

Beyond Open Skies

After Its 100th Open Skies Agreement, Where Does the U.S. Go From Here?

By Michael Goldman

In 2010, the United States signed its 100th Open Skies Agreement, including the landmark U.S.-EU Stage 2 Agreement and Open Skies with Japan. The U.S. has now concluded Open Skies Agreements with countries around the world, including Japan, Canada, India, Brazil, Chile, Colombia, Peru, the 27 nations of the European Union (EU), and numerous other countries in Africa and Asia. The major hold-outs to the U.S. Open Skies aviation model are an odd collection of countries—China, Hong Kong, Mexico, Russia, and Argentina.

“Open Skies” has always been somewhat of a misnomer since “openness” for international flights to and from the U.S.—even under an Open Skies Agreement—is still less than 100 percent. There continues to be restrictions on a foreign airline’s ability to fly domestic routes and to invest in and control a U.S. airline. The ability to operate U.S. international flights is also limited by airport slots, curfews, Customs and Border Protection (CBP) operating hours, and various post-9/11 aviation security measures. Nonetheless, it may now be a good time to think about what is next—to consider what is Beyond Open Skies for U.S. international aviation policy.

The Need for an Expanded Open Skies Template

We are accustomed to thinking that Beyond Open Skies should embrace bilateral aviation agreement provisions addressing such matters as ownership and control liberalization, cabotage, and so-called 7th freedom rights.¹ These traffic rights and investment rules have been missing from the basic U.S. Open Skies “template.” While the EU has advocated for Beyond Open Skies in the Stage 1 and 2 Open Skies negotiations, it is an expansion of Open Skies that has met political resistance in the U.S., mainly from labor unions and the U.S. Congress. In terms of cabotage and investment liberalization, adoption of Beyond Open Skies would require amendment of U.S. aviation laws. There is much merit to this agenda; it has now been debated extensively in and out of government. Clearly, ownership and control liberalization, cabotage, and 7th freedom traffic rights should be included in any new and improved U.S. Open Skies template.

But, we should not draw the line at what has been advocated unsuccessfully to date by the EU. There are other elements still missing from a new and improved U.S. Open Skies template. If U.S. international aviation is to expand—which after all is the initial *raison d’être* for Open Skies—we should explore some other areas that should become part of a new U.S. Open Skies model for the 21st century.

¹ “Seventh Freedom” is the right granted by one state to another state to transport traffic between the territory of the granting state and any third state with no requirement to include on such operation any point in the territory of the recipient state. INTERNATIONAL CIVIL AVIATION ORGANIZATION, Frequently Asked Questions: Freedoms of the Air, http://www.icao.int/icao/en/trivia/freedoms_air.htm (last visited Jan. 25, 2011).

The three issues that I would propose for inclusion in a new U.S. model Open Skies agreement are:

- Streamlined visa/facilitation provisions;
- Enhanced and harmonized aviation security measures; and
- *De facto* capacity limits resulting from airport/air traffic constraints, greenhouse gas rules and noise curfews.

They are really contemporary “doing business” issues that go to the heart of the Open Skies policy.

Why now bring these issues under the Open Skies template? Because it will be in danger of becoming irrelevant if the U.S. Open Skies model continues to be limited to traditional designation, route, pricing, and capacity freedoms and if exogenous factors seriously limit international airport/airway capacity and the ability of individuals (especially foreign businessmen and tourists) to travel without inconvenience to and from the U.S.

An Open Skies agreement is a means to an end, not an end in itself. At a minimum, this means the agreements should provide airlines with the ability to expand and prosper based on commercial considerations to benefit shareholders, airline workers, and the traveling public. However, the agreements should more broadly impact the national economy, local economies, and airport communities to benefit from the possibility of more flights serving more markets with increased travel by U.S. citizens and foreign visitors; the revenues that foreign visitor spending brings to local economies; the jobs created by airborne U.S. exports; and the commerce generated domestic and foreign traveling to and from the U.S. to invest in our country, reach commercial arrangements, and visit our nation’s attractions. Due to what has happened in the decade since 9/11, the current U.S. Open Skies template is no longer sufficiently broad to assure the achievement of these national goals. We need to address these new “doing business” issues and create an Open Skies template for the 21st century.

