

# Open Skies 1978-2009

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# Precursors to first wave liberalization

## (1) Bermuda II

- US – UK was & remains the most important long haul aviation market worldwide
- 1970s decline of market share of British Airways
- British government took overt protective measures
- Revision of seminal Bermuda I agreement
- Routes restricted, Heathrow barricaded, stricter capacity controls, dual tariff approval

# Precursors to first wave liberalization (1)

- Airline Deregulation Act 24 October 1978–  
Complete liberalization of United States domestic market: entry, routes, pricing, capacity
- Viewed initially as unqualified success
- Consumer benefits from new carriers and greater competition

# First wave liberalization: internal policy

- Revision of Presidential policy on international air transportation (21 August 1978).
- Enactment of International Air Transportation Competition Act (14 February 1980).
- Measures espoused US philosophy and created mechanisms to avoid subjection of US carriers to anticompetitive practices
- Structural limitation of internal law to international liberalization

# First wave liberalization: Benelux Protocols & Encirclement

- Neighbouring European markets to dissuade protective policies in large States
- First liberalized agreement concluded with Netherlands by Protocol: followed by Israel & Belgium
- Focus on competitive markets
- Capacity increases permitted
- New pricing mechanisms: Country of origin disapproval (Netherlands)/Dual disapproval (Belgium)
- Extension to further countries, Bermuda II liberalized, adoption by third States

# 1980s: Stagnation of US liberalization

- Airline opposition
- Partner country opposition
- Imperfections of domestic deregulation become apparent
- More difficult trading conditions for airlines

# European Union: *Sui generis* experiment in liberalization

- Nouvelles Frontières ECJ 1986: EU competition law applies to air transport
- Competition commissioner threatened to act against 10 major European airlines for anticompetitive practices
- Commission proposed legislation to Council on establishment of common air transport policy and intra-Community liberalization
- Unique due to supranational powers of EU
- Precedent of regionalization

# Three packages establishing a Single European Aviation Market

- Progressive shift from tightly domestically controlled to integrated European market
- Stage I: Introducing flexibility – Multiple designation, removing 50%/50% rule, zone pricing
- Stage II: Expanding flexibility
- Stage III: Single open aviation market:  
Community carrier - Elimination of barriers to entry - Free competition



# Current generation open skies 1992-present

- 1992: Bush administration resurrects encirclement approach to make inroads
- Netherlands again first strategic partner
- Fully liberalized market access
- Backdrop of KLM/Northwest ownership
- 1993: Liberalization supplemented by first case of anti-trust immunity conferred to KLM/Northwest
- Small States adhered to new policy
- 1996: Major progress as Germany adheres
- To date: 94 signatories to US Open Skies Agreements including all EU Member States, Australia, Canada, most of the Gulf States & Singapore. Not China, Japan, Brazil, Mexico.

# Key features of the US Model Open Skies Agreement

- Unrestricted 3<sup>rd</sup>-4<sup>th</sup>-5<sup>th</sup> freedom passenger traffic rights on all routes without limitations on capacity or frequency
- Third country code-share permitted
- Marketplace pricing
- Substantial ownership & effective control retained
- Fair competition clause
- Frequently 7<sup>th</sup> freedom cargo

# MALIAT: Multilateralization of open skies

- Multilateral non-region specific agreement
- Key participants: like-minded liberal States: Chile, New Zealand, Brunei, Singapore, United States
- Full open skies regime established among all signatories
- Moreover liberalizes ownership and control
- Failed to attract further major signatures

# 5 November 2002: European Court of Justice Open Skies Judgments

- Proceedings against Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany and UK
- Establishing bilateral air transport agreements with the United States did not violate an exclusive Community competence
- Attribution of fifth freedom intra-EU routes by bilateral accord was legal
- Provisions relating to fares within EU were illegal
- Substantial ownership and effective control requirements violate

# Corrective actions

- State renegotiations
- Horizontal agreements
- Council granting mandate to Commission to negotiate bilateral agreements
- First bilateral agreement concluded by Commission with Morocco

# US-EU negotiations 2003-2007

- Extended negotiation process
- Open Aviation Area vs. Open Skies
- Perceived disequilibrium of benefits
- Cabotage and foreign ownership issues

# US-EU: Open Skies Plus – A new standard bearer?

- Traditional Open Skies freedoms of market access in designation/pricing/capacity/routes
- Bilateral agreement with regional bloc
- Acceptance of Community designation clause
- Third State ownership provisions
- Joint regulatory mechanisms
- Multilateral or bilateral?

# EU-US Outcomes to date

- Shake up in UK-US and Ireland–US markets which previously operated under a restrictive regime
- Joint ventures
- Lack of new entry



# EU-US: A work in progress

- Establishment of timeline for second stage negotiations and denunciation in case of failure
- Areas for further negotiation: greater traffic rights (7<sup>th</sup> freedom and cabotage) – foreign investment – environmental measures – Government procured transportation -wet leasing
- Second stage negotiations underway
- Potential difficulties

# EU-Canada: Expanding the boundaries of Open Skies

- Provisional text agreed on 9 December 2008
- Multi-phase integration
- Phases one and two equate to open skies
- Phases three and four extend to establishing full open aviation area with full investment rights and cabotage
- Agreement mandates modification of domestic certification laws
- Prospects for single transatlantic aviation area

# Open Skies beyond EU/US

- Canada Blue Sky Policy: progressive but still inward looking
- Single Oceanic Aviation Market: cabotage but not international liberalization
- Transit States with strong airlines: Singapore, Chile, Gulf States
- Strong Origin and Destination markets remain cautious e.g. Japan
- Other isolated instances
- Tacit approval