Foreign Ownership and Control Restrictions in United States Airlines: Barrier to Mergers and Restructurings

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II. INTRODUCTION

The United States (U.S.) airline industry is unique among industries in being governed by federal statutes requiring air carriers seeking to be certified in the U.S. to be "owned or controlled" by a "citizen" of the U.S.[1] This requirement is enforced by the Department of Transportation (DOT) performing "fitness reviews" on applicant airlines to ensure they meet the "citizenship" definition.[2] Historically, the U.S. has limited ownership and control to U.S. citizens for four primary reasons: the protection of a fledgling U.S. airline industry, the regulation of international air service through bilateral agreements, concern about allowing foreign aircraft access to U.S. airspace, and military reliance on civilian airlines to supplement airlift capacity.[3] The practical effect of these restrictions is to prevent cross-border airline mergers and acquisitions, cut off the flow of potential equity capital to the industry, and retard industry growth and efficiency. As will be discussed, the primary reasons for these foreign ownership and control restrictions either no longer serve their intended purposes or can be mitigated through less onerous restrictions.

U.S. airline industry financial losses have been staggering this century. According to the Air Transportation Association (ATA), the industry posted net losses of $8.3 billion in 2001, $11.3 billion in 2002, $3.6 billion in 2003, with additional losses expected for 2004 and 2005.[4] Additionally, long-term debt in the industry has ballooned from $24.1 billion in 1999 to $52.7 billion in 2003.[5] These losses create a tremendous need for restructuring and recapitalization in the industry. These restrictive ownership laws preclude the industry from seeking merger and equity partners oversees, effectively preventing access to a major source of potential equity

[1] 49 U.S.C. § 40102(a)(15) (2003)
[2] 49 U.S.C. § 41102 (a) (2000)
[3] GENERAL ACCOUNTING OFFICE, *Foreign Investment in US Airlines*, GAO-04-34R (2003) [hereinafter GAO].
[4] AIR TRANSPORT ASSOCIATION OF AMERICA, 2001-04 ECONOMIC REPORTS (2001-04).
[5] *Id.*

capital and restructure partners. Once the industry recovers and seeks to grow and expand again, ownership and control restrictions will prevent airlines from establishing operations in other nations and prevent expansion of their product through cabotage[6] and other legal restrictions.

This paper addresses the current state of foreign ownership and control restrictions in the U.S., what significant legislation and administrative case law created this environment, the benefits from removing these restrictions, and in what direction the political environment heading. The first section discusses significant legislative acts that have affected ownership and control restrictions in the U.S., while the second section analyzes how U.S. administrative agencies have interpreted and applied the law over the years by analyzing significant administrative cases. The third section takes a view towards the current political environment in the U.S. and other regions of the globe that are likely to shape the direction of ownership and control law in the near future. The fourth and last section discusses benefits expected should the industry eliminate these restrictive clauses. Although the focus of the discussion primarily addresses restrictions to foreign mergers and acquisitions created by these restrictions, the subject is intertwined with other aspects of the airline industry necessitating a discussion of other relevant issues in order to provide a complete picture.

III. STATUTORY AUTHORITY GOVERNING FOREIGN OWNERSHIP AND CONTROL RESTRICTIONS

1) Statutory Authority

The authority of a government to control its own airspace relates back to the historic principle of state sovereignty, when as far back as 1625 Hugo Grotius wrote that sovereignty was

[6] Cabotage is the practice of selling air travel solely within the borders of a foreign nation by a noncitizen airline.

subject to the powers of the state and "not limited either in power, or in function, or in length of time."[7] This authority was first codified multilaterally in the 1919 Paris Convention treaty recognizing that every nation has exclusive sovereignty over its own airspace.[8] As an exercise of that authority, the U.S. has restricted allowable foreign entity ownership levels in U.S. airlines almost to the beginning of U.S. commercial aviation itself. The underlying justifications and rationales for restricting foreign ownership levels have changed over the years, but the policy continues until today.

a) Air Commerce Act of 1926[9]

The Air Commerce Act of 1926 (1926 Act) was the first U.S. statute enacting citizenship requirements for U.S. airlines.[10] As enacted, the 1926 Act required a minimum of fifty-one percent of voting stock to be in the hands of a U.S. citizen, at least sixty-six and two-thirds percent of the board of directors to be U.S. citizens, and the president of the company to be a U.S. citizen for an airline to be qualified to operate in the U.S.[11] The motivation for this legislation was largely to ensure aircraft availability, maintain a reserve corp of pilots in the event of a national emergency, and establish federal jurisdiction over aviation safety and maintenance of the national aviation infrastructure.[12] Although in different form, the basic motivation for maintaining foreign ownership restrictions on national security grounds continues as a justification to preserve these restrictions.

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[7] Major Stephen M. Shrewsbury, *September 11th and the Single European Sky: Developing Concepts of Airspace Sovereignty*, 68 J. AIR L. & COM. 115, 118 (2003) (quoting Hugo Grotius, *the Rights of War and Peace,* 62 (M. Walter Dunne ed 1901) (1625)) [hereinafter Shrewsbury].
[8] *Id.* at 130.
[9] Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568 (1926) (formerly 49 U.S.C. §§ 171-84 (West 1951)) (repealed 1958).
[10] GAO, *supra* note 3.
[11] James E. Gjerset, *Crippling U.S. Airlines: Archaic Interpretations of the Federal Aviation Act's Restrictions on Foreign Capital Investments*, 7 AM. U. J. INT'L. L. & POL'Y 173, 181-82 (1991).
[12] *Id.* at 181; Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L.J. 235, 280 (2003) [hereinafter Dempsey].

b) Civil Aeronautics Act of 1938[13]

The Civil Aeronautics Act of 1938 (1938 Act) retained substantially the same definition of U.S. Citizen as established in the 1926 Act, but modified the permitted ownership limits.[14] The 1938 Act increased the minimum voting interest necessary to qualify as a U.S. Citizen from fifty-one percent to seventy-five percent.[15] Proponents of the act argued that greater assistance to, and regulation of, the U.S. airline industry was required in order too provide greater support for economic growth and development and better assist it in competing with foreign air carriers as the justification for increasing required U.S. citizen ownership.[16] The U.S. Department of Commerce considered the previous fifty-one percent U.S. citizen ownership threshold to be insufficient for receiving economic support and backed the increase to seventy-five percent.[17]

Another significant aspect of the 1938 Act was its establishment of the Civil Aeronautics Authority (CAA) as an administrative body of the U.S. government.[18] The CAA, subsequently reorganized as the Civil Aeronautics Board (CAB), was created to engage in economic regulation of airlines and given jurisdiction over three facets of airline operations: deciding where airlines could fly, the rates they were allowed to charge, and antitrust and business practices.[19] These functions combined to give the CAA/CAB authority to review and approve or deny any airline--foreign or domestic--the opportunity to serve markets, establish an airline, merge with an existing airline, and decide compliance with the U.S. citizenship requirements of the 1938 Act. These CAA/CAB reviews of proposed mergers, acquisitions and consolidations

[13] Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973 (1938).
[14] *See Supra* note 11, at 183.
[15] *Id.*
[16] *Id.*
[17] *Id* at 184.
[18] Dempsey, *supra* note 12, at 280.
[19] *Id.* at 290.

still serve today as precedent in analyzing ownership and control restrictions in the industry, a function now under the jurisdiction of the Department of Transportation (DOT).

c) The Chicago Conference of 1944[20]

At the closing of World War II the U.S. sponsored the Chicago Conference in order to establish an international aviation accord that would promote freedom in air commerce. This conference spawned a number of multilateral aviation treaties.[21] Though participants rejected the notion of largely unrestricted air commerce proposed by the U.S., the Conference did formally recognize five "freedoms of the air" and reaffirmed states' sovereignty over their airspace.[22] Countries that were party to the conference were also successful in blocking the inclusion of ownership and control restrictions in any conference related agreement.[23] In addition to the multilateral treaties, the result of this Conference was to establish the mechanism by which countries would negotiate air services between each other based on these freedoms through bilateral agreements. The Bermuda Convention of 1946 (Bermuda I) between the U.S. and United Kingdom (U.K.) became the model bilateral agreement for nations and was the first time language regarding ownership and control of air carriers was articulated in an aviation treaty.[24]

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[20] U.S. Dep't of State Pub. L. No. 2820, proceedings of the International Civil Aviation Conference, Chicago, Ill., Nov.-Dec. 7, 1944 (1948) (The Chicago Conference of 1944 resulted in the Interim Agreement on International Civil Aviation, International Air Services Transit Agreement, International Air Transport Agreement and bilateral agreement formats. For purposes of this paper, the International Air Transport Agreement and bilateral agreements are relevant).
[21] Shrewsbury, s*upra* note 7, at 133.
[22] *Id.* at 136 (The freedoms can be summarized as: 1st freedom - the right to fly over state B without commercial or technical stops, 2nd freedom - the right to land in state B for technical purposes, e.g. refueling, 3rd freedom - the right to set down traffic from state A in state B, 4th freedom - the right to pick up traffic in state B destined for state A, 5th freedom - the right to pick up traffic in state B destined for state C or put down traffic in state B originating in state C. Additionally, other freedoms are often referred to: 6th freedom - a service taking passengers between states B and C which flies via state A, 7th freedom - a service between state B and state C operated by airline of state A, 8th freedom - cabotage, picking up and setting down traffic within the borders of state B by an aircraft registered in state A).
[23] Constantine G. Alexandrakis, *Foreign Investment in US Airlines: Restrictive Law is Ripe for Change*, 4 U. MIAMI BUS. L. REV. 71, 74-5 (1994) [hereinafter Alexandrakis].
[24] *Id.* at 75.

