and "non-time-sensitive" (typically leisure) passengers has long been an element of airline cases. Also, in the most recent cases, such as *Lufthansa/Brussels Airlines* and *Lufthansa/Austrian Airlines*, the commission relied on the distinction to dismiss competitive constraints invoked by the merging parties, such as

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travel alternatives that involve longer travel time (trains, indirect flights, flights from secondary airports) or inferior schedules (such as carriers that do not offer a same-day return), or fail other “soft” criteria such as on-board frills, lounges, or frequent flyer programs. However, one can detect increasing uncertainty as to how valid the distinction still is and where the line between time-sensitive and non-time-sensitive passengers should properly be drawn. This is due in part to the commission having had to argue against its own distinction in cases such as *Ryanair/Aer Lingus* and *Lufthansa/Eurowings*, in which the notifying party alleged that there was only marginal competition between the parties as they pursued different business models aiming at different passenger groups.⁹ More fundamentally, however, the uncertainty is rooted in dramatic changes in passenger behavior and airline business models that over time have led to a large-scale migration of business travelers to economy class and restricted tickets (at least on short- and medium-haul routes), and have thus made it very difficult to categorize any given traveler as time sensitive or non-time sensitive based on his or her choice of a given type of ticket. While the commission has recognized that the time span between booking and departure may provide some indication for the degree of relative time and price sensitivity, it is readily apparent that drawing a clear line for market definition purposes is very difficult. Nevertheless, one should expect that in future cases the commission will continue to seek empirical support for the intuition that there must be a certain group of passengers who would typically only choose between the merging parties.

Similarly, the commission’s recent case law shows a certain tension when it comes to accepting whether flights from secondary airports should be considered as part of the same market. In *Ryanair/Aer Lingus*, the commission viewed Ryanair-operated flights from many secondary airports as substitutable with Aer Lingus-operated flights to principal airports. The commission stipulated a benchmark to the effect that airports within 100 kilometers or one hour’s driving distance of the relevant city center should normally be considered as within the same catchment area and thus the same relevant market.¹⁰ However, in *Lufthansa/Brussels Airlines*, the commission did not accept the benchmark as relevant for flights from Antwerp airport, located only 50 kilometers away from the Brussels city center, and in *Lufthansa/Austrian Airlines*, it did not accept that Frankfurt-Hahn was a substitute for flights to Austria (not even for non-time-sensitive passengers), while it had viewed Frankfurt-Hahn as an alternative for flights to Dublin in *Ryanair/Aer Lingus*.¹¹ Similarly, in *Lufthansa/British Midland*, the commission did not view flights from East Midlands and Nottingham to Brussels as substitutable, even though it had reached the opposite conclusion in *Ryanair/Aer Lingus* with respect to flights to Dublin.¹² It would appear that

the only certainty that parties have in future merger reviews is that they should not rely too heavily on the success of any argument based on the presence (or, as the case may be, the absence) of competitive interaction between two airports within the same broader catchment area.

Potential competition and appropriate counterfactual in cases of preexisting cooperation

In past reviews of airline mergers (at least as far as the combination of network carriers was concerned), the commission did not focus much attention on the elimination of potential competition on a given route, and never required remedies on this basis. This changed in the three recent Lufthansa transactions. In *Lufthansa/Brussels Airlines* and *Lufthansa/British Midland*, the commission grappled with the question of whether preexisting, standard unilateral free-flow code share agreements between the parties provided an indication of potential competition by the marketing carrier, competition that would be eliminated by combining it with the operating carrier. The commission determined that while such code share agreements allow the marketing carrier some degree of freedom in setting fares, the operating carrier’s control over its inventory means that such residual competition for seats on the same flight is not structurally safeguarded, so that the transaction does not materially reduce premerger competition on routes covered by the code sharing agreement.¹³ However, this insight prompted the commission to question whether the continued existence of this code share agreement should be the appropriate “counterfactual” against which to measure the transaction’s impact. In *Lufthansa/Brussels Airlines*, the commission concluded that but for the transaction, Brussels Airlines would have joined the oneworld alliance, which would in turn have led to a termination of the preexisting code share agreement that Brussels Airlines had with Lufthansa’s subsidiary Swiss, which in turn would have caused Brussels Airlines to start operating its own services on the Brussels-Zurich route. On this basis, the commission required slot remedies on the Brussels-Zurich route.

In *Lufthansa/Austrian Airlines*, the commission dealt with a variation of the aforementioned potential competition issue, in that preexisting cooperation between Lufthansa and Austrian Airlines went much further than standard code sharing.¹⁴ Indeed, for almost 10 years before the merger, the parties had operated a profit-sharing joint venture on the routes between Austria and Germany. The commission did not dispute that the joint venture in its present form precluded price competition between the parties, including on hub-to-hub routes where both airlines were operating aircraft under the joint venture. However, again the commission questioned whether the continued existence of the joint venture was the appropriate counterfactual against which to measure

the transaction's impact. Its decision stipulates that, but for the sale of Austrian Airlines to Lufthansa, Lufthansa's rival Air France—which had not even submitted a nonbinding offer in the privatization process—would eventually have acquired Austrian Airlines, terminated the joint venture with Lufthansa, and prompted Austrian Airlines to compete with Lufthansa on a number of Austrian-German routes.

It can thus be expected that in future merger cases involving preexisting cooperation between airlines, the commission will conduct a necessarily speculative analysis of possible counterfactuals. Where alternative transaction or alliance membership scenarios seem tenuous, it should not be excluded that the commission will resort to the argument—which only appears as a dictum in the Lufthansa decisions—that preexisting cooperation in its current form could be viewed as infringing Article 81 EC (the EC's equivalent of § 1 of the Sherman Act¹⁵) and could thus not be guaranteed to continue indefinitely, notwithstanding the substantial procedural and substantive issues that such an analysis in the framework of a merger case raises.

Spillover effects between the target airline and the acquirer's existing alliance partners

While most of the aforementioned developments point to increasing scrutiny of airline mergers, there is one area in which the commission's approach in recent cases is more restrained than in the past, namely the treatment of the merging airlines' alliance partners. In *Air France/KLM* and *Lufthansa/Swiss*, the commission assumed that airlines with which the acquirer had a particularly close alliance (e.g., Alitalia in the case of Air France and SAS in the case of Lufthansa) would also cease competing with the target company post-merger.¹⁶ This led to a considerable increase in the number of city pairs on which the commission considered the transaction to create overlaps. However, beginning with *Lufthansa/Brussels Airlines*, the commission refined its approach. It recognized that a blanket presumption that the target and the acquirer's existing alliance parties would no longer compete post-merger could be justified only where existing alliance agreements automatically extend to subsequently acquired affiliates, which should only rarely be the case. Beyond that, merger-specific spillover effects could arise only on city pairs where the merging parties' services overlap in any event. In such a situation, the commission will investigate on a case-by-case basis whether the alliance partner's (typically indirect) services constitute an effective competitive constraint on the merging parties. This limitation makes sense, as the commission can easily intervene on the basis of Article 81 EC post-merger if the existing alliance relationship is in fact later expanded to cover the target's network. In future cases, the commission will thus not encounter the kind of situation that it faced in *Lufthansa/Austrian Airlines*, when it had to recognize that Austrian and

Lufthansa's no-frills subsidiary Germanwings were in fact competing fiercely, even though the commission had predicted the opposite four years earlier when it examined the acquisition by Lufthansa of Germanwings' parent company Eurowings.¹⁷

Investigatory tools

In its airline merger investigations prior to *Ryanair/Aer Lingus*, the commission relied primarily on market shares calculated on the basis of booking data available from Global Distribution Systems (so-called MIDT data), as well as the views of competitors, corporate customers, and travel agencies. However, in line with the evolution of the commission's substantive analysis, it has employed new investigatory tools in its recent investigations.

Econometric analysis

In *Ryanair/Aer Lingus*, Ryanair's arguments hinged to a large extent on showing that Ryanair and Aer Lingus were not close competitors even where they served the same city pairs. To support its arguments, Ryanair's economists submitted extensive econometric evidence to the commission, which in turn prompted unwilling target Aer Lingus to counter with econometric evidence of its own.¹⁸ The resulting "battle of the economists," with the commission's Chief Economist Team (CET) conducting its own analysis, produced a 115-page economic annex to the commission's decision, and set the standard for future reviews.¹⁹ Thus, in all three Lufthansa cases, the CET requested extensive daily pricing data over a several-year period to examine issues such as the closeness of competition between the merging parties, the impact of third-party entry, and the degree of competition between flights departing from proximate airports. While the final decisions in all three cases do not suggest that these analyses were dispositive, companies need to be aware that the data the commission may request may entail considerable delay and expense, and will typically require the retention of outside economists. It is noteworthy that in *Lufthansa/Austrian Airlines*, the commission even required the submission of extensive pricing data as part of the prenotification process.²⁰

Internal documents

Consistent with a general trend in its merger review practice, the commission has recently shown considerable interest in the parties' internal documents as a means of verifying competitive dynamics. In particular, the commission's new focus on potential competition means that in future reviews, it is likely to issue requests for documents discussing possible entry on routes served by the other party to the merger. Such requests need not necessarily be limited to the merging parties—in *Lufthansa/Brussels Airlines*, the commission issued a formal, wide-ranging request for documents to a third-party airline to verify its intentions to enter a

number of overlap routes. Nor do the documents need to be limited to the overlap routes themselves—in the three Lufthansa cases, the commission took great interest in, and requested large amounts of documents and data with regard to, the parties' entry and exit decisions on comparable benchmark routes. Parties contemplating mergers are well advised to identify in advance the possible custodians for such documents.

Passenger survey

Another legacy of the *Ryanair/Aer Lingus* case is that, at least in future Phase II airline reviews, the commission is likely to retain an independent third party to conduct a passenger survey in order to gather empirical evidence of actual and hypothetical passenger behavior, such as passengers' willingness to switch to alternative carriers, airports, or modes of transport in response to a hypothetical post-merger price increase. The commission did so in *KLM/Martinair* and *Lufthansa/Brussels Airlines*, and the survey results are an integral part of the final decisions in those cases. While even the best-designed survey will have methodological limitations, and the results almost inevitably give rise to divergent interpretations, they are clearly preferable to relying on often strategic and/or superficial responses from competitors, travel agents, and corporate customers. It is thus somewhat disappointing that the commission seems reluctant to accept the application of its own survey results in a critical loss analysis.²¹ Given the airlines' high fixed costs and corresponding high margins per passenger, such an analysis typically shows that even a small percentage of passengers switching in response to a hypothetical fare increase would make such a fare increase unprofitable.

Remedies

As mentioned above, shortly after *Ryanair/Aer Lingus*, the commission conducted an internal review of its remedies policy in past cases, and Commissioner for Competition Neelie Kroes has repeatedly stated in public that, notwithstanding the commission's support for airline in Europe consolidation, she will insist on effective remedies that protect competition on the overlap routes.²²

At first glance, the remedies agreed in the most recent cases—*Iberia/Clickair/Vueling*, *Lufthansa/Brussels Airlines*, and *Lufthansa/Austrian Airlines*—do not differ radically from those used in earlier airline cases. They principally involve the parties' commitment to transfer takeoff and landing slots at congested airports to new entrants that are unable to obtain suitable slots through the regular allocation process. Over time, the commission has tightened the requirements for such slot releases. For short-haul flights, the merging parties now need to release slots within a 20-minute window of the new entrant's requested times. New entrants no longer need to

attempt to secure their own slots through the regular process for every IATA season but can continue to use the transferred slots as long as they operate on the route. These and other small changes make it easier for low-cost carriers to take up slots, as these carriers typically have particularly demanding operational requirements due to short turnaround times.

Of particular interest is the use of grandfathering of slots in order to provide additional inducement for a new entrant. Grandfathering in this context means that after a certain period of operating on the overlap route in competition with the merged entity (the so-called utilization period), the new entrant is free to use the slots for operating services to other, more lucrative destinations if it wishes. From a regulatory perspective, grandfathering is a double-edged sword: while it may induce entry on the problem route in the short term, it incentivizes exit from that route after the utilization period. The shorter the utilization period, the greater the incentive for purely opportunistic entry that does not really address the route-specific competition problem. The issue also has a legal dimension, given the importance the Community courts attach to the principle of proportionality when it comes to designing remedies in merger cases generally and in airline cases specifically.²³ Grandfathering is not a new concept, but the most recent cases clearly show the commission's willingness to apply it in new ways. Thus, in *Lufthansa/Brussels Airlines* and *Lufthansa/Austrian Airlines*, the commission used different utilization periods depending on the relative value of the slots—shorter utilization periods for routes that are relatively unattractive for new entrants and involved airports with comparatively low levels of congestion, longer utilization periods for routes involving congested hub airports. The commitments in *Iberia/Vueling/Clickair* provide for a reduced utilization period of only two IATA seasons in the event that one and the same entrant is willing to operate in competition with the merged entity on a "significant number" of overlap routes from a given airport, effectively incentivizing a new entrant to set up a base or station additional aircraft at that airport.²⁴

While fine-tuning of the slot and other remedies may obviously facilitate entry into routes that are in any event attractive for new entrants, a fundamental problem remains. Unlike in traditional merger cases, there is no productive asset dedicated to the overlap market that the parties could divest. The entry decision is ultimately driven by the new entrant's business decisions and thus outside of the scope of any remedy that the merged entity can offer. The commission recognized in its *Lufthansa/Brussels Airlines* and *Lufthansa/Austrian Airlines* decisions that the profound crisis affecting the entire air transport sector will lead to more muted expressions of interest in entering new routes. But the more fundamental tension runs deeper than the current

crisis: the more the commission insists that a remedy be designed to virtually assure new entry, the more the merging parties (and ultimately the commission's own pro-consolidation agenda) may become hostage to strategic behavior of their fiercest rivals. The dilemma is compounded by the extent to which the commission insists on identifying additional problem routes based on debatable notions such as the distinction between time-sensitive and non-time-sensitive passengers or potential competition.

