

Other Areas of International Law

A Level Playing Field for “Open Skies”: The Need for Consistent Aviation Regulation

by Peter Paul FITZGERALD.

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“Open skies”, a policy concept that calls for the liberalization of international air transport, has been a key phrase in the field of aviation law and policy for the past twenty-five years. Although aviation is still one of the most protected industries, change is in the air. Once carefully guarded traffic rights are generally in the process of liberalization as states lower the hurdles that curtail the ability of other states’ airlines to operate in their markets. Bilateral air services agreements are the principal instruments for liberalizing international air transport, so this mostly affects flights between two states by their national airlines. However, two separate bilateral air services agreements can make connecting flights possible via the state located in the middle.

Dr Fitzgerald begins his book with an observation: “Today’s [aviation] industry is dominated by government-owned intercontinental airlines based in the Middle East and carrying passengers the majority of whom are ultimately destined for States other than the States where the airlines are based” (p. 1). He calls them “Government-Backed Mega Carriers” [GBMCs] and claims that their aggressive use of connecting flights in small home markets distorts competition within the international airline market. On a related topic, he examines the emergence of deeply integrated airline alliances known as “metal neutral joint ventures” [MNJVs], which he argues can be anti-competitive.

In Dr Fitzgerald’s analysis, only a multilateral approach can effectively address the issue of intensifying competition in international commercial aviation. His proposal is for Australia, Canada, the European Union, New Zealand, and the United States to negotiate a treaty to create a multilateral forum, which he tentatively names the “Open Skies Intercontinental Aviation Block” [OSIAB]. The proposed OSIAB would discuss not only fair competition but also areas where he claims there is insufficient international harmonization, namely aviation security, environmental regulation, and passenger rights.

This book is extremely well researched and exhibits the author’s extensive research in the commercial aviation industry from the perspectives of law, business, and policy. The detailed historical examples in the footnotes are entertaining as well. Although some readers may find that the monograph discusses too many topics, the author does not fail to create a coherent whole. One of the striking arguments related to environmental regulation is that governments should encourage airlines to work together by up-gauging aircraft (that is, using bigger aircraft). The author’s rationale is that down-gauging results in more flights carrying the same number of passengers, with a corresponding increase in greenhouse gas emissions per passenger. Thus, even if regulators’ encouragement for rival airlines to share capacity could have a negative impact on fair competition, this could be outweighed by the public good of fewer emissions.

Most literature on fair competition in the airline industry relies heavily on protectionism and nationalism, but Dr Fitzgerald tackles this highly controversial topic in a rational and convincing way. The greater regulatory scrutiny that he suggests in his book is worth considering.

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