Today, the bilateral model is still the method nations use to regulate foreign air travel and enforce ownership laws regarding airlines.

d) Federal Aviation Act of 1958[25]

The Federal Aviation Act of 1958 (1958 Act) replaced the Civil Aeronautics Act of 1938 and is still in effect today under Subtitle VII, Title 49 U.S. Code. This Act, though altering many airline regulations and creating the Federal Aviation Administration (FAA), maintained the required voting interest of a U.S. citizen at seventy-five percent, but modified the provisions by requiring air carriers to obtain a "Certificate of Public Convenience and Necessity."[26] The requirement that an air carrier obtain a certificate of public convenience and necessity, also known as the "fitness" requirement, is the vehicle the CAB/DOT uses to require a review of air carriers and determine if foreign ownership and control levels are in violation of statutory limits.[27]

e) Airline Deregulation Act of 1978[28]

The Airline Deregulation Act of 1978 (Deregulation Act) implemented domestically the transition from a regulated airline environment to one of competition by eliminating controls on market entry, frequency of service, capacity levels and pricing.[29] The Act only applied to domestic competition and did not directly affect foreign ownership and control restrictions, but the climate of airline liberalization started by the Deregulation Act has indirectly affected how

[25] Federal Aviation Act, Pub. L. No. 85-726, 72 Stat. 731 (codified as amended at 49 U.S.C. §§ 1301-1557 (1988)) [hereinafter Federal Aviation Act].
[26] Seth M. Warner, *Liberalize Open Skies: Foreign Investment and Cabotage Restrictions Keep Noncitizens in Second Class*, 43 AM. U. L. REV. 277, 307 (1993).
[27] Certificates of public convenience and necessities are required to establish any air carrier operation in the U.S., or acquire an existing carrier, but if there is no question as to ownership meeting U.S. citizenship requirements the foreign ownership and control test is not applied.
[28] Airline Deregulation Act of 1978, Pub. L. 95-504, 92 Stat. 1705 (1978).
[29] Dempsey, s*upra* note 12, at 336.

the DOT interprets the provisions. The Act included a sunset provision for the CAB which on Dec. 31, 1984 ceased to exist, its fitness review authority transferring to the DOT.[30]

f) Current Governing Statutory Authority

Under current U.S. law, in order to operate as an airline within the U.S. the company must obtain the certificate of public convenience and necessity from the DOT as required by 49 U.S.C. § 41102. The statute states in part, "[t]he Secretary of Transportation may issue a certificate of public convenience and necessity to a citizen of the U.S. authorizing the citizen to provide any part of the following air transportation the citizen has applied for…" as a requirement for providing air transportation in the U.S.[31] As often can be the case, this leaves the operating provision to the definition section of statute, 49 U.S.C. § 40102(a)(15), which defines "citizen of the U.S." as: "(A) an individual U.S. citizen, (B) a partnership each of whose partners are U.S. citizens, or (C) a corporation or association organized under the laws of the U.S. whereby the president and at least two-thirds of the board of directors and other managing officers are U.S. citizens, which is under the actual control of U.S. citizens, and at least 75 percent of the voting interest is owned or controlled by U.S. citizens."[32] Thus in order to pass the fitness review and obtain a certificate of public convenience and necessity an airline must meet the citizenship requirements stated above.

The DOT will evaluate an airline's citizenship both when applying for a certificate to operate in the U.S., for example starting a new airline, and following any substantial change in the airline's ownership, management, or operations.[33] Filing requirements necessitated by significant changes in ownership, management or operations are governed by 14 C.F.R. § 204.5 and require

[30] *Id.*
[31] *Supra* note 2.
[32] *Supra* note 1.
[33] 14 C.F.R. § 204.5 (2005).

an amendment to the operating certificate, triggering a review to ensure U.S. citizenship requirements are met. Any attempted merger, acquisition or significant equity investment in a U.S. airline by a foreign entity will go through a fitness review by the DOT, which interprets and applies the statutes on a case-by-case basis.

IV. C.A.B. AND DOT APPLICATION OF FOREIGN OWNERSHIP AND CONTROL STATUTES

1) Early Administrative Interpretation of Ownership and Control

One of the earliest decisions by the CAB interpreting the ownership and control provisions of the Federal Aviation Act of 1958 is the case of *Willye Peter Daetwyler*.[34] In this case, the issue under consideration by the DOT is not whether Mr. Daetwyler is within the "technical" ownership requirements of the law, but if he exercises "de facto" control over the airline.[35] This latter test is significant as statutory law has been relatively stable regarding the technical restrictions on foreign ownership, so any leeway by the DOT in interpreting the provisions comes from tightening or loosening the control requirement of the statute. Similarly, applicants attempting to establish or acquire a U.S. airline often structure transactions to be within the statutes technical requirements, but seek to maintain significant levels of control in the company and run afoul of the control requirement.

a) Willye Peter Daetwyler, d.b.a. Interamerican Airfreight Company

Interamerican Air Freight Corp. applied with the CAB for operating authorization as a U.S. citizen international airfreight forwarder.[36] There was no disputing U.S. citizens owned seventy-

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[34] Willye Peter Daetwyler, d.b.a. Interamerican Airfreight Company, Foreign Permit, 58 C.A.B. 118 (1971) [hereinafter Daetwyler].
[35] *Id.*
[36] *Id.*

five percent of the stock and that two-thirds of the board of directors were U.S. citizens.[37] The CAB found that Mr. Daetwyler, a Swiss national, exercised direct control over the operations of the company and denied an operating certificate.[38] In the CAB's analysis, they determined that: (1) the company was created wholly at his insistence, (2) the airline will operate as part of his existing system of controlled companies, and (3) that the U.S. citizen shareholders were employees of and/or had close business relationships with Mr. Daetwyler.[39] The CAB ruled that for these reasons he would be in a position to influence significantly decisions of the board.[40]

Significantly, in this decision the CAB rules that the intent of Congress in enacting the statute was that air carriers be "owned and controlled" by U.S. citizens, not "owned or controlled" as in the text of the statute, feeling the latter interpretation would defeat the purpose of the provision.[41] In *Daetwyler*, the CAB sets a precedent for interpreting the statutes still followed today, while also providing guidance for what constitutes "de facto" control.

2) Technical Control – Ownership Analysis

The Federal Aviation Act of 1958 effectively bars any merger between a U.S. air carrier, and any foreign entity due to the requirement that seventy-five percent of voting interest must remains in the hands of a U.S. citizen.[42] The Act is silent as to how debt securities, notes, non-voting stock or convertible securities in the hands of a foreign citizen should be interpreted as affecting citizenship requirements, leaving this interpretation largely up to the CAB and DOT. What follows is a selection of cases where technical control analysis has been required in determining U.S. citizenship requirements.

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[37] *Id.* at 119.
[38] I*d.*
[39] *Id.*
[40] *Id.* at 120.
[41] *Id.* at 120-21.
[42] *Supra* note 1.

a) Matter of National Airlines Acquisition[43]

The CAB reviewed the application of Texas International Airlines, Inc. (TXI) for the acquisition of National Airlines, requiring consideration of public interest and antitrust requirements of the Federal Aviation Act of 1958 governing airline mergers and acquisitions.[44] As the recently enacted Airline Deregulation Act of 1978 contained antitrust provisions, the court interprets this antitrust language as based on the Clayton Act and applies that statute for the first time to an airline merger.[45] The foreign ownership concern in the case was related to convertible debentures issued by TXI in overseas markets that if converted would represent greater then a twenty-five percent equity interest in TXI being held by non-US citizens.[46] TXI argued that for economic reasons these debentures were unlikely to be converted, and that accounting procedures and a Foreign Stock Register were in place to determine the extent of foreign ownership.[47] The CAB viewed the matter as a "potential negative public interest factor" but approved TXI's application on the condition they report to the CAB within 10 days if greater then one percent of debentures are converted as a means to protect TXI's citizenship, while allowing them to retain access to foreign capital markets.[48]

b) Matter of Citizenship of Golden West[49]

Golden West, a small regional airline, purchased four deHavilland Dash-7's with bank financing and then defaulted on the loan.[50] The Enterprise Development Board (EDB) of Canada insured the loans, and as part of the restructuring were to receive an option to buy twenty-five percent of the airlines stock and appoint one board representative, in addition to the

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[43] National Airlines Acquisition, 84 C.A.B. 408 (1979).
[44] *Id.* at 409.
[45] *Id.* at 412.
[46] *Id.* at 470.
[47] *Id*.
[48] *Id.*
[49] Citizenship of Golden West, 96 C.A.B. 814 (1982)
[50] *Id.*

approximately fifty percent of the airlines long-term debt already held.[51] Golden West petitioned the CAB for a declaratory ruling as to its U.S. citizenship status.[52] The CAB found that the transaction as structured was within the citizenship test of the Federal Aviation Act of 1958.[53] It is interesting to note that many airlines currently have financing arrangements with foreign banks and aircraft manufacturers. Because of this, available restructuring options can be constrained by the ownership and control limitations on the amount of equity allowed due to debt conversion by these foreign entities in any restructuring package. This case highlights that the administrative agency may provide some leeway, but would be unlikely to allow as part of any restructuring package an equity for debt swap that exceeds what is allowable under the law.