Outlook

The commission has clearly stepped up its scrutiny of airline mergers in the last few years—identifying substantive issues such as potential competition it has not previously focused on, using investigatory tools that involve considerable delay and expense for the merging parties, and increasing its expectations in terms of remedies. Ultimately, these hurdles did not stop any of the airline mergers notified post *Ryanair/Aer Lingus*, even if in some of these cases agreement on the remedies was reported to be hard fought and achieved only at the eleventh hour. Nevertheless, as the air transport industry continues to face its gravest crisis in history, the pressure to consolidate increases, and the number of carriers that will commit to enter overlap routes based on remedies declines, the commission will have to carefully consider whether its new approach to airline mergers is sustainable and compatible with its pro-consolidation stance.

Endnotes

1. Case COMP/M.3280, Air France/KLM (Feb. 11, 2004), http://ec.europa.eu/competition/mergers/cases/decisions/m3280_en.pdf; and Case COMP/M.3770, Lufthansa/Swiss (July 4, 2005), http://ec.europa.eu/competition/mergers/cases/decisions/m3770_20050704_20212_en.pdf.
2. Case T-177/04, *easyJet v. Commission*, [2006] ECR II-01931.
3. Case COMP/M.4439, *Ryanair/Aer Lingus* (June 27, 2007), http://ec.europa.eu/competition/mergers/cases/decisions/m4439_20070627_20610_en.pdf.
4. Case COMP/M.5141, *KLM/Martinair* (Dec. 17, 2008), http://ec.europa.eu/competition/mergers/cases/decisions/m5141_20081217_20682_en.pdf; Case COMP/M.5335, *Lufthansa/SN Brussels Airlines* (June 22, 2009) (text of decision not yet publicly available); Case COMP/M.5440, *Lufthansa/Austrian Airlines* (Aug. 28, 2009) (text of decision not yet publicly available).
5. See, e.g., Case COMP/M.5335, *Lufthansa/SN Airholding* (June 22, 2009) (not yet published), ¶¶ 12–14.
6. See, e.g., *id.* ¶¶ 51–104.
7. See, e.g., *id.* ¶¶ 36–50.
8. See, e.g., *id.* ¶¶ 117–40.
9. Case COMP/M.4439, *Ryanair/Aer Lingus* (June 27, 2007), http://ec.europa.eu/competition/mergers/cases/decisions/m4439_20070627_20610_en.pdf; Case COMP/M.3940, *Lufthansa/Eurowings* (Dec. 22, 2005), http://ec.europa.eu/competition/mergers/cases/decisions/m3940_20051222_20212_de.pdf.
10. Case COMP/M.4439, *Ryanair/Aer Lingus*.
11. Case COMP/M.5335, *Lufthansa/SN Brussels Airlines* (June 22, 2009) (text of decision not yet publicly available); Case COMP/M.5440, *Lufthansa/Austrian Airlines* (Aug. 28, 2009) (text of decision not yet publicly available); Case COMP/M.4439, *Ryanair/Aer Lingus*.
12. Case COMP/M.5403, *Lufthansa/BMI* (May 14, 2009), http://ec.europa.eu/competition/mergers/cases/decisions/m5403_20090514_20310_en.pdf; Case COMP/M.4439, *Ryanair/Aer Lingus*.

13. Case COMP/M.5335, *Lufthansa/SN Brussels Airlines*; Case COMP/M.5403, *Lufthansa/BMI*.
14. Case COMP/M.5440, *Lufthansa/Austrian Airlines*.
15. 15 U.S.C. §§ 1–7.
16. Case COMP/M.3280, *Air France/KLM* (Feb. 11, 2004), http://ec.europa.eu/competition/mergers/cases/decisions/m3280_en.pdf; and Case COMP/M.3770, *Lufthansa/Swiss* (July 4, 2005), http://ec.europa.eu/competition/mergers/cases/decisions/m3770_20050704_20212_en.pdf.
17. Case COMP/M.5440, *Lufthansa/Austrian Airlines*.
18. Case COMP/M.4439, *Ryanair/Aer Lingus*.
19. *Id.*
20. Case COMP/M.5440, *Lufthansa/Austrian Airlines*.
21. See Case COMP/M.5141, *KLM/Martinair*. The commission took a similar position in Case COMP/M.5335, *Lufthansa/SN Brussels Airlines*.
22. Case COMP/M.4439, *Ryanair/Aer Lingus*.
23. See Case T-177/04, *easyJet v. Commission*.
24. Case COMP/M.5364, *Iberia/Vueling/Clickair* (Jan. 9, 2009), http://ec.europa.eu/competition/mergers/cases/decisions/m5364_20090109_20212_en.pdf.

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An Intersection of Air and Space Law: Licensing and Regulating Suborbital Commercial Human Space Flight Operations

By Michael C. Mineiro

Imagine the excitement of traveling to the upper limits of the atmosphere, experiencing weightlessness and the beauty of mother Earth, and returning home to share your stories. Several companies in the United States are developing and actively marketing this experience and it is anticipated that in a few years and for a few hundred thousand dollars you will be able to purchase such a ride. But where man goes, so does law, and as lawyers our natural inclination is to ask how these activities are to be regulated.

This article examines the regulation of suborbital commercial human space flight in the United States, highlighting aspects of the U.S. regulatory regime, particularly the role of the Federal Aviation Administration (FAA). The European Union is now starting to look at developing its own regulations as well and this article illustrates how the EU approach may differ from that of the United States. The practical questions of future demand for legal services and upcoming legal challenges also are addressed.

What is the emerging industry of suborbital commercial human space flight?

Suborbital commercial space flight is a service offered by private companies to private individuals, government agencies, nonprofit organizations, and educational institutions. Numerous applications have been identified for suborbital flights, including flights for purposes of tourism and high-altitude scientific research.

Suborbital commercial human space flight is one subset of commercial space flight. It can be understood as the carriage of persons for compensation on a suborbital trajectory¹ that passes through outer space.² The suborbital commercial human space flight industry will be comprised of primary and secondary service providers and manufactures. Vehicle operators, vehicle manufacturers, insurers, pilots, participant training, and medical service providers are just a few examples of potential industry participants. And let's not forget the lawyers!

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What legal advice will the commercial human space flight industry need?

A full range of legal services specially tailored to the industry will be required. A market will develop for lawyers practicing in "traditional" areas, such as contracting, financing, and regulatory, that are able to transpose their traditional knowledge base for this unique industry. Niches will include federal and state vehicle licensing and liability risk management.

How is suborbital commercial human flight regulated in the United States?

The Commercial Space Launch Act (CSLA), as amended, is the principal law governing the licensing and regulation of commercial space transportation in the United States.³ As originally enacted in 1984, the CSLA was limited to the regulation of expendable launch vehicle (ELV) operators and launch sites. This regulatory authority was granted to the Department of Transportation (DOT). To implement this authority, DOT established the Office of Commercial Space Transportation, and later the Associate Administrator for the Office of Commercial Space Transportation (FAA-AST) under the administration of the FAA. In 1988, the CSLA was amended to provide a three-tier liability risk-sharing regime, including conditional indemnification for catastrophic accidents.⁴ In 1998, CSLA was amended to make clear DOT authority to license reusable launch vehicle (RLV) operators. In 2004, Congress amended the CSLA "to promote the development of the emerging commercial human space flight industry" and clarified DOT authority to implement regulatory standards to govern commercial human space flight.⁵

The CSLA is primarily driven by two public policy objectives: (1) "to ensure compliance with the international obligations of the United States" and (2) "to protect the public health and safety, safety of property, and national security and foreign policy interests of the United States."⁶ Congressional legislation pertaining to the regulation of human space flight has attempted to strike a balance between these objectives and the needs of the nascent human space flight industry to evolve in a regulatory environment that "neither stifles technology development nor exposes crew or space flight participants to avoidable risks as the public comes to expect greater safety for crew and space flight participants from the industry."⁷

The FAA's Office of Commercial Space Transportation (FAA-AST) issues experimental permits and licenses to vehicle and site operators. Permits and licenses require interagency review and approval, including the Department of State, Federal Communications Commission (FCC), and Environmental Protection Agency.⁸ To obtain a suborbital human space flight launch operator license, an applicant must (1) undertake a pre-application consultation with the FAA, (2) provide information and satisfy a public safety review, (3) demonstrate compliance with human space flight regulations, (4) provide information for an environmental impact review and satisfy environmental impact requirements, (5) provide information for maximum probable loss (MPL) analysis and satisfy financial responsibility requirements, and (6) receive approval from an interagency policy review. Only one license or permit is required from the DOT to conduct activities involving crew or space flight participants, including launch and reentry.⁹

Two important features within the FAA-AST regulatory regime are suborbital rockets and spaceflight participants. Suborbital vehicles are regulated as suborbital rockets if the vehicle is rocket-powered and generates thrust that is greater than its lift for the majority of the rocket-powered portion of its ascent.¹⁰ By focusing on the degree of lift generated by the non-aerodynamic lift of a vehicle, this definition achieves the legislative goal of including a broad array of possible suborbital vehicles into the regulatory structure of the CSLA. However, operators of suborbital rockets that "use traditional aviation technology and components, including wings, for lift and glide capability, as well as rocket propulsion for thrust to maintain their trajectories" may require other FAA authorization, specifically "an experimental airworthiness certificate (EAC), as a condition of a launch license, to operate in the National Airspace (NAS)."¹¹

In the United States, suborbital human space flights carry paying "space flight participants," not "passengers."¹² Unlike aircraft passengers, space flight participants assume a significant degree of physical and legal risk.¹³ The FAA-AST has limited regulatory authority to protect the health and safety of space flight participants. Furthermore, given the nature of suborbital flight, space flight participants have potentially significant third-party liability exposure.¹⁴

Recently states have begun to pass legislative initiatives in support of the commercial space flight industry. These include the establishment of spaceport authorities, tax incentives, state and local taxing and bonding authorization, military spaceport infrastructure conversion, trust funds, liability immunity, and spaceport infrastructure development.¹⁵ Federal law does not prohibit state legislation, so long as it is not inconsistent with the CSLA.¹⁶

How might the EU regulatory approach differ from that of the United States?

The EU has not yet adopted a regulatory position with regard to regulating suborbital commercial human space flight. There is an academic discussion about whether or not and to what extent the European Aviation Safety Agency (EASA) system is adequate to accommodate such regulations. However, neither the European Commission nor member states have yet given an opinion on the regulatory authority of EASA in this field.

A primary question raised in European discourse is whether such vehicles fall under the International Civil Aviation Organization (ICAO) definition of aircraft and, therefore, whether the rules for aircraft should apply. It has been proposed that the ICAO annex definition of aircraft includes suborbital vehicles. This means that suborbital vehicles that "derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface" would be categorized as suborbital aircraft and suborbital rockets.¹⁷ Categorization of these vehicles as aircraft would subject them to aircraft certification standards. As compared to current U.S. suborbital rocket standards, this is a considerably more detailed and substantial standard for vehicle manufacturers to achieve.

Another important departure that has been proposed is for participants on suborbital flights to be regulated as "passengers" and not "space flight participants."¹⁸ This approach would allow for more significant regulation of suborbital vehicles in order to protect the health and safety of passengers. It also would shift assumptions of liability risks and loss to the operators.

Will there be international standards similar to ICAO SARPS (Standards and Recommended Practices)?

In 2005, the ICAO Council considered the concept of suborbital space flights in relation to the Chicago Convention.¹⁹ The main question explored by the Council was whether suborbital flights would fall within the scope of the Chicago Convention and therefore ICAO's mandate.²⁰

The Council's working paper appropriately reasoned that "should suborbital vehicles be considered (primarily) as aircraft, when engaged in international air navigation, consequences would follow under the Chicago Convention, mainly in terms of registration, airworthiness certification, pilot licensing and operation requirements (unless otherwise classified as State aircraft under Article 3 of the Convention)."²¹ However, the Council failed to conclude whether or not suborbital vehicles should be considered primarily as aircraft. The U.S. regulatory approach does not consider suborbital vehicles primarily as aircraft. If the EU adopts the ICAO annex definition of aircraft within its suborbital vehicle regulatory regime,

then an important precedent will be established that strengthens the argument that ICAO should consider suborbital vehicles primarily as aircraft.

Practically, the international harmonization of regulations governing all vehicles operating in shared airspace is necessary. If ICAO does not take the lead in this area, other mechanisms will need to be implemented, either via ad hoc or formal arrangements, to ensure aircraft and suborbital vehicles can operate safely in shared airspace.

