

Table of Contents

About the Author	vii
Foreword	ix
Preface	xiii
Acknowledgements	xv
List of Abbreviations	xxix
Chapter 1	
Introduction: Preparing for a New Era in International Aviation	1
I REPLACING A FLAWED REGULATORY SYSTEM	1
II THE 'CHICAGO SYSTEM' AND A PROPOSAL FOR ITS REFORM	5
A An Overview of The Global Air Transport Industry: Passenger/Cargo Services	6
B A Synoptic View of the 'Chicago System'	8
C Open Skies: Seeking Flexibility within the Chicago System	12
III A SUMMARY OF CORE PRINCIPLES FOR A SECOND STAGE PLURILATERAL TREATY	17
Chapter 2	
Prelude to Change: A Synthesis of Transatlantic Aviation Relations 1993-2008	23
I INTRODUCTION: AN EPISTEMIC COMMUNITY RISES	23
II RETHINKING BILATERALISM: THE OPEN SKIES DECADE 1993-2003	25
A Beyond Bilateralism: The Baliles Airline Commission	25
B A Bridge to Multilateralism: The Strategic Implications of U.S. Open Skies	29

C	The EC Responds to Open Skies: An Incomplete First ‘Mandate’	34
D	Webs of Influence: International Organizations and Academic Commentators	40
1	Webs of Influence I: International Nongovernmental Organizations	40
2	Webs of Influence II: International Governmental Organizations	43
3	Webs of Influence III: Academic Commentators	46
E	Glimmerings of Multilateralism: Some Tentative U.S. Initiatives	52
III	FIXING A NEW HORIZON FOR OPEN SKIES: U.S./EC AVIATION RELATIONS AFTER 2003	55
A	The Force of EC Nondiscrimination Law: The European Court Destabilizes the Nationality Rule	57
B	Managing the Fallout: The Commission Secures A Second (Double) Mandate	61
IV	THE TRAJECTORY OF U.S./EC AIR SERVICES NEGOTIATIONS 2003-2007	67
A	Toward a U.S./EC Agreement I: Political Stalemate	67
B	Toward a U.S./EC Agreement II: Breaking the Impasse	71
V	AN EXECUTIVE BRIEFING ON THE 2007 U.S./EC AIR TRANSPORT AGREEMENT	78
A	The 17 Keynote Ideas of the 2007 Agreement	79
B	The Second Stage Agenda and Timetable	82
1	The Second Stage Timetable	83
2	A Threat of EU Member State Unilateralism	84
3	The Second Stage Agenda: Toward an OAA?	85
VI	CONCLUSION: VISIONARIES, PRAGMATISTS, AND THE SHAPING OF A POST-CHICAGO GLOBAL AVIATION ORDER	93

Chapter 3

Airspace Sovereignty: The Ontology of the Chicago System of International Air Transport Regulation 97

I	INTRODUCTION: THE CONCEPTUAL FRAMEWORK OF THE CHICAGO SYSTEM	97
II	AIRSPACE SOVEREIGNTY	99
III	AT THE HEART OF THE CHICAGO SYSTEM: THE FREEDOMS OF THE AIR AND BILATERALISM	103
A	The Nine Freedoms	103
B	Trading the Freedoms: The Rise of Bilateralism	109
1	<i>Ex Post Facto</i> Flexibility: The Moderate Liberalism of Bermuda I	111
2	Treaty-Based Rigidity: Bermuda II	116