3) De Facto Control – Effective Control Analysis

The CAB and DOT as part of their fitness review of any transaction will determine who has control of the applicant airline and if effective control rests with a foreign entity. As was determined by *Daetwyler*, the CAB and DOT interpret 49 U.S.C. § 40102(a)(15) to mean that seventy-five percent of the voting interest must be "owned and controlled" by the applicant airline, not "owned or controlled" as was argued by Mr. Daetwyler and written in the statute.[54] Congress did not define "control" in the Federal Aviation Act of 1958 leaving that determination to the pertinent regulatory agency, thus providing the agency with an area for leeway in interpretation. The line of cases that follows highlights how the CAB and DOT have interpreted "control," often the crucial determinant, and how this interpretation has changed up to and including the most recent case on the subject, *Citizenship of DHL Airways*.

[51] *Id.*
[52] *Id.*
[53] *Id.* at 815.
[54] Daetwyler, *supra* note 34, at 121.

a) Matter of Citizenship of Page Avjet[55]

Page Avjet Corp., an air taxi company and formerly Page Airways, was determined not to be a U.S. citizen by the CAB and petitioned the CAB not to make final their order as Page intended to restructure the ownership arrangement of its operation.[56] The original plan was to issue a total of 1,100 shares of stock, 100 being "nonvoting common" owned by Page, and 1,000 of "voting preferred" to be owned by U.S. citizens who would have day-to-day control.[57] The nonvoting shareholders were to remain with the right of approval over extraordinary circumstances such as plans for mergers, acquisition or consolidation of the company as proposed by either management or the voting shareholders. The nonvoting shareholders also retained the right to initiate and/or approve a company dissolution or liquidation.[58] The CAB concluded this structure gave the nonvoting--foreign--shareholders the ability to prevent merger and acquisition actions by voting shareholders, but that voting shareholder would be unable to block a company dissolution or liquidation.[59] The CAB determine that the structure fails to meet citizenship requirements as the foreign interests are able, directly or indirectly, to influence the board of directors in crucial decisions citing negative control as being a factor to consider.[60]

The CAB in *Page Avjet* offers a merger test it would allow whereby the foreign acquirer places stock in a voting trust provided: the acquired stock be voted on a proportional basis with the remaining stock (U.S. stockholders), the acquisition of the stock be limited (presumably to 25%), and there exists an interest adverse to that of the acquiring company with whom the trustee could cast their votes.[61] This early bright line test on the subject of airline mergers and

[55] Citizenship of Page Avjet, 102 C.A.B. 488 (1983).
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 489.
[60] *Id.* at 490.
[61] *Id.* at 492.

acquisitions seems to leave no room for control, positive or negative, for a foreign entity effectively removing an important underlying motive for merger transactions.

b) Matter of Intera Arctic Services, Inc. [62]

Intera Arctic Services Inc. (IAS) was an aerial surveying company whereby parent corporations containing significant Canadian interest and board members held a sizeable amount of nonvoting stock. The transaction was modeled along the lines of *Page Avjet.*[63] The DOT[64] found that the foreign owners had leverage over IAS because they could compel IAS to buy them out over a broad range of circumstances as the owners held eighty-two percent of the total outstanding shares, versus only nine percent held by nonvoting shareholders in *Page Avjet.*[65] The DOT also found that two officers of IAS, even though U.S. citizens, were key employees of the foreign parent company.[66] In its holding, the DOT interprets the second prong of the *Page Avjet* test to consider total equity shares outstanding, not just voting shares. The DOT also expands *Daetwyler* to apply to all foreign interests, not just an individual foreign interest, by stating "[i]f persons other then U.S. citizens, individually or collectively, can significantly influence the affairs of IAS, it is not a U.S. citizen…"[67] The DOT in *IAS* thus further broadens the definition of "control" to include total shareholdings in an airline, not just voting interest as stated in the statute, and to consider cumulative foreign influence.

[62] In the Matter of Intera Arctic Services, Inc., DOT Order 87-8-43, Docket No. 44723 (Aug. 1987).
[63] *Id.* at 4.
[64] The CAB expired as an independent authority in 1984 as determined by the Sunset provision of the Airline Deregulation Act of 1978. The function of issuing certificates of public convenience and necessity and performing fitness reviews folded into the DOT who maintained effectively the same procedures.
[65] *See supra* note 62, at 7.
[66] *Id.* at 8.
[67] *Id.* at 3.

c) Acquisition of Northwest Airlines, Inc. by Wings[68]

The *Wings* case is significant as a major turning point in airline foreign ownership liberalization, while also highlighting the significant political influences affecting this legal arena. In 1989, Wings Holdings Inc. acquired Northwest Airlines parent company, NWA Inc.[69] In addition to the U.S. citizen owners, Wings was partially owned by KLM Royal Dutch Airlines (KLM).[70] KLM was the largest equity provider in Wings, purchasing $350 million in preferred stock and $50 million in common stock equaling 56.74 percent of the total equity investment.[71] This investment gave KLM 70 percent of Wings' nonvoting preferred stock, 31 percent of its nonvoting common stock, 4.9 percent of the voting common stock, and warrants granting KLM the right to convert up to $50 million of its preferred stock into common stock of which a portion could be voting.[72] An Australian entity, Elders IXL Ltd., acquired $50 million in preferred stock and $30 million in common stock of Wings, for 10 percent of its nonvoting preferred stock, 16 percent of its nonvoting common stock and 15.4 percent of the voting common stock.[73] KLM and Elders each received the right to name one board representative with no restrictions and KLM proposed setting up a committee to advise Wings on financial affairs, and have KLM/Northwest enter into a series of commercial arrangements.[74] The DOT denied Wings' proposed acquisition, finding that KLM was able to exert actual control over Wings and jeopardize Northwest's citizenship status.[75]

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[68] In the Matter of the Acquisition of Northwest Airlines, Inc. by Wings, DOT Order 91-1-41, Docket No. 46371 (Jan. 1991) [hereinafter *Wings*].
[69] *Id.* at 1.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* at 2.

In response, Northwest filed a petition to terminate the order denying citizenship and permit KLM to hold 49 percent of the equity in Wings, 10.5 percent of the voting interest free of any trust requirement, allow KLM to appoint three members to Wings' enlarged board (12 to 15) and remove financial reporting conditions that had been ordered.[76] Conversion rights of the KLM preferred stock were removed.[77]

The DOT granted the petition stating "Northwest is firmly controlled by U.S. citizens, we see no potential for the foreign interest represented by KLM to exert control…"[78] The DOT amended their previous order, permitting total foreign equity investment in Wings of up to 49 percent with no restrictions other then the 25 percent voting stock restriction contained in the statute and that any equity amount above 49 percent is converted to debt or held in trust.[79] The DOT permitted the increase in board membership provided the foreign board members were not disproportionately appointed to important committees.[80] In addition, the DOT waived the need for any special reporting requirements.[81]

Why the change of heart at the DOT? The DOT expressly states so by providing, "we reached these decisions in the context of the liberalized aviation relationship that prevails between the U.S. and KLM's homeland."[82] During this time, the U.S. was actively promoting an "open skies"[83] agenda with the intention of liberalizing international aviation, in effect adopting the policy of spreading deregulation in some form to its bilateral agreement partners. This decision signaled that in exchange for open skies bilateral agreements freeing up airline pricing

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[76] *Id.*
[77] *Id.*
[78] *Id.* at 5.
[79] *Id.* at 6.
[80] *Id.* at 7.
[81] *Id.*
[82] *Id.* at 4.
[83] Open skies is the common term for a liberalized form of bilateral agreement between nations. Under open skies, cabotage and foreign ownership are still restricted but pricing, scheduling, inter-airline cooperation restrictions are eliminated or greatly reduced.

and scheduling between signatory nations, the Unites States was prepared to further open its home market and relax the application of foreign ownership restrictions. Although cabotage, complete foreign ownership and effective control would continue to be prohibited, the U.S. was prepared to allow a greater degree of foreign control in U.S. airlines, foreign carriers open access to U.S. cities, and possibly antitrust immunity for code-sharing[84] and scheduling. In exchange for an open skies agreement the DOT required the same rights in return plus removal of pricing and capacity restrictions on routes between the signatory nations. The main benefit to the foreign nation was greater access the large U.S. market and the ability to partner with a major U.S. carrier.

Coming out of *Wings* are new tests for U.S. citizenship that the DOT would apply provided the foreign nation is willing to enter into an open skies agreement. The tests includes: (1) U.S. citizens still need to demonstrate actual control of the carrier, (2) foreign voting equity allowable up to 25 percent, (3) total foreign voting and non voting equity allowed up to 49 percent, (4) absent default or special rights, debt will not be a factor in establishing citizenship, and (5) foreign board participation allowable up to the statutory limit but foreign board members cannot be Chairman of the Board or have disproportionate powers.[85] The decision does preserve DOT discretion by stating that "check list" standards are not applicable but flexible guidelines can be established, providing additional guidance in footnote 22 stating, "the decision in this order will constitute a part of the body of our precedent to be considered in the disposition of future cases as appropriate."[86] Thus, the DOT will take a more relaxed view on foreign ownership for investors coming from countries willing to negotiate open skies bilateral agreements.