The Post 9/11 Aviation World

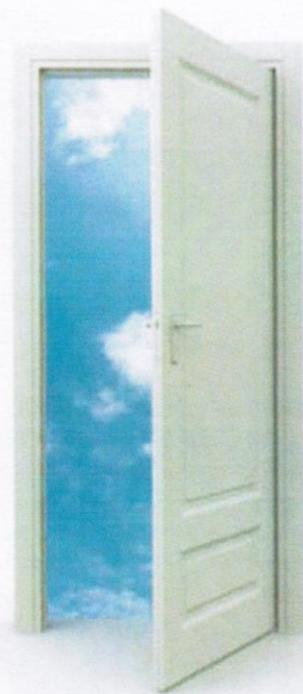
In the 1990s, we enjoyed a seemingly endless expansion of U.S. international air traffic. Subsequent to the terrorist attacks of September 11, 2001, however, it has leveled off. This change is a product of three post-9/11 changes to the world of international aviation.

First, post-9/11 aviation security and tightened immigration rules restrict foreigners visiting the U.S.

Second, the “Great Recession”² and its continuing economic after-effects have dampened traveling by citizens and nationals of the U.S.,

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² The term “Great Recession” refers to the recent economic downturn that started in or around 2007. Courtney Schlisserman, ‘Great Recession’ Gets Recognition as Entry in AP Stylebook, BLOOMBERG (Feb. 23, 2010) <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ayoB2KWQG4k> (last visited Jan. 25, 2011).



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Japan, and similarly economically affected nations in Western Europe. By contrast, post-9/11 aviation security measures and tougher visa procedures hamper foreign visitors to the U.S. from the less-impacted emerging economies in Asia and South America.

Lastly, capacity at key international airports is now more restricted because of universally inadequate infrastructure spending, and the need to solve environmental concerns like climate change and airplane noise with cap and trade regimes, carbon taxes, higher jet fuel prices, and nighttime noise curfews. Unless our Open Skies Agreements address these issues, we run the risk that they will cease to be an engine for growth of U.S. international traffic, its foreign visitor component, and the resulting foreign visitor spending in the U.S.

The current Open Skies model can no longer be relied on to yield spectacular increases in U.S. international traffic and foreign tourist revenues.

For instance, U.S. international passengers, not surprisingly, declined in 2009 over 2008, and the numbers are still below the pre-Great Recession levels of 2007. Indeed, the decade since 9/11 has not seen much growth in U.S. international passengers. There were 143.7 million U.S. international passengers in 2000 at the decade's start before dropping in 2001 to 130.6 million—down 9.1%—as the impact of 9/11 and the economic downturn that followed took hold. Traffic grew to 160.8 million U.S. international passengers in 2007, falling to 160.6 million in 2008, and then to 151.1 million in 2009.³ Thus, we have seen U.S. international traffic increase by just 6.0 % overall over the 10 years since year 2000.

Moreover, foreign visitors to the U.S. stood at 55 million in 2009, up from 50.8 million in 2000, a respectable growth rate of 10% for the decade. The pattern since 9/11 has been uneven. Foreign visitors, which stood at a little less than 51 million in 2000, declined between 2001 and 2003, and then rose until 2008 to reach 58 million when the big decline caused by the Great Recession occurred.⁴ According to the U.S. Department of Commerce, the U.S. Government's keeper of tourism statistics, foreign visitors to the U.S. are expected to increase 9% to 60 million in 2010—surpassing the 2008 mark—and to 83 million by 2015.⁵

Foreign visitor spending stood at \$120.3 billion in 2009 rising from the pre-9/11 level of \$100 billion in 2000. Asian visitors are historically the big spenders. The 2.9 million Japanese visitors spent \$13.0 billion, and the 500,000 Chinese spend \$3.6 billion.⁶ Each Japanese and Chinese visitor spends roughly \$4,000 to \$ 7,000 per U.S. visit. At \$120 billion, foreign tourism ranks ahead of agriculture and motor vehicles in terms of U.S. "export" sales according to the White House's recent report to the President on the National Export

³ See U.S. DEPARTMENT OF TRANSPORTATION, INTERNATIONAL AIR PASSENGER AND FREIGHT STATISTICS (Dec. 2002), <http://ostpxweb.dot.gov/aviation/international-series/dec2002.pdf> (last visited January 25, 2011); U.S. DEPARTMENT OF TRANSPORTATION, INTERNATIONAL AIR PASSENGER AND FREIGHT STATISTICS (Dec. 2009), <http://ostpxweb.dot.gov/aviation/international-series/dec2009.pdf> (last visited January 25, 2011).