IV	THE VENERABLE DOCTRINE OF CABOTAGE	119
	A A Principle of Exclusion	119
	B Cabotage in a Multilateral Airspace Environment	122
	1 Pooling Airspaces in the EC: Can Cabotage Be Traded Away?	123
	2 Cabotage and U.S. International Aviation Policy	126
	a <i>The Legal Foundations of U.S. Cabotage</i>	126
	b <i>The Durability of U.S. Cabotage Restrictions</i>	128
V	SOVEREIGNTY AND CITIZENSHIP PURITY: THE NATIONALITY RULE	133
	A The Substantial Ownership/Effective Control Dyad	133
	B Proscribing Multinational Airlines: The Nationality Rule in Domestic Law	135
	1 Case Studies in the Nationality Rule and the Unmaking of a U.S. Government Rulemaking	138
	a <i>Airline Citizenship: Law and Policy in the United States</i>	138
	b <i>DHL/ASTAR and Virgin America: Citizenship as a Competitive Weapon</i>	143
	i DHL/ASTAR	144
	ii Virgin America	150
	c <i>The DOT's Noble Failure: The 2005/06 Rulemaking</i>	155
	C A Future Without the Nationality Rule?	162
	1 Alliances: From Code-Sharing to Contract	162
	2 Reforming the Nationality Rule in Domestic Law	164
	3 Liberalizing the U.S. Domestic Rules on Ownership and Control	167
	D Conclusion: The Superior Norm of Nationality	171
VI	FETISHIZING SOVEREIGNTY: THE PUBLIC STAKE IN AIR TRANSPORT	172
	A Public Airlines and Public Subsidy	172
	B The Retreat of the State: The Age of Deregulation	178
	1 New Models of Airline Regulation in the United States and EC	178
	2 Airline Privatization in the EU	184
VII	THE REGULATORY REFLEX: COMPUTER RESERVATIONS SYSTEMS AND AIRPORT ACCESS	188
	A CRS: From Regulation to Deregulation in 20 Years	189
	B The Competitive Quandaries of Airport Access	194
VIII	THE LATE-MODEL CHICAGO SYSTEM: STRATEGIC ALLIANCES AND CODE-SHARING	198
	A Entrepreneurial Circumventions of the Nationality Rule	198
	B Global Marketing Alliances	198
	1 Strategies for Alliance-Building	198
	2 KLM/Northwest and Its Progeny: The Immunity Artifice	203

- C Code-Sharing as ‘Pseudo-Cabotage’ 208
 - 1 A Code-Share Taxonomy 208
 - 2 Does Code-Sharing Violate Cabotage? 213
 - 3 Code-Sharing: A Costly Compromise for U.S. International Aviation Policy – and for the Airline Industry 214
 - 4 Code-Shares and the Consumer 220
- IX MULTILATERALISM AND REGIONALISM IN THE CHICAGO SYSTEM 223
- X THE CHICAGO SYSTEM ON THE CUSP OF REFORM 231

Chapter 4

Model Jurisdiction I: The United States 235

Airline Deregulation Within and Beyond a Unitary Airspace

- I INTRODUCTION 235
- II THE LEGAL AND HISTORICAL BACKGROUND 239
 - A Prologue: An Apt Quotation 239
 - B The Regulatory Era: The *Kitty Hawk* Irony 240
 - 1 CAB Route Authority: The ‘Grandfather’ Syndrome 242
 - 2 CAB Rate Authority: The ‘Pullman’ Effect 244
 - 3 CAB Antitrust Authority: Regulatory Omnipotence 246
 - C Deregulation: The Intellectual Premises 248
 - D Deregulation: A Political Act of Will 251
 - 1 CAB Route Deregulation: The Fruits of Dormancy 255
 - 2 CAB Fare Deregulation: Zones of Flexibility 258
 - 3 CAB Antitrust Deregulation: The Longest Sunset 259
 - 4 A Regulatory Vestige: The Essential Air Service Program 263
 - E Scrambling the System: Alfred Kahn’s Regulated Deregulation 264
- III EXPORTING DEREGULATION: PROBING THE LIMITS OF BILATERALISM 268
 - A The Emergence of an Open Skies International Aviation Policy 268
 - B The IATCA: An Ambivalent Challenge to Bilateralism 272
 - 1 The IATCA’s ‘Soft Law’ Approach to the Chicago System 274
 - 2 Protecting U.S. Carriers: The IATCA’s ‘Hard Law’ Approach 275
 - C The IATCA and the Chicago System: Enduring Regulation 279
 - 1 International Designation: Public Franchises and Private Profits 279
 - 2 International Fares: Zonalism and Unilateralism 283
 - 3 International Antitrust Regulation: Wielding the Wand of Immunity 285

