



McGill

Centre for Research in Air and Space Law
Centre de recherche en droit aérien et spatial

Occasional Paper Series

No. I

December 2015

Unravelling Open Skies

by

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ABSTRACT

In this paper, the author discusses the three very controversial international aviation issues that are currently confronting the United States (US) Government: (1) whether Norwegian Air International (NAI) is a "flag of convenience" (or a "corporate inversion") whose pending application to operate services to and from the US should, therefore, be denied; (2) whether, apart from the issues being debated in the pending US Government investigation into whether the Middle East carriers are otherwise subsidised, the fact that they pay no taxes to their governments and are subject to no labour law requirements alone constitute subsidisation; and (3) whether the reduced financing arrangements provided by the US Export-Import Bank (and other export credit agencies around the world) to the Middle East carriers facilitating their purchase of wide body jets constitute still another subsidy that should be prohibited. The author replies to all of these questions with a resounding "Yes".

KEYWORDS:

Airline competition, unfair competition, United States, Open Skies Agreement, Middle East airlines, flag of convenience, airline subsidies, corporate inversion

* This paper builds on the author's submission made on 24 April 2015 in response to the Request of the United States Government for Public Comment on the Issue of Foreign Government Subsidies to Foreign Air Carriers.

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I. INTRODUCTION

Following the internet publication of the paper “Restoring Open Skies: The Need To Address Subsidized Competition From State-Owned Airlines in Qatar and the UAE”¹ prepared by Delta Airlines, American Airlines and United Airlines concerning the issue of whether subsidies are in fact provided by the Gulf nations of the United Arab Emirates (UAE) and Qatar to their respective airlines (Emirates, Etihad Airways and Qatar Airways), the United States (US) Government requested public comment on this critically important issue.² In their well-researched paper, the US carriers persuasively argued that such subsidies were in fact being provided in very substantial sums by those nations to their three airlines and that such subsidies have a very adverse distorting impact on the marketplace and on the ability of the US air carrier industry to operate successfully and profitably.

Appended to the present paper is a speech the author presented in February 2015 at the annual Legal Symposium of the International Air Transport Association (IATA). In that speech, the author discussed the issue of Norwegian Air International (NAI) and whether it is a “flag of convenience” enjoying low and, hence preferential, tax advantages by incorporating or “flagging” in Ireland rather than in Norway. The author suggested that such an advantageous tax rate would in effect constitute a subsidy not unlike, for example, the subsidies that the Middle East air carriers are allegedly receiving from their respective governments due to the fact that they are government-owned and presumably pay no corporate taxes at all. In addition, the author questioned whether Middle East carriers are also subsidised in other ways, not least of which would be the plain and simple—but very valuable—subsidies provided to Middle East carriers by the Export-Import Bank in the United States and various export credit agencies in Europe. What the curious case of NAI and the Middle East carriers have in common as they vie to compete in the US aviation market is the belief that these foreign carriers enjoy an unlevel playing field that requires the applicable open skies agreement to be revisited, or even perhaps terminated.

¹ Air Line Pilots Association, *Restoring Open Skies: The Need To Address Subsidized Competition From State-Owned Airlines in Qatar and the UAE* (28 January 2015) [*Restoring Open Skies*], online: ALPA <<https://www.alpa.org/~media/ALPA/Files/pdfs/news-events/white-papers/white-paper-soe.pdf?la=en>>.

² The US Government, under the auspices of the Department of State (docket number: DOS-2015-0016), Department of Transportation (docket number: DOT-OST-2015-0082) and Department of Commerce (docket number: DOC-2015-0001) requested public comment on the matter entitled “Information on Claims Raised about State-Owned Airlines in Qatar and the UAE”. From April 2015 to the end of the invitation for public comment in August 2015, a total of 3650 comments were received (as of 3 November 2015). The comments can be accessed online by inputting the separate docket numbers: see online: Regulations.gov <<http://www.regulations.gov>>.

Before the US Government (and its various departments) expresses its view on these controversial, yet economically and internationally significant, issues, it is essential to review several of the developments and expose some of the fallacies surrounding the debate.

II. THE MIDDLE EAST CARRIERS AND THE US GOVERNMENT'S PENDING PROCEEDING

While it is not yet appropriate to reach any definitive conclusions with respect to the contentions of the Gulf carriers, it is a fact that the US carriers have been joined in this controversy by their major counterparts in Europe (Lufthansa³ and Air France/KLM⁴). All of these airlines are now requesting, if not demanding, that the US and European governments take prompt and effective measures to either substantially restrict and limit the operations of the Gulf carriers to US and European destinations, or otherwise work to "level the playing field" so that the Gulf carriers do not enjoy and benefit from substantially more advantageous competitive operating conditions than those enjoyed by unsubsidised US and European carriers. In other words, in seeking "a level playing field," the US and other western air carriers are attempting to assure that government-provided subsidies do not skew the marketplace in favour of carriers enjoying those subsidies and against carriers that do not enjoy those subsidies and, hence, face unfair, if not destructive, competition in the marketplace.

Regarding the continuing controversy over the extent, if any, to which the Middle East carriers are subsidised, the almost unprecedented proceeding that the US Departments of Transportation, Commerce and State jointly opened in April 2015, inviting any and all interested parties to submit their views and comments openly, publicly, and "on the record," was closed on 24 August 2015.⁵ The issue with all of its ramifications is presumably now under active consideration by all three departments, with a decision of some sort expected reasonably soon and more than likely to be issued by the Department of Transportation.

³ See "Gulf Carriers Stakeholder Engagement Process /Docket No. DOT-OST-2015-0082, DOS-2015-0016, DOC-2015-0001 Subsidies to carriers from the Gulf - Impact on airlines of the Lufthansa Group" (11 June 2015), online: Skift

<<http://skift.com/wp-content/uploads/2015/06/Gulf-Carriers-submission-LHGroup-to-US-Docket-Gulf-subsidies-11062015.pdf>>.

⁴ See Submission of Air France KLM on 12 June 2015 in response to "Information on Claims Raised about State-Owned Airlines in Qatar and the UAE", online: Regulations.gov

<<http://www.regulations.gov/contentStreamer?documentId=DOT-OST-2015-0082-0394&attachmentNumber=1&disposition=attachment&contentType=pdf>>.

⁵ US Department of State, "U.S. Departments of State, Commerce, and Transportation Seek Stakeholder Input on Gulf Carrier Subsidy Claims", Media Note (10 April 2015), online: US Department of State <<http://www.state.gov/r/pa/prs/ps/2015/04/240582.htm>>.

The proceeding was more or less opened by and because of the public filing of a previously non-public publication of the three US carriers (Delta, United and American),⁶ meticulously describing and outlining what they characterised as state-provided subsidies totalling upwards of US\$ 42 billion given by the two Gulf States, the United Arab Emirates (UAE) and Qatar, to their three carriers.

