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Globalism versus Extraterritoriality Consensus versus Unilateralism: Is there a Common Ground? A US Perspective

Introduction

The new millennium will offer the aviation industry great opportunity for growth. We begin to tap this potential through more efficient aircraft, the rise of the internet, deregulation and 'open skies' and new approaches to marketing and serving consumers. However, as the industry strives for globalization, it faces substantial challenges from government policies. Today, the European Union and the United States often seem to be pulling in different directions by imposing laws that affect the operation of carriers outside their territorial jurisdiction. Perhaps our policy makers have forgotten that the ability to travel to virtually every corner of the globe, at a moment's notice, is largely the result of the unprecedented level of international cooperation and consensus that has served the industry for over 50 years.

I. Overview – Governmental Policies Challenge The Industry

The Chicago Convention – The Cornerstone of International Aviation

As we look back it is clear that the seminal event in setting the course for international air transportation was the Chicago Convention. In December 1944, 52 nations met in Chicago to decide if a legal framework could be established to support an international system of civilian air transportation. It is interesting, as we discuss issues of extraterritoriality, that President Roosevelt in the opening message described the purpose of the Chicago Convention 'to establish a fundamental law that would give full recognition of the sovereignty and *juridical equality* of all nations so that airways would serve humanity.'

Many ideas were discussed at the Chicago Convention. Ultimately, the participants agreed on a scheme that built upon three important principles. First, agreement was reached to follow

customary principles of international law under which each state exercises jurisdiction over all airlines within its territory as well as over its national airlines in international air space as reflected in Articles 1, 11 and 12 of the Convention on International Civil Aviation. Second, the participants agreed to establish the International Civil Aviation Organization (ICAO). ICAO was given a broad charter 'to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport' to promote the industry. Finally, the participants agreed that traffic and other commercial rights would be exchanged on a bilateral basis between nations.

Over the last five decades, relying on the Convention and the work of ICAO, the world's governments have been able to achieve a high level of consensus to work out Standards and Recommended Practices (SARPs) that are followed worldwide. These standards are included in the 18 Annexes to the Convention covering virtually every aspect of air transportation including air navigation, pilot licensing, aircraft maintenance and operation and the environment.

The 1990s – A Lack of Consensus

Over the last 20 years we have witnessed dramatic changes in our industry. Among the most notable events were the deregulation of the US domestic airlines, the creation of a single, and now deregulated, air transport system in the European Union, and more recently the rise of airline alliances and code-share agreements. Now, as we move into the next century these changes, the concomitant growth in air travel,

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and the needs of special interest groups have generated a variety of issues. For some issues, such as those related to competition and antitrust, there is no forum for multilateral resolution. For other social policy issues, governments have eschewed the dictates of the Convention and the ICAO mechanism and imposed regulations with extraterritorial impact.

Certainly the most visible area of unilateralism is on competition policy. The rapid development of international airline alliances and cooperative arrangements has led to complex issues of competition policy particularly between the US and the EU. One year ago there were approximately 390 airline alliances; today there are over 500. Most alliances have neither sought nor received antitrust immunity from the US or other competition authorities. American and British Airways have asked, but have yet to receive any immunity. They have, however, gone forward with Canadian Airlines, Cathay Pacific Airways and Qantas Airways, to establish Oneworld, which was implemented last week. The launch of Oneworld without antitrust immunity and no code-share on the Transatlantic will certainly offer a test of the power of joint marketing in competing with three immunized alliances. The filing of the American-British alliance more than two years ago, brought to life its already immunized competitors and some independent carriers like Virgin Atlantic, TWA and US Airways. These carriers knocked on the door of the European Competition Commission with the message that the end of the world as we know it was near. As we say in America, having let the cat out of the bag, the EC not only had much to say about AA/BA but also decided to make the Transatlantic world better suit its own competition ideals. The EU conducted an *ex post facto* review of the United/SAS/ Lufthansa (part of the Star Alliances) and Delta/Swissair/Sabena/Austrian (Atlantic Excellence) alliances that had already received antitrust immunity from the US and has proposed conditions not required by the US on their operations. It remains to be seen how this dispute will be resolved, but, as I will discuss, the focus of the competition policies of the US and EU are not the same and this divergence will create problems for the industry.