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[84] Code sharing is the practice of advertising one airlines flight number on a partner airlines flight, thus being able to market your partner airlines flights as if they were your own.
[85] *See* Wings, *supra* note 68.
[86] *Id.* at 5.

d) In the Matter of USAir and British Airways[87]

On the heels of *Wings,* the DOT had the opportunity to review a larger and bolder transaction. In November 1992, the DOT instituted proceedings to determine the citizenship of USAir after it received a major equity stake and cooperative agreement proposal by British Airways (BA).[88] The announced plan was for BA to invest $750 million cash in exchange for 44 percent of USAir's common stock and 21 percent of voting stock.[89] Additionally, the arrangement would have included board representation by BA, significant influence over major financing decisions by USAir, and would have created the world's largest airline alliance.[90] A major concern the DOT had with the transaction was BA's super-majority voting provision requiring that major decisions need approval by at least 80 percent of the board.[91] This provision would have given BA power over major capital expenditure decisions and personnel appointments similar to the initial *Wings* proposal.[92] For USAir, having lost $973 million between 1989 and 1992, the injection of capital was to reduce debt from $2.19 billion to $1.44 billion and give them access to BA's transatlantic passenger base and marketing benefits.[93]

The proposal was fiercely opposed by U.S. airlines who demanded the DOT obtain concessions. As a condition for approval, the U.S. sought an open skies agreement with the United Kingdom (U.K.), as exhibited by the Secretary of Transportation stating "my objective is to use [the BA/USAir] proposal as a vehicle in rewriting the current bilateral agreement with [the

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[87] In the Matter of Acquisition by British Airways PLC of USAir Inc., DOT Order 92-11-10, Docket No. 48441 (Nov. 1992) (The docket is sparse of information as the order instituted proceedings and BA later withdrew their petition before the DOT provided a complete hearing on the citizenship matter) [hereinafter BA/US].
[88] *Id.*
[89] Alexandrakis, *supra* note 23, at 84.
[90] GAO, *supra* note 3, at 5.
[91] Alexandrakis, *supra* note 23, at 84.
[92] *Id.* at 87.
[93] *Id.* at 85.

U.K.].”[94] At the time, air transportation service between the U.S. and U.K. was governed by the Bermuda II bilateral agreement, the direct descendent of the Bermuda I agreement, and a highly restrictive bilateral accord. Discussions between the nations to liberalize Bermuda II did not materialize and BA withdrew its proposal in expectation of denial by the DOT. Shortly thereafter, BA submitted a revised proposal at a reduced $300 million equity investment whereby it would receive 24.6 percent of total equity, a 21.8 percent voting stock share, three seats on the 16 member board of directors and a code sharing agreement without antitrust immunity.[95] The level of control over USAir by BA in this revised proposal was substantially less gaining it DOT approval.[96] The decision reinforced the U.S. policy of requiring open skies arrangements as a condition for allowing greater control and equity ownership in U.S. air carriers and greater access to U.S. aviation markets.

e) Matter of Citizenship of DHL Airways[97]

The most recent, and in many ways most interesting interpretation of foreign ownership and control restrictions is the case of *DHL Airways* (DHLA). DHLA was a U.S. cargo air carrier wholly owned by DHL, with operations within the U.S. and to foreign points from the U.S. in support of the company’s freight and shipping business. In 2002, Deutsche Post AG, the German national postal company, became the sole owner of DHL changing its name to DHL Holdings (DHLH), and the sole owner of DHL Worldwide Express (DHLWE) acting as the operating company.[98] DHLA notified the DOT of a substantial change in ownership and proposed plan of restructuring whereby selling 75 percent of the voting equity and 55 percent of total equity for

[94] *Id.* at 89.
[95] *Id.* at 88.
[96] *Id.*
[97] In the Matter of the Citizenship of DHL Airways, Inc. n/k/a ASTAR Air Cargo, Inc., DOT Order 2004-5-10, Docket No. OST-2002-13089 (May 2004) [hereinafter DHL].
[98] *Id.* at 2.

$42 million to William Robinson, a U.S. citizen. The remaining 25 percent voting equity and 45 percent total equity remained with DHLH, the foreign owned holding corp.[99] DHLWE and DHLA subsequently entered into an ACMI[100] service agreement, in which DHLA provided the cargo flying for a significant percentage of DHLWE's cargo, this contract accounted for about 90 percent of DHLA's revenues.[101] Federal Express and United Parcel Service (UPS) strenuously objected and challenged DHLA's citizenship status.

Partially due to this challenge, and the death of DHLA's prior CEO, DHLA restructured its ownership arrangement. Under the new transaction John Dasburg, former CEO of Northwest Airlines, and an investment group acquired a controlling interest in DHLA.[102] This revised transaction was eventually reviewed by the DOT who in their ruling stated that only the current ownership structure is material, not the previous one.[103] In the new acquisition, Robinson sold his stake to Dasburg and his partners Blum and Klein for $60 million, $50 million of which was financed by Boeing Capital Corp.[104] The ACMI[105] agreement was renegotiated between the parties, DHLA and DHLWE. This new ACMI agreement became central to the Federal Express and UPS charge that DHLA was still under effective control of DHLWE, a foreign owned entity due to it's being a subsidiary of DHLH.[106] The appointed DOT Administrative Law Judge

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[99] *Id.*
[100] ACMI is an acronym for Aircraft, Crew, Maintenance and Insurance. ACMI is a standard term for an agreement between two parties whereby one party leases aircraft from another party in a condition ready to operate with only fuel as the major cost item not included.
[101] *Supra* note 7, at 5.
[102] *Id.* at 5; DHLA under the new ownership subsequently changed its name to ASTAR but for clarity I will continue to refer to the company as DHLA.
[103] *Id.* at 3.
[104] *Id.* at 6.
[105] Under the new ACMI 38 of 40 of DHLA's aircraft were dedicated to DHWE service at a guaranteed annual payment of $15 million, DHLWE could inspect DHLA's books, DHLA could provide service to third parties but not to FedEx/UPS, the term was for eleven years with early termination allowable if there was a change in control of DHLA or certain operational or financial defaults occur.
[106] *Supra* note 97, at 7.

(ALJ)[107] went into detail on the issue of de facto control, as there was no dispute that DHLA was a U.S. citizen under the technical control test.[108]

The ALJ reviewed the motivations for the transaction and concluded that just because the foreign entity, here DHLH, controlled the transaction and restructuring was not indicative in and of itself that the foreign entity controlled the resulting airline.[109] This aspect of the ruling is a complete reversal from *Deatwyler* where the CAB determined previously that because the airline was created wholly at the insistence of a foreign national, and will operate as part of *Deatwyler's* system of controlled companies, this issue would be viewed as a major determinate of de facto control.

Federal Express and UPS also charged that the buyer of DHLA received a "phenomenally good deal."[110] There was conflicting testimony as to the value of the company, but the ALJ noted that the challengers' expert did not account in his valuation for the risk that DHLA might loose this proceeding and thus their certificate, effectively bootstrapping this part of his decision.[111] The ALJ also felt the sunk cost of the transaction was unlikely to affect decisions going forward because the transaction was completed at arms length and featured hard bargaining so there could be no determination that continuing control existed solely from the terms of the sale.[112]

The ALJ also addressed the charge that the ACMI receivable, being the main collateral supporting the Boeing Capital loan and guaranteed by Deutsche Post, was another indication of foreign control. The ALJ determined that this receivable was money already owed and legally payable to DHLA, thus it was not possible for DHLWE to use it as an instrument of control over

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[107] The ALJ was appointed by the DOT to hear the substantive merits and make a recommendation. The DOT adopted the recommendations and decision of the ALJ in its entirety.
[108] *Supra*, note 97, at 11.
[109] *Id.* at 12.
[110] *Id.* at 13.
[111] *Id.* at 14.
[112] *Id.* at 15-16.

DHLA.[113] He concluded that the guarantee of the receivable by Deutsche Post, though "raising eyebrows", was not itself indicative of control and there was no evidence it could be used as leverage for control.[114]

Another issue raised was that a threat to terminate the ACMI agreement could be used as leverage to control DHLA. The ALJ held that a threat to terminate the ACMI agreement by DHLWE would cost them significant termination expenses and that the contract allowed DHLA ample opportunity to cure.[115] The ALJ continued that termination of the ACMI would prove so costly to DHLWE, for them to use this threat as a means of control was illusory because it would be so commercially irresponsible.[116] The interesting aspect of this part of the holding is that in effect the ALJ is saying because the two companies are so closely tied together the foreign partner is unable to exert control.

Another argument raised was that the many provisions in the ACMI contract preventing "change of control" effectively prevents Dasburg and his partners from selling the company without approval from DHLWE.[117] In detail, the argument is that the advance notice requirement would give DHLWE the opportunity to implement a poison pill by: (1) eliminating the minimum guaranteed payment to DHLA, (2) requiring DHLA to return a two-week prepayment to DHLWE, and (3) elevating the minimum on-time performance guarantee.[118] The argument being that any change of control is prevented by the severe financial impact to DHLA that would occur. The ALJ finds this argument unconvincing. He holds that contractually DHLA can sell as much equity as they wish to U.S. citizens provided that Dasburg's group retains at least 50

[113] *Id.*
[114] *Id.* at 17.
[115] *Id.* at 18.
[116] *Id.* at 19.
[117] *Id.* at 22.
[118] *Id.* at 22.

percent of the voting rights in the company, so in effect the provisions only restrict a fraction of DHLA's alienability rights.[119] Again, it appears a form of negative control previously found unacceptable in *Page Avjet* is now acceptable provided that it does not overly restrict management's ability to sell its equity in the company. Notably, the DOT in this decision does allow a foreign entity to constrain the rights of the U.S. owners through negative control by allowing a provision that may cause significant financial harm to the company should the owners choose to sell more then 50 percent of the voting equity of DHLA.

