

[ORAL ARGUMENT NOT YET SCHEDULED]

No. 17-1012

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; ASSOCIATION OF
FLIGHT ATTENDANTS-CWA; ALLIED PILOTS ASSOCIATION; and
SOUTHWEST AIRLINES PILOTS' ASSOCIATION,

Petitioners,

v.

ELAINE L. CHAO, Secretary of the United States Department of Transportation,
Respondent,

NORWEGIAN AIR INTERNATIONAL LIMITED,
Intervenor.

ON PETITION FOR REVIEW OF AN ORDER
OF THE DEPARTMENT OF TRANSPORTATION

BRIEF FOR RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici.

Petitioners are the Air Line Pilots Association, International; the Association of Flight Attendants-CWA; the Allied Pilots Association; and the Southwest Airlines Pilots' Association. Respondent is Elaine L. Chao, Secretary of the U.S. Department of Transportation. Intervenor is Norwegian Air International Limited.

B. Rulings Under Review.

The ruling under review is the Department of Transportation's Order 2016-11-22, entered on December 2, 2016, in Docket Number DOT-OST-2013-0204, granting Norwegian Air International Limited a foreign air carrier permit. That Order, which is unpublished, is reprinted at Joint Appendix 569-77.

C. Related Cases.

There are no related cases.

/s/ Sharon Swingle
Sharon Swingle

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JA

Joint Appendix

Norwegian Air

Norwegian Air International Limited

Pet. Br.

Brief for Petitioners

STATEMENT OF JURISDICTION

The Department of Transportation's order granting a foreign air carrier permit to Norwegian Air International Limited (Norwegian Air) was issued on November 30, 2016, and entered in the docket on December 2, 2016. Joint Appendix (JA) 569-77. Petitioners filed a timely petition for review on January 12, 2017. *See* 49 U.S.C. § 46110(a). Petitioners invoke this Court's jurisdiction under 49 U.S.C. § 46110(c).

STATEMENT OF THE ISSUES

1. Whether petitioners have established that the Department of Transportation's grant of a foreign air carrier permit to Norwegian Air will cause petitioners or their members concrete, non-speculative, and imminent injury, as required to establish Article III standing.

2. Whether the Department of Transportation's grant of a foreign air carrier permit to Norwegian Air was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

PERTINENT STATUTES

Under 49 U.S.C. § 41301, a foreign air carrier must have a permit from the Secretary of Transportation to transport passengers or property as a common carrier for compensation between the United States and a foreign country. *See id.*;

see also id. § 40102(a)(23). The Secretary of Transportation may issue a foreign air carrier permit

if the Secretary finds that –

(1) the person is fit, willing, and able to provide the foreign air transportation to be authorized by the permit and to comply with [Title 49, Subtitle VII, Part A] and regulations of the Secretary; and

(2)(A) the person is qualified, and has been designated by the government of its country, to provide the foreign air transportation under an agreement with the United States Government; or

(B) the foreign air transportation to be provided under the permit will be in the public interest.

49 U.S.C. § 41302.

In carrying out her responsibilities under Title 49, Subtitle VII, Part A, which includes 49 U.S.C. § 41302, the Secretary “shall act consistently with obligations of the United States Government under an international agreement.”

49 U.S.C. § 40105(b)(1)(A).

STATEMENT OF THE CASE

A. UNITED STATES-EUROPEAN UNION AIR TRANSPORT AGREEMENTS.

The United States is a party to “open skies” air transport agreements that, among other issues, facilitate competition in international air services. The 2007 United States-European Community Air Transport Agreement is an executive agreement between the United States and the European Community and the Member States of the European Union, signed on April 25 and April 30, 2007. *See*

Addendum (Add.) 3-81. The 2007 Air Transport Agreement was intended to, *inter alia*, “promote an international aviation system based on competition among airlines in the marketplace with minimum government interference and regulation”; “make it possible for airlines to offer the travelling and shipping public competitive prices and services in open markets”; and allow “all sectors of the air transport industry, including airline workers, [to] benefit [from] a liberalized agreement.” 2007 Air Transport Agreement, preamble, Add. 6-7. The Agreement had “the goal of opening access to markets and maximizing benefits for consumers, airlines, labor, and communities on both sides of the Atlantic.” 2007 Air Transport Agreement, preamble, Add. 8.

Under Article 2 of the 2007 Air Transport Agreement, “[e]ach Party shall allow a fair and equal opportunity for the airlines of both Parties to compete in providing the international air transportation governed by this Agreement.” Add.

11. Article 4 of the 2007 Air Transport Agreement requires that, when an airline from one party applies for operating authorizations and technical permissions from another party,

the other Party shall grant appropriate authorizations and permissions with minimum procedural delay, provided:

(a) for a U.S. airline, substantial ownership and effective control of that airline are vested in the United States, U.S. nationals, or both, and the airline is licensed as a U.S. airline and has its principal place of business in U.S. territory;

(b) for a Community airline [*e.g.*, an airline of the European Community and its Member States, *see* Art. 3(1)(c)(ii)], substantial ownership and effective control of that airline are vested in a Member State or States, nationals of such a state or states, or both, and the airline is licensed as a Community airline and has its principal place of business in the territory of the European Community;

(c) the airline is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air transportation by the Party considering the application or applications; and

(d) the provisions set forth in Article 8 (Safety) and Article 9 (Security) are being maintained and administered.

2007 Air Transport Agreement, art. 4, Add. 16-17.

The parties to the 2007 Air Transport Agreement also agreed to enter into “second stage negotiations” aimed at further liberalizing air traffic rights and reaching agreement on other specified agenda items. 2007 Air Transport Agreement, art. 21, Add. 46-47. The second stage negotiations culminated in a 2010 “Protocol to Amend the Air Transport Agreement Between the United States of America and the European Community and its Member States, Signed on April 25 and 30, 2007.” Add. 82-109. The 2010 Protocol was signed by the United States, the European Union, and its Member States.¹

¹ As noted in the preamble to the 2010 Protocol, “the European Union replaced and succeeded the European Community as a consequence of the entry into force on December 1, 2009 of the Treaty of Lisbon amending the Treaty of European Union and the Treaty establishing the European Community.” Add. 85. “[A]s of that date, all the rights and obligations of, and all the references to the

The 2010 Protocol amended the 2007 Air Transport Agreement to require parties to grant reciprocal recognition of regulatory determinations with regard to airline fitness and citizenship. 2010 Protocol, art. 2, Add. 87-88. A fitness determination is “a finding that an air carrier proposing to operate services * * * has satisfactory financial capability and adequate managerial expertise to operate such services and is disposed to comply with the laws, regulations, and requirements that govern the operation of such services.” 2010 Protocol, art. 1(2), Add. 86.

The 2010 Protocol amended the 2007 Air Transport Agreement by adding a new provision, “Article 6 *bis*.” 2010 Protocol, art. 2 (adding Article 6 *bis*), Add. 87-88. Under Article 6 *bis*,

Upon receipt of an application for operating authorization, pursuant to Article 4, from an air carrier of one Party, the aeronautical authorities of the other Party shall recognise any fitness and/or citizenship determination made by the aeronautical authorities of the first Party with respect to that air carrier as if such a determination had been made by its own aeronautical authorities and not enquire further into such matters.

Art. 6 *bis* (1), Add. 87. Article 6 *bis* recognizes an exception to this obligation where the aeronautical authorities of the other Party have a specific reason for concern that the conditions for authorization or permission have not been met, but requires the other Party to promptly advise and consult with the first Party, and

European Community in the [2007 Air Transport Agreement] apply to the European Union.” *Id.*

potentially to submit the matter to the Joint Committee established under Article 18 of the 2007 Air Transport Agreement for further action. Art. 6 *bis* (1)(a), Add. 88.

The 2010 Protocol also added a new article on “Social Dimension” to the 2007 Air Transport Agreement, Article 17 *bis*. Protocol, Art. 4 (adding Article 17 *bis*), Add. 92-93. In Article 17 *bis*,

1. The Parties recognise the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards. The opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties’ respective laws.

2. The principles in paragraph 1 shall guide the Parties as they implement the Agreement, including regular consideration by the Joint Committee, pursuant to Article 18, of the social effects of the Agreement and the development of appropriate responses to concerns found to be legitimate.

Id.

Subsequent to the 2010 Protocol, the United States, the European Union and its Member States, Iceland, and Norway signed the Air Transport Agreement of June 16 and 21, 2011. Add. 110-33. The 2011 Agreement incorporates the 2007 Air Transport Agreement, as amended by the 2010 Protocol, and provides for its application to Iceland and Norway as if they were Member States of the European Union. 2011 Air Transport Agreement, art. 2, Add. 116. The 2007 Air Transport Agreement, 2010 Protocol, and 2011 Air Transport Agreement are not yet in force,

but they are being provisionally applied consistent with their terms. 2007 Air Transport Agreement, art. 25, Add. 50; 2010 Protocol, art. 9, Add. 100; 2011 Air Transport Agreement, art. 5, Add. 119; *see also* Restatement (Fourth) of Foreign Relations Law of the United States § 104 cmt. d (Tentative Draft No. 2, Mar. 20, 2017) (“Provisional application binds a state to fulfill the indicated rights and obligations in an international agreement * * *.”), Add. 138.

B. FACTUAL BACKGROUND AND ADMINISTRATIVE PROCEEDINGS.

1. Norwegian Air, a foreign air carrier incorporated in Ireland, applied to the Department of Transportation for a foreign air carrier permit that would allow it to conduct scheduled and charter air transportation of persons, property, and mail between foreign locations and the United States. JA 1-5. At the time of its application, Norwegian Air indicated that it had applied for an “Air Operator Certificate” from the Irish Aviation Authority, and would submit it to the Department of Transportation upon receipt. JA 3. The Irish Aviation Authority subsequently granted Norwegian Air an Air Operator Certificate, authorizing Norwegian Air to provide commercial air transportation services to, from, and within Ireland. JA 254-61.

The Air Line Pilots Association, a labor union representing pilots, participated in the administrative proceedings before the Department of Transportation and objected to Norwegian Air’s application. Air Line Pilots

argued that granting Norwegian Air a foreign air carrier permit “would be directly at odds with [the] intent of the social clause” in Article 17 *bis*. JA 12.

Air Line Pilots submitted materials suggesting that Norwegian Air Shuttle, the corporate parent of Norwegian Air, had established another wholly-owned subsidiary, Norwegian Long Haul, AS, a Norwegian air carrier that provides international air service. JA 18, 240-41. Norwegian Long Haul, AS was assertedly established to permit Norwegian Air Shuttle to operate aircraft using pilots and flight attendants with lower wages and inferior working conditions than pilots and flight attendants employed directly by Norwegian Air Shuttle. JA 18. Norwegian Long Haul, AS purportedly registered its aircraft in Ireland “so that Norwegian law would not apply to the establishment of the wages and working conditions that apply to the air crew who work on board those aircraft.” JA 18.

Norwegian Long Haul, AS also assertedly contracted with foreign staffing companies to employ pilots and flight attendants, rather than employ them directly. JA 19. Air Line Pilots claimed that the terms and conditions of employment under the type of contract used by the staff agency companies “are significantly inferior to those that apply” to pilots directly employed by Norwegian Air Shuttle. JA 19. Air Line Pilots suggested that Norwegian Air would use similar tactics, and that it was incorporating in Ireland and seeking authorization to fly from the Irish

Aviation Authority so that it would not be required to comply with Norwegian labor laws. JA 20, 240-41; *see also* JA 59, 64, 66, 73-74.

The Allied Pilots Association and the Southwest Airlines Pilots Association similarly urged the Department of Transportation to deny Norwegian Air a foreign air carrier permit. JA 198-99, 200-01. Allied Pilots asserted that Norwegian Air sought “to establish itself as an Irish air carrier in order to avoid the application of Norwegian social laws,” and that the airline “plans to skirt even Ireland’s wage and labor protections – and thus offer substantially inferior terms of employment – by utilizing sub-contracted pilots directly employed by non-EU entities.” JA 198-99. Both Allied Pilots and Southwest Airlines Pilots argued that Norwegian Air’s proposed service would not encourage “fair wages and working conditions,” 49 U.S.C. § 40101(a)(5), or “strengthen the competitive position of [U.S.] air carriers to at least insure equality with foreign air carriers,” *Id.* § 40101(a)(15), (e)(1), and accordingly that granting Norwegian Air a permit would not be “in the public interest” pursuant to 49 U.S.C. § 41302(2)(B). JA 199, 201. Southwest Airlines Pilots also stated that Norwegian Air’s application “raises concerns about whether or not it is consistent with” the 2011 Air Transport Agreement. JA 201.

2. The Department of Transportation issued an order to show cause on April 15, 2016, tentatively finding under 49 U.S.C. § 41302 that Norwegian Air should be issued a foreign air carrier permit. JA 415-23.

The Department's order summarized objections to Norwegian Air's application, including objections that Norwegian Air "would hire its pilots and cabin crew from a third-party company domiciled in Singapore" and thereby "effectively fragment[] [workers'] ability to associate and bargain collectively." JA 417. The Department recounted opponents' assertion that this "would run counter to Article 17 *bis* of the U.S.-EU Agreement * * * and would violate the Department's statutory public interest goal of encouraging fair wages and working conditions." JA 417.

The Department also summarized submissions from Norwegian Air and others, including Norwegian Air's "claims that it offers competitive wages" and would promote competition and consumer benefits in the highly concentrated transatlantic market. JA 418.

The Department of Transportation explained that, in light of the questions raised in the administrative proceedings "regarding [Norwegian Air]'s business plan and the applicability of Article 17 *bis*" of the 2007 Air Transport Agreement, as amended, the Department had solicited the views of the Department of State and the Department of Justice's Office of Legal Counsel regarding whether Article 17 *bis* of the Agreement permits the United States to unilaterally deny a permit to a foreign air carrier that is otherwise qualified to receive it under the Department of Transportation's authorities and the 2007 Air Transport Agreement, as amended.

JA 420. The order appended responses from the Department of State and the Office of Legal Counsel, both of which concluded that Article 17 *bis* does not provide an independent basis upon which to deny a permit to a foreign air carrier that is otherwise qualified to receive it. JA 466-82. The Department of Transportation also conducted its own legal analysis, concluding that “Article 17 *bis*, while articulating important policy objectives, does not provide an independent legal basis for denying” Norwegian Air’s application. JA 460-65.

The Department of Transportation tentatively decided to grant Norwegian Air a foreign air carrier permit. The Department tentatively found that Norwegian Air had demonstrated that it was financially and operationally fit to perform the services authorized, thereby satisfying 49 U.S.C. § 41302(1). JA 420-21. The Department also found that Norwegian Air was substantially owned and effectively controlled by citizens of Member States of the European Union, and otherwise satisfied the requirements of Article 4 of the 2007 Air Transport Agreement, as amended. JA 421. In tentatively concluding that Norwegian Air satisfied the requirements of Article 4, the Department gave reciprocal recognition to the fitness and citizenship findings of the Irish aviation authority, as it was required to do under Article 6 *bis* of the 2007 Air Transport Agreement, as amended. Accordingly, the Department tentatively concluded that 49 U.S.C. § 41302(2)(A) was satisfied. JA 421 & nn.18-19, 21.

The Department of Transportation reasoned that “Article 17 *bis* cannot be invoked to take precedence over our normal licensing standards,” noting that this conclusion was in accord with the legal views of the Department of Transportation, the Department of State, and the Office of Legal Counsel. JA 421. The Department also reasoned that, under the plain language of 49 U.S.C. § 41302(2), it did not “reach the question of whether grant of authority would be in the public interest” under subsection (2)(B) because the requirements of (2)(A) were met. JA 421-22. The order invited all interested persons to show cause why the Department’s tentative decision should not be made final. JA 422.

3. After receiving and considering additional submissions, the Department of Transportation issued a final order awarding Norwegian Air a foreign air carrier permit on December 2, 2016. JA 569-77.

The objectors argued that Article 17 *bis* permitted the Department of Transportation to deny a permit to Norwegian Air on the basis that it would be contrary to the public interest and to labor terms and conditions. JA 570-71. The Department rejected this contention, concluding that Article 17 *bis* did not provide an independent basis for denying a permit. JA 572. The Department also reasoned that, because the carrier was entitled to receive the permit under the terms of the 2007 Air Transport Agreement, as amended, the grant of the permit was necessarily in the public interest pursuant to 49 U.S.C. § 41302(2)(A) and the

Department did not make a separate determination under § 41302(2)(B) whether grant of the permit would be in the public interest.

The Department also noted that parties opposing Norwegian Air's application for a foreign air carrier permit had raised "significant concerns" regarding Norwegian Air's "potential hiring and employment practices affecting its operations in U.S. markets." JA 572. In response, the Chief Executive Officer of Norwegian Air had voluntarily taken steps "designed to address" those concerns, by committing to certain hiring and employment practices. JA 572. The Department explained that, in granting the permit, the Department had taken account of the totality of the record, including the commitments made by Norwegian Air. JA 572-73.

Once the order became final, Air Line Pilots Association, International, Allied Pilots Association, Association of Flight Attendants-CWA, and Southwest Airlines Pilots' Associations filed this petition for review.²

SUMMARY OF ARGUMENT

I. The petition for review should be dismissed for lack of jurisdiction because petitioners have failed to establish Article III standing. Petitioners have the burden to submit admissible evidence to establish that the Department of

² The petition for review was also filed on behalf of the American Federation of Labor-Congress of Industrial Organizations and the Transportation Trades Department, AFL-CIO, but those petitioners subsequently moved to withdraw.

Transportation's grant of a foreign air carrier permit to Norwegian Air threatens them with concrete and imminent harm. Their unsupported assertions are too speculative and attenuated to satisfy that burden. Petitioners claim that Norwegian Air's entry into the transatlantic aviation market will lead to reduced wages and inferior working conditions for their members, but they fail to show that this is a likely result. To the contrary, information in the administrative record suggests that the increased demand for pilots and flight crew, and employees' strong bargaining position, could result in higher wages and improved working conditions.

II. The Department of Transportation's grant of a foreign air carrier permit to Norwegian Air was not arbitrary, capricious, or otherwise not in accordance with law.

The Department properly determined that Norwegian Air satisfied the requirements for an air carrier permit under 49 U.S.C. § 41302. Norwegian Air is fit, willing, and able to provide the foreign air transportation described in its permit and to comply with applicable statutes and regulations, thereby satisfying § 41302(1). In addition, Norwegian Air is qualified, and has been authorized by Irish aviation authorities, to provide foreign air transportation. Under Article 4 and Article 6 *bis* of the 2007 Air Transport Agreement, as amended, the Department of Transportation was required to recognize as valid Ireland's determinations of

fitness and citizenship, and to give reciprocal effect to those determinations.

Norwegian Air thus satisfied the requirements of 49 U.S.C. § 41302(2)(A).

Petitioners argue that the Department of Transportation failed to make a determination that granting a foreign air carrier permit to Norwegian Air was in the “public interest.” Under the plain language of 49 U.S.C. § 41302(2), however, no such determination was necessary or authorized because Norwegian Air was “qualified, and has been designated by the government of its country, to provide the foreign air transportation under an agreement with the United States Government.”

Petitioners also argue that granting a foreign air carrier permit to Norwegian Air was inconsistent with Article 17 *bis* of the 2007 Air Transport Agreement, as amended. The Executive Branch has reasonably interpreted Article 17 *bis* as not providing an independent basis for denying operating authorization to a foreign air carrier that is otherwise qualified, based on generalized concerns about the potential impact on employees’ wages or working conditions. That interpretation which is shared by officials of the European Commission, is entitled to judicial deference. In any event, the Department of Transportation did take into account

Norwegian Air’s potential hiring and employment practices in acting on its application.

STANDARD OF REVIEW

This Court reviews in the first instance whether petitioners in a direct-review case have established Article III standing. *See Association of Flight Attendants-CWA, AFL-CIO v. U.S. Dep’t of Transp.*, 564 F.3d 462, 464 (D.C. Cir. 2009) (“*Flight Attendants*”). “[T]he petitioner must either identify in [the administrative record] evidence sufficient to support its standing to seek review or, if there is none because standing was not an issue before the agency, submit additional evidence to the court of appeals.” *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002).