In addition to divergent competition policies, the 1990's has witnessed the proliferation of social policy issues that impact international air

transportation. The unilateral approach taken by various governments or regional regulatory bodies has led to justifiable claims of extraterritoriality. These issues include:

Noise and Environment. In 1990, the ICAO Assembly adopted a resolution that permitted states with airport noise problems to phase out Chapter 2 Aircraft between 1995 and 2002. The US imposed an accelerated phase out which will be completed at the end of this year. However, the EU has now proposed a special rule to effectively preclude the operation of even Chapter 3-compliant hush-kitted or re-engined aircraft that will have a disproportionate impact on US airlines. The proposed rule has already prompted a complaint by Northwest Airlines to the US Department of Transportation.

Security/Safety. Annex 17 to the Convention on International Civil Aviation provides comprehensive Standards and Recommended Procedures for Security programs to be adopted by Contracting States. However, the bombing of Pan American Flight 103 led the US Government to reassess measures to protect US citizens. Congress imposed additional requirements on US Airlines and required foreign carriers to use comparable procedures on flights to or from the USA. In 1996 the US Congress passed a law requiring foreign carriers to use 'identical' procedures as used by US carriers. The US Federal Aviation Administration has recently proposed a rule to require foreign carriers to comply with this law.

In August 1992 the US Federal Aviation Administration established the International Aviation Assessment (IASA) program to review a foreign state's ability to adhere to ICAO's standards and recommended practices for aircraft operations and maintenance. If the FAA is not satisfied that a country is meeting the ICAO standards, depending on the scope of the perceived problems, the FAA can either freeze carrier operations from the country at its current level based upon a 'conditional' finding, or prohibit flights to and from the USA by that carrier except through a wet lease. This program has generated much criticism as usurping the role of ICAO. However, the US Government believes it has the right under the Convention to determine whether oversight of foreign carrier operations are adequate to insure safe operations in US foreign commerce. The US has conducted 94 assessments and currently lists 12 countries as

conditional and 14 countries as not meeting the ICAO standards.

Gambling on aircraft. The rapid growth of computer technology has created the opportunity for airlines to install individual game systems for every passenger. A number of carriers wanted to offer various forms of gambling games on international flights including those to, or from, the USA. In 1994 the US Congress passed a law, 49 U.S.C. § 41311(b) prohibiting gambling on flights to or from the USA. This action resulted in strong protests with the US Department of State by foreign governments and with the US Department of Transportation by foreign carriers objecting to this unilateral extraterritorial action, which appears primarily intended to protect US carriers from the competitive impact of gambling only on foreign aircraft.

Victims rights. In 1990 in the wake of Pan American Flight 103, the US Congress passed a law requiring US airlines to provide passenger manifest information to the US Department of State within one hour if technically possible, but not more than three hours after an accident outside the US. The DOT was instructed to consider a comparable rule for foreign airlines. In January 1991 DOT issued a request for comments on how to implement this requirement. The DOT took no further action until several more high profile airline disasters culminated in the passage of the *Aviation Disaster Family Assistance Act* of 1996 and the *Foreign Air Carrier Family Support Act* of 1997. The latter applies only to accidents that occur within the territorial jurisdiction of the US. In 1998, the DOT issued a final rule requiring US and foreign carriers to collect the full name of each US-citizen travelling on a flight segment to or from the US and to solicit a contact name and telephone number. Carriers failing to comply have been threatened with expulsion from the US market. Finally, in the last several months, the DOT has taken enforcement action against foreign carriers for alleged discrimination against disabled travelers. Although the DOT regulations on non-discrimination against disabled travelers do not apply to foreign airlines, DOT has acted under a general statute that prohibits foreign or domestic US carriers from subjecting any person to 'unreasonable discrimination.' In one case the foreign carrier was carrying a US code-share passenger. However, the most recent case did not involve a code-share flight and the passenger was

boarding the flight in Europe. These enforcement actions have a strong extraterritorial element to them.