While an extraordinary number of individuals and organisations ultimately participated in the proceeding and filed comments some of which will be alluded to and discussed below, the principal submissions of interest for present purposes were those of the three Gulf carriers.⁷

Emirates, for example, filed an extraordinary 210 page pleading (plus nine attached exhibits) – but with no disclosed authorship – totally denying that it receives any subsidies from the UAE Government.⁸ Emirates then provided facts, figures and arguments buttressing its claim that it is “one of the world’s leading airlines precisely because [it] does not depend on government subsidies, bailouts, and bankruptcy laws but operates as a consumer-focused, profit-driven commercial enterprise”.⁹ It then proceeded, in an almost unprecedented extended effort, to attempt to rebut most if not all of the three US carriers’ arguments and contentions which Emirates describes as “a series of demonstrably inaccurate assertions, outright distortions, and legal misinterpretations of the Open Skies Agreement”.¹⁰ Emirates concluded by arguing that, in seeking the relief they do, the US carriers want “to defeat the fundamental principles of Open Skies and [to] block competitors who may disrupt their entrenched market positions”.¹¹

While the pleadings of Etihad and Qatar are limited to only some 60-plus pages,¹² they contain and advance many of the same seemingly persuasive arguments made by Emirates. The Etihad pleading accuses the “Big 3 Carriers” of “launch[ing] an attack on competition, targeting Etihad, Emirates and Qatar Airways... [and] other carriers that threaten their market hegemony ... [or] that seek to compete in the United States”,¹³

⁶ See *Restoring Open Skies*, *supra* note 1.

⁷ Like most of the submissions made by the Gulf carriers in this proceeding, the submission made by the three US carriers was similarly unsigned with no evidence of authorship – a non-disclosure approach that is most unusual for those who, like myself, regularly practice in this field and before the US DOT.

⁸ See Emirates, *Emirates' response to claims raised about state-owned airlines in Qatar and the United Arab Emirates*, online: Emirates

<http://content.emirates.com/downloads/ek/pdfs/openskies_rebuttal/EK_Response_Main.pdf>

⁹ *Ibid* at i.

¹⁰ *Ibid* at ii.

¹¹ *Ibid* at 191.

¹² Etihad Airways, *Etihad Airways Response to Claims Raised about State-Owned Airlines in Qatar and the United Arab Emirates* (31 May 2015), online: Skift <<http://skift.com/wp-content/uploads/2015/06/Etihad-Response-to-US-Carrier-Allegations-31-May-2015.pdf>>.

¹³ *Ibid* at 4.

specifically alluding by way of a footnote to the still stalled efforts of Irish-registered NAI to obtain authority to operate to the US.¹⁴ Positing that US carriers are doing nothing more than “attempt[ing] to further cement their oligopoly, particularly on transatlantic markets”, Etihad argues that “the Big 3 Carriers affirmatively and voluntarily choose not to directly serve Etihad’s key Middle East and Indian Subcontinent markets in a meaningful way [but] [i]nstead they are routing U.S. passengers through congested European hubs and on to their European alliance partners to serve certain destinations”.¹⁵ In a similar vein, Qatar’s 80-plus page (likewise unsigned) submission accuses the US carriers of “manipulation and misrepresentation”,¹⁶ being “especially disingenuous”,¹⁷ and of “deliberate obfuscation”.¹⁸

It should come as no surprise to the reader that with pleadings of this length, scope, and tenor, it is quite honestly difficult – if not impossible – especially in a paper of this abbreviated type to review in any detail, let alone attempt to weigh and decide upon, all the many arguments that the three Middle East carriers have so ably advanced and in such copious detail. Additionally, the so-called Big 3 have themselves filed their own lengthy and detailed rebuttal comments which appear to contain equally persuasive arguments to the contrary.¹⁹ Still further, Messrs. Darin Lee and Eric Amel, two very well-known aviation economists, presumably retained by the “Big 3,” submitted Supplemental Comments supporting the conclusion that major subsidies are in fact being provided by the Mid-East governments to their air carriers and that such subsidies are having a very deleterious impact on the US carriers.²⁰

¹⁴ *Ibid* at fn 7.

¹⁵ *Ibid* at 8. The *Aviation Daily* of 15 May 2015 (at 102) reported on Etihad’s argument that the three US carriers received the following very subsidised US Government benefits by way of the bankruptcy protection available under US law:

	Bankruptcy Debt Relief	Pension Benefits	Termination
United	\$26 billion	\$16.8 billion	
Delta	\$7.9 billion	\$4.6 billion	
American	\$1.6 billion	\$8.1 billion	

Whether these are in fact subsidies provided by the US Government is questionable (as discussed below IV-B).

¹⁶ Qatar Airways, *COMMENTS OF QATAR AIRWAYS Q.C.S.C., Re: Information on Claims Raised about State-Owned Airlines in Qatar and the UAE* (30 July 2015) at 5, online: Qatar Airways <http://www.qatarairways.com/images/Internet/qr_commercial/ecommerce/relaunch-2011/5-column/promotions/americas/us/QatarAirways-openskies-white-paper.pdf>.

¹⁷ *Ibid* at 7.

¹⁸ *Ibid* at 13.

¹⁹ *Comments of the Partnership for Open and Fair Skies on the Responses of Qatar Airways, Etihad Airways, and Emirates Airlines* (24 August 2015), online: Open and Fair Skies <<http://www.openandfairskies.com/wp-content/uploads/2015/08/Partnership-Rebuttal-Filing-DOT-Aug-24.pdf>>.

²⁰ Darin Lee & Eric Amel, *Supplemental Comments regarding the Impact of Subsidized Gulf Carrier Competition*

In addition to the pleadings of the directly involved air carrier parties, moreover, pleadings have also been filed by the US cargo carriers (FedEx and Atlas), joined by Jet Blue and Alaska Airlines, fully and totally supporting the arguments of the Middle East carriers as well as their approach to interpreting the applicable provisions of "open skies" agreements.²¹ On the other hand, but as was to be expected, Lufthansa and Air France/KLM, are fully in support of the "Big 3," as are the major aviation labour unions like the Airline Pilots Association (ALPA) and Southwest Airline Pilots Association (SWAPA).