On the merits of petitioners’ claim, the agency’s decision must be upheld unless it was arbitrary, capricious, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A); *Republic Airline Inc. v. U.S. Dep’t of Transp.*, 669 F.3d 296, 299 (D.C. Cir. 2012).

ARGUMENT

I. PETITIONERS HAVE FAILED TO ESTABLISH ARTICLE III STANDING.

A. Petitioners Must Produce Evidence To Establish Injury-In-Fact, Causation, and Redressability.

“The ‘irreducible constitutional minimum of standing contains three elements’: (1) injury-in-fact, (2) causation, and (3) redressability.” *Flight*

Attendants, 564 F.3d at 464 (quoting *Miami Bldg. & Const. Trades Council v. Secretary of Def.*, 493 F.3d 201, 205 (D.C. Cir. 2007) (quoting in turn *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992))). To establish “injury-in-fact,” petitioners must show “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *SunCom Mobile & Data Inc. v. FCC*, 87 F.3d 1386, 1388 (D.C. Cir. 1996). The injury-in-fact must also be “fairly traceable to the [opposing party’s] allegedly unlawful conduct and likely to be redressed by the requested relief.” *Flight Attendants*, 564 F.3d at 464 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

In a direct-review case, a petitioner is in the same position as a litigant in district court seeking summary judgment. *See Sierra Club*, 292 F.3d at 899. “When the petitioner’s standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing.” *Flight Attendants*, 564 F.3d at 464 (quoting D.C. Cir. R. 28(a)(7)).

The petitioner’s burden of production is to “support each element of its claim to standing ‘by affidavit or other evidence.’” *Sierra Club*, 292 F.3d at 899 (quoting *Lujan*, 504 U.S. at 561)). “[A] supporting affidavit must set forth specific facts pursuant to Federal Rule of Civil Procedure 56(e), that is, it must be made on personal knowledge, set out facts that would be admissible in evidence, and show

that the affiant is competent to testify on the matters stated.” *Flight Attendants*, 564 F.3d at 465 (citations, quotation marks, and alterations omitted). Conclusory assertions lacking factual support in the record are not sufficient to meet this burden. *See id.* at 465-66; *see also Swanson Group Mfg. LLC v. Jewell*, 790 F.3d 235, 240 (D.C. Cir. 2015). Furthermore, counsel’s allegations of injuries, made without personal knowledge, “are not evidence” and do not suffice to satisfy a litigant’s burden. *Sierra Club*, 292 F.3d at 901-02.

The petitioner’s burden of proof “is to show a ‘substantial probability’ that it has been injured, that the defendant caused its injury, and that the court could redress that injury.” *Sierra Club*, 292 F.3d at 899 (quoting *American Petroleum Inst. v. U.S. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000)).

Where a petitioner is itself the subject of the challenged government action (or refusal to act), “there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.” *Lujan*, 504 U.S. at 561-62. Where, however, a petitioner’s “asserted injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed,” and standing “is ordinarily ‘substantially more difficult to establish.’” *Id.* at 562 (quoting *Allen*, 468 U.S. at 758). Causation and redressability in that context “ordinarily hinge on the response of the regulated (or regulable) third party to the government action or

inaction—and perhaps on the response of others as well,” and “it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.” *Lujan*, 504 U.S. at 562. Furthermore, “any petitioner alleging only future injuries confronts a significantly more rigorous burden to establish standing.”

United Transp. Union v. ICC, 891 F.2d 908, 913 (D.C. Cir. 1989).

B. Petitioners Have Not Met Their Burden of Production or Burden of Proof.

According to their brief, petitioners are labor unions that collectively represent more than 100,000 pilots and flight attendants who are employed by U.S. airlines, and who claim to “have a substantial interest in the order under review.” Brief for Petitioners (Pet. Br.) 12. Petitioners’ only attempt to establish Article III standing consists of statements in their brief unsupported by any admissible evidence. Petitioners claim that they “and their members will be injured by DOT’s action because [Norwegian Air] will be using lower-cost pilots and flight attendants aboard its transatlantic flights, thus placing pressure on the members’ terms and conditions of employment.” Pet. Br. 13. According to petitioners, the order “will directly cause harm because [Norwegian Air] could not operate to the United States without the permit issued by the Order,” and “[a] court order vacating [the] Order would redress the harm that would otherwise be suffered by Petitioners and their members.” Pet. Br. 13.

Petitioners' unsupported claims of injury, causation, and redressability are too speculative and attenuated to establish Article III standing. Petitioners assert that the Department's grant of a foreign air carrier permit to Norwegian Air will permit Norwegian Air to provide service between the United States and foreign locations, using pilots, flight attendants, and other air crew members who are paid less and provided with working conditions inferior to those of the flight crews of other carriers providing service between the United States and foreign locations. Although petitioners do not explain their theory of causation, it appears to be premised on an assumption that existing carriers that provide service between the United States and foreign locations will pay less and provide less desirable conditions of employment to their own pilots and flight crews as a result of increased competition, or conversely, that existing carriers will lose market share on existing flight routes, thus forcing pilots and other air crew members to work for Norwegian Air instead of a higher-paying competitor. Each step of this attenuated causal link is speculative, and at odds with information in the administrative record.

Norwegian Air's affiliate, Norwegian Air Shuttle, has provided transatlantic air service to the United States since 2014. JA 52-53, 55-56. Although Norwegian Air Shuttle assertedly registers its planes in Ireland and employs pilots based in Thailand under individual employment contracts with inferior terms, *see* JA 191-

92, 196-97—the same types of employment practices that petitioners claim Norwegian Air will employ and about which they complain here—petitioners have submitted no admissible evidence that Norwegian Air Shuttle’s practices have injured petitioners or their members. And members of Norwegian Air Shuttle’s U.S.-based crew submitted a letter in the administrative proceedings explaining that they “found Norwegian’s training program, compensation and benefits package to be of the highest quality and market competitive,” and that many of them had “left U.S. legacy carriers because the wages and benefits at Norwegian are better.” JA 399.

In addition, while Norwegian Air’s application was pending before the Department of Transportation, the carrier committed “to use only European and U.S. pilots and crew on [Norwegian Air] transatlantic flights (except if compelled by extraordinary and unforeseen operational reasons).” JA 404. Norwegian Air also affirmed that “U.S. labor organizations representing aviation workers will be entitled under U.S. labor law—and indeed will be welcome—to propose unionization to the hundreds of new employees hired by Norwegian International in the United States.” JA 313. It is entirely speculative that the entry of a new airline into the U.S. transatlantic aviation market would reduce the bargaining rights of U.S.-based pilots or flight crew members, or result in a corresponding reduction in wages and a deterioration of their working conditions.

Nor is this a situation in which competitive injury can be presumed. In some cases, this Court has found Article III standing “when a challenged agency action authorizes allegedly illegal transactions that will almost surely cause petitioner to lose business,” without waiting “for injury from specific transactions to claim standing.” *El Paso Natural Gas Co. v. FERC*, 50 F.3d 23, 27 (D.C. Cir. 1995). A party that seeks to establish standing under the “competitor standing doctrine ‘must demonstrate that it is a *direct* and *current* competitor whose bottom line may be adversely affected by the challenged government action.’” *Mendoza v. Perez*, 754 F.3d 1002, 1013 (D.C. Cir. 2014) (quoting *KERM, Inc. v. FCC*, 353 F.3d 57, 60 (D.C. Cir. 2004)).

Neither the unions themselves nor their members are direct and current competitors of Norwegian Air. The grant of a foreign air carrier permit to Norwegian Air does not impose any competitive injury on them. In these circumstances, the mere fact of Norwegian Air’s entry as a new airline providing transatlantic service does not establish that petitioners and their members are likely to suffer injury that is imminent and certainly impending. *Cf. United Transp. Union*, 891 F.2d at 914 (deeming it “wholly speculative whether decreased competition in the railroad industry will harm rather than help” union members).

Furthermore, information submitted in the administrative proceeding before the Department of Transportation suggests that granting a permit to Norwegian Air

could benefit, rather than injure, pilots and other flight crew members. In the negotiations that led to the 2010 Protocol, representatives from the European and U.S. aviation industries noted that, between 2001 and 2009, “the US industry * * * generated only one year of profits and * * * reduced the number of full time employees by 25 percent.” JA 111; *see also* JA 168. The European Union explained that “the creation of a full [European Union-United States] Open Aviation Area has been estimated to be worth up to 12 billion euro in economic benefits and up to 80,000 new jobs,” “spread more or less equally between” the United States and the European Union. JA 282, 284. And the removal of barriers to serving the transatlantic United States-European Union market, and corresponding “reduction in the cost of tickets,” was predicted to increase the passenger traffic from under 50 million passengers in 2007 to an additional 26 million passengers over a period of five years. JA 284.

Information before the Department of Transportation showed that, between 2006 and 2014, the overall number of pilots employed by Norwegian Long Haul increased from 196 to 978, and was predicted to more than double between 2014 and 2017. JA 275. The Government of Ireland, in its submission in the proceeding, informed the Department of Transportation that “there is a worldwide shortage of qualified air crew” and that, “[i]n such a competitive environment airlines use a range of new arrangements to help attract and retain the best staff”

and that it is “unlikely in these circumstances that labour standards would be undermined.” JA 485. Given significantly increased demand for pilots and other flight crew members resulting from increased numbers of carriers and reduced fares in the transatlantic market, it is reasonable to infer that Norwegian Air’s entry to the market could enable airline pilots and flight crew to command higher wages and an improvement in working conditions, rather than the opposite.

This inference gains further support from submissions representing the views of representatives of the European Commission during the negotiations leading to the 2010 Protocol. The European Commission explained that allowing increased competition from foreign airlines was unlikely to harm unionized workers because of “other rules (immigration, flights limitations, etc.),” clauses secured by unions in their agreements, and the fact that “unions were increasingly aligned internationally.” JA 106. A special advisor to the European Commission charged with studying labor issues reported that the airline industry in the United States and the European Union “demonstrates high levels of union membership, and [that] many categories of its workers have demonstrated a long track-record of securing and maintaining wages and conditions in excess of national averages,” commensurate with “the high level of skill, training and experience needed” to perform those jobs. JA 176. The special advisor also noted that “the principally national nature of the relationship between airline labour and management []

provides considerable benefit in enabling employment to be tailored to the culture, customs and commercial realities of the local markets served by an airline.”

JA 176. Again, it would be entirely speculative in the face of these submissions, and in the absence of contradictory evidence in the record, to conclude that the Department’s grant of a foreign air carrier permit to Norwegian Air is likely to cause imminent injury to U.S. pilots and other flight crew members by harming collective bargaining and reducing wages and harming conditions of employment.

This Court has previously “denied standing where ‘the plaintiff seeks to change the defendant’s behavior *only as a means* to alter the conduct of a third party, not before the court, who is the direct source of the plaintiff’s injury.’”

Fulani v. Brady, 935 F.2d 1324, 1330 (D.C. Cir. 1991) (quoting *Common Cause v. Dep’t of Energy*, 702 F.2d 245, 251 (D.C. Cir. 1983)). Here, petitioners seek to compel the Department of Transportation to deny a foreign air carrier permit to Norwegian Air in order to compel Norwegian Air, or its competitors, to offer higher wages and better working conditions to current or prospective employees. That attenuated chain of causation, based on entirely speculative predictions of future harm, and without any admissible evidence to support it, fails to establish Article III standing. *See, e.g., Flight Attendants*, 564 F.3d at 468-69.

Finally, to the extent petitioners rely on their participation in the administrative proceedings before the Department of Transportation, *see* Pet. Br.

12, this is clearly insufficient to establish Article III standing. *See Sierra Club*, 292 F.3d at 899; *New World Radio, Inc. v. FCC*, 294 F.3d 164, 170 n.5 (D.C. Cir. 2002). The petition for review should be dismissed for lack of jurisdiction.

II. THE DEPARTMENT OF TRANSPORTATION’S GRANT OF A FOREIGN AIR CARRIER PERMIT TO NORWEGIAN AIR WAS NOT ARBITRARY, CAPRICIOUS, OR OTHERWISE UNLAWFUL.

Petitioners’ claims also fail on the merits. The Department of Transportation’s determination that Norwegian Air satisfied the requirements for a foreign air carrier permit under 49 U.S.C. § 41302 was reasonable and based on a correct interpretation of the statute. The issuance of a foreign air carrier permit was also consistent with the provisions of the 2007 Air Transport Agreement, as amended, including Article 17 *bis*.

A. The Department of Transportation Reasonably Concluded That Norwegian Air Satisfied the Requirements of 49 U.S.C. § 41302.

As noted above, 49 U.S.C. § 41302 establishes two requirements for the issuance of a foreign air carrier permit: (1) that the carrier is fit, willing, and able to provide the foreign air transportation authorized by the permit; and (2) either that the carrier has been designated by the government of its country to provide the foreign air transportation under an agreement with the United States government, or that issuing the permit is otherwise in the public interest. The Department of Transportation’s conclusion that Norwegian Air satisfied the requirements for a foreign air carrier permit under 49 U.S.C. § 41302 was not arbitrary or capricious.

The Department of Transportation concluded, and petitioners do not contest, that Norwegian Air is fit, willing, and able to provide the foreign air transportation described in its permit and to comply with Title 49, Part A, of the U.S. Code, and regulations of the Secretary of Transportation. JA 422, 573. The requirements of 49 U.S.C. § 41302(1) were thus satisfied.

In addition, the Department of Transportation found, and petitioners do not contest, that Norwegian Air is qualified, and has been designated by Ireland, the country of its incorporation, to provide foreign air transportation under an agreement with the United States. JA 420-22, 573. Thus, 49 U.S.C. §41302(2) was satisfied. Norwegian Air established that it is a “Community airline,” as that term is used in the 2007 Air Transport Agreement, as amended; that substantial ownership and effective control are vested in nationals of a European Union Member State (which per the 2011 Air Transport Agreement is extended to include Norway and Iceland); and that it is licensed as a Community airline by Ireland and has its principal place of business in Ireland, thereby satisfying the requirements of Article 4(b) of the 2007 Air Transport Agreement, as amended. The United States was thus obligated under Article 4 to “grant appropriate authorizations and permissions with minimum procedural delay,” provided it determined that the requirements of “Article 8 (Safety) and Article 9 (Security) are being maintained and administered.” 2007 Air Transport Agreement, art. 4(d), Add. 17.

Furthermore, under Article 6 *bis* of the 2007 Air Transport Agreement, as amended, “upon receipt of an application for operating authorization pursuant to Article 4,” the United States was obligated to “recognise any fitness and/or citizenship determination made by the aeronautical authorities of [Ireland] with respect to [Norwegian Air] as if such a determination had been made by its own aeronautical authorities and not enquire further into such matters,” unless it had “specific reason for concern” about Norwegian Air’s qualifications to operate. Add. 87-88. The Department of Transportation acted in accordance with those international obligations in recognizing, and giving reciprocal effect to, Ireland’s determinations of fitness and citizenship, in the course of granting a foreign air carrier permit to Norwegian Air. *See* 49 U.S.C. § 40105(b)(1)(A) (requiring Secretary to “act consistently with obligations of the United States Government under an international agreement”).

Petitioners argue that the Department of Transportation did not properly apply 49 U.S.C. § 41302 because it did not make a determination pursuant to § 41302(2)(B) that the grant of a permit to Norwegian Air would be “in the public interest.” Pet. Br. 25-28. By its plain terms, however, that statutory requirement did not apply. The statute requires *either* that (A) an air carrier “is qualified, and has been designated by the government of its country, to provide the foreign air transportation under an agreement with the United States Government, *or* (B) the

foreign air transportation to be provided under the permit will be in the public interest.” 49 U.S.C. § 41302(2) (emphasis added). Having found that (A) was satisfied, the Department was not required to determine that (B) was also satisfied. JA 421, 464.

Petitioners nevertheless contend that the “or” in 49 U.S.C. § 41302(2) should be read to mean “and,” suggesting that that construction is supported by legislative history. Pet. Br. 25-27. That legislative history, however, confirms that the Department’s interpretation of the plain language of the statute is correct. Indeed, the basic purpose of the section of the bill adding the provision codified at § 41302(2) was to provide the Department an alternative to the “public interest” standard.

In the 1979 Senate committee hearings, the Civil Aeronautics Board submitted a section-by-section analysis of the proposed bill that explained that the provision that was ultimately enacted without material changes as 49 U.S.C. § 41302 would

authorize the issuance of a foreign air carrier permit to a fit applicant *either* [1] upon a finding that the applicant is qualified, and has been designated by its government, to perform such foreign air transportation under the terms of an agreement with the United States, *or* (2) upon a finding that such transportation will be in the public interest. Currently the latter is the only criterion.

International Air Transportation Competition Act of 1979: Hearings on S. 1300 Before the Subcomm. on Aviation of the S. Comm. on Commerce, Sci. & Transp.,

96th Cong. 67 (1979) (“1979 Hearings”) (emphasis added). The Board explained that “[t]he negotiation of a bilateral agreement itself represents a determination by the Government of the United States that the grant of route authority provided for under the bilateral is in the ‘public interest,’” and that the new provision “would avoid an unnecessary relitigation of the public interest question.” *Id.*

Although the Civil Aeronautics Board noted that the statute permitted but did not require issuance of a permit, and that the Board “would still retain the power to withhold a permit where issuance would not be in the public interest,” the example it provided was where “the foreign government was not complying with its obligations under an international agreement.” 1979 Hearings 67. Nothing in that statement suggests that the Board must make a separate determination that issuance of the permit is in the public interest in cases in which § 41301(2)(A) is satisfied. To the contrary, the Civil Aeronautics Board explicitly disagreed with a proposal by the Air Transport Association of America to amend the statute “to include a public interest criteria for grant of permits where the carrier is designated under a bilateral agreement.” *Id.* at 80.

The State Department’s section-by-section analysis of the bill also explained that the change would allow the Civil Aeronautics Board to “act consistently with our international agreements” and “enable the United States to provide firm assurances to foreign governments,” by “eliminating a dilemma previously faced

on occasion where a service by a foreign carrier was authorized by a bilateral agreement but nevertheless attacked before the [Board] as not being in the ‘public interest.’” 1979 Hearings 101. The State Department explained that the provision, “in effect, creates a conclusive presumption that a service authorized by a bilateral agreement *is* in the public interest.” *Id.* Thus, although noncompliance with a bilateral agreement might provide a basis for the government to decline to issue a foreign air carrier permit, there is no statutory requirement that the Department of Transportation make a determination that issuance of a permit authorized under a bilateral agreement is in the public interest.

Petitioners also claim that the Department of Transportation “has consistently and historically interpreted the ‘or’ between [§ 41302](2)(A) and (2)(B) to be an ‘and.’” Pet. Br. 25; *see also* Pet. Br. 28-30. That assertion is incorrect. Petitioners cite to the Department of Transportation’s Foreign Air Carrier Information Packet, but that guidance notes that, in deciding foreign air carrier applications, the Department considers “whether the authority is covered by a bilateral agreement, and whether the applicant has been designated by its homeland.” U.S. Dep’t of Transp., Foreign Air Carrier Information Packet 5 (Sept. 2000), available at <https://cms.dot.gov/office-policy/aviation-policy/foreign-air-carrier-information-packet>. Furthermore, the Department’s guidance on “Application Procedures for Foreign Air Carriers of the European Union” explains

that the Department “uses determinations made by aeronautical authorities of Member States on the fitness and citizenship of their air carriers, rather than basing these findings on detailed evidentiary submissions” filed under 14 C.F.R. Part 211, as would presumably be the case if the Department needed to make a public interest assessment. U.S. Dep’t of Transp., Appl. Procedures for Foreign Air Carriers of the European Union, Appl. Procedures for EU Carriers (Feb. 19, 2009), available at <https://cms.dot.gov/policy/aviation-policy/application-procedures-foreign-air-carriers-european-union>. And although the Department of Transportation has previously stated, in tentatively concluding that it would grant a foreign air carrier permit under 49 U.S.C. § 41301 and an exemption from the permit requirement under 49 U.S.C. § 40109(c), that the public interest supported its decision (a finding that *is* required under § 40109(c)), nothing in those decisions suggests that the Department believed it was required to make that determination as a condition of issuing a foreign air carrier permit under 49 U.S.C. § 41302(1) and (2)(A).