These actions by the EU and the US may be well intentioned or, in some cases may be motivated by a desire to aid a domestic industry or both. However, starting down the road of taking unilateral actions that have extraterritorial impact can only have a negative impact on the shared objective of creating a global, efficient free market in air transportation.

Competition Policy – The US Versus the EU

The term 'extraterritorial' in the context of competition and antitrust enforcement has certainly taken on a pejorative meaning. However, the term itself is probably a misnomer when considered in the proper context. In *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), Judge Learned Hand held that US competition laws can apply to foreign activity where the acts were intended to have an effect on the US and did have such an effect. This is now referred to as the 'effects test.' Clearly, if companies outside the US conspire to fix prices in the US it would seem reasonable that US antitrust laws should reach such conduct. The same holds true in the areas of mergers that involve a US and foreign firm or exclusively foreign firms if the consolidation would have a negative effect on consumers in the US.

The European Court of Justice has applied a test that is essentially identical to the 'effects test'. In 1988 the Court upheld the Commission's jurisdiction over a number of non-EU based wood pulp producers for anti-competitive conduct on the grounds that the unlawful agreement was 'implemented' in the EU where the wood pulp was sold. The European Commission has relied on this analysis to assume jurisdiction to review mergers. The breadth of the Commission's jurisdiction came as a shock to many Americans when it reviewed the Boeing-McDonnell Douglas merger. In that case the EC imposed conditions on approval of the Boeing merger which had not been challenged by US antitrust authorities who viewed the merger as promoting worldwide competition for civil aircraft.

When the charge of extraterritoriality was levied against the Commission's action,

Commissioner Van Miert stated through a spokesman 'we don't give a damn about extraterritoriality.' American critics of the EC's action assert that the EC was really more interested in protecting the European based competitor, Airbus, than in promoting competition. Whilst this may be true, it also may simply reflect the fact that the European Union competition laws, unlike the US antitrust laws, specifically prohibit abusive acts by a firm with a dominant market position. A firm with a market share of 50 per cent is presumed to be dominant and Boeing's worldwide market share is in the range of 60 per cent.

Thus, it is not surprising that the US and the EU have taken somewhat divergent paths with respect to airline alliances and competition. The US Government's approach to alliances has been to look at broad based benefits to consumers created by the linking of networks to flow travelers from multiple points behind a gateway hub in one country to multiple points behind the gateway hub in the second country. Competition is enhanced as alliances compete for this traffic through different gateways and improved service allegedly provided by the alliance partners. In approving alliances, the US has imposed some restrictions on the coordination of unrestricted fares in several gateway-to-gateway markets. In connection with the proposed American/ British Airways alliance, the US authorities have indicated that the two carriers must give up slots at Heathrow. But, in general, the US has not sought to impose restrictions on frequent flier programs, CRS listings, or the use of corporate discounts and travel agent overrides to promote competition. Rather, Assistant Secretary Hunnicutt has described the alliances that have received immunity as 'pro-competitive and pro-consumer.'

The EC has taken a more pro-active approach to alliances with the object of protecting smaller competitors as well as consumers. In a recent speech to the American Bar Association Commissioner Karel Van Miert was less than sanguine about the wonders of alliances. He noted the purpose of alliances (with antitrust immunity) is to discuss prices, capacity and routes, the core elements of competition. He questioned whether code-sharing served travelers any better than the system of interlining that has existed for decades when consumers at least knew what airline they

were actually going to fly on before boarding. Commissioner Van Miert also expressed concerns about reductions in competitive service for time-sensitive business travelers in certain point-to-point markets such as New York-Zurich, New York-Brussels and Miami-Frankfurt.