The remaining argument addressed by the ALJ is the charge that, in total, the terms of the ACMI and relationship between the two companies are so close as to demonstrate actual control by DHLWE, the foreign partner. One factor considered by the ALJ is that because DHLWE provides for 90 percent of DHLA's revenues, and in turn is DHLA's predominant customer, DHLWE can thus exercise control. The test the ALJ applies is: whether the predominant customer [DHLWE] is in a position to control by threatening removal of business and revenues, and whether a rational economic actor would perceive the threat as credible.[120] DHLA's counter to this argument is that nothing in the contract precludes them from seeking additional business elsewhere, despite the fact ACMI dedicated aircraft are restricted from third-party service without DHLWE's approval.[121] The ALJ considers it irrelevant whether DHLA <u>has</u> successfully obtained third-party business, the determining factor is that they are contractually free to do so whether by utilizing existing aircraft or by acquiring additional ones.[122] He states succinctly, "[w]hether ASTAR [DHLA] exercises the option to grow outside its core business does not remove the option. The existence of the option, which enables the carrier to act independently of

[119] *Id.* at 23.
[120] *Id.* at 24.
[121] *Id.* at 24 (38 out of 40 aircraft are dedicated to the ACMI contract).
[122] *Id.* at 25.

DHLWE and the Deutsche Post family, is the critical consideration."[123] Another segment of this last argument was that DHLA effectively operates as a "cost center" of DHLWE, who retains administrative and operational control. The AJL is unconvinced, noting that DHLA makes its own investment decisions, has control over employees and their compensation, and creates its own budgets and financial statements.[124]

The ALJ determined that DHLA is not effectively controlled by Deutsche Post directly or through DHLWE and thus is a U.S. citizen under 49 U.S.C.A. §40102(a)(15), a finding subsequently upheld in the May 13, 2004 DOT order.[125] As Germany, the home country of Deutsche Post, was already an open skies partner with the U.S., bilateral negotiations were not a factor in the DOT decision process. The policy of promoting competition does seem to have been included as a new factor for consideration given the statement from the DOT, "American consumers benefit from the participation in the U.S. market of ASTAR [DHLA] and the DHL network because it promotes competition within the express delivery business."[126]

4) ***Application of Ownership and Control Law***

Since airline foreign ownership and control restrictions were first implemented in 1926, the statutes governing the subject have been materially changed only once, making the provision more restrictive. Over the same period, the industry has progressed from single engine open cockpit bi-planes flying subsidized airmail contracts, to jet powered computerized aircraft holding up to 555 passengers each on commercial flights to the other side of the globe.[127] Since deregulation, the DOT has had some flexibility in adopting a more liberal interpretation of foreign ownership and control statutes and has effectively used this flexibility to negotiate

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[123] *Id.* at 25.
[124] *Id.* at 30.
[125] *Id.* at 1.
[126] *Id.* at 26.
[127] A-380 baseline capacity is 555 passengers, *available at* www.airbus.com.

numerous open skies agreements under U.S. policy, but the DOT remains constrained by the language of the statutes and its own precedentiary interpretations.

Analyzing the above cases provides insight into DOT interpretation of ownership and control restrictions and its present application can be summarized as follows. Voting equity up to 25 percent and nonvoting equity up to 49 percent by a foreign entity is allowed, and any equity above these levels must be held in trust or converted to debt. Foreign holdings will be counted cumulatively towards these totals. Debt or loan guarantees are not a factor in the analysis unless they are convertible into equity or include extraordinary restrictions or mechanisms for control. The DOT will interpret "control" to require day-to-day management decisions and significant corporate decisions to be in the hands of U.S. Citizens. Foreign representation is allowable up to one-third of the board of directors or managing officers, provided contracts do not significantly restrict management or board control, positively, or negatively, otherwise de facto control will exist. Similarly, any super-majority voting powers or disproportionate quantity of foreign representatives in management will constitute de facto control. Interconnected business agreements were considered a de facto control factor, but since *Wings* and *DHL* will be interpreted more liberally. If the foreign partners' home nation is negotiating a liberalized bilateral agreement with the U.S., or the company offers a competitive benefit, the interpretation of control will likely be construed more liberally. Lastly, the DOT will evaluate each petition on a case-by-case basis, but using precedentiary holding in previous cases as a guide.

V. CURRENT POLITICAL DIRECTION OF THE OWNERSHIP AND CONTROL REGIME

1) *Domestic Liberalization Issues*

In May 2003, President Bush proposed amending legislation to relax foreign ownership restrictions in U.S. airlines by proposing to raise the allowable foreign ownership limits of voting stock from 25 percent to 49 percent.[128] The change was a component of Vision 100 - the Century of Aviation Reauthorization Act, a comprehensive bill affecting many segments of aviation funding and policy.[129] Although this change to the citizenship definition did not make it through to enactment, another alteration to the "citizenship" definition and a GAO study on the subject were outcomes of the process. This GAO study provides a view to the issues of concern by the government on the matter of foreign ownership and control of airlines.

The prior version of citizenship found in 49 U.S.C. § 40102(a)(15) stated that for a corporation to be a U.S. citizen at least 75 percent of the voting interest needs to be owned or controlled by persons that are citizens of the U.S.[130] Vision - 100 as amended added the requirement that the corporation be "under the actual control of citizens of the U.S." placing the de facto test long applied by the DOT into the statute.[131] As this is not a policy change, no effect on the interpretation of citizenship by the DOT is expected.

The GAO study completed at the request of members of Congress[132] provides insight into the current policy of the U.S. government on the subject. The GAO reports that the motivation for

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[128] *GAO, supra* note 3, at 1.
[129] *Aviation Advisor: President Signs Vision 100-FAA Reauthorization, and More,* Zuckerman Scoutt & Rasenberger (7th ed. 2003).
[130] *Supra* note 1.
[131] *Supra* note 129, at 3.
[132] Senators Trent Lott and John D. Rockefeller asked the GAO two discuss two topics: (1) current proposals to revise U.S. limits on foreign ownership and control, including information on current shareholders and past examples of efforts by foreign interests to purchase significant equity in U.S. carriers, and (2) whether key analytical issues raised it the GAO's 1992 report on foreign ownership and control remain relevant.

the amendment increasing the allowable foreign ownership levels was to bring the U.S. in line with the European Union, but the proposal does not seek to change U.S. law regarding control of air carriers.[133] This proposal to increase the allowable foreign ownership limitation had support from both the DOT and the Department of State.[134] Similarly, the report noted that most major airlines, the Air Transportation Association (ATA), the International Civil Aviation Association (ICAO), and the International Air Transportation Association (IATA) were in support of liberalizing ownership and control.[135] The GAO report noted that other groups, especially labor organizations such as the Association of Flight Attendants and the AFL-CIO opposed the change.[136]

The GAO study identifies five key issues affected by liberalizing ownership and control provisions: (1) domestic competition, (2) national security, (3) employment, (4) safety, and (5) international competition.[137]

Regarding domestic competition, it is felt by the GAO that allowing greater access to foreign capital would allow U.S. airlines to enhance their domestic competitive position.[138] This makes sense. Allowing U.S. airlines to access additional sources of capital gives them more avenues in which to seek capital. Investors have different risk profiles, motivations and financial goals so restricting U.S. airlines only to seeking major capital investments from domestic sources artificially eliminates a large segment of the world's capital markets. Similarly, by reducing the available capital pool airlines can access, foreign ownership restrictions increase the cost of capital invested in the airlines. Having fewer sources to which airlines can turn for investment

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[133] GAO, *supra* note 3, at 1-2 (Not explored in the report was the issue of "golden shares" or other possible means of control of EU flagged airlines).
[134] *Id.*
[135] *Id.* at 4.
[136] *Id.*
[137] *Id.* at 7.
[138] *Id.*

capital places capital providers in an improved bargaining position with fewer competitors, which one expects that they would take advantage of. The airlines could use capital received to retire debt, consolidate, improve service or avoid bankruptcy thus improving their domestic competitive positions.

The national security concern traces its roots back to the Air Commerce Act of 1926.[139] Although U.S. commercial airlines no longer provide a reserve corp of pilots, they still make up a significant portion of the nations reserve airlift capacity via the Civil Reserve Air Fleet (CRAF) program.[140] By participating in CRAF, U.S. airlines under contract commit aircraft and crews to be made available to the Department of Defense (DOD) for use during a national emergency.[141] Participating airlines need to make slight modifications to their aircraft, and receive compensation at the negotiated contract rate if called upon to provide service to the DOD.[142] In exchange, participation in CRAF is a condition to bid for DOD peacetime cargo and passenger business, which contractually uses CRAF participating carriers whenever possible.[143] The main concern of the DOD is that foreign owned airlines will be less willing to participate in the CRAF program.

Although the argument may have some merit, there is nothing preventing a change in the foreign ownership and control provisions from including requirements that an airline must participate in CRAF as a condition for acquiring or establishing a U.S. citizen airline. As CRAF agreements are already contractual, and the airline would be based in the U.S., the U.S. government and DOD would still maintain substantial influence with which to enforce the

[139] *See supra* note 9.
[140] GAO, *supra* note 3, at 7.
[141] *Id.*
[142] *Id.*
[143] *Id.*

agreements. A recent proposal by the ABA Air & Space Law Forum detailed such a proposal as part of their recommendation for removing restrictive ownership and control provisions.[144]

A second measure that can serve to temper the concerns of the DOD and other national security concerns is the availability of the Exon-Florio amendment.[145] This provision's title is Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons,[146] and the law allows the President to investigate and block a merger or takeover by foreign persons based on threats to impair national security.[147] Should an airline acquisition be attempted by an entity viewed as a threat, the President under his power could invoke this provision to block the merger. Although a heavy-handed option, it is nonetheless currently available as a backstop to any merger considered by the President to be a threat to national security, helping to allay some fears pertaining to removing foreign ownership restrictions.