If there was, indeed, any surprise in the breakdown of supporters and opponents, it was in the fact that, unlike Skyteam and Star Alliance, in which Delta and United Airlines are respectively the principal anti-trust immune airlines participants, and which openly and actively supported the views of the "Big 3", the third airline alliance, OneWorld, within which American Airlines is one of the principal anti-trust immune participants, and which includes the parent or holding company known as the International Airlines Group or IAG (which owns British Airways, Iberia, Vueling, and now Irish Aer Lingus), openly and actively supported the views not of their fellow member American Airlines but rather of the Middle East carriers.²²

However much of a surprise this may have been to the average observer, and perhaps also to American Airlines, the fact of the matter is that Qatar Airlines has recently become a member of OneWorld. Moreover, the Government of Qatar is reportedly not only the largest shareholder in IAG (having just invested US\$ 1.7 billion in the company), but it is also known to be the owner of several very prominent properties in the United Kingdom, including Harrods and Canary Wharf.²³ It is probably these connections, plus the reported long and personal friendship between British Airways' CEO, Willie Walsh, and Qatar Airways' CEO, Akbar Al Baker, that caused the totally unexpected and highly unusual difference of views between and among the three international airline alliances.

Under the circumstances and given the depth and extent of the controversy, it is not for this author even to attempt to weigh and reach any conclusions with respect to the many arguments that appear to have been so ably raised by the identified and unidentified authors of the many pleadings that have been filed. Such a task can and will be undertaken only by the US departments presently examining and studying the multitude of various filed pleadings.

on US Carriers (24 August 2015), online: Open and Fair Skies

<<http://www.openandfairskies.com/wp-content/uploads/2015/08/Compass-Lexecon-Report.pdf>>.

²¹ See "US Airlines for Open Skies" (3 August 2015), online: Fedex

<<http://about.van.fedex.com/wp-content/uploads/2015/08/080315-Open-Skies-Filing-Final.pdf>>.

²² *Response of IAG to the USE Department of Transportation* (14 May 2015), online: eTurboNews

<<http://www.eturbonews.com/58984/wrong-american-delta-and-united-right-etihad-emirates-and-qatar->>>.

²³ See *Aviation Daily* 22 April 2015 at 2 (also reporting that, unlike Skyteam and Star Alliance, IAG likewise supports NAI's application to the US DOT). See also atwonline.com, March 2015 at 9.

But there is one important and overriding observation that deserves to be made and that this author has previously made in a different context. Whether or not any of the Middle East governmental financial transactions with their airlines do or do not constitute a “subsidy,” no one can or should dispute what appear to be the following two largely uncontested facts.

First, none of the three Middle East carriers pays anything in the nature of any corporate income tax, whether it be one of only 12.5% – i.e., the favourable (publicised) tax rate in Ireland – or one of more than 30%, like those in France and the US. Significantly, when the US and other developed-State maritime vessel owners began in the 1950s and 1960s to re-flag their vessels in countries that imposed no corporate taxes at all (e.g., Panama, Liberia and Honduras), that reflagging and the substantial monetary advantages that ensued were viewed by almost every observer at the time not only as a huge subsidy for the vessel owners but a more-than-persuasive reason to change the nationality of a vessel. Whether the equivalent and, I believe, undisputed absence of any corporate income tax in the UAE and Qatar can or should likewise be viewed in context as a comparably huge subsidy is an open issue.

Second, and similarly open, is the equally controversial and equally undisputed issue of the impact of the fact that neither Qatar nor the UAE has anything in the nature of a labour law that protects, much less enhances, the rights of their airlines’ employees. This was always and accurately viewed as another major reason why the maritime vessel owners of the 1950s and 1960s were so quick and anxious to change their vessels’ nationality and thereby gain the very substantial monetary advantages (a.k.a. subsidy) of union-free employees.

Whether the US Government will wish to make either of these analogous and largely comparable comparisons – much less take remedial steps in aviation of the type it did not take in maritime – thus resulting in the well-known but highly unfortunate fact that the once dominant and prosperous US-owned and flagged maritime fleet (that paid substantial US taxes and employed thousands of American seamen) has totally disappeared and is all but non-existent on the oceans of the world today – is the open and very controversial question facing the US Department of Transportation and other US governmental authorities.

Suffice it to say, however, that these two issues are to a very large extent separate and apart from the multitude of more conventional subsidy issues raised in the pleadings that the interested parties and so many others have filed in the above mentioned interdepartmental proceeding. Not unexpectedly, there is absolutely no prediction as to when a decision might be issued in that proceeding, let alone what its contents might be.

III. NORWEGIAN AIR INTERNATIONAL

The allegations of unfair subsidies provided to Middle East carriers erupted while Norwegian Air International (NAI) is still awaiting regulatory approval to fly to destinations in the US— now almost two years since NAI originally applied to the US DOT for that authority.²⁴

The still-continuing controversy over NAI centres on that airline's legally questionable effort to change its flag registration from Norway to Ireland. Once known (at least in maritime law) as the process by which vessel-owning corporations re-registered in or “reflagged” their vessels to “flag of convenience” countries, this stratagem is now known simply as “corporate inversion”. However known, the stratagem is employed for the singular purpose of avoiding what some corporations view as onerous tax, labour, and other laws imposed by their country of original incorporation. Once locating a country (of which there are an increasing number) with low or flexibly non-existent tax, labour and similar regulatory laws, the corporation takes steps, either by acquiring, or being acquired by, a subsidiary in that second country to escape from the laws of its former country to the lax or otherwise non-existent laws of its now-adopted country.

NAI first reflagged from Norway to Ireland back in December 2013 (to take advantage of Ireland’s low 12.5% tax rate, its lax labour laws, and perhaps other non-public advantages), and then applied to the US Department of Transportation for authority to operate low-cost services between points in the US and points in the rest of the world. That application has now been pending undecided before the DOT for an unprecedented period of time, and, again, there is no prediction when or even if a decision— much less a favourable decision— will be reached anytime in the near future.

The more-than-likely reason for the delay at least during the first year was the sharp and sustained criticism by labour unions, and especially the Air Line Pilots Association (ALPA),²⁵ supported by an increasingly vocal number of US Senators and Congressmen,²⁶ that NAI’s only reason for reflagging to Ireland was its desire to avoid Norway’s strict and enforceable labour laws— few if any of which existed in Ireland. Accordingly, so it was argued, NAI was nothing more than a maritime type “flag of convenience” and that allowing it to operate to this country would subject US air carriers

²⁴ See *Application of Norwegian Air International Limited for an Exemption and Foreign Air Carrier Permit* (3 December 2013), DOT-OST-2013-0204-0001.

²⁵ See ALPA, *Flags of Convenience: Undercutting Labor Standards, Undermining International Aviation*, online: ALPA <<http://www.alpa.org/advocacy/flag-of-convenience>>.