What are the future legal challenges for the regulation of U.S. suborbital commercial human space flight?

Tort Liability: Serious deficiencies exist in the tort liability. Tort liability is primarily governed by state law, with litigants subject to a multiplicity of jurisdictions without unified standards. As a result, parties involved in human space flight must do their best to formulate potential risk by drawing parallels to other established industries such as aviation and adventure sports/tourism.²² Legal precedent exists in these respective fields that establish legal duties, standards of care, immunities, and defenses for involved parties. The difficulty is predicting how courts will interpret current federal and state statutory law and common law and how the law will be applied in litigation arising from an accident. Interested parties should undertake legal risk mitigation measures that minimize exposure and protect against tort liability.

On-Orbit Jurisdiction: The DOT has not been granted explicit jurisdiction to regulate orbital operations. Commercial space flight will evolve from suborbital to orbital operations. Congress will need to address this omission.

Catastrophic Indemnification: The federal government provides conditional catastrophic loss indemnification for licensed operations.²³ On December 24, 2009, Congress extended this legislation until the end of 2012.

Safety Regulations: The DOT is prohibited from restricting or prohibiting launch vehicle design features and operating practices until the year 2012 unless a serious or fatal injury occurred to crew or a space flight participant, or an event during flight posed a high risk of causing a serious or fatal injury to crew or a space flight participant.²⁴ In 2012 this prohibition is lifted, but the DOT is not required to implement such regulations. Should such regulations be implemented? And if so, to what extent?

Conclusions

To date, several experimental permits have been issued, but no licenses have yet been issued for suborbital human space flight operators.²⁵ It is anticipated suborbital human space flight operator licenses will be issued in the near future. Until operator licenses are

issued and the industry has time to apply the licensing regulatory regime in practice, it will be difficult to conclude whether the current regime is sufficient to serve the needs of the United States and its domestic commercial suborbital human space flight industry.

It is important for the licensing regime to be assessed as one part of a larger federal regulatory regime. As the commercial suborbital human space flight industry develops and experience with the U.S. regulatory regime is gained, it is likely regulatory issues outside licensing, such as export control and FCC licenses, will have an impact on licensed operations.

Neither the European Commission nor member states have yet to adopt a regulatory regime for suborbital vehicles. For the time being, Europe is observing the United States and engaging in relevant discourse. If the EU chooses to regulate suborbital vehicles as aircraft and not as suborbital rockets, the respective cross-Atlantic regimes will not be harmonized. This raises two important questions. How will the EU's regulatory approach affect both the U.S. and EU commercial human space flight industry? What, if any, regulatory body should be responsible for harmonizing international suborbital flight?

Endnotes

1. Commercial Space Launch Act of 1984, Pub. L. No. 98-575, 49 U.S.C. § 70102(20) (2009), defines "suborbital trajectory" as "the intentional flight path of a launch vehicle, re-entry vehicle, or any portion thereof, whose vacuum instantaneous impact point does not leave the surface of the Earth."

2. No rule of conventional international law has been established that defines where airspace ends and outer space begins. Likewise, no U.S. law or regulation defines or demarcates air and outer space. It is interesting to note that the U.S. Department of Transportation awards commercial astronaut wings to pilots and flight crew on board a licensed launch vehicle on a flight that exceeds 80.45 km as recognition for having reached outer space. As suborbital transport systems and high-altitude platform vehicles enter into service, this legal ambiguity in demarcation of air and outer space will need to be addressed in order to resolve questions of concurrent conflicting air and outer space legal norms.

3. See Timothy Hughes & Esta Rosenberg, *Space Travel Law (and Politics): The Evolution of the Commercial Space Launch Amendments Act of 2004*, 31:2 J. SPACE L. 12 (2005).

4. See *id.* at 17.

5. H.R. 5382, 107th Cong., preamble (2004). Enacted as Commercial Space Launch Amendments Act of 2004, Pub. L. No. 108-492, 118 Stat. 3974-83 (2004). The CSLA and related amendments are codified in Title 49, Subtitle IX, Chapter 701, of the U.S. Code.

6. 49 U.S.C. § 70101(a)(7) (2009).

7. *Id.* § 70101(a)(15).

8. *Id.* §§ 70101 et seq.; Commercial Space Transportation Regulations, 14 C.F.R. §§ 401 et seq. (2009).

9. Commercial Space Launch Act of 1984, Pub. L. No. 98-575, 49 U.S.C. § 70104(d) (2009).

10. *Id.* § 70102(16).

11. *Id.*

12. *Id.* § 70102(17).

13. See Tracey Knutson, *What Is "Informed Consent"?* 33 J. SPACE LAW 105 (2007).

14. See *id.*

15. Michael Mineiro, *Law and Regulation Governing U.S. Commercial Spaceports: Licensing, Liability, and Legal Challenges*, 73 J. AIR L. &

continued on page 22



The International Charter on Space and Major Disasters and International Disaster Law: The Need for Collaboration and Coordination

By Josie Beets

When countries look for help in the aftermath of a disaster, they do not intuitively look to space technologies and industry for assistance. Space systems, however, provide an opportunity for both preparation for and reaction to disasters, as earth observation satellites and satellite telecommunications are invaluable resources to recovering communities. Developing countries typically do not have direct access to these technologies; resources are generally scarce and focused on citizens' most basic needs, not on the disaster risks they disproportionately face.¹

The International Charter on Major Disasters,² Tampere Convention,³ and other cooperative agreements constitute a coordinated international effort to provide resources of space systems to those falling victim to major disasters. This article examines the underpinning of legal obligations relating to the use of satellites to assist in natural disaster management. It reviews the international disaster law regime, as well as law in the various states regarding outer space treaties to foster community assistance. It then suggests international law should move further to create a cooperative system of satellite imagery and communications. Specifically, it suggests better legal safeguards and coordination to maximize the ability of communities to quickly turn to satellites in their recovery efforts.

International law on disasters

International instruments on disasters

International law regarding disasters is scattered and inconsistent.⁴ The field consists of multilateral treaties, international declarations, regional agreements, and intergovernmental operations. No central treaty regime exists, but many separate tracks of international law have addressed disaster issues; treaties relating to disasters tend to do so tangentially or by analogy, with their primary focus elsewhere.⁵ International resolutions and declarations in particular are plentiful.⁶ These instruments bear the limitations of soft law and are not formally binding but identify important unifying principles. Conclusions about the body of international

disaster law can be elusive due to their varying geographic scopes and levels of specificity.⁷

Human rights and international humanitarian law

Human rights law is one field that bears on international disasters.⁸ Many treaties identify rights germane to disaster relief (the right to life, food and water, housing, clothing, health, livelihood, and freedom from discrimination), though few are binding instruments.⁹ A right to receive humanitarian assistance during national disasters could be inferred from human rights instruments as a matter of customary law; "[u]nder the classical doctrine of international customary law, for a right to be binding upon a State, there must exist extensive and uniform State practice carried out so as to show a general recognition that a rule of law or legal obligation is involved."¹⁰ Human rights arguments posit that when a government cannot meet needs, victims have a right to access aid and nations have an obligation to seek aid. Even during times of crisis, states are reluctant to receive aid based on such grounds due to sovereignty concerns.¹¹

While human rights law is expressed as a series of rights, international humanitarian law consists of a series of duties that create more substantial obligations upon states than human rights law when paired with humanitarian law's deep history and broad acceptance.¹² Humanitarian law is generally considered as the law of armed conflict and shares challenges with disaster scenarios, including a sense of urgency, a reduced administrative capacity domestically, and the pressures of high-visibility situations.¹³ Over these areas of similarity, international humanitarian law is instructive by analogy. The Geneva Conventions and the Additional Protocols have many requirements that benefit humanitarian organizations providing relief, typically to be applied during times of war. The world's largest humanitarian network, the International Red Cross and Red Crescent Movement, has two branches, one dealing with humanitarian relief during times of armed conflict and the other focused on humanitarian relief during disasters.¹⁴

Privileges and immunities law

Privileges and immunities law is relevant because of the roles of the United Nations (UN) and the International Committee of the Red Cross (ICRC) in

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disaster response.¹⁵ The concept of privileges and immunities stems from the special treatment accorded to diplomats, but intergovernmental organizations also have some of these rights. Two widely ratified instruments grant privileges and immunities to the UN, and the ICRC has agreements with most of the countries where they operate. Common privileges and immunities include exemptions from customs regulations, immigration restrictions, and domestic taxation.¹⁶ These benefits can be very useful for entities involved in disaster response, as they allow the holder “to easily enter, exit and operate in a foreign country.” However, most nongovernmental organizations have to pursue bilateral agreements to achieve special status and privileges within a country.

Regional agreements

Regional agreements are more plentiful and often directly related to disasters, unlike multilateral treaties.¹⁷ In Europe, an extensive system of bilateral and regional treaties and agreements regulates many of the important aspects of disaster management. These treaties have created “a comprehensive network of mutual cooperation including most countries in the region.”¹⁸ This preparation by Europe, and lack thereof elsewhere, is incongruous with Africa’s and Asia’s particular vulnerabilities.¹⁹ In 2006, of 27 disasters each affecting over a million people, 20 occurred in Asia and seven in Africa.

The Association of Southeast Asian Nations (ASEAN) has had joint commitments regarding disasters for decades, but in 2005 they adopted a more comprehensive treaty on disasters, calling for exemptions from taxes for relief goods, standards for the quality of relief goods, and facilitation of the entry of relief personnel. However, the treaty requires ratification by all member states before officially entering force. While still palling before Europe’s elaborate legal structure, ASEAN’s efforts are very promising for the region. Also, many bilateral agreements exist that often set out procedures for assistance, provide for the exchange of information, and minimize bureaucratic formalities between the party nations with regard to relief efforts.²⁰

Nonbinding resolutions have the broadest scope regarding disasters.²¹ An ICRC report found at least 50 resolutions and declarations on disaster response made by intergovernmental forums.²² UN Resolution 46/182 acknowledges the importance of humanitarian assistance in disaster, urges states to give and receive international assistance, and sets up mechanisms for UN facilitation.²³ Also, the UN’s Millennium Declaration included commitments to reduce the impact of disasters.²⁴ In 2005, an international conference convened to address disasters and adopted the Hyogo Framework for Action, a framework for a decade of attention to disaster reduction. In the Hyogo Framework, the parties identified priorities for the next 10 years, among them ensuring disaster risk reduction as a priority and

enhancing early warning systems.²⁵

International law on disasters draws on many different sources. As a result of their variety, international instruments often lack consistency between states, including states of a particular region and even within a state’s own active treaties.²⁶ Firm, broadly applicable principles are difficult to discern; the international community has expressed dedication to addressing the problems of disasters, but the utility of the existent instruments is questionable.²⁷

Effectiveness of the international disaster regime

Though the number of instruments bearing on disaster law is high, in the field they are rarely used. Major challenges include a general lack of awareness of the instruments and the diverse nature of the instruments. International instruments on disasters are “largely unknown to government and field personnel and are rarely referred to or effectively utilized.”²⁸ Yet, even if field workers could be well educated on the body of international disaster response law, its diverse and sometimes contradictory nature would still limit effectiveness. Regional agreements may be more focused and thus more valuable,²⁹ especially in regions such as Latin America and Southeastern Asia where a single disastrous event can impact a geographic area spanning many countries.³⁰

Space law regimes addressing disasters

Numerous international organizations have drafted recommendations, resolutions, and international conventions reflecting the international community’s dedication to addressing the problems of disasters.³¹ The International Charter on Major Disasters (the Charter) is the first to focus on space resources as a point of comprehensive coordination between space organizations and states for the benefit of the wider community.³²

Overview and history of the Charter

The Charter arose from discussions at the third United Nations conference on the exploration and peaceful uses of outer space (UNISPACE III conference) in Vienna in 1999.³³ The UNISPACE III conference was specifically tasked with finding ways to utilize space technology to solve regional and world problems as well as assisting developing countries while also increasing international cooperation. Initiated by the European Space Agency (ESA) and the French Centre National d’Etudes Spatiales (CNES), the Charter was signed on October 20, 2000, and began operations in November of that same year. The Charter was the first internationally coordinated and comprehensive system that integrated different space resources, making them available to a wider community through interagency cooperation.³⁴ The Charter’s purpose is to share data and information that results from the use of space facilities before, during, and after a natural disaster.³⁵ Currently, the Charter includes nine international

agencies.³⁶ Charter members participate on a voluntary basis, making data collected from their respective remote sensing or earth observation satellites available to states affected by disasters as soon as possible at little or no cost to the affected states.³⁷

Governance and procedures to activate the Charter

Governance of the Charter is the responsibility of a Charter Board composed of all members.³⁸ The Charter functions without a formal office, but each Charter member serves as a rotating host agency, becoming the lead Charter agency for administering the Charter's obligations and liaising with external parties; the current host agency is the British National Space Center through its affiliation with ESA. Utilizing the Charter involves a clearly defined process as outlined by the text of the Charter and the Charter website. Those authorized to use the Charter are defined as a civil protection, rescue, and defense or security body from the country of a Charter member (referred to as an "Authorized User"). Agencies from countries not listed as Charter members can activate the Charter by requesting assistance from similar agencies in their countries or by requesting international aid from Charter member countries. Also, since 2004, the United Nations Office for Outer Space Affairs has been authorized to request Charter data on behalf of UN agencies responding to disasters, widely expanding the reach of the Charter. Exclusions from Charter activations include activation occurring more than 10 days after the beginning of the actual crisis, as the call would be beyond the emergency period; ice or oil-spill monitoring, as they are also nonemergency situations; droughts, as the benefits from space assets is doubtful; and war or armed conflicts, as they are outside the scope of the Charter.³⁹

Purposes and costs of activating the Charter

Article II of the Charter states that no funds will be exchanged between members in return for services provided through the Charter. Operational costs of activities under the Charter are covered by the member space agencies; this includes costs in acquiring the satellite image, processing the data, and producing products for delivery.⁴⁰ Providing data under the Charter is voluntary, and member agencies know they will not be compensated for their services when they ratify the Charter. The cost for responding to Charter requests is expensive, and is higher for some agencies than for others.⁴¹ The cost generally impacts agencies at the agency level but does not affect national budgets.⁴² The willingness to provide these services for no cost underlies the Charter's ideals of goodwill and best endeavors. Even though the Charter is not a binding instrument filling its parties with legal duties and obligations, parties adhere to the common goodwill of participating agencies.