a	<i>Avoiding the Sunset</i>	285
b	<i>Two Case Studies in Alliance Approval and Antitrust Immunity: The Force of Bilateral 'Specificity'</i>	287
c	<i>Immunity Proceedings: The Conflict of Competition and Aviation Policy</i>	293
d	<i>The SkyTeam Proceedings: Slouching Toward Regulatory Incoherence</i>	297
e	<i>Mixing Competition Policy and Politics: The Instability of Immunity Jurisprudence</i>	301
D	Moving Beyond Open Skies: The Need to Reconceptualize U.S. International Aviation Strategy	302
1	Open Skies and Retrenchment: U.S. Bilateral Relations 1978-92	302
2	U.S./Europe: A Continuing Story of Aeropolitical Discord	305
3	Resisting Open Skies: The U.S./Asia/Oceania Market	309
4	The U.S. Response: Aerodiplomacy Trumps Retaliation and Denunciation	312
5	A Reconceptualization of Open Skies – Some Preliminary Thoughts	318
a	<i>IATCA and the 2007 U.S./EC Air Transport Agreement</i>	322
b	<i>The Risks of More Bilateralism</i>	325
IV	A CRITIQUE OF U.S. FEDERAL AIRLINE DEREGULATION	326
A	Lessons from the U.S. Experience	326
B	Securing Competition in a Deregulated Airline Industry	327
1	The Structural Unpredictability of U.S. Deregulation	327
2	An Enduring Business Model: Complex, Costly Hub-and-Spoke Networks	331
3	CRS: Adjusting to a Post-Regulatory Environment	335
4	Loyalty Programs and Slot/Gate Scarcity: Enduring Non-Price Entry Barriers	340
5	The Death and Life of A Merger Policy for the U.S. Airline Industry	347
a	<i>Mergers in the Reagan Era: Laissez-Faire under CAB/DOT Review</i>	348
b	<i>After 1989: Stronger Surveillance by the Antitrust Division</i>	352
6	Finding the Proper Regulatory Tempo: A Case Study of the 1998 Predatory Pricing Guidelines	357
a	<i>The DOT Enters a Jurisprudential Minefield</i>	357
b	<i>The Rational Side of Predation</i>	362
c	<i>The DOT Abandons Regulatory a Priorism</i>	365
C	Portents of Reregulation: An Industry in Perpetual Transition	368
1	The Lessons of the September 11, 2001 'Stabilization' Package	368

a	<i>The First Approach of Reregulation: The September 11, 2001 ‘Stabilization’ Package</i>	369
b	<i>Lessons of the Stabilization Act</i>	373
2	2008: The Reregulation Debate Redux	374
D	U.S. Airline Deregulation: An Unfinished Experiment	378

Chapter 5

Model Jurisdiction II: The European Community **381** *An Experiment in Multilateral Airline Liberalization*

I	INTRODUCTION: AN OVERVIEW OF THE EU AIR TRANSPORT INDUSTRY	381
II	THE SUPRANATIONAL LEGAL AND POLICY FOUNDATIONS OF EC AIRLINE DEREGULATION	386
A	General Principles of the Community Legal Order	386
B	The Community Institutions and EC Air Transport Liberalization	388
1	The Council of the European Union	388
2	The European Commission	389
3	The European Parliament	391
4	The European Court of Justice	393
C	The Legislative Foundations of the Single Aviation Market: A ‘Package’ Deal	401
D	The EC Treaty’s Competition Code: Still Leading from the Center	410
1	The Primary and Secondary Sources of EC Competition Law	411
a	<i>Regulating Private Action: Articles 81 and 82, Regulation 1 of 2003</i>	411
b	<i>Applying Competition Law to the Airlines</i>	416
c	<i>Merger Control in the EC</i>	418
d	<i>Regulating Public Action: State Aids</i>	422
E	Toward Multilateralism: The EC’s External Aviation Relations	424
1	The Open Skies Rulings and the External Competence of the EC	424
2	A Synthesis of the Community’s External Competence	432
III	AN APPRAISAL OF MULTILATERAL AIRLINE DEREGULATION IN THE EC: GUIDEPOSTS FOR THE ERA BEYOND OPEN SKIES	434
A	The Demonstration Effect of the European Experiment	434
B	Reprising the U.S. Experience: Protecting Competition in a Deregulated Era	435
1	Europe’s FTC: The Shifting Role of the European Commission	435

