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More Turbulence Ahead: A Bumpy Ride During U.S.-Japanese Aviation Talks Exemplifies the Need for A Pragmatic Course in Future Aviation Negotiations

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NOTES

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TABLE OF CONTENTS

I. INTRODUCTION

As U.S. firms collectively weather the relatively hostile business climate in Japan, certain United States-based airlines have been flying above it all for years. Those U.S. airline carriers allowed to take advantage of the trans-Pacific passenger and cargo market are doing well competing against their Asian counterparts particularly on routes into and out of Japan. In 1995, U.S. airlines carried about sixty-five percent of the passengers flying between the United States and Japan.[1] This success alone generated a $5.3 billion aviation trade surplus in 1996—the only U.S. trade surplus with Japan.[2] Additionally, this trade surplus is growing at a quarter of a billion dollars

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1. *See U.S. Japan Aviation Relations: Hearing Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transp.*, 105th Cong. (1997), *available in* 1997 WL 11234085 (statement of John Dasburg, President and CEO, Northwest Airlines) [hereinafter Dasburg Senate Testimony]; Marsha Stopa, *U.S.-Japan Talks Threaten to Close the 'Open Skies,'* CRAIN'S DETROIT BUS., Oct. 20, 1997, at 40, *available in* 1997 WL 8577023.

2. *See* Dasburg Senate Testimony, *supra* note 1; Stopa, *supra* note 1, at 40. The overall trade deficit with Japan in 1996 was about $48 billion and would have been greater had it not been for the air service surplus. See Dasburg Senate Testimony, *supra* note 1. Since the early 1980s, the United States trade deficit with Japan has reached as high as $50-$60 billion annually. *See U.S. Japan Aviation Relations: Hearing Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transp.*, 105th Cong. (1997), *available in* 1997 WL 11234082 (statement of Frederick Smith, Chairman and CEO of Federal Express) [hereinafter Smith Senate Testimony].

annually,[3] and it accounts for sixty percent of the $26 billion travel surplus the United States has with the rest of the world.[4] However, most of the revenues generated by U.S. airlines operating in the Japanese market have gone to just two passenger carriers (Northwest and United) and one cargo carrier (Federal Express).[5] This concentration of revenue is the result of a 1952 bilateral aviation treaty between the United States and Japan that provided significant access into the Japanese market only to those three U.S. carriers.[6]

After more than four decades under the treaty, the United States and Japan agreed to a major revision of the agreement's terms in 1998.[7] The new aviation agreement substantially alters the original post-World War II treaty,[8] but falls short of the initial U.S. goal of creating "open skies" between the two countries.[9] Under an open skies agreement, both countries would have opened access to international airline routes between the two countries and eliminated practically all domestic restrictions on international carriers.[10] The inability of the United States to convince Japan to accept an open skies agreement may signal trouble for future aviation agreement negotiations unless the United States maintains its pragmatic approach, reaching the optimal agreement given the economic and political climate in the countries with which the United States is negotiating.[11]

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3. *See* Dasburg Senate Testimony, *supra* note 1. The air service trade surplus was $5 billion in 1995 and $4.8 billion in 1994. *See id.*

4. *See Dogfight Over Tokyo: The U.S.-Japan Air Spat*, FAR E. ECON. REV., Aug. 14, 1997, at 5, *available in* 1997 WL-FEER 11441533 [hereinafter *Dogfight*].

5. *See Japan, U.S. Close to Agreement: U.S. Air Industry Head*, JAPAN TRANSP. SCAN, Sept. 29, 1997, *available in* 1997 WL 8250176 (noting that the three companies enjoy special access rights) [hereinafter *Close to Agreement*].

6. *See id.* See generally Civil Air Transport Agreement, Aug. 11, 1952, U.S.-Japan, 4 U.S.T. 1948, 1949, which gave the United States and Japan the power to designate which airlines would be able to fly under the terms of the agreement. *Id.* at 1950. At the time the agreement was signed, Japan's first major airline, Japan Airlines, "hadn't even gotten off the ground." *Morning Edition* (National Public Radio radio broadcast, Sept. 22, 1997) (*available in* 1997 WL 12823289).

7. *See infra* notes 395-99 and accompanying text. *See generally infra* Part V (discussing US-Japan agreement). As Thomas Foley, then the newly-named U.S. ambassador to Japan, stated at the height of the negotiations in the fall of 1997, the bilateral aviation agreement is "the most important bilateral relationship the United States has." *New Envoy to Japan Reassures Tokyo as He Takes Up Post*, Agence France-Presse, Nov. 7, 1997, *available in* 1997 WL 13429669.

8. *See infra* notes 421-56 and accompanying text.

9. *See id.*

10. *See infra* notes 30-44 and accompanying text.

11. *See infra* notes 531-40 and accompanying text.

This Note analyzes the U.S.-Japanese aviation agreement and the negotiations that led to its signing. More specifically, it examines how the parties involved—including U.S. airline carriers who disagreed as to how the United States should proceed—influenced the negotiation process. Part II of the Note focuses on the current U.S. policy of expanding open skies when negotiating bilateral aviation treaties with foreign countries. Part III looks at the U.S.-Japanese aviation market and its importance for U.S. airlines. Part IV examines how the Japanese government successfully used its strategic placement in the Asian market to avoid U.S. efforts to impose an open skies agreement. In this section, emphasis is placed on the peculiarities of relations between the two countries under the 1952 agreement and how the details of the new agreement represent a middle ground that both countries hope to exploit. Part V describes the new 1998 bilateral agreement. Finally, Part VI predicts how the Japanese agreement may impact future aviation "liberalization" negotiations: did the United States compromise its bargaining position in future negotiations by "caving in" to Japan and accepting an agreement that falls short of open skies? Or did the United States correctly approach the negotiations pragmatically and with an eye toward reaching the best agreement possible given the circumstances? The Note attempts to answer these questions and proposes how the United States should conduct future aviation negotiations.

II. U.S. INTERNATIONAL AVIATION POLICY BASED ON EXPANDING "OPEN SKIES"

In an effort to better effectuate what had been an unsuccessful U.S. international aviation policy goal of promoting "unfettered operations for airlines,"[12] the Clinton administration sought to renegotiate bilateral agreements to encourage competition.[13] Patrick Murphy, the Clinton administration's

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12. *U.S. Japan Aviation Relations: Hearing Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transp.*, 105th Cong. (1997), *available in* 1997 WL 11234084 (statement of Gerald L. Baliles, Chairman of Access U.S.-Japan) [hereinafter Baliles Senate Testimony]. The United States goal of creating a free market for international aviation has been in place for more than 50 years. *See id.*

13. *See International Aviation Bilaterals and Code Sharing Relationships: Hearing Before the Subcomm. on Aviation of the House Comm. on Transp. and Infrastructure*, 105th Cong. (1997), *available in* 1997 WL 11233697 (statement of Patrick V. Murphy, Deputy Assistant Secretary of Transportation for Aviation and International Affairs) [hereinafter Murphy House Testimony]. There are currently more than 1,200 bilateral aviation agreements in force worldwide. *See* Gerald L.

Deputy Assistant Secretary of Transportation for Aviation and International Affairs, summarized the rationale for the current U.S. policy while testifying before the House Aviation Subcommittee in June of 1997: "Our aviation liberalization policy is working to create a global environment in which well managed, competitive air transportation companies can deliver the best possible transport options to the travelling and shipping public while earning profits for owners and offering well paying jobs to employees."[14] In trying to create an international aviation market based on competitive economic principles, the United States has fought to eliminate foreign barriers that limit U.S. carrier access to foreign markets when negotiating or renegotiating bilateral agreements with other nations.[15] Traditionally, bilateral aviation agreements have strictly defined what routes may be served between signing countries, whether the fares are subject to each government's approval, how frequently flights may be offered, and how many airlines may fly under the agreement.[16] As Deputy Assistant Transportation Secretary Murphy bluntly described before a congressional committee, the United States is trying to move away from the traditional "tit-for-tat" protectionist bilateral aviation agreements.[17] Instead, the United States has promised foreign countries greater access for their carriers if they open their aviation markets and commit to increased competition.[18]

Despite financial problems in the 1990s, and what the U.S. government characterizes as the "resurgence in foreign

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Baliles, *Fear of Flying: Aviation Protectionism and Global Growth*, FOREIGN AFF., May 15, 1997, at 8, *available in* 1997 WL 9287526. Aviation experts have criticized the protectionist nature of the bilateral approach and have called the array of bilateral agreements "a global regulatory morass." *Id.* The United States negotiated its first bilateral aviation agreement with the United Kingdom in 1946. *See id.*

14. Murphy House Testimony, *supra* note 13.

15. *See id.* International aviation is generally governed by bilateral trade agreements because of a framework established by the United States and fifty-one other nations in 1944 at the Chicago Conference on International Civil Aviation. *See* GENERAL ACCOUNTING OFFICE, GAO/RCED-95-99, INTERNATIONAL AVIATION: AIRLINE ALLIANCES PRODUCE BENEFITS, BUT EFFECT ON COMPETITION IS UNCERTAIN (1995), at 11 <http://www.airportnet.org/dept/federal/gao/alliance.htm> [hereinafter INTERNATIONAL AVIATION]. For a detailed review of the 1944 Chicago Convention, see Daniel C. Hedlund, Note, *Toward Open Skies: Liberalizing Trade in International Airline Services*, 3 MINN. J. GLOBAL TRADE 259, 265-68 (1994). As of February 1995, the United States was a party to seventy-two bilateral aviation agreements. *See* INTERNATIONAL AVIATION, *supra*, at 11. For a discussion of how the United States should use other tools in addition to bilateral agreements to liberalize world aviation access, see generally Michael F. Goldman, *A Modest Proposal for a Short-Term U.S. International Aviation Negotiation Strategy*, 8 AIR & SPACE LAW. 6, 9-12 (Winter 1994).

16. *See* INTERNATIONAL AVIATION, *supra* note 15, at 11.

17. *See* Murphy House Testimony, *supra* note 13.

18. *See id.*

government protectionism," U.S. air carriers competing in international markets are experiencing record profits.[19] Furthermore, the airlines are projected to do well financially for years to come.[20] In 1996, the major U.S.-based passenger and cargo airlines reported a combined operating profit of $6 billion and a combined net profit of $2.8 billion, according to the U.S. Department of Transportation.[21] International operations alone generated a combined operating profit of $629 million and a net profit of $204 million.[22] The Transportation Department attributes the strong financial position of U.S. airlines in the international markets to the generally strong world economy, U.S. airline efficiency, and the increasing demand for international air travel caused by economic globalization.[23]

Currently, forty percent of all world trade, as measured by value, is transported by air.[24] Between 1992 and 1996, the number of international passengers flying U.S. airlines increased by more than twenty-two percent.[25] That increase amounted to ten million more international passengers flying U.S. carriers.[26] United States carriers are doing so well that it is not uncommon for them to carry more passengers traveling between a foreign country and the United States than the competing foreign carrier.[27] The amount of international freight carried by U.S. carriers is increasing at an even faster pace than the passenger market. Between 1992 and 1996, the amount of international

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19. *Id.*

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

24. *See Semi-Open Skies*, WASH. POST, Oct. 10, 1997, at A24, *available in* 1997 WL 14706413; Smith Senate Testimony, *supra* note 2.

25. *See* Murphy House Testimony, *supra* note 13. Using another measure, the General Accounting Office found the number of passengers flying U.S. carriers between the United States and foreign countries increased by forty-seven percent between 1987 and 1993. *See* INTERNATIONAL AVIATION, *supra* note 15, at 2. International passenger traffic from the United States and foreign countries increased by one hundred and thirty-four percent from 1980 through 1993. *See id.* at 10.

26. *See* Murphy House Testimony, *supra* note 13.

27. *See* David Field, *Open Skies Treaties Facing Turbulence*, USA TODAY, July 22, 1997, at 4B, *available in* 1997 WL 7008495. U.S. airlines carry 60.5 percent of the passenger traffic between the United States and Italy; 54.7 percent between the United States and France; 50.4 percent between the United States and Germany; 46.3 percent between the United States and the Netherlands; 46 percent between the United States and the United Kingdom; and 22.1 percent between the United States and Japan. *See id.* (using U.S. Immigration and Naturalization Service data for calendar year 1996 as analyzed by Global Aviation Associates).

cargo carried by U.S. airlines increased by fifty-nine percent.[28] In real terms during the same time frame, international cargo traffic on U.S. airlines increased by one million freight tons.[29]

A. *Open Skies as a Vehicle for Breaking Down Aviation Trade Barriers*

Under U.S. aviation policy, the ultimate goal for the United States is to reach international agreements that embrace "open skies."[30] An open skies bilateral agreement allows for air carriers of both signatory countries to compete on an equal basis for passengers traveling between the two countries.[31] Under this type of pact, governmental barriers limiting a foreign carrier's access to routes into and out of its country are eliminated and replaced with a market-dominated allocation.[32] Under a pure open skies agreement, all restrictions on routes, capacity, frequency, pricing, and entry are eliminated.[33] The only aviation restrictions left in place are those created by physical space constraints at airports or required because of safety concerns.[34] Furthermore, an open skies agreement permits airline alliances in which a domestic and foreign carrier join forces to jointly market and operate routes assigned to them.[35] This is known as code-sharing because the two carriers may use each other's "designator code" when listing their flights on computer reservation systems.[36] Essentially, these

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28. *See* Murphy House Testimony, *supra* note 13.
29. *See id.*
30. *See id.*; *U.S. DOT: Progress Toward Global Open Skies Accelerated in 1997, Secretary Slater Says*, M2 Presswire, Jan. 7, 1998, *available in* 1998 WL 5044787 [hereinafter *Global Open Skies*]. Secretary of Transportation Rodney Slater announced in January of 1998 that it was his goal to "reach Open Skies, or be on a definitive path to Open Skies" with most major trading partners by the year 2000. *Id. See United States: Model Bilateral Air Transport Agreement ("Open Skies Agreement")*, 35 I.L.M. 1479, 1479 (Nov. 1996) (listing the countries with which the United States has already signed the Open Skies Agreement) [hereinafter *Model Bilateral*].
31. *See* Murphy House Testimony, *supra* note 13.
32. *See id.*; *U.S. Japan Aviation Relations: Hearing Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transp.*, 105th Cong. (1997), *available in* 1997 WL 11234081 (statement of Charles A. Hunnicutt, Assistant Secretary of Transportation for Aviation and International Affairs) [hereinafter Hunnicutt Senate Testimony].
33. *See Aviation Pact Eludes Japan, U.S.*, JAPAN TRANSP. SCAN, Sept. 29, 1997, *available in* 1997 WL 8250179 [hereinafter *Aviation Pact*]; Hunnicutt Senate Testimony, *supra* note 32.
34. *See Aviation Pact, supra* note 33.
35. *See* Murphy House Testimony, *supra* note 13.
36. *See* INTERNATIONAL AVIATION, *supra* note 15, at 13. The U.S. Department of Transportation, which must approve code-sharing agreements, listed sixty-one such agreements in 1994. *See id.* The Transportation Department has

marketing alliances allow for "seamless connection" of internal ticketing and seating operations between the partner carriers.[37]

After what the U.S. Transportation Department calls "careful consideration of their potential competitive consequences," it has granted antitrust immunity to several of these strategic alliances between U.S. and foreign carriers in an effort to increase competition in the international aviation markets.[38] Although not highlighted publicly, the Transportation Department understands that the "carrot" of antitrust exemption creates an incentive to get countries with powerful airline carriers to the negotiating table.[39] According to the U.S. Transportation Department, antitrust immunity allows domestic and foreign carriers to integrate their separate systems into a highly efficient network.[40] Transportation Department officials have said that the agency believes antitrust immunity may reduce competition among the partnership carriers, but it results in more efficient competition among various multicarrier networks.[41] United States officials and aviation industry analysts supporting a free trade approach argue that the increased competition will lead to lower fares for consumers, better air service flying to more cities, increased tourism, and more jobs.[42]

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traditionally not required approval for limited agreements between U.S. and foreign carriers, such as those that allow for mutual acceptance of passenger tickets, baggage checks and cargo waybills. *See id.* at 13. Likewise, agreements that allow for the sharing of frequent flyer plans and airport facilities are not reviewed by the Transportation Department. *See id.*

37. *No Deal in Latest Round of U.S.-Japan Aviation Talks*, NIKKEI/DOW JONES JAPAN REP., Oct. 25, 1997, *available in* 1997 WL 12924111 [hereinafter *No Deal*].

38. Murphy House Testimony, *supra* note 13. Under U.S. law, the Secretary of Transportation may grant antitrust immunity if the airline agreement is "in the public interest and is necessary to permit implementation of an approved cooperative agreement." INTERNATIONAL AVIATION, *supra* note 15, at 24. Generally, the U.S. antitrust laws are designed to prevent competitors from joining together and engaging in anti-competitive alliances. *See id.*

39. *See* Murphy House Testimony, *supra* note 13. The Transportation Department credits the early alliance between Northwest Airlines and the Netherlands' KLM Airlines as being so successful that it influenced Germany's decision to seek open skies. *See id.* Similarly, the United States is aware that the United Kingdom's British Airways is seeking an alliance with American Airlines and it is refusing to give antitrust immunity to the partnership until the United Kingdom negotiates a more liberal aviation agreement. *See id.*

40. *See id.*

41. *See id.*

42. *International Aviation Bilaterals and Code Sharing Relationships: Hearing Before the Subcomm. on Aviation of the House Comm. on Transp. and Infrastructure*, 105th Cong. (1997), *available in* 1997 WL 11233691 (statement of Mary Rose Loney, Commissioner, Chicago Department of Aviation) [hereinafter Loney House Testimony].

Another ingredient of the open skies agreement is a provision that allows carriers from the signatory countries to fly through each other's countries and on to third-country destinations.[43] These rights are called "beyond rights" or "fifth freedom rights" by the industry.[44]

B. *Successful Negotiation of Open Skies Agreements*

The U.S. government has been fairly successful in negotiating open skies agreements with many smaller countries. In effect, some nations simply agreed to open skies pacts upon invitation by the United States. In deciding which countries to first pursue for open skies negotiations, the United States has focused not purely on the economic value of the various international markets, but instead has looked to which markets have "strategic value in influencing the transformation of entire regions."[45] As of August 1998, the United States had reached open skies accords with thirty-one countries.[46] Because of the U.S. progress in negotiating with countries for aviation liberalization treaties, one-third of U.S. international passengers in 1997 were expected to fly under open skies.[47]

1. Europe

The United States completed its first open skies agreement with the Netherlands in 1992, and it was entered into force in May of 1993.[48] In 1995, the United States offered any country in Europe the opportunity to enter into an open-market aviation agreement with the United States.[49] As of August 1998, the United States had open skies agreements with thirteen European

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43. *See generally* Hunnicutt Senate Testimony, *supra* note 32, (discussing this concept in the context of current Japanese restrictions).

44. *See generally* Dasburg Senate Testimony, *supra* note 1 (discussing Japanese negotiation strategy of withholding beyond rights from some U.S. carriers).

45. Murphy House Testimony, *supra* note 13.

46. *See U.S. and British 'Open Skies' Talks Set for October*, WALL ST. J., Aug. 3, 1998, at B6, *available in* 1998 WL-WSJ 3503924 [hereinafter *Open Skies Talks*].

47. *See* Field, *supra* note 27, at 4B. As a *Wall Street Journal* story noted: the open skies pacts "have made trans-Atlantic travel easier for passengers, while cutting costs and boosting traffic for carriers." Charles Goldsmith, *Open-Skies Pacts Lift U.S., European Carriers*, WALL ST. J., Sept. 24, 1997, at A15, *available in* 1997 WL-WSJ 14167422.

48. *See Model Bilateral*, *supra* note 30, at 1479; *see also* Field, *supra* note 27, at 4B; Goldsmith, *supra* note 47, at A15.