Legal basis for the Charter

The Charter espouses principles set forth in both the Outer Space Treaty⁴³ and the UN Remote Sensing

Principles,⁴⁴ two texts that outline the legal framework of space activities. Generally, these principles are maintaining the freedom of outer space, using space for the common good of humanity, and encouraging international cooperation. The Outer Space Treaty establishes that space should be free for exploration and use by all countries, should be used for the benefit of all mankind, and should promote international cooperation. In kind, the Remote Sensing Principles state that remote sensing activities should be conducted for the benefit of all countries and should promote international cooperation.

In accordance with these principles, the Charter provides remote sensing data to all countries suffering from disaster that request help through authorized bodies at no cost to those seeking assistance, keeping the domain of space open. The Charter is the ultimate representation of international cooperation, as agencies in a multitude of jurisdictions stand ready to assist countries suffering from disaster in an efficient and nondiscriminatory manner. In fact, the Charter goes beyond the framework and requirements in the Remote Sensing Principles, as it provides the sensed countries with data completely free of charge, whereas the Remote Sensing Principles call for "reasonable cost terms."⁴⁵

Liability Under the Charter

One drawback of the Charter is liability, as it provides a waiver of liability in its text for Charter members. Article V, § 5.4 states:

The parties shall ensure that . . . no legal action will be taken against the parties in the event of bodily injury, damage or financial loss arising from the execution or non-execution of activities, services, or supplies arising out of the Charter.

Agencies that provide erroneous data, data that could further worsen a disaster, are under no legal duty to mitigate the consequences of their actions.⁴⁶

This waiver is partly due to a lack of a remote sensing liability regime. The Liability Convention establishes the international liability of a launching state for physical damage directly caused by a space object on Earth, a definition of damage too narrow to include damage from remote sensing activities.⁴⁷ The Remote Sensing Principles provide broader wording that states will bear international responsibility for their activities but limits responsibility to the state operating the remote sensing satellite.⁴⁸

A lack of a liability regime is a serious issue for implementation and growth of the Charter's operations. The unintentional or intentional misuse or misrepresentation of data provided by Charter members could create serious consequences. Especially egregious mistakes could turn opinion against the Charter.

Successes and drawbacks of the Charter

Since its inception in 2000, the Disasters Charter has been activated over 150 times.⁴⁹ That number is

increasing yearly; the number of activations has risen from just 12 in 2002 to 43 in 2007. While the instances of natural disasters are increasing,⁵⁰ the extraordinary increase of activations is also a testimony to the success of the Charter. The Charter has covered disasters on all the continents without restriction; Charter members activate for disasters in their countries while countries that are not Charter members can request assistance through the UN Office for Outer Space Affairs.⁵¹ The numerous activations of the Charter attest to its usefulness and the immense value of remote sensing data to responders during disasters.⁵² By all accounts, the Charter is a success.

There still exists, however, room for improvement. Having a more formal legal status (for example, making membership more than voluntary) would serve to lend more credibility to the Charter and its members. The Charter may find itself to be binding over time, as it is confirmed by *opinion juris* and state practice.⁵³ The more agencies that become members, the better the Charter's operations will be; but there are notable absences from its membership roster, including NASA. Some also have argued that, in addition to raw data required by the Charter, agencies should provide additional analysis, as some analysis is necessary for non-satellite expert users (those typically handling disaster crises).⁵⁴ However, member agencies often exceed their obligations, providing the end user with value-added work at private sector facilities; this was seen most extensively with the Indian Ocean tsunami disaster of 2004.⁵⁵ This is further evidence of the Charter's viability as a forward-thinking hub encouraging collaboration between government and civilian satellite operators and space agencies in the realm of disasters.

The future of the Charter and disaster management

The Charter is at the forefront of interoperability and coordination among international space and civil agencies, but many more areas exist where cooperation is essential. Communication and coordination of efforts—be they in remote sensing data or telecommunications—are paramount in a disaster. One important multilateral agreement that could be utilized with the Charter, the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 1998, relates directly to disasters and provides a framework to facilitate cooperation regarding telecommunications resources in disasters.⁵⁶ This convention refers to the telecommunications field but has a broad view that addresses many disaster response activities.⁵⁷ The convention, which unlike the Charter is enforceable law, is centered on removing regulatory barriers restricting telecommunications that could hinder disaster response.⁵⁸

One example of a comprehensive system is the Global Earth Observation System of Systems (GEOSS). Led by the Group on Earth Observations (GEO), itself a group born out of the recognized

need for international collaboration to grow the potential of Earth observation systems, GEOSS will connect a global network of content providers with comprehensive, real-time data, information, and analysis for a diverse group of users. It includes 72 governments and the European Commission (GEO Members), as well as 52 intergovernmental, international, and regional organizations (GEO Participating Organizations).⁵⁹ The aim of the system is to enhance relevance of Earth observations to global issues; disaster management and response are an important factor in its development. The development of this comprehensive system, if done in conjunction or with the same purpose as the Charter, provides an opportunity for expansion of the Charter's goals through further cooperation and coordination. But the rights and obligations of sensed and sensing states, data providers, and recipients should be clearly defined.⁶⁰ GEOSS reinforces the need for an unambiguous legal regime, including a liability convention for remote sensing, that covers earth observation programs.

In addition to the Tampere Convention, many of the instruments of international law discussed earlier could be called upon to create a comprehensive, collaborative legal framework for disaster response. The principles of international cooperation and activities for the benefit of all mankind enshrined in the International Charter on Space and Major Disasters, the Outer Space Treaty, and the Remote Sensing Principles are nowhere more apparent than when discussing aiding countries suffering the effects of disaster. Addressing international relief regimes is an essential part of disaster preparedness; as such, space agencies, remote sensing satellites, and satellite telecommunications should pay particular attention to what services they can offer to states recovering from disaster.

Endnotes

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2. International Charter Space & Major Disasters, Charter on Cooperation to Achieve the Coordinated Use of Space Facilities in the Event of Natural or Technological Disasters, *available at* <http://www.disasterscharter.org/web/charter/charter> [hereinafter Charter].

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4. Int'l Fed'n of the Red Cross and Red Crescent Soc'ys, *International Disaster Response Laws (IDRL): Project Report 2002–2003*, at 2, 28th International Conference of the Red Cross and Red Crescent (Dec. 2–6, 2003), *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRD77/\\$File/IDRL_Report_FINAL_ANG.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRD77/$File/IDRL_Report_FINAL_ANG.pdf) [hereinafter IDRL Project Report].

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9. *Id.* (mentioning in particular Article 23 of the African Charter on the Rights and Welfare of the Child, which includes protection for displaced children and specifically includes among them children displaced by natural disasters; and the International Convention on the Rights of Persons with Disabilities of 2006, which requires state parties to take “all necessary measures to ensure protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters”).
10. Ronan J. Hardcastle & Adrian T. L. Chua, *Humanitarian Assistance: Toward a Right of Access to Victims of Natural Disasters*, 325 INT’L REV. OF THE RED CROSS 89; see also IFRC Desk Study on Disaster Response, *supra* note 5, at 34.
11. Fisher, *supra* note 6, at 352.
12. *Id.* at 346.
13. *Id.*
14. Int’l Fed’n of Red Cross and Red Crescent Soc’ys, *Who We Are*, <http://www.ifrc.org/who/movement.asp>.
15. IFRC Desk Study on Disaster Response, *supra* note 5, at 39.
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17. *Id.* at 16.
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20. *Id.*
21. Fisher, *supra* note 6, at 354.
22. IDRL Project Report, *supra* note 4, at 17.
23. G.A. Res. 46/182, U.N. Doc. A/RES/46/182 (Dec. 19, 1991).
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26. IDRL Project Report, *supra* note 4, at 16.
27. *Id.* at 2.
28. *Id.*
29. *Id.* at 16 (noting some benefits of Europe’s comprehensive network of treaties).
30. See INT’L FED’N OF THE RED CROSS AND RED CRESCENT SOC’YS, LEGAL ISSUES FROM THE INTERNATIONAL RESPONSE TO THE TSUNAMI IN INDONESIA 5 (2006), available at <http://www.ifrc.org/Docs/pubs/idrl/indonesia-cs.pdf> (noting the tsunami affected 12 countries in Southeast Asia); see also INT’L FED’N OF THE RED CROSS AND RED CRESCENT SOC’YS, LEGAL ISSUES FROM THE INTERNATIONAL RESPONSE TO TROPICAL STORM STAN IN GUATEMALA 5 (Apr. 2007), available at <http://www.ifrc.org/Docs/pubs/idrl/guatemala-cs.pdf> (mentioning Mexico, Costa Rica, El Salvador, Honduras, and Nicaragua as affected by Tropical Storm Stan).
31. Sylvia Ospina, *SOS—Is Anyone Getting This Message? in PROCEEDINGS OF THE 49TH COLLOQUIUM ON THE LAW OF OUTER SPACE* 86 (2006).
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33. International Charter Space & Major Disasters, available at <http://www.disasterscharter.org>.
34. Mahulena Hoffman, *The International Legal Framework of Remote Sensing in the Year 2005: Changed Conditions and Changed Needs*, in IISL/ECSL SPACE LAW SYMPOSIUM 2005 (Apr. 4, 2005).
35. Charter, *supra* note 2, art. II.
36. ESA; CNES; the Canadian Space Agency (CSA); Argentine Space Agency (CONAE); the Indian Space Research Organization (ISRO); Japan’s Aerospace Exploration Agency (JAXA); the U.S. National Oceanic and Atmospheric Administration; the U.S. Geological Survey (USGS); the British National Space Centre (BNSC) on behalf of the Disaster Monitoring Constellation (DMC) Consortium; and the China National Space Administration (CNSA). See International Charter Space & Major Disasters, *About Us*, http://www.disasterscharter.org/about_e.html.
37. ESA provides data from Environmental Satellite (ENVISAT); CNES provides data from Satellite Pour l’Observation de la Terre (SPOT); CSA provides data from RADARSAT-1 and RADARSAT-2; CONAE provides data from SAC-C; ISRO provides data from Indian Remote Sensing satellite (IRS); JAXA provides data from Advanced Land Observing Satellite (ALOS). See also Disasters Charter website, http://www.disasterscharter.org/participants_e.html (last accessed Apr. 23, 2006).
38. Charter, *supra* note 2, art. III, § 3.3.
39. International Charter Space & Major Disasters, 2002 Annual Report of, available at <http://www.disasterscharter.org/downloadable/2ndAnnualReport.pdf> (last accessed May 16, 2009).
40. *Legal Aspects of the International Charter*, *supra* note 32, at 234.
41. Atsuyo Ito, *Report: IISL/ECSL Space Law Symposium 2006: Legal Aspects of Disaster Management and the Contribution of the Law of Outer Space*, in 45TH SESSION OF THE UNCOPUS LEGAL SUBCOMMITTEE (Apr. 2006) [hereinafter Ito Report].
42. Ospina, *supra* note 31, at 82.
43. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, opened for signature Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S.
44. Principles Relating to Remote Sensing of the Earth from Outer Space, G.A. Res. 41/65, U.N. Doc. A/Res/41/65 (Dec. 3, 1986).
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48. *Legal Aspects of the International Charter*, *supra* note 32, at 237.
49. International Charter Space & Major Disasters, *International Charter Activations*, <http://www.disasterscharter.org/web/charter/activations>.
50. Kofi A. Annan, *An Increasing Vulnerability to Natural Disasters*, INT’L HERALD TRIBUNE, Sept. 10, 1999, <http://www.un.org/News/ossg/sg/stories/articleFull.asp?TID=34&Type=Article>.
51. International Charter Space & Major Disasters, <http://www.disasterscharter.org>.
52. Ospina, *supra* note 31, at 82.
53. Ito Report, *supra* note 41.
54. Stefan Voigt, *Satellite Image Analysis for Disaster and Crisis-Management Support*, IEEE TRANSACTIONS ON REMOTE SENSING (June 2007), available at <http://ieeexplore.ieee.org/iel5/36/4215027/04215094.pdf?tp=&arnumber=4215094&isnumber=4215027>.
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56. Tampere Convention, *supra* note 3. See also Ospina, *supra* note 31, at 84.
57. IDRL Project Report, *supra* note 4, at 15.
58. Ospina, *supra* note 31, at 85.
59. Group on Earth Observations, *About GEO*, http://earthobservations.org/about_geo.shtml.
60. *Legal Aspects of the International Charter*, *supra* note 32, at 241.