⁴ See U.S. DEPARTMENT OF COMMERCE, INTERNATIONAL VISITATIONS TO THE UNITED STATES: A STATISTICAL SUMMARY OF U.S. ARRIVALS (2009), http://tinet.ita.doc.gov/outreachpages/download_data_table/2009_Visitation_Report.pdf (last visited Jan. 25, 2011); U.S. DEPARTMENT OF COMMERCE, INTERNATIONAL VISITATIONS TO THE UNITED STATES: A STATISTICAL SUMMARY OF U.S. ARRIVALS (2008), http://tinet.ita.doc.gov/outreachpages/download_data_table/2008_Visitation_Report.pdf (last visited Jan. 25, 2011).

⁵ See U.S. DEPARTMENT OF COMMERCE, INTERNATIONAL VISITORS TO THE U.S. AND PROJECTIONS (2001-2015), <http://tinet.ita.doc.gov/view/IF-2000-99-001/forecast/Arrivals.pdf> (last visited Jan. 25, 2011).

⁶ See U.S. DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, FAST FACTS: UNITED STATES TRAVEL AND TOURISM INDUSTRY 2009 (2009), http://tinet.ita.doc.gov/outreachpages/download_data_table/Fast_Facts_2009.pdf (last visited Jan 25, 2011).



Initiative.⁷

The flattening out of U.S. international traffic levels since 2000 and the worldwide slowdown in economic growth—combined with the U.S. visa/security policies—makes it difficult to accept the government forecast that foreign visitors will go from 55 million last year to 83 million by 2015.⁸ Instead, we need to use our Open Skies Agreements—revised to meet the new challenges of the post-9/11 world—to jump start U.S. international passenger volumes and the level of foreign visitors, especially from the growing economies in Asia and Latin America. The increased foreign visitor spending that will come with increased foreign visitor numbers will give a “big bang” to both the national and local economies, stimulating job growth and a broader economic recovery at home. Overall, according to the U.S. Travel Association (USTA), an industry-sponsored tourism promotion organization, if the U.S. could double the number of visitor arrivals from Brazil, China and India, it would be worth an additional \$24.2 billion in “export” revenues and would create 207,600 jobs.⁹

The New Open Skies Agenda

Let's now examine each of the new issues proposed for inclusion in Open Skies Agreements:

- *Visas/Facilitation: Our Open Skies Agreements should include provisions that provide for reciprocal visa waiver requirements and streamlined procedures for issuance of group business and tourist visas where visa waiver is not possible.*

⁷ See U.S. DEPARTMENT OF COMMERCE, REPORT TO THE PRESIDENT ON THE NATIONAL EXPORT INITIATIVE: THE EXPORT PROMOTION CABINET'S PLAN FOR DOUBLING U.S. EXPORTS IN FIVE YEARS 54 (Sept. 2010) [hereinafter *NEI Report*], http://www.whitehouse.gov/sites/default/files/nei_report_091510_extended.pdf.

⁸ Indeed a Euromonitor presentation at the World Travel Market Conference in November 2010 forecast that global tourism will grow at a slower pace in 2011 as global consumers reduce spending; 4% growth in 2011 in forecast compared with 5% in 2010. See Armored Kenna, *International Tourism Set to Slow Next Year, Euromonitor Says*, BLOOMBERG.COM (Nov. 9, 2010), <http://noir.bloomberg.com/apps/news?pid=20670001&tid=aMabXvjfsV0> (last visited Jan. 25, 2011).

⁹ See Letter from USTA to Hon. Patrick Leahy and Hon. Judd Gregg, U.S. Senate, (Jul. 9, 2010); see also USTA, *Obama Embraces Travel's Unique Role in Doubling Exports, Creating American Jobs*, Press Release (July 7, 2010), <http://www.ustravel.org/news/press-releases/us-travel-applauds-senare-effort-pursuing.html> (last visited Jan. 25, 2011).