49. *See* Murphy House Testimony, *supra* note 13.

nations.[50] France and the United States reached an aviation agreement in 1998 that liberalized aviation access, but it failed to implement open skies.[51] In addition, as of August 1998, the United States was in negotiations with Italy to complete an open skies pact.[52] These agreements allowed any U.S. carrier to network with their counterparts in the signatory countries, if they could work out partnership agreements with the foreign airlines.[53] Both U.S. and foreign airlines took advantage of the open skies agreements and negotiated among themselves partnership agreements that combined their resources to service the international markets.[54] Even though beyond rights were sought in the European aviation agreements, the U.S. airlines have found it more efficient to rely on their foreign partners' well-established routes for travel beyond the airport in which the U.S. carrier traditionally lands.[55]

Within a year of the Netherlands agreement, Northwest Airlines aligned with KLM Royal Dutch Airlines.[56] Under the Northwest partnership with KLM, which was given antitrust immunity by the U.S. government,[57] the two carriers posted

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50. *See infra* notes 51 and 52. In addition to the Netherlands, the following European countries accepted the U.S. offer and adopted open skies agreements with the United States: Austria, Belgium, Denmark, Finland, Germany, Iceland, Luxembourg, Norway, Sweden, and Switzerland. *See Open Skies Momentum Slows, But Pace May Quicken Again*, WORLD AIRLINES NEWS, June 10, 1996, *available in* LEXIS, MARKET Library, IACNWS File [hereinafter Momentum Slows]. Romania reached an open skies agreement with the United States in 1997. *See* Murphy House Testimony, *supra* note 13; *Global Open Skies, supra* note 30. The Romanian open skies agreement was formally signed in Washington, D.C. in July 1998. *See U.S. and Netherlands Antilles Officials Signed an Open-Skies Pact*, 333 AVIATION DAILY 92 (1998), *available in* 1998 WL 9034456.

51. *See* Sue Kendall, *France, United States Sign Air Transport Liberalisation Deal*, AGENCE FRANCE-PRESSE, Apr. 8, 1998, *available in* 1998 WL 2257891. The deal fell short of open skies because France will continue to prohibit U.S. carriers from taking on passengers in France destined for locations other than the United States. *See id.*

52. *See U.S.-Italy Open-Skies Talks Scheduled This Week in Washington Have Been Postponed*, 333 AVIATION DAILY 69 (1998).

53. *See* Murphy House Testimony, *supra* note 13.

54. *See* Goldsmith, *supra* note 47, at A15.

55. *See id.*

56. *See* Murphy House Testimony, *supra* note 13. The General Accounting Office estimated that the Northwest/KLM agreement produced between $125 and $175 million in added revenues for Northwest in 1994. *See* INTERNATIONAL AVIATION, *supra* note 15, at 28. These figures accounted for about one-third of Northwest's trans-Atlantic passenger revenues in that year. *See id.* More than 350,000 passengers flew on Northwest under the alliance in the year ending June 1994, compared to about 164,000 flying the airline on connecting Northwest/KLM flights before the agreement in 1991. *See id.* at 27.

57. *See* INTERNATIONAL AVIATION, *supra* note 15, at 24.

greatly increased profits and traffic.[58] Delta Airlines followed Northwest's lead and created partnerships with Austrian, Sabena, and SwissAir.[59] United Airlines joined their U.S. competitors and allied with Germany's Lufthansa.[60] Like the Northwest/KLM partnership, the Lufthansa/United operating agreement increased passenger traffic for the two airlines.[61] The Lufthansa pact was signed in 1994, before Germany agreed to open skies, but the partnership was allowed to expand with open skies eliminating barriers to "coordination of schedules and pricing."[62] Lufthansa claimed that its pact with United, Scandinavian Airlines System, Air Canada, and Thai Airways helped increase its trans-Atlantic traffic by twenty-one percent in the first half of 1997.[63] In 1997, United increased its flight service between Frankfurt and Washington and Chicago from one flight a day to two, and added a Duesseldorf to Chicago flight[64]

The U.S. Transportation Department credits these alliances and the competition they created for German-based Lufthansa airlines, despite its initial limited alliance with United, with forcing Germany to "abandon protectionism" and join the open skies agreement.[65] According to the Transportation Department, forty percent of all traffic between the United States and Europe falls under the open skies regime.[66] Additionally, the Department of Transportation claims that the success of the open skies initiative has brought Spain, Italy, and France to the negotiating table to discuss opening their aviation markets to increased competition from U.S. carriers.[67] Portugal was expected to begin open skies talks in 1998.[68] Reports also indicated that Hungary and other countries of the former Eastern Bloc have signaled they are contemplating open skies negotiations.[69]

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58. *See* Goldsmith, *supra* note 47, at A15. The Northwest/KLM joint venture was "so successful, in fact" that the Wall Street Journal reported the linkup "led to a bitter shareholding dispute." *Id.*
59. *See* Murphy House Testimony, *supra* note 13.
60. *See* Goldsmith, *supra* note 47, at A15.
61. *See id.*
62. *Id.*
63. *See id.*
64. *See id.* A United spokesperson emphasized that the route expansion was the result of the open skies agreement with Germany: "It's the sort of route that open skies helps you to launch, while code-sharing makes it profitable." *Id.*
65. Murphy House Testimony, *supra* note 13.
66. *See id.*
67. *See id.*; Goldsmith, *supra* note 47, at A15; *Momentum Slows, supra* note 50.
68. *See Global Open Skies, supra* note 30.
69. *See* Goldsmith, *supra* note 47, at A15; *Momentum Slows, supra* note 50.

The European Commission (EC) has indicated that it will likely embrace open skies in the future, according to the U.S. Transportation Department.[70] However, in 1998 the EC threatened to undermine open skies agreements by threatening to place limits on code-sharing alliances.[71] The very reason that there is no aviation treaty among European countries now is because of protectionist policies implementd by European governments.[72] Nowhere is this reluctance more evident than in the case of Britain, which is particularly concerned about opening its aviation markets to U.S. competition.[73] The United States has been in protracted negotiations with Great Britain for years, but has yet to come up with an agreement that satisfies both the U.S. government's goal of liberalization and the British goal of insulating its carriers from fierce international competition.[74] Perhaps the largest obstacle standing in the way of an agreement between the major European countries, as well as nations in other parts of the world, is the general feeling that the United States is not bargaining fairly.[75] When determining whether the European market will open its skies, the question seems to be whether the competitive pressures will force the major European countries to look at opportunities in the European market without casting their sights across the Atlantic toward U.S. skies.

2. The Americas

The United States has also been negotiating open skies agreements in the Western Hemisphere. Canada agreed to open skies in 1995.[76] Patrick Murphy, the Deputy Assistant Secretary of Transportation for Aviation told Congress that the U.S.-Canada agreement has been "impressive".[77] In addition, passenger volume between the United States and Canada has increased by twenty-

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70. *See* Murphy House Testimony, *supra* note 13.

71. *See* Charles Goldsmith and Julie Wolf, *EU Approves AMR/British Airways Alliance*, WALL ST. J., July 9, 1998, at A3 [hereinafter *EU Approves Alliance*]; *EC vs. EU*, FOREIGN REP., June 25, 1998, *available in* 1998 WL 7895438.

72. *See* Goldsmith, *supra* note 47, at A15.

73. *See id.*

74. *See infra* notes 519-28 and accompanying text for a detailed discussion of the status of U.S.-United Kingdom aviation negotiations.

75. As the Wall Street Journal noted: "There's a feeling in some European circles that the deals favor the U.S. because U.S. law forbids foreign airlines from carrying passengers within the U.S. itself—the world's largest single aviation market." Goldsmith, *supra* note 47, at A15.

76. *See* Murphy House Testimony, *supra* note 13.

77. *Id.*

eight percent under the open skies agreement.[78] In 1998, the transition agreement with Canada was to be implemented fully.[79]

In the fall of 1996, the United States offered to accept open skies agreements with any interested country in Central America.[80] As of the fall of 1997, the United States had reached agreements with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama.[81] Aruba and Chile also signed open skies agreements with the United States in late 1997.[82] A temporary agreement between the United States and Chile that froze growth of capacity was scheduled to expire in 1997 and revert back to the previous agreement, which had no limits on capacity growth.[83] The U.S.-Chile open skies agreement is conditioned on U.S. antitrust immunity for an American Airlines/LanChile partnership agreement.[84] In addition, the United States reached an open skies agreement with Peru in May of 1998.[85]

As of 1998, the United States was in negotiations with Argentina,[86] Belize, and the Dominican Republic.[87] The United States also was pursuing initial negotiations with Colombia.[88] Under a Colombia-United States bilateral agreement, U.S. carriers

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78. *See* Field, *supra* note 27, at 4B.

79. *See* Baliles, *supra* note 13, at 8. The agreement has been so successful that in August of 1998, Air Canada announced that it had begun service to its forty-third new U.S. destination since open skies was implemented. *Air Canada: Air Canada Launches Toronto-New Orleans Service*, M2 Presswire, August 14, 1998, *available in* 1998 WL 16517695.

80. *See* Murphy House Testimony, *supra* note 13.

81. *See id.*

82. *See Global Open Skies*, *supra* note 30.

83. *See Momentum Slows*, *supra* note 50.

84. *See* Christopher Fotos, *New Entrants Shold [sic] be Careful What They Wish for Open Skies: All Targets Lie Ahead*, 331 AVIATION DAILY 25 (1998), *available in* 1998 WL 9030077. Some have expressed concern over the partnership because together the two airlines control eighty-one percent of the passenger seats in the U.S.-Chile market. *See* Scott McCartney & Jonathan Friedland, *The Aviation Industry: American Threatens and Cajoles Carriers to Ally With it in Latin American Drive*, ASIAN WALL ST. J., Jan. 13, 1998, at 11, *available in* 1998 WL-WSJA 3468160. American Airlines is the dominant carrier in Latin America, and it has been aggressive in expanding in the area. *See id.*

85. *See* U.S. Department of Transportation, News Release, *United States, Peru Sign Open Skies Agreement*, June 10, 1998, *available in* 1998 WL 308114; *see also All's Not Fine with Open-Skies Pact*, SOUTH AM. REP., July 1, 1998, *available in* 1998 WL 10367285 (despite new pact with Peru, Miami-based Fine Air is still banned from Peruvian air space); *Peru Becomes First Open-Skies Partner for U.S. in South America*, 332 AVIATION DAILY 438 (1998), *available in* 1998 WL 9033690.

86. *See U.S., Argentina Plan Open-Skies Talks in October*, 333 AVIATION DAILY 193 (1998), *available in* 1998 WL 9034935.

87. *See* Murphy House Testimony, *supra* note 13.

88. *See Momentum Slows*, *supra* note 50.

would have access to Colombia from New York, but Colombia has been unwilling to give its approval.[89] Colombia has expressed its concern that American and Continental flights will eat into the revenue of its national airline, Avianca.[90] The United States has threatened to sanction Avianca, and industry analysts indicate that the dispute may spur talks that could lead to open skies.[91]

3. Pacific Rim

The United States has also initiated discussions with countries in the Pacific Rim for open skies. In a "first step," the United States has focused on Singapore, Taiwan, Brunei, Malaysia, Korea, and New Zealand.[92] As of summer 1997, Singapore, New Zealand, Malaysia, and Brunei had formally signed agreements.[93] Later in 1997, Taiwan also reached an open skies accord with the United States.[94] Singapore's willingness to sign on to open skies was not surprising. Singapore is a major aviation hub in the Southeast Asian market, home to a strong carrier, and it "lusts for more trade."[95] New Zealand's assent was not unexpected either, for it had already been pursuing liberal aviation agreements to boost its standing in the aviation market.[96] South Korea signed on to an open skies agreement with the United States in June 1998.[97] South Korea's Asiana Airlines wanted to pursue more access to the U.S. market, and it lobbied its government to begin negotiations.[98]

The Taiwan agreement allows unlimited service by U.S. carriers into Taipei and Kaohsiung.[99] In exchange, Taiwan-based airlines have unlimited access into Honolulu, Seattle, San Francisco, Los Angeles, Dallas, and New York.[100] This expansion

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89. *See id.*
90. *See id.*
91. *See id.*
92. Hunnicutt Senate Testimony, *supra* note 32; Murphy House Testimony, *supra* note 13.
93. *See* Hunnicutt Senate Testimony, *supra* note 32.
94. *See Global Open Skies*, *supra* note 30.
95. Bob James, *Opening Asian Skies: The United States Isn't Waiting to See Whether Its European Strategy Works Before Exporting It to Asia*, AIR CARGO WORLD, Oct. 1996, at 16, *available in* LEXIS, TRANS Library, AIR File.
96. *See id.*
97. *See U.S., South Korea Sign Open Skies Accord*, AVIATION WK. & SPACE TECH., June 15, 1998, at 38, *available in* 1998 WL 8144319.
98. *See* James, *supra* note 95, at 16; *see also Delta, Korean Air Sign Agreement to Form Global Marketing Alliance*, M2 Presswire, Aug. 10, 1998, *available in* 1998 WL 16516733.
99. *See U.S./Taiwan Pact a 'Model for Bilateral Agreement,'* ASIAN AVIATION NEWS, June 16, 1995, *available in* 1995 WL 6690472.
100. *See id.*

is based on the expectation of receiving open skies in the future.[101] Taiwan's China Airlines is seeking the official open skies agreement with the United States because it wants even more access to the U.S. market.[102]

Taiwan's China Airlines is showing its desire to expand and ability to compete by leasing and buying additional aircraft to meet growing demand.[103] Taiwan's second carrier, Eva Air, is also planning international expansion.[104] Eva Air began service to Brussels, Belgium in 1997, and company officials have said it will expand elsewhere if it gets the aviation rights.[105] Taiwan is currently the major hub for the United Parcel Service in the Southeast Asian market, and the nation is seeking to upgrade its status as an even larger international aviation port.[106] Taiwan recognizes that it is "strategically located near the booming South China market," and for that reason it poses a "challenge to Japan's dominance of trans-Pacific travel."[107]

Overall, the United States has approached smaller countries in the Asian market in hopes of pressuring Japan into agreeing to negotiate an open skies agreement.[108] The underlying goals of open skies agreements with the smaller Asian nations include not only providing better air service to Asia, but also sending a warning signal to Japan that it may lose its prominent hub status as other countries become accessible to U.S. carriers.[109] Still, Japan is pivotal to the entire Asian aviation market, and it is aware that it has a great deal of leverage.[110] Primarily, this leverage comes from the fact that Japan's gross domestic product remains greater than the combined value of all the countries with whom the United States has reached open skies agreements.[111]

United States Department of Transportation officials deny the U.S. aviation plan is meant to "surround and capture" the Japanese, but they admit the plan is designed to fight Japanese

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101. *See Japanese Carriers Still Need to Worry More About Pacific Competition Than Domestic Deregulation*, ASIAN AVIATION NEWS, Jan. 24, 1997, *available in* LEXIS, NEWS Library, AAVN File [hereinafter *Japanese Carriers*].

102. *See id.* A China Airlines official noted that the airline expects open skies: "That's the trend. Most carriers, especially in the Orient, expect it." *Id.*

103. *See id.* China Airlines is leasing six Boeing 737-400 aircraft until it can take delivery of six new Boeing 737-800s in late 1998. *See id.* The airline is buying four Boeing 747s with the option to buy 4 more. *See id.*

104. *See id.*

105. *See id.* Eva Air is also purchasing aircraft to help it prepare for future international expansion. *See id.*

106. *See* James, *supra* note 95, at 16.

107. *Japanese Carriers*, *supra* note 101.

108. *See* James, *supra* note 95, at 16.

109. *See id.*

110. *See* Dogfight, *supra* note 4, at 5.

111. *See id.*

"protectionism and appeals to regional insularity . . . ."[112] On the regional scale, the United States has urged the Asia-Pacific Economic Cooperation Forum (APEC) to promote open skies.[113] APEC has advocated achieving free trade across all sectors and all developed countries in the region by 2010, and the United States hopes it can encourage the group to focus on aviation.[114] In addition, the United States hopes to receive the assistance of the Organization for Economic Cooperation and Development (OECD), a group of twenty-nine major industrialized nations from Europe, North America, and the Pacific that supports global aviation liberalization.[115]

III. JAPANESE AND ASIAN MARKETS VITAL TO THE U.S. AIRLINES

Despite whatever international help it can get, the United States is going to have a difficult time convincing Japan to further open its aviation market. Japan is a formidable adversary intent on protecting its valuable market, and it has proven its willingness to reject an immediate transition to open skies.[116] The U.S.-Japan aviation market is the largest in the world in terms of revenue.[117] In 1995, the U.S. and Japanese carriers generated a combined total of roughly $10 billion in revenue by providing air transport service in this market.[118] Approximately $8 billion of revenue came from passenger service, while the remaining $2 billion was the result of cargo service.[119] When combined, the

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112. James, *supra* note 95, at 16.

113. *See* Murphy House Testimony, *supra* note 13; Baliles, *supra* note 13, at 8.

114. *See* Murphy House Testimony, *supra* note 13.

115. *See id.* According to the Transportation Department, the group "advocates the overhaul of the currently regulation-bound international air transportation system and the establishment of one based more on market principles." *Id.* Japan is aware of the OECD's position on liberalizing aviation agreements. When Japan held an aviation conference (closed to the West) in 1996, it "fought vigorously" against the position of the OECD's paper. James, *supra* note 95, at 16.

116. *See No Deal, supra* note 37.

117. *See* Hunnicutt Senate Testimony, *supra* note 32; Michael Goldman, *U.S.-Japan Aviation Wars: Negotiating Not-Quite-Open Skies*, 12 AIR AND SPACE LAW. 1, 6 (Summer 1997). The sheer size of the U.S.-Japan aviation market should be of no surprise considering that Japan is the United States' second largest international trading partner. *See* Baliles Senate Testimony, *supra* note 13. U.S. businesses sell more goods to Japan than to Great Britain, France, Italy, and Spain combined. *See id.*

118. *See* Hunnicutt Senate Testimony, *supra* note 32; Goldman, *supra* note 117, at 6.

119. *See Japan-U.S. Aviation Talks Fail to Reach Accord*, Agence France-Presse, Sept. 26, 1997, *available in* 1997 WL 13402366 [hereinafter *Aviation Talks*

U.S.-Japan passenger and cargo market is "crucial to hundreds of billions more in business exchanges."[120] In 1995, U.S. carriers alone derived about $4.9 billion in gross revenue from the U.S.-Japan passenger market and about $1 billion from cargo transportation between the countries.[121] The market is particularly lucrative because these flights are "among the longest-haul routes in the world," and airlines can get top prices for their services.[122]

In 1995, U.S. carriers dominated their competitors in the U.S.-Japan market. U.S. carriers held about sixty-three percent of the passenger market and fifty-three percent of the cargo market.[123] Aviation analysts looking at figures for 1996 estimate that about eleven million passengers fly in the U.S.-Japan market each year.[124] According to a study completed by Washington, D.C.-based GKMG Consulting Services for Northwest Airlines, the U.S.-Japan market is expected to continue to grow, reaching 15.6 million passengers by the year 2000.[125] That represents a thirty percent increase over four years.[126]

A. *Japan: Gateway to Asia*

While the aviation routes in Europe, Central America and the Pacific Rim are attractive to U.S. carriers, the routes between the United States and Japan appear particularly lucrative. The right to travel through the country is important because of "Japan's unique geographic and demographic value."[127] Not only do the U.S.-Japan routes account for substantial revenue in themselves,

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Fail]. Others estimate that the U.S.-Japan market is worth $12 billion annually. *See Semi-Open Skies, supra* note 24, at A24.

120. *Semi-Open Skies, supra* note 24, at A24.

121. *See* Murphy House Testimony, *supra* note 13.

122. *U.S. Airlines Have a Yen for Japan Service*, TRAVEL AGENT, Sept. 22, 1997, at 112, *available in* 1997 WL 15017943 [hereinafter *Yen for Japan*]. The down-side to the relatively high fares for flights between the United States and Japan is that Asian passengers may choose not to fly in times of economic instability and foreign currency crises. *See* Fotos, *supra* note 84, at 25.

123. *See* Murphy House Testimony, *supra* note 13.

124. *See American, Delta and Others Form New Coalition to Push U.S.-Japan Talks*, AIRLINE FIN. NEWS, Feb. 26, 1996, *available in* 1996 WL 8068693 [hereinafter *New Coalition*]; *Yen for Japan, supra* note 122, at 112.

125. *See* Tony Kennedy, *NWA Hopes for 'Open Skies' Are Fading*, STAR-TRIB. (Minneapolis-St. Paul, Minn.), Sept. 19, 1997, at 1D, *available in* 1997 WL 7582673; *Yen for Japan, supra* note 122, at 112.

126. *See* Kennedy, *supra* note 125, at 1D; *Yen for Japan, supra* note 122, at 112.