2	Two Case Studies in Supranational Trusteeship: The Article 82 'Dominance' Factor	438
a	<i>An Early Example: British Midland v. Aer Lingus</i>	439
b	<i>Focusing on the Competitive Structure: The Travel Agency Incentives Case</i>	443
3	Airline Mergers and Alliances: A New Commission Activism	450
a	<i>Europe's Airline Culture: Cooperation Trumps Merger</i>	450
b	<i>Case Studies in the Commission's Scrutiny of Transatlantic Alliances</i>	453
i	The Nebulous World of Transnational EU Mergers: Air France-KLM	456
ii	A Case Study in Community Merger Policy: The easyJet Challenge to Air France-KLM	459
c	<i>Conclusion: When the Mergers Come</i>	466
C	Regulatory Challenges of Multilateral Airline Liberalization I: Issues Common to the U.S. Experience	469
1	Computer Reservations Systems in Europe	469
2	The Infrastructure Challenge	473
3	Passenger Rights: Overexuberant Regulation?	477
D	Regulatory Challenges of Multilateral Airline Liberalization II: Issues Beyond the U.S. Experience	482
1	Building the Community's External Aviation Policy I: The Chicago Bilateral System After the ECJ Open Skies Rulings	482
2	Building the Community's External Aviation Policy II: More Verticality and a European Common Aviation Area	488
3	A Concluding Note on the Community's External Aviation Policy	492
E	A Conceptual Conflict: The Community Licensing System and the Right of Establishment	492
F	Dipping into the Well of Public Subsidy: The Battle Against 'State Aids'	495
1	Two Flag Carriers Under Scrutiny: Olympic and Alitalia	497
2	A New State Aids Challenge: Airport Subsidies	502
3	Should State Aids Be a Transitional Phenomenon?	506
G	Conclusion: Some Counterpoints to the EC Deregulation Experiment	507
1	Two General Counterpoints	509
a	<i>The Commission's 'Industrial Policy'</i>	509
b	<i>A Partial Deregulation of the 'Aviation' Industry</i>	510

2	Three Specific Counterpoints	511
a	<i>The Anomaly of Public Service Obligation (PSO) Routes</i>	511
b	<i>A Doomed Suggestion: Fare Reregulation</i>	513
c	<i>A Cautionary Tale of External Relations</i>	515

Chapter 6

Conclusion: A Proposal for a Second Stage U.S./EC Air Transport Agreement

		517
I	INTRODUCTION: THE CHANGE IMPERATIVE	517
II	THE IMPERATIVES OF LIBERALIZATION AND GLOBALIZATION	518
	A The Global Regulatory Backdrop to Airline Deregulation	518
	B A Constitutional Symmetry: U.S./EC Airline Deregulation	521
III	THE FOUNDATIONS OF A NEW PLURILATERAL AIRSPACE	522
	A Introduction: The Narrowness of Open Skies	522
	B Visualizing a Multilateral Air Transport Regime	524
	C GATS Gradualism: A Search for the Highest Common Denominator	526
	1 Introduction	526
	2 Applying the GATS Framework Principles to Global Air Transport	528
	a <i>The GATS Trade Principles</i>	530
	b <i>Most-Favored-Nation</i>	530
	c <i>National Treatment</i>	534
	d <i>Market Access</i>	535
	3 A Critique of the GATS Approach to Multilateralism	535
	4 Conclusion: Politics and the GATS	540
	D A Plurilateral Reconceptualization of the U.S./EC Second Stage Negotiations	542
	E Some Guiding Principles for the Negotiators	544
	1 Principle 1: The End of Managed Trade	546
	2 Principle 2: The End of Cabotage and Chicago's Contrivance of 'Freedoms'	547
	3 Principle 3: A New Doctrine of 'Regulatory' Nationality	548
	4 Principle 4: An End to Pricing Controls	550
	5 Principle 5: A 'Deep Integration' Program of Regulatory Convergence	551
	a <i>Convergence in Air Transport Competition Law and Policy</i>	553
	i Introduction: Globalizing Trends in Competition Law Enforcement	553
	ii A Proposal for Competition Surveillance of the Airlines	559
	(a) Shaping a Common Body of Competition Law	560
	(b) A Rule of Abstention for Competition Enforcement Agencies	561
	iii Conclusion	562

b	<i>The End of Operating Aid for Failing Carriers</i>	562
c	<i>Resetting the Tempo of Regulation: Abstention and Convergence</i>	564
i	A Code for Airport Constraints	566
ii	Labor Rights in a Plurilateral Setting	567
6	Principle 6: A Mandatory Supranational Dispute Settlement/Appellate Mechanism	570
a	<i>Introduction</i>	570
b	<i>A Sector-Specific Supranational Tribunal</i>	572
c	<i>Advancing to Private Supranational Dispute Settlement</i>	576
d	<i>Private Supranational Dispute Settlement: A Constitutional Possibility?</i>	578
e	<i>Conclusion</i>	580
7	Principle 7: Adopting the EC 'Community Designation Clause' for Countries outside the Second Stage Plurilateral	581
IV	BEYOND OPEN SKIES: THE POLITICAL CHALLENGE OF AUTHENTIC LIBERALIZATION	583
Appendix I		
Department of Transportation Statement of United States International Air Transportation Policy May 3, 1995		589
Appendix II		
Model U.S. Open Skies Agreement		601
Appendix III		
2007 U.S./EC Air Transport Agreement		615
Tables of Cases and Administrative Proceedings		659
Select Bibliography		669
Index		695