²⁶ US Congressman Daniel Lipinski, “Bipartisan Letter to Secretary of State John Kerry and Transportation Secretary Anthony Foxx”, online: US House of Representatives <<http://lipinski.house.gov/uploads/Bipartisan%20Letter%20to%20Secretary%20of%20State%20John%20Kerry%20and%20Transportation%20Secretary%20Anthony%20Foxx.pdf>>.

to the very same type of grossly unfair competition that destroyed the US merchant marine one half century ago.²⁷

However valid and persuasive this argument was and continues to be today, the opposition to NAI currently seems to be based at least as much on the fact that NAI's objective is also that of what has recently become known as a "corporate inversion" – in other words reincorporating in a different country that advertises low or negotiable or even non-existent tax rates – all in an effort to avoid Norway's 27% tax rate.

What the press and others seem today to be focusing their attention on is the fact that Ireland's tax rate appears not to be set at even the advertised 12.5% but rather seems to be adjustable or negotiable, depending on circumstances, to considerably lower and perhaps even non-existent and, of course, non-publicised percentages. Thus, a recently issued publication by the Citizens for Tax Justice reports that Apple, one of America's most well-known corporations, has worked out a uniquely favourable tax rate with what appears to be its newly adopted country, none other than Ireland. As the report states:

Apple claims to have paid a 36.5% tax rate on its claimed U. S. profits, but only 3.4% on its foreign profits. The low "foreign" rate mainly reflects the fact that Apple, for *tax purposes*, has moved about two thirds of its worldwide profits to Ireland, where those profits are taxed neither by Ireland nor by the U. S. or any other government.²⁸

Because of Ireland's largesse, Apple is believed to have avoided payment to the US Government of "at least \$3.5 billion in U. S. federal taxes in 2011 and \$9 billion in 2012".²⁹ While the EU announced some time ago that it was investigating Apple's tax arrangements with Ireland to determine whether they might constitute unlawful "state aid", no decision has yet been reached in the case, according to a recent article in the New York Times.³⁰ The article also reported that on 21 October 2015, the EU announced that tax advantages of over US\$ 30 million had unlawfully been given by Luxembourg to Fiat-Chrysler and by the Netherlands to Starbucks. Although both companies immediately

²⁷ See "Learn Why DOT Must Deny NAI", online: YouTube <<https://www.youtube.com/watch?v=IJCjHS0KQdc>>.

²⁸ Citizens for Tax Justice, *The Sorry State of Corporate Taxes*, at 29, online: CTJ <<http://www.ctj.org/corporatetaxdodgers/sorrystateofcorptaxes.pdf>>. See also, Jim Edwards, "Here's how much money Apple avoids paying in taxes by pretending it's based in Ireland", *Business Insider* (11 June 2014), online: Yahoo Finance <<http://finance.yahoo.com/news/heres-much-money-apple-avoids-165949866.html>>.

²⁹ See *Washington Post* 1 October 2014 at A-12. See also "Apple Taxes: Company Avoids Paying Billions By Using Offshore Companies, U.S. Senate Finds", *Associated Press* (20 May 2013), online: Huffington Post <http://www.huffingtonpost.ca/2013/05/20/apple-uses-companies-outs_n_3309151.html>.

³⁰ James Kanter & Andrew Higgins, "Jean-Claude Juncker, Top E.U. Official, Faces Rising Furor Over Luxembourg Tax Revelations", *New York Times* (6 November 2014), online: New York Times <http://www.nytimes.com/2014/11/07/world/europe/head-of-european-commission-under-pressure-over-luxembourg-tax-revelations.html?ref=topics&_r=0>.

indicated they would appeal, a member of the European Parliament publicly opined that “[t]hese two cases have proven that tax competition among [E.U.] states to attract companies and profits is the norm” and that Europe is now “more a jungle than an area of cooperation” in tax matters.³¹ An earlier *Washington Post* report referred to Luxembourg as “[t]he little Grand Duchy [that] became a haven by granting some firms a corporate tax rate below 1% for profits funneled through Luxembourg”.³² Meanwhile, *The Economist* recently reported that even the United Kingdom seems to have joined the race to the bottom with “[a] growing array of tax benefits [that] have made London the city of choice for big firms to put everything from “letterbox” subsidiaries to full-blown headquarters”.³³ In the face of all of this burgeoning concern about corporate tax evasion, the highly regarded multinational Organization for Economic Cooperation and Development (OECD) recently indicated that, because of escalating tax avoidance schemes being implemented by corporations throughout the EU, it would shortly be taking action (which it has since done) that will require companies operating within the EU to “declare the amount of revenue, profit and tax paid in each country as well as total employment, capital and assets used in each location”.³⁴ To be sure, all of these events suggest that some solution may be in sight some day after appeals, delays, national resistance, etc. etc. In short, the problem today is what must be done by the US Government today – in the face of NAI’s patent tax avoidance antics and the role that can surely play in the increasingly unpleasant bigger picture.

³¹ James Kanter, "E.U. Orders 2 Nations to Recover Taxes From Starbucks and Fiat", *New York Times* (21 October 2015), online: New York Times <<http://www.nytimes.com/2015/10/22/business/international/starbucks-fiat-eu-tax-netherlands-luxembourg.html>>. The Wall Street Journal specifically reported in detail on the EC’s conclusion that the tax deals “amounted to illegal state subsidies that must be repaid”: See Tom Fairless, "EU Regulators to Require Starbucks, Fiat Pay Millions of Euros in Back Taxes", *Wall Street Journal* (21 October 2015), online Wall Street Journal <<http://www.wsj.com/articles/eu-rules-that-starbucks-fiat-benefited-from-illegal-tax-deals-1445419279>>. It will be most interesting to learn whether the EC will reach a similar conclusion regarding the tax deals worked out by Apple and NAI with Ireland.

³² See Anthony Faiola, "Juncker scandal prompts sniping at European Commission election system", *The Washington Post* (13 November 2014), online: The Washington Post <https://www.washingtonpost.com/world/europe/juncker-scandal-prompts-sniping-at-european-commission-election-system/2014/11/13/cf8804e8-69c0-11e4-bafd-6598192a448d_story.html>. It was also reported that “EU regulators are currently analyzing 300 further tax deals in a number of EU countries”: see Tom Fairless & Stephen Fidler, EU to Pursue Google Parent Alphabet on Multiple Fronts, Vestager Says”, *The Wall Street Journal* (26 October 2015), online: The Wall Street Journal <<http://www.wsj.com/articles/eu-to-pursue-google-parent-alphabet-on-multiple-fronts-vestager-says-1445817842>>. While the US Treasury recently adopted regulations making it increasingly difficult for US firms to buy foreign firms (for tax reasons), nothing prevents set-up arrangements for foreign firms to buy U.S. firms; and such purchases have soared from US\$ 71 billion in 2013 to US\$ 379 billion by late September of 2015: see *Wall Street Journal*, 22 September 2015, at C-1 and 26-27 September 2015 at A-12.

