by

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ollowing 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 im

Before the US Government (and its various departments) expresses its view on these controversial, yet economically and internationally significant, issues, it

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]

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[6] See 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,

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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

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 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, 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

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]

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:

[35] Christina Zander, "Norwegian Air Halts Dreamliner Talks Amid Permit Delay", (28 April 2014), online: The Wall Street Journal http://www.wsj.com/articles/SB10001424052702304163604579529681687171504>. This is all too reminiscent of the oft-stated view of former Air France/K s27

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.

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

irst, I would like very quickly but very sincerely to thank IATA and each of the sponsors of this conference for putting on such an exc

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-

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

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

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I can say with some truth that I have heard senior officials at both Emirates and Etihad Airways deny public

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