To deal with the potential reduction in competition for the time-sensitive traveler in certain hub-to-hub markets, the EC has proposed both 'structural' and 'behavioral' remedies. Structural remedies include reductions in flights in certain specified markets and surrender of slots (without compensation) if needed by new entrants at the hub airports. Examples of behavioral remedies include restrictions on travel agent overrides, limitations on multiple listing of code-share flights, and compulsory interlining to remedy perceived abuse of dominant position.

As matters now stand, there is a significant gap between the position of the EC and the US on both the value of immunized alliances and the nature of restrictions that should be imposed on their approval. Both the EC and the US claim the same unilateral or extraterritorial right to approve alliances that involve coordination of prices, schedules and capacity and thus have many attributes of a joint venture or merger. In addition to differing views on substance, the situation is further complicated by the relationship of the EC to the members of the EU. Thus, the EC cannot at this time negotiate hard rights (routes, capacity and pricing) with the US on a regional basis. Indeed, even the enforcement of the proposed restrictions on the alliances can only occur through action by the Member States. This situation, in turn, has prompted United Air Lines to file a complaint under the *International Fair Competitive Practices Act*, 49 U.S.C. § 41310, against the Commission and the affected Governments which have open skies bilateral agreements. The EC is suing these governments for not following the EC directives and United seeks action by the US Government if they do. Specifically, United has requested the US DOT to issue an order finding the actions of the Commission and the affected member governments as illegal and in violation of the open skies agreements. Furthermore, they request assurances from the affected governments that the bilaterals remain in full force and effect, and if DOT cannot persuade the Commission not to interfere with bilateral rights to consult with the

US Trade Representative on appropriate sanctions and remedies. However, it is far from clear that the US could or should take action against the Member governments if the EC's authority to act is upheld.¹

It is not apparent that the current state of brinkmanship and indignation serves the long-term interest of advancing real competition that benefits consumers. It frankly appears that the US Government may have an exaggerated view of the benefits of immunized alliances just as the EU may have exaggerated the potential harm. These are ideal conditions for a negotiated solution through the development of guidelines that can apply to all alliances. In 1995 the US and the EU entered into the Antitrust Cooperation Agreement. Under this agreement, the two countries have cooperated on and coordinated many activities including enforcement, mutual notification of merger filings and in most instances, the avoidance of conflicting case resolutions. If the US and the EU can work cooperatively on antitrust issues across a broad spectrum of industries there is no reason why similar cooperation cannot be achieved in air transportation.

There is no reason why the US and the EC could not develop harmonized rules on alliances. We suggested five guidelines that could be applied to ensure the potential for competition in alliance controlled markets. These proposals are:

1. Require alliance partners that dominate a hub (i.e. control more than 60 per cent of departures or passengers) to interline on behind – gateway traffic with non-code-share international carriers under IATA interline resolutions or negotiated interline agreements.
2. Prohibit coordination of unrestricted fares by carriers with antitrust immunity in gateway-to-gateway city-pairs where the code-share partners jointly provide more than 60 per cent of the direct service.
3. Prohibit exclusive code-share agreements to small countries or in city-pairs where code-share partners would control more than 60 per cent of the seats.
4. Compel alliance partners to release slots at any gateway where the alliance controls more than 60 per cent of slots to enable new competition if slots are not otherwise available. The two governments would agree on the number of slots to be released.²

5. Prohibit the introduction of override commissions in response to entry by a new competitor at a fortress hub where a carrier or alliance controls at least 60 per cent of the daily operations.

Each alliance must still be considered on its own facts to determine if approval is justified. However, the establishment of mutually agreed guidelines that fall in between the positions currently taken by the US and the EC is clearly preferable to the application of unilateral restrictions that can potentially harm consumers.

II. Extraterritorial Application of Laws to Achieve Social Policy Objectives and a Need to Return to the ICAO Approach

As discussed above, the 1990s in particular has been marked by governments' moving to resolve domestic political issues related to international air transport through rules and legislation. The urge to solve problems the easy way is often overwhelming to legislators trying to please their constituents. We believe it is useful to take a more detailed look at several of these issues.