³³ “Still slipping the new”, *The Economist* (10 October 2015), online: The Economist <<http://www.economist.com/news/business/21672232-europes-corporate-tax-havens-say-they-are-reforming-up-point-still-slipping-net>>.

³⁴ Paul Hannon, “Crunchtime for Global Tax-Avoidance Push”, *The Wall Street Journal* (27 September 2015), online: The Wall Street Journal <<http://www.wsj.com/articles/crunchtime-for-global-tax-avoidance-push-1443376341>>.

Meanwhile, Norwegian's CEO, Asgeir Nyseth, boldly denies that NAI moved to Ireland to avoid Norway's high taxes or its strict labour laws and asserts it did so only to enjoy EU traffic rights and to be able to apply to the U. S. Ex-Im Bank for discounted financing on its intended purchase of Boeing aircraft. The easy answer to this, of course, is that it could have equally done most if not all of this by reflagging to France or Germany. In addition, Mr. Nyseth, like his counterpart NAI CEO, Bjorn Kjos, both never hesitate to make certain that the US Government is well aware that NAI has "put on hold" an order for up to 20 Boeing 787-9s "until after" DOT grants the authority to NAI and that, once granted, NAI intends to operate as many as 40 to 50 Boeing 787s.³⁵

IV. ICAO'S POSSIBLE ROLE IN THE BATTLE OVER SUBSIDIES

A. ICAO AND SUBSIDIES

However admirable and laudable the effort by the US Government is to attempt to explore the subject of Middle East government subsidies and how, if they exist, they could work to distort and undermine the objective of a level playing field for international air carriers, the fact of the matter is that the US Government should be encouraged to treat this inquiry only as a short-term approach to the problem. As this author recommends in his remarks (see Appendix), the better approach, and especially for purposes of the long term, is to vest the International Civil Aviation Organization (ICAO) with the responsibility of very promptly investigating and regularly monitoring all forms of alleged and actual subsidies provided to all air carriers by their governments throughout the world. Moreover, lest this be deemed too novel of a proposal, the US and other governmental authorities should keep in mind the express provisions of Article 54 of the venerated and venerable 1944 Chicago Convention, which provides as follows:

³⁵Christina Zander, "Norwegian Air Halts Dreamliner Talks Amid Permit Delay", *The Wall Street Journal* (28 April 2014), online: [The Wall Street Journal](http://www.wsj.com/articles/SB10001424052702304163604579529681687171504) <<http://www.wsj.com/articles/SB10001424052702304163604579529681687171504>>. This is all too reminiscent of the oft-stated view of former Air France/KLM CEO, Jean Cyril Spinetta, that the UAE's Emirates Airlines always received additional slots in France each time it bought a couple of A-380s from Airbus. It was also reported that Qatar Airways received additional traffic rights into France as part of a US\$ 7.3 million purchase of 24 French-built Rafale fighter jets: see Cathy Buyck, "Qatar Airways could gain more Traffic Rights to France from Qatar Rafale Deal", *Aviation Daily* (5 May 2015), online: [Aviation Week](http://aviationweek.com/commercial-aviation/qatar-airways-could-gain-more-traffic-rights-france-qatar-rafale-deal) <<http://aviationweek.com/commercial-aviation/qatar-airways-could-gain-more-traffic-rights-france-qatar-rafale-deal>>. Nor did it come as a surprise that in the very midst of the U. S. Government's investigation into the alleged subsidies provided to the Mid-East airlines (see above discussion), Qatar Airways let it be known that in addition to the 50 B-777 9Xs it already has on order, it has recently "topped off" that order with a firm order for ten 777 8Xs and four 777 freighters: see *Aviation Daily* (16 June 2015), at 1-2.

The [ICAO] Council shall:

...
(i) *Request, collect, examine and publish information relating to the advancement of air navigation and the operation of international air services, including information about the costs of operations and particulars of subsidies paid to airlines from public funds.*³⁶

Nothing can be more certain from this provision than that the framers of the Chicago Convention were not only well aware of the possibility that public subsidies might be given by governments to their national air carriers, but those framers also expressly desired and authorised the international community to keep careful track of “the particulars” about what subsidies were paid by which governments. To be sure, and because of the importance of the subsidy issue, this provision implicitly empowers individual governments, like the US Government here, to initiate the instant inquiry and, if necessary, to take appropriate action to correct the issues being confronted. More importantly, however, the provision suggests that any inquiry undertaken by the ICAO Council ought not be limited only to Middle East carriers, but should rather be extended to all carriers throughout the world. In addition, the inquiry should be very promptly undertaken and conducted by ICAO or by such committee or body within ICAO as is designated by the ICAO Council.

B. THE US AND SUBSIDIES

Following the presentation of his remarks at the February 2015 IATA Symposium, the author was questioned by several attendees about two elements of the US legal system and whether, in any examination of the overriding issue of subsidies granted by governments, these elements should be included. The two elements were:

- (1) the U.S. bankruptcy laws that allow US carriers to file for reorganisation under the US bankruptcy laws and, in doing so, they can thus emerge as a new entity largely without debt; and
- (2) the “Fly America”³⁷ legislation that allows the US Government to require all of its employees, when traveling on US Government business, to fly to their destinations throughout the world on US flag-bearing carriers. The replies provided to both questions were relatively brief and simple:

As to the bankruptcy laws, the fact of the matter is that the bankrupt airline’s ability to emerge from and otherwise avoid its debts (that caused its bankruptcy filing) comes not at the expense of, or from subsidies or funds given by, the US Government but rather at the expense of stockholders and unsecured creditors. These individuals or

³⁶ *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295, ICAO Doc 7300/6 (entered into force 4 April 1947), art 54(i) [*Chicago Convention*] [emphasis added].

³⁷ 49 USC 40118 – Government-Financed Air Transportation.

entities, in losing their stock investments and their rights as creditors, provide the means and the money whereby the airline can begin anew debt free. In other words, bankruptcy law is not a government-provided subsidy but rather, if you will, a “subsidy” provided by fellow Americans who suffer the loss of their stock investments and their rights as creditors.

As to the requirements of the Fly American Act, not only do I personally see no “subsidy” in allowing the payor for transportation to select the carrier on which the payee can or will fly, but equally as important, with all the alliance and code-share arrangements in existence today, it is possible, if not likely, that foreign carriers transport a sufficiently substantial number or percentage of US Government employees such that the issue is no longer relevant.

Nevertheless, and as I added, if ICAO does, indeed, undertake a sweeping investigation of all government-provided subsidies, it would be appropriate for the US Government to list the two foregoing programmes as “alleged” or “possible” subsidy programmes and allow them to be examined or questioned as such.