Finally, petitioners argue that the Department of Transportation’s interpretation of 49 U.S.C. § 41302(2) will bar the agency from taking action under other statutory provisions setting forth a “public interest” standard. Pet. Br. 30-31. That is erroneous. The Department remains authorized to take steps as necessary to protect the public interest in connection with the statutes cited by petitioners,

where applicable. Under the circumstances of this case, the Department decided to issue Norwegian Air a foreign air carrier permit because the carrier had satisfied the conditions of § 41302(1) and (2)(A). The Department's construction simply means that it need not conduct a separate analysis of the public interest under § 41302(2)(B) before issuing a foreign air carrier permit. Should the public interest warrant taking action under the other statutes petitioners cite, the Department has ample authority to do so.

Petitioners also contend that, even if the Department of Transportation did not deny Norwegian Air's application outright, it was arbitrary and capricious in not imposing conditions on the foreign air carrier permit under 49 U.S.C. § 41305(b), which provides that the Secretary of Transportation "may" (but is not required to) "impose terms for providing foreign air transportation under the permit that the Secretary finds may be required in the public interest." Pet. Br. 11, 13. Although the Department of Transportation did not expressly address petitioners' request to place conditions on Norwegian Air's foreign air carrier permit, the Department's reasoning that "[t]he existence of an air service agreement demonstrates that granting operating authority to a foreign carrier is *per se* in the public interest" is dispositive of that assertion. JA 421; *accord* JA 572. It would make little sense to find that grant of a permit is *per se* in the public interest and

yet to impose permit conditions based on the theory that in their absence a grant would not be in the public interest.

B. The Department of Transportation’s Grant of a Foreign Air Carrier Permit to Norwegian Air Did Not Contravene Article 17 *bis* of the 2007 Air Transport Agreement, as Amended.

Petitioners also erroneously contend that the Department of Transportation’s grant of a foreign air carrier permit to Norwegian Air was inconsistent with Article 17 *bis* of the 2007 Air Transport Agreement, as amended. Pet. Br. 16-19, 31-32.

1. In interpreting the meaning of the 2007 Air Transport Agreement, as amended, including Article 17 *bis*, this Court “begin[s] with the text of the treaty and the context in which the written words are used.” *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1508-09 (2017).

As noted above, Article 4 of the 2007 Air Transport Agreement, as amended, obligated the United States to grant Norwegian Air “appropriate authorizations and permissions with minimum procedural delay,” provided it determined that the ownership requirements of Article 4(b) were met, the fitness provision of Article 4(c) was satisfied, and requirements of Article 8 (Safety) and Article 9 (Security) were being maintained and administered, Art. 4(d). Add. 16. Furthermore, under Article 6 *bis*, upon receipt of an application for operating authorization pursuant to Article 4, the United States was obligated to “recognise any fitness and/or citizenship determination made by the aeronautical authorities of

[Ireland] with respect to [Norwegian Air] as if such a determination had been made by its own aeronautical authorities and not enquire further into such matters,” unless it had “specific reason for concern” about Norwegian Air’s qualifications to operate. Add. 87-88. Under the plain language of the 2007 Air Transport Agreement, as amended, those are the exclusive criterion required for a grant of operating authority.

Against this backdrop, Article 17 *bis*, entitled “Social Dimension,” provides in paragraph 1 that

[t]he Parties recognise the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards. The opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties’ respective laws.

Add. 92. That subsection imposes no obligations, and does not require the parties to take any particular action. It is a statement of principle, rather than a binding obligation.

Petitioner contends that the Department of Transportation failed to comply with paragraph 2 of Article 17 *bis*, which provides that

The principles in paragraph 1 shall guide the Parties as they implement the Agreement, including regular consideration by the Joint Committee, pursuant to Article 18, of the social effects of the Agreement and the development of appropriate responses to concerns found to be legitimate.

Add. 93. But that paragraph also fails to impose any binding obligation that the Department of Transportation violated in issuing a foreign air carrier permit to

Norwegian Air. The requirement that the principles in paragraph 1 “shall guide the Parties as they implement the Agreement” does not compel or prohibit any specific conduct by a party to the Agreement. Nor does it set out any specific standards to govern implementation of the Agreement.

Paragraph 2 of Article 17 *bis* does provide for consideration by the Joint Committee of the social effects of the Agreement, pursuant to Article 18, and Paragraph 4(b) of Article 18 directs the Joint Committee to “consider[] the social effects of the Agreement as it is implemented and develop[] appropriate responses to concerns found to be legitimate.” Add. 93. But neither Article 17 *bis* nor Paragraph 4(b) of Article 18 provide for a party to deny reciprocal recognition of fitness under Article 6 *bis* or operating authorization under Article 4.

In contrast, Article 4 sets out a mandatory requirement for a party to grant authorization and permission to an air carrier from another party provided that the stated conditions are satisfied. Add. 16-17. Although Article 4 conditions the grant of authority on a finding that the safety and security provisions in Articles 8 and 9 “are maintained and administered,” Add. 17, it has no similar requirement for the “social dimension” principles set forth in Article 17 *bis*. The plain language of Article 4 supports the interpretation that Article 17 *bis* does not provide an independent basis to refuse to comply with Article 4’s mandatory terms, nor justify

withholding the authorization, as would a failure to meet the requirements of Article 8 (safety) or Article 9 (security).

Similarly, Article 6 *bis*, which was added at the same time as Article 17 *bis* in the 2010 Protocol, provides that in connection with applications by airlines under Article 4, a party shall “recognize any fitness and/or citizenship determination made by the aeronautical authorities” of the other party “as if such a determination had been made by its own aeronautical authorities and not enquire further into such matters,” unless the party has a specific reason for concern that the applicant does not satisfy “the conditions prescribed in Article 4.” Add. 87-88. Like Article 4 itself, Article 6 *bis* does not condition recognition on satisfaction of Article 17 *bis*. Rather, Paragraph 1(a) of Article 6 *bis* refers exclusively to “the conditions prescribed in Article 4 of this Agreement for the grant of appropriate authorisations or permissions, Add. 87, thus confirming that the drafters did not intend for the “Social Dimension” principles in Article 17 *bis* to be an independent ground on which to deny recognition.

Petitioners nevertheless argue that Article 17 *bis*’s paragraph 2 imposes a relevant mandatory obligation through its use of the phrase “[t]he principles in paragraph 1 shall guide the Parties as they implement the Agreement.” Pet. Br. 17-18. But the assertion that the “principles” in paragraph 1 dictate a particular outcome in an individual case is not supported by the plain language of Article 17

bis. In Paragraph 1 of Article 17 *bis*, the parties “recognise the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards,” and note that the “opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties’ respective laws.”

Add. 92. That language can hardly be characterized as directive or imposing an affirmative obligation on the parties to the Agreement. It merely advises that the opportunities created by the Agreement are not intended to undermine certain labor standards or labor-related rights and principles. Had the parties intended for labor standards or labor-related rights to be a basis for denial of operating authorization under Article 4, they would have said so directly. *See Water Splash*, 137 S. Ct. at 1510. Petitioner’s argument is inconsistent with the plain text of the agreement.

Article 17 *bis* should also be interpreted in light of the object and purpose of the 2007 Air Transport Agreement, as amended. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006) (“An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.”) (quoting Restatement (Third) of Foreign Relations Law § 325(1) (1987)). The central purpose of the 2007 Air Transport Agreement, as amended, was to increase opportunities to provide air services between the parties; in particular, the preamble expresses the desire to

allow airlines to offer “competitive prices and services in open markets.” 2007 Air Transport Agreement, preamble, Add. 7. That purpose would be defeated by allowing States to point to generalized labor concerns to deny authorization to foreign carriers that meet the specific requirements set forth in Article 4 and Article 6 *bis*.

Furthermore, it is well established that the views of the Executive Branch regarding the meaning of an international agreement are entitled to “great weight,” *Abbott v. Abbott*, 560 U.S. 1, 15 (2010), particularly where, as is the case here, the Department of State led negotiations of the agreement. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982). Here, the Department of State, the Department of Transportation, and the Department of Justice all concur that Article 17 *bis* does not provide an independent basis to deny authorization to an air carrier that is otherwise qualified to receive it under Article 4. *See* JA 463-64, 469-71, 476-81.

Finally, it is notable that aviation officials from the European Commission, which led the negotiation of the 2007, 2010, and 2011 agreements for the European Union and its Member States, share the Executive Branch’s view about the meaning of Article 17 *bis*. The administrative proceeding before the Department of Transportation reflects the following views from the European Commission’s Directorate General for Mobility and Transport, as expressed by the Director of

Aviation and International Transport Affairs: “Article 17 *bis* does not provide a legal basis for unilaterally denying an application under Article 4 because (1) Article 4 makes no reference to Article 17 *bis* and (2) Article 17 *bis* itself does not formulate a legal rule that can be applied unilaterally by one party.” JA 338. As the Director explained, “[P]aragraph 1 of Article 17 *bis* sets out the parties’ views on the ‘importance of the social dimension’ of the Agreement and the ‘intentions’ underlying the opportunities it creates. It does not provide for legal consequences to be drawn from these views.” JA 338. Furthermore, the implementation of the Agreement referred to in Article 17 *bis* paragraph 2 “is referred to as a matter to be dealt with by ‘the parties,’ not any one single party.” JA 338. “[A]ny unilateral decision to deny an application using Article 17 *bis* runs against the letter and spirit of the Agreement.” JA 339.

In sum, the Department of Transportation’s issuance of a foreign air carrier permit to Norwegian Air was fully consistent with Article 17 *bis*.

2. Furthermore, even if petitioners were correct that Article 17 *bis* required the Department of Transportation to consider the social effects of granting a foreign air carrier permit to Norwegian Air—and the Department has explained why this interpretation of Article 17 *bis* is erroneous—the Department satisfied any such requirement.

As the Department explained in its final order, in deciding to grant Norwegian Air's application for a foreign air carrier permit, the Department considered "significant concerns" raised by the parties opposing the application regarding Norwegian Air's "potential hiring and employment practices affecting its operations in U.S. markets." JA 572. In response, the Chief Executive Officer of Norwegian Air voluntarily committed to take steps "designed to address these concerns." JA 572. The Department of Transportation's final order expressly notes that, in deciding to grant the application, the Department took "into account the totality of the record regarding [Norwegian Air's] application, including those changes to its hiring and employment practices that it has offered as a direct result of the difficult issues that have been raised during the course of this proceeding." JA 573. Thus, even if Article 17 *bis* required the Department to consider the "Social Dimension" of granting a foreign carrier authorization to fly, the Department did so.

CONCLUSION

The petition for review should be dismissed for lack of jurisdiction or, in the alternative, should be denied.

Respectfully submitted,

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JULY 2017

**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,531 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Sharon Swingle
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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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49 U.S.C.A. § 40102. Definitions

(a) General definitions.--In this part--

* * *

(21) “foreign air carrier” means a person, not a citizen of the United States, undertaking by any means, directly or indirectly, to provide foreign air transportation.

(22) “foreign air commerce” means the transportation of passengers or property by aircraft for compensation, the transportation of mail by aircraft, or the operation of aircraft in furthering a business or vocation, between a place in the United States and a place outside the United States when any part of the transportation or operation is by aircraft.

(23) “foreign air transportation” means the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft, between a place in the United States and a place outside the United States when any part of the transportation is by aircraft.

49 U.S.C.A. § 40105. International negotiations, agreements, and obligations

* * * **(b) Actions of Secretary and Administrator.**--**(1)** In carrying out this part, the Secretary of Transportation and the Administrator--

(A) shall act consistently with obligations of the United States Government under an international agreement;

(B) shall consider applicable laws and requirements of a foreign country; and

(C) may not limit compliance by an air carrier with obligations or liabilities imposed by the government of a foreign country when the Secretary takes any action related to a certificate of public convenience and necessity issued under chapter 411 of this title.

49 U.S.C.A. § 41301. Requirement for a permit

A foreign air carrier may provide foreign air transportation only if the foreign air carrier holds a permit issued under this chapter authorizing the foreign air transportation.

49 U.S.C.A. § 41302. Permits of foreign air carriers

The Secretary of Transportation may issue a permit to a person (except a citizen of the United States) authorizing the person to provide foreign air transportation as a foreign air carrier if the Secretary finds that--

- (1) the person is fit, willing, and able to provide the foreign air transportation to be authorized by the permit and to comply with this part and regulations of the Secretary; and
- (2)(A) the person is qualified, and has been designated by the government of its country, to provide the foreign air transportation under an agreement with the United States Government; or
- (B) the foreign air transportation to be provided under the permit will be in the public interest.

AIR TRANSPORT AGREEMENT

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THE UNITED STATES OF AMERICA (hereinafter the "United States"),

of the one part; and

THE REPUBLIC OF AUSTRIA,

THE KINGDOM OF BELGIUM,

THE REPUBLIC OF BULGARIA,

THE REPUBLIC OF CYPRUS,

THE CZECH REPUBLIC,

THE KINGDOM OF DENMARK,

THE REPUBLIC OF ESTONIA,

THE REPUBLIC OF FINLAND,

THE FRENCH REPUBLIC,

THE FEDERAL REPUBLIC OF GERMANY,

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THE HELLENIC REPUBLIC,

THE REPUBLIC OF HUNGARY,

IRELAND,

THE ITALIAN REPUBLIC,

THE REPUBLIC OF LATVIA,

THE REPUBLIC OF LITHUANIA,

THE GRAND DUCHY OF LUXEMBOURG,

MALTA,

THE KINGDOM OF THE NETHERLANDS,

THE REPUBLIC OF POLAND,

THE PORTUGUESE REPUBLIC,

ROMANIA,

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THE SLOVAK REPUBLIC,

THE REPUBLIC OF SLOVENIA,

THE KINGDOM OF SPAIN,

THE KINGDOM OF SWEDEN,

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,

being parties to the Treaty establishing the European Community and being Member States of the European Union (hereinafter the "Member States"),

and the EUROPEAN COMMUNITY,

of the other part;

DESIRING to promote an international aviation system based on competition among airlines in the marketplace with minimum government interference and regulation;

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DESIRING to facilitate the expansion of international air transport opportunities, including through the development of air transportation networks to meet the needs of passengers and shippers for convenient air transportation services;

DESIRING to make it possible for airlines to offer the traveling and shipping public competitive prices and services in open markets;

DESIRING to have all sectors of the air transport industry, including airline workers, benefit in a liberalized agreement;

DESIRING to ensure the highest degree of safety and security in international air transport and reaffirming their grave concern about acts or threats against the security of aircraft, which jeopardize the safety of persons or property, adversely affect the operation of air transportation, and undermine public confidence in the safety of civil aviation;

NOTING the Convention on International Civil Aviation, opened for signature at Chicago on December 7, 1944;

RECOGNISING that government subsidies may adversely affect airline competition and may jeopardize the basic objectives of this Agreement;

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AFFIRMING the importance of protecting the environment in developing and implementing international aviation policy;

NOTING the importance of protecting consumers, including the protections afforded by the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal May 28, 1999;

INTENDING to build upon the framework of existing agreements with the goal of opening access to markets and maximizing benefits for consumers, airlines, labor, and communities on both sides of the Atlantic;

RECOGNISING the importance of enhancing the access of their airlines to global capital markets in order to strengthen competition and promote the objectives of this Agreement;

INTENDING to establish a precedent of global significance to promote the benefits of liberalization in this crucial economic sector;

HAVE AGREED AS FOLLOWS:

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ARTICLE 1

Definitions

For the purposes of this Agreement, unless otherwise stated, the term:

1. "Agreement" means this Agreement, its Annexes and Appendix, and any amendments thereto;
2. "Air transportation" means the carriage by aircraft of passengers, baggage, cargo, and mail, separately or in combination, held out to the public for remuneration or hire;
3. "Convention" means the Convention on International Civil Aviation, opened for signature at Chicago on December 7, 1944, and includes:
 - (a) any amendment that has entered into force under Article 94(a) of the Convention and has been ratified by both the United States and the Member State or Member States as is relevant to the issue in question, and
 - (b) any Annex or any amendment thereto adopted under Article 90 of the Convention, insofar as such Annex or amendment is at any given time effective for both the United States and the Member State or Member States as is relevant to the issue in question;

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4. "Full cost" means the cost of providing service plus a reasonable charge for administrative overhead;
5. "International air transportation" means air transportation that passes through the airspace over the territory of more than one State;
6. "Party" means either the United States or the European Community and its Member States;
7. "Price" means any fare, rate or charge for the carriage of passengers, baggage and/or cargo (excluding mail) in air transportation, including surface transportation in connection with international air transportation, if applicable, charged by airlines, including their agents, and the conditions governing the availability of such fare, rate or charge;
8. "Stop for non-traffic purposes" means a landing for any purpose other than taking on or discharging passengers, baggage, cargo and/or mail in air transportation;

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9. "Territory" means, for the United States, the land areas (mainland and islands), internal waters and territorial sea under its sovereignty or jurisdiction, and, for the European Community and its Member States, the land areas (mainland and islands), internal waters and territorial sea in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty and any successor instrument; application of this Agreement to Gibraltar airport is understood to be without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to the dispute over sovereignty over the territory in which the airport is situated, and to the continuing suspension of Gibraltar Airport from European Community aviation measures existing as at 18 September 2006 as between Member States, in accordance with the Ministerial statement on Gibraltar Airport agreed in Córdoba on 18 September 2006; and

10. "User charge" means a charge imposed on airlines for the provision of airport, airport environmental, air navigation, or aviation security facilities or services including related services and facilities.

ARTICLE 2

Fair and Equal Opportunity

Each Party shall allow a fair and equal opportunity for the airlines of both Parties to compete in providing the international air transportation governed by this Agreement.

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ARTICLE 3

Grant of Rights

1. Each Party grants to the other Party the following rights for the conduct of international air transportation by the airlines of the other Party:

- (a) the right to fly across its territory without landing;
- (b) the right to make stops in its territory for non-traffic purposes;
- (c) the right to perform international air transportation between points on the following routes:
 - (i) for airlines of the United States (hereinafter "U.S. airlines"), from points behind the United States via the United States and intermediate points to any point or points in any Member State or States and beyond; and for all-cargo service, between any Member State and any point or points (including in any other Member States);

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(ii) for airlines of the European Community and its Member States (hereinafter "Community airlines"), from points behind the Member States via the Member States and intermediate points to any point or points in the United States and beyond; for all-cargo service, between the United States and any point or points; and, for combination services, between any point or points in the United States and any point or points in any member of the European Common Aviation Area (hereinafter the "ECAA") as of the date of signature of this Agreement; and

(d) the rights otherwise specified in this Agreement.

2. Each airline may on any or all flights and at its option:

(a) operate flights in either or both directions;

(b) combine different flight numbers within one aircraft operation;

(c) serve behind, intermediate, and beyond points and points in the territories of the Parties in any combination and in any order;

(d) omit stops at any point or points;

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- (e) transfer traffic from any of its aircraft to any of its other aircraft at any point;
- (f) serve points behind any point in its territory with or without change of aircraft or flight number and hold out and advertise such services to the public as through services;
- (g) make stopovers at any points whether within or outside the territory of either Party;
- (h) carry transit traffic through the other Party's territory; and
- (i) combine traffic on the same aircraft regardless of where such traffic originates;

without directional or geographic limitation and without loss of any right to carry traffic otherwise permissible under this Agreement.

3. The provisions of paragraph 1 of this Article shall apply subject to the requirements that:

- (a) for U.S. airlines, with the exception of all-cargo services, the transportation is part of a service that serves the United States, and
- (b) for Community airlines, with the exception of (i) all-cargo services and (ii) combination services between the United States and any member of the ECAA as of the date of signature of this Agreement, the transportation is part of a service that serves a Member State.

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4. Each Party shall allow each airline to determine the frequency and capacity of the international air transportation it offers based upon commercial considerations in the marketplace. Consistent with this right, neither Party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the airlines of the other Party, nor shall it require the filing of schedules, programs for charter flights, or operational plans by airlines of the other Party, except as may be required for customs, technical, operational, or environmental (consistent with Article 15) reasons under uniform conditions consistent with Article 15 of the Convention.