EU Hush-kit/Noise Regulations. The US has taken actions that have extraterritorial effects, but which, at least arguably, are intended to protect air travelers and their families (e.g. prohibition on gambling, security measures, passenger manifest

1. In 1993, in *Hartford Fire Ins. Co v. California*, 509 U.S. 764, 799 (1993), the US Supreme Court held that an antitrust claim against London based reinsurers for fixing insurance prices in the US could go forward despite the fact that the industry was regulated by the UK. The Court held there was no conflict because compliance with English law did not preclude compliance with US law and therefore, there was no conflict. However, the implication of the Court's decision is that if there is a binding foreign obligation, international comity may require that the US courts abstain from taking jurisdiction. By way of analogy, in the case of the airline alliances, if the Member governments are required to follow the EC directives, as a matter of comity it may be inappropriate for the US to take retaliatory action against these governments.

2. Carriers should be able to sell slots, which were purchased by those carriers. If the slots were given to the carrier it should not be compensated for releasing the slots.

rule and nondiscrimination against the disabled). The EU however, in dramatic fashion has proposed a 'noise' rule that flies in the face of ICAO standards, the result of painstaking efforts over several years. The rule seems to have only one purpose, which is to benefit EU airlines and aircraft manufacturers at the expense of US airlines.

The proposed regulation would effectively bar US and other non-EU airlines from operating hush-kitted, or re-engined aircraft as of 1 April 2002. While EU airlines operate few hush-kitted aircraft, US carriers are expected to operate approximately 1,500 such aircraft by the year 2000. Moreover, the rule will prevent the addition of such aircraft to the registry of EU Member States as of 1 April 1999. This rule according to James D. Erickson, the Director of the FAA's Office of Environment and Energy 'would create a situation where aircraft which meet ICAO standards would not have free market access to European markets.' He stated that it 'is not acceptable for the US to be denied a market for aircraft that meet ICAO standards.'³ The proposed rule has already had an impact on the value of US carrier aircraft and will substantially effect the ability of US carriers to compete – particularly in the cargo market where the use of hush-kitted aircraft is expected to rise over the several years.

The proposed rule creates a design standard as opposed to an operational standard, as proscribed by ICAO. The recertificated aircraft operate at the same noise levels as aircraft that are newly certificated as Stage 3. Thus, the rule if it is approved by the European Parliament will have no impact on noise but will certainly interfere with the rights of US air carriers and those of other countries to decide which aircraft type to operate in specific markets. If approved, the rule will clearly violate Article 33 of the Convention which requires EU Member States to recognize the airworthiness certificates of US-registered aircraft, so long as they meet all ICAO standards. Moreover, the proposed rule appears to discriminate against domestic and foreign operators in violation of Article 15 and comparable provisions in bilateral agreements.

Environmental issues are highly contentious both domestically and internationally. Indeed, it is a great tribute to this industry and to ICAO that over the years we have been able to achieve

global solutions. However, as Assistant Secretary Hunnicutt stated in a letter he sent last September to Neil Kinnock, Commissioner of DG VII, the proposed legislation 'could easily lead to a patchwork of national and regional standards with little environmental benefit, and could destroy ICAO's ability to achieve uniform environmental standards in the future.' Even Airbus Industrie has opposed the regulation as a unilateral action that could be viewed as a trade barrier that will lead to retaliation, and harm the European industry. Northwest Airlines have already filed an action with the US DOT under the *International Air Transportation Fair Competitive Practices Act*.⁴