127. *United Cites Value of Japan in Booz Allen Study*, WORLD AIRLINE NEWS, Oct. 9, 1995, *available in* 1995 WL 6155955 [hereinafter *Booz Allen Study*].

but they are feeder routes into the entire Asian-Pacific market.[128] As Charles Hunnicutt, the Assistant Secretary of Transportation for Aviation and International Affairs, explained to a Senate committee: "Because of the size of the Japanese market and Japan's geographic location as a natural gateway to Asia, access to Japan is almost essential to any carrier that wishes to compete successfully on the transpacific."[129]

Japan represents more than sixty percent of the traffic between the U.S. mainland and Asia, or five million passengers a year.[130] Tokyo's Narita airport has itself been called the gateway to Asia and described as "the only conceivable point for a limited-range plane from the United States to refuel before delivering people to other countries in the region."[131] United Airlines officials in 1995 publicly stated that Japan was essential to their Asia routes because many of the destinations which can be served efficiently through Tokyo are "either too distant or have insufficient demand to serve nonstop from the United States . . . ."[132] However, others have pointed out that the introduction of new aircraft such as the Boeing 777, the MD-11ER, and the Airbus A-340, might make non-stop travel between the United States and cities in eastern Asia more cost effective.[133] If that happens, it is likely to make Japan "less important as a gateway to Asia."[134]

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128. *See id.* Estimates as to the value of beyond rights into Asia from Japan vary widely. Dueling studies found that if U.S. carriers were to lose those beyond rights it could cost the U.S. airlines anywhere from $5.5 billion to $100 billion over a 20 year period. *Compare UAL Sees $100 Billion U.S. Stake in Asian Markets*, AIRLINE FIN. NEWS, Oct. 2, 1995, *available in* 1995 WL 6703799 (stating the potential gain to Japanese carriers), *with Access: U.S.-Japan Study Says United Claims Are Exaggerated*, WORLD AIRLINE NEWS, March 4, 1996, *available in* 1996 WL 8067369 (estimating the loss to United and Northwest).

129. Hunnicutt Senate Testimony, *supra* note 32.

130. *See Yen for Japan*, *supra* note 122, at 112. For Northwest Airlines, flights connecting through Japan represent about eighty percent of its Pacific Rim business. *See* Tony Kennedy, *Northwest Reports Record Profit*, STAR-TRIB. (Minneapolis-St. Paul, Minn.), Jan. 21, 1998, at 1D, *available in* 1998 WL 6338076 [hereinafter *Record Profit*].

131. Michele Kayal, *Britain, Japan: Formidable Head Winds to Open Skies*, J. OF COM., Apr., 14, 1997, at 1A.

132. *Booz Allen Study*, *supra* note 127.

133. *See id.*; Goldman, *supra* note 117, at 8. However, the use of larger aircraft may not be feasible for international airlines service. One study found that growth in the Asian market will require airlines to expand frequencies and increase point-to-point services in Asia, requiring the use of more planes, not bigger planes. *See Study: Increase in Frequencies, Not Aircraft Size, Will Be Key to Growth in Asia/Pacific*, WORLD AIRLINE NEWS, July 18, 1997, *available in* LEXIS, MARKET Library, IACNWS File [hereinafter *Growth in Asia/Pacific*].

134. *Booz Allen Study*, *supra* note 127.

Some Asian aviation analysts have speculated that Hong Kong could be used as an alternative gateway to Asia, but there is concern that it is too congested.[135] Hong Kong also may be unable to convince carriers that it is viable because it is so far south.[136] Even Korea has been suggested as a potential alternative to Japan.[137] A new airport is expected to open in Seoul around the year 2000, but the dominance of the flag carrier may keep out foreign competition.[138] Additionally, Thailand is making efforts to expand its aviation capabilities.[139] Thai officials hope to complete much of the construction on a new "transpark" by 2000.[140] The transpark combines air cargo facilities, a deep-sea port, modern highways, and railways into one location.[141] Thailand is already the fourth busiest air cargo port in Asia, and it ranks fifth in passenger traffic in Asia.[142]

B. *Phenomenal Growth in Asian Markets*

On the worldwide scale, the Asian-Pacific aviation market represents a great opportunity for all international carriers because of its expected growth in the upcoming years. The Asian-Pacific aviation market currently is valued at $14 billion,[143] and it is estimated that Asian-Pacific air traffic will double in the next ten years.[144] The annual growth rate of the Asian-Pacific market is expected to be between seven and ten percent.[145] China is predicted to lead other Asian nations in growth. China accounted for slightly more than five percent of Asia-Pacific travel in 1985, and that figure was expected to grow to twenty-six percent by 2010.[146] The Air Transport Action Group has concluded that this growth in the Asia aviation market represents a growth that

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135. *See id.*
136. *See id.*
137. *See id.*
138. *See id.*
139. *See Bid to Make U-Tapao Regional Aviation Hub: But Three Issues Need to Be Resolved, Warns Project Consultants*, BANGKOK POST, Jan. 20, 1998, *available in* 1998 WL 7886691.
140. *Id.*
141. *See id.*
142. *See id.*
143. *See United in the Asian Sky*, SINGAPORE STRAITS TIMES, Oct. 24, 1997, *available in* 1997 WL 15659261 [hereinafter *Asian Sky*].
144. *See id.*
145. *See* Murphy House Testimony, *supra* note 13; *Asian Sky*, *supra* note 143. Downturns in the Asian economy can certainly impact aviation growth. In 1998, just such a downturn in Asia forced carriers to reconfigure their fleets to reduce excess capacity into and out of Asia. *See* James Ott, *Air Transport*, AVIATION WK. & SPACE TECH., Aug. 24, 1998, at 32.
146. *See Growth in Asia/Pacific*, *supra* note 133.

exceeds the rate of other overseas markets.[147] Furthermore, the region is expected to account for forty percent of global air traffic by the year 2000.[148]

In the last decade, air traffic between the United States and Southeast Asia has more than tripled.[149] This growth will continue into the next decade. By 2010, it is estimated that there will be approximately 288 million international passengers traveling annually in the intra-Asian markets alone.[150] Also by 2010, passenger travel in the Asian markets is expected to account for half of all the world's passenger traffic.[151] Seventy percent of the passengers will be traveling within the region, fifteen percent will be crossing the Pacific from the Americas, and fifteen percent will travel from Europe and elsewhere.[152] The Pacific Travel Association's 1993 Travel Statistical Report found that passenger arrivals in the Asia-Pacific region increased 7.3 percent from 1992 to 1993.[153] That trend matches the expected market breakdown because it showed that outbound U.S. travel from Asia remained basically the same at about nine million, but inter-Asian arrivals had increased from twenty-one million to thirty-three million from 1989 through 1993.[154] The report also showed that Hong Kong, Japan, and China were the three most popular international travel destinations for U.S. travelers.[155] Hong Kong and Japan have held the top ranking since the late 1980s.[156] However, during that same time China moved up from ten to three on the rankings.[157]

Cargo transportation is also expected to increase in the Asian region. In 1995, Boeing projected that worldwide air cargo traffic would grow at 6.6 percent annually through 2014, or more than

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147. *See id.*
148. *See Asian Sky*, *supra* note 143.
149. *See* Murphy House Testimony, *supra* note 13.
150. *See* Dasburg Senate Testimony, *supra* note 1.
151. *See Asian Carriers Get Warnings on Competition, 'America Problem,'* 322 AVIATION DAILY 327 (1995), *available in* 1995 WL 13297413 [hereinafter *Warnings*]; Asra Q. Nomani & Douglas A. Blackmon, *U.S., Japan Near Accord To Open Skies*, WALL ST. J., Sept. 19, 1997, at A3. It is also estimated that by 2010 more than half of all U.S. international passengers will be flying to Asia. *See International Aviation Bilaterals and Code Sharing Relationships: Hearing Before the Subcomm. on Aviation of the House Comm. on Transp. and Infrastructure*, 105th Cong. (1997), *available in* 1997 WL 11233693 (statement of Robert Crandall, Chairman and CEO of American Airlines) [hereinafter Crandall House Testimony].
152. *See Warnings*, *supra* note 151, at 327.
153. *See Marketing Briefs*, AIRLINE MARKETING NEWS, Aug. 31, 1994, *available in* 1994 WL 8734431.
154. *See id.*
155. *See id.*
156. *See id.*
157. *See id.*

the 5.1 percent growth it projected for passenger travel.[158] Charles Tyler, a Malaysia-based aerospace specialist, predicted that the Asian cargo market will grow even more than the Asian passenger market.[159]

Given this pace of economic growth, it is no surprise that the U.S. carriers are scrambling to enter the Asian market.[160] Aviation expert Charles Tyler agrees that U.S. carriers should be investing in the Asian aviation market. Tyler estimated that the aviation market in Vietnam is expected to grow nineteen percent a year; China is expected to grow at seventeen percent annually, and Taiwan at more than eleven percent.[161] The growth is expected to come primarily from tourism, not only from Europe, but also from some regions of Asia where the population is using newly acquired wealth to pay for travel.[162]

For U.S. carriers, the growing Asian market represents a global economic shift. In 1980, Atlantic routes generated twice the annual revenue of Pacific routes.[163] Recently, however, U.S. Transportation Secretary Federico Pena announced that U.S. airlines will be generating more revenue from trans-Pacific than from trans-Atlantic flights in the near future.[164] In 1995, United and Northwest led the U.S. carriers in the Asian market, generating $961 million and $835 million in revenue respectively.[165] United gained a net profit of $109 million in the Asian market in 1995, and Northwest followed with a net profit of $100 million.[166] As a result of this steady foothold in Asia, and

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158. *See* Joan M. Feldman, *Doing the Rights Thing*, AIR TRANSPORT WORLD, Dec. 1995, at 57, 57.

159. *See Warnings*, *supra* note 151, at 327.

160. One U.S. newspaper advocating open skies summed up the reasons for U.S. airline interest in Asia: "Owing to Asia's dense population and growing economic strength, increased presence in the region is of utmost importance to U.S. air carriers . . . ." Open *Skies Should be Goal of Talks*, NEWS-TRIBUNE (Tacoma, Wash.), Sept. 24, 1997, at A12, *available in* 1997 WL 3461297 [hereinafter *Open Skies Goal*].

161. *See Warnings*, *supra* note 151, at 327.

162. *See id.*

163. *See id.*

164. *See The Future of Commercial Aviation: Consolidation and Pacific Routes*, AM. MARKETPLACE, Nov. 16, 1995, *available in* 1995 WL 8155314 [hereinafter *Pacific Routes*].

165. *See New Coalition*, *supra* note 124.

166. *See id.* In 1997 an Asian currency crisis was temporarily eating away at airlines' profits in the Asian market. For example, Northwest's Pacific division witnessed a seventy percent decrease in operating income between 1996 and 1997—from $168 million to about $50 million. *See Record Profit*, *supra* note 130, at 1D. As a result of the currency crisis, Northwest actually planned to reduce its capacity in the Pacific by about ten percent for the first quarter of 1998. *See id.* The U.S. airline industry as whole was expected to temporarily reduce traffic for the first half of 1998 to minimize income lost because of empty seats. *See id.*

the sea-change taking place in the global aviation market, Pena said the Clinton administration had "turned [its] sights to Asia, the fastest-growing market in the world."[167]

IV. JAPAN REFUSES TO ACCEPT OPEN SKIES

Under the 1952 bilateral aviation agreement, Northwest, United, and Federal Express are the only U.S. carriers that have authority to fly freely into Japan, conditioned upon safety restrictions and space availability.[168] Essentially, these three U.S. carriers compete in the Japanese market on a level playing field with their counterparts in Japan. Together with the one Japanese carrier that was given liberal access to the U.S. market, Japanese Airlines (JAL), these airlines are known as "incumbent" carriers in the industry.[169] Northwest has been an incumbent airline since the agreement's inception.[170] United gained incumbent rights when it purchased Pan Am's entire Pacific division in 1985.[171] Federal Express received incumbent rights by acquiring the privileges from the cargo carrier Flying Tigers in 1989.[172]

The U.S. incumbent carriers have leveraged their rights in the Japanese and Asian markets, making them some of the more highly utilized carriers in the region. Similarly, United and Northwest dominate the routes between the United States and Japan. Together, the two U.S. carriers fly more than eighty-five percent of American passengers in the U.S.-Japan aviation market.[173] When all passengers in the U.S.-Japan routes are included, United, Northwest, and Japan Airlines fly eighty percent of the passenger traffic between the two nations.[174] The second Japanese airline, All Nippon Airways (ANA), along with three U.S. carriers, share the remaining twenty percent of traffic between the

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167. *Pacific Routes*, *supra* note 163.

168. *See* Hunnicutt Senate Testimony, *supra* note 32. Importantly, neither Japan nor the United States have "cabotage" rights, or the right to fly intra-country routes freely. *See* Civil Air Transport Agreement, *supra* note 6, 4 U.S.T. at 1950; *see also U.S., Japan Settle in For Long Match Over Beyond Rights*, AIRLINE FIN. NEWS, Oct. 9, 1995, *available in* 1995 WL 6703829 [hereinafter *Beyond Rights*].

169. *See* Hunnicutt Senate Testimony, *supra* note 32.

170. *See Booz Allen Study*, *supra* note 127.

171. *See id.*; *New Coalition*, *supra* note 124. Pan Am sold its Asian rights to United for $750 million. John Schmeltzer & Mike Dorning, *U.S.-Japan Deal in Final Approach*, CHI. TRIB., Jan. 15, 1998, at 1.

172. *See* Smith Senate Testimony, *supra* note 2; Feldman, *supra* note 158, at 58.

173. *See Yen for Japan*, *supra* note 122, at 112.

174. *See ANA Plans 25 Percent International Capacity Growth in 1997*, 327 AVIATION DAILY 223 (1997), *available in* 1997 WL 8611893 [hereinafter *ANA Plans*].

United States and Japan.[175] The incumbent carriers owe their success to their status under the 1952 agreement.[176]

Northwest Airlines, which operates 245 flights per week between the United States and Japan, provides more flights between the two countries than any other airline.[177] Northwest derives an estimated thirty percent of its revenue from its flights between the United States and Asia.[178] It is also estimated that twenty-five percent of Northwest's operating profit comes from flights between the United States and countries in the Pacific Rim.[179] In addition, Northwest's freight capacity to Asia "substantially exceeds" that of any other U.S. carrier.[180] The airline operates eight Boeing 747s exclusively in the Pacific cargo market, and it also carries cargo on its passenger flights.[181] Northwest reportedly gets about ten percent of its overall revenue from cargo, a high percentage for a U.S. passenger carrier.[182]

Besides giving JAL trans-Pacific privileges to enter the United States,[183] the 1952 agreement also gave JAL beyond rights, authorizing the airline to land in the United States and fly to a third nation.[184] JAL has taken advantage of its incumbent status under the agreement, flying about 130 flights a week to the United States and Canada.[185] In 1997, JAL reached a code-sharing agreement with American Airlines that called for the two airlines to cooperate in providing service between the two nations in the event that a bilateral agreement between the countries was

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175. *See id.*

176. As explained by one aviation newsletter, the incumbent carriers "enjoy long-standing slot preferences at crowded Japanese airports, leaving most other carriers to fight for scraps among the remaining few flight and capacity openings." *New Coalition*, *supra* note 124.

177. *See* Dasburg Senate Testimony, *supra* note 1. The flight frequency is as of June 1997. *See id.* One commentator has said that Northwest's hub at Tokyo's Narita Airport "funnels flights in and out like Delta does at Atlanta." Goldman, *supra* note 117, at 6. The U.S. carrier coming in second in the number of routes between the two countries has 155 flights a week. *See Dasburg Senate Testimony*, *supra* note 1.

178. *See* Hugh Jackson, *Progress Made on European-to-Vegas Flights*, LAS VEGAS BUS. PRESS, Oct. 27, 1997, at 1, *available in* 1997 WL 9378192.

179. *See* Kennedy, *supra* note 125, at 1D.

180. Dasburg Senate Testimony, *supra* note 1.

181. *See id.*; *Japan, U.S. Wrangle Over Access to Rich Asian Cargo Market*, AIRLINE FIN. NEWS, July 17, 1995, *available in* 1995 WL 6703481 [hereinafter *Wrangle Over Access*].

182. *See Wrangle Over Access*, *supra* note 181.

183. *See Japan, U.S. Set to Resolve Aviation Row in Sept.*, JAPAN TRANSP. SCAN, July 14, 1997, *available in* 1997 WL 8249966 [hereinafter *Aviation Row*].

184. *See id.*

185. *See Japan May Seek Stability As Much As Change in Bilateral Talks*, AIRLINE FIN. NEWS, Aug. 14, 1995, *available in* 1995 WL 6703586 [hereinafter *Bilateral Talks*].

reached.[186] Initial plans called for the two carriers to provide service between Tokyo and Los Angeles.[187]

As for cargo carriers, Federal Express is the largest U.S. cargo carrier in the Asian market.[188] As of July 1995, Federal Express and Northwest Airlines together flew sixty-two all-cargo flights each week between the United States and Japan.[189] Their Japanese competitors, Nippon Cargo Airways (NCA) and the passenger carrier JAL, operated only twenty-six weekly flights between the two countries.[190] Overall, the U.S. carriers control sixty-two percent of the U.S.-Japan cargo market.[191] In addition, Federal Express and Northwest operate fifty-five weekly flights beyond Japan to other destinations in Asia.[192]

Other agreements between the United States and Japan have given additional airlines access to the aviation market that serves the two countries. These agreements were signed in the late 1970s.[193] Although their routes and numbers of flights are limited,[194] American, Delta, Continental, United Parcel Service, and Polar Air have rights to serve Japan under these agreements.[195] Trans World Airlines and U.S. Airways have no authority to serve Japan directly under any agreement.[196] One of the most important agreements was a 1985 pact that gave a significant number of flights between the United States and Japan to American, Continental, and Delta in exchange for giving Nippon Cargo and All Nippon Airways (ANA) limited access to the U.S. market.[197] This agreement granted access only to fly between the United States and Japan; it did not grant rights to fly from

186. *See Japanese, US Airlines to Tie Up in Passenger Services: Report*, AGENCE FRANCE-PRESSE, Aug. 31, 1997, *available in* 1997 WL 13386602.

187. *See id.*; see also *ANA Sees U.S.-Japan Traffic Doubling by 2000; Wants Quick Fix to Bilateral*, ASIAN AVIATION NEWS, Jan. 26, 1996, *available in* 1996 WL 8303177 (discussing code sharing between ANA and Delta with service between Osaka and New York City, Portland, Oregon and Honolulu) [hereinafter *ANA Quick Fix*].

188. *See Wrangle Over Access*, *supra* note 181.

189. *See* Feldman, *supra* note 158, at 57.

190. *See id.*

191. *See id.* at 58.

192. *See id.* at 57-58.

193. *See* Hunnicutt Senate Testimony, *supra* note 32.

194. For example, American Airlines as a MOU carrier is prohibited from operating more than 20 round-trip flights per week. *See* Crandall House Testimony, *supra* note 151. American may serve only Tokyo, and it may do so only from Dallas/Ft. Worth, Seattle, and San Jose. *See id.*

195. *See* Hunnicutt Senate Testimony, *supra* note 32.

196. *See id.*

197. *See* Feldman, *supra* note 158, at 58. Neither ANA nor Nippon had privileges to fly to the United States under the 1952 agreement. *See Aviation Talks Fail*, *supra* note 119.

Japan to other destinations in Asia.[198] Japan did not desire more U.S. competition in their market—even on a limited basis, without beyond rights. The Japanese government, however, succumbed to the demands of Nippon Cargo and ANA to help the carriers get at least limited access to the lucrative U.S. market.[199]

ANA's pressure upon the Japanese government has been a constant factor in aviation negotiations between the United States and Japan. ANA, the world's ninth largest airline,[200] is trying to expand its international base.[201] Paradoxically, ANA plans major cutbacks in labor costs as it expands because it needs to compete with more efficient foreign airlines.[202] ANA relies heavily on its domestic routes, which account for seventy percent of its passenger business.[203] In fiscal year 1995, ANA increased its domestic passenger traffic by a steady five percent, but its international traffic increased by more than twenty percent.[204] The following year, ANA had similar growth, expanding its international capacity by another twenty-three percent.[205] In 1997, the airline predicted that it would increase international capacity by another twenty-five percent.[206]

ANA maintains only a five percent share of the U.S.-Japan aviation market.[207] The airline was hoping for "major growth in its operations to the United States," and its expansion plans were

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198. *See Booz Allen Study*, *supra* note 126.

199. *See* Feldman, *supra* note 158, at 57. For a detailed analysis of ANA and its relationship with other Japanese airlines, see ARTHUR J. ALEXANDER, CIVIL AVIATION IN THE U.S. AND JAPAN (Japan Economic Institute Report No. 34A, 1994) *available at* <http://www.gwjapan.com/ftp/pub/policy/jei/1994/a-series/0902-94a.txt>.