Shortly after the agreement was concluded, Northwest and KLM, already partners in a marketing and operational joint venture, filed a petition with DOT seeking immunity from the antitrust laws for all joint activities undertaken within the framework of their alliance.⁵ They sought to integrate their services more completely and to operate as though they were a single carrier. In January 1993, DOT approved the agreement and granted the requested antitrust exemption.⁶

The U.S.-Netherlands Open Skies agreement, and the order granting ATI that followed shortly thereafter, established the template for a major transformation of international aviation. DOT had hoped it would do just that. As it made clear in its order approving and immunizing the KLM-Northwest alliance: "The United States signed the Open Skies Accord with the Netherlands not only to liberalize aviation services with the Netherlands, but also to encourage other EC members to enter into an open skies regime with the United States."⁷

In the years since, DOT's expectation has been vindicated. Liberalized regimes and Open Skies agreements have become increasingly ubiquitous—not just for air services to and from the United States, but worldwide. To date, the United States has entered into 94 Open Skies agreements,⁸ many of which have been followed by grants of ATI to alliances operating in the newly liberalized bilateral markets.⁹ The confluence of Open Skies agreements, alliances, and ATI has spawned a fundamental reinvention of the global air transport industry.

Today, however, a newly intensified debate about the effect of airline alliances and ATI on

competition threatens to endanger the progress that the United States and its many Open Skies partners have made in fostering a more efficient and competitive global aviation system. The outcome will have profound implications for the future of commercial aviation.

Evidence of the challenge abounds:

- Legislative proposals passed in 2009 by the U.S. House of Representatives would sunset existing ATI grants to airline alliances and require the establishment of new criteria for the review of future applications, while tightening further the requirements for U.S. citizen control of U.S. airline operations.¹⁰
- In a 55-page objection to DOT's tentative decision in the recent "Star II" proceeding,¹¹ in which DOT approved, inter alia, the addition of Continental Airlines to a previously immunized alliance, the Department of Justice suggested that the benefits of inter-alliance competition had not been established.¹²
- In October 2009, Senators Herb Kohl and Orrin G. Hatch, chairman and ranking member, respectively, of the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, informed Secretary of Transportation Ray LaHood that the Subcommittee would examine "whether the DOT is the appropriate agency to have final authority over the grant of antitrust immunity for international airline alliances, or whether legislation should be drafted to give greater authority to the Justice Department."¹³

These developments appear to reflect an attitude approaching outright hostility, at least in some quarters of the U.S. government,

toward the airline industry and its efforts to find a coherent and contemporary operating model.

Importance of strategic alliances

Strategic alliances are not unique to the airline industry. They are but one form of partnering among business enterprises on a continuum of transaction types, ranging from passive investment by one company in another to a complete merger of two business entities.¹⁴ Increasingly popular in today's rapidly evolving marketplace, alliances allow enterprises to respond more efficiently to changes in the commercial environment without incurring the costs, delays, complications, or permanent commitments associated with a full merger. The size and character of today's global marketplace pose challenges that require companies of all sizes to enhance their reach and competitiveness through carefully structured partnerships.¹⁵ As a general proposition, alliances generate important competitive benefits. Put simply, if a combination of resources from different enterprises is necessary to compete effectively in a market, then allowing the combination to take the most efficient form effectively lowers the barriers to entry into that market.

In international aviation, alliances generate an additional and unique benefit not found in other sectors: airline alliances have been a vital contributor to the liberalization of worldwide air transport. They are helping to break down barriers to competitive entry that even Open Skies agreements leave unaddressed. For example, an Open Skies agreement between two countries does not allow airlines from either country to establish a system of domestic feeder flights in the other country. A well-crafted alliance agreement, however, can permit an airline to

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enjoy the benefits of such a system without violating the domestic law of the other country. Similarly, no Open Skies agreement guarantees that an airline of one country will be able to find enough traffic to make flights to the other country economically viable, particularly if flights beyond that other country are restricted by the policies of third countries.¹⁶ Alliance participation allows an airline to create a network that enables it to fill up seats throughout its system with traffic to a variety of destinations, even where the “last segment” operations to some of those destinations must be on other airlines.

Alliances also have helped airlines address the most conspicuous of the residual nationality-based impediments to rational industry structure and performance—the laws in most countries that make ownership and control by citizens a prerequisite to eligibility for an airline license.¹⁷ Those laws effectively prohibit cross-border mergers and acquisitions and even some forms of cooperation—transactions that have enabled the globalization of so many other industries. By facilitating the sharing of resources, including capital and possibly equity, without a change of control, airline alliances have engendered many of the competitive benefits of rationalization that would be available in a more conventional legal and diplomatic environment.

Thus, by allowing airline partners to sell their services freely on each other’s equipment and coordinate their service offerings, alliances have allowed much of the industry to replicate the advantages enjoyed by the efficient global networks in many other sectors (e.g., telecommunications, shipping, financial services). They also have facilitated a new and robust form of global competition. In sum, given the restrictions that continue to impede efficiency and competition in international air transport even after the spread of liberal

air services agreements, the emergence of alliances—and particularly immunized alliances—arguably has represented the most important development in the industry since the introduction of jet aircraft.

Origins of DOT’s jurisdiction over international alliances

Congress, when it deregulated the U.S. airline industry and abolished the Civil Aeronautics Board (CAB), preserved and transferred to DOT the CAB’s discretionary authority to exempt certain forms of airline conduct from the operation of the antitrust laws.¹⁸ Although DOT’s authority relating to *domestic* airline mergers, acquisitions, and agreements was terminated on January 1, 1989, DOT’s authority to approve and immunize agreements relating to *international* aviation was left wholly intact.¹⁹ This outcome was consistent with a DOT recommendation to Congress and wholly supported by the Department of Justice.²⁰ The congressional decision to maintain the CAB’s antitrust exemption authority for agreements relating to international aviation, and to keep it at DOT, was predicated on a recognition that competition in international aviation is closely related to, and often a product of, the bilateral negotiating process.²¹ If the U.S. government was to attempt through diplomacy to move its aviation trading partners coherently toward a more market-based and pro-competitive regime, it was essential that the antitrust exemption authority be vested in the agency primarily responsible for the development of U.S. international aviation policy. Some 94 Open Skies agreements later, the wisdom of that assessment is undeniable.

Alliances and public benefits: The emerging jurisprudence

If DOT finds that a proposed agreement between airlines would substantially reduce or eliminate competition, DOT can approve the agreement only if it “is necessary to meet a serious transportation

need or to achieve important public benefits” and if there is no less anticompetitive alternative.²² DOT is required to exempt from the antitrust laws any agreement approved on those grounds to the extent necessary to allow the transaction to proceed.²³

Where DOT finds that an agreement is not adverse to the public interest and does not violate the statute—i.e., that it does not substantially reduce or eliminate competition—DOT is required to approve it. A grant of ATI is permitted in such a case only if it is “*required* by the public interest,” however, and then only “to the extent necessary to allow the person to proceed with the transaction specifically approved by the order and with any transaction necessarily contemplated by the order.”²⁴

While references to the public interest appear in both the test for approval (“not adverse to the public interest”) and the test for granting ATI (“required by the public interest”), the latter test is substantially more daunting. As DOT wrote in its seminal *KLM/Northwest* decision: “The Department has always recognized that the public interest standard in [49 U.S.C. § 41308] is a much more stringent standard than [49 U.S.C. § 41309’s] public interest standard.”²⁵ DOT also has recognized consistently that, “[b]ecause the antitrust laws represent a fundamental national economic policy, one that serves consumers and travelers well, . . . immunity from the antitrust laws should be the exception, not the rule.”²⁶

Nevertheless, because the prospect of enjoying the benefits of that exception became so attractive to carriers following the *KLM/Northwest* decision, and because DOT had made it clear that an Open Skies agreement was an essential prerequisite to consideration of a request for ATI, foreign government interest in Open Skies relationships with the United States began to

increase dramatically. The result was a rapid increase in international aviation liberalization, in the number of alliance ATI applications submitted to DOT, and in the frequency of ATI awards.

It was essential, during a time of such ferment, that DOT assess the real-world consequences for competition and consumers. DOT's first formal assessments of immunized alliances and their effect on international aviation markets were issued in 1999 and 2000, after seven years' experience with immunized alliances in Open Skies markets. Based wholly on an empirical analysis, DOT's conclusions regarding the role and impact of airline alliances were reported in two detailed reports: "Global Deregulation Takes Off" (December 1999) and "Transatlantic Deregulation: The Alliance Effect" (October 2000).²⁷

The 1999 report told a remarkable story. It found that, operating within the framework of new Open Skies agreements, immunized alliances were stimulating demand, accelerating system growth, and producing more attractive service and price offerings. The report highlighted important consequences not just for the users of air transportation, but also for local and national economies through increased air service. It concluded that global deregulation and alliance development were still at an embryonic stage and predicted the continued expansion of alliances in the future, together with the emergence of new ways of competing as alliances continued to expand and overlap each other.

The 2000 report, which was similarly quantitative in its approach, concluded that "the pro-consumer changes identified in our first report dramatically accelerated during 1999."²⁸ Importantly, DOT found that "[a]lliance-based networks are the principal driving force behind transatlantic price

reductions and traffic gains. The 'Alliance Network Effect' will therefore play a key role in the evolving international aviation economic and competitive environment."²⁹

The case for international alliances was a powerful one, but the "fundamental national economic policy" reflected in the antitrust laws required that any grant of ATI be predicated on a transparent and sensible set of criteria.

Approving agreements under 49 U.S.C. § 41309

DOT's analysis of whether to approve an alliance agreement is typically based on the Clayton Act³⁰ test, long used to predict the competitive effects of mergers. The issue is whether the alliance would be likely to substantially reduce competition such that the applicants would be able to exercise market power—i.e., to profitably charge supracompetitive prices or reduce service or quality below competitive levels in any relevant market. This entails a determination of whether the alliance would significantly increase concentration, whether the alliance would raise concern about potential anticompetitive effects in light of other factors, and whether entry into the market would be timely, likely, and sufficient to either deter or counteract a proposed alliance's potential for harm.

DOT's jurisprudence during the past decade treats an Open Skies agreement and its guarantee of open market access as sufficient in most cases to prevent partners in an alliance from reducing or eliminating competition or exercising market power. Where an Open Skies agreement exists, DOT typically finds that it can approve a proposed alliance agreement under 49 U.S.C. § 41309 on the ground that it is not adverse to the public interest.

Granting ATI

The second element of a DOT alliance decision—whether to award ATI to an approved alliance under the more stringent test of 49

U.S.C. § 41308 ("required by the public interest")—is now predicated on the applicants' ability to demonstrate that the alliance will deliver public benefits of sufficient quality and magnitude to justify the exemption.

DOT decisions both granting and denying ATI over the past few years reflect a sophisticated understanding of the way alliances have evolved and how airline networks function. The orders make clear that ATI will be awarded only where the applicants can demonstrate that the public benefits likely to flow from the alliance will be significant—in keeping with the positive effects DOT described in its 1999 and 2000 reports—and that those benefits would not materialize without a grant of ATI.³¹ Thus, for example, in its most recent award of ATI as of this writing—to the expanded Star immunized alliance—DOT concluded that the alliance would produce "numerous public benefits," including

- an expanded network serving many new cities;
- new online service, including both new routes and expanded capacity on existing routes;
- enhanced service options such as more routings, reduced travel times, expanded nonstop service in selected markets, new fare products, and integrated corporate contracting and travel agency incentives;
- enhanced competition due to the addition of a major new gateway, the elimination of multiple markups on code-share segments, and more vigorous competition between alliances;
- cost efficiencies;
- strengthened financial positions for the participating carriers; and
- substantial economic benefits to communities.³²

It would not have been

sufficient, however, for the applicants merely to make “theoretical and attenuated” predictions about the likely public benefits of the enlarged alliance.³³ DOT noted that “[t]he applicants explain in detail how they will expand the existing immunized alliance to incorporate the largely complementary services of Continental”—the carrier being added to the Star immunized alliance—by implementing a “metal neutral,” highly integrated, revenue-sharing joint venture agreement.³⁴ DOT explained further why it had concluded that ATI was essential to realizing the alliance’s potential benefits:

The carriers are not likely to achieve the efficiencies and cost savings on their own; an integrated economic benefit sharing arrangement is needed to provide the incentive for the carriers to invest the significant resources necessary to create additional consumer benefits. By sharing risk and optimizing the joint network, the alliance members will likely accelerate the introduction of new capacity, give consumers more travel options and shorter travel times, and reduce fares at the margin, due to the elimination of multiple mark-ups. Antitrust immunity is well suited to enable carriers to achieve merger-like efficiencies and deliver benefits that would not otherwise be possible.³⁵

In sum, DOT has reached its conclusions about ATI and public benefits carefully and has validated them repeatedly. DOT knows that anachronistic regulatory constraints continue to impede the international operations of airlines everywhere, and that those constraints compromise the value that aviation delivers to consumers and national economies. Through a carefully calibrated exercise of its long-standing authority to grant exemptions from the antitrust laws, DOT has helped the industry to begin overcoming these impediments and to begin replicating the kind of

market that would emerge under more conventional legal and diplomatic arrangements.