5. Any airline may perform international air transportation without any limitation as to change, at any point, in type or number of aircraft operated; provided that, (a) for U.S. airlines, with the exception of all-cargo services, the transportation is part of a service that serves the United States, and (b) for Community airlines, with the exception of (i) all-cargo services and (ii) combination services between the United States and a member of the ECAA as of the date of signature of this Agreement, the transportation is part of a service that serves a Member State.

6. Nothing in this Agreement shall be deemed to confer on:

- (a) U.S. airlines the right to take on board, in the territory of any Member State, passengers, baggage, cargo, or mail carried for compensation and destined for another point in the territory of that Member State;

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- (b) Community airlines the right to take on board, in the territory of the United States, passengers, baggage, cargo, or mail carried for compensation and destined for another point in the territory of the United States.
7. Community airlines' access to U.S. Government procured transportation shall be governed by Annex 3.

ARTICLE 4

Authorization

On receipt of applications from an airline of one Party, in the form and manner prescribed for operating authorizations and technical permissions, the other Party shall grant appropriate authorizations and permissions with minimum procedural delay, provided:

- (a) for a U.S. airline, substantial ownership and effective control of that airline are vested in the United States, U.S. nationals, or both, and the airline is licensed as a U.S. airline and has its principal place of business in U.S. territory;
- (b) for a Community airline, substantial ownership and effective control of that airline are vested in a Member State or States, nationals of such a state or states, or both, and the airline is licensed as a Community airline and has its principal place of business in the territory of the European Community;

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- (c) the airline is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air transportation by the Party considering the application or applications; and
- (d) the provisions set forth in Article 8 (Safety) and Article 9 (Security) are being maintained and administered.

ARTICLE 5

Revocation of Authorization

1. Either Party may revoke, suspend or limit the operating authorizations or technical permissions or otherwise suspend or limit the operations of an airline of the other Party where:
 - (a) for a U.S. airline, substantial ownership and effective control of that airline are not vested in the United States, U.S. nationals, or both, or the airline is not licensed as a U.S. airline or does not have its principal place of business in U.S. territory;
 - (b) for a Community airline, substantial ownership and effective control of that airline are not vested in a Member State or States, nationals of such a state or states, or both, or the airline is not licensed as a Community airline or does not have its principal place of business in the territory of the European Community; or

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(c) that airline has failed to comply with the laws and regulations referred to in Article 7 (Application of Laws) of this Agreement.

2. Unless immediate action is essential to prevent further noncompliance with subparagraph 1(c) of this Article, the rights established by this Article shall be exercised only after consultation with the other Party.

3. This Article does not limit the rights of either Party to withhold, revoke, limit or impose conditions on the operating authorization or technical permission of an airline or airlines of the other Party in accordance with the provisions of Article 8 (Safety) or Article 9 (Security).

ARTICLE 6

Additional Matters related to Ownership, Investment, and Control

Notwithstanding any other provision in this Agreement, the Parties shall implement the provisions of Annex 4 in their decisions under their respective laws and regulations concerning ownership, investment and control.

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ARTICLE 7

Application of Laws

1. The laws and regulations of a Party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft utilized by the airlines of the other Party, and shall be complied with by such aircraft upon entering or departing from or while within the territory of the first Party.
2. While entering, within, or leaving the territory of one Party, the laws and regulations applicable within that territory relating to the admission to or departure from its territory of passengers, crew or cargo on aircraft (including regulations relating to entry, clearance, immigration, passports, customs and quarantine or, in the case of mail, postal regulations) shall be complied with by, or on behalf of, such passengers, crew or cargo of the other Party's airlines.

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ARTICLE 8

Safety

1. The responsible authorities of the Parties shall recognize as valid, for the purposes of operating the air transportation provided for in this Agreement, certificates of airworthiness, certificates of competency, and licenses issued or validated by each other and still in force, provided that the requirements for such certificates or licenses at least equal the minimum standards that may be established pursuant to the Convention. The responsible authorities may, however, refuse to recognize as valid for purposes of flight above their own territory, certificates of competency and licenses granted to or validated for their own nationals by such other authorities.

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2. The responsible authorities of a Party may request consultations with other responsible authorities concerning the safety standards maintained by those authorities relating to aeronautical facilities, aircrews, aircraft, and operation of the airlines overseen by those authorities. Such consultations shall take place within 45 days of the request unless otherwise agreed. If following such consultations, the requesting responsible authorities find that those authorities do not effectively maintain and administer safety standards and requirements in these areas that at least equal the minimum standards that may be established pursuant to the Convention, the requesting responsible authorities shall notify those authorities of such findings and the steps considered necessary to conform with these minimum standards, and those authorities shall take appropriate corrective action. The requesting responsible authorities reserve the right to withhold, revoke or limit the operating authorization or technical permission of an airline or airlines for which those authorities provide safety oversight in the event those authorities do not take such appropriate corrective action within a reasonable time and to take immediate action as to such airline or airlines if essential to prevent further noncompliance with the duty to maintain and administer the aforementioned standards and requirements resulting in an immediate threat to flight safety.

3. The European Commission shall simultaneously receive all requests and notifications under this Article.

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4. Nothing in this Article shall prevent the responsible authorities of the Parties from conducting safety discussions, including those relating to the routine application of safety standards and requirements or to emergency situations that may arise from time to time.

ARTICLE 9

Security

1. In accordance with their rights and obligations under international law, the Parties reaffirm that their obligation to each other to protect the security of civil aviation against acts of unlawful interference forms an integral part of this Agreement. Without limiting the generality of their rights and obligations under international law, the Parties shall in particular act in conformity with the following agreements: the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, done at Tokyo September 14, 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague December 16, 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal September 23, 1971, and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal February 24, 1988.

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2. The Parties shall provide upon request all necessary assistance to each other to address any threat to the security of civil aviation, including the prevention of acts of unlawful seizure of civil aircraft and other unlawful acts against the safety of such aircraft, of their passengers and crew, and of airports and air navigation facilities.

3. The Parties shall, in their mutual relations, act in conformity with the aviation security standards and appropriate recommended practices established by the International Civil Aviation Organization and designated as Annexes to the Convention; they shall require that operators of aircraft of their registries, operators of aircraft who have their principal place of business or permanent residence in their territory, and the operators of airports in their territory act in conformity with such aviation security provisions.

4. Each Party shall ensure that effective measures are taken within its territory to protect aircraft and to inspect passengers, crew, and their baggage and carry-on items, as well as cargo and aircraft stores, prior to and during boarding or loading; and that those measures are adjusted to meet increased threats to the security of civil aviation. Each Party agrees that the security provisions required by the other Party for departure from and while within the territory of that other Party must be observed. Each Party shall give positive consideration to any request from the other Party for special security measures to meet a particular threat.

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5. With full regard and mutual respect for each other's sovereignty, a Party may adopt security measures for entry into its territory. Where possible, that Party shall take into account the security measures already applied by the other Party and any views that the other Party may offer. Each Party recognizes, however, that nothing in this Article limits the ability of a Party to refuse entry into its territory of any flight or flights that it deems to present a threat to its security.

6. A Party may take emergency measures including amendments to meet a specific security threat. Such measures shall be notified immediately to the responsible authorities of the other Party.

7. The Parties underline the importance of working towards compatible practices and standards as a means of enhancing air transport security and minimising regulatory divergence. To this end, the Parties shall fully utilize and develop existing channels for the discussion of current and proposed security measures. The Parties expect that the discussions will address, among other issues, new security measures proposed or under consideration by the other Party, including the revision of security measures occasioned by a change in circumstances; measures proposed by one Party to meet the security requirements of the other Party; possibilities for the more expeditious adjustment of standards with respect to aviation security measures; and compatibility of the requirements of one Party with the legislative obligations of the other Party. Such discussions should serve to foster early notice and prior discussion of new security initiatives and requirements.

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8. Without prejudice to the need to take immediate action in order to protect transportation security, the Parties affirm that when considering security measures, a Party shall evaluate possible adverse effects on international air transportation and, unless constrained by law, shall take such factors into account when it determines what measures are necessary and appropriate to address those security concerns.

9. When an incident or threat of an incident of unlawful seizure of aircraft or other unlawful acts against the safety of passengers, crew, aircraft, airports or air navigation facilities occurs, the Parties shall assist each other by facilitating communications and other appropriate measures intended to terminate rapidly and safely such incident or threat.

10. When a Party has reasonable grounds to believe that the other Party has departed from the aviation security provisions of this Article, the responsible authorities of that Party may request immediate consultations with the responsible authorities of the other Party. Failure to reach a satisfactory agreement within 15 days from the date of such request shall constitute grounds to withhold, revoke, limit, or impose conditions on the operating authorization and technical permissions of an airline or airlines of that Party. When required by an emergency, a Party may take interim action prior to the expiry of 15 days.

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11. Separate from airport assessments undertaken to determine conformity with the aviation security standards and practices referred to in paragraph 3 of this Article, a Party may request the cooperation of the other Party in assessing whether particular security measures of that other Party meet the requirements of the requesting Party. The responsible authorities of the Parties shall coordinate in advance the airports to be assessed and the dates of assessment and establish a procedure to address the results of such assessments. Taking into account the results of the assessments, the requesting Party may decide that security measures of an equivalent standard are applied in the territory of the other Party in order that transfer passengers, transfer baggage, and/or transfer cargo may be exempted from re-screening in the territory of the requesting Party. Such a decision shall be communicated to the other Party.

ARTICLE 10

Commercial Opportunities

1. The airlines of each Party shall have the right to establish offices in the territory of the other Party for the promotion and sale of air transportation and related activities.
2. The airlines of each Party shall be entitled, in accordance with the laws and regulations of the other Party relating to entry, residence, and employment, to bring in and maintain in the territory of the other Party managerial, sales, technical, operational, and other specialist staff who are required to support the provision of air transportation.

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3.(a) Without prejudice to subparagraph (b) below, each airline shall have in relation to groundhandling in the territory of the other Party:

- (i) the right to perform its own groundhandling ("self-handling") or, at its option
- (ii) the right to select among competing suppliers that provide groundhandling services in whole or in part where such suppliers are allowed market access on the basis of the laws and regulations of each Party, and where such suppliers are present in the market.

(b) The rights under (i) and (ii) in subparagraph (a) above shall be subject only to specific constraints of available space or capacity arising from the need to maintain safe operation of the airport. Where such constraints preclude self-handling and where there is no effective competition between suppliers that provide groundhandling services, all such services shall be available on both an equal and an adequate basis to all airlines; prices of such services shall not exceed their full cost including a reasonable return on assets, after depreciation.

4. Any airline of each Party may engage in the sale of air transportation in the territory of the other Party directly and/or, at the airline's discretion, through its sales agents or other intermediaries appointed by the airline. Each airline shall have the right to sell such transportation, and any person shall be free to purchase such transportation, in the currency of that territory or in freely convertible currencies.

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5. Each airline shall have the right to convert and remit from the territory of the other Party to its home territory and, except where inconsistent with generally applicable law or regulation, the country or countries of its choice, on demand, local revenues in excess of sums locally disbursed. Conversion and remittance shall be permitted promptly without restrictions or taxation in respect thereof at the rate of exchange applicable to current transactions and remittance on the date the carrier makes the initial application for remittance.

6. The airlines of each Party shall be permitted to pay for local expenses, including purchases of fuel, in the territory of the other Party in local currency. At their discretion, the airlines of each Party may pay for such expenses in the territory of the other Party in freely convertible currencies according to local currency regulation.

7. In operating or holding out services under the Agreement, any airline of a Party may enter into cooperative marketing arrangements, such as blocked-space or code-sharing arrangements, with:

- (a) any airline or airlines of the Parties;
- (b) any airline or airlines of a third country; and

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(c) a surface (land or maritime) transportation provider of any country;

provided that (i) all participants in such arrangements hold the appropriate authority and (ii) the arrangements meet the conditions prescribed under the laws and regulations normally applied by the Parties to the operation or holding out of international air transportation.

8. The airlines of each Party shall be entitled to enter into franchising or branding arrangements with companies, including airlines, of either Party or third countries, provided that the airlines hold the appropriate authority and meet the conditions prescribed under the laws and regulations normally applied by the Parties to such arrangements. Annex 5 shall apply to such arrangements.

9. The airlines of each Party may enter into arrangements for the provision of aircraft with crew for international air transportation with:

(a) any airlines or airlines of the Parties; and

(b) any airlines or airlines of a third country;

provided that all participants in such arrangements hold the appropriate authority and meet the conditions prescribed under the laws and regulations normally applied by the Parties to such arrangements. Neither Party shall require an airline of either Party providing the aircraft to hold traffic rights under this Agreement for the routes on which the aircraft will be operated.

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10. Notwithstanding any other provision of this Agreement, airlines and indirect providers of cargo transportation of the Parties shall be permitted, without restriction, to employ in connection with international air transportation any surface transportation for cargo to or from any points in the territories of the Parties, or in third countries, including transport to and from all airports with customs facilities, and including, where applicable, the right to transport cargo in bond under applicable laws and regulations. Such cargo, whether moving by surface or by air, shall have access to airport customs processing and facilities. Airlines may elect to perform their own surface transportation or to provide it through arrangements with other surface carriers, including surface transportation operated by other airlines and indirect providers of cargo air transportation. Such intermodal cargo services may be offered at a single, through price for the air and surface transportation combined, provided that shippers are not misled as to the facts concerning such transportation.

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ARTICLE 11

Customs Duties and Charges

1. On arriving in the territory of one Party, aircraft operated in international air transportation by the airlines of the other Party, their regular equipment, ground equipment, fuel, lubricants, consumable technical supplies, spare parts (including engines), aircraft stores (including but not limited to such items of food, beverages and liquor, tobacco and other products destined for sale to or use by passengers in limited quantities during flight), and other items intended for or used solely in connection with the operation or servicing of aircraft engaged in international air transportation shall be exempt, on the basis of reciprocity, from all import restrictions, property taxes and capital levies, customs duties, excise taxes, and similar fees and charges that are (a) imposed by the national authorities or the European Community, and (b) not based on the cost of services provided, provided that such equipment and supplies remain on board the aircraft.

2. There shall also be exempt, on the basis of reciprocity, from the taxes, levies, duties, fees and charges referred to in paragraph 1 of this Article, with the exception of charges based on the cost of the service provided:

- (a) aircraft stores introduced into or supplied in the territory of a Party and taken on board, within reasonable limits, for use on outbound aircraft of an airline of the other Party engaged in international air transportation, even when these stores are to be used on a part of the journey performed over the territory of the Party in which they are taken on board;

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- (b) ground equipment and spare parts (including engines) introduced into the territory of a Party for the servicing, maintenance, or repair of aircraft of an airline of the other Party used in international air transportation;
- (c) fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of a Party for use in an aircraft of an airline of the other Party engaged in international air transportation, even when these supplies are to be used on a part of the journey performed over the territory of the Party in which they are taken on board; and
- (d) printed matter, as provided for by the customs legislation of each Party, introduced into or supplied in the territory of one Party and taken on board for use on outbound aircraft of an airline of the other Party engaged in international air transportation, even when these stores are to be used on a part of the journey performed over the territory of the Party in which they are taken on board.

3. Equipment and supplies referred to in paragraphs 1 and 2 of this Article may be required to be kept under the supervision or control of the appropriate authorities.

4. The exemptions provided by this Article shall also be available where the airlines of one Party have contracted with another airline, which similarly enjoys such exemptions from the other Party, for the loan or transfer in the territory of the other Party of the items specified in paragraphs 1 and 2 of this Article.

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5. Nothing in this Agreement shall prevent either Party from imposing taxes, levies, duties, fees or charges on goods sold other than for consumption on board to passengers during a sector of an air service between two points within its territory at which embarkation or disembarkation is permitted.

6. In the event that two or more Member States envisage applying to the fuel supplied to aircraft of U.S. airlines in the territories of such Member States for flights between such Member States any waiver of the exemption contained in Article 14.1 (b) of Council Directive 2003/96/EC of 27 October 2003, the Joint Committee shall consider that issue, in accordance with paragraph 4(c) of Article 18.

7. A Party may request the assistance of the other Party, on behalf of its airline or airlines, in securing an exemption from taxes, duties, charges and fees imposed by state and local governments or authorities on the goods specified in paragraphs 1 and 2 of this Article, as well as from fuel through-put charges, in the circumstances described in this Article, except to the extent that the charges are based on the cost of providing the service. In response to such a request, the other Party shall bring the views of the requesting Party to the attention of the relevant governmental unit or authority and urge that those views be given appropriate consideration.

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ARTICLE 12

User Charges

1. User charges that may be imposed by the competent charging authorities or bodies of each Party on the airlines of the other Party shall be just, reasonable, not unjustly discriminatory, and equitably apportioned among categories of users. In any event, any such user charges shall be assessed on the airlines of the other Party on terms not less favorable than the most favorable terms available to any other airline at the time the charges are assessed.
2. User charges imposed on the airlines of the other Party may reflect, but shall not exceed, the full cost to the competent charging authorities or bodies of providing the appropriate airport, airport environmental, air navigation, and aviation security facilities and services at the airport or within the airport system. Such charges may include a reasonable return on assets, after depreciation. Facilities and services for which charges are made shall be provided on an efficient and economic basis.
3. Each Party shall encourage consultations between the competent charging authorities or bodies in its territory and the airlines using the services and facilities, and shall encourage the competent charging authorities or bodies and the airlines to exchange such information as may be necessary to permit an accurate review of the reasonableness of the charges in accordance with the principles of paragraphs 1 and 2 of this Article. Each Party shall encourage the competent charging authorities to provide users with reasonable notice of any proposal for changes in user charges to enable users to express their views before changes are made.

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4. Neither Party shall be held, in dispute resolution procedures pursuant to Article 19, to be in breach of a provision of this Article, unless (a) it fails to undertake a review of the charge or practice that is the subject of complaint by the other Party within a reasonable amount of time; or (b) following such a review it fails to take all steps within its power to remedy any charge or practice that is inconsistent with this Article.

ARTICLE 13

Pricing

1. Prices for air transportation services operated pursuant to this Agreement shall be established freely and shall not be subject to approval, nor may they be required to be filed.

2. Notwithstanding paragraph 1:

(a) The introduction or continuation of a price proposed to be charged or charged by a U.S. airline for international air transportation between a point in one Member State and a point in another Member State shall be consistent with Article 1(3) of Council Regulation (EEC) 2409/92 of 23 July 1992, or a not more restrictive successor regulation.

(b) Under this paragraph, the airlines of the Parties shall provide immediate access, on request, to information on historical, existing, and proposed prices to the responsible authorities of the Parties in a manner and format acceptable to those authorities.

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ARTICLE 14

Government Subsidies and Support

1. The Parties recognize that government subsidies and support may adversely affect the fair and equal opportunity of airlines to compete in providing the international air transportation governed by this Agreement.
2. If one Party believes that a government subsidy or support being considered or provided by the other Party for or to the airlines of that other Party would adversely affect or is adversely affecting that fair and equal opportunity of the airlines of the first Party to compete, it may submit observations to that Party. Furthermore, it may request a meeting of the Joint Committee as provided in Article 18, to consider the issue and develop appropriate responses to concerns found to be legitimate.
3. Each Party may approach responsible governmental entities in the territory of the other Party, including entities at the state, provincial or local level, if it believes that a subsidy or support being considered or provided by such entities will have the adverse competitive effects referred to in paragraph 2. If a Party decides to make such direct contact it shall inform promptly the other Party through diplomatic channels. It may also request a meeting of the Joint Committee.

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4. Issues raised under this Article could include, for example, capital injections, cross-subsidization, grants, guarantees, ownership, relief or tax exemption, by any governmental entities.