200. *See ANA Quick Fix*, *supra* note 187.

201. *See Japan Could Loosen Up on 'Beyond Rights' for All Nippon Access*, ASIAN AVIATION NEWS, May 2, 1997, *available in* 1997 WL 8469197. In April 1997, ANA announced a new five-year plan that called for increasing international passenger service by sixteen to seventeen percent per year through 2002. *See id.* However, these aggressive plans may be altered because just shortly after they were announced the president of ANA, Seiji Fukatsu, resigned. *See All Nippon Leadership Instability Prompts Questions About Direction of ANA and Open Skies*, WORLD AIRLINE NEWS, May 23, 1997, *available in* 1997 WL 8541705. Some aviation analysts called ANA's international plans "unrealistic". *See id.*

202. *See ANA Profit Slight on Aggressive Expansion*, ASIAN AVIATION NEWS, June 14, 1996, *available in* 1996 WL 8303288 [hereinafter *Aggressive Expansion*]; *ANA Quick Fix*, *supra* note 187. In addition to cutting labor costs, ANA planned to increase aircraft utilization by ten percent in the three years through March 1998 as another cost-saving measure. *See ANA Wants to Expand More Vigorously Abroad*, ASIAN AVIATION NEWS, Feb. 21, 1997, *available in* LEXIS, NEWS Library, AAVN File [hereinafter *ANA Wants to Expand*].

203. *See Aggressive Expansion*, *supra* note 202.

204. *See id.*

205. *See ANA Plans*, *supra* note 174, at 223.

206. *See ANA Wants to Expand*, *supra* note 202.

207. *See ANA Quick Fix*, *supra* note 187.

dependent on the United States and Japan reaching some form of aviation liberalization agreement.[208] ANA was "anxious" to begin service from Osaka's Kansai Airport to Honolulu, Hawaii and to cities in the continental United States.[209] To help it take advantage of any new agreement, ANA instituted an alliance with Delta Airlines in 1995.[210] The plan allows the two airlines to coordinate flight schedules and recognize each other's frequent flyer programs.

A. *Differing Interpretations of the 1952 Aviation Agreement*

Many disputes between the United States and Japan erupted in the mid-1990s, fueled by an aggressive public relations war by those U.S. airlines upset with the way Japan was treating them under the 1952 agreement. In 1997, Transportation Department officials, who were in the middle of negotiations, publicly stated that the failure to reach a consensus on aviation trade policy had created a "strained relationship" between the two countries.[211] Of particular concern to U.S. airlines and U.S. government officials was Japan's refusal to approve additional services for incumbent carriers through Japan to other destinations in Asia.[212]

The United States argued, as did aviation experts, that the 1952 agreement clearly imposed a duty on Japan to authorize

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208. *ANA Plans*, *supra* note 174, at 223. The United States is just one region in which ANA hopes to expand. As the U.S.-Japan negotiations were underway, ANA was planning new service to Europe. ANA wanted to begin service to Frankfurt from Tokyo and to Milan from Osaka. *See Aggressive Expansion*, *supra* note 202. In January 1998, ANA announced a joint flight arrangement with Germany's Lufthansa in which the two airlines would code-share some flights and put each other's names on their aircraft. *See Japan's ANA to Launch Code-Sharing Flights with Lufthansa*, Dow Jones Int'l News Service, Jan. 29, 1998, *available in* WESTLAW, DJINS database. In addition, ANA planned to increase service to London and Vienna from Osaka, and to Paris from Tokyo. *See ANA Plans*, *supra* note 174, at 223; *see also ANA Wants to Expand*, *supra* note 202. Other international expansion included routes from Japan to Delhi, Bombay, Bangkok, Singapore, Sydney, Beijing, Shanghai, and Hong Kong. *See Aggressive Expansion*, *supra* note 202; *ANA Plans*, *supra* note 174, at 223; *ANA Wants to Expand*, *supra* note 202. At present, Hong Kong is becoming ANA's largest international market. *See ANA Plans*, *supra* note 174, at 223.

209. *ANA Wants to Expand*, *supra* note 202. ANA is particularly interested in routes from Japan to San Francisco, Chicago, and Orlando. *See ANA Quick Fix*, *supra* note 187.

210. *See ANA Quick Fix*, *supra* note 187. In order for ANA to receive any benefit from the agreement, a new agreement must be reached. *See id.* In 1996, ANA had planned to start code sharing with Air Canada as well. *See Aggressive Expansion*, *supra* note 202.

211. Murphy House Testimony, *supra* note 13.

212. *See id.*; Asra Q. Nomani, *Japan-U.S. Aviation Talks Hit Turbulence*, ASIAN WALL ST. J., Sept. 25, 1997, at 2, *available in* 1997 WL-WSJA 11017129.

such beyond rights when asked by U.S. carriers.[213] Japan had refused to approve flights by United and Northwest Airlines through Osaka to Jakarta.[214] As of June 1997, Northwest had been trying to get further beyond rights for more than a year.[215] Furthermore, Japan's government had refused to allow Federal Express to fly beyond Japan to several Asian destinations since 1993.[216] Federal Express had sought permission to fly through Japan to the Philippines, China, and Indonesia.[217] In still other instances, Japan permitted only short-term authority to fly routes in which U.S. airlines had sought full approval, such as United's request for additional Los Angeles to Tokyo flights.[218] In yet another sticking point, the Japanese consistently used their authority under the 1952 agreement to restrict changes in air fares, while the United States routinely allowed for changes.[219]

Although these disagreements could be characterized as relatively minor, U.S. airlines were concerned because of the precedent they were setting for future operations. The disagreements threatened U.S. airline plans to use Japan as a "launching pad" to serve the growing Asian market.[220] According to some U.S. airline officials, Japan's refusal to give limited beyond rights now seriously threatened airline expansion.[221] To

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213. *See* Murphy House Testimony, *supra* note 13; Nomani, *supra* note 212, at 2; *see also* Civil Air Transport Agreement, *supra* note 6, 4 U.S.T. at 1950.

214. *See* Murphy House Testimony, *supra* note 13.

215. *See* Dasburg Senate Testimony, *supra* note 1.

216. *See* Smith Senate Testimony, *supra* note 2. According to Federal Express executives, the cargo airline had no problem with access or beyond rights from 1989 through 1993. *See id.* Then, in 1993, the Japanese government required filings for new rights to be sent to the Ministry of Transport rather than the Ministry of Foreign Affairs. *See id.* According to Federal Express officials, the Japanese government then "arbitrarily and without notice, refused to permit FedEx to operate certain schedules authorized by the Air Transport Agreement." *Id.* Upon hearing of Japan's actions, House Transportation Committee Chairman Bud Shuster drafted legislation that would prohibit Japanese carriers from flying Asian passenger and cargo traffic to the United States through Japan unless U.S. carrier beyond rights were recognized. *Congress, Conciliators On Collision Course Over Japan as DOT Reviews Policy*, 328 AVIATION DAILY 447 (1997), *available in* 1997 WL 14516356.

217. *See* Hunnicutt Senate Testimony, *supra* note 32.

218. *See* Murphy House Testimony, *supra* note 13. The aviation trade disputes escalated and the United States retaliated and refused to act on a request by Japan Airlines to provide service between Honolulu and Hiroshima. *See id.* Also the United States limited the duration of Japan Airlines' authority to fly from Sendai to Honolulu. *See id.*

219. *See* James W. Brosnan, *Japanese Close to Air Treaty with U.S.*, COM. APPEAL (Memphis, Tenn.), Oct. 25, 1997, at B3, *available in* 1997 WL 14516356.

220. Kennedy, *supra* note 125, at 1D.

221. *See id.*

U.S. airlines, these beyond rights were "vital" to their Asian operations.[222]

The Japan-U.S. aviation disputes of the mid-1990s resulted from differing views as to the purpose and intent of the 1952 agreement.[223] Specifically, Japan interpreted the agreement as allowing for restrictions on U.S. incumbent carrier access, while the United States interpreted it as offering unconditional flight rights.[224] Furthermore, Japan saw the agreement as providing an unfair advantage to U.S. carriers, given the new market conditions that had developed in the forty years since the agreement was signed, and complained that the United States was violating the underlying intentions of the agreement.

United States Department of Transportation officials recognized that the Japanese considered the agreement unfair but believed that the Japanese were simply complaining about competition. Deputy Assistant Secretary of Transportation Murphy testified before the House Aviation Subcommittee that he thought Japan's increasingly obstructionist actions were the result of "a perception on the part of the Japanese that the existing aviation agreement and related understandings . . . are unfair to Japan and give U.S. carriers more access to Japan's market than Japanese carriers have to the U.S. market."[225] Murphy said that it was true that since the late 1980s U.S. carriers had been increasing their market share in the U.S.-Japan aviation market, but that those gains were the result of more efficient operations and not an unfair aviation agreement.[226] Testifying before the Senate Aviation Subcommittee, Assistant Secretary of Transportation Hunnicutt echoed Murphy's comments. Hunnicutt acknowledged that the Japanese perception is that U.S. carriers "abuse" their flight rights.[227] But, Hunnicutt also emphasized that the market share disparity is the result of the U.S. carriers' ability to compete more efficiently than Japanese carriers.[228]

The U.S. carriers' share of the passenger market between the United States and Japan has risen from about fifty percent to nearly sixty-six percent over the last decade.[229] The United

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222. *Id.*

223. *See generally* Jacqueline McFadyen, *U.S.-Japan Civil Aviation: Prospects for Progress* (visited June 6, 1997) <http://www.iie.com/97-2.htm> (a working paper summarizing a Feb. 13, 1997 forum discussion on U.S.-Japan aviation relations sponsored by the Institute for International Economics).

224. *See Aviation Row*, *supra* note 183.

225. Murphy House Testimony, *supra* note 13.

226. *See id.*

227. Hunnicutt Senate Testimony, *supra* note 32.

228. *See id.*

229. *See id.*

States was quick to point out that Japan's share in the of the U.S.-Japan aviation market was roughly equivalent to the current U.S. share under the same agreement from the 1970s through the late 1980s.[230] According to U.S. officials, U.S. carriers were reaping the benefits of deregulation, which forced them to become more efficient in the late 1970s and early 1980s.[231] U.S. officials further noted that ANA and JAL had not been forced to respond to the same competitive pressures because of Japan's tight regulation of the industry.[232]

As a result of being protected from competition in the domestic market,[233] both ANA and JAL are "hopelessly inefficient by American standards."[234] ANA's operating costs are estimated to be eighty percent higher than the competing U.S. carriers, and JAL's are estimated to be about sixty-six percent higher.[235] Some of these higher costs are beyond the carriers' control because they result from higher fixed costs such as landing charges and fuel costs.[236] Other costs are within the airlines' control,[237] but until recently, they have been unwilling to cut these expenditures.

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230. *See* Murphy House Testimony, *supra* note 13.

231. *See* Baliles, *supra* note 13. Congress passed the Airline Deregulation Act in 1978. *See id.* The Act gave domestic airlines—and not the government—the right to choose which routes they would fly, how often they would fly them, and what fares they would charge. *See* INTERNATIONAL AVIATION, *supra* note 15, at 12. For an in-depth analysis of Japan's regulation of the domestic aviation market, see ARTHUR J. ALEXANDER, DOMESTIC AVIATION IN JAPAN: MARKET FORCES/REGULATION (Japan Economic Institute Report A, 1996) available at <http://www.gwjapan.com/ftp/pub/policy/jei/1996/a-series/0329-96a.txt>.

232. The Washington Post, in a blunt editorial staking out the U.S. view, said that "Japan has resisted fiercely such deregulation, both because it fears for its long-coddled and relatively inefficient national carrier, Japan Airlines, and because full deregulation has not, up to now, been Japan's style." *Semi-Open Skies*, *supra* note 24, at A24.

233. Japan did begin some domestic "deregulation" in 1996, which allowed JAL and ANA to lower their fares to a level that took into account the direct route expenses. *See Japanese Carriers*, *supra* note 101. A Japanese aviation analyst said that the limited deregulation was designed to stimulate competition and efficiency in the Japanese airline industry. *See id.* As a result of the deregulation, Japanese airlines discounted fares by an estimated forty-five to fifty percent, according to Shoei Hino of Japan's Civil Aviation Bureau. *See id.* For a detailed assessment of the impact on U.S. airlines of domestic deregulation, see ALEXANDER, *supra* note 231.

234. *Risky Take-off: Japanese Airlines*, ECONOMIST, Oct. 25, 1997, *available in* 1997 WL 13361238 [hereinafter *Risky Take-off*]. *See* Japanese Carriers, *supra* note 101 (explaining that Japanese airlines may not be able to compete against their U.S. competitors in a free market).

235. *See Risky Take-off*, *supra* note 234.

236. *See id.*

237. *See Japanese Carriers*, *supra* note 101. Industry analysts estimate that the Japanese carriers' labor costs are about double that of U.S. and other Asian carriers. *See id.* The Japanese airlines did try contracting out some cabin staff, but it did not lead to significant labor savings. *See id.*

At the time of the bilateral negotiations, JAL had already instituted some measures to become more efficient. JAL was cutting about $830 million a year from its overhead.[238] The airline had also cut 5,000 jobs since 1989, bringing its workforce down to 17,000.[239] In a unique move for a Japanese company, JAL has opened maintenance facilities in Singapore and southwest China to cut costs.[240] In the new facility, JAL can overhaul a Boeing 747 for one-sixth of what it would cost in Japan.[241] Unlike JAL, ANA has not been able to implement significant cost-cutting measures. Seiji Fukatsu, the former president of ANA who tried to reform the company, quit after meeting resistance to efforts to streamline operations.[242] Still, ANA has been able to maintain an operating profit because a majority of its service is in the high-margin Japanese domestic market.[243]

To protect Japanese-based airlines from U.S. competition, Japanese officials had steadfastly refused to negotiate a full-fledged open skies agreement with the United States. Hiromichi Toya, Japan's Vice Transport Minister for International Affairs, stated his government's aversion to the U.S. position after the September, 1997 negotiations: "It is obvious that we cannot accept any proposal that would commit us to open skies. It would be difficult to continue talks if we would be forced to accept a proposal like that."[244] Instead of open skies, Japan had been seeking "equality" in any agreement. To the Japanese negotiators, equality meant that each country should have the same number of carriers with liberal access to each other's market.[245] Essentially, the Japanese version of equality meant that only two carriers would have open access to the Japanese market, and in exchange, both Japanese carriers—ANA and JAL—would have open access to the U.S. market.[246] U.S. negotiators found this approach unworkable. Deputy Assistant Secretary of Transportation Murphy outlined the U.S. view on Japan's approach to aviation negotiations: "This approach would essentially give Japan's international airline industry unrestricted access to the US market while excluding a major portion of the US industry from liberal access to Japan."[247]

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238. *See Risky Takeoff*, *supra* note 234.
239. *See id.*
240. *See id.*
241. *See id.*
242. *See id.*
243. *See id.*
244. *Aviation Pact*, *supra* note 33.
245. *See* Murphy House Testimony, *supra* note 13.
246. *See id.*
247. *Id.*

To the Japanese, the "equality" approach to negotiations made sense and was reasonable. Japanese officials believed that the 1952 plan clearly created an "imbalance" in favor of the United States.[248] To the Japanese, the United States had two airlines with essentially unrestricted access to the Japanese market, while Japan had only one air carrier with the same rights to the U.S. market. To Japan, that did not represent fair trade.[249] Similarly, Japanese officials felt that changed conditions made unrestricted U.S. access to the Japanese market unnecessary. When the 1952 agreement was signed, U.S. carriers flying into Asia needed to land in Japan because of their limited range.[250] Today, however, it is no longer absolutely necessary to land in Japan because newer planes can make the trans-Pacific flight to Asia without stopping in Japan to refuel.[251] As the Japanese officials saw it, U.S. carriers wanted access to Japanese airports not out of geographic necessity, but to exploit the large Japanese passenger and cargo markets. The Japanese government said that U.S. carriers, by continuing to use Japanese landing rights in this manner, "violated the spirit" of the agreement.[252] Japanese airline officials accused U.S. airlines of unfair competition, price undercutting, and market domination.[253] Japanese sentiment was that the beyond rights permitted low-cost U.S. airlines to dominate profitable routes between Japan and other destinations in Asia.[254]

In part, the Japanese contentions were true. But whether the 1952 agreement is the cause of the market share imbalance was not so certain. As JAL Chairman Susumu Yamaji admitted to the International Aviation Club in 1992, there has been a change in airline traffic between the two countries with more Japanese than Americans flying between the two nations.[255] When the agreement was signed in 1952, more than eighty percent of passengers between the United States and Japan were from the

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248. *See Japan, U.S. Agree on Safety Net for Aviation Deal*, JAPAN TRANSP. SCAN, Oct. 27, 1997, *available in* 1997 WL 15608966 [hereinafter *Safety Net*]. The Japanese media opined that Japanese negotiators "should continue to assert [Japan's] views and work to win the understanding of the United States." *Persevering for 'Equality in the Sky,'* DAILY YOMIURI, Aug. 8, 1997, *available in* 1997 WL 12800617 [hereinafter *Equality in the Sky*].

249. *See Safety Net, supra* note 248.

250. *See Beyond Rights, supra* note 168.

251. *See id.; UAL's Wolf to Japan*, AIRLINE FIN. NEWS, July 5, 1993, *available in* 1993 WL 2887388 [hereinafter *Wolf to Japan*].

252. *Wolf to Japan, supra* note 251.

253. *See id.*

254. *See id.*

255. *See JAL Chairman Yamaji: Time to Modify Japan-U.S. Bilateral Air Agreement*, AIRLINE FIN. NEWS, Nov. 9, 1992, *available in* 1992 WL 2251539 [hereinafter *JAL Chairman Yamaji*].

United States, but now eighty-five percent of the passengers are Japanese.[256] Because of the change in traffic, Yamaji said the 1952 bilateral agreement "functions largely in favor of the U.S." and that there is "no reason to justify the necessity of such a large U.S. presence in the Asian markets."[257] Although JAL had the same rights as U.S. carriers to fly through U.S. cities on their way to third countries, JAL operated only one such route.[258] U.S. airline officials argued that U.S. carriers should not lose their beyond rights simply because they used their rights "more aggressively" than JAL.[259] JAL countered that the opportunities beyond the United States were "not financially rewarding," and that the airline did not necessarily desire to take advantage of those rights.[260] To JAL and the Japanese negotiators, it would have been more advantageous to either restrict or drop beyond rights altogether rather than deal with U.S. competition in the Asian market.[261]

United States carriers are indeed competing fiercely with their foreign counterparts in the Asian market. U.S. carriers fly to more cities in both the United States and Japan than their Japanese competitors.[262] U.S. carriers have twice the number of flights between the two countries.[263] And they fly about two-thirds of the passenger traffic between the United States and Japan even though Japanese passengers account for more than 80 percent of those traveling between the two countries.[264] In addition, U.S. carriers have far more passengers making use of beyond rights.[265]

Given the state of the market, and the relative inefficiency of Japanese airlines, it is not hard to understand why the Japanese argued that open skies would result in some sort of U.S. "monopolization of routes."[266] The Japanese believed that the market is so unequal that competition alone cannot account for the difference in market share.[267] To Japan, the U.S. market

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256. *See id.*

257. *Id.*

258. *See Beyond Rights, supra* note 168. JAL flies from Los Angeles to Sao Paolo, Brazil, to serve a large Japanese community located there. *See Wolf to Japan, supra* note 251; *Bilateral Talks, supra* note 185.

259. *Wolf to Japan, supra* note 251.

260. *Id.*

261. *See Bilateral Talks, supra* note 185 (discussing the greater benefits that flow to the United States from beyond rights than flow to Japan).

262. *See Equality in the Sky, supra* note 248.