V. CONCLUSION

It is impossible to predict in any meaningful way how either of these escalating controversies will be resolved. There can be no question, however, that to the extent the US Government leans towards taking restrictive action in either case, the problems will likely only escalate. Under Open Skies agreements, it is not lawful for parties to take unilateral action such as imposing frequency restrictions on the airlines of the other party. The most that can be done is for the parties to engage in consultations in a good faith effort to reach an agreed resolution that includes some restrictions but that is nonetheless acceptable to both sides. That is the likely course that should ensue in these types of disputes, assuming both sides are not irrational about their positions and are prepared to understand the position of the other side and reach some accommodation between the two.

On the other hand, if—as seems to be the case today in both controversies—the parties on both sides remain steadfast and unfaltering in their views that what they are doing is perfectly lawful under the terms of the applicable Open Skies agreement, it would seem as though, from a strictly legal point of view, the US would have no alternative but to denounce the applicable Agreement.

As pointed out earlier, however, it is neither a difficult nor a necessarily hostile act to denounce an Executive Agreement of this type. Unlike treaties, which are specifically provided for in the US Constitution, and which become effective as the “supreme law of

the land”³⁸ only after a two thirds vote of the US Senate,³⁹ Executive Agreements not only require no Congressional approval of any type to enter into effect but do not in fact ever become the “law of the land”. Accordingly, following little more than formal interagency or departmental agreement, they can be easily and readily denounced in accordance with their terms, usually after a one year period to the other contracting party. In so denouncing, the United States Government would be taking the lead in emphasising to the world that it will tolerate neither flags of convenience nor excessive governmental subsidisation of airlines in today’s world of burgeoning international air travel. Moreover, that may not be such a catastrophic action given that the denunciation would not take effect until the passage of one year; and during that added period of time, the parties can even more carefully and in good faith examine the circumstances, attempt to understand each side’s views more fully, and then devise and take some corrective action that is, to put it diplomatically, tolerable for each side.

But let us all hope that before denunciation becomes necessary in either controversy, the parties can, during expedited consultations carried out in good faith, reach compromise solutions that meet the needs and objectives of all concerned.

³⁸ *Constitution of the United States*, art VI.

³⁹ *Ibid*, art II, sect 2.

APPENDIX

The following is the speech delivered by Mr. Mendelsohn as part of the “Grand Debate” held at IATA’s Annual Legal Seminar in Seoul, South Korea, on 27 February 2015.

First, I would like very quickly but very sincerely to thank IATA and each of the sponsors of this conference for putting on such an excellent and educational seminar for all of us. It could not have been better done, and I am sure I speak for all of us when I say this. Second, I would like to thank Korean Air and the Korean people for being such totally marvellous, friendly and helpful hosts. It has been a true pleasure visiting and touring through your totally lovely and interesting country.

That said, let me now quickly launch into my segment of this debate. I intend to raise and focus on three very controversial issues that are right now facing the international aviation community and that deserve extended discussion in this debate. These issues are:

- (1) the recent emergence of this carrier, called Norwegian Air international (NAI), that appears to be owned by Norwegian nationals but that is flagged in Ireland - most everyone believes in order to be able to enjoy Ireland’s tax haven status and its lax labor laws;
- (2) the growing problem of governments that hugely subsidise their airlines - whether by direct subsidies of different sorts or by not imposing on their airlines any form of corporate or other comparable income tax; and, finally,
- (3) the increasingly controversial US Export-Import Bank (Ex-Im Bank) “subsidies” given to international airlines to buy large new Boeing aircraft, even though these airlines are anything but “developing” and are, indeed and for the most part, very profitable and, in a word, “rich”. Needless to say, no one would have ever contemplated or predicted that such airlines would be the recipients of subsidies to purchase new aircraft, while US and other national carriers pay the full price.

But let me get into these details later and let me start first with the highly controversial subject of NAI.

I. NAI

Many of you are aware of the speech I gave last year at an air law conference at American University in Washington, DC. The speech was later published as an article in Southern Methodist University’s Journal of Air Law and Commerce.⁴⁰ I understand that

⁴⁰ Allan I Mendelsohn, “Flags of Convenience, Maritime and Aviation” (2014) 79 JALC 151.

it's been widely read, but if any of you have not yet read it, I brought a few copies with me and would be pleased to provide you with one. In any event, in that article, I took the open position that NAI is nothing more than a "flag of convenience", no different from the flags of convenience in maritime law that destroyed the once very dominant and powerful American flag fleet that emerged and that largely governed maritime commerce in the first decade or so following the end of the Second World War.

By the late 1960s, as I said in the article, that fleet, once operating totally under the US flag and employing American seamen-employees, was rapidly disappearing. Their US owners had been permitted by the United States Government to freely reflag all of their vessels to countries like Panama, Liberia and Honduras, which imposed no corporate taxes of any sort (instead of the US 35% corporate tax), and allowed the owners to discharge all their US seamen employees and hire in their place low-paid un-unionised South American and Asian seamen. As a result of all of this, there are today no US-owned, US-flagged vessels plying the blue water commerce; and no less than 55% of the ocean carriers operating around the world today are flagged in obscure, sometimes even landlocked, small "flag of convenience" nations. Needless to say, this is exactly what I do not want to see happen in international aviation.

Now let's take a closer look at NAI. It is reflagging from Norway, with its 27% corporate tax rate and its enforceable labour laws, to Ireland that openly prides itself on being a "tax haven" state with a corporate tax rate of only 12.5% and virtually non-existent labour laws. This alone should be enough to prove that Ireland may well be the new and first flag of convenience country in international aviation. But the situation seems to get worse, as just recently we've read stories about Ireland's increasingly popular secret tax deals, known locally as the "Double Irish", where foreign corporations that reincorporate in Ireland are given even lower and of course still secret tax rates. So frankly, it may not be an easy task to ascertain what tax rate NAI (or, for that matter Ryanair) will enjoy.

To be sure, the European Commission (EC) now seems to have woken up to the issue and has declared that it is investigating Ireland's "Double Irish" and will presumably be taking steps to rectify the situation.⁴¹ But within days of the disclosure of the existence of the "Double Irish" in Ireland, we were next to learn that the Netherlands has a so-called "Dutch Sandwich" by which the Netherlands too reportedly provides very substantial tax reductions, again all secret, to foreign corporations that re-register in the Netherlands. And as recently as this past November 7, the New York Times carried a lengthy exposé about the pervasive extent of tax cheating that goes on in Luxembourg, a

⁴¹ European Commission, *State aid: Commission investigates transfer pricing arrangements on corporate taxation of Apple (Ireland) Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg)*, Press Release (11 June 2014), online: European Commission <http://europa.eu/rapid/press-release_IP-14-663_en.doc>.

country previously thought to be open and above board at least on tax issues.⁴²

Two comments should be made about this. First, instead of the EC spending so much time pushing the US to allow NAI to operate, the EC would be far better advised to be spending its time cleaning up the deplorable tax mess that seems to be engulfing so many countries in Europe. And the second comment is that the EC needs desperately to do this not only to restore some decency or legitimacy to the tax picture in Europe but even more so to make sure that, if the US were ever to allow NAI to operate, EU countries like Latvia, Estonia or even Luxembourg or the Netherlands might well not fashion their own tax laws, secretly or otherwise, so as to be even more attractive as a corporate tax haven than Ireland. It is precisely such a "race to the bottom" that occurred and moved very quickly in maritime law some half century ago; and, as I said, the last thing I would like to see is a similar "race to the bottom" happening in international aviation, whether within the European Union or elsewhere in the world.