ARTICLE 15

Environment

1. The Parties recognize the importance of protecting the environment when developing and implementing international aviation policy. The Parties recognize that the costs and benefits of measures to protect the environment must be carefully weighed in developing international aviation policy.
2. When a Party is considering proposed environmental measures, it should evaluate possible adverse effects on the exercise of rights contained in this Agreement, and, if such measures are adopted, it should take appropriate steps to mitigate any such adverse effects.
3. When environmental measures are established, the aviation environmental standards adopted by the International Civil Aviation Organization in Annexes to the Convention shall be followed except where differences have been filed. The Parties shall apply any environmental measures affecting air services under this Agreement in accordance with Article 2 and 3(4) of this Agreement.

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4. If one Party believes that a matter involving aviation environmental protection raises concerns for the application or implementation of this Agreement, it may request a meeting of the Joint Committee, as provided in Article 18, to consider the issue and develop appropriate responses to concerns found to be legitimate.

ARTICLE 16

Consumer Protection

The Parties affirm the importance of protecting consumers, and either Party may request a meeting of the Joint Committee to discuss consumer protection issues that the requesting Party identifies as significant.

ARTICLE 17

Computer Reservation Systems

1. Computer Reservation Systems (CRS) vendors operating in the territory of one Party shall be entitled to bring in, maintain, and make freely available their CRSs to travel agencies or travel companies whose principal business is the distribution of travel-related products in the territory of the other Party provided the CRS complies with any relevant regulatory requirements of the other Party.

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2. Neither Party shall, in its territory, impose or permit to be imposed on the CRS vendors of the other Party more stringent requirements with respect to CRS displays (including edit and display parameters), operations, practices, sales, or ownership than those imposed on its own CRS vendors.

3. Owners/Operators of CRSs of one Party that comply with the relevant regulatory requirements of the other Party, if any, shall have the same opportunity to own CRSs within the territory of the other Party as do owners/operators of that Party.

ARTICLE 18

The Joint Committee

1. A Joint Committee consisting of representatives of the Parties shall meet at least once a year to conduct consultations relating to this Agreement and to review its implementation.

2. A Party may also request a meeting of the Joint Committee to seek to resolve questions relating to the interpretation or application of this Agreement. However, with respect to Article 20 or Annex 2, the Joint Committee may consider questions only relating to the refusal by either Participant to implement the commitments undertaken, and the impact of competition decisions on the application of this Agreement. Such a meeting shall begin at the earliest possible date, but not later than 60 days from the date of receipt of the request, unless otherwise agreed.

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3. The Joint Committee shall review, no later than at its first annual meeting and thereafter as appropriate, the overall implementation of the Agreement, including any effects of aviation infrastructure constraints on the exercise of rights provided for in Article 3, the effects of security measures taken under Article 9, the effects on the conditions of competition, including in the field of Computer Reservation Systems, and any social effects of the implementation of the Agreement.

4. The Joint Committee shall also develop cooperation by:

- (a) fostering expert-level exchanges on new legislative or regulatory initiatives and developments, including in the fields of security, safety, the environment, aviation infrastructure (including slots), and consumer protection;
- (b) considering the social effects of the Agreement as it is implemented and developing appropriate responses to concerns found to be legitimate;
- (c) considering potential areas for the further development of the Agreement, including the recommendation of amendments to the Agreement;
- (d) maintaining an inventory of issues regarding government subsidies or support raised by either Party in the Joint Committee;
- (e) making decisions, on the basis of consensus, concerning any matters with respect to application of paragraph 6 of Article 11;

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- (f) developing, within one year of provisional application, approaches to regulatory determinations with regard to airline fitness and citizenship, with the goal of achieving reciprocal recognition of such determinations;
 - (g) developing a common understanding of the criteria used by the Parties in making their respective decisions in cases concerning airline control, to the extent consistent with confidentiality requirements;
 - (h) fostering consultation, where appropriate, on air transport issues dealt with in international organizations and in relations with third countries, including consideration of whether to adopt a joint approach;
 - (i) taking, on the basis of consensus, the decisions to which paragraph 3 of Article 1 of Annex 4 and paragraph 3 of Article 2 of Annex 4 refer.
5. The Parties share the goal of maximizing the benefits for consumers, airlines, labor, and communities on both sides of the Atlantic by extending this Agreement to include third countries. To this end, the Joint Committee shall work to develop a proposal regarding the conditions and procedures, including any necessary amendments to this Agreement, that would be required for third countries to accede to this Agreement.
6. The Joint Committee shall operate on the basis of consensus.

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ARTICLE 19

Arbitration

1. Any dispute relating to the application or interpretation of this Agreement, other than issues arising under Article 20 or under Annex 2, that is not resolved by a meeting of the Joint Committee may be referred to a person or body for decision by agreement of the Parties. If the Parties do not so agree, the dispute shall, at the request of either Party, be submitted to arbitration in accordance with the procedures set forth below.

2. Unless the Parties otherwise agree, arbitration shall be by a tribunal of three arbitrators to be constituted as follows:

- (a) Within 20 days after the receipt of a request for arbitration, each Party shall name one arbitrator. Within 45 days after these two arbitrators have been named, they shall by agreement appoint a third arbitrator, who shall act as President of the tribunal.

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(b) If either Party fails to name an arbitrator, or if the third arbitrator is not appointed in accordance with subparagraph (a) of this paragraph, either Party may request the President of the Council of the International Civil Aviation Organization to appoint the necessary arbitrator or arbitrators within 30 days of receipt of that request. If the President of the Council of the International Civil Aviation Organization is a national of either the United States or a Member State, the most senior Vice President of that Council who is not disqualified on that ground shall make the appointment.

3. Except as otherwise agreed, the tribunal shall determine the limits of its jurisdiction in accordance with this Agreement and shall establish its own procedural rules. At the request of a Party, the tribunal, once formed, may ask the other Party to implement interim relief measures pending the tribunal's final determination. At the direction of the tribunal or at the request of either Party, a conference shall be held not later than 15 days after the tribunal is fully constituted for the tribunal to determine the precise issues to be arbitrated and the specific procedures to be followed.

4. Except as otherwise agreed or as directed by the tribunal:

(a) The statement of claim shall be submitted within 30 days of the time the tribunal is fully constituted, and the statement of defense shall be submitted 40 days thereafter. Any reply by the claimant shall be submitted within 15 days of the submission of the statement of defense. Any reply by the respondent shall be submitted within 15 days thereafter.

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(b) The tribunal shall hold a hearing at the request of either Party, or may hold a hearing on its own initiative, within 15 days after the last reply is filed.

5. The tribunal shall attempt to render a written decision within 30 days after completion of the hearing or, if no hearing is held, within 30 days after the last reply is submitted. The decision of the majority of the tribunal shall prevail.

6. The Parties may submit requests for clarification of the decision within 10 days after it is rendered and any clarification given shall be issued within 15 days of such request.

7. If the tribunal determines that there has been a violation of this Agreement and the responsible Party does not cure the violation, or does not reach agreement with the other Party on a mutually satisfactory resolution within 40 days after notification of the tribunal's decision, the other Party may suspend the application of comparable benefits arising under this Agreement until such time as the Parties have reached agreement on a resolution of the dispute. Nothing in this paragraph shall be construed as limiting the right of either Party to take proportional measures in accordance with international law.

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8. The expenses of the tribunal, including the fees and expenses of the arbitrators, shall be shared equally by the Parties. Any expenses incurred by the President of the Council of the International Civil Aviation Organization, or by any Vice President of that Council, in connection with the procedures of paragraph 2(b) of this Article shall be considered to be part of the expenses of the tribunal.

ARTICLE 20

Competition

1. The Parties recognize that competition among airlines in the transatlantic market is important to promote the objectives of this Agreement, and confirm that they apply their respective competition regimes to protect and enhance overall competition and not individual competitors.
2. The Parties recognize that differences may arise concerning the application of their respective competition regimes to international aviation affecting the transatlantic market, and that competition among airlines in that market might be fostered by minimising those differences.

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3. The Parties recognize that cooperation between their respective competition authorities serves to promote competition in markets and has the potential to promote compatible regulatory results and to minimise differences in approach with respect to their respective competition reviews of inter-carrier agreements. Consequently, the Parties shall further this cooperation to the extent feasible, taking into account the different responsibilities, competencies and procedures of the authorities, in accordance with Annex 2.

4. The Joint Committee shall be briefed annually on the results of the cooperation under Annex 2.

ARTICLE 21

Second Stage Negotiations

1. The Parties share the goal of continuing to open access to markets and to maximise benefits for consumers, airlines, labor, and communities on both sides of the Atlantic, including the facilitation of investment so as to better reflect the realities of a global aviation industry, the strengthening of the transatlantic air transportation system, and the establishment of a framework that will encourage other countries to open their own air services markets. The Parties shall begin negotiations not later than 60 days after the date of provisional application of this Agreement, with the goal of developing the next stage expeditiously.

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2. To that end, the agenda for the second stage negotiations shall include the following items of priority interest to one or both Parties:

- (a) further liberalization of traffic rights;
- (b) additional foreign investment opportunities;
- (c) effect of environmental measures and infrastructure constraints on the exercise of traffic rights;
- (d) further access to Government-financed air transportation; and
- (e) provision of aircraft with crew.

3. The Parties shall review their progress towards a second stage agreement no later than 18 months after the date when the negotiations are due to start in accordance with paragraph 1. If no second stage agreement has been reached by the Parties within twelve months of the start of the review, each Party reserves the right thereafter to suspend rights specified in this Agreement. Such suspension shall take effect no sooner than the start of the International Air Transport Association (IATA) traffic season that commences no less than twelve months after the date on which notice of suspension is given.

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ARTICLE 22

Relationship to Other Agreements

1. During the period of provisional application pursuant to Article 25 of this Agreement, the bilateral agreements listed in section 1 of Annex 1, shall be suspended, except to the extent provided in section 2 of Annex 1.
2. Upon entry into force pursuant to Article 26 of this Agreement, this Agreement shall supersede the bilateral agreements listed in section 1 of Annex 1, except to the extent provided in section 2 of Annex 1.
3. If the Parties become parties to a multilateral agreement, or endorse a decision adopted by the International Civil Aviation Organization or another international organization, that addresses matters covered by this Agreement, they shall consult in the Joint Committee to determine whether this Agreement should be revised to take into account such developments.

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ARTICLE 23

Termination

Either Party may, at any time, give notice in writing through diplomatic channels to the other Party of its decision to terminate this Agreement. Such notice shall be sent simultaneously to the International Civil Aviation Organization. This Agreement shall terminate at midnight GMT at the end of the International Air Transport Association (IATA) traffic season in effect one year following the date of written notification of termination, unless the notice is withdrawn by agreement of the Parties before the end of this period.

ARTICLE 24

Registration with ICAO

This Agreement and all amendments thereto shall be registered with the International Civil Aviation Organization.

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ARTICLE 25

Provisional Application

Pending entry into force pursuant to Article 26:

- 1) The Parties agree to apply this Agreement from 30 March 2008.**
- 2) Either Party may at any time give notice in writing through diplomatic channels to the other Party of a decision to no longer apply this Agreement. In that event, application shall cease at midnight GMT at the end of the International Air Transport Association (IATA) traffic season in effect one year following the date of written notification, unless the notice is withdrawn by agreement of the Parties before the end of this period.**

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ARTICLE 26

Entry into Force

This Agreement shall enter into force one month after the date of the later note in an exchange of diplomatic notes between the Parties confirming that all necessary procedures for entry into force of this Agreement have been completed. For purposes of this exchange, the United States shall deliver to the European Community the diplomatic note to the European Community and its Member States, and the European Community shall deliver to the United States the diplomatic note or notes from the European Community and its Member States. The diplomatic note or notes from the European Community and its Member States shall contain communications from each Member State confirming that its necessary procedures for entry into force of this Agreement have been completed.

IN WITNESS WHEREOF the undersigned, being duly authorized, have signed this Agreement.

DONE at Brussels on the twenty-fifth day of April, 2007 and at Washington on the thirtieth day of April, 2007, in duplicate.

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For the United States of America

Condoleezza Rice

Mary L. Peterson

За Република България

Lucy

Pour le Royaume de Belgique
Voor het Koninkrijk België
Für das Königreich Belgien

Adrian

Cette signature engage également la Communauté française, la Communauté flamande, la Communauté germanophone, la Région wallonne, la Région flamande et la Région de Bruxelles-Capitale.

Deze handtekening verbindt eveneens de Vlaamse Gemeenschap, de Franse Gemeenschap, de Duitstalige Gemeenschap, het Vlaamse Gewest, het Waalse Gewest en het Brussels Hoofdstedelijk Gewest.

Diese Unterschrift bindet zugleich die Deutschsprachige Gemeinschaft, die Flämische Gemeinschaft, die Französische Gemeinschaft, die Wallonische Region, die Flämische Region und die Region Brüssel-Hauptstadt.

Za Českou republiku

Jan Pátek

På Kongeriget Danmarks vegne

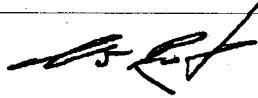
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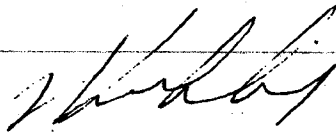
Für die Bundesrepublik Deutschland



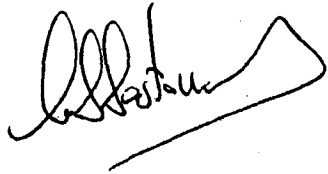
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Για την Ελληνική Δημοκρατία



Por el Reino de España



Pour la République française



USA/CE/X 5

Thar cheann Na hÉireann
For Ireland

Bobby McDevagh

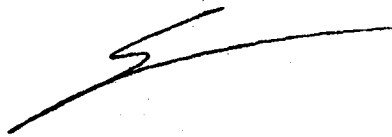
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A. Angelosi

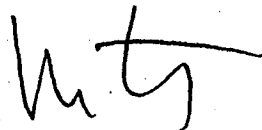
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N.γ. - E.γ.

Latvijas Republikas vārda



Lietuvos Respublikos vardu



USA/CE/X7

Pour le Grand-Duché de Luxembourg

M. Schuman

A Magyar Köztársaság részéről

[Signature]

Għal Malta

[Signature]

Voor het Koninkrijk der Nederlanden

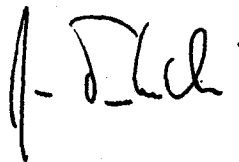
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Für die Republik Österreich

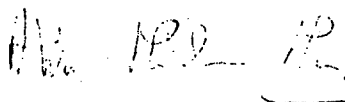
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W imieniu Rzeczypospolitej Polskiej



Pela República Portuguesa



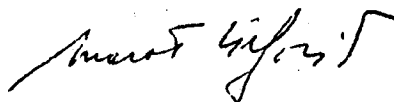
Pentru România



Za Republiko Slovenijo



Za Slovenskú republiku

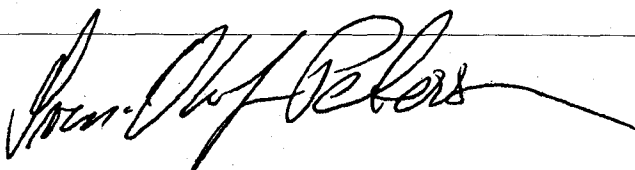


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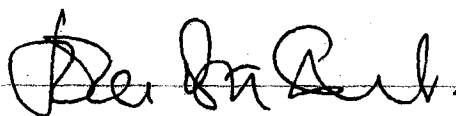
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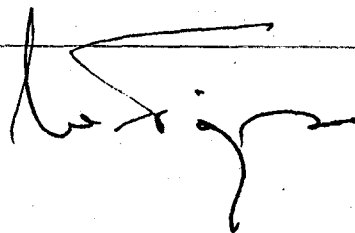
För Konungariket Sverige



For the United Kingdom of Great Britain and Northern Ireland



За Европейската общност
For the European Community
Por la Comunidad Europea
Za Evropské společenství
For Det Europæiske Fællesskab
Für die Europäische Gemeinschaft
Euroopa Ühenduse nimel
Για την Ευρωπαϊκή Κοινότητα
Pour la Communauté européenne
Per la Comunità europea
Eiropas Kopienas vārds
Europos bendrijos vardu
az Európai Közösség részéről
Għall-Komunità Ewropea
Voor de Europese Gemeenschap
W imieniu Wspólnoty Europejskiej
Pela Comunidade Europeia
Pentru Comunitatea Europeană
Za Európske spoločenstvo
za Evropsko skupnost
Euroopan yhteisöjen puolesta
På Europeiska gemenskapens vägnar



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ANNEX 1

Section 1

As provided in Article 22 of this Agreement, the following bilateral agreements between the United States and Member States shall be suspended or superseded by this Agreement:

- a. The Republic of Austria: Air services agreement, signed at Vienna March 16, 1989; amended June 14, 1995.
- b. The Kingdom of Belgium: Air transport agreement, effected by exchange of notes at Washington October 23, 1980; amended September 22 and November 12, 1986; amended November 5, 1993 and January 12, 1994.

(amendment concluded on September 5, 1995 (provisionally applied).)
- c. The Republic of Bulgaria: Civil aviation security Agreement, signed at Sofia April 24, 1991.
- d. The Czech Republic: Air transport agreement, signed at Prague September 10, 1996; amended June 4, 2001 and February 14, 2002.

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- e. The Kingdom of Denmark: Agreement relating to air transport services, effected by exchange of notes at Washington December 16, 1944; amended August 6, 1954; amended June 16, 1995.
- f. The Republic of Finland: Air transport agreement, signed at Helsinki March 29, 1949; related protocol signed May 12, 1980; agreement amending 1949 agreement and 1980 protocol concluded June 9, 1995.
- g. The French Republic: Air transport agreement, signed at Washington June 18, 1998; amended October 10, 2000; amended January 22, 2002.
- h. The Federal Republic of Germany: Air transport agreement and exchanges of notes, signed at Washington July 7, 1955; amended April 25, 1989.

(related protocol concluded November 1, 1978; related agreement concluded May 24, 1994; protocol amending the 1955 agreement concluded on May 23, 1996; agreement amending the 1996 protocol concluded on October 10, 2000 (all provisionally applied).)
- i. The Hellenic Republic: Air transport agreement, signed at Athens July 31, 1991; extended until July 31, 2007 by exchange of notes of June 22 and 28, 2006.

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- j. The Republic of Hungary: Air transport agreement and memorandum of understanding, signed at Budapest July 12, 1989; extended until July 12, 2007 by exchange of notes of July 11 and 20, 2006.
- k. Ireland: Agreement relating to air transport services, effected by exchange of notes at Washington February 3, 1945; amended January 25, 1988 and September 29, 1989; amended July 25 and September 6, 1990.

(Memorandum of consultations, signed at Washington October 28, 1993 (provisionally applied).)

- l. The Italian Republic: Air transport agreement, with memorandum and exchange of notes, signed at Rome June 22, 1970; amended October 25, 1988; related memorandum of understanding signed September 27, 1990; amendment of 1970 agreement and 1990 MOU concluded November 22 and December 23, 1991; amendment of 1970 agreement and 1990 MOU concluded May 30 and October 21, 1997; agreement supplementing the 1970 agreement concluded December 30, 1998 and February 2, 1999.

(Protocol amending the 1970 agreement concluded December 6, 1999 (provisionally applied).)

- m. The Grand Duchy of Luxembourg: Air transport agreement, signed at Luxembourg August 19, 1986; amended June 6, 1995; amended July 13 and 21, 1998.
- n. Malta: Air transport agreement, signed at Washington October 12, 2000.
- o. The Kingdom of the Netherlands: Air transport agreement, signed at Washington April 3, 1957; protocol amending the 1957 agreement concluded on March 31, 1978; amendment of 1978 protocol concluded June 11, 1986; amendment of 1957 agreement concluded October 13 and December 22, 1987; amendment of 1957 agreement concluded January 29 and March 13, 1992; amendment of 1957 agreement and 1978 protocol concluded October 14, 1992.
- p. The Republic of Poland: Air transport agreement, signed at Warsaw June 16, 2001.
- q. The Portuguese Republic: Air transport agreement, signed at Lisbon May 30, 2000.
- r. Romania: Air transport agreement, signed at Washington July 15, 1998.
- s. The Slovak Republic: Air transport agreement, signed at Bratislava January 22, 2001.