Post 9/11, the U.S. Government has implemented programs in the visa/facilitation area that restrict foreign visitor travel to the U.S. in the name of national security while denying the resources that would make visiting the U.S. an experience worth repeating—if attempted at all by a foreign national. The Administration's National Export Initiative Report cites limited visa access and enhanced border security as barriers to expanding foreign tourism revenues.¹⁰

While the U.S. expanded the Visa Waiver Program (VWP) recently to include South Korea and some Eastern Europe countries,

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bringing to 36 the total number of countries that now have VWP, we then imposed the ESTA (Electronic System for Travel Authorization) online registration process on visitors from these same visa waiver countries.¹¹ Not surprisingly the EU considers ESTA inconsistent with U.S. commitments to facilitate trans-Atlantic mobility.¹²

Visitors from non-VWP countries, including the three biggest emerging markets of China, India and Brazil, must obtain business and tourist visas. These visas are difficult to obtain in light of the long wait times for the required in-person interviews at U.S. consulates.¹³ Moreover, there are no U.S. consulates outside of the largest cities. There are 5 consulates in all of China, and 4 in all of Brazil.¹⁴ The U.S. then charges each person a \$140 non-refundable visa application fee, which is not cheap for a family of 4 to visit the U.S.

For instance, in 2009, 1.2 million Americans traveled to China but only 500,000 Chinese visited the U.S.; that is about 1/20 of 1% of the Chinese population of 1.33 billion.¹⁵ The consequences of this

¹⁰ See NEI Report at 54.

¹¹ ESTA is a visa-like program that requires a potential foreign visitor from a VWP country to register on a U.S. Government website for a U.S. travel approval and pay a \$14 application fee. Approvals usually come within 24 to 48 hours but airlines are required to receive the ESTA authorization before boarding the visitor on a U.S.-bound flight. See DHS, *Changes to the Visa Waiver Program to Implement the Electronic System for Travel Authorization Program* 73 Fed. Reg. 32,440 (Jun. 9, 2008), <http://www.gpo.gov/fdsys/pkg/FR-2008-06-09/pdf/E8-12673.pdf>.

¹² See Julia Werdigier, *European Officials Criticize U.S. Airport Security*, N.Y. TIMES, Oct. 27, 2010, <http://www.nytimes.com/2010/10/28/business/global/28air.html?src=un&feedurl=> (last visited Jan. 25, 2011).

¹³ These wait times average 70 to 100 days in China, and up to two months in Brazil, according to USTA officials. See Roger Yu, *Companies Criticize U.S. Travel Visa Process*, USA TODAY, Aug. 30, 2010, available at http://travel.usatoday.com/news/2010-08-31-business-travel/31_ST_N.htm (last visited Jan. 25, 2011).

¹⁴ See Amanda Finnegan, *Tourism officials seek to make international travel to U.S. easier*, LAS VEGAS SUN, Oct. 27, 2010, <http://www.lasvegassun.com/news/2010/oct/27/tourism-officials-seek-make-international-travel-u/> (last visited Jan. 25, 2011).

¹⁵ See Central Intelligence Agency, *The World Factbook*, China, <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> (last visited Jan. 25, 2011).

restrictive and “unfriendly” U.S. visa policy are clear. Without easy access to securing a travel visa, the number of Chinese visitors to the U.S. remains small. With Chinese visitor spending almost \$7,000 per visit, doubling Chinese visitors to the U.S. to match roughly U.S. citizen levels would be worth another \$3.8 billion annually to the U.S. economy. That is not insignificant considering that total foreign visitor spending was \$120.3 billion in 2009.¹⁶

This is not just a U.S. problem. China, India and Brazil all require visas for Americans to travel to these countries; these procedures are time-consuming and expensive. Reducing visa burdens would benefit nationals of both countries and the countries' economies by promoting business and tourist visits.

The solution here calls out for the negotiation of reciprocal visa waiver procedures in our Open Skies Agreements. If a country cannot qualify for VWP status because it cannot meet standards set out in U.S. law, then we should be able to negotiate procedures that will allow for simplified visa treatment for business and tourist travel groups—perhaps including waiver of the in-person interview requirement; improved and more convenient consulate facilities in each country for those needing to secure an individual visa; and longer validity periods for visas when issued. There is no reason why these actions cannot be taken as reciprocal obligations by the U.S. and a bilateral partner as part of a U.S. Open Skies agreement. We should strive to find some way to negotiate in U.S. Open Skies Agreements refundability, or waiver, of ESTA fees on a reciprocal basis.