A final word should be said on the issue about labour conditions, especially as that is the issue upon which the US and EU pilot unions argue that there is a clear violation of Article 17 *bis* of the US-EU Open Skies Agreement.⁴³ If anyone doubts just how deplorable Ireland's labour laws are at least as they apply (or do not apply) to the employees of Irish-flagged Ryanair, please peruse footnote 4 of my article that I mentioned earlier.⁴⁴ It sets out citations to four extremely critical articles about Ryanair's labour relations; and there are no fewer than at least 20 other articles readily available of similar import.

The long and short of my conclusion is that there can be no doubt but that NAI is a flag of convenience whose approval by the US Government would almost surely lead to the emergence of other flag of convenience airlines and an inevitable race to the bottom just as occurred in the world of maritime commerce. I strongly and sincerely encourage the US Government to take every step to make sure that this does not occur in international air transportation.

⁴² James Kanter & Andrew Higgins, "Jean-Claude Juncker, Top E.U. Official, Faces Rising Furor Over Luxembourg Tax Revelations", *New York Times* (6 November 2011), online: http://www.nytimes.com/2014/11/07/world/europe/head-of-european-commission-under-pressure-over-luxembourg-tax-revelations.html?ref=topics&_r=0.

⁴³ EC, *Decision of the Council and the Representatives of the Governments of the Member States of the European Union, meeting within the Council of 25 April 2007 on the signature and provisional application of the Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand*, [2007] OJ L 134/4 [US-EU Open Skies Agreement].

⁴⁴ Mendelsohn, *supra* 40 JALC at 154, fn 4.

UNRAVELLING OPEN SKIES

I do not like to leave a controversial subject like this one without at least advancing some suggestions as to how the problems we've discussed can be solved in some fashion or at least what next best steps we might be advised to take towards a solution. First, I think it is absolutely essential that, as I said, the EC must move itself:

- (1) to take major and very prompt steps to get its tax act together, to remove incentives for the kind of tax cheating that now seems to be running rampant throughout the EU, and, if at all possible,
- (2) to establish and enforce a uniform corporate tax rate, say perhaps of 20% or 25%, to apply throughout the EU or at least throughout those countries that use the Euro. If the EU does not believe it has such powers, perhaps the EU and the US might give thought to a multilateral treaty establishing such a uniform tax rate between the two – perhaps just for airline companies or possibly even for all corporations.

Nor are these off-the-wall recommendations; I am certainly not the first one to think of them; and there's no reason why one or both ought not at least be seriously explored. Moreover, if it should ultimately turn out either that the EU has no power to move in such a direction or that the US and the EU are unable to reach such a multilateral agreement, then and especially if the EC continues to push the US on NAI, it may well be time for the US Government to fall back on the less cooperative remedy, namely, for the US to give very serious thought to withdrawing from or cancelling the US-EU Open Skies Agreement altogether – or at least until such time as the EU can vest itself with authority to take the kind of decisive action that is now so essential in these circumstances.

I should say a few words about such a seemingly serious step, and these words will be as applicable to the next subject I shall be discussing as this one. Despite the fact that so many who favour NAI regularly call the Open Skies Agreement a "treaty" – carrying with it the suggestion that denunciation would, therefore, be almost unthinkable – the fact of the matter is that it is nothing more than an executive agreement that can be cancelled or otherwise terminated easily with no advance treaty requirements and simply with notice of one year given by either of the contracting parties to the other.

I happened to have been one of those US Government officials who in the 1960s moved the US Department of State and other US agencies and departments to agree to denounce the treaty known as the Warsaw Convention, which we felt at the time ran totally counter to US values with its antiquated 1929 US\$ 8,300 limit on personal injury and death of passengers in international air transportation. While we ultimately withdrew that denunciation – mainly because our colleagues in IATA, and its then General Counsel, Julian Gazdik, came up with the uniquely inventive and satisfactory 1966 interim carrier agreement – I certainly learned from that experience how much more difficult it is to denounce a treaty than a mere executive agreement. So when supporters of NAI call it a treaty and try to attach to it some level of force of law, they

should recall that it is not a treaty and can, therefore, be cancelled or terminated almost without effort. Let me only add that I would much prefer not to be forced to do so. But if it is a question of either accepting NAI or cancelling the US-EU Open Skies Agreement, there is absolutely no doubt in my mind that I would unhesitatingly encourage the US Government to cancel the agreement.

II. SUBSIDIES

I would now like to turn my attention to the second argument, this one about subsidies. And I want to begin this discussion with an open admission and apology. I have absolutely no facts upon which to base an argument that certain airlines operating today in the world are heavily subsidised by their governments. The unfortunate fact is that there is no governmental or non-governmental organisation anywhere in today's world that in any way monitors or collects data or facts or figures on the extent, if at all, by which airlines might be subsidised in one or another way, directly or indirectly, by their governments.

Indeed, the world does not even have any data or information about the extent to which airlines are allowed by their governments to operate free of any corporate or other forms of required tax payments to their governments. In other words, in most cases, we cannot even ascertain whether an airline pays taxes to its governments or, if it does, the extent or percentage of such payment(s).

I also want to mention the fact that, whenever anyone in the US today complains about the unfairness caused by possible subsidies, tax advantages, or other types of support given by foreign governments to their airlines, they are always and invariably accused of being a "protectionist". Frankly, I prefer to use another term, namely, "level playing field". It is not, and I repeat, not by any means "protectionist" to demand that your competitors operate and compete on a playing field that is level for everyone or at least as level as possible for everyone.

Now let me return to the issue of tax preferences as subsidies. We all now know, of course, that Ireland maintains a 12.5% tax rate on its books, but we have no idea whether Ryanair or NAI might be able to enjoy special tax advantages or refunds under the secretive so-called "Double Irish". So, while we might be aware of statutory national tax rates (e.g., 35% in the USA), we have no idea as to the extent to which airlines are in compliance with such rates or can avoid them with special (often undisclosed) deductions, discounts or rebates. I shall propose a remedy for this very significant - and total - absence of information later, but for the moment, let me focus on the broader issue of subsidies in general.