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- t. The Kingdom of Spain: Air transport agreement signed at Madrid February 20, 1973; related agreement of February 20, March 31 and April 7, 1987; amendment of 1973 agreement concluded May 31, 1989; amendment of 1973 agreement concluded November 27, 1991.
- u. The Kingdom of Sweden: Agreement relating to air transport services, effected by exchange of notes at Washington December 16, 1944; amended August 6, 1954; amended June 16, 1995.
- v. The United Kingdom of Great Britain and Northern Ireland: Agreement concerning air services, and exchange of letters, signed at Bermuda July 23, 1977; agreement relating to North Atlantic air fares, concluded March 17, 1978; agreement amending the 1977 agreement, concluded April 25, 1978; agreement modifying and extending the 1978 agreement relating to North Atlantic air fares, concluded November 2 and 9, 1978; agreement amending the 1977 agreement, concluded December 4, 1980; agreement amending the 1977 agreement, concluded February 20, 1985; agreement amending Article 7, Annex 2, and Annex 5 of the 1977 agreement, concluded May 25, 1989; agreement concerning amendments of the 1977 agreement, termination of the US/UK Arbitration Concerning Heathrow Airport User Charges and the request for arbitration made by the United Kingdom in its embassy's note no. 87 of 13 October 1993 and settlement of the matters which gave rise to those proceedings, concluded March 11, 1994; agreement amending the 1977 agreement, concluded March 27, 1997.

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(Arrangements, being provisionally applied, contained in the memorandum of consultations dated September 11, 1986; arrangements contained in the exchange of letters dated July 27, 1990; arrangements contained in the memorandum of consultations of March 11, 1991; arrangements contained in the exchange of letters dated October 6, 1994; arrangements contained in the memorandum of consultations of June 5, 1995; arrangements contained in the exchange of letters dated March 31 and April 3, 2000 (all provisionally applied).)

Section 2

Notwithstanding section 1 of this Annex, for areas that are not encompassed within the definition of "territory" in Article 1 of this Agreement, the agreements in paragraphs (e)

(Denmark-United States), (g) (France-United States), and (v) (United Kingdom-United States) of that section shall continue to apply, according to their terms.

Section 3

Notwithstanding Article 3 of this Agreement, U.S. airlines shall not have the right to provide all-cargo services, that are not part of a service that serves the United States, to or from points in the Member States, except to or from points in the Czech Republic, the French Republic, the Federal Republic of Germany, the Grand Duchy of Luxembourg, Malta, the Republic of Poland, the Portuguese Republic, and the Slovak Republic.

Section 4

Notwithstanding any other provisions of this Agreement, this section shall apply to scheduled and charter combination air transportation between Ireland and the United States with effect from the beginning of IATA Winter season 2006/2007 until the end of the IATA Winter season 2007/2008.

- a. (i) Each U.S. and Community airline may operate 3 non-stop flights between the United States and Dublin for each non-stop flight that the airline operates between the United States and Shannon. This entitlement for non-stop Dublin flights shall be based on an average of operations over the entire three-season transitional period. A flight shall be deemed to be a non-stop Dublin, or a non-stop Shannon, flight, according to the first point of entry into, or the last point of departure from, Ireland.
- (ii) The requirement to serve Shannon in subparagraph (a)(i) of this Section shall terminate if any airline inaugurates scheduled or charter combination service between Dublin and the United States, in either direction, without operating at least one non-stop flight to Shannon for every three non-stop flights to Dublin, averaged over the transition period.

- b. For services between the United States and Ireland, Community airlines may serve only Boston, New York, Chicago, Los Angeles, and 3 additional points in the United States, to be notified to the United States upon selection or change. These services may operate via intermediate points in other Member States or in third countries.
 - c. Code sharing shall be authorized between Ireland and the United States only via other points in the European Community. Other code-share arrangements will be considered on the basis of comity and reciprocity.
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ANNEX 2

**Concerning
Cooperation With Respect to Competition Issues in the Air Transportation Industry**

Article 1

The cooperation as set forth in this Annex shall be implemented by the Department of Transportation of the United States of America and the Commission of the European Communities (hereinafter referred to as "the Participants"), consistent with their respective functions in addressing competition issues in the air transportation industry involving the United States and the European Community.

Article 2

Purpose

The purpose of this cooperation is:

1. To enhance mutual understanding of the application by the Participants of the laws, procedures and practices under their respective competition regimes to encourage competition in the air transportation industry;
2. To facilitate understanding between the Participants of the impact of air transportation industry developments on competition in the international aviation market;

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3. To reduce the potential for conflicts in the Participants' application of their respective competition regimes to agreements and other cooperative arrangements which have an impact on the transatlantic market; and
4. To promote compatible regulatory approaches to agreements and other cooperative arrangements through a better understanding of the methodologies, analytical techniques including the definition of the relevant market(s) and analysis of competitive effects, and remedies that the Participants use in their respective independent competition reviews.

Article 3

Definitions

For the purpose of this Annex, the term "competition regime" means the laws, procedures and practices that govern the Participants' exercise of their respective functions in reviewing agreements and other cooperative arrangements among airlines in the international market. For the European Community, this includes, but is not limited to, Articles 81, 82, and 85 of the Treaty Establishing the European Community and their implementing Regulations pursuant to the said Treaty, as well as any amendments thereto. For the Department of Transportation, this includes, but is not limited to, sections 41308, 41309, and 41720 of Title 49 of the United States Code, and its implementing Regulations and legal precedents pursuant thereto.

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Article 4

Areas of Cooperation

Subject to the qualifications in subparagraphs 1(a) and 1(b) of Article 5, the types of cooperation between the Participants shall include the following:

- (1) Meetings between representatives of the Participants, to include competition experts, in principle on a semi-annual basis, for the purpose of discussing developments in the air transportation industry, competition policy matters of mutual interest, and analytical approaches to the application of competition law to international aviation, particularly in the transatlantic market. The above discussions may lead to the development of a better understanding of the Participants' respective approaches to competition issues, including existing commonalities, and to more compatibility in those approaches, in particular with respect to inter-carrier agreements.
- (2) Consultations at any time between the Participants, by mutual agreement or at the request of either Participant, to discuss any matter related to this Annex, including specific cases.
- (3) Each Participant may, at its discretion, invite representatives of other governmental authorities to participate as appropriate in any meetings or consultations held pursuant to paragraphs 1 or 2 above.

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(4) Timely notifications of the following proceedings or matters, which in the judgment of the notifying Participant may have significant implications for the competition interests of the other Participant:

- a. With respect to the Department of Transportation, (i) proceedings for review of applications for approval of agreements and other cooperative arrangements among airlines involving international air transportation, in particular for antitrust immunity involving airlines organized under the laws of the United States and the European Community, and (ii) receipt by the Department of Transportation of a joint venture agreement pursuant to section 41720 of Title 49 of the United States Code; and
- b. With respect to the Commission of the European Communities, (i) proceedings for review of agreements and other cooperative arrangements among airlines involving international air transportation, in particular for alliance and other cooperative agreements involving airlines organized under the laws of the United States and the European Community, and (ii) consideration of individual or block exemptions from European Union competition law;

(5) Notifications of the availability, and any conditions governing that availability, of information and data filed with a Participant, in electronic form or otherwise, that, in the judgment of that Participant, may have significant implications for the competition interests of the other Participant; and

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- (6) Notifications of such other activities relating to air transportation competition policy as may seem appropriate to the notifying Participant.

Article 5

Use and Disclosure of Information

- (1) Notwithstanding any other provision of this Annex, neither Participant is expected to provide information to the other Participant if disclosure of the information to the requesting Participant:
- a. is prohibited by the laws, regulations or practices of the Participant possessing the information; or
 - b. would be incompatible with important interests of the Participant possessing the information.
- (2) Each Participant shall to the extent possible maintain the confidentiality of any information provided to it in confidence by the other Participant under this Annex and to oppose any application for disclosure of such information to a third party that is not authorized by the supplying Participant to receive the information. Each Participant intends to notify the other Participant whenever any information proposed to be exchanged in discussions or in any other manner may be required to be disclosed in a public proceeding.

- (3) Where pursuant to this Annex a Participant provides information on a confidential basis to the other Participant for the purposes specified in Article 2, that information should be used by the receiving Participant only for that purpose.

Article 6
Implementation

- (1) Each Participant is designating a representative to be responsible for coordination of activities established under this Annex.
- (2) This Annex, and all activities undertaken by a Participant pursuant to it, are
- a. intended to be implemented only to the extent consistent with all laws, regulations, and practices applicable to that Participant; and
 - b. intended to be implemented without prejudice to the Agreement between the European Communities and the Government of the United States of America Regarding the Application of their Competition Laws.

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ANNEX 3

Concerning
U.S. Government Procured Transportation

Community airlines shall have the right to transport passengers and cargo on scheduled and charter flights for which a U.S. Government civilian department, agency, or instrumentality (1) obtains the transportation for itself or in carrying out an arrangement under which payment is made by the Government or payment is made from amounts provided for the use of the Government, or (2) provides the transportation to or for a foreign country or international or other organization without reimbursement, and that transportation is (a) between any point in the United States and any point in a Member State, except - with respect to passengers only - between points for which there is a city-pair contract fare in effect, or (b) between any two points outside the United States. This paragraph shall not apply to transportation obtained or funded by the Secretary of Defense or the Secretary of a military department.

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ANNEX 4

**Concerning
Additional Matters Related to Ownership, Investment and Control**

**Article 1
Ownership of Airlines of a Party**

1. Ownership by nationals of a Member State or States of the equity of a U.S. airline shall be permitted, subject to two limitations. First, ownership by all foreign nationals of more than 25 percent of a corporation's voting equity is prohibited. Second, actual control of a U.S. airline by foreign nationals is also prohibited. Subject to the overall 25 percent limitation on foreign ownership of voting equity:

a. ownership by nationals of a Member State or States of:

- (1) as much as 25 percent of the voting equity; and/or
- (2) as much as 49.9 percent of the total equity

of a U.S. airline shall not be deemed, of itself, to constitute control of that airline;

and

- b. ownership by nationals of a Member State or States of 50 percent or more of the total equity of a U.S. airline shall not be presumed to constitute control of that airline. Such ownership shall be considered on a case-by-case basis.

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2. Ownership by U.S. nationals of a Community airline shall be permitted subject to two limitations. First, the airline must be majority owned by Member States and/or by nationals of Member States. Second, the airline must be effectively controlled by such states and/or such nationals.
3. For the purposes of paragraph (b) of Article 4 and subparagraph 1(b) of Article 5 of this Agreement, a member of the ECAA as of the date of signature of this Agreement and citizens of such a member shall be treated as a Member State and its nationals, respectively. The Joint Committee may decide that this provision shall apply to new members of the ECAA and their citizens.
4. Notwithstanding paragraph 2, the European Community and its Member States reserves the right to limit investments by U.S. nationals in the voting equity of a Community airline made after the signature of this Agreement to a level equivalent to that allowed by the United States for foreign nationals in U.S. airlines, provided that the exercise of that right is consistent with international law.

USA/CE/ANNEX 4/en 2

Article 2

Ownership and Control of Third-Country Airlines

1. Neither Party shall exercise any available rights under air services arrangements with a third country to refuse, revoke, suspend or limit authorizations or permissions for any airlines of that third country on the grounds that substantial ownership of that airline is vested in the other Party, its nationals, or both.
2. The United States shall not exercise any available rights under air services arrangements to refuse, revoke, suspend or limit authorizations or permissions for any airline of the Principality of Liechtenstein, the Swiss Confederation, a member of the ECAA as of the date of signature of this Agreement, or any country in Africa that is implementing an Open-Skies air services agreement with the United States as of the date of signature of this Agreement, on the grounds that effective control of that airline is vested in a Member State or States, nationals of such a state or states, or both.
3. The Joint Committee may decide that neither Party shall exercise the rights referred to in paragraph 2 of this Article with respect to airlines of a specific country or countries.

USA/CE/ANNEX 4/en 3

Article 3
Control of Airlines

1. The rules applicable in the European Community on ownership and control of Community air carriers are currently laid down in Article 4 of Council Regulation (EEC) No. 2407/92 of 23 July 1992 on licensing of air carriers. Under this Regulation, responsibility for granting an Operating Licence to a Community air carrier lies with the Member States. Member States apply Regulation 2407/92 in accordance with their national regulations and procedures.
2. The rules applicable in the United States are currently laid down in Sections 40102(a)(2), 41102 and 41103 of Title 49 of the United States Code (U.S.C.), which require that licenses for a U.S. "air carrier" issued by the Department of Transportation, whether a certificate, an exemption, or commuter license, to engage in "air transportation" as a common carrier, be held only by citizens of the United States as defined in 49 U.S.C §40102(a)(15). That section requires that the president and two-thirds of the board of directors and other managing officers of a corporation be U.S. citizens, that at least 75 percent of the voting stock be owned by U.S. citizens, and that the corporation be under the actual control of U.S. citizens. The requirement must be met initially by an applicant, and continue to be met by a U.S. airline holding a license.
3. The practice followed by each Party in applying its laws and regulations is set out in the Appendix to this Annex.

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Appendix to Annex 4

1. In the United States, citizenship determinations are necessary for all U.S. air carrier applicants for a certificate, exemption, or commuter license. An initial application for a license is filed in a formal public docket, and processed "on the record" with filings by the applicant and any other interested parties. The Department of Transportation renders a final decision by an Order based on the formal public record of the case, including documents for which confidential treatment has been granted. A "continuing fitness" case may be handled informally by the Department, or may be set for docketed procedures similar to those used for initial applications.
2. The Department's determinations evolve through a variety of precedents, which reflect, among other things, the changing nature of financial markets and investment structures and DOT's willingness to consider new approaches to foreign investment that are consistent with U.S. law. DOT works with applicants to consider proposed forms of investment and to assist them in fashioning transactions that fully comply with U.S. citizenship law, and applicants regularly consult with DOT staff before finalising their applications. At any time before a formal proceeding has begun, DOT staff may discuss questions concerning citizenship issues or other aspects of the proposed transaction and offer suggestions, where appropriate, as to alternatives that would allow a proposed transaction to meet U.S. citizenship requirements.

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3. In making both its initial and continuing citizenship and fitness determinations, DOT considers the totality of circumstances affecting the U.S. airline, and Department precedents have permitted consideration of the nature of the aviation relationship between the United States and the homeland(s) of any foreign investors. In the context of this Agreement, DOT would treat investments from EU nationals at least as favorably as it would treat investments from nationals of bilateral or multilateral Open-Skies partners.
4. In the European Union, paragraph 5 of Article 4 of Regulation 2407/92 provides that the European Commission, acting at the request of a Member State, shall examine compliance with the requirements of Article 4 and take a decision if necessary. In taking such decisions the Commission must ensure compliance with the procedural rights recognized as general principles of Community law by the European Court of Justice, including the right of interested parties to be heard in a timely manner.
5. When applying its laws and regulations, each Party shall ensure that any transaction involving investment in one of its airlines by nationals of the other Party is afforded fair and expeditious consideration.

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ANNEX 5

**Concerning
Franchising and Branding**

1. The airlines of each Party shall not be precluded from entering into franchise or branding arrangements, including conditions relating to brand protection and operational matters, provided that: they comply, in particular, with the applicable laws and regulations concerning control; the ability of the airline to exist outside of the franchise is not jeopardized; the arrangement does not result in a foreign airline engaging in cabotage operations; and applicable regulations, such as consumer protection provisions, including those regarding the disclosure of the identity of the airline operating the service, are complied with. So long as those requirements are met, close business relationships and cooperative arrangements between the airlines of each Party and foreign businesses are permissible, and each of the following individual aspects, among others, of a franchise or branding arrangement would not, other than in exceptional circumstances, of itself raise control issues:
 - a) using and displaying a specific brand or trademark of a franchisor, including stipulations on the geographic area in which the brand or trademark may be used;
 - b) displaying on the franchisee's aircraft the colors and logo of the franchisor's brand, including the display of such a brand, trademark, logo or similar identification prominently on its aircraft and the uniforms of its personnel;

- c) using and displaying the brand, trademark or logo on, or in conjunction with, the franchisee's airport facilities and equipment;
- d) maintaining customer service standards designed for marketing purposes;
- e) maintaining customer service standards designed to protect the integrity of the franchise brand;
- f) providing for license fees on standard commercial terms;
- g) providing for participation in frequent flyer programs, including the accrual of benefits; and
- h) providing in the franchise or branding agreement for the right of the franchisor or franchisee to terminate the arrangement and withdraw the brand, provided that nationals of the United States or the Member States remain in control of the U.S. or Community airline, respectively.

2. Franchising and branding arrangements are independent of, but may coexist with, a code-sharing arrangement that requires that both airlines have the appropriate authority from the Parties, as provided for in paragraph 7 of Article 10 of this Agreement.

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Joint Declaration

Representatives of the United States and of the European Community and its Member States confirmed that the Air Transport Agreement initialled in Brussels on 2 March 2007 and envisioned for signature on 30 April 2007 is to be authenticated in other languages, as provided either by exchange of letters, before signature of the Agreement, or by decision of the Joint Committee, after signature of the Agreement.

This Joint Declaration is an integral part of the Air Transport Agreement.

For the United States:

For the European Community
and its Member States; *ad referendum*

[signed. John Byerly]

[signed. Daniel Calleja]

Date: 18 April 2007

Date: 18 April 2007

USA/CE/JOINT DECLARATION/en 1

PROTOCOL
TO AMEND THE AIR TRANSPORT AGREEMENT
BETWEEN THE UNITED STATES OF AMERICA
AND THE EUROPEAN COMMUNITY AND ITS MEMBER STATES,
SIGNED ON APRIL 25 AND 30, 2007

THE UNITED STATES OF AMERICA (hereinafter the "United States"),

of the one part; and

THE KINGDOM OF BELGIUM,

THE REPUBLIC OF BULGARIA,

THE CZECH REPUBLIC,

THE KINGDOM OF DENMARK,

THE FEDERAL REPUBLIC OF GERMANY,

THE REPUBLIC OF ESTONIA,

IRELAND,

THE HELLENIC REPUBLIC,

THE KINGDOM OF SPAIN,

THE FRENCH REPUBLIC,

THE ITALIAN REPUBLIC,

THE REPUBLIC OF CYPRUS,

THE REPUBLIC OF LATVIA,

THE REPUBLIC OF LITHUANIA,

THE GRAND DUCHY OF LUXEMBOURG,

THE REPUBLIC OF HUNGARY,

MALTA,

THE KINGDOM OF THE NETHERLANDS,

THE REPUBLIC OF AUSTRIA,

THE REPUBLIC OF POLAND,

THE PORTUGUESE REPUBLIC,

ROMANIA,

THE REPUBLIC OF SLOVENIA,

THE SLOVAK REPUBLIC,

THE REPUBLIC OF FINLAND,

THE KINGDOM OF SWEDEN,

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,

being parties to the Treaty on European Union and to the Treaty on the Functioning of the European Union and being Member States of the European Union (hereinafter the "Member States"),

and the EUROPEAN UNION,

of the other part;

INTENDING to build upon the framework established by the Air Transport Agreement between the United States of America and the European Community and its Member States, signed on April 25 and April 30, 2007 (hereinafter referred to as the "Agreement"), with the goal of opening access to markets and maximising benefits for consumers, airlines, labour, and communities on both sides of the Atlantic;

FULFILLING the mandate in Article 21 of the Agreement to negotiate expeditiously a second stage agreement that advances this goal;

RECOGNISING that the European Union replaced and succeeded the European Community as a consequence of the entry into force on December 1, 2009 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, and that as of that date, all the rights and obligations of, and all the references to, the European Community in the Agreement apply to the European Union;

HAVE AGREED TO AMEND THE AGREEMENT AS FOLLOWS:

ARTICLE 1

Definitions

Article 1 of the Agreement shall be amended by:

1. Inserting the following new definition after paragraph 2:

"2 *bis* "Citizenship determination" means a finding that an air carrier proposing to operate services under this Agreement satisfies the requirements of Article 4 regarding its ownership, effective control, and principal place of business;"

2. Inserting the following new definition after paragraph 3:

"3 *bis* "Fitness determination" means a finding that an air carrier proposing to operate services under this Agreement has satisfactory financial capability and adequate managerial expertise to operate such services and is disposed to comply with the laws, regulations, and requirements that govern the operation of such services;"

ARTICLE 2

Reciprocal Recognition of Regulatory Determinations with Regard to Airline Fitness and Citizenship

A new Article 6 *bis* shall be inserted following Article 6 as follows:

"ARTICLE 6 *bis*

Reciprocal Recognition of Regulatory Determinations with Regard to Airline Fitness and Citizenship

1. Upon receipt of an application for operating authorisation, pursuant to Article 4, from an air carrier of one Party, the aeronautical authorities of the other Party shall recognise any fitness and/or citizenship determination made by the aeronautical authorities of the first Party with respect to that air carrier as if such a determination had been made by its own aeronautical authorities and not enquire further into such matters, except as provided for at sub-paragraph (a) below:

- (a) If, after receipt of an application for operating authorisation from an air carrier, or after the grant of such authorisation, the aeronautical authorities of the receiving Party have a specific reason for concern that, despite the determination made by the aeronautical authorities of the other Party, the conditions prescribed in Article 4 of this Agreement for the grant of appropriate authorisations or permissions have not been met, then they shall promptly advise those authorities, giving substantive reasons for their concern. In that event, either Party may seek consultations, which should include representatives of the relevant aeronautical authorities, and/or additional information relevant to this concern, and such requests shall be met as soon as practicable. If the matter remains unresolved, either Party may bring the matter to the Joint Committee;
- (b) This Article shall not apply to determinations in relation to safety certificates or licences; security arrangements; or insurance coverage.