The GAO report states that the impact of increased foreign investment on employment is unclear due to conflicting views that either investment could stimulate domestic aviation and increase employment, or it could lead to the transfer of jobs overseas.[148] The DOT position is that there is no evidence to suggest increased foreign investment in U.S. airlines would have any effect on labor.[149] The issue is complex, but there is evidence that overall there would be a benefit to U.S. airline employment.

The current situation is that U.S. major airline employment has been decreasing steadily, from a peak of 679,967 employees in the year 2000 down to 570,868 in 2003 as carriers

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[144] Jonathan B. Hill, *Working Group Position Statement on Relaxing Airline Foreign Ownership Restrictions*, A.B.A. SEC. AIR & SPACE L., Vol. 19 No. 3 (2005).
[145] 31 C.F.R. § 800.101 (2005).
[146] *Id.*
[147] *Id.*
[148] *Id.* at 8.
[149] *Id.*

restructure and/or enter bankruptcy.[150] A report by the United Kingdom (U.K.) Civil Aviation Authority points to employment benefits that nation received from liberalization in the U.K.[151] The study analyzed the impact that European airline liberalization has had in the U.K., and the impact that could be expected if the European Union (E.U.) and United States enter into an Open Aviation Area.[152] As to the U.K.'s experience so far, the report determined that liberalization facilitated the growth of the aviation market and boosted overall employment in that business sector.[153] Importantly, the report noted that threats to labor did not materialize because airlines did not re-flag themselves to exploit lax regulatory regimes, U.K. workers were not displaced by cheaper workers from other E.U. countries, and U.K. airlines did not loose market share to airlines from lower wage E.U. countries.[154] Given the similarities between the U.S. and E.U. market's, we can expect a similar outcome in the U.S. by the removal of restrictive foreign ownership and control provisions.

The safety concern questioned in the GAO report was that the transfer of foreign aircraft into U.S. registry could place additional burdens on the Federal Aviation Administration's safety and oversight responsibility.[155] This concern would be unlikely to materialize as there is no motivation for a large scale re-registering of aircraft to the U.S. Similarly, as new airlines are established in the U.S., a requirement to incorporate in the U.S. would subject them to taxes and user fees the same as other airlines, effectively paying for their share of any service increases

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[150] AIR TRANSPORT ASSOCIATION OF AMERICA, 2001-2004 ECONOMIC REPORT (2001-2004).
[151] UK CIVIL AVIATION AUTHORITY ECONOMIC REGULATION GROUP, THE EFFECT OF LIBERALIZATION ON AVIATION EMPLOYMENT (2004)
[152] An Open Aviation Area is a regime whereby global regions, such as US-EU, enter into agreement to eliminate most restrictions on commercial aviation between them.
[153] *Supra* note 151, at v.
[154] *Id.*
[155] *Id.*

they require. In the GAO report itself, it was determined that no significant FAA workload issue was expected.[156]

The international competition issue questions what effect an increase in allowed foreign ownership levels would have on bilateral agreements and alliances.[157] The GAO report noted it was unclear what effect raising the allowable foreign ownership limits would have on existing bilateral agreements, or on negotiations regarding new agreements between the E.U. and U.S.[158] Adjusting these limits was believed unclear as the relaxation of these restrictions would be a primary negotiating point of negotiation.[159] It is true that relaxing these restrictions would be a negotiating point, but the true goal should be the elimination of them altogether.

Whether the U.S. should increase the levels to which foreign entities can invest in U.S. airlines can be determined on a case-by-case basis by the DOT who is authorized to negotiate aviation agreement on behalf of the United States. The DOT has a long history of successfully negotiating open skies and other bilateral agreements and providing a statute that eliminates restrictions would enhance their negotiating leverage in order to obtain reciprocal rights from the other party as called for in 49 U.S.C. § 40101.[160] Under this provision, the DOT retains the authority to negotiate international air transportation rights including the selection of American air carriers to serve international markets.[161] Specifically, 49 U.S.C. § 40101(e)(8) states:

> "In formulating United States international air transportation policy, the Secretaries of State and Transportation shall develop a negotiating policy …including the following…(8) opportunities for carriers of foreign countries to increase their access to places in the U.S. if exchanged for benefits of similar magnitude for air carriers or the traveling public with permanent linkage between rights granted and rights given away."[162]

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[156] *Id.* at 9.
[157] *Id.*
[158] *Id.*
[159] GAO, *supra* note 3, at 9.
[160] 49 U.S.C. § 40101 (2000).
[161] 49 U.S.C. §§ 40101-105 (2000) generally.
[162] *Supra* note 160.

Although this statute addressed U.S. policy regarding open skies agreements, it highlights the policy that any loosening of ownership and control restrictions will require similar concessions by the other party.

As an administrative agency, the DOT will interpret the statute as written, so changes in policy through administrative decision alone will be limited at best. In order to achieve the complete removal of foreign ownership and control restrictions, the responsibility remains wholly with the legislative and executive branches to revise the governing statutes.

The GAO also stated in the report that by raising ownership limits, alliances may find mutual investment more desirable, either to sustain a partner experiencing financial difficulty or to solidify a commercial arrangement.[163] This may have been true at one time, but the GAO's report itself identifies only two major airlines with foreign holdings above 5 percent, Continental and Northwest, in both cases the investor is Axa Financial.[164] Both the KLM/NW and BA/USAir acquisitions previously discussed resulted in the foreign partners divesting the majority of the holdings they had acquired. The likely reason is that investing in a non-controlling equity stake provides little or no benefit to the investor who could better use the funds elsewhere. In seeking an alliance partner, a code-share arrangement along with an open skies bilateral agreement, especially if granted antitrust immunity, provides major commercial benefits and is currently available by law with no need for significant investment. An equity holding that cannot be raised to a controlling level not only adds little additional value, but may jeopardize the arrangement if the U.S. partner is determined a non-citizen due to the equity holding by the foreign partner. Material benefit to the industry will thus be far greater from a complete removal of the

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[163] GAO, *supra* note 3, at 9.
[164] *Id.* at 22 (The holdings were as of July 2003 with French based Axa Financial holding 18% of NW and 13% of CO).

ownership and control restrictions rather then just raising the allowable voting stock level from 25 percent to 49 percent.

2) Asia-Pacific Multilateral Open Skies Agreement

In November 2000, the DOT announced that it had reached a multilateral open skies agreement between the United States, Brunei, Chile, New Zealand and Singapore commonly known as the APEC agreement.[165] Similar to other open skies bilateral agreements, APEC allows for unrestricted service by the airlines of each side to, from, and beyond each other's territory with no restrictions on pricing or scheduling and was effective for all signatories.[166] A sweetener in the arrangement was included called "expanded carrier access to equity financing."[167] The object was to relax the ownership and control clause requiring ownership of an airline to be in the hands of a designated state or its nationals, instead to allow ownership of any signatory state airline by citizens of any other signatory state.[168] Unfortunately, APEC still contains, under Article 3(2)(a) of the agreement, language that effective control of the airline is to reside with the designating party or its citizens.[169]

According to Allan Mendelsohn, former Chairman of the U.S. APEC delegation, the agreement demonstrated the intent of signatory nations to allow and encourage multinational investment and ownership in airlines.[170] In discussing the motivation for the agreement by the signatories he goes on, "to the extent that internationalization worked to encourage mergers and thereby reduce the escalating number of nationally as well as privately owned carriers in the sky,

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[165] DEPARTMENT OF TRANSPORTATION, *United States, Asia-Pacific Partners Enter Multilateral Open Skies Agreement* (Nov. 2000), *available at* www.dot.gov/affairs/briefing.html.
[166] *Id.*
[167] *Id.*
[168] Allan I. Mendelsohn, *The United States, The European Union and the Ownership and Control of Airlines*, CCH ISSUES IN AVIATION LAW AND POLICY 13171 (Mar. 2003).
[169] *Id* at 6.
[170] *Id.*

such a development was viewed as an internationally desirable objective."[171] APEC is a good agreement that regrettably has not spread. The benefit of relaxing or eliminating ownership and control restrictions multilaterally is that signatories can immediately begin to reap benefits from the agreement within the group of signatory nations, while in a bilateral agreement the signatories would be subject to enforcement by a third nation deeming a signatory nations airline that had changed ownership a non-citizen.[172] As the first multilateral agreement to remove ownership and control provisions that require citizenship of an airline in the designating state APEC may serve as a model, at least in part, for future agreements and negotiations such as between the U.S. and E.U.[173]

3) ***US-EU Open Aviation Area (OAA)***[174]

The current front line in the global airline liberalization battle is between the U.S. and the E.U. With the U.S. accounting for 36 percent and the E.U. 26 percent of global international passenger air traffic, an agreement between the two regions removing ownership and control restriction would have an enormous impact on the traditional bilateral regime.[175] Similarly, an agreement of this size would likely have a ripple affect on other nations, possibly convincing many to liberalize further and even rethink the notion of having to support a state flag carrier. As the worlds two largest economic and financial markets, an agreement between the U.S. and E.U.