I can say with some truth that I have heard senior officials at both Emirates and Etihad Airways deny publicly and on the record that their airlines receive any subsidies of any nature from the Government of the UAE. Shortly after I made a similar admission in the speech that I gave at American University School of Law, however, I read an extraordinary comment that appeared in the *Aviation Daily* and that I quoted in footnote 7 of my article.⁴⁵ I would like to read that footnote now, because I believe it to be of critical importance.

The speaker was Amer Hadidi, President and CEO of Royal Jordanian Airlines. As he was quoted in the *Aviation Daily* of 28 April 2014, he openly railed at the harsh “reality” that his airline had to face because of the – and here is the important part of the quotation:

strong government subsidy policy of the UAE and Qatar for their airlines – Emirates, Etihad and Qatar Airlines – for fuel, airport charges and capital improvements”. Hadidi then added that “there is nothing we can do about it, we have to face it.

Now this is not a spokesman from Delta or American Airlines. It is a spokesman from a fellow Middle Eastern airline, and his very accusatory statement, therefore, must not only be widely heard and credited, but it must also require us to move forward and conduct a real and intensive investigation into whether or not these Mid-East airlines are or are not being subsidised. Depending on what this investigation discloses, and if it does appear that certain airlines are in fact enjoying significant subsidies and tax advantages from their governments and that these subsidies and advantages are not about to be terminated, we may well find ourselves, not unlike the situation of NAI, with no acceptable alternative other than to cancel the Open Skies Agreement and impose, in its place, very serious flight restrictions.

But before any of us needs to think about such a serious confrontation, I would much prefer to discuss and recommend the alternative path that I firmly believe the US and others must pursue as soon as possible, namely, that it is now very clearly the time for the US and other major western countries to call upon and invest ICAO with unlimited authority to immediately begin the process of collecting all the facts and statistics about all forms of airline subsidies, including their payment (or non-payment) of taxes.

Many of you may have seen the recent issue of the quarterly magazine, *Air and Space Lawyer*, edited by our good friend and colleague, David Heffernan, who is with us today. Anyway, the issue contained an excellent article by Mr. Ruwantissa Abeyratne,

⁴⁵ Mendelsohn, *supra* 40 at 156, fn 7.

who, as many of you know, served ICAO as one of its principal and extremely able legal officials for almost 25 years.⁴⁶ He recommended that ICAO be given a role as an economic regulator of air transport; and I can say that I agree with him totally that ICAO should be given such a role, including the specific task and responsibility of collecting all the facts and statistics about airline subsidies, including corporate taxes.

It will not be easy for ICAO to succeed in this effort. But if we are ever to make any progress in achieving that elusive goal of a level playing field, the air transport world must begin somewhere to assemble this increasingly important data; and there is certainly no organisation that has a better proven track record for success in the aviation world than ICAO. And we absolutely must gain full knowledge in this critically important area, because it is essential that airlines be required, to the extent possible, to operate on a relatively level playing field – lest the world be forced to consider such world trade-related phenomena as “countervailing duties” and comparable sanctions to counter unfairness.

Let me say as a word of conclusion that the continuing absence of such a level field not only means an increasing number of bankruptcies among western airlines, but it will also necessarily mean major and continuing persistent confrontations among airlines and governments in the days and years ahead.⁴⁷

III. EX-IM BANK SUBSIDIES

The final subject I wish to debate is one that I think is very well known and perhaps even not subject to dispute. My discussion, therefore, will be very short. The subject is the extraordinary competition in subsidies that are provided by the Ex-Im Bank and by various European Export Credit Agencies (ECAs) to subsidise lower-cost financing for the purchase of Boeing and Airbus aircraft by major, very well-capitalised foreign

⁴⁶ Ruwantissa Abeyratne, “Should ICAO Have a Role As An Economic Regulator of Air Transport” (2014) 27:1 Air and Space Lawyer (ABA) 8 at 8.

⁴⁷ Following the presentation of this speech in Seoul on Friday 27 February 27 2015, newspaper articles began to appear in the US press about American, United and Delta Airlines joining forces in openly complaining, and providing some 55 pages of supporting data, to the US Government, about the subsidies given by the Governments of the UAE and Qatar to their carriers, Emirates, Etihad and Qatar. On or about 9 March 2015, the carriers placed their supporting documents and statistics online at: www.openandfairskies.com. The papers are a “must” read and have since provoked a major and continuing confrontation between and among the officials of the carriers on both sides of the issue. Lufthansa and Air France/KLM have also since announced their agreement with the position of the US carriers, who argue in their document that the three Middle Eastern carriers have received no less than US\$ 40 billion in subsidies in the past ten years. Meanwhile, the CEOs of both Emirates and Etihad have again publicly and categorically denied that their airlines are subsidised. See “Gulf Airlines Deny Getting Unfair Aid”, Wall Street Journal (18 March 2015) at B-8.

carriers – including, once again, those from the Middle East. Why such well-capitalised foreign airlines should be receiving such subsidies when their US and European competitors are not defies explanation – at least for me.

These subsidies are given not just to allow new airlines from emerging countries to buy single-aisle jet aircraft (a subsidy I would support and encourage) but they are given to facilitate the purchase by well-capitalised foreign carriers of wide-body aircraft, including the largest and most costly aircraft that Boeing and Airbus manufacture. Frankly, it seems absolutely inconceivable to me that the United States Government would ever condone such substantial subsidies given to the very same well-capitalised foreign airlines against which the US carriers must compete. Moreover, you should all be aware that a 2.5 to 3% reduction in an interest rate can mean a savings of as much as US\$ 20 million on a wide-body aircraft.

I frankly know of no one with whom I've exchanged views on this subject who supports such subsidies. But they are vigorously defended by both Airbus and Boeing on grounds that, if one or the other does not offer – or is prohibited from offering – the subsidy on the sale of its aircraft, the purchaser will simply walk across the street and buy the competing aircraft from the other manufacturer – thus allegedly causing heavy job losses and profits for the manufacturer that did not offer the subsidy.

The reply to all of this is so simple and obvious that I can only be amazed no one has seriously suggested it to date – a multilateral treaty between the US and the EU outlawing and prohibiting all such export credit subsidies except when given to airlines of developing countries. And needless to say, I have absolutely no doubt but that all the major airlines in both the US and the EU would enthusiastically support this solution.

Moreover, to the extent manufacturers from third countries begin to find themselves called upon to provide such subsidies for any of their newly produced aircraft, those countries can be moved to join the US-EU multilateral treaty. Such an approach would help to put all western and other developed-country air carriers on a level playing field – which, as I have said repeatedly before, is a goal that we must achieve if we are to have any hope of avoiding serious escalation of various forms of unilateral retaliation in the days and years ahead.

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