- *Aviation Security: We should be using our Open Skies Agreements to negotiate provisions providing for the convergence of aviation security measures with bilateral partners, including agreed-upon standards for the certification of security equipment.*

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Such measures include the Transportation Security Adminis-

¹⁶ See U.S. DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, *FAST FACTS: UNITED STATES TRAVEL AND TOURISM INDUSTRY (2009)* (2009), http://tinet.ita.doc.gov/outreachpages/download_data_table/Fast_Facts_2009.pdf (last visited Jan. 25, 2011).

tration (TSA) requirements that passengers remove their shoes for separate screening despite the availability of more sensitive metal detectors, the banning of carry-on liquids and gels,¹⁷ the repetitive screening of international connecting passengers and their baggage both at the departing and connecting airports, and the confiscation of duty-free liquor from connecting passengers arriving in the U.S. who purchased the items on the aircraft or from a duty-free store in a foreign departure airport's secured area.

The solution here is also straight-forward. We should be using our U.S. Open Skies Agreements to negotiate and provide "one-stop" screening at a single location, aviation security convergence measures and common international standards for security procedures and equipment and to eliminate other current rules that discourage foreign visitors' travel to the U.S.

• *Congestion/Greenhouse Gas Emissions/Curfews: Our Open Skies Agreements should be expanded to address capacity constraints, whether a product of airport congestion, noise curfews or greenhouse gas regulation.*

The U.S. Open Skies Agreement's prohibition on government restrictions and limits on airline capacity or flights offered is under assault these days. Capacity is being restricted *de facto* in the name of airport congestion, climate change, or the need for quiet evenings. Real-world airport capacity limits undermine the unrestricted capacity promised by the U.S. Open Skies model; the resulting increased levels of airline passengers, tourist visitors, and tourism revenues, are placed in jeopardy.

The threat to open and unrestricted capacity is present in emerging and established markets. In the key emerging China market, Beijing had become the second most busiest airport in the world after Atlanta with 49 million passengers in the first eight months of 2010.¹⁸ Recently, at its key Beijing, Shanghai and Guangzhou international airports China cited congestion as a basis for limiting new flights by some international airlines to hours in the middle of the night—between midnight and 3 a.m. In Brazil's emerging market, the Sao Paulo airport has a freeze on new arrivals and departures until a new terminal is constructed in 2 to 3 years. The IATA Director General recently stated that "Thirteen of Brazil's largest airports cannot accommodate demand in existing passenger terminals."¹⁹

In established markets, the airport conditions for international flights are also under stress. In the U.S., JFK and Newark, the two major international airports serving New York, are slot restricted; Tokyo-Narita has been that way for many years; and key European airports—Heathrow, Paris-CDG and Frankfurt—are all slot-controlled.

Where there are transparent airport slot allocations and after market slot buy-sell procedures, such airport capacity limits may be ac-

ceptable. But even the relatively transparent IATA Worldwide Scheduling Guidelines (WSG) and EU rules are problematic because they do not authorize an after-market buy/sell procedure.²⁰ In the U.S. we have no such buy-sell system at JFK and EWR under current FAA rules; however we do continue to offer assurances that the FAA will provide slots for new international flights.²¹

China and Japan have opaque systems that do not provide for transparent slot allocation for new services or a buy/sell aftermarket. Japan has traditionally relied on its negotiation of specific frequency levels in agreements with bilateral partners to assure that international flights did not exceed traffic capacity at its international airports. Now that Japan has entered into an Open Skies Agreement with the U.S., that system will no longer work. The recently concluded U.S.-Japan Open Skies Agreement did contain provisions assuring U.S. carriers a fair share of new capacity as it becomes available at Narita in coming years.²² Whether it works in practice is an open question.

What then is the value of Open Skies with China if U.S. and Chinese international carriers cannot secure slots at China's principal international airports for commercially viable times? Without new flights, the ability to develop the U.S.-China market, and the potentially resultant tourism revenues, is in jeopardy. What value is Open Skies with Japan if new Narita slots are not available to U.S. airlines?