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[171] *Id* at 4.
[172] An example would be countries N1 and N2 remove ownership and control requirements between each other, and an N1 carrier, A1, is acquired by an N2 citizen. Third party nation, N3, to which carrier A1 operates could argue that it is no longer a citizen of N1 and thus not allowed to take advantage of flights allowed in the bilateral between the N1 and N3. Multilateral arrangements relieve this problem by eliminating it completely within the signatory nations and reducing the possibility of enforcement by third party nations.
[173] *Supra* note 168, at 6.
[174] Also known as the Transatlantic Common Aviation Area (TCAA), a specific EU proposal on the matter. As the concept is still in early stages of negotiations the terms are used somewhat interchangeably.
[175] INTERNATIONAL CIVIL AVIATION ORGANIZATION, *available at* www.unescap.org/ttdw/publications/tpts_pubs/pub_2307.

would also provide the greatest opportunity for cross-border airline mergers, acquisitions and establishments.

The U.S. has bilateral air transport agreements with all nations of Europe, and open skies agreements with many. Over the past decade, the E.U. has rebuilt its airline regulatory structure in a way that closely mirrors the U.S. structure of liberalized and deregulated service within its market.[176] What still remains is the issue of each E.U. member state having its own individual, often very different, set of bilateral agreements with nations outside the E.U. In 1998, the European Commission (EC) filed suit with the European Court of Justice (ECJ) largely with the goal of obtaining a mandate under which the E.U. would be the appointed negotiator for bilateral air service agreements on behalf of its member states with other nations of the world.[177] The ECJ issued its decision in November 2002. The Court did not give the E.U. its sought after mandate, but did effectively hold unlawful the ownership and control provisions of the member states bilateral agreements.[178] The E.U. set about negotiating with its member states for a broad mandate to negotiate air service agreements, receiving one in June 2003, the terms of which remain secret.[179] Upon receiving this mandate, discussions between the U.S. and E.U. began in October 2003 to negotiate changes in their bilateral agreements, including ownership and control and establishment provisions between the two regions.[180]

It is against this background that there have been calls for a U.S.-E.U. Open Aviation Area (OAA). The goal of any OAA is, or should be, the elimination of the right of establishment clauses contained in bilateral agreements and removal of all restrictive "freedoms." As discussed,

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[176] Brian F. Havel, *Preparing for a New Era in International Aviation: A Transatlantic Common Aviation Union Takes Shape*, 11 IRISH JOURNAL OF EUROPEAN LAW, 5, 10 (2004).
[177] Allan I. Mendelsohn, *The USA and the EU - Aviation Relations: An Impasse or an Opportunity*, Vol. 29/4-5 AIR & SPACE LAW 263, 264 (Nov. 2004).
[178] *Id.* at 265.
[179] *Id.* at 268.
[180] *Id.*

these clauses require that the airline be owned and controlled by citizens of the nation from which it operates. The replacement for establishment and citizenship provisions should be with straightforward "principle place of business" or "place of incorporation" doctrines that work so well for other multinational corporations. Just as Daimler-Benz was allowed to purchase Chrysler and Ford to purchase Jaguar, or BMW to create a BMW USA subsidiary, airlines should equally be allowed to participate in cross-border mergers and the establishment of subsidiaries. Existing law is already capable of regulating these entities, all that remains is to relax the restrictions and apply these laws to the airline industry. What is missing is the political will to overcome the historic notion that each nation needs a flag carrier as its chosen instrument. I believe the airline industry has matured to the degree that both the U.S. and E.U. can overcome this historical baggage and reap the benefits.

The most comprehensive study on the subject to date, completed by the Brattle Group, identifies numerous benefits achievable by a U.S.-E.U. OAA agreement.[181] The study quantifies the economic benefits associated with allowing more efficient carriers to replace less efficient carriers, achieving price synergies on interline routes through transatlantic consolidation, and eliminating output restrictions between the U.S. and E.U. states that do not have reciprocal open skies agreements.[182] The study concluded that there would be a significant increase in passengers on the transatlantic and intra-EU markets of between 9 and 24 percent annually, and savings to consumers of approximately € 5.1 billion to € 5.2 billion annually.[183] The study also determined that should ownership and control restrictions be removed in a U.S.-E.U. OAA agreement the

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[181] THE BRATTLE GROUP, THE ECONOMIC IMPACT OF AN EU-US OPEN AVIATION AREA (Dec. 2002) [hereinafter Brattle Group]

[182] *Id.* at 6-1. (E.U. countries with which the U.S. did not have open skies agreements with at the time of this report were Greece, Ireland, Spain, and the United Kingdom. The majority of countries initiated subsequently into the E.U. do not have open skies agreements with the U.S. and would be expected to increase the benefits calculated in this study).

[183] *Id.* at 6-1, 2.

more efficient firms will take control of less efficient ones through acquisition or merger, introduce superior management and technologies and increase the level of competition between airlines forcing less efficient ones to improve.[184] Cost savings to the airlines obtained from these efficiency gains estimated by the Brattle Group study to be approximately € 2.9 billion annually as competing carriers improve efficiencies, consolidate and move towards industry best practices.[185]

Although some may view consolidations as distasteful, it is a proven method of improving the financial health and future well-being of struggling industries and an option available to most, but severely restricted in the airline industry. The implementation of a U.S.-E.U. OAA would eliminate these ownership, control and establishment restrictions in two of the world's largest aviation markets accounting for a combined 62 percent of the world's international passenger traffic.[186] Removal of foreign ownership and control restrictions can be replaced with existing corporate, antitrust, labor and national security laws. Studies show that the benefits both to the consumer and to the industry are significant, thus the benefits of removing these ownership and control restrictions outweigh the few outdated justifications still used to shield and support existing inefficient carriers and industry structures.

[184] *Id.* at 2-1.
[185] *Id.* at 3-3.
[186] *Supra* note 175.

VI. BENEFITS OF AND MOTIVATION FOR REMOVING OWNERSHIP AND CONTROL RESTRICTIONS

1) *Removal of Restrictive "Freedoms"*

The most liberal bilateral air services agreement at this time is the open skies bilateral, which the U.S. has been successful in concluding with over 50 nations. These agreements still invariably contain restrictive ownership and control provisions, citizenship clauses, and restrictions on 7th and 8th (cabotage) freedoms. Removing ownership and control restrictions is closely tied to and goes hand in hand with the removal of 7th freedom and cabotage restrictions. For example, should airline A1 from country N1 acquire airline A2 from country N2, with ownership and control restrictions removed, the transaction would be allowed and A2 would be considered a subsidiary of A1 and incorporated in country N2. In addition to the right to sell tickets between N1 and N2, a right that already existed, airline A2 would now be allowed to sell tickets between cities within country N2. Similarly, should country N3 be a party to the agreement, with restrictions removed it would be allowable for A2 to sell tickets between N2 and N3. Said a different way, it would be the equivalent of allowing an American company to purchase a Japanese company, then be allowed to sell product within Japan, and between Japan and a third nation such as Korea. Current ownership restrictions prevent this, only allowing sales from America to Japan and back.

The advantage of removing these restrictive "freedoms" becomes obvious as the markets in which airlines may participate in increases drastically allowing for greater diversification and increased scope and scale efficiencies. The ability to establish or acquire airlines in foreign countries also allows the acquiring airline to tailor better its new service to the customer needs and demands of those new markets in which it enters. Additionally, allowing airlines to schedule

these services freely can have the affect of increasing competition in many markets and allowing airlines to create more efficient flight schedules and thus utilize their assets more efficiently.

2) ***De-politicization of the Airline Industry***

The airline industry, though highly deregulated remains politicized. If an airline wishes to commence service to a non-open skies bilateral country it must seek approval from the DOT and may be awarded the service if unutilized flights are available in the agreement. Most often unutilized flights are unavailable, so the airline needs to petition the DOT to negotiate with the other nation for changes to the bilateral, which may happen in years or not at all. This is an unnecessary restriction on commerce and an administrative burden. Should ownership and control restrictions be eliminated, airlines would be free to increase operations in markets that are promising and profitable with little delay in timing. Conversely, when a market declines, airlines would be in a position to reduce capacity without fear of loosing their right to resume service, as is the case with existing bilateral agreements. Airlines from all participating countries would be in a better position to match seat capacity with existing traffic demands. This increased flexibility and efficiency is achievable by depoliticizing the international flight allocation process and allowing the free market to determine adequate capacity levels for each market. Similarly, cost savings would accrue to the airlines from the removal of these costly administrative burdens.

In some instances, airlines are still state owned, subsidized and often state sanctioned. Removal of ownership and control restrictions would allow states to divest their interest to the most capable bidder without limitation to citizens of their own nation. The increase in access to potential bidders can be expected to attract a better price should they choose to divest, in addition to removing the burden from their tax base. Attitudes towards supporting state flag carriers by

nations would likely change over time to a view more aligned with those states that have removed ownership and control clauses.

3) ***Access to Equity and Merger Capital***

Probably the greatest benefit to the airline industry that would occur from the removal of ownership and control clauses is improved access to global capital. The airline industry is legally restricted from seeking significant levels of overseas capital or vertically integrating with aircraft manufacturers. As airline industry fortunes often move up and down in tandem, when a horizontal merger with another airline would be most likely is also the time when the airlines can least afford the cost of merging. Boxed in as such, allowing the industry to tap the huge market of foreign capital would greatly benefit the financial needs of this capital-intensive industry. Being one of the most international of industries, it is especially anachronistic that its financial requirements should be restricted based on a rationale established in the law dating back to the Air Commerce Act of 1926.