2. Each Party shall inform the other in advance where practicable, and otherwise as soon as possible afterward, through the Joint Committee of any substantial changes in the criteria it applies in making the determinations referred to in paragraph 1 above. If the receiving Party requests consultations on any such change they shall be held in the Joint Committee within 30 days of such a request, unless the Parties agree otherwise. If, following such consultations, the receiving Party considers that the revised criteria of the other Party would not be satisfactory for the reciprocal recognition of regulatory determinations, the receiving Party may inform the other Party of the suspension of paragraph 1. This suspension may be lifted by the receiving Party at any time. The Joint Committee shall be informed accordingly."

ARTICLE 3

Environment

Article 15 of the Agreement shall be deleted in its entirety and replaced with the following:

"ARTICLE 15

Environment

1. The Parties recognise the importance of protecting the environment when developing and implementing international aviation policy, carefully weighing the costs and benefits of measures to protect the environment in developing such policy, and, where appropriate, jointly advancing effective global solutions. Accordingly, the Parties intend to work together to limit or reduce, in an economically reasonable manner, the impact of international aviation on the environment.
2. When a Party is considering proposed environmental measures at the regional, national, or local level, it should evaluate possible adverse effects on the exercise of rights contained in this Agreement, and, if such measures are adopted, it should take appropriate steps to mitigate any such adverse effects. At the request of a Party, the other Party shall provide a description of such evaluation and mitigating steps.

3. When environmental measures are established, the aviation environmental standards adopted by the International Civil Aviation Organisation in Annexes to the Convention shall be followed except where differences have been filed. The Parties shall apply any environmental measures affecting air services under this Agreement in accordance with Article 2 and 3(4) of this Agreement.

4. The Parties reaffirm the commitment of Member States and the United States to apply the balanced approach principle.

5. The following provisions shall apply to the imposition of new mandatory noise-based operating restrictions at airports which have more than 50,000 movements of civil subsonic jet aeroplanes per calendar year:

- (a) The responsible authorities of a Party shall provide an opportunity for the views of interested parties to be considered in the decision-making process.
- (b) Notice of the introduction of any new operating restriction shall be made available to the other Party at least 150 days prior to the entry into force of that operating restriction. At the request of that other Party, a written report shall be provided without delay to that other Party explaining the reasons for introducing the operating restriction, the environmental objective established for the airport, and the measures that were considered to meet that objective. That report shall include the relevant evaluation of the likely costs and benefits of the various measures considered.

- (c) Operating restrictions shall be (i) non-discriminatory, (ii) not more restrictive than necessary in order to achieve the environmental objective established for a specific airport, and (iii) non-arbitrary.

6. The Parties endorse and shall encourage the exchange of information and regular dialogue among experts, in particular through existing communication channels, to enhance cooperation, consistent with applicable laws and regulations, on addressing international aviation environmental impacts and mitigation solutions, including:

- (a) research and development of environmentally-friendly aviation technology;
- (b) improvement of scientific understanding regarding aviation emissions impacts in order to better inform policy decisions;
- (c) air traffic management innovation with a view to reducing the environmental impacts of aviation;
- (d) research and development of sustainable alternative fuels for aviation; and
- (e) exchange of views on issues and options in international fora dealing with the environmental effects of aviation, including the coordination of positions, where appropriate.

7. If so requested by the Parties, the Joint Committee, with the assistance of experts, shall work to develop recommendations that address issues of possible overlap between and consistency among market-based measures regarding aviation emissions implemented by the Parties with a view to avoiding duplication of measures and costs and reducing to the extent possible the administrative burden on airlines. Implementation of such recommendations shall be subject to such internal approval or ratification as may be required by each Party.

8. If one Party believes that a matter involving aviation environmental protection, including proposed new measures, raises concerns for the application or implementation of this Agreement, it may request a meeting of the Joint Committee, as provided in Article 18, to consider the issue and develop appropriate responses to concerns found to be legitimate."

ARTICLE 4

Social Dimension

A new Article 17 *bis* shall be inserted following Article 17 as follows:

"ARTICLE 17 *bis*

Social Dimension

1. The Parties recognise the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards. The opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties' respective laws.

2. The principles in paragraph 1 shall guide the Parties as they implement the Agreement, including regular consideration by the Joint Committee, pursuant to Article 18, of the social effects of the Agreement and the development of appropriate responses to concerns found to be legitimate."

ARTICLE 5

The Joint Committee

Paragraphs 3, 4, and 5 of Article 18 of the Agreement shall be deleted in their entirety and replaced with the following:

"3. The Joint Committee shall review, as appropriate, the overall implementation of the Agreement, including any effects of aviation infrastructure constraints on the exercise of rights provided for in Article 3, the effects of security measures taken under Article 9, the effects on the conditions of competition, including in the field of Computer Reservation Systems, and any social effects of the implementation of the Agreement. The Joint Committee shall also consider, on a continuing basis, individual issues or proposals that either Party identifies as affecting, or having the potential to affect, operations under the Agreement, such as conflicting regulatory requirements.

4. The Joint Committee shall also develop cooperation by:

(a) considering potential areas for the further development of the Agreement, including the recommendation of amendments to the Agreement;

(b) considering the social effects of the Agreement as it is implemented and developing appropriate responses to concerns found to be legitimate;

- (c) maintaining an inventory of issues regarding government subsidies or support raised by either Party in the Joint Committee;
- (d) making decisions, on the basis of consensus, concerning any matters with respect to application of paragraph 6 of Article 11;
- (e) developing, where requested by the Parties, arrangements for the reciprocal recognition of regulatory determinations;
- (f) fostering cooperation between the respective authorities of the Parties in efforts to develop their respective air traffic management systems with a view toward optimising the interoperability and compatibility of those systems, reducing costs, and enhancing their safety, capacity, and environmental performance;
- (g) promoting the development of proposals for joint projects and initiatives in the field of aviation safety, including with third countries;
- (h) encouraging continued close cooperation among the relevant aviation security authorities of the Parties, including initiatives to develop security procedures that enhance passenger and cargo facilitation without compromising security;
- (i) considering whether the Parties' respective laws, regulations, and practices in areas covered by Annex 9 of the Convention (Facilitation) may affect the exercise of rights under this Agreement;

(j) fostering expert-level exchanges on new legislative or regulatory initiatives and developments, including in the fields of security, safety, the environment, aviation infrastructure (including slots), and consumer protection;

(k) fostering consultation, where appropriate, on air transport issues dealt with in international organisations and in relations with third countries, including consideration of whether to adopt a joint approach; and

(l) taking, on the basis of consensus, the decisions to which paragraph 3 of Article 1 of Annex 4 and paragraph 3 of Article 2 of Annex 4 refer.

5. The Parties share the goal of maximising the benefits for consumers, airlines, labour, and communities on both sides of the Atlantic by extending this Agreement to include third countries. To this end, the Joint Committee shall consider, as appropriate, the conditions and procedures, including any necessary amendments to this Agreement, that would be required for additional third countries to accede to this Agreement."

ARTICLE 6

Further Expansion of Opportunities

Article 21 shall be deleted in its entirety and replaced with the following:

"ARTICLE 21

Further Expansion of Opportunities

1. The Parties commit to the shared goal of continuing to remove market access barriers in order to maximise benefits for consumers, airlines, labour, and communities on both sides of the Atlantic, including enhancing the access of their airlines to global capital markets, so as better to reflect the realities of a global aviation industry, the strengthening of the transatlantic air transportation system, and the establishment of a framework that will encourage other countries to open up their own air services markets.
2. Pursuant to the shared goal in paragraph 1, and in fulfilling its responsibilities under Article 18 to oversee implementation of this Agreement, the Joint Committee shall review annually developments, including towards the legislative changes referred to in this Article. The Joint Committee shall develop a process of cooperation in this regard including appropriate recommendations to the Parties. The European Union and its Member States shall allow majority ownership and effective control of their airlines by the United States or its nationals, on the basis of reciprocity, upon confirmation by the Joint Committee that the laws and regulations of the United States permit majority ownership and effective control of its airlines by the Member States or their nationals.

3. Upon written confirmation by the Joint Committee, in accordance with paragraph 6 of Article 18, that the laws and regulations of each Party permit majority ownership and effective control of its airlines by the other Party or its nationals:

- (a) Section 3 of Annex 1 to the Agreement shall cease to have effect;
- (b) Airlines of the United States shall have the right to provide scheduled passenger combination services between points in the European Union and its Member States and five countries, without serving a point in the territory of the United States. These countries shall be determined by the Joint Committee within one year from the date of signature of this Protocol. The Joint Committee may amend the list, or increase the number, of such countries; and
- (c) The text of Article 2 of Annex 4 to the Agreement ("Ownership and Control of Third-Country Airlines") shall cease to have effect and the text of Annex 6 to the Agreement shall take effect in its place, with regard to third-country airlines owned and controlled by the United States or its nationals.

4. Upon written confirmation by the Joint Committee, in accordance with paragraph 6 of Article 18, that the laws and regulations of the European Union and its Member States with regard to the imposition of noise-based operating restrictions at airports having more than 50,000 annual movements of civil subsonic jet aeroplanes provide that the European Commission has the authority to review the process prior to the imposition of such measures, and, where it is not satisfied that the appropriate procedures have been followed in accordance with applicable obligations, to take in that case, prior to their imposition, appropriate legal action regarding the measures in question:

- (a) Airlines of the European Union shall have the right to provide scheduled passenger combination services between points in the United States and five additional countries, without serving a point in the territory of the European Union and its Member States. These countries shall be determined by the Joint Committee within one year from the date of signature of this Protocol. The Joint Committee may amend the list, or increase the number, of such countries; and
- (b) The text of Article 2 of Annex 4 to the Agreement ("Ownership and Control of Third-Country Airlines") shall cease to have effect and the text of Annex 6 to the Agreement shall take effect in its place, with regard to third-country airlines owned and controlled by Member States or their nationals.

5. Following written confirmation by the Joint Committee that a Party has met the conditions of paragraphs 3 and 4 that are applicable to that Party, that Party may request high-level consultations regarding the implementation of this Article. Such consultations shall commence within 60 days of the date of delivery of the request, unless otherwise agreed by the Parties. The Parties shall make every effort to resolve the matters referred to consultation. If the Party requesting consultations is dissatisfied with the outcome of the consultations, that Party may give notice in writing through diplomatic channels of its decision that no airline of the other Party shall operate additional frequencies or enter new markets under this Agreement. Any such decision shall take effect 60 days from the date of notification. Within that period, the other Party may decide that no airline of the first Party shall operate additional frequencies or enter new markets under the Agreement. Such a decision shall take effect on the same day as the decision by the first Party. Any such decision by a Party may be lifted by agreement of the Parties, which shall be confirmed in writing by the Joint Committee."

ARTICLE 7

U.S. Government Procured Transportation

Annex 3 of the Agreement shall be deleted in its entirety and replaced with the following:

"Annex 3

Concerning U.S. Government Procured Transportation

Community airlines shall have the right to transport passengers and cargo on scheduled and charter flights for which a U.S. Government civilian department, agency, or instrumentality:

- (1) obtains the transportation for itself or in carrying out an arrangement under which payment is made by the Government or payment is made from amounts provided for the use of the Government; or
- (2) provides the transportation to or for a foreign country or international or other organisation without reimbursement,

and that transportation is:

- (a) between any point in the United States and any point outside the United States, to the extent such transportation is authorised under subparagraph 1(c) of Article 3, except – with respect to passengers who are eligible to travel on city-pair contract fares – between points for which there is a city-pair contract fare in effect; or

(b) between any two points outside the United States.

This Annex shall not apply to transportation obtained or funded by the Secretary of Defense or the Secretary of a military department."

ARTICLE 8

Annexes

The text of the Attachment to this Protocol shall be appended to the Agreement as Annex 6.

ARTICLE 9

Provisional Application

1. Pending its entry into force, the Parties agree to provisionally apply this Protocol, to the extent permitted under applicable domestic law, from the date of signature.
2. Either Party may at any time give notice in writing through diplomatic channels to the other Party of a decision to no longer apply this Protocol. In that event, application of this Protocol shall cease at midnight GMT at the end of the International Air Transport Association (IATA) traffic season in effect one year following the date of written notification, unless notice is withdrawn by agreement of the Parties before the end of this period. In the event that provisional application of the Agreement ceases pursuant to paragraph 2 of Article 25 of the Agreement, provisional application of this Protocol shall cease simultaneously.

ARTICLE 10

Entry into Force

This Protocol shall enter into force on the later of:

1. the date of entry into force of the Agreement, and
2. one month after the date of the last note in an exchange of diplomatic notes between the Parties confirming that all necessary procedures for entry into force of this Protocol have been completed.

For purposes of this exchange of diplomatic notes, diplomatic notes to or from the European Union and its Member States shall be delivered to or from, as the case may be, the European Union. The diplomatic note or notes from the European Union and its Member States shall contain communications from each Member State confirming that its necessary procedures for entry into force of this Protocol have been completed.

IN WITNESS WHEREOF the undersigned, being duly authorised, have signed this Agreement.

Done at Luxembourg on the twenty-fourth day of June in the year two thousand and ten.

Съставено в Люксембург на двадесет и четвърти юни две хиляди и десета година.

Hecho en Luxemburgo, el veinticuatro de junio de dos mil diez.

V Lucemburku dne dvacátého čtvrtého června dva tisíce deset.

Udfærdiget i Luxembourg den fireogtyvende juni to tusind og ti.

Geschehen zu Luxemburg am vierundzwanzigsten Juni zweitausendzehn.

Kahe tuhande kümnenda aasta juunikuu kahekümne neljandal päeval Luxembourgis.

Έγινε στο Λουξεμβούργο, στις είκοσι τέσσερις Ιουνίου δύο χιλιάδες δέκα.

Fait à Luxembourg, le vingt-quatre juin deux mille dix.

Fatto a Lussemburgo, addì ventiquattro giugno duemiladieci.

Luksemburgā, divi tūkstoši desmitā gada divdesmit ceturtajā jūnijā.

Priimta du tūkstančiai dešimtų metų birželio dvidešimt ketvirtą dieną Liuksemburge.

Kelt Luxembourgban, a kétezer-tizedik év június huszonnegyedik napján.

Magħmul fil-Lussemburgu, fl-erbgha u ghoxrin jum ta' Gunju tas-sena elfejn u ghaxra.

Gedaan te Luxemburg, de vierentwintigste juni tweeduizend tien.

Sporządzono w Luksemburgu dnia dwudziestego czwartego czerwca roku dwa tysiące dziesiątego.

Feito em Luxemburgo, em vinte e quatro de Junho de dois mil e dez.

Întocmit la Luxembourg, la douăzeci și patru iunie două mii zece.

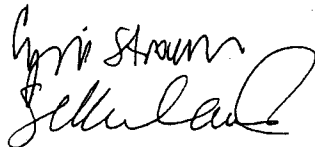
V Luxemburgu dňa dvadsiateho štvrtého júna dvetisícdesať.

V Luxembourg, dne štiriindvajsetega junija leta dva tisoč deset.

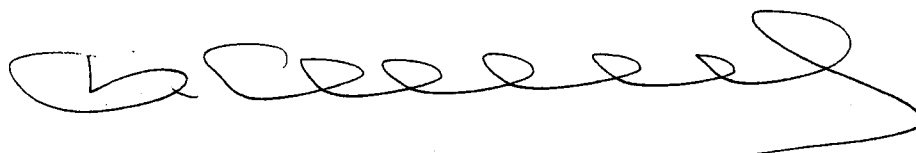
Tehty Luxemburgissa kahdentenakymmenentenäneljäntenä päivänä kesäkuuta vuonna kaksituhattakymmenen.

Som skedde i Luxemburg den tjugofjärde juni tjugohundratio.

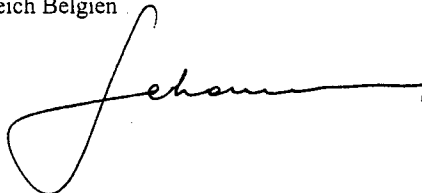
For the United States of America



За Република България

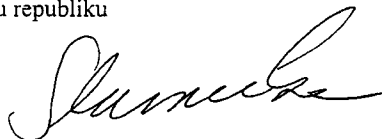


Voor het Koninkrijk België
Pour le Royaume de Belgique
Für das Königreich Belgien



Deze handtekening verbindt eveneens het Vlaamse Gewest, het Waalse Gewest en het Brussels Hoofdstedelijk Gewest.
Cette signature engage également la Région wallonne, la Région flamande et la Région de Bruxelles-Capitale.
Diese Unterschrift bindet zugleich die Wallonische Region, die Flämische Region und die Region Brüssel-Hauptstadt.