263. *See id.*

264. *See id.*

265. *See id.*

266. *Id.*

267. *See id.*

share is the direct result of an unfair advantage acquired under the 1952 agreement.[268] Japanese officials are also quick to point out that "open skies" policy is not completely open because the United States does not allow foreign carriers to establish hubs at U.S. destinations.[269]

Because of the U.S. strength in the aviation markets, Japan felt it was necessary to stand up to the United States in aviation negotiations. The tension between the two countries had been building for years. At a 1995 Asian-Pacific industry meeting, JAL's Director of International Public Relations Geoff Tudor blamed the United States for aviation tensions around the world: "If you were to take a sweeping look at the aeropolitical problems affecting the international civil aviation industry worldwide, you might—after analysis—realize that a common denominator in many of these problems was one country—the United States of America."[270] The JAL official went on to say that the U.S. carriers "flagrantly abused" their beyond traffic rights and that the U.S. airlines "are resented in Asia, not because they are in the market at all, but because they are greedy, and take too much."[271] As negotiations got underway, Japanese airline officials continued their public relations campaign against U.S. carriers in an effort to convince other countries to join and combat the "America problem."[272]

B. *Drawn-Out Negotiations and Numerous Aborted Takeoffs*

The United States and Japan have both sought to renegotiate the 1952 aviation pact for years. Industry and government officials for both countries have been discussing the benefits of crafting a new agreement since 1992.[273] In 1993, the fifteen-member Orient Airlines Association recommended that Asian governments negotiate "fairer agreements which provide a level playing field" to help Asian carriers who compete against U.S. airlines.[274] In 1995, specific disputes kick-started aviation negotiations between the United States and Japan. After Japan refused to allow Federal Express to expand its service from Japan to its Philippines hub at Subic Bay, the U.S. government

268. *See id.*

269. *See* Jackson, *supra* note 178, at 1. However, it should be noted that neither the U.S. nor Japan allows foreign airlines to fly between their domestic destinations. *See id.*

270. *Warnings*, *supra* note 151, at 327.

271. *Id.*

272. James, *supra* note 95, at 16.

273. *See JAL Chairman Yamaji*, *supra* note 255 (discussing how Japanese airline officials were seeking to change the 1952 bilateral agreement).

274. *See Wolf to Japan*, *supra* note 251.

threatened sanctions.[275] To head off an aviation trade war, the two parties engaged in negotiations[276] and reached a limited agreement that would allow Federal Express to begin full operations to the Philippines in exchange for six additional weekly cargo flights by Nippon Cargo Airlines (NCA) and JAL to Chicago.[277] Even more importantly, during the cargo negotiations, the two countries agreed to begin comprehensive talks in September 1995 about overhauling the entire 1952 agreement.[278] Some U.S. airline officials expressed their frustration that the United States would give in to the Japanese, arguing that it was Japan, not the United States, that was violating the 1952 agreement.[279] Due to the intense criticism concerning the talks and the difficulty of negotiations, the early discussions focused primarily on cargo issues.[280]

As early discussions got underway in 1995, ANA joined those U.S. carriers locked out of the 1952 bilateral agreement in asking for a new bilateral pact.[281] The primary reason for ANA's interest was not only to get access to the U.S. market, but also to get approval for a code-sharing alliance it had signed with Delta Airlines.[282] In 1996, ANA CEO Seiji Fukatsu reemphasized the importance of reaching a new agreement and publicly endorsed

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275. *See U.S. Sanctions Spark Talk of Bilateral Battle with Japan*, WORLD AIRLINE NEWS, June 26, 1995, *available in* 1995 WL 6155392 [hereinafter *Sanctions Spark Talk*]. The U.S. sanctions would have prohibited JAL and Nippon Cargo Airlines (NCA) from carrying any cargo that did not originate in Japan (for example, from Hong Kong, Singapore, Indonesia, Taiwan, and Thailand) on their scheduled all-cargo services to the United States. *See id.*

276. *See Wrangle Over Access, supra* note 181.

277. *See Japan/U.S. Reach Agreement, FedEx Begins Intra-Asia Service Sept. 4*, ASIAN AVIATION NEWS, July 28, 1995, *available in* 1995 WL 6690567 [hereinafter *FedEx Begins Service*]; *U.S. and Japan Reach Agreement, New Bilateral Talks in September*, AIRLINE FIN. NEWS, July 31, 1995, *available in* 1995 WL 6703523 [hereinafter *New Bilateral*]. Prior to the authorization of additional flights, the two Japanese carriers had seven flights a week to Chicago from Tokyo. *Fedex Begins Service, supra.*

278. *See FedEx Begins Service, supra* note 277; *New Bilateral, supra* note 277. JAL announced that it was "pleased that a way has been opened to discuss the revision of the basic air transport agreement itself. We now expect the Japanese government to make every effort to revise this outdated and unfair agreement." *Id.*

279. *See U.S. Should Stiffen 'Timid' Stance in Japan Talks, FedEx Tells Congress*, 323 AVIATION DAILY 425 (1996), *available in* 1996 WL 2081181 [hereinafter *Timid Stance*].

280. *See ANA Chief Urges U.S., Japan To Start Passenger Talks*, 323 AVIATION DAILY 91 (1996), *available in* 1996 WL 2079614 [hereinafter *ANA Chief*].

281. *See ANA Aligns Itself with U.S. Carriers Calling for U.S.-Japan Talks*, WORLD AIRLINE NEWS, Dec. 4, 1995, *available in* 1995 WL 12731857 [hereinafter *ANA Aligns with U.S.*].

282. *See id.*

changes that would eliminate different treatment for incumbent airlines and those not covered by the 1952 agreement.[283]

Cargo negotiations continued between the United States and Japan into 1996, with passenger issues taking on importance as the year progressed.[284] By this time, the need to rework the aviation agreement had made it to the two countries' top decision-makers. At the U.S.-Japan Summit in Tokyo in the spring of 1996, President Clinton urged Japan's Prime Minister Hashimoto to embrace open skies and to abide by the 1952 agreement as negotiations got underway.[285] President Clinton himself was receiving pressure to get an open skies agreement. In April 1996, twenty-three members of the U.S. Airports for Better International Air Service urged Clinton to continue talks with the goal of achieving open skies.[286] The cargo talks concluded in April 1996, but neither U.S. nor Japanese airlines were completely satisfied with the results.[287] Northwest, United, and Federal Express, as incumbent airlines, each received rights to fly cargo on three additional routes.[288] Federal Express also "preserved" its existing services beyond Japan.[289] United Parcel Service, one of the airlines allowed to fly into Japan under a memorandum of understanding, received six additional weekly flights beyond Osaka carrying Japanese as well as trans-Pacific cargo.[290] In exchange, JAL and NCA each got three more cargo routes to the United States.[291]

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283. *See ANA Chief, supra* note 280, at 91.

284. *See* Hunnicutt Senate Testimony, *supra* note 32; *Aviation Talks Fail, supra* note 119.

285. *See* Dasburg Senate Testimony, *supra* note 1.

286. *See USA-BIAS Seeks U.S.-Japan Talks On Liberalizing Passenger Service*, AIRPORTS, Apr. 23, 1996, at 160, *available in* LEXIS, NEWS Library, AIRPTS File.

287. *See UPS Wins in US-Japan Cargo Round, But Everybody Got Something*, WORLD AIRLINE NEWS, Apr. 8, 1996, *available in* LEXIS, MARKET Library, IACNWS File [hereinafter *Cargo Round*].

288. *See id.*

289. *Id.*

290. *See id.* Just before gaining its additional routes, UPS had announced a plan to spend $400 million to construct a hub in Taiwan. *See id.* In August of 1996, UPS worked on its own and received rights to operate twelve additional weekly flights between the United States and Osaka and beyond Osaka to two additional Asian destinations. *See Japanese Unmoved By Threat of U.S. Sanctions*, AIR CARGO REP., Aug. 1, 1996, *available in* LEXIS, TRANS Library, AIR File [hereinafter *Japanese Unmoved*]. UPS had operated in the market under a joint venture with Japanese-based Yamato since 1991. *See id.*

291. *See Cargo Round, supra* note 287.

At the conclusion of the spring 1996 cargo talks, the negotiators agreed to discuss passenger issues.[292] Some short-term talks led to temporary summer service schedule increases for both United and JAL.[293] But in June, the comprehensive passenger talks turned acrimonious. The talks deadlocked after the Japanese refused the United States request to allow United and Northwest to expand their service to Jakarta through Japan while the talks continued.[294] Japan was reportedly considering renouncing the agreement altogether, but it did not.[295] By mid-July 1996, the United States was threatening to impose sanctions on JAL and NCA after Japan, balking on an earlier agreement, refused to allow Federal Express to begin its service through Japan to the Philippines, Indonesia and China.[296] As an explanation, the Japanese government released a prepared statement by Japanese Minister of Transportation Yoshiyuki Kamei: "The Japanese Government has been reserving its decision on applications by a U.S. carrier for new beyond routes based upon the Japanese side's interpretation of these agreements."[297] After talks broke down in 1996, Transportation Department officials privately said that negotiations would not continue because of election year political pressures.[298]

Formal talks between the two countries began again in 1997.[299] In late January 1997, Charles Hunnicutt, the U.S Assistant Secretary of Transportation for Aviation and International Affairs, put forth the administration negotiation plans: "We are willing to be pragmatic, as long as we make progress toward a competitive market."[300] Essentially, the United States had given up hope for immediate open skies with Japan and was ready to push for an agreement that created a transition

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292. *See With Service Issues Solved, U.S., Japan to Hold Discussions June 3-4*, 324 AVIATION DAILY 189, May 2, 1996, *available in* LEXIS, NEWS Library, AVDAILY File [hereinafter *Service Issues Solved*].

293. *See id.*

294. *See Japan Poised to Renounce? Airline Passenger Talks Between the US and Japan*, AIRLINE BUS., July 1996, at 8, *available in* LEXIS, TRANS Library, AIR File [hereinafter *Poised to Renounce*].

295. *See id.*

296. *See Japanese Unmoved, supra* note 290.

297. *Id.*

298. *See New Coalition, supra* note 124.

299. *See Aviation Row, supra* note 183.

300. *U.S. Speakers Debate Way to Open Skies, OAA's Stirland Asks Why Go?*, ASIAN AVIATION NEWS, Feb. 7, 1997, *available in* LEXIS, NEWS File, AAVN File [hereinafter *Speakers Debate*]. Hunnicutt and Alan Larson, the Assistant Secretary of State for Economic and Business Affairs led the U.S. negotiating team. *See U.S., Japan Search for Common Ground in Tokyo*, 329 AVIATION DAILY 207 (1997) [hereinafter *Common Ground*].

to open skies within a specific timeframe.[301] The United States also wanted a specific commitment from Japan that it would allow more access for non-incumbent carriers, such as American, Delta, and Continental.[302]

The negotiators met three times during the spring of 1997, and then met again in July and August with the hopes of reaching an agreement by September 1997.[303] Throughout the negotiations, the United States sought to resolve the immediate Federal Express cargo dispute, but the Japanese reportedly "held the issue 'hostage' to force U.S. concession" on the transition to open skies.[304] In September, the negotiators met again but reached no agreement.[305] Alan Larson, the lead U.S. negotiator, stressed his continued commitment to open skies: "The question is how we get there, and I believe there is room for pragmatism."[306] After the September meeting, Larson publicly announced three U.S. objectives in future discussions: permanent resolution of the current disputes, substantial liberalization, and a commitment to "future liberalization."[307] The September meetings focused on a four-year agreement.[308] During the September 1997 meetings, Japanese negotiators refused to accept a full transition to open skies, so the United States retreated "from its original position" and proposed that both sides agree to a four-year deal with a transition to open skies when the interim

301. *See* Hunnicutt Senate Testimony, *supra* note 32; Murphy House Testimony, *supra* note 13; *Speakers Debate, supra* note 300.

302. *See* Murphy House Testimony, *supra* note 13.

303. *See Aviation Row, supra* note 183. The negotiations were held in various locations throughout the year. The July meeting was held in Portland, Oregon, and the August meeting was held in Washington, D.C. *See Negotiators Retrace Gulf as U.S., Japan Partisans Continue Pressure*, 329 AVIATION DAILY 367 (1997); *Negotiators See Path to U.S.-Japan Bilateral, Aim for September Signing*, 329 AVIATION DAILY 61 (1997). In September, the negotiations moved across the Pacific to Tokyo. *See Hanyu, Larson Meet Informally in Attempt to Avoid U.S.-Japan Impasse*, 329 AVIATION DAILY 395 (1997).

304. *Aviation Row, supra* note 183. In July, Japan was reportedly willing to give Federal Express additional cargo rights, but this did not come to pass because Japan wanted the United States to accept less than an open skies arrangement in exchange. *See id.* The Japanese concession would have allowed Federal Express to carry Japanese cargo to other Asian destinations as long as it made up no more than fifty percent of the total revenues per flight—as opposed to a fifty percent limit on cargo weight under the current agreement. *See id.* Under this proposal, Federal Express would have been able to increase shipping from Japan into Asia because the revenues per flight from the United States to Asia are much greater than from Japan to other Asian markets. *See id.*

305. *See* Nomani, *supra* note 212, at 2.

306. Kennedy, *supra* note 125, at 1D.

307. *USIS-Japan/US Civil Aviation Talks Extended*, ASIA PULSE, Sept. 30, 1997, *available in* 1997 WL 13565137.

308. *See* Nomani, *supra* note 212, at 2.

deal expired.[309] This four-year transition to open skies was not accepted outright, and the two nations failed to reach an agreement on whether open skies would ever be implemented.

Other sticking points in the September 1996 meetings included the availability of takeoff and landings slots at Japanese airports for U.S. carriers, the extent to which U.S. carriers would be allowed to fly through Japan to other Asian destinations, and whether code-sharing agreements would be allowed between Japanese and U.S. airlines.[310] Beyond rights presented a particularly formidable obstacle during the September negotiations. Japan sought to restrict the number of U.S. flights that passed through Japan to third countries, but the United States held firm, stressing that beyond rights were already allowed in the 1952 agreement.[311]

However, progress was made on one front. Absent open skies, the United States sought one hundred more flights per week into Japan for U.S. carriers.[312] Japan was willing to provide seventy additional weekly flights to Japan and grant Federal Express' request to fly from Japan to other Asian destinations.[313] Still, no agreement was reached, and Federal Express and the other U.S. airlines were unable to take advantage of any greater access.[314]

Following some preliminary meetings, high-level negotiations followed in late October of 1997.[315] U.S. negotiators continued their efforts to create a "trigger mechanism" that would require Japan to come back the bargaining table after any interim agreement expired.[316] The United States was concerned that once ANA was given access to the U.S. market under an interim deal, Japan would have no reason to return to the bargaining table.[317] Still, the United States was willing to negotiate away the trigger mechanism. Absent a formal trigger in the deal, the United States wanted Japan to allow for twenty additional weekly flights (in

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309. *Aviation Pact*, *supra* note 33.

310. *See* Nomani, *supra* note 212, at 2.

311. *See Aviation Pact*, *supra* note 33.

312. *See Aviation Talks Fail*, *supra* note 119.

313. *See Treaty to Open U.S.-Japan Air Traffic*, PAC. BUS. NEWS (Honolulu, Haw.), Sept. 29, 1997, at 32, *available in* 1997 WL 12191546 [hereinafter *Air Traffic*].

314. *See* Nomani, *supra* note 212, at 12. Federal Express was particularly disadvantaged by the lack of agreements because it needed the pact completed by September, 1996 so it could begin its planned 1997 service expansion to China and other Asian markets. *See id.*

315. *See Aviation Pact*, *supra* note 33; *Aviation Talks Fail*, *supra* note 119; *Japan, U.S. Eye 4-Year Deal As Aviation Talks Resume*, JAPAN TRANSP. SCAN, Oct. 27, 1997, *available in* 1997 WL 15608964 [hereinafter *Aviation Talks Resume*].

316. *Risky Takeoff*, *supra* note 234.

317. *See Safety Net*, *supra* note 248.

addition to the seventy that Japan had suggested in the September negotiations). The United States also wanted Japan to provide access to one or two more U.S. airlines.[318] If Japan was willing to agree to the additional flights, any agreement would reportedly have used phrases such as "full liberalization," but without formalizing a commitment from Japan for full-fledged open skies.[319] However, the October discussions became bogged down, and the United States threatened to impose sanctions on Japan if aviation talks did not reach an agreement.[320] U.S. negotiators were hoping to push the Japanese into a completed agreement by the November, 1997 Asia-Pacific Economic Cooperation forum in Canada, and if not then, at least by year's end.[321]

Negotiators met again in November,[322] but they agreed only to talk further. To encourage substantive negotiations, the United States withdrew its threat of sanctions at the beginning of the November talks.[323] An Asian currency crisis only made the November negotiations even more difficult. As domestic passengers curbed their travel because of tight financial times, Japan's airlines and the Japanese negotiators became increasingly wary of allowing more competition.[324] December talks in Tokyo made some headway when the Japanese agreed to increased takeoff and landing slots for U.S. carriers at Tokyo's Narita Airport.[325] Japanese negotiators had earlier refused U.S. demands for more slots saying that the airports were running at full capacity.[326] Although they could not create more space, the Japanese increased the allocation by allowing more flights to be jointly operated by U.S. and Japanese carriers.[327] Despite this progress, the larger issue of increasing the number of flights and

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318. *See Risky Takeoff, supra* note 234; *Safety Net, supra* note 248.

319. *Aviation Talks Resume, supra* note 315; *see Safety Net, supra* note 248.

320. *See U.S. Rescinds Threat of Sanctions Against Japan*, Japan Econ. Newswire, Nov. 15, 1997, *available in* WESTLAW, JWIRE database [hereinafter *U.S. Rescinds Threat*].

321. *See* Brosnan, *supra* note 219, at B3; Kohei Murayama, *U.S. Tables New Proposals on Aviation Talks with Japan*, Japan Econ. Newswire, Nov. 8, 1997, *available in* WESTLAW, JWIRE database; *No Deal, supra* note 37.

322. *See U.S., Japan to Meet for Fifth Round of Aviation Talks*, STAR-TRIB. (Minneapolis-St. Paul, Minn.), Nov. 13, 1997, at 1D, *available in* 1997 WL 7589982 [hereinafter *Fifth Round*]. The November talks were held in San Francisco. *See US Hopes to Build on "Incremental Progress" in Air Talks with Japan*, AGENCE FRANCE-PRESSE, Nov. 12, 1997, *available in* 1997 WL 13432973.

323. *See U.S. Rescinds Threat, supra* note 320.

324. *See Fifth Round, supra* note 322, at 1D.

325. *See Japan Approves More Slots in Tokyo for U.S. Airlines*, JAPAN TRANSP. SCAN, Dec. 22, 1997, *available in* 1997 WL 15609121.

326. *See id.*

327. *See id.*

routes for U.S. carriers into Japan remained unresolved.[328] More negotiations were planned for January, 1998.[329] Those negotiations successfully led to an agreement.[330]

1. U.S. Airlines Divided Over Goals of Talks

U.S. negotiators not only had to walk through the Japanese trade negotiation minefield, but they also had to avoid friendly fire from a sharply divided U.S. airline industry that sought different results from the aviation negotiations.[331] The airline coalitions were at first divided between those passenger carriers with incumbent rights to the Japanese market (United and Northwest) and those that did not enjoy liberal access to the Japanese market (American, Delta, Continental, and Trans World). The incumbents wanted nothing less than open skies, and they feared that any compromise might leave them with less access than they currently had under the 1952 agreement.[332] The latter group wanted the U.S. government to pursue a middle ground agreement that would provide further access to the market to more U.S. carriers regardless of whether or not it would be equivalent to open skies.[333] Transportation Department officials, in reacting to the split within the industry, poignantly illustrated their desire to appease both domestic camps: "[W]e share . . . a recognition of the need for greater access . . . [a]t the same time, we will continue our longstanding efforts to work with Japan to ensure that U.S. rights under the bilateral [agreement] . . . are appropriately recognized."[334]

The domestic carriers split into various coalitions, with each camp launching multi-million dollar advertising campaigns aimed at influencing the talks.[335] In February of 1996, the non-

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328. *See id.*

329. *See id.*

330. *See infra* Part V.

331. The travel industry press reported the talks were failing in part "because of the difficult position in which U.S. negotiators find themselves as the airlines pit themselves against one another." *Yen for Japan*, *supra* note 122, at 112.

332. *See United Airlines Blasts Rivals' Japan Coalition*, WORLD AIRLINE NEWS, Feb. 26, 1996, *available in* 1997 WL 8067357 [hereinafter *United Airlines*].

333. *See ACCESS U.S.-JAPAN: Statement of Purpose*, (visited Jan. 4, 1998) <http://accessusjapan.org/bi/mission.html> [hereinafter *Statement of Purpose*].

334. *United Airlines*, *supra* note 332.