Lifting ownership and control restrictions would likely result in an increase in foreign direct investment as airlines establish operations in new markets and consolidate through merger and acquisition. This increase in investment would lead to capital improvements, debt reduction and a more rational use of resources providing financial benefits to airlines and their balance sheets. Should increased financing and investment be allowed, the increased competition among those financing the industry would place downward pressure on financing costs and reduce the overall cost of capital that the industry pays. The financial benefits gained from this increased access to capital will be found both very beneficial to this financially troubled industry short-term and a support to the long-term stability of the airline industry.

4) ***Greater Stability via Global Diversification and Expansion***

If airline ownership restrictions are removed, stability to the system will be enhanced due to the ability to expand into markets and regions not currently available. As U.S. and other airlines expand operations into new markets through either acquisition or expansion, they will diversify their customer base, country political risks, currency risk, economic risk and other risks associated with the confinement of operating out of only one nation. Currently, U.S. airlines derive 79.5 percent of their revenues solely from the domestic market with the balance derived from service to Asia, Latin America and Europe.[187] The largest single foreign market for U.S. airlines, Europe, accounts for only 9.2 percent of revenues and is strictly limited only to flights to and from the U.S. and Europe.[188] The reduced reliance on a single home market for the vast majority of revenues would serve to better insulate airlines to economic shocks and downturns in their home markets creating more stable and reliable revenue streams. Similarly, global diversification would allow for a better allocation of costs and the ability to improve cost performance through taking advantage of lower cost structure regions of the world, and provide a greater degree of currency diversification both on the cost and revenue sides. Allowing airlines to branch out and operate in other nations by removing foreign ownership restrictions would provide the industry with greater stability and diversification currently available to most other global industries.

5) ***Operational Rationalization via Mergers***

Currently, the most liberal airline bilateral agreements include open skies between two nations and a code-share partnership agreement with antitrust immunity between airlines of each nation. This arrangement increases economies of scope and scale available, and allows for some

[187] AIR TRANSPORT ASSOCIATION OF AMERICA, 2004 ECONOMIC REPORT (2004).
[188] *Id.*

joint marketing efforts by the partners, but does not reach the benefits achievable given a full merger.[189] Similarly, any increase in size creates the opportunity to negotiate better pricing with vendors, labor, airports and governments.

Code share agreements with antitrust immunity do not amount to operational mergers. Two partner airlines, each focused almost exclusively on their home markets, do not coordinate scheduling and operations as if they reported to one CEO with a view of the entire network. Should ownership and control restrictions be removed, a merger would allow two airlines to coordinate scheduling at a complete network level rather then just focusing on the markets where they overlap as in the current situation. This coordination could significantly increase the total number of city pairs served and/or increase frequency to existing city pairs due to the scope economies gained through more efficient scheduling by what were previously two separate entities. This would allow for a commensurate increase in passengers and revenues, on an unchanged fixed cost base improving the combined entity's financials.

Code share agreements are often criticized for selling the customer one product and providing a different one, sometimes not well disclosed or inferior from the customer perspective. Allowing two foreign airlines to merge provides the opportunity to offer a consistent product over the combined network of the two carriers, which is unlikely to happen with two separate management teams. Certain items such as food an entertainment content could continue to be tailored to individual markets, but decisions such as offering two or three class service, seat quality or number of attendants per flight could be standardized both to the convenience of customers and at a cost savings to the combined entity.

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[189] Economies of scale are the reduction in unit costs achieved as a business grows due to a larger output of units of production with fixed costs remaining relatively unchanged. Economies of scope are achieved by network businesses whereby as the business connects a new node (City A), to the hub (City H), the gain to the network is not just A to H, but A to H and all cities that connect out of H with the flight from A to H. The number of city pairs offered thereby increase exponentially as new connecting service is added.

Airlines three largest costs are labor, fuel and aircraft ownership (including leases). If an airline grows in new markets either through the establishment of a subsidiary or by acquisition, economies of scale are achievable. Airlines are crewed largely from the labor force of the country where it is established, avoiding "flags of convenience" problems. Removal of ownership and control restrictions will not necessarily change this as labor laws and labor contracts would still require flights to be crewed by labor from the nation of incorporation. What will follow is the creation of additional labor pools within the airline from new nations as operations are established in these new markets. This may not directly create downward pressure on wages in the home country, but will make an airline less susceptible to labor actions by any single labor group. The current situation is that any major labor group choosing to strike can exercise their "nuclear option" and reduce company revenues almost to zero by completely halting operations. The harm to both airline financials and customers is well documented. Should an airline have diversified operations it would be in a better position to negotiate, as labor actions would affect only the country where it occurs, not the entire network and revenues. This transition can be achieved while continuing to protect local hiring requirements and the right to bargain.

Fuel and other costs should similarly be lowered due to the greater purchasing power of the combined entity. The combined purchasing of goods by partner airlines has been previously attempted but with mixed results. As the different managements of the partner airlines make independent decisions on which aircraft, engines, on board amenities and other items to purchase there is often little commonality of purchases between partners. A combined airline would allow for centralized planning of these items throughout the enlarged company, and at larger volumes, thus taking advantage of scale economies. Interestingly, as many service providers and other

vendors to the airlines are not restricted by foreign ownership and control laws they have subsidiaries established in many nations. A global airline would be better positioned to negotiate global contracts with these vendors taking advantage of scale economies not currently available to airlines that remain restricted due to foreign ownership and control clauses.

VII. RECOMMENDATIONS

Almost from their inception, U.S. airlines have been constrained from foreign ownership and control by federal regulation. Early in the airlines history valid reasons may have existed such as protecting and nurturing a fledgling industry and maintaining a pool of pilots and aircraft for national security reasons. Today, these justifications seem outdated and anachronistic.

Proponents of eliminating the restrictions point to benefits achievable by improved capital flows, more seamless and efficient operations and consumer benefits through increased competition and the flow-through of cost savings and efficiency improvements into cheaper pricing. The experience of deregulation in the U.S. and E.U., along with open skies liberalization supports the argument by proponents for eliminating these restrictions. Similarly, studies related to Open Aviation Areas and removal of restrictions supports continued liberalization and the removing ownership and control restrictions.

Detractors argue concerns about the introduction of flags of convenience, wholesale outsourcing of labor and national security threats. These arguments against liberalization appear unfounded or preventable. Flags of convenience and safety concerns are preventable via regulatory means without necessitating an almost complete prohibition on cross-border acquisitions and capital flow. Similarly, existing labor regulations and contracts serve to prevent wholesale outsourcing of employee functions to low cost nations. Even if they should not, the experience of E.U. internal liberalization points to an increase in overall employment and no

transfer of labor to lower cost nations.[190] National security concerns can be adequately addressed by the existing Exon-Florio legislation allowing mergers to be blocked on national security grounds, and conditioning the establishment or acquisition of U.S. based airlines on participation in the CRAF program.

Also informative to the argument is the position of stakeholders and interested parties from both sides of the Atlantic. As the GAO report mentions, the DOT and most major airlines favor relaxing ownership and control restrictions, with the CEO of United Airlines, Glenn Tilton, referring to these restrictions stating, "[t]his restriction has emerged as one of the most significant barriers to this industry becoming more global."[191] The E.U. position is also in favor of removing the restrictions. In 1999, the E.U. presented to the U.S. a Transatlantic Common Aviation Area proposal, and recent statements by transport spokesman for the European Commission, Stefaan de Rynck, speaking on the matter stated "[t]he fact that you have to be European to own a European company and you have to be American to own an American company is archaic."[192] Other institutions such as the International Civil Aviation Organization (ICAO), the Organization for Economic Co-operation and Development (OECD) and the ABA Air & Space Law Forum have also called for liberalization of ownership and control restriction along with making specific proposals on how to overcome some of the legal hurdles.

In order to achieve a regime without restrictions on the ownership and control of airlines, the negotiations must grant reciprocal rights to both parties. Obviously, not all nations are willing and ready to liberalize to this degree for a number of reasons. There is significant enough support within the U.S. and E.U. that ownership and control liberalization is highly achievable between

[190] *See supra* note 151.
[191] GAO *supra* note 3; Erik Ahlberg, *UAL CEO: U.S. Must Ease Foreign Airline-Ownership Rules,* DOW JONES NEWSWIRES, April 21, 2005.
[192] *E.U. Seeks end to U.S. Airline Ownership Rules*, REUTERS, March 4, 2005.

these two huge economic blocks. An agreement would set the model for future agreements with other nations, much as the Bermuda I agreement between the U.S. and U.K. became the model for traditional bilateral agreements and the U.S./Netherlands open skies agreement became the model for that liberalized form of agreement. Given the current state of the airline industry and the rate at which debt continues to accumulate, removal of ownership and control restrictions is not only achievable, but also highly desirable.

VIII. CONCLUSION

The current financial state of the U.S. airline industry can be described as stable but still in intensive care and under watch. Restrictions on foreign ownership and control of airlines, though not the cause of the problems, continue to be a major barrier to attracting new capital and restructuring into a more efficient industry. At best these restrictive clauses are outdated in an environment where companies of almost every other industry are allowed to operate freely between nations, exercise good corporate citizenship, are subject to and abide by the laws of those nations providing benefits to both consumers and shareholders of these companies. The airline industry should be no different. Concerns with the removal of these restrictions are readily addressable from existing corporate and other law. The analysis has shown that over the years the DOT has liberalized their interpretation of these restrictions to the point where almost the only remaining barrier is the black letter law on ownership contained in the Federal Aviation Act itself. This law, on the subject of ownership and control of U.S. airlines, has remained effectively unchanged since 1926. The only barrier remaining to be crossed is the political one between nations and multilateral regions requiring reciprocal removal of these restrictive clauses, and allowing the airlines to operate far more efficiently and profitably then is currently achievable.