The industry is at a critical juncture on noise and the environmental issues. ICAO, through its Committee on Aviation Environmental Protection (CAEP), is currently studying a new more stringent Chapter 4 noise rule as well as new restrictions on nitrogen oxide emissions. Current expectations are that at the CAEP 5 meeting to be held late next year or in early 2001, agreement will be reached on new noise certification standards. It is extremely difficult to see how it could be in the interest of the EU to adopt a rule of no practical significance that could lead to a bitter dispute with the US and ultimately interfere with the most important task of reaching an international consensus on environmental issues. *Identical Security Measures*. In another questionable action the US Congress in the *Antiterrorism and Effective Death Penalty Act of 1996* amended 49 U.S.C. § 44906 to require foreign carriers in 'operations to and from airports in the United States to adhere to the identical security measures' required of US air carriers. Prior to the enactment of this law, foreign carriers were required to use security procedures 'comparable' to those used by air carriers. These measures are set forth in the Model Security Program (MSP) which are based upon ICAO

3. *Aviation Daily*, 'U.S. Airlines Enter Last Year of Flying Stage 2 Aircraft', 6 January 1999.

4. In addition to the hush-kit issue, the EU is considering an amendment to place a nighttime restriction on noise that is outside the ICAO standard and would have a major impact on US cargo operators. The FAA Assistant Administrator for Policy Planning and International Aviation has stated that the proposed amendment would 'prohibit approximately 430 currently scheduled US carrier cargo flights during this time period.'

standards and recommended procedures developed under Annex 17 to the Convention. In a Notice of Proposed Rulemaking issued by the Federal Aviation Administration in November 1998, the agency contended that the proposed rule was an 'exercise of authority recognized in the Convention... and US air transport agreements and is not intended to undermine the sovereignty of other nations.' However, the estimated costs to foreign airlines of implementing the requirements of the Air Carrier Standard Security Program (ACSSP) over the next ten years would be USD1.19 billion (net present value USD 826 million) based upon the need for additional and more sophisticated screening equipment and personnel. The US Congress chose to impose these costs on foreign airlines without any findings that compliance with the MSP creates an undue risk to the security and safety of US passengers. In addition, the US DOT Inspector General recently announced that it planned to investigate safety issues involving code-share alliances including airframe and equipment, operations, maintenance and repair. Once again one must wonder whether security or competition is the issue.

The international aviation community has been aggressive in its efforts to counter terrorism. The destruction or hijacking of an aircraft of any nation clearly has a chilling affect on air travel. In 1974 ICAO adopted Annex 17 which became applicable in 1975. ICAO has adopted standards and recommended practices to protect international civil aviation. These SARPs are comprehensive and updated regularly to adjust to perceived risks. Compliance with the ICAO standards should be viewed as adequate except in situations where there is a known risk that might require special consideration at a specific airport. The US DOT and the FAA have methods to prevent entry from airports that represent an unacceptable security risk by prohibiting direct travel from such airports, or by preventing certain foreign carriers from flying to the US. Both of these methods have been, and are being, used to protect US citizens. Beyond these remedies it is hard to see the basis upon which Congress could conclude that meeting ICAO standards (particularly in light of the former compatibility law) is inadequate.

The US DOT and the FAA have been generally supportive of ICAO. In a speech before the ICAO

Assembly in September 1998, Administrator Jane Garvey stated 'We believe that the only global forum for debate on standards affecting international civil aviation is ICAO, and that setting and maintaining standards is ICAO's foremost role.' Therefore, the FAA should take a more aggressive role with the US Congress to support application of ICAO standards. In this connection, the FAA has not given a date for implementing the proposed rule. However, carriers that are affected by the proposed rules should present comments at the public meeting scheduled for 24 February 1999 in Washington, by notifying the FAA by 17 February and/or file comments with the FAA on or before the March 1999 due date. Carriers should also encourage their governments to protest these rules with the FAA and the US Department of State.

The No Gambling Law. One of the more disturbing examples of such extraterritorial application of domestic law involves the enactment by the US Congress in 1994 of 49 U.S.C. § 41311. This law prohibits both US and foreign air carriers from offering any form of gambling games on flights to, or from, the USA, and instructed the US DOT to conduct a study on issues related to onboard gambling. Congress passed this legislation even though the US federal government does not regulate or control gambling in any of the states or aboard cruise ships outside the territorial waters of the USA.