335. *See* Dori Meinert, *No Deal Yet on Open Skies Dispute Increased Flights Between U.S., Japan Subject of Talks*, PEORIA J. STAR, Oct. 25, 1997, at A10, *available in* 1997 WL 7680706; *No Deal*, *supra* note 37. Northwest Airlines, whose newspaper ad campaign was perhaps the most extensive, reportedly paid as much as $70,000 per advertisement. *See United's Willingness to Settle for Less*

incumbent airlines officially formed an advocacy coalition named Aviation Coalition for Competition and Expanded Services Between the United States and Japan (ACCESS U.S.-Japan).[336] Gerald Baliles, the former Virginia Governor and ex-Chairman of the National Airline Commission, headed the group.[337] The coalition claimed to represent more than two thousand consumer and tourism policy organizations, corporations, airlines (American, Delta, Continental, and Trans World), labor groups and business associations, as well as cities and local officials.[338] The group's policy statement provided that the coalition was formed to increase aviation traffic between the two countries.[339] ACCESS U.S.-Japan announced that it wanted to "expand air service on routes . . . while preserving beyond rights currently being exercised by U.S. carriers."[340]

Northwest and United both stressed that the United States should settle for nothing less than open skies.[341] Northwest CEO John Dasburg told the U.S. Senate that "[i]t would be a trade mistake of colossal proportions" if the United States negotiated an agreement that compromised on U.S. beyond rights and "let our carriers be relegated to the future role of transpacific feeder service for the Japanese carriers serving the rest of Asia."[342] Dasburg said that Japan would eventually accept open skies only if the United States stood its ground in negotiations. Northwest Airlines presented its case to the American Bar Association's Forum on Air and Space Law in February of 1997,[343] arguing that Japan would, in time, accept open skies because: 1) like all other nations, it was under the pressure of economic globalization; 2) to compete in the future, Japanese airlines would be forced to work

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than 'Open Skies' Could Break Impasse in U.S.-Japan Talks, AIRLINE FIN. NEWS, June 16, 1997, *available in* LEXIS, NEWS Library, AIRFIN File.

336. *See* Dasburg Senate Testimony, *supra* note 1; *New Coalition*, *supra* note 124; *United Airlines*, *supra* note 332.

337. *See New Coalition*, *supra* note 124. Baliles was appointed by President Clinton to chair the National Commission to Ensure a Strong Competitive Airline Industry. *See id.*; *see also* Baliles, *supra* note 13.

338. *See* Baliles Senate Testimony, *supra* note 13; New Aviation Agreement Could Mean $10.8 Billion and 3,600 New Flights for the United States to Japan, U.S. Newswire, Sept. 4, 1997, *available in* 1997 WL 13912629 [hereinafter New Aviation Agreement]; New Coalition, *supra* note 124. For a more detailed list of ACCESS U.S.-Japan members, *see A Coalition Profile of ACCESS U.S.-Japan*, (visited Jan. 4, 1998) <http://www.accessusjapan.org/bi/profile.html> [hereinafter Coalition Profile].

339. *See New Aviation Agreement*, *supra* note 338; *Statement of Purpose*, *supra* note 333.

340. *United Airlines*, *supra* note 332.

341. *See Speakers Debate*, *supra* note 300.

342. Dasburg Senate Testimony, *supra* note 1.

343. *See Speakers Debate*, *supra* note 300.

within the global network; 3) for each Japanese carrier to have a global network, it must cooperate with a U.S. carrier; 4) to have a meaningful U.S. partnership, it must have U.S. antitrust immunity; and 5) for antitrust immunity, the United States can require open skies.[344] Richard Hirst, a Northwest senior vice president, stated the airline's belief that U.S. market dominance also gave the United States leverage in the talks: "we have the luxury of being Japanese in negotiations, having something they want and are willing to pay for."[345]

In the summer of 1997, United Airlines defected from the Northwest camp and joined supporters of an interim agreement that would partially open access to the Japanese market.[346] While speaking before a House committee along with officials from Northwest, United executives said it was time to adopt "more modest objectives."[347] United announced that it was now seeking a "result-oriented" strategy that would allow for code-sharing and other airline alliances.[348] Just four months earlier, United had joined Northwest in condemning ACCESS U.S.-Japan and its objectives.[349] At the time, United was concerned that those airlines with partnership agreements in the works were willing to negotiate away the incumbents' existing beyond rights.[350] But when the September negotiations concluded, there was no question of United's unequivocal support for a middle-ground agreement.[351]

While United and the non-incumbent airlines were pleased with the way discussions were proceeding in September of 1997, Northwest argued that the United States had "totally squandered

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344. *See id.*

345. *Id.*

346. *See* Nancy Dunne, *US Airlines Diverge on Asian Open Skies Strategy*, FIN. TIMES (United States), June 13, 1997, at 7, *available in* 1997 WL 11034659 [hereinafter *US Airlines Diverge*].

347. *Id.*

348. *Id.*

349. *See United Airlines*, *supra* note 332.

350. *See id.* United General Counsel Stuart Oran attacked the non-incumbent group by saying that it's "nothing more than a smokescreen created by American and Delta to obtain new rights . . . ." *Id.* In the spring of 1996, United's General Counsel criticized the group as being counterproductive to U.S. interests: "Access appears willing to give away existing U.S. rights to participate over the next several decades in the growing Asia market—an existing right worth tens of billions of dollars—so that a handful of U.S. carriers may achieve their parochial goals of obtaining a few new flights to Japanese cities." *Id.*

351. United Senior Vice President Cyril Murphy told the Wall Street Journal that if the details discussed in September negotiations were to be agreed to it would be an "historic event" because it would be the first liberalization of the Japanese aviation market in four decades. Nomani & Blackmon, *supra* note 151, at A3.

the leverage that it had to get a fully open skies agreement" and that it was "giving up a golden opportunity."[352] Northwest stated that if an agreement were reached incorporating the details of the September discussions the United States would never get the Japanese back to the negotiating table.[353] Northwest cited a study it commissioned from GKMG consulting services in Washington, D.C. that concluded if the United States settled for less than open skies the Japanese airlines would enjoy most of the benefits of the agreement.[354] The GKMG study found that the U.S. share of the U.S.-Japan aviation market would drop from almost sixty-five percent to fifty-four percent by 2001.[355] Furthermore, a Northwest executive publicly accused American and United of "selling out" in return for alliances with Japanese airlines and being "bought off" by Japan.[356]

Contrary to the position of Northwest Airlines, the non-incumbent airline coalition rallied behind the interim deal being considered by negotiators. The possibility of 70 additional weekly flights—3600 each year—tantalized the coalition airlines. ACCESS U.S.-Japan estimated that the additional flights would produce about $10.8 billion in additional annual economic activity.[357] The group claimed that the new flights would create about 250,000 new jobs and bring service to ten new U.S. cities.[358] Based on these estimates, the coalition found it incredible that, despite the significant value of this potential agreement, one U.S. airline—the airline with the largest current share of the U.S.-Japan market—is still mounting vigorous opposition to this type of agreement; an agreement that would provide more flights by more airlines to more cities between the U.S. and Japan, and beyond.[359] The coalition leader, Gerald Baliles, publicly accused Northwest of trying to "scuttle" the agreement because it feared competition.[360] Specifically, he told aviation reporters that "it would be an

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352. *Id.*

353. *See id.*

354. *See Yen for Japan*, *supra* note 122, at 112. The study concluded that if the agreement created less than open skies, the Japanese would be able to completely reverse their trade deficit with the United States. *See id.* According to GKMG, Japan would erase $2.1 billion of the projected $6.4 billion trade surplus with Japan in the year 2001. *See* Kennedy, *supra* note 125, at 1D.

355. *See* Kennedy, *supra* note 125, at 1D.

356. Jennifer Loven, *The Complex Dispute between the United States . . .*, AP, Oct. 20, 1997, *available in* 1997 WL 2556228.

357. *See New Aviation Agreement*, *supra* note 338.

358. *See id.*

359. *Id.*

360. Greg Gordon, *Northwest Sees Problems in Talks on Japan Flights*, STAR-TRIB. (Minneapolis-St. Paul), Sept. 25, 1997, at 2D, *available in* 1997 WL 7583460.

enormous mistake to allow Northwest to continue to keep competition out."[361]

2. U.S. Communities Apply Political Pressure

As a group, U.S. airlines impact every geographical area in the United States. Because of the incumbent airlines' use of the "hub and spoke" system, those regions without a Northwest or United hub lacked direct access to the Japanese and Asian markets.[362] States in the Southwest lacked aviation access to Japan,[363] and cities such as Orlando, Cincinnati, Miami, St. Louis, Salt Lake City, and Boston were excluded from direct access.[364] Only one of every five weekly flights between the United States and Japan originated east of the Mississippi River, even though one of every three Americans lives in the eastern United States.[365] More than forty states have trade offices in Tokyo, but only twelve U.S. cities have non-stop service to Japan.[366] In contrast, fourteen U.S. cities have non-stop flights to Paris, fifteen to Frankfurt, and twenty-two to London.[367]

The hub system also results in a large concentration of airline employees who reside around the busiest regional U.S. airports.[368] This creates a significant economic impact on those communities. Predictably, both Northwest and the non-incumbent coalition used their economic powers in their major markets to influence political leaders who might pressure U.S. negotiators.

Northwest has major hubs in Minneapolis and Detroit, and it focused its political power on the congressional delegations from Minnesota and Michigan. At Northwest Airlines' request, eleven senators and thirty-two members of the U.S. House of

361. *Close to Agreement*, *supra* note 5. The executives of the non-incumbent carriers joined in railing against Northwest's refusal to back down from absolute open skies. American Airlines Chairman Robert Crandall claimed that Northwest's real intention was not free aviation trade, but keeping the status quo. *See US Airlines Diverge*, *supra* note 346, at 7. Scott Yohe, Delta's Senior Vice President of government affairs concurred with Crandall and said that Northwest "fears new competition and seeks to protect its own dominant position." *Delta Urges U.S. Negotiators to Conclude a New Agreement with Japan*, M2 Presswire, Sept. 29, 1997, *available in* 1997 WL 14464422.

362. *See* Loney House Testimony, *supra* note 42; Goldman, *supra* note 117, at 6.

363. *See* Goldman, *supra* note 117, at 6.

364. *See Statement of Purpose*, *supra* note 333.

365. *See* Loney House Testimony, *supra* note 42.

366. *See* Crandall House Testimony, *supra* note 151.

367. *See id.*

368. The U.S. airline industry has a powerful political asset in its employment roll of more than 600,000 workers worldwide, most of whom are based in the United States. *See* Murphy House Testimony, *supra* note 13.

Representatives—including every member of the Minnesota and Michigan delegations—wrote the Clinton administration in 1996 urging U.S. negotiators to stand firm and protect the beyond rights that were part of the 1952 agreement.[369] The governors of California, Indiana, Michigan, Minnesota, Tennessee, Washington, and Wisconsin also wrote the President asking him to negotiate an open skies agreement.[370] In another letter to President Clinton in 1997, Senators Rod Grams, Jesse Helms, and Spencer Abraham argued that any agreement short of open skies would widen the trade deficit and erode confidence in the President's free trade policies.[371] By September of 1997, nine powerful congressional committee chairman backed Northwest's stance that open skies should be the U.S. negotiators' only option.[372]

Detroit mobilized its business community after learning that Northwest could lose some flights to Japan under an interim aviation agreement. Detroit is Northwest's largest hub worldwide, and it is in the midst of a $1 billion terminal expansion to accommodate the airline's growth.[373] Detroit's community leaders were concerned about the impact any route losses would have on the local economy. Community leaders estimated that $1.5 billion in local economic benefits accrued annually due to Northwest's Asian routes through Detroit.[374] At the time of negotiations, Northwest flew twice daily to Tokyo and Osaka and three times each week to Beijing and Seoul from Detroit.[375] Nearly sixty percent of passengers traveling to Japan from Detroit are using Japan as a layover while flying to other Asian destinations.[376] More than twenty Detroit business leaders wrote to President

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369. *See Service Issues Solved*, *supra* note 292, at 189.

370. *See id.*

371. *See* Gordon, *supra* note 360, at 2D. Both Senator Grams (of Minnesota) and Senator Abraham (of Michigan) have a large constituency of Northwest workers in their states. Sen. Helms became involved in his role as Chairman of the Senate Foreign Relations committee. *See Japan Waits to be Tested on Liberalization*, 328 AVIATION DAILY 425 (1997) [hereinafter *Japan Waits*].

372. *See* Nancy Dunne, *Ships, Glass and Open Skies Keep U.S.-Japan Trade Friction Going*, FIN. TIMES (London), Oct. 23, 1997, at 4, *available in* 1997 WL 14788031. Sen. Alfonse D'Amato, chairman of the Senate Banking Committee, sent a letter to the President in September 1997 saying that if the United States failed to insist on open skies it would send a message embracing protectionism that would "resound throughout Asia." *Larson Reaches for Sept. 30 Agreement as Lobbying Continues*, 329 AVIATION DAILY 509 (1997).

373. *See* Stopa, *supra* note 1, at 40.

374. *See id.* Detroit airport officials estimate that each international flight contributes about $1 million to the metropolitan Detroit economy. *See id.*

375. *See id.*

376. *See id.*

Clinton asking the administration to negotiate only open skies.[377] Notably, Chrysler Chairman Robert Eaton, speaking for the "big three" automakers wrote to President Clinton and urged him to stand firm on open skies because of his concern over the trade deficit.[378]

Despite the significant political support mustered by Northwest Airlines, the other U.S. airlines were careful to exercise their political power, particularly through the ACCESS U.S.-Japan coalition.[379] American Airlines has a major presence in Texas, home to the Majority Leader and the Majority Whip in the U.S. House of Representatives.[380] Delta's operations are important to the state of Georgia, the home of Speaker of the House Newt Gingrich.[381] Trans World Airlines is based in St. Louis, Missouri, the home state of House Minority Leader Richard Gephardt.[382] And United's presence in Chicago brought the large Illinois delegation into the political battle.[383]

Chicago-area business leaders formed their own advocacy group in hopes of increasing the number of flights between Chicago and Japan. The group, called the Midwest-Asia Aviation Coalition, was led by Bob Michel, the former Republican leader in the U.S. House of Representatives.[384] The group directly aligned itself with the non-incumbent airlines and stressed that "progress should not be stalled by all-or-nothing insistence on complete deregulation."[385] The coalition, which had the support of both Illinois Governor Jim Edgar and Chicago Mayor Richard Daley,

377. *See id.*

378. *See* Kennedy, *supra* note 125, at 1D.

379. According to ACCESS U.S.-Japan, the following members of Congress sent letters to President Clinton urging him to negotiate and expand passenger access to Japan: House Speaker New Gingrich, House Democratic Leader Richard Gephardt, House Republican Leader Dick Armey, and Senators Robert Bennett, John Breaux, Richard Bryan, William Cohen, Paul Coverdell, Mike DeWine, Wendell Ford, Phil Gramm, Orrin Hatch, Fritz Hollings, Kay Bailey Hutchinson, Edward Kennedy, John Kerry, Frank Lautenberg, Connie Mack, Mitch McConnell, and Sam Nunn. *See Coalition Profile, supra* note 338.

380. *See* Kennedy, *supra* note 125, at 1D.

381. *See id.*

382. *See* Christopher Carey, *Treaty Clears TWA for Return to Japan*, ST. LOUIS POST-DISPATCH, Jan. 31, 1998, at 28, *available in* LEXIS, NEWS Library, SLPD File. If an aviation agreement gives TWA rights into Japan, it was anticipated that it would bring $500 million in economic benefits into the St. Louis region annually. *See id.*

383. *See United Airlines Applauds New Aviation Agreement*, PR Newswire, Jan. 30, 1998, *available in* LEXIS, NEWS Library, PRNEWS File [hereinafter *United Applauds*]. United Airlines expressed its thanks to Illinois Senators Dick Durbin and Carol Moseley-Braun for their help in pressuring the administration to complete the deal. *See id.*

384. *See* Field, *supra* note 27, at 4B.

385. *Id.*

was created to "do battle" with Northwest Airlines and pursue a middle-ground agreement if open skies could not be agreed upon.[386]

Dennis Whetstone, President of the Illinois Chamber of Commerce, said that, to the members of the Midwest Coalition, any agreement was "an economic development issue" and any new route would open "a lot more doors than we've ever had in the Midwest to attract a more diverse investment base."[387] Whetstone said that dozens of Japanese companies could locate manufacturing plants in Illinois if the aviation routes gave them access to the Chicago area.[388] Another Illinois Chamber of Commerce member said that the group would like to see an open skies agreement, but that strategically, the group thought any opening of skies was better than no agreement because of endlessly stalled negotiations.[389] According to supporters of the Midwest Coalition, an agreement could mean millions of dollars for the Chicago area. An Arthur Anderson study completed for the Midwest coalition concluded that lifting nonstop restrictions between Chicago and Japan could create more than 2,600 jobs in the region and have an economic impact of up to $80 million annually.[390]

Other airlines and cities placed their own spin on whether an interim agreement would benefit their interests. The Dallas Morning News editorialized about Northwest's stance: "One cannot blame Minnesota-based Northwest Airlines for fighting hard to maintain its privileged position. But what's good for one U.S. carrier is not always good for the country."[391] The Dallas newspaper noted that the 1952 aviation agreement prevented the Ft. Worth-based American Airlines from expanding its service to the Asian market, and that under the interim agreement under discussion at least one additional weekly flight to Japan could depart from the Dallas-Ft. Worth airport.[392] The newspaper extrapolated data from an ACCESS U.S.-Japan report and concluded that under an interim agreement the Texas economy would benefit by $503 million annually.[393]

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386. Meinert, *supra* note 335, at A10.
387. Loven, *supra* note 356.
388. *See id.*
389. *See* Meinert, *supra* note 335, at A10.
390. *See id.*; Loven, *supra* note 356.
391. *Air Bridge to Japan: U.S. Negotiator Should Press for Good Agreement*, DALLAS MORNING NEWS, Sept. 25, 1997, *available in* 1997 WL 11523980.
392. *See id.*
393. *See id.*

V. UNITED STATES AND JAPAN REACH FOUR-YEAR LIBERALIZATION AGREEMENT

In January, 1998, the United States and Japan reached a compromise four-year framework agreement.[394] The agreement represented a middle-ground approach, giving both U.S. and Japanese carriers more access to each other's market—without the adoption of open skies. President Clinton praised the terms of the agreement, and U.S. Secretary of Transportation Rodney Slater called the pact a "dramatic step forward."[395] The U.S. government estimates that the agreement will generate $4 billion in additional revenue for U.S. carriers over the four years of the pact.[396] In addition, the government claims consumers will save $1.2 billion under the terms of the agreement,[397] but officials declined to estimate how much the pact would reduce fares.[398]

U.S. airline response to the agreement was mixed. Northwest called the agreement "disappointing," but also said that it was a "substantial improvement over what Japan had been seeking to impose on the U.S. . . . ."[399] Northwest noted that it was pleased that the agreement protected its beyond rights, allowed it to keep its landing and takeoff rights, and permitted its partnership agreement with Continental.[400] United Chairman Gerald Greenwald called the agreement a historic breakthrough.[401] Delta executives called the agreement a "good start," but expressed concerns about acquiring the landing and takeoff slots it needed.[402] Both JAL and ANA expressed concern that the agreement would "herald an era of

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394. *See* Kohei Murayama, *Japan, U.S. Strikes Civil Aviation Accord*, Japan Economic Newswire, Jan. 30, 1998, *available in* WESTLAW, JWIRE database [hereinafter *Civil Aviation Accord*]. The agreement has not yet been drafted into a final form for high-level signature. *See id.*

395. Henry Chu, *U.S., Japan Reach Pact to Broaden Air Access Transportation*, L.A. TIMES, Jan. 31, 1998, at A1, *available in* 1998 WL 2393929.

396. *See id.*; Matthew L. Wald, *U.S., Japan to Remove Air-Traffic Restrictions*, New York Times News Service, Jan. 31, 1998, *available in* 1998 WL-NYT 9803102600.

397. *See* Chu, *supra* note 395, at A1; Wald, *supra* note 396.

398. *See* Wald, *supra* note 396. Clinton administration officials acknowledged that the Japanese government would still regulate ticket prices, but they added that Japan has agreed to consider a partial deregulation in the future when it considers deregulating domestic fares. *See id.*

399. *Northwest Reacts to U.S.-Japan Agreement*, PR Newswire, Jan. 30, 1998, *available in* LEXIS, NEWS Library, PRNEWS file [hereinafter *Northwest Reacts*].

400. *See id.*

401. *See United Applauds*, *supra* note 383.