The ATI controversy

Much of the controversy surrounding DOT’s handling of alliance agreements is attributable to the conviction among critics that alliances approved by DOT following the negotiation of an Open Skies agreement, if indeed unobjectionable on competition grounds as DOT has found, do not need an antitrust exemption to deliver the public benefits they promise. While acknowledging that DOT is required by the statute to approve an agreement that it finds will not reduce or eliminate competition, the opponents maintain that the statute prohibits DOT from granting an exemption from the antitrust laws in most cases because it is not possible to make the prerequisite finding that the public interest requires it. It is a seriously mistaken view. ATI, in most cases, is an essential prerequisite to realizing the competitive benefits that international strategic airline alliances can engender.

First, alliances have become as complicated as the international regulatory environment in which they operate. The risk that private attorneys general representing a large class of plaintiffs would seek treble damages for some perceived wrong means that, without immunity, the members of an alliance would be deterred from exploiting its potential efficiencies. Accordingly, it is critical that alliance parties have certainty regarding the lawfulness of their agreements.

To make matters worse, antitrust jurisprudence itself is murky in this area. The Department of Justice/Federal Trade Commission “Antitrust Guide for Collaborations Among Competitors” illustrates the challenge confronting alliance participants.³⁶ The document is nearly 40 pages of single-spaced “guidance” that would require

interpretation by a team of antitrust experts working full time in the case of a complex, multiple-party, and multiple-market joint venture. Even then, the likely conclusions would be at best tentative:

- What conduct is reasonably related to the objectives of the joint venture?
- Is it the least anticompetitive alternative?
- Is there a market analysis of its effects?

No safe harbors exist, just safety zones that themselves are severely hedged. No relevant examples are furnished.³⁷ In addition, critical questions in this area of antitrust law remain unsettled.³⁸ The financial consequences of failure in such cases are likely to be enormous. Alliance members can have no confidence in their ability, as defendants in a treble-damages case, to explain to a court after the fact the dynamics of a commercial aviation joint venture and the exigencies of networked operations.

While a complicated subject beyond the immediate scope of this article,³⁹ a legitimate and growing concern exists in some quarters that U.S. antitrust laws—and the inherently conservative jurisprudence that has developed under those laws—are not keeping pace with the emergence of newly important joint venture models. Some experts argue that the antitrust laws create an unhealthy chill on the development of strategic alliances and that this chill, in turn, generates anticompetitive effects. Congress itself has recognized the impact that the threat of treble-damage liability can have on joint ventures, including those involving the production of services.⁴⁰ In such an environment, DOT’s carefully calibrated oversight, informed by its participation in the crafting and conduct of U.S. international aviation policy, provides a more appropriate regulatory framework for alliances than conventional antitrust

litigation, with its inherent costs and uncertainties.

Unsurprisingly, airlines seeking a DOT antitrust exemption for alliance participation routinely state in their applications that they will not implement the alliance agreement without ATI. The statement represents an appropriate measure of caution—and in every case is based on the advice of antitrust counsel. DOT is correct to accord it significant weight. Without ATI, alliance members will not undertake to generate the innovative programs, service offerings, and scheduling efficiencies that typically benefit travelers.

DOT's decisions to grant ATI even to alliances that it finds will not substantially reduce or eliminate competition are consistent with the statutory test: Where it is clear that the parties will not proceed with the transaction in the absence of ATI, the exemption is indeed "required by the public interest."⁴¹ The analysis is significantly reinforced by reference to the aviation diplomacy required for the further liberalization of aviation markets—a rationale that DOT is uniquely positioned to acknowledge and evaluate.⁴²

Conclusion

Airlines and regulators have always understood the value of efficient networks. For many decades, antitrust immunity facilitated a single, monopoly network operated by IATA. Today, we enjoy competition among a number of networks operating as immunized alliances. Immunity allows alliance participants—which cannot legally merge—to realize a level of economic integration that provides significant public benefits.

Open Skies, airline alliances, and DOT's savvy administration of its power to confer ATI have been a major public policy success story for consumers, global airline competition, and the airline industry itself. Proposals to tinker with

that success should be considered with great care, and proponents of any alternative approach should bear the burden of showing how and why it would serve the public interest better.

Endnotes

1. The authors take no position on any pending alliance ATI application.

2. Air Transport Agreement Between the United States and the Netherlands, Oct. 14, 1992, T.I.A.S. No. 11976.

3. *In re* Defining "Open Skies," DOT Docket 48130, Order Requesting Comments (Apr. 29, 1992); Final Order (Aug. 5, 1992).

4. 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, *reprinted in* 3 Av. L. Rep. (CCH) ¶ 26,540a, at 23,219.

5. The petition was filed pursuant to §§ 412 and 414 of the Federal Aviation Act of 1958, now codified at 49 U.S.C. §§ 41308 and 41309.

6. Joint Application of Northwest Airlines and KLM Royal Dutch Airlines, DOT Order 93-1-11 (Docket 48342) (Jan. 11, 1993). For a discussion of the statutory test for granting ATI, see text accompanying notes 22–24, *infra*.

7. *Northwest/KLM*, DOT Order 93-1-11, at 12.

8. See list of Open Skies agreements in force on the Department of State's website, at <http://www.state.gov/e/eeb/rls/othr/ata/114805.htm>.

9. See list of immunized alliances on the Department of Transportation's website at http://ostpxweb.dot.gov/aviation/X-50%20Role_files/immunizedalliances.htm.

10. H.R. 915, 111th Congress, 1st Sess. (passed by House of Representatives on May 21, 2009), §§ 426 (sunsetting all grants of ATI three years after effective date of legislation; developing new criteria for review of future applications) and 801 (providing that an airline shall not be deemed eligible for an air carrier certificate "unless citizens of the United States control all matters pertaining to the business and structure of the air carrier, including operational matters such as marketing, branding, fleet composition, route selection, pricing, and labor relations").

11. Joint Application of Air Canada, The Austrian Group, British Midland Airways Ltd., Continental Airlines, Inc., Deutsche Lufthansa AG, Polskie Linie Lotnicze Lot S.A., Scandinavian Airlines System, Swiss International Air Lines, Ltd., TAP Air Portugal, and United Air Lines, Inc. to Amend Order 2007-2-16 under 49 U.S.C. §§ 41308 and 41309 so as to Approve and Confer Antitrust Immunity, DOT Docket OST-2008-0234 ("Star II").

12. Star II, *supra* note 11, Comments of the Department of Justice on the Show Cause Order (Public Version), at 33–34 ("The Applicants inflate the importance of inter-alliance competition . . . The Applicants also suggest, without evidentiary

support, that consumers benefit from competition between alliances, particularly immunized alliances.").

13. Letter from Senators H. Kohl & O. Hatch to R. LaHood, Secretary of Transportation (Oct. 13, 2009).

14. John P. Beavers, *Strategic Alliances: What They Are and Why They Are Popular*, BOARDANDEXECUTIVE.NET (Aug. 2001), www.boardandexecutive.net/strategic/79.asp.

15. *Id.*

16. In an Open Skies agreement, Party A forfeits the right to object to flights by airlines of Party B between the territory of Party A and third countries. But nothing in any Open Skies agreement requires third countries to accept such flights.

17. U.S. airline citizenship requirements are set forth at 49 U.S.C. § 40102(a)(2) and (15).

18. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978).

19. Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 (1984), § 3.

20. DEP'T OF TRANSP., ADMINISTRATION OF AVIATION ANTITRUST FUNCTIONS, REPORT TO CONGRESS PURSUANT TO PUB. L. 98-443, at 1, 22–25 (May 1987). DOT stated that "its authority to approve and immunize international agreements is an important element in its conduct of U.S. international aviation policy and regulatory oversight." *Id.* at 25. The Introduction noted that the report had been prepared by DOT and that "[t]he Department of Justice (DOJ) concurs in the recommendations contained therein." *Id.* at 1.

21. International reactions to a controversial and long-running CAB case launched in 1978 may have encouraged this delegation of responsibility. The CAB had proposed to stimulate international airline price competition by withdrawing the ATI extended since 1946 to the International Air Transport Association (IATA)'s tariff coordination activities. Agreements adopted by the International Air Transport Association relating to the Traffic Conferences, CAB Docket 32851, Order to Show Cause (June 9, 1978). The CAB proposal triggered a firestorm of criticism from U.S. trading partners everywhere as a highly objectionable exercise in unilateralism. Most other countries' policies not only tolerated IATA's industry price-fixing activities but also often relied on them, as did the United States itself for many years. Because the CAB did not receive statutory authority to suspend or investigate a tariff in foreign air transportation until 1972, the Board's only tool for addressing an issue relating to an airline's fares was its ability to disapprove the IATA agreement pursuant to which those fares were charged. *Id.* at 3. In 1982, after four years of tension in U.S. aviation relations, the United States concluded a novel memorandum of understanding with several European civil aviation authorities meeting under the auspices of the European Civil Aviation Conference. The "U.S.-ECAC MOU" established zones of pricing flexibility within which airlines would be allowed to set fares without government interference. Following the sunset of the CAB, DOT terminated the Show-Cause Proceeding without ordering any

major change in IATA's tariff coordination machinery.

22. 49 U.S.C. § 41309(b).

23. *Id.* § 41308(c).

24. *Id.* §§ 41309(b), 41308(b) (emphasis added).

25. Joint Application of Northwest Airlines and KLM Royal Dutch Airlines, DOT Order 93-1-11 (Docket 48342), at 11 (Jan. 11, 1993).

26. Joint Application of Alitalia-Linee Aeree Italiane S.p.A., Czech Airlines, Delta Air Lines, Inc., KLM Royal Dutch Airlines, Northwest Airlines, Inc., and Société Air France for Approval of and Antitrust Immunity for Alliance Agreements under 49 U.S.C. §§ 41308 and 41309, DOT Docket OST-2004-19214 ("SkyTeam I"), Show Cause Order, DOT Order 2005-12-12, at 33.

27. U.S. DEP'T OF TRANSP., INTERNATIONAL AVIATION DEVELOPMENTS: GLOBAL DEREGULATION TAKES OFF (Dec. 1999), available at <http://ostpxweb.dot.gov/aviation/Data/globalderegtake.pdf>; U.S. DEP'T OF TRANSP., INTERNATIONAL AVIATION DEVELOPMENTS: TRANSATLANTIC DEREGULATION: THE ALLIANCE NETWORK EFFECT (Oct. 2000), available at <http://ostpxweb.dot.gov/aviation/Data/transatlantdereg.pdf> ("2000 DOT Report").

28. 2000 DOT Report, *supra* note 27, at 1-2.

29. *Id.* at 5. DOT also found in its 2000 report that "[t]raffic on both alliance and non-alliance carriers have [sic] increased dramatically, demonstrating that deregulation and airline alliances have not simply re-allocated traffic among carriers but have stimulated additional demand. Increased supply (capacity) is a critically important component of consumer benefits in deregulated markets." *Id.* at 10. Moreover, "[i]nternational airline alliances have improved service in historically underserved regions of the world and, as a result, have stimulated additional demand for air transportation in those markets." *Id.*

30. 15 U.S.C. §§ 12 *et seq.*

31. Moreover, the ATI enjoyed by many airline alliances is not a license to pillage. Airlines cannot obtain the global, comprehensive ATI enjoyed by labor unions, ocean common carriers, agriculture, professional sports leagues, newspapers, insurance providers, and others. Under current law, the only way airlines can obtain ATI is to apply to DOT for an exemption for specific activities pursuant to a specific agreement. All antitrust exemptions granted by DOT are conditional, and failure to comply with DOT's conditions can result in the loss of immunity. Finally, any agreement or activity that is exempted from the operation of the antitrust laws remains subject to DOT's authority to prosecute unfair or deceptive practices and unfair methods of competition (49 U.S.C. § 41712), which mirrors the authority of the Federal Trade Commission under § 5 of the FTC Act (15 U.S.C. § 45).

32. Star II, *supra* note 11, Order to Show Cause, DOT Order 2009-4-5, at 18-19.

33. SkyTeam I, *supra* note 26, Order to Show Cause, DOT Order 2005-12-12, at 34 (in proposing to deny the SkyTeam I ATI application, DOT stated: "we are reluctant to immunize the alliance agreements

when the Joint Applicants have given us so little information about their plans for implementing a grant of antitrust immunity under section 41308").