In March 1996, the DOT issued its report to Congress on 'Video Gambling in Foreign Air Transportation.' The DOT noted that Congress at the time was considering a comprehensive study on the impact of gambling on the nation. While little has been heard on this study, it is clear that gambling is a growth industry in the US where virtually every state now has a lottery, and Native American run casinos have spread across the country. The DOT also noted the competitive impact of these gambling systems, and estimated that foreign airlines could receive an additional USD 112 million in gambling revenue per year just on flights to or from the USA if gambling were permitted on foreign air carriers but still banned on US carriers. Thus, one is left with the feeling that the gambling law is as much a competitive issue as a moral issue.

The action of the US Congress appears to directly contravene the requirements of the Convention on International Civil Aviation. As

noted above, a nation may regulate the conduct of any aircraft within its territorial jurisdiction but may only regulate conduct on aircraft in international air space that bears that country's registration. Indeed, comments filed with the US DOT noted no other instance where a state had enacted laws to control or prohibit conduct related to passenger comfort or entertainment on foreign aircraft in international air space. Moreover, the ban clearly is contrary to the free market objectives of 'open skies' bilateral agreements which are intended to offer a wide spectrum of choices to consumers.

As everyone knows, it is difficult to fight city hall and there are no easy ways around this legislation. In its March 1996 report, the DOT stated that it was not prepared to recommend a change in the law at the time. Now three years later perhaps it is time for the DOT to recommend that the US return to the international regulatory regime as defined by the Convention. In Assistant Secretary Hunnicutt's recent presentation to the American Bar Association, he stated, 'We must begin to consider the question [of] the continued utility of limitations on airline operations that are outside of our aviation services agreements. These limitations typically involve restrictions that the US and other countries impose on the industry through domestic legislation.' Whilst Mr. Hunnicutt's remarks were specifically directed at restrictions on foreign ownership, his words apply with equal or greater force to the gambling prohibition, which directly interferes with a State's traditional and universally accepted right to regulate conduct on its national airlines. Certainly, it appears the time is ripe for non-US airlines and their governments to raise this issue whenever a US government official is promoting 'open skies' and 'free' competition.

Conclusion

The history of international air transportation is a proud one. Indeed, the level of international cooperation and joint decision-making is unprecedented when compared with virtually any other industry. This cooperative spirit, together with technical innovation and rising consumer demand has carried the industry to the threshold of a truly global open market in air transportation

services that will benefit the airlines, airline suppliers and the public.

To achieve this next step will require an even higher level of cooperation in key technical areas such as air navigation, safety and security, and the environment. In addition, globalization requires renewed effort to harmonize the rules of competition for international air travel. This article has focused on the US and the EU, however, many countries have adopted competition laws that have the potential now or in the future to conflict with those of the US or the EU.

Assistant Secretary Hunnicutt in his presentation to the ABA spoke of the need to eliminate domestic restrictions that will hinder the transition to a global marketplace. I know the Assistant Secretary is sincere in his desire to move forward to accomplish this goal. But certainly, action speaks louder than words, and similar moves by the EU and other countries will be necessary for the US Administration to prevail on Congress to repeal these restrictions.

The gambling and security laws imposed by the US Congress are areas where the Administration could and should take the initiative to repeal ill-conceived laws that conflict with the fundamental scheme of the Convention. Similarly, EU Member States must seriously reconsider the impact of the proposed hush-kit rule in light of the strong opposition and the direct conflict with the Convention and ICAO standards. These are all steps that could be taken almost immediately and establish a commitment to replace unilateral action with consensus. Finally, the US and EU should establish a formal joint committee to carefully review alliance issues and develop a joint policy that will give guidance to the industry and if necessary impose certain mutually agreed restrictions on existing alliances which seek to maintain antitrust immunity.

At the end of the day the achievement of multilateral solutions will only come if the airlines and their governments are prepared to work together for mutual long run advantage through dialogue and compromise. Through such a process perhaps the term extraterritorial will no longer be a part of the international air transport vocabulary.