402. Tony Kennedy, *NWA Plans Japan-Taiwan Route, Using Rights in New Aviation Deal*, STAR-TRIB. (Minneapolis-St. Paul, Minn.), Feb. 11, 1998, at 1D, *available in* 1998 WL 6341373.

cutthroat competition."[403] JAL President Akira Kondo called the agreement a "big disappointment,"[404] saying that it gave more benefits to U.S. carriers than to Japanese airlines.[405]

A. *The Four-Year Deal as a Transition*

The final January, 1998 agreement was a four-year transitional pact.[406] As early as September, 1997, negotiators anticipated that the agreement would take the short-term form.[407] Aviation analysts expected that U.S. officials would agree to such a transition because it would allow them to "proclaim it as a breakthrough" that moved Japan closer to open skies.[408] Perhaps the most important provision in the agreement permitted non-incumbent U.S. carriers to provide ninety new flights a week from the United States to Japan.[409] Of the ninety new flights, twenty-eight round-trips are to the high-demand Narita Airport in Tokyo.[410] When the ninety additional flights a week for non-incumbents are added to additional flights expected from incumbent U.S. airlines, more than five thousand new flights will be available each year between the United States and Japan.[411]

Surprisingly, the agreement also provided for more U.S. carriers to fly to Japan as non-incumbent airlines. The agreement allows one additional non-incumbent carrier to service Japan immediately, with a second non-incumbent to enter the market in 2000.[412] Trans World Airlines and U.S. Airways are expected to

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403. Japan's Airlines See Price War on the Horizon, Japan Economic Newswire, Jan. 31, 1998, *available in* WESTLAW, JWIRE database [hereinafter *Price War*].

404. Chu, *supra* note 394, at A1.

405. *See id.*; *Japan Airlines Unhappy with New U.S.-Japan Aviation Pact*, Dow Jones Int'l News Service, Jan. 31, 1998, *available in* WESTLAW, DJINS database.

406. *See Civil Aviation Accord*, *supra* note 394.

407. *See* Nomani & Blackmon, *supra* note 151, at A3.

408. *Risky Takeoff*, *supra* note 234.

409. *See* Wald, *supra* note 396. It was widely reported in the fall of 1997 that non-incumbent carriers would be given only 70 additional flights. *See* Loven, *supra* note 356; Nomani & Blackmon, *supra* note 151, at A3.

410. *See Civil Aviation Accord*, *supra* note 394. Although Narita Airport does not have any additional landing and takeoff slots, the additional flights will use twenty eight slots (fourteen round-trips) currently unused by Federal Express. *See id.* Another twenty-eight slots will come from Japanese carriers who code-share with U.S. carriers. *See id.*

411. *See U.S. Carriers Welcome Aviation Accord, Eye New Flights*, Japan Economic Newswire, Jan. 31, 1998, *available in* WESTLAW, JWIRE database [hereinafter *New Flights*].

412. *See* Kohei Murayama, *Japan, U.S. Resolve Key Issues in Aviation Talks*, Japan Economic Newswire, Jan 25, 1998, *available in* WESTLAW, JWIRE database [hereinafter *Key Issues*].

receive the non-incumbent slots.[413] If TWA gets the rights to serve Japan, it plans to begin flights to Tokyo from St. Louis in late 1999.[414]

As part of the agreement, ANA receives incumbent status and is given unlimited authority to fly into the U.S. market.[415] ANA's incumbent status was expected early in negotiations.[416] However, somewhat unexpectedly, Japan Air System (JAS) was also given incumbent status.[417] Although ANA had aggressively sought incumbent status so that it could serve the United States, aviation analysts have called it a "pyrrhic" victory because ANA has traditionally lost money on its international routes.[418] In addition, for ANA to expand it must purchase new aircraft, which is costly.[419]

1. U.S. Carrier Beyond Rights

The 1998 pact also guaranteed incumbent carriers the same rights they had acquired under the 1952 agreement.[420] All the U.S. incumbent carriers considered the beyond rights as too valuable to be traded away in negotiations.[421] The beyond rights are important to U.S. carriers because Japanese destinations alone do not always fill capacity; passengers flying beyond Japan are needed to fill trans-Pacific flights.[422] The protection of beyond rights was particularly good news for Federal Express, which had sought beyond rights but had been rebuffed by Japanese officials.[423] The new agreement also allowed limited beyond rights

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413. *See id.*

414. *See* Carey, *supra* note 382, at 28.

415. *See Civil Aviation Accord, supra* note 394; *Key Issues, supra* note 412.

416. *See* Nomani, *supra* note 212, at 2; *Risky Takeoff, supra* note 234.

417. *See Civil Aviation Accord, supra* note 394; *Key Issues, supra* note 412.

418. *Risky Takeoff, supra* note 234. As early as 1995, ANA was planning flights to New York and Honolulu from Osaka, if it were given the power to do so under a new agreement. *See ANA Aligns with U.S., supra* note 281.

419. *See Risky Takeoff, supra* note 234.

420. *See Key Issues, supra* note 412.

421. *See* Feldman, *supra* note 158, at 58; *Pacific Routes, supra* note 163. The estimated value of beyond rights varied greatly. A United analyst estimated beyond rights were worth $100 billion over twenty years. *See UAL Sees $100 Billion U.S. Stake in Asian Markets, supra* note 128. The non-incumbent airlines attacked the United estimate with a Coopers & Lybrand study that found the rights worth a maximum of $5.5 billion over twenty years. *See Access: U.S.-Japan Study Says United Claims Are Exaggerated, supra* note 128.

422. *See United Claims Japanese Will 'Eat Us Alive' Across the Pacific*, ASIAN AVIATION NEWS, Dec. 1, 1995, *available in* 1995 WL 11187932 [hereinafter *Eat Us Alive*].

423. *See* Wald, *supra* note 396. Federal Express had established a cargo base in the Philippines and had unsuccessfully sought approval to increase its

for Polar Air Cargo and United Parcel Service.[424] In addition, the agreement permits an additional U.S. cargo carrier to fly into Japan in four years.[425]

2. Code-Sharing

The allowance for code-sharing agreements, one of the last major stumbling blocks to an agreement, took a creative solution. At the United States' request, Japan readily agreed to allow for all alliances between U.S. and Japanese carriers.[426] However, Japan's ban of same-country alliances caused problems. A same country alliance ban would not have allowed any flights between Japan and the United States under the newly-formed Northwest-Continental alliance.[427] As a compromise, Japan agreed to lift its ban to allow twenty-eight flights a week under same-country partnerships,[428] but only if those partnerships contained only one partner serving Japan from mainland U.S. airports.[429] In addition, the United States had to agree that Japan Air System (JAS), Japan's third-largest carrier, would be guaranteed a U.S. partner.[430] Northwest Airlines, which already has a limited relationship with JAS,[431] has expressed interest in a code-sharing arrangement with the airline.[432]

Now that the agreement is completed, JAL and American's alliance is expected to become more expansive.[433] Prior to the agreement, JAL and American's partnership was limited to frequent flyer program cooperation and a limited cargo handling agreement.[434]

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flights through Japan to China, Manila, Jakarta, and Bangkok. *See* Nomani & Blackmon, *supra* note 151, at A3.

424. *See Civil Aviation Accord, supra* note 394; Wald, *supra* note 396.

425. *See Civil Aviation Accord, supra* note 394.

426. *See Key Issues, supra* note 412.

427. *See id.*

428. *See id.*; *Civil Aviation Accord, supra* note 394.

429. *See Civil Aviation Accord, supra* note 394.

430. *See* Kohei Murayama, *Japan, U.S. Set for Aviation Deal Possibly by Friday*, Japan Economic Newswire, Jan. 23, 1998, *available in* WESTLAW, JWIRE database.

431. *See* Tony Kennedy, *NWA Seeks Alliance in Bid to Compete Effectively in Japan*, STAR-TRIB. (Minneapolis-St. Paul, Minn.), Jan. 15 1998, at 1D, *available in* 1998 WL 6337418. Northwest and JAS operated complimentary frequent flyer agreements and flight schedules. *See id.*

432. *See id.*

433. *See Aviation Talks Resume, supra* note 315; *U.S. Airlines Now Calling for Less Than Open Skies*, WORLD AIRLINE NEWS, June 20, 1997, *available in* 1997 WL 8541750 [hereinafter *Calling for Less*].

434. *See Calling for Less, supra* note 433.

ANA and Delta operate a similar limited alliance, and the two airlines have publicly stated that they would code-share flights from Los Angeles to Tokyo and Osaka if an agreement was reached.[435] However, aviation analysts believe ANA may try to break its agreement with Delta and code-share with United.[436]

3. Expanding U.S.-Japan Service Predicted

Before U.S. airlines may begin new service, their routes must be approved through the U.S. Department of Transportation's regulatory process.[437] American is expected to request new flights to Tokyo and Osaka from Chicago, as well as increased flights from Dallas.[438] Dallas airport officials expect American to get two new flights a day from Dallas, including one additional flight to Tokyo and a new flight to Osaka.[439] Continental will likely ask for service to Tokyo from Newark and Houston.[440] Delta is likely to seek daily service to Tokyo, Osaka, and Fukuoka from Portland, plus daily service to Tokyo from Atlanta.[441] Northwest is going to take advantage of its beyond rights and begin additional service from Seattle to Kuala Lumpur, Malaysia and Jakarta, Indonesia through Osaka.[442] Northwest may add even more service to Japan and its Asian markets because of its new alliance with Continental.[443] TWA would like to service Tokyo from St. Louis.[444] United expects to boost the number of flights it currently operates from Chicago to Tokyo from six to fourteen a week.[445] United was

435. *See id.*

436. *See* Wald, *supra* note 396.

437. *See American May Get New Flight*, DALLAS MORNING-NEWS, Jan. 15, 1998, at 2D, *available in* 1998 WL 2505292; Nomani & Blackmon, *supra* note 151, at A3.

438. *See Air Traffic*, *supra* note 313, at 32; Nomani & Blackmon, *supra* note 151, at A3.

439. *See* Dan Reed, *U.S.-Japan Air Treaty Likely to Generate Flights*, FORT WORTH STAR-TELEGRAM, Jan. 27, 1998, at 1, *available in* 1998 WL 3272967.

440. *See Air Traffic*, *supra* note 313, at 32; Nomani & Blackmon, *supra* note 151, at A3; Schweltzer & Dorning, *supra* note 171, at 1.

441. *See Air Traffic*, *supra* note 313, at 32; Nomani & Blackmon, *supra* note 151, at A3; Schweltzer & Dorning, *supra* note 171, at 1.

442. *See New Flights*, *supra* note 411; *Northwest Reacts*, *supra* note 399.

443. *See* John Schmeltzer, *New Airline Alliance Announced*, CHI. TRIB., Jan. 27, 1998, at 3, *available in* 1998 WL 2818841. The Northwest/Continental agreement was publicly announced just four days before the 1998 bilateral was reached.

444. *See Air Traffic*, *supra* note 313, at 32; Nomani & Blackmon, *supra* note 151, at A3.

445. *See New Flights*, *supra* note 411. United expected the additional Chicago-Tokyo flights to begin just nine weeks after the agreement was reached. *See id.*

also exploring additional service increases from other U.S. cities.[446]

Like their American counterparts, both JAL and ANA plan to boost capacity to the United States.[447] JAL initially plans to increase flights to Los Angeles from Nagoya and to Honolulu from Hiroshima.[448] ANA plans twenty-eight weekly round-trip flights between Osaka and Honolulu, New York and Chicago.[449] ANA is expected to take some time to begin all of its flights because it has a limited number of planes available for the expansion.[450]

4. "Safety-net" Provision Encourages Japan to Conduct Further Liberalization

The United States was careful to include a "safety net" provision in the 1998 agreement that automatically allows for more U.S. carrier access if no agreement is reached after the four years of the pact. If fourth year negotiations fail, and no new aviation agreement is reached, the non-incumbent U.S. carriers will be permitted to fly an additional thirty-five weekly flights to Japan.[451] If no agreement is reached within a year after the 1998 agreement expires, U.S. carriers can add twenty-one more weekly flights to Japan.[452] In the third year after the expiration of the agreement, U.S. carriers can add another seven unlimited flights if no new agreement is reached.[453] And if no new agreement is reached by the fifth year after the expiration of the 1998 accord, then U.S. carriers are authorized seven more flights on limited routes.[454] For the trigger to be implemented in each year, U.S. carriers must be using fifty-six of the ninety new flights permitted under the 1998 agreement.[455]

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446. *See New Flights*, *supra* note 411.

447. *See Japan Airlines Targets U.S., Cuts Asia Flights*, Dow Jones Int'l News Service, Jan. 20, 1998, *available in* WESTLAW, DJINS database; Price War, *supra* note 403.

448. *See Japan Airlines Targets U.S. Cuts Asia Flights*, Dow Jones Int'l News Service, Jan. 20, 1998, *available in* WESTLAW, DJNS database.

449. *See Price War*, *supra* note 403.

450. *See id.*

451. *See Civil Aviation Accord*, *supra* note 394; *Key Issues*, *supra* note 412.

452. *See Civil Aviation Accord*, *supra* note 394; *Key Issues*, *supra* note 412. Fourteen of the additional twenty-one flights, must not be between Tokyo and New York, Chicago, or Honolulu. *See Key Issues*, *supra* note 412.

453. *See Civil Aviation Accord*, *supra* note 394; *Key Issues*, *supra* note 412.

454. *See Civil Aviation Accord*, *supra* note 394; *Key Issues*, *supra* note 412.

455. *See Key Issues*, *supra* note 412.

B. *Concern Over Japan's Commitment*

As a warning to U.S. negotiators, the *Washington Post* enumerated what aviation analysts predicted were the potential pitfalls of an interim aviation agreement in an October 1997 editorial:

> [A] partial liberalization could also be a big mistake. The United States shouldn't accept a deal unless U.S. airlines' rights to fly beyond Japan are spelled out with total clarity. Any deal should allow U.S. airlines to compete based on price. And no deal will be worth much unless it guarantees that Japan can't subvert it by manipulating the availability of landing slots at Tokyo's Narita airport, which already is overcrowded. Any ambiguity on these matters is likely to be exploited in favor of Japanese carriers and to the detriment of open competition.[456]

The primary concern among skeptics of the aviation agreement is that Japan will fail to follow through on its commitment. Many of the aviation disputes that arose in the 1990s can be traced to Japan's unwillingness to follow the provisions of the 1952 agreement. Japan does not always live up to the expectations of U.S. officials, as their reticence to honor the beyond rights in the 1952 aviation agreement demonstrated. Richard Hirst, the General Counsel of Northwest Airlines, echoed the sentiments of many critics of a short-term agreement when he stated in the midst of the July 1996 negotiations that, "Japan has followed a pattern of agreeing and then refusing to implement what they have agreed to."[457] Still others are concerned that by allowing Japan to use its non-compliance under the 1952 treaty as a "bargaining chip" in negotiations, the United States is only sending Japan the message that non-compliance is acceptable. That could spell disaster at the termination of the interim agreement.

Aviation experts point to Federal Express and its inability to get Japanese authorization to increase its flights beyond Japan as a clear example of how the Japanese government can refuse to live up to its commitments under aviation agreements. Despite contentions from the U.S. government that the 1952 agreement did not give Japan the power to prevent increased U.S. traffic through Japan to other destinations in Asia,[458] the Japanese government had refused since 1993 to allow beyond routes to

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456. *Semi-Open Skies*, *supra* note 24, at A24.

457. *Poised to Renounce*, *supra* note 294, at 8.

458. *See* Brosnan, *supra* note 219, at B3; *Japan, United States Remain at Impasse Over Air Cargo Issue*, ASIAN AVIATION NEWS, July 14, 1995, *available in* 1995 WL 6690537 [hereinafter *Impasse Over Air Cargo*].

China and Subic Bay in the Philippines.[459] Aviation experts say that Japan prevented the Federal Express expansion because it felt that the additional routes would disadvantage Japan-based cargo carriers.[460] Still, the United States imposed no sanctions hoping instead to reach an agreement at the negotiating table.[461]

Some airline executives have expressed concern that because the agreement lets ANA into the U.S. market there will be no incentive for Japan to come to the table to negotiate open skies.[462] Other critics have said that by giving Japan "most of what they want," the United States has "less leverage" in the future.

1. Landing Slots Availability a Concern

Greater access to the Japanese aviation market is useless without the ability to land in Japan. Finding landing slots at Japanese airports may be a major problem for U.S. carriers.[463] As the Asian Aviation News stated in February of 1997, "[t]he most scarce competitive [aviation] asset [in Japan] is airport access . . . ."[464] As of May, 1997, U.S. carriers already had rights to one-third of the landing slots at Tokyo's Narita airport.[465] Japan was not expected to give U.S. carriers more slots in Tokyo, and those slots that were available at Osaka's Kansai were

459. *See* Brosnan, *supra* note 219, at B3; *Impasse Over Air Cargo, supra* note 458. Federal Express needed the route from Japan to Subic Bay to help it operate out of its new hub located there. *See Impasse Over Air Cargo, supra* note 458.

460. *See Impasse Over Air Cargo, supra* note 458. The Asian cargo market is extremely competitive, and Japanese cargo carriers have been unable to match U.S. carriers' price or its worldwide network reach. *See Wrangle Over Access, supra* note 181.

461. *See* Brosnan, *supra* note 219, at B3.

462. *See Fifth Round, supra* note 322, at 1D. The Tacoma News Tribune editorialized during negotiations that a temporary agreement might give Japanese air carriers greater access "with little assurance that Japan would reciprocate. Such an outcome could hardly be characterized as fair trade or open skies." *Open Skies Goal, supra* note 160, at A12.

463. *See* Michiyo Nakamoto, *US and Japan to Sign Airline Accord*, FIN. TIMES (London), Jan. 31, 1998, at 2, *available in* 1998 WL 3529086. Japan claims that no more landing slots were available at Tokyo's Narita, and it stopped allocating new slots in 1990. *See id.*

464. *Japan's Major Airlines Vie for Space at Home and Across the Pacific*, ASIAN AVIATION NEWS, Feb. 21, 1997, *available in* 1997 WL 8469126.

465. *See* David Knibb, *Battle of Wills*, AIRLINE BUS., May 1, 1997, at 1, *available in* 1997 WL 9065598. Records for the summer of 1997 showed that of the 2,354 weekly landing slots for passenger and cargo flights at Narita Airport, Japanese airlines had 860 and the U.S. carriers had 804. *See Common Ground, supra* note 300, at 207. Of the 804 U.S. slots, Northwest operated 316, United had 218, Federal Express had 144, Continental had 48, American had 40, Delta had 26, and United Parcel Service had 12. *See id.*

"guard[ed by Japan] like pearls."[466] The 1998 agreement does not include any net increase in landing and takeoff slots, but it does shuffle some unused slots among U.S. carriers.[467] The agreement calls for Federal Express to sell its unused landing/takeoff slots at Tokyo's Narita Airport to the other U.S. carriers who have gained access under the agreement.[468] Some carriers have already expressed concern that Federal Express is asking too high of a price, particularly since any unused slots should be returned to the Japanese government at no charge.[469] For its part, Japan has agreed to let the transfer take place as a commercial transaction without getting deeply involved.[470] The U.S. Transportation Department is also trying to stay above the fray, according to Alan Larson, who stated that that the landing/takeoff slot arrangements "need to be worked out by the private sector."[471] In addition to the twenty-eight Federal Express slots, Japan also "secretly" promised to increase landings at Narita from twenty-eight to thirty or thirty-one per hour and give preference to U.S. carriers in the allocation of the new slots.[472]

Early in the aviation negotiations, Northwest Airlines stressed the importance of landing slots, calling the Japanese offer of new routes "useless" without landing capacity.[473] United and American executives countered Northwest's dire prediction by explaining that a new runway will soon be completed at Tokyo's Narita airport and that Osaka's Kansai airport might provide a less constrained alternative in the meantime.[474] This new runway, expected to open in the year 2000,[475] will reportedly increase landing capacity by fifty percent.[476] However, the two Japanese airlines are expected to receive half of the landing

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466. Knibb, *supra* note 465, at 1.
467. *See* Wald, *supra* note 396.
468. *See id.*
469. *See id.*
470. *See id.*
471. *Id.*
472. *Japan to Offer Daytime Slots for U.S. Air Carriers*, Japan Economic Newswire, Jan. 30, 1998, *available in* WESTLAW, JWIRE database. The twenty-eight per hour limit stems from labor contracts and noise reduction agreements. *See id.*
473. *See* Gordon, *supra* note 360, at 2D. Sen. Jesse Helms also expressed concern about limited landing slots when the Japanese indicated more routes could be made available to Japanese airlines if U.S. carriers gave up some of the slots they already had at Japanese airports. *See Japan Waits*, *supra* note 371, at 425.
474. *See* Loven, *supra* note 356; *United Airlines: CEO Issues Statement on US/Japan Air Talks*, M2 Presswire, Sept. 29, 1997, *available in* 1997 WL 14464420.
475. *See Japanese Carriers*, *supra* note 101; *Risky Takeoff*, *supra* note 234.
476. *See Booz Allen Study*, *supra* note 127.

slots.[477] Osaka's Kansai airport announced in April 1997 that it is at capacity and does not have any further landing slots available.[478] Kansai, which was completed in September of 1994, operates its single runway twenty-four hours a day.[479] Although Kansai was constructed to serve Osaka's international traffic, Japanese officials have allowed JAL and ANA to use its precious slots for domestic service.[480] Construction on a second runway and terminal will not begin until 1999, and neither will be operational until 2007.[481]

2. Japanese Airline Competition for Japanese Passengers

Japanese travelers' strong preference for Japanese airlines greatly concerns the U.S. carriers. As long as the U.S. carriers remain less expensive, the Japanese traveler undoubtedly will fly with them. But as Japanese carriers become more competitive and offer more flights to the United States, U.S. carriers may have reason to be worried. A consultant working for Northwest Airlines concluded that an "overwhelming number" of new Japanese travelers will fly Japanese airlines if those airlines are given more access to the U.S. market.[482] According to the consultant, Japanese travelers prefer Japanese airlines by a 3-1 margin.[483] The preference is even more important because Japanese travelers and other foreign nationals account for eighty percent of those flying between the United States and Japan.[484]

Also disconcerting to U.S. airlines is the relative advantage Japanese carriers have in booking Japanese passenger tickets. JAL and ANA have greater leverage in dealing with Japanese tour wholesalers.[485] These wholesalers control the ticket pricing and distribution system in Japan and are seen as essential to

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477. *See Risky Takeoff*, *supra* note 234.