Another challenge to the Open Skies Agreement's promise of unrestricted capacity are night curfews imposed by airports, especially in Europe, which bans nighttime operations for environmental reasons (e.g., to reduce airplane noise). The U.S. tried to address this with the "balanced approach" in the U.S.-EU Stage 2 Agreement; it is principally a concern now for nighttime freighter operators.²³ There is no similar U.S. problem because the 1990 Airport Noise and Capacity Act preempted local airports and governments from imposing curfews on Stage 3 aircraft; securing an FAA approval for a local curfew or other measure to reduce commercial airline noise at a U.S. airport is almost impossible under the procedures adopted by FAA.²⁴ European airport curfews could spread to daylight hours, resulting in reduced opportunities for transatlantic flights if not subject to a regime agreed to by both sides.

Our Open Skies Agreements should address directly capacity at congested airports with provisions assuring non-discriminatory slot allocation procedures and a transparent slot buy/sell mechanism when slots are restricted, or both. We should insist on meaningful "balanced approach" procedures that keep airports open both in the U.S. and in our bilateral partner's homeland.

Efforts to control greenhouse gas emissions to combat climate change will also impact Open Skies capacity freedoms. The European Emissions Trading Scheme (ETS) (to be implemented for aviation in

17 See Daniel Michaels and Keith Johnson, *Air Passenger Screening Draws New Scrutiny*, WALL STREET JOURNAL (Nov. 2, 2010), <http://online.wsj.com/article/SB10001424052748704865104575588540192424022.html>? (last visited Jan. 25, 2011); Robert Barr, *US air travel security rules spark Europe debate*, ASSOCIATED PRESS (Oct. 27, 2010) <http://www.newsmax.com/Newsfront/EU-Britain-Flight-Security/2010/10/27/id/375094> (last visited Jan. 25, 2011). Indeed the EU has certified machines that perform both functions and has tentatively voted to rescind the liquids ban in 2013. See *EU approves County Durham airport liquid scanners*, BBC NEWS (Oct. 25, 2011), <http://www.bbc.co.uk/news/uk-england-wear-11623449>? (last visited Jan. 25, 2011).

18 See Airports Council International, *Year to Date Passenger Traffic Data*, http://www.aci.aero/cda/aci_common/display/main/aci_content07_c.jsp?zn=aci&cp=1-5-212-218-222-666_2__ (last visited Jan. 25, 2011).

19 Paul Kiernan, *IATA Chief Urges Brazil to Upgrade Inadequate Airports*, WALL STREET JOURNAL (Nov. 18, 2010), <http://online.wsj.com/article/BT-CO-20101118-710042.html> (last visited Jan. 25, 2011) (available by subscription only).

20 See IATA, *World Scheduling Guidelines* (2010), http://www.iata.org/whatwedo/passenger/scheduling/Documents/wsg_20_edition.pdf (last visited Jan. 25, 2011); Council Regulation 95/93, 1993 O.J. (L 14) 1 (EC), http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod:CELEXnumdoc&numdoc=393R0095&lg=en (last visited Jan. 25, 2011).

21 See U.S. Department of Transportation, *Operating Limitations at John F. Kennedy International Airport*, 74 Fed. Reg. 51,650 (Oct. 7, 2009); U.S. Department of Transportation, *Operating Limitations at Newark Liberty International Airport* 74 Fed. Reg. 51,648 (Oct. 7, 2009).

22 See U.S. DEPARTMENT OF STATE, *U.S.-JAPAN OPEN SKIES AGREEMENT, RECORD OF DISCUSSIONS 2-3* (2009), <http://www.state.gov/documents/organization/133720.pdf> (last visited Jan. 25, 2011).

23 The "balanced approach" is an ICAO policy principle dealing with measures taken by individual states to manage the impact of aircraft noise, including restrictions to limit aircraft access to airports at particular times. Such measures should attempt to balance aircraft restrictions with other regulatory mechanisms to achieve the desired reduction of aircraft noise.