34. Star II, *supra* note 11.

35. *Id.* The contrast between DOT's response to two separate efforts by the leading SkyTeam carriers to secure ATI for a major expansion of their immunized alliance, including the combination of the separately immunized Delta/Air France and Northwest/KLM alliances, highlights DOT's approach. In the first application in 2005, the details of the SkyTeam carriers' proposed expanded joint venture had not yet been developed in great detail. DOT found that the expanded alliance could be approved as not adverse to the public interest, but it was unable to find, on the basis of the material submitted by the applicants, that a grant of ATI was "required by the public interest." SkyTeam I, *supra* note 26, Order to Show Cause, DOT Order 2005-12-12, at 34. By contrast, SkyTeam's second attempt to expand its alliance, addressed in a 2007 joint application, was successful because, as DOT wrote, "the Joint Applicants now supply a detailed joint venture agreement that integrates international operations to such an extent as to suggest metal neutrality [indifference among participating carriers regarding which carrier's capacity they are selling in any given transaction] and seamless travel across one joint network." DOT found that the alliance would generate substantial public benefits, including "the introduction of new capacity and greater availability of discount fares across the entire joint network[.]" and that ATI was necessary to enable the carriers to achieve these "mergerlike efficiencies and . . . benefits." Joint Application of Alitalia-Linee Aeree Italiane S.p.A., Czech Airlines, Delta Air Lines, Inc., KLM Royal Dutch Airlines, Northwest Airlines, Inc., and Société Air France for Approval of and Antitrust Immunity for Alliance Agreements under 49 U.S.C. §§ 41308 and 41309, DOT Docket OST-2007-28644 ("SkyTeam II"), Show Cause Order, DOT Order 2008-4-17, at 15.

36. The guidelines were published in April 2000 by the Department of Justice and the Federal Trade Commission and are available at <http://www.ftc.gov/os2000/04/ftcdojguidelines.pdf>.

37. Another Department of Justice/FTC publication, ANTITRUST ENFORCEMENT FOR INTERNATIONAL OPERATIONS (Apr. 1995), available at <http://www.justice.gov/atr/public/guidelines/internat.htm/>, is not likely to be helpful either.

38. The Supreme Court has granted certiorari in a case that may provide guidance on whether and to what extent the marketing activities of an authorized joint venture are entitled to single-entity treatment under the antitrust laws. *See* Am. Needle, Inc. v. Nat'l Football League, 129 S. Ct. 2859 (2009).

39. *See* R. Shyam Khemani & Leonard Waverman, *Strategic Alliances: A Threat to Competition?* in COMPETITION POLICY IN THE GLOBAL ECONOMY: MODALITIES FOR COOPERATION (Leonard Waverman, William S. Comanor &

Akira Goto eds., 1997).

40. The National Cooperative Research and Production Act, as amended, 15 U.S.C. §§ 4301-4306, was enacted to promote innovation, facilitate trade, and strengthen the competitiveness of the United States in world markets by (1) clarifying the applicability of the rule of reason standard to the antitrust analysis of joint ventures and standards development organizations, (2) providing for the possible recovery of attorney fees by joint ventures and standards development organizations that are prevailing parties in damage actions brought against them under the antitrust laws, and (3) establishing a procedure under which joint ventures and standards development organizations are liable for actual, rather than treble, antitrust damages.

41. 49 U.S.C. § 41308(b).

42. *See* Joint Application of Northwest Airlines and KLM Royal Dutch Airlines, DOT Order 93-1-11 (Docket 48342), at 12 (Jan. 11, 1993).

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COMM. 759, 792 (2008).

16. 49 U.S.C. § 70117(c) (2000).

17. *See* Jean-Bruno Marciacq, Yves Morier, Filippo Tomasello, Zsuzsana Erdelyi & Michael Gerhard, *Accommodating Sub-orbital Flights into the EASA Regulatory System*, PROCEEDINGS OF THE 3RD IAASS CONFERENCE—ROME: BUILDING A SAFER SPACE TOGETHER (Oct. 21-23, 2008).

18. *See id.*

19. *See* Paul S. Dempsey & Michael Mineiro, *ICAO's Legal Authority to Regulate Aerospace Vehicles*, PROCEEDINGS OF THE 3RD IAASS CONFERENCE—ROME: BUILDING A SAFER SPACE TOGETHER (Oct. 21-23, 2008).

20. *Id.*

21. ICAO Council, 175th Sess., *Concept of Suborbital Flights*, at § 2.3 (Working Paper CWP/12436, May 30, 2005).

22. *See* Knutson, *supra* note 13, at 105.

23. Commercial Space Launch Act of 1984, Pub. L. No. 98-575, 49 U.S.C. § 70113 (2008).

24. *Id.* § 70105(c).

25. FAA-AST, *FAA-AST Launch Data and Vehicles*, http://www.faa.gov/about/office_org/headquarters_offices/ast/launch_data/.

Impact of September 11th

Work leading to the UIC began as a consequence of, and immediately following, the events of September 11, 2001. A prompt and direct result of 9/11 was the withdrawal of aviation insurance cover and the halt of air transport. To permit the resumption of air transport, government-supported war risk insurance was needed to address contractual, risk management, and corporate governance issues. Such government support was viewed as a stop-gap measure. It was clear across the air transport sector that a more lasting solution to risk management in the terrorism context was required, and that such solution needed to be global in nature. To that end, within weeks of 9/11, the Aviation Working Group (working with the International Coordinating Committee of Aerospace Industries Associations) and IATA submitted to ICAO a proposed draft convention limiting liability. ICAO's focus was multipronged: in the short term, governments were requested to provide national war risk insurance or guarantees; in the medium term, work was intensified on a global war risk insurance program;² and in the longer term, a treaty would be developed.

Perceptions tend to change over time. The fortunate absence of major aviation terrorist events since 9/11 has led some to lose sight of the general principles and ideas that animated thinking and discussion at that time. Should another major terrorist event occur, these principles and ideas undoubtedly would resurface, but law and policy should not depend

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on the success or failure of terrorists. Rather, the following principles should remain paramount.

First, aviation terrorism is an act against governments. Like others harmed by terrorism, aviation industry participants are victims as well. To the extent that airlines are asked to compensate other victims, this approach stems more from an interest in efficiency than from the application of accepted legal principles of fault. Policies underlying strict liability are stretched beyond reasonable recognition in the terrorism context. Similar arguments apply to negligence-based liability, given that terrorist acts by definition involve intervening criminal conduct designed to maximize damage of which it is the proximate cause. This principle will be called the "industry-as-victim principle."

Second, following from the industry-as-victim principle, any allocation of legal risk to airlines for acts of terrorism must be limited by the amount of insurance available on a commercially reasonable basis. Anything else would undercut the efficiency basis for liability, and, thus, would be inappropriately punitive. This linking of liability and insurance, a necessity in this context, was taken as a given after 9/11. As time has passed, however, some have lapsed back into unhelpful formal distinctions—such as liability is one thing, insurance is another. No government would have acted differently than the United States when it retroactively limited 9/11 liability to the amount of insurance in place at that time.³ This principle will be called the "insurance liability cap principle."

Third, as this article's focus reflects, 9/11 materially and adversely impacted the entire industry, not only the airlines. Insurance was withdrawn for other industry participants, which raised the same risk management

and corporate governance issues faced by airlines. Customary indemnities given by airlines were weakened, given the latter's insurance problems. These developments adversely affected the airlines (uninsured direct exposure) and the indemnitees (uninsured credit exposure). One need look no further than the range of 9/11 defendants to observe the risks of protracted litigation and potential liability faced by the entire industry. A corollary of multiparty litigation, common in the aviation industry, is that limiting the liability of one party directly impacts the potential exposure of other parties.⁴ The aviation industry is integrated, with overall air transport dependent on the working of the entire system. This principle will be called the "integrated industry principle."

The above principles underlie the U.S. government's post-9/11 legislation, the FAA war risk insurance program, and the statutory limits placed on liability. They also formed the conceptual basis for ICAO's Globaltime compensation scheme, which contemplated the provision of funds—to all industry participants—to address liabilities, including in the case of further restrictions of commercial insurance. They should animate the solutions adopted by the international community in these conventions.

Lessors, financiers, and manufacturers

In the case of lessors and financiers, 9/11 raised basic risk considerations, particularly in jurisdictions where such parties could be exposed to strict liability (relatively few) or the prospect of complex and protracted litigation. The fundamental point, which must guide policy regarding these parties, is that the economics and structure of the aviation industry simply do not support any

third-party (or passenger) liability against lessors or financiers. These entities merely provide a financial service: the provision of credit. Airlines have operational responsibility. Governments have regulatory responsibility. This reality is reflected in many—though regrettably not all—jurisdictions. Law and policy support this reality, as reflected in U.S. federal law, as properly interpreted.⁵

In the case of manufacturers, three threshold points apply. First, governments, in approving an aircraft's design, have ultimate responsibility for antiterrorism features. It follows that manufacturers should have no liability for the consequences of such governmental decisions. Manufacturers are bound by these governmental determinations, which have been made in light of a wide range of policy considerations—such as policy preferences on preventing terrorists, passenger safety, available technology, cost, and military and technology transfer issues. One example of such a determination is whether antimissile technologies should be included on an aircraft, a matter beyond the control of manufacturers. Another example is the nature and extent of cockpit security. Second, the insurance liability cap principle applies to manufacturers. Clearly, the same policies applicable to airlines apply in favor of limiting manufacturers' product liability in the terrorism context to available insurance. Third, in accord with the integrated industry principle, limiting airlines' liability increases risks to manufacturers, the other party customarily involved in aviation accident litigation.

The UIC: Key provisions

At a conceptual level, the UIC represents a breakthrough in air law. For the first time, a major international air law instrument recognizes and advances the integrated industry principle. Previous air law instruments have

equated airlines with the industry as a whole. The liability of others was beyond the scope of such instruments, meaning that they were left to applicable law.⁶ One could argue in principle or in context about the merits of such an approach, and the complexity and thus the procedural implications of any other approach. But no reasonable argument can be made that ignoring the integrated industry principle is sound law and policy, while limiting liability for airlines. Such an approach contains a zero-sum game element: other industry participants potentially face greater exposure, as they become comparatively more attractive as litigation targets. ICAO and the states at the diplomatic conference deserve credit for this breakthrough.

The means by which the integrated industry principle was followed was through the exclusive remedy provision. Given its importance, the text is set out in full as follows:

Article 29—Exclusive remedy

1. Without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights, any action for compensation for damage to a third party due to an act of unlawful interference, however founded, whether under this Convention or in tort or otherwise, can only be brought against the operator and, if need be, against the International Fund and subject to the conditions and limits of liability set out in this Convention. No claim by a third party shall lie against any other person for compensation for such damage.

2. Paragraph 1 shall not apply to an action against a person who has committed, organized or financed an act of unlawful interference.

This provision, while superficially similar to parallel clauses in other air law instruments, is in fact quite new.⁷ It channels liability to the operators. It prevents actions by third-party victims against

others. Based on the last sentence in Article 29(1), such actions must be immediately dismissed (to the extent there is jurisdiction in the first place). Channeling was inspired by other international instruments (outside of aviation) addressing low and unknown probability but high magnitude liability exposure, which present insuring difficulties.⁸ In the present context, channeling provides a sound and economically efficient approach; it assigns liability to those best able to insure and collectivize the risk. It limits the exposure to the assigned party, taking into account insurance available on a commercially reasonable basis.

This channeling concept is based on the UIC's general approach of advancing compensation objectives, rather than assigning blame through liability rules, as traditionally formulated and justified.⁹ The "compensation versus liability" question is the prism through which the UIC is best understood. Compensation generally prevailed: the UIC seeks to provide victims with compensation, and does so in a functional manner. The basic elements are strict liability of the airline up to a capped amount, with further claims made against an International Fund,¹⁰ financed by passenger and cargo-based contributions. The airlines, supported by the wider industry, sought a "hard" or "unbreakable" cap through procedures designed to provide a certified safe harbor as a quid pro quo for liability, which they do not deserve in the terrorism context (per the industry-as-victim principle).¹¹ That hard cap was regrettably diluted.

Grasping the full picture on liability for lessors, financiers, and manufacturers requires a summary of Articles 24, 25, 26, and 27 of the UIC. Articles 24 and 25 establish rights of recourse in favor of the operator (airline) and the International Fund against

“any other person.” There are no express substantive or procedural standards governing that right, meaning that such is determined under applicable law. This point was confirmed on the record, following a statement and direct question by the Aviation Working Group. There could be no other sensible interpretation, particularly given that a “person” is defined in Article 1(g) to include a state.

Articles 26 and 27 restrict any right of recourse under applicable law. Article 27 contains two direct and complete restrictions. First, no right of recourse shall lie “against an owner, lessor, or financier retaining title to holding security in an aircraft,” where such is not the operator (meaning the airline controlling or making use of the aircraft (see Article 1(f)). This is a wide restriction, which, in a stroke, sweeps aside concepts of strict liability and assertions of negligence. It realistically reflects and promotes the basic structure and economics of the aircraft leasing and financing industry. Second, Article 27 prevents recourse “against a manufacturer if that manufacturer proves that it has complied with the mandatory requirements in respect of the design of the aircraft, its engines or components.” This provision is intended to address, and reject, potential claims such as whether antimissile technology is included on an aircraft and the design of cockpit security. The concept of “design” should be read broadly. Manufacturers, which will carry the burden of proof for this exclusion, are well advised to ensure that any design requirements related to antiterrorism are fully and clearly documented.