478. *See Osaka Kansai May Have to Shift Domestic Service*, 328 AVIATION DAILY 67 (1997).

479. *See id.* That single runway can support 160,000 departures a year. *See id.*

480. *See id.*

481. *See id.* To make matters worse, Kansai airport was constructed on an island which makes expansion more difficult and time consuming. *See id.* Airport officials noted that if airport expansions are not done carefully, they will sink into the ocean—literally. *See id.*

482. Kennedy, *supra* note 125, at 1D. *See NWA-Backed GKMG Study Sees Demographic Risk in Japanese Proposal*, 329 AVIATION DAILY 483 (1997) (stating that Japanese travelers prefer home-country airlines by a 3 to 1 margin) [hereinafter *GKMG Study*].

483. *See* Kennedy, *supra* note 125, at 1D; *GKMG Study*, *supra* note 482, at 483.

484. *See* Goldman, *supra* note 117, at 6; Kennedy, *supra* note 125, at 1D.

485. *See Yen for Japan*, *supra* note 122, at 112.

developing a significant passenger base.[486] The new agreement does allow for U.S. carriers to own travel agencies and ticket distribution systems in Japan,[487] but the Japanese carriers will still dominate the domestic ticket handling market.

VI. THE JAPANESE AGREEMENT: SETTING A STANDARD

The United States and United Kingdom currently operate international flights between the two countries under a 1977 agreement known as Bermuda II.[488] U.S. officials consider the agreement highly restrictive and hope to renegotiate a more liberal pact in the near future.[489] At hearings before the House of Representatives in 1997, Transportation Department officials noted that in 1993 the United Kingdom committed itself to "aviation liberalization within a year," but that U.K. negotiators have refused to let go of the "protectionist framework" of the Bermuda II agreement.[490] Prior to Bermuda II, U.S. carriers had beyond rights to fly from the United Kingdom into Europe, but those rights were canceled under the agreement.[491] United Airlines blames Bermuda II for British Airways' "dominance of the trans-Atlantic business" and claims that it has cost the United States "billions of dollars in revenue and thousands of jobs."[492] Others have agreed, saying that Bermuda II gave British Airways a "stranglehold on London's Heathrow [airport] that has helped it become the largest international airline in the world."[493] Under Bermuda II, only American Airlines and United Airlines may serve Heathrow.[494] British carriers now control sixty percent of the U.K.-U.S. passenger service market.[495] More than thirteen million passengers travel between the United States and the United Kingdom each year.[496]

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486. *Id.*
487. *See* Wald, *supra* note 396.
488. *See* Kayal, *supra* note 131, at 1A (discussing the 1977 agreement).
489. *See* Murphy House Testimony, *supra* note 13; *Momentum Slows*, *supra* note 50.
490. Murphy House Testimony, *supra* note 13.
491. *See Eat Us Alive*, *supra* note 422; Kayal, *supra* note 131, at 1A.
492. *Eat Us Alive*, *supra* note 422.
493. Kayal, *supra* note 131, at 1A. British Airways, with about $930 million in pre-tax profits is the "best in the industry." James Srodes, *Alliance? Open Skies? It's Really a Merger, and They're Not Really Open; So Ground Both Plans*, BARRON'S, Jan. 12, 1998, at 49.
494. *See* Kayal, *supra* note 131, at 1A.
495. *See* Dasburg Senate Testimony, *supra* note 1.
496. *See* Srodes, *supra* note 493, at 49.

Aviation talks have been underway between the United States and the United Kingdom for years, but they have been at a relative standstill. Talks were suspended in February 1997, but resumed in 1998.[497] As of August 1998, talks were scheduled to continue into the fall.[498] Aviation analysts note that even though the United States has had luck negotiating open skies with many smaller countries, Japan and the United Kingdom are the "giants" and present more resourceful adversaries than most countries: "Positioned at the top of the world on opposite sides of the United States, these two island nations are American's most lucrative aviation markets and the entry points to the prosperous economies of their hemispheres."[499] One-third of all U.S.-European air traffic goes through Britain, and London's Heathrow is the busiest international airport in the world.[500] Not surprisingly, aviation analysts have compared the United Kingdom to Japan, noting that both countries are masters at using their geographical location and economic strength as leverage in negotiations.[501]

A. *Critics Assert Agreement Weakens the U.S. Bargaining Position*

Even before the final four-year agreement was reached, U.S. airline executives were concerned that the United States government was not forcefully advocating its position. As a result, some feared that the government would not be able to stand up to foreign countries in aviation negotiations. Federal Express Chairman Frederick Smith, speaking before the Senate Aviation Subcommittee in 1996, said that the United States was too timid in responding to Japan's violations under the 1952 agreement.[502] Specifically, Smith claimed that rather than standing up to the Japanese when they made threats to limit beyond rights in violation of the 1952 aviation agreement, U.S. negotiators caved in and granted additional cargo access to Japanese carriers in the Chicago market.[503] Smith compared the situation to a fight in

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497. *See* Carole A. Shifrin, *U.S., U.K. To Resume Open Skies Talks*, AVIATION WK. & SPACE TECH., Aug. 10, 1998, at 38, *available in* 1998 WL 8145112.

498 *See id.*

499. Kayal, *supra* note 131, at 1A.

500. *See id.*; Srodes, *supra* note 493, at 49.

501. *See* Kayal, *supra* note 131, at 1A.

502. *See Timid Stance*, *supra* note 279, at 425. Smith was so concerned with the state of aviation negotiations that he sought—and got—a meeting with President Clinton. *See Flying Circus*, WALL ST. J., Jan. 30, 1998, at A14. The meeting lasted forty-five minutes, and shortly thereafter, Federal Express gave $100,000 to the Democratic National Committee for its 1996 election efforts. *See id.*

503. *See Timid Stance*, *supra* note 279, at 425.

which "[t]hey punch us in the nose and get rewarded."[504] Although the immediate results of the 1996 cargo talks were particularly upsetting to Smith, he expressed additional concern for what conclusions other countries may have drawn from the U.S. actions: "One can only imagine the long-term impact of a U.S. negotiating strategy so timid that [the government of Japan] feels free to threaten the shutdown of an existing U.S. cargo operation in Asia if the U.S. does not accept restrictions demanded by the Government of Japan."[505] Smith stressed that China is beginning to follow a negotiating strategy similar to that of Japan—threatening restrictions in hopes of gaining negotiating leverage.[506]

Northwest Airlines, upset at the U.S. negotiating strategy early on in the talks, also indicated its belief that other nations would take their negotiating cues from the U.S.-Japan talks. Northwest CEO John Dasburg said during negotiations that if Japan was successful in getting the United States to agree to its objectives that "it would signal that the United States is willing to allow constraint of a trade sector when a foreign country deems it to be too competitive."[507] Dasburg noted that China and other countries were "closely watching" aviation negotiations.[508] Dasburg laid out Northwest's concerns before the Senate Aviation Subcommittee in 1997:

> The precedent we set in U.S.-Japan aviation relations has implications far broader than the United States' current air service balance of trade surplus. To the extent we agree to something less than Open Skies in substance and name, we will, in effect, be telling Japan and other trading partners that maintaining managed competition relationships is permissible.[509]

Robert Eaton, the CEO of Chrysler, also claimed that the aviation talks would impact trade negotiations and have ramifications beyond the aviation markets.[510] Eaton stated during negotiations that a failure to reach an open skies accord would "signal to the rest of us who are watching, that we should trade in our hopes for free markets and open competition as we watch Japan and the rest of the governments in Asia carve up their markets."[511]

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504. *Id.*
505. *Id.* (brackets and capitalization in original)
506. *See id.*
507. Dasburg Senate Testimony, *supra* note 1.
508. *Id.*
509. *Id.*
510. *See* Kennedy, *supra* note 125, at 1D.
511. *Id.*

On Capitol Hill, Senator Jesse Helms put pressure on the administration during negotiations to accept nothing less than open skies.[512] In a letter to Secretary of State Madeleine Albright, Helms noted that of the forty-five "market-opening agreements" signed between the United States and Japan since 1980, only thirteen had resulted in opening markets to U.S. businesses.[513] Senator Helms argued that without an open skies agreement "Japan will conclude that the US is not serious about deregulation and market opening and will act accordingly."[514] In addition, Helms asserted that other countries in the region would also see the agreement as a signal that they too could continue protectionism.[515] Helms became so disturbed at the direction U.S. negotiators were going with the aviation talks that he sent staff members of the Senate Foreign Relations Committee to observe the August 1997 discussions.[516] In January of 1998, as aviation negotiations were nearing an end, Helms "warned" the Clinton administration not to conclude an agreement until he held Senate hearings on the state of U.S.-Japan aviation relations in February.[517]

B. *U.S. Officials: Aviation Agreements Must be Pragmatic*

United States officials respond to their critics by pointing out that each country presents a unique situation—politically and economically—that must be handled in a pragmatic fashion. Charles Hunnicutt, the Transportation Department Assistant Secretary in charge of international aviation policy, told the Senate Aviation Subcommittee in 1997 that even given the goal of reaching open skies agreements, U.S. policy "recognizes that some countries are not prepared to fully embrace open skies immediately."[518] When a country refuses to accept open skies after U.S. encouragement, Hunnicutt said it is policy to "work

512. *See* Japan Waits, *supra* note 371, at 425.
513. *Id.*
514. Nancy Dunne, *Helms Demands Air Accord Hearing*, FIN. TIMES (London), Jan. 16, 1998, at 4, *available in* 1998 WL 3525590 [hereinafter *Helms Demands Hearings*].
515. *See id.*
516. *See Senate Foreign Relations Observers Add New Twist to U.S.-Japan Talks*, 329 AVIATION DAILY 359 (1997). The Senate staff members were asserting only persuasive power because aviation agreements are not considered treaties in the official sense, so they do not require Senate approval. *See* Carey, *supra* note 382, at 28; *Helms Demands Hearings*, *supra* note 514, at 4.
517. *Helms Demands Hearings*, *supra* note 514, at 4.
518. Hunnicutt Senate Testimony, *supra* note 32.

with the country to develop alternatives."[519] In Hunnicutt's view, that is precisely what happened in U.S.-Japanese negotiations.

As for the United Kingdom, United States officials are hoping that a tentative partnership agreement between American Airlines and British Airways will pressure the British government to accept aviation liberalization.[520] Under the U.S. strategy, the United States will only grant the needed antitrust immunity to the partnership if U.S. carriers can make inroads into the British aviation market and ensure competition.[521] The United States has explicitly told the United Kingdom that it will not approve antitrust immunity for the agreement if "the essential open-skies elements are not present."[522] The United States is hoping that British Airways, in pursuing its own interest, will effectively lobby the British government to reach a new agreement with the United States. The antitrust leverage may have worked to some extent. One publication noted that the announcement of the American Airlines-British Airways deal "jump-started" talks that had been stalled for years.[523] Furthermore, the proposed partnership was reportedly the "single most important driver in whether Britain joins Washington's open-skies club."[524]

Aside from the logistics of the American Airlines-British Airways venture, current U.S.-U.K. talks are stalled because of a major dispute as to whether landing rights into Heathrow airport

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519. *Id.* U.S. officials are also beginning to recognize that open skies agreements are not necessarily the only way of significantly increasing U.S. airline access around the world. *See* Fotos, *supra* note 84, at 25. The reason is that code sharing agreements are often more efficient means of getting access to international passengers who are already comfortable flying their national carriers. *See id.* Experts at the Washington, D.C.-based Economic Strategy Institute agreed with the pragmatic approach, arguing that the United States should first insist on open skies, but agree if necessary to "transitional arrangements." *Think Tank Calls for Open Skies in U.S.-Japan Aviation Talks*, WORLD AIRLINE NEWS, Mar. 25, 1996, *available in* 1996 WL 8067416.

520. *See Momentum Slows*, *supra* note 50. The British Airways-American Airlines partnership agreement was reached in June 1996, but it requires U.S. approval. *See* Baliles, *supra* note 13.

521. *See* Baliles, *supra* note 13.

522. Murphy House Testimony, *supra* note 13. In what has been called "a bit of brinkmanship," the United Kingdom has asked the United States to approve the partnership between American Airlines and British Airways prior to any open skies agreement. *See Open Skies Talks*, *supra* note 46, at B6.

523. *See* Kayal, *supra* note 131, at 1A.

524. *Id.* Aviation experts have criticized the British Airways-American Airlines agreement, and argued that if the two airlines are allowed to operate jointly they would control too much of the U.S.-U.K. market—including all flights between London's Heathrow and Dallas and Boston. *See* Srodes, *supra* note 493, at 49.

should be expanded for U.S. carriers.[525] Other issues in dispute include pricing, beyond rights, groundhandling, and security.[526] In addition, the American Airlines-British Airways agreement remains caught up in both British and European Union regulatory proceedings.[527] Overall, however, the United States and the United Kingdom agreed that open skies should be the norm.[528] The real issue for the two countries is exactly what open skies means in terms of implementation.[529]

VII. CONCLUSION

Although smaller countries in Europe, Central America, and Asia embraced open skies agreements with the United States, convincing other nations to sign such agreements will continue to grow more difficult for U.S. officials. The United States essentially chose to target less problematic nations first. Now, talks with the larger countries, with whom the United States has more complex trade relations, are generally stalled.[530] The reason for the slow down of negotiations for successful open skies agreements is simple: some countries have less to gain in opening up their aviation markets to U.S. carriers. Like Japan and the United Kingdom, some countries place a high priority on protecting their national carriers from increased U.S. competition. Other countries, like China, want to use their large aviation market as leverage in overall international trade negotiations. Greg Principato, an advisor to ACCESS U.S.-Japan, summed up the growing reluctance in the world community to agree to open skies with the United States: "Smaller countries without (much) clout can be made to agree to a certain formula . . . . The countries with more clout have more interests, and they're going to negotiate harder."[531]

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525. *See* Field, *supra* note 27, at 4B. Despite British concerns over increasing U.S. airline access to Heathrow, the United Kingdom has agreed that under an open skies regime Heathrow must be opened up to more than the two U.S. carriers currently allowed rights. *See* Murphy House Testimony, *supra* note 13.

526. *See* Murphy House Testimony, *supra* note 13.

527. *See* Goldsmith, *supra* note 47, at A15. In 1998, the European Commission approved the American Airlines/British Airways alliance, but it placed conditions on its approval. *See Commission Outlines Ground Rules for TransAtlantic Air Market*, EUR. REP. July 11, 1998, *available in* 1998 WL 8802801. Therefore, the alliance may still be mired in EC red tape, unless the two airlines follow the EC guidelines. *See id.*

528. *See* Kayal, *supra* note 131, at 1A.

529. *See id.*

530. *See* Field, *supra* note 27, at 4B.

531. Kayal, *supra* note 131, at 1A (alteration in original).

Given the wide variety of economic and political pressures faced by foreign governments within their own countries, a U.S. policy that each nation capitulate and adopt open skies would be counterproductive. No nation would be receptive to such ultimatums. By insisting upon open skies without providing any alternatives, the United States would essentially be forcing its will on other nations. Aviation talks would not be "negotiations," but merely U.S. cajoling sessions intent on forcing other countries to accept what the U.S. deems to be in the other nation's best interests.

Some blamed the United States and its continued insistence on open skies for the protracted U.S.-Japan negotiations. At the height of U.S-Japan negotiations in the fall of 1997, the *Singapore Straits Times* accused the United States of stalling negotiations: "It was precisely because of these sustained attempted to browbeat weaker partners that, in spite of protracted talks, the Americans still have not been able to come to an agreement with the Japanese."[532] This criticism is likely to be repeated in the future unless the United States continues to embrace a flexible approach to international aviation policy.

The perception among foreign nations is that when it comes to allowing foreign carriers to fly domestic routes, giving them beyond rights, or allowing joint arrangements between foreign and U.S. carriers, "the Americans expect far more than they are prepared to concede."[533] Many countries point out that the U.S. domestic aviation market is large, and that it provides a strong revenue base for U.S. airlines who want to expand into international markets. This solid domestic market is the "basic asymmetry in all U.S. discussions with other nations."[534] In essence, foreign countries harbor a belief that U.S. carriers get an unfair advantage in all liberalization agreements because U.S. airlines can exploit the U.S. domestic market while their foreign competitors are locked out.[535] The foreign critics of open skies pin their allegations of "unfair" free trade on this domestic market regulation. Even those who agree that the "economic pie gets bigger when you open markets and compete" believe that the

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532. *Asian Sky*, *supra* note 143. Furthermore, the paper took issue with the United States efforts to pressure European nations to allow U.S. carriers to pick up passengers in one European destination and fly them to other European destinations. *See id.* The paper stated that the U.S. actions were unfair because the United States does not allow foreign carriers to fly passengers from one destination to another within the United States. *See id.*

533. *Id.*

534. *Beyond Rights*, *supra* note 168.

535. *See id.* Those who support the U.S. policy of protecting the domestic market from foreign competition point out that the U.S. domestic market is highly competitive and would not likely create any profit for foreign airlines. *See id.*

foreign governments have "every right to point out that the biggest slice seem[s] reserved for the US."[536]

Economists may agree that open skies, like free trade across all sectors, would be of most benefit to trading partners. But political pressures make that ideal difficult to achieve. The *Far East Economic Review*, focusing on Japan's aviation trade deficit with the United States, found that the United States "was dead right" in arguing that open skies will be in Japan's best interests.[537] Yet, the publication adopted a tone critical to the United States, stating that the United States, which itself has been concerned about large trade deficits with Japan, should not have been surprised by Japan's reluctance to open itself up to further U.S. competition in the airline industry.[538] Others also noted that Japanese government officials had reason to approach open skies skeptically: "For obvious competitive reasons, Japan is in no hurry to radically change the arrangement by allowing foreign carriers to gain stronger footholds in that burgeoning market."[539]

Just as Japan was reluctant to accept unconditional open skies, other nations will manifest the same apprehension in future aviation negotiations. While the United States should continue to pursue its policy goal of open skies, it must be willing to compromise. Each country's limitations, including the economic and political context underlying negotiations, must be considered. Taking an all-or-nothing open skies approach would transform U.S. officials from negotiators into ultimatum enforcers. Foreign nations would resent the implication that they are to bend to U.S. wishes. As a result, foreign officials could refuse to negotiate aviation accords altogether. The United States would be left with the satisfaction of having a forceful and principled aviation policy, but little else.

An international trade policy based on opening up markets does not benefit U.S. interests unless it is implemented, and successful implementation in economically competitive markets would be unlikely under an all-or-nothing approach. The result of

536. *Asian Sky*, *supra* note 143.

537. *Dogfight*, *supra* note 4, at 5.

538. *See id.* As an editorial stated in August of 1997, "if Japan were to succumb to the temptation to play the trade-deficit card here, would anyone really blame them?" *Id.*

539. *Open Skies*, *supra* note 160, at A12.

an all-or-nothing open skies approach is simply to maintain the status quo, which in many cases means inefficient, costly, and artificially constrained air service for American and foreign consumers alike.

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