24 See 14 C.F.R. part 161.

2012) caps an airline's carbon emissions levels at some historic level of operations; to exceed the limits the airline must purchase emission credits on the open market or risk sanctions (a so-called "cap and trade" regulatory program). U.S. airlines serving EU airports will be subject to the ETS for both their intra-EU and transatlantic flights.²⁵

The "leading" U.S. legislative proposal—the Kerry-Lieberman Bill introduced in Spring 2010—would regulate mainly U.S. electric utilities, transportation fuel providers, and heavy industry by setting allowances for permitted emissions levels; it would regulate airlines indirectly by capping oil refineries' gasoline and jet fuel output.²⁶ For the airline end-user, it would effectively function as a carbon tax as the refiners would have to purchase emissions allowances that would limit transportation fuels production to allowable levels.

To properly address greenhouse gas rules, we need to include in our Open Skies Agreements provisions that provide—in the case of Europe, for example—for a U.S.-EU reciprocal treatment regime to take into account each other's regulatory regime for controlling greenhouse gases. The object of such provisions would be reciprocal exemptions for U.S. and European carriers from each side's greenhouse gas regulatory programs. U.S. carriers would not be subject to ETS for their transatlantic flights, and European carriers would not be subject to any carbon tax should a Kerry-Lieberman-type program be enacted in the U.S.

Objections to the Open Skies Agenda Approach

Some will argue that these three new Open Skies agenda issues have no place in Open Skies aviation agreements for either of two reasons: either they involve participation of U.S. government agencies that are not a part of the traditional aviation negotiating team, and/or they are issues better dealt with in a security or environmental multilateral, not aviation bilateral agreement, context.

As to the first objection, there is nothing sacrosanct about limiting aviation negotiations and the relevant issues officials with the U.S. Departments of Transportation and State. In recent aviation negotiations, officials from TSA, Commerce, and Justice (as well as the FAA) have been on the official U.S. delegation. Moreover, Open Skies agreements, and the U.S.-EU Stage 2 agreement in particular, already address issues that are beyond DOT's "turf," such as environmental issues, aviation security, and exemptions from customs duties and taxes. Indeed the U.S.-EU Open Skies Agreement provides for Joint Committee bi-annual meetings that already discuss aviation

²⁵ See Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, 2009 O.J. L 8/3, 13.1.2009, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:008:0003:0003:EN:PDF> (last visited Jan. 25, 2011).

²⁶ See The Clean Energy Jobs and American Power Act, S. 1733, 111th Cong (2010).

security, environmental, and other relevant transatlantic aviation issues. It is an ideal forum for reaching binding agreements with our largest bilateral aviation partner, the EU, on these post-9/11 Open Skies issues.

Turning to whether a different multilateral or aviation bilateral format is best for addressing issues like visas, aviation security, and greenhouse gas rules (inclusion of airport capacity should be a "no brainer"), there is no right answer; we should do what works. If the U.S. can address these aviation-related issues and reach agreements in the Open Skies Agreement context with our leading aviation partners like the EU, Canada and Japan, then countries that account for the preponderance of U.S. international air commerce would be under such new Open Skies Agreements, and a model for the rest of the aviation world to follow would be established.

There is little doubt from the U.S.-EU Stage 2 negotiations and Joint Committee deliberations that the Europeans would be prepared to engage with the U.S. on these 3 issues in the Open Skies aviation context. The U.S.-EU Stage 2 Agreement reflects initial efforts by the two sides to address such issues as nighttime noise curfews, greenhouse gas rules, airport security, and congestion and slots. Canada and Japan would likely be similarly inclined. While there are other multilateral forums for such negotiation, ICAO, multilateral security, UN climate change, they have not been successful to date. Why then should we not try the Open Skies format with our major aviation partners? It might work.

Conclusion: Moving Forward

Expanding the U.S. Open Skies template to include investment rules, cabotage, and 7th freedom traffic rights is insufficient. The Open Skies template must also be expanded to include three new issues that are a product of the post-9/11 world that threaten the policy goals promised by Open Skies. Our Open Skies Agreements need to address: 1) visa/facilitation issues such as reciprocal visa waiver and simplified visa issuance procedures; 2) aviation security standards and convergence of security measures between bilateral partners; and 3) airport capacity matters such as reciprocal slot availability assurances and transparent slot buy/sell procedures, agreed approaches for noise and nighttime curfews, and reciprocity under greenhouse gas emission regulatory programs. With this new template, the United States will be in a position to negotiate the Open Skies Agreements of the 21st century necessary to assure the continued growth of U.S. international traffic and the tourism revenues that flow into the country from increased levels of foreign nationals visiting our cities and tourist attractions.



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