Article 26(1) further restricts any right of recourse under applicable law “to the extent the person against whom recourse is sought could have been covered [by] insurance available on a commercially reasonable basis.” The

word “commercially” was added to the pre-diplomatic conference text. That addition indicates that the provision is linked to standard business decision making; it should not require a higher level of cover than is customary. Efforts were made to provide more objectivity, including through an amendable schedule set out by the Conference of the Parties. States, however, did not agree. Thus, a court would determine the amount of insurance available on a commercially reasonable basis. This provision reflects the insurance liability cap principle—with only one modification. Article 26(2) states that, in an otherwise permissible recourse claim by the International Fund (but not by the operator), the insurance cap does not apply where the person against whom recourse is sought has acted “recklessly and with knowledge that damage would probably occur.” While this standard for breaking the cap is relatively high, the clause is misguided. It could potentially be invoked in claims against a manufacturer for non-design issues. As the clause is limited to action by the International Fund, a collective decision would be required regarding any such “reckless” conduct. To some degree, this procedural step will minimize the risk of speculative and strategic assertions.

A final point on Article 29(2). That clause removes the exclusion for financiers in respect of a person, *inter alia*, who “financed *an act* of unlawful interference” (i.e., terrorism) (emphasis added). This provision should be interpreted narrowly. The entity must have financed the actual terrorist act. Changes were made from a prior, interim draft that could have been read as casting a wider net, to include the general financing of terrorism. The final, narrower text reflects that the UIC is not the proper place to address broader questions relating to the financing of terrorism.

Assessment

Turning to the assessment of the UIC as applied to lessors, financiers, and manufacturers, one may draw several conclusions. Lessors and financiers are fully protected from direct claims by third parties and recourse claims by the operator/airline or the International Fund. Likewise, such protections apply equally to manufacturers as regards matters relating to approved antiterrorist design, provided they carry the burden of proof on its mandatory character. In the case of normal product liability claims against a manufacturer (e.g., improper performance of its manufacturing of the governmentally approved design), recourse, but not direct, claims are permitted. Applicable law determines the standards for any such recourse claim, but such recourse is capped by the amount of insurance available to manufacturers on a commercially reasonable basis. The only exception to that cap applies in the case of recourse by the International Fund, where a determination must first be made that a manufacturer acted recklessly and with knowledge that damage would probably occur.

The UIC significantly improves the position of lessors, financiers, and manufacturers regarding design claims—arguably their greatest risk in this context. While imperfect, the manufacturers’ position regarding normal product liability is generally improved, when measured against current law in most jurisdictions.

Lessors, financiers, and manufacturers will naturally take into account the position of their airline customers in determining the extent to which they actively support the UIC. There are some concerns in this regard, most notably the softening of the airlines’ liability cap. That softening raises questions about adherence to the industry-as-victim principle. The airlines, individually and

collectively, must determine their own positions on the UIC. They will likely weigh its terms against their position under current law, while taking into account the payment of passenger and cargo contributions to the International Fund. The airline industry will note other aspects, both positive and negative, in assessing the UIC. On the positive side, Article 18(3) contains a reasonably helpful “drop-down” provision accessing the International Fund, and reducing liability, where insurance is wholly or partially unavailable. On the negative side, a state can declare at time of ratification that the UIC does not apply to domestic flights, which contravened the position of the airline industry (noting that 9/11 involved domestic flights).

General Risks Convention (GRC)

Throughout the development and negotiation of the texts, most state delegations and industry representatives felt that a treaty on third-party liability for general risks was neither necessary nor desirable. Current law is not seen as problematic. Insurance is available at reasonable rates to cover general risks. Legal systems are sharply divided between fault and strict liability regimes, thus making wide acceptance of a harmonized system unlikely. The outdated Rome Convention of 1952, with low limits of airline liability, lacks contemporary relevance, and thus need not be directly superseded by a modernized instrument (*compare* the Warsaw system and the Montreal Convention of 1999). Nonetheless, certain groups of states pressed for adoption of the GRC, principally contending that it will help modernize their national laws. Although this arguably is not the soundest basis for an international convention of this type, overall political considerations resulted in the proposed GRC.

The GRC text is favorable from a lessor and financier perspective.

Article 13, following the wording in the UIC, states that “neither the owner, lessor or financier retaining title or holding security in an aircraft, not being an operator, nor their servants or agents, shall be liable for damages under this Convention or the law of any State Party relating to third party damage.” This is fortified by Article 11, which prevents recourse by an operator against these entities and persons. Taken together, the GRC provisions, like the UIC, reflect and advance the basic structure and economics of the leasing and financing industry.

From a manufacturer perspective, the GRC is more complex and its merits are more debatable. The starting point is Article 4, in which the airlines are granted a soft cap limiting the amount for which they are strictly liable (Article 4(1)). Article 4(3) provides that cap is breakable on simple negligence. The threshold issue for manufacturers is whether their overall risk has increased or remains roughly the same, measured against current law.¹² The argument for the former is that the airlines have a cap, making the manufacturers more attractive litigation targets by comparison. The argument for the latter is that airlines are strictly liable up to the cap, which may increase their comparative attractiveness as a litigation target. Moreover, the cap is easily breakable, thus not protective in practical terms. A final consideration is that, through Article 12(2), certain limits on types of recoverable damages in favor of the airlines (e.g., preventing punitive damages) also apply in favor of manufacturers.

The future of the UIC and GRC

The entry into force prospects for the UIC are unclear, given the significant differences of opinion on the approach followed by, and details of, that convention. The prospects for the GRC are equally uncertain, in view of basic questions about its necessity and utility.

Each of these instruments requires 35 ratifications to enter into force. In the case of the UIC, those ratifications must be from countries with sufficiently high levels of traffic to ensure the capitalization of the International Fund. In practical terms, that means that the UIC needs to be ratified by either the United States or most European Community member states. While little time has passed since adoption of these texts, there is currently no apparent rush toward ratification. Yet circumstances may change, producing different ratification dynamics.

The UIC addresses a critical topic for the air transport sector. Recalling the lessons of 9/11 and the resulting core principles outlined above, all interested parties should consider whether, on balance, the UIC provides a better and more lasting framework than current law to address aviation terror compensation and liability. A strong argument can be made that it does. The UIC also represents a breakthrough in air law: for the first time, the integrated industry principle was followed. Air law should embrace this broader conception of the range of interested parties.

Both the UIC and the GRC provide sensible rules for the treatment of lessors and financiers. These aspects bode well for future legal issues addressed by ICAO and the states that might take ICAO precedent into account in the development of national law.

Endnotes

1. See Final Act, International Conference on Air Law, Montreal, Apr. 20 to May 2, 2009, DCCD Doc No. 44. For the final version of the two texts adopted at the Diplomatic Conference, the Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft and the Convention on Compensation for Damage Caused by Aircraft to Third Parties, see DCCD Doc No. 43 and DCCD Doc No. 42, respectively. No article commenting on the results of the Diplomatic Conference would be complete without commending Mrs. Kate Staples, president of the Conference, for her extraordinary skill and fairness in leading the Conference and Ms. Tan Siew Huay, for her diligence and thoroughness

in chairing the Drafting Committee.

2. Press Release, ICAO, ICAO Council Approves Global Aviation War Risk Insurance Scheme (June 14, 2002). While ICAO's Globaltime compensation scheme did not enter into force, the work on it helped lay the foundation for the UIC. In particular, the scheme was farsighted in its treatment of the industry as a whole, its global approach to risk sharing in the terrorism context, and its method for addressing future withdrawal of insurance coverage (the so-called drop-down). Each of these aspects features prominently in the UIC.

3. See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

4. See R. Litan, *The Case for Government-Supported Terrorism Insurance for U.S. Aerospace Manufacturers* (Nov. 11, 2002) (on file with the author).

5. 49 U.S.C. § 44112 (a "lessor, owner, or secured party is liable for personal injury, death, or property loss or damage on land or water only when a civil aircraft, aircraft engine, or propeller is in the actual possession or control of the lessor, owner, or secured party . . .") (emphasis added). The intention of § 44112 was to "remove one of the obstacles to the financing of purchases of aircraft." See H.R. REP. NO. 802091 (1948). As a general proposition, federal courts have correctly interpreted this section to preempt liability under state law. See, e.g., *In re Lawrence W. Inlow Litig.*, 2001 U.S. Dist. LEXIS 2747 (S.D. Ind. 2001). There have been some misguided state law decisions, see, e.g., *Retzler v. Pratt & Whitney*, 723 N.E.2d (Ill. App. 1999), that need to be addressed at the first opportunity.

6. Most notably in the Convention for the Unification of Certain Rules for International Carriage by Air, 1999 ("MC 99"), reprinted in S. Treaty Doc. 106-45, 1999 WL 333292734, and the Convention for the Unification of Certain Rules relating to International Transport by Air, 1929, reprinted in note following 49 U.S.C.A. § 40105 (1997).

7. See, e.g., MC 99, art. 29 (basis of claims).

8. Examples include the Convention on Third Party Liability in the Field of Nuclear Energy (1960), the Vienna Convention on Civil Liability for Nuclear Damage (1963), the International Convention on Civil Liability for Oil Pollution Damage (1992), the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea (1996), and the International Convention on Civil Liability for Bunker Oil Pollution Damage (2001).

9. See M. Jennison, *Report of the Rapporteur on the Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in the Case of Unlawful Interference*, ICAO Legal Committee, 33d Sess., L/C33-WP/3-3 at ¶ 2.2.

10. See UIC arts. 8 (constitution and objectives of the Fund), 9-10 (conference of the parties (authority over the Fund)), 11 (secretariat and director of the Fund (management of the Fund)), 12-15 (matters relating to contributions to the Fund), 16 (duties

of State Parties in respect of the Fund), and 17-18 (use of funds and compensation by the Fund).

11. See Joint Industry Paper, International Conference on Air Law, Montreal, April 20 to May 2, 2009, DCCD Doc No. 10.

12. See Aviation Working Group Paper, International Conference on Air Law, Montreal, Apr. 20 to May 2, 2009, DCCD Doc No. 5.

Chair's Message

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abroad, to enhance the breadth and depth of our topics and to develop a strategic approach to our conference topics. Finally, Captain David Hayes chairs the Public Relations Committee, which will get the word out about the Forum and will make sure that our stellar speakers get the press coverage they deserve. Should any of these committees intrigue you, please contact the committee chair, Dawn Holiday, or me.

Finally, I want to wish each of you a new year filled with well-being, prosperity, and adventure.

Warm regards,



Renee Martin-Nagle

Editor's Column

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conflicts with its otherwise pro-consolidation stance.

Following Sven's piece, and merging U.S. and EU aviation policy, is an article entitled "An Intersection of Air and Space Law: Licensing and Regulating Suborbital Commercial Human Space Flight Operations," by Mike Mineiro, a doctoral candidate at McGill. Mike succinctly poses and answers questions related to the legal ramifications of the emerging and exciting industry of commercial human space flight. He outlines the current U.S. laws governing space transportation and juxtaposes that with the possible regulatory approach of the EU as

well as other international standards. He offers a great foundation on which we can all start considering legal work in a stimulating new field of law.

Speaking of space, Josie Beets, who won our law student writing competition, presents us with the article "The International Charter on Space and Major Disasters and International Disaster Law: The Need for Collaboration and Coordination." Josie's article focuses on the current international legal regime for assisting in disasters and suggests greater collaboration among governments and industry with the use of satellite imagery and analysis to detect and respond to disasters.

No issue would be complete without our Web faves. We are pleased to bring you some favorite sites from none other than Bob Rivkin, DOT General Counsel. Find out where he gets his flight information, music, and politics, with a great suggestion on how to talk cheaply and effectively to distracted college kids.

We hope to see you in D.C. for the Update Conference in January. As always, please feel free to send any compliments or gripes our way and keep those articles coming to kquinn@pillsburylaw.com and david.heffernan@wilmerhale.com. Cheers.



Kenneth P. Quinn
Editor-in-Chief

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Web Favorites

For each issue, we ask a member of the air and space community to share favorite websites with our readers. Robert Rivkin, Department of Transportation General Counsel, shares his.

FlightAware
<http://flightaware.com>
No need to call the airline—or FAA ATO Operations—to get current flight information. This site provides a live picture of the current position of all flights, by tail number or airline flight number, with departure and expected arrival times.

Routes International and The Man in Seat Sixty-One
<http://routesinternational.com> and www.seat61.com
Routes International has links to virtually every transportation source imaginable: airlines, airports, city transit agencies, rail, bus, ferries, and everything in between. Seat61 gives great tips on train and ship travel worldwide. Both are inspiring when you're feeling stuck in the office. Oh, the places you could go, if only . . .

Pandora Internet Radio
www.pandora.com
If you have any interest in expanding a music collection that was frozen in time upon college graduation, and your teenage children's music just doesn't do it for you, try Pandora. Applying some basic algorithms to analyze your favor-

ites, it finds songs like the ones you already like, introducing you to artists you never heard of.

Skype
www.skype.com
Speaking of teens, Skype is an amazing way to touch base when your loved ones move out of the nest. Computer-to-computer video chat for free with your college-age kids, watching them as they busily check all their incoming messages and pretend to pay attention to you at the same time. Just like when they lived at home.

RealClearPolitics
www.realclearpolitics.com
The best collection I have found of political news, analysis, opinion, and polling across the spectrum.