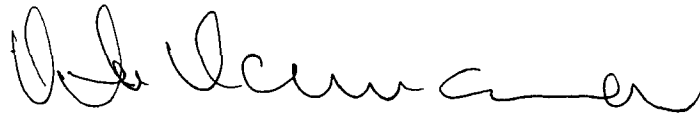
Za Českou republiku



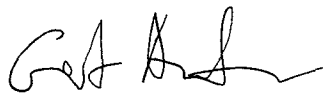
På Kongeriget Danmarks vegne



Für die Bundesrepublik Deutschland



Eesti Vabariigi nimel



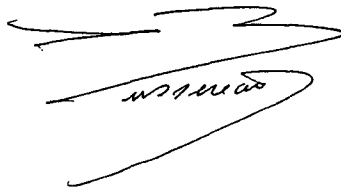
Για την Ελληνική Δημοκρατία



Por el Reino de España



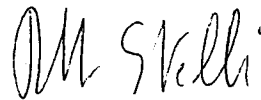
Pour la République française



Thar cheann Na hÉireann
For Ireland



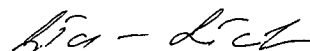
Per la Repubblica italiana



Για την Κυπριακή Δημοκρατία



Latvijas Republikas vārdā



Lietuvos Respublikos vardu



Pour le Grand-Duché de Luxembourg

Eientorhel

A Magyar Köztársaság részéről

Va

Għal Malta

in a hand

Voor het Koninkrijk der Nederlanden

Einfunk

Für die Republik Österreich

Die Dees

W imieniu Rzeczypospolitej Polskiej



Pela República Portuguesa



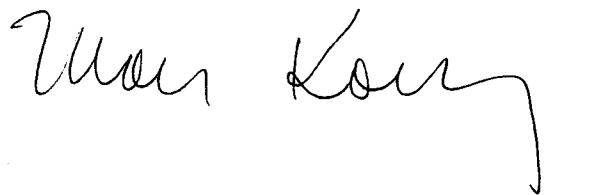
Pentru România



Za Republiko Slovenijo



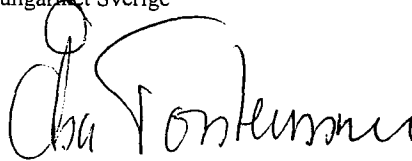
Za Slovenskú republiku



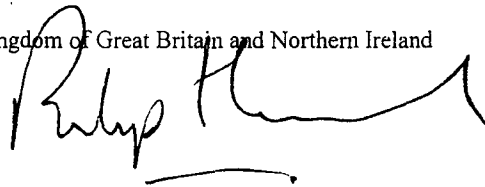
Suomen tasavallan puolesta \



För Konungariket Sverige



For the United Kingdom of Great Britain and Northern Ireland



За Европейския съюз
Por la Unión Europea
Za Evropskou unii
For Den Europæiske Union
Für die Europäische Union
Euroopa Liidu nimel
Για την Ευρωπαϊκή Ένωση
For the European Union
Pour l'Union européenne
Per l'Unione europea
Eiropas Savienības vārdā –
Europos Sąjungos vardu
Az Európai Unió részéről
Għall-Unjoni Ewropea
Voor de Europese Unie
W imieniu Unii Europejskiej
Pela União Europeia
Pentru Uniunea Europeană
Za Európsku úniu
Za Evropsko unijo
Euroopan unionin puolesta
För Europeiska unionen




ANNEX 6

Ownership and Control of Third Country Airlines

1. Neither Party shall exercise any available rights under air services arrangements with a third country to refuse, revoke, suspend or limit authorisations or permissions for any airlines of that third country on the grounds that substantial ownership of that airline is vested in the other Party, its nationals, or both.
2. The United States shall not exercise any available rights under air services arrangements to refuse, revoke, suspend or limit authorisations or permissions for any airline of the Principality of Liechtenstein, the Swiss Confederation, a member of the ECAA as of the date of signature of this Agreement, or any country in Africa that is implementing an Open-Skies air services agreement with the United States as of the date of signature of this Agreement, on the grounds that effective control of that airline is vested in a Member State or States, nationals of such a state or states, or both.
3. Neither Party shall exercise available rights under air services arrangements with a third country to refuse, revoke, suspend or limit authorisations or permissions for any airlines of that third country on the grounds that effective control of that airline is vested in the other Party, its nationals, or both, provided that the third country in question has established a record of cooperation in air services relations with both Parties.
4. The Joint Committee shall maintain an inventory of third countries that are considered by both Parties to have established a record of cooperation in air services relations.

EU - Iceland - Norway
Perm

AIR TRANSPORT AGREEMENT

US/EU/IS/NO/en 1

THE UNITED STATES OF AMERICA (hereinafter, "the United States"),

of the first part;

THE KINGDOM OF BELGIUM,

THE REPUBLIC OF BULGARIA,

THE CZECH REPUBLIC,

THE KINGDOM OF DENMARK,

THE FEDERAL REPUBLIC OF GERMANY,

THE REPUBLIC OF ESTONIA,

IRELAND,

THE HELLENIC REPUBLIC,

THE KINGDOM OF SPAIN,

THE FRENCH REPUBLIC,

THE ITALIAN REPUBLIC,

THE REPUBLIC OF CYPRUS,

US/EU/IS/NO/en 2

THE REPUBLIC OF LATVIA,

THE REPUBLIC OF LITHUANIA,

THE GRAND DUCHY OF LUXEMBOURG,

THE REPUBLIC OF HUNGARY,

MALTA,

THE KINGDOM OF THE NETHERLANDS,

THE REPUBLIC OF AUSTRIA,

THE REPUBLIC OF POLAND,

THE PORTUGUESE REPUBLIC,

ROMANIA,

THE REPUBLIC OF SLOVENIA,

THE SLOVAK REPUBLIC,

THE REPUBLIC OF FINLAND,

THE KINGDOM OF SWEDEN,

US/EU/IS/NO/en 3

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,

being parties to the Treaty on European Union and the Treaty on the Functioning of the European Union and being Member States of the European Union (hereinafter, "the Member States"),

and

THE EUROPEAN UNION,

of the second part;

ICELAND,

of the third part; and

THE KINGDOM OF NORWAY (hereinafter, "Norway"),

of the fourth part;

DESIRING to promote an international aviation system based on competition among airlines in the marketplace with minimum government interference and regulation;

DESIRING to facilitate the expansion of international air transport opportunities, including through the development of air transportation networks to meet the needs of passengers and shippers for convenient air transportation services;

US/EU/IS/NO/en 4

DESIRING to make it possible for airlines to offer the travelling and shipping public competitive prices and services in open markets;

DESIRING to have all sectors of the air transport industry, including airline workers, benefit in a liberalized agreement;

DESIRING to ensure the highest degree of safety and security in international air transport and reaffirming their grave concern about acts or threats against the security of aircraft, which jeopardize the safety of persons or property, adversely affect the operation of air transportation, and undermine public confidence in the safety of civil aviation;

NOTING the Convention on International Civil Aviation, opened for signature at Chicago on December 7, 1944;

RECOGNIZING that government subsidies may adversely affect airline competition and may jeopardize the basic objectives of this Agreement;

AFFIRMING the importance of protecting the environment in developing and implementing international aviation policy;

NOTING the importance of protecting consumers, including the protections afforded by the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal May 28, 1999;

US/EU/IS/NO/en 5

INTENDING to build upon the framework of existing agreements with the goal of opening access to markets and maximizing benefits for consumers, airlines, labor, and communities on both sides of the Atlantic;

RECOGNIZING the importance of enhancing the access of their airlines to global capital markets in order to strengthen competition and promote the objectives of this Agreement;

INTENDING to establish a precedent of global significance to promote the benefits of liberalization in this crucial economic sector;

RECOGNIZING that the European Union replaced and succeeded the European Community as a consequence of the entry into force on December 1, 2009 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, and that as of that date, all the rights and obligations of, and all the references to the European Community in the Air Transport Agreement signed by the United States of America and the European Community and its Member States on April 25 and 30, 2007, apply to the European Union;

HAVE AGREED AS FOLLOWS:

US/EU/IS/NO/en 6

ARTICLE 1

Definition

"Party" means the United States, the European Union and its Member States, Iceland, or Norway.

ARTICLE 2

Application of the Air Transport Agreement as amended by the Protocol and the Annex to this Agreement

The provisions of the Air Transport Agreement signed by the United States of America and the European Community and its Member States on April 25 and 30, 2007 (hereinafter, "the Air Transport Agreement"), as amended by the Protocol to Amend the Air Transport Agreement signed by the United States of America and the European Union and its Member States on June 24, 2010 (hereinafter, "the Protocol"), which are hereby incorporated by reference, shall apply to all Parties to this Agreement, subject to the Annex to this Agreement. The provisions of the Air Transport Agreement, as amended by the Protocol, shall apply to Iceland and Norway as though they were Member States of the European Union, so that Iceland and Norway shall have all of the rights and obligations of Member States under that agreement. The provisions of the Annex to this Agreement form an integral part of this Agreement.

US/EU/IS/NO/en 7

ARTICLE 3

Termination or cessation of provisional application

1. Either the United States or the European Union and its Member States may, at any time, give notice in writing through diplomatic channels to the other three Parties of its decision to terminate this Agreement or to end this Agreement's provisional application under Article 5.

A copy of the notice shall be sent simultaneously to the International Civil Aviation Organization (ICAO). This Agreement shall terminate, or provisional application of this Agreement shall end, at midnight GMT at the end of the International Air Transport Association (IATA) traffic season in effect one year following the date of the written notification, unless the notice is withdrawn by agreement of all of the Parties before the end of this period.

2. Either Iceland or Norway may, at any time, give notice in writing through diplomatic channels to the other Parties of its decision to withdraw from this Agreement or to end its provisional application of this Agreement under Article 5. A copy of the notice shall be sent simultaneously to ICAO. Such withdrawal or cessation of provisional application shall be effective at midnight GMT at the end of the IATA traffic season in effect one year following the date of written notification, unless the notice is withdrawn by agreement of the Party giving written notice, the United States, and the European Union and its Member States before the end of this period.

US/EU/IS/NO/en 8

3. Either the United States or the European Union and its Member States may, at any time, give notice in writing through diplomatic channels to Iceland or Norway of its decision to terminate this Agreement or to end this Agreement's provisional application, with respect to Iceland or Norway. Copies of the notice shall be sent simultaneously to the other two Parties to this Agreement and to ICAO. Termination or cessation of provisional application with respect to Iceland or Norway shall be effective at midnight GMT at the end of the IATA traffic season in effect one year following the date of written notification, unless the notice is withdrawn by agreement of the United States, the European Union and its Member States, and the Party receiving the notice, before the end of this period.

4. For purposes of the diplomatic notes contemplated by this Article, diplomatic notes to or from the European Union and its Member States shall be delivered to or from, as the case may be, the European Union.

5. Notwithstanding any other provision of this Article, if the Air Transport Agreement, as amended by the Protocol, is terminated, this Agreement shall terminate simultaneously.

US/EU/IS/NO/en 9

ARTICLE 4

Registration with ICAO

This Agreement and all amendments thereto shall be registered with ICAO by the General Secretariat of the Council of the European Union.

ARTICLE 5

Provisional Application

Pending its entry into force, the Parties agree to provisionally apply this Agreement, to the extent permitted under applicable domestic law, from the date of signature. If the Air Transport Agreement, as amended by the Protocol, is terminated in accordance with Article 23 thereof, or its provisional application ceases in accordance with Article 25 of that agreement, or provisional application of the Protocol ceases in accordance with Article 9 of the Protocol, provisional application of this Agreement shall cease simultaneously.

US/EU/IS/NO/en 10

ARTICLE 6
Entry into force

This Agreement shall enter into force on the later of:

1. the date of entry into force of the Air Transport Agreement,
2. the date of entry into force of the Protocol, and
3. one month after the date of the last note of the exchanges of diplomatic notes among the Parties confirming that all necessary procedures for entry into force of this Agreement have been completed.

For the purposes of this exchange of diplomatic notes, diplomatic notes to or from the European Union and its Member States shall be delivered to or from, as the case may be, the European Union. The diplomatic note or notes from the European Union and its Member States shall contain communications from each Member State confirming that its necessary procedures for entry into force of this Agreement have been completed.

IN WITNESS WHEREOF the undersigned, being duly authorized, have signed this Agreement.

Done at Luxembourg and Oslo, in quadruplicate, on the 16th and 21st of June 2011 respectively.

US/EU/IS/NO/en 11



For the United States of America



За Европейския съюз
Por la Unión Europea
Za Evropskou unii
For Den Europæiske Union
Für die Europäische Union
Euroopa Liidu nimel
Για την Ευρωπαϊκή Ένωση
For the European Union
Pour l'Union européenne
Per l'Unione europea
Eiropas Savienības vārdā –
Europos Sąjungos vardu
Az Európai Unió részéről
Għall-Unjoni Ewropea
Voor de Europese Unie
W imieniu Unii Europejskiej
Pela União Europeia
Pentru Uniunea Europeană
Za Európsku úniu
Za Evropsko unijo
Euroopan unionin puolesta
För Europeiska unionen



Fyrir Ísland



For Kongeriket Norge

US/EU/IS/NO/X 3

Voor het Koninkrijk België
Pour le Royaume de Belgique
Für das Königreich Belgien

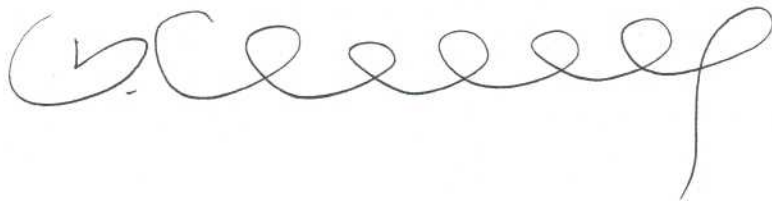


Deze handtekening verbindt eveneens het Vlaamse Gewest, het Waalse Gewest en het Brussels Hoofdstedelijk Gewest.

Cette signature engage également la Région wallonne, la Région flamande et la Région de Bruxelles-Capitale.

Diese Unterschrift bindet zugleich die Wallonische Region, die Flämische Region und die Region Brüssel-Hauptstadt.

За Република България



Za Českou republiku



US/EU/IS/NO/X 5

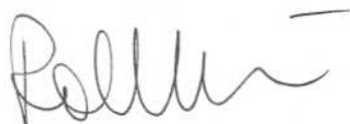
For Kongeriget Danmark

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Für die Bundesrepublik Deutschland

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Eesti Vabariigi nimel

A handwritten signature in black ink, appearing to be 'P. J. J. J.' with a horizontal line at the end.

Thar cheann Na hÉireann
For Ireland

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US/EU/IS/NO/X 7

Για την Ελληνική Δημοκρατία



Por el Reino de España



Pour la République française



Per la Repubblica italiana



US/EU/IS/NO/X 9

Για την Κυπριακή Δημοκρατία



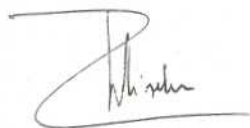
Latvijas Republikas vārdā –



Lietuvos Respublikos vardu



Pour le Grand-Duché de Luxembourg



US/EU/IS/NO/X 11

A Magyar Köztársaság részéről



Għali Malta



Voor het Koninkrijk der Nederlanden



Für die Republik Österreich



US/EU/IS/NO/X 13

W imieniu Rzeczypospolitej Polskiej



Pela República Portuguesa



Pentru România

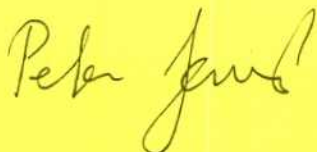


Za Republiko Slovenijo



US/EU/IS/NO/X 15

Za Slovenskú republiku



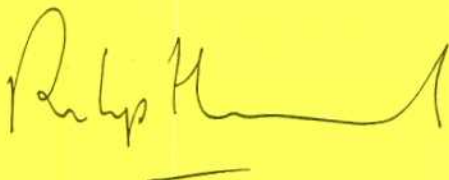
Suomen tasavallan puolesta
För Republiken Finland



För Konungariket Sverige



For the United Kingdom of Great Britain and Northern Ireland



US/EU/IS/NO/X 17

JOINT DECLARATION


Representatives of the United States of America, the European Union and its Member States, Iceland, and the Kingdom of Norway confirmed that the text of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part ("the Agreement"), is to be authenticated in other languages, as provided either, before signature of the Agreement, by Exchanges of Letters or, after signature of the Agreement, by decision of the Joint Committee.

This Joint Declaration is an integral part of the Agreement.


For the United States of America


For the European Union
and its Member States


For Iceland


For the Kingdom of Norway

US/EU/IS/NO/JD/en 1

ANNEX

Specific Provisions with Respect to Iceland and Norway

The provisions of the Air Transport Agreement, as amended by the Protocol, modified as follows, shall apply to all Parties to this Agreement. The provisions of the Air Transport Agreement, as amended by the Protocol, shall apply to Iceland and Norway as though they were Member States of the European Union, so that Iceland and Norway shall have all of the rights and obligations of Member States under that agreement, subject to the following:

1. Paragraph 9 of Article 1 of the Air Transport Agreement, as amended by the Protocol, shall read as follows:

""Territory" means, for the United States, the land areas (mainland and islands), internal waters and territorial sea under its sovereignty or jurisdiction, and, for the European Union and its Member States, the land areas (mainland and islands), internal waters and territorial sea in which the Agreement on the European Economic Area is applied and under the conditions laid down in that agreement and any successor instrument, with the exception of the land areas and internal waters under the sovereignty or jurisdiction of the Principality of Liechtenstein; application of this Agreement to Gibraltar airport is understood to be without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to the dispute over sovereignty over the territory in which the airport is situated, and to the continuing suspension of Gibraltar Airport from European Union aviation measures existing as at 18 September 2006 as between Member States, in accordance with the Ministerial statement on Gibraltar Airport agreed in Córdoba on 18 September 2006; and".

US/EU/IS/NO/Annex/en 1

2. Articles 23 to 26 of the Air Transport Agreement, as amended by the Protocol, shall not apply to Iceland and Norway.
3. Articles 9 and 10 of the Protocol shall not apply to Iceland and Norway.
4. The following shall be added to Section 1 of Annex 1 of the Air Transport Agreement, as amended by the Protocol:
 - "w. Iceland: Air Transport Agreement, signed at Washington June 14, 1995; amended March 1, 2002 by exchange of notes; amended August 14, 2006 and March 9, 2007 by exchange of notes.
 - x. The Kingdom of Norway: Agreement relating to Air Transport Services effected by exchange of notes at Washington, October 6, 1945; amended August 6, 1954 by exchange of notes; amended June 16, 1995 by exchange of notes."

US/EU/IS/NO/Annex/en 2

5. The text of Section 2 of Annex 1 of the Air Transport Agreement, as amended by the Protocol, shall read as follows:

"Notwithstanding Section 1 of this Annex, for areas that are not encompassed within the definition of "territory" in Article 1 of this Agreement, the agreements in paragraphs (e) (Denmark-United States), (g) (France-United States), (v) (United Kingdom-United States), and (x) (Norway-United States) of that section shall continue to apply, according to their terms."

6. The text of Section 3 of Annex 1 of the Air Transport Agreement, as amended by the Protocol, shall read as follows:

"Notwithstanding Article 3 of this Agreement, U.S. airlines shall not have the right to provide all-cargo services, that are not part of a service that serves the United States, to or from points in the Member States, except to or from points in the Czech Republic, the French Republic, the Federal Republic of Germany, the Grand Duchy of Luxembourg, Malta, the Republic of Poland, the Portuguese Republic, the Slovak Republic, Iceland, and the Kingdom of Norway."

7. The following sentence shall be added at the end of Article 3 of Annex 2 of the Air Transport Agreement, as amended by the Protocol:

"For Iceland and Norway, this includes, but is not limited to, Articles 53, 54, and 55 of the Agreement on the European Economic Area and the European Union Regulations implementing Articles 101, 102 and 105 of the Treaty on the Functioning of the European Union as incorporated into the Agreement on the European Economic Area, as well as any amendments thereto."

8. Paragraph 4 of Article 21 of the Air Transport Agreement, as amended by the Protocol, shall apply to Iceland and Norway to the extent that the relevant laws and regulations of the European Union are incorporated into the Agreement on the European Economic Area, in accordance with any adaptations thereby stipulated. The rights provided for in subparagraphs 4(a) and 4(b) of Article 21 of the Air Transport Agreement, as amended by the Protocol, shall only be available to Iceland or Norway if, with respect to the imposition of noise-based operating restrictions, Iceland or Norway, respectively, is subject, under the relevant laws and regulations of the European Union as incorporated into the Agreement on the European Economic Area, to oversight that is comparable to that provided for in paragraph 4 of Article 21 of the Air Transport Agreement, as amended by the Protocol.

Submitted by the Council to the Members of
The American Law Institute
for Consideration at the Ninety-Fourth Annual Meeting on May 22, 23, and 24, 2017



RESTATEMENT OF THE LAW FOURTH
THE FOREIGN RELATIONS LAW OF THE UNITED STATES
TREATIES

Tentative Draft No. 2

(March 20, 2017)

SUBJECT COVERED

CHAPTER 2 Status of Treaties in United States Law (§§ 102, 104-106, 110-113)
APPENDIX A Black Letter of Tentative Draft No. 2
APPENDIX B Other Relevant Black-Letter Text

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E-mail: ali@ali.org • Website: <http://www.ali.org>

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As of the date of publication, this Draft has not been considered by the members of The American Law Institute and does not represent the position of the Institute on any of the issues with which it deals. The action, if any, taken by the members with respect to this Draft may be ascertained by consulting the Annual Proceedings of the Institute, which are published following each Annual Meeting.

1 represent a state for purposes of concluding an international agreement if . . . such
2 authority *clearly* appears from the circumstances” (emphasis added), subsection (2) of
3 this Section simply requires apparent authority, although in practice the inquiries will be
4 satisfied by the same evidence—for example, a person’s position as the Minister of
5 Foreign Affairs or as head of a diplomatic mission. Subsection (3), Comment *c*, and
6 Reporters’ Note 6 of this Section also add that in order for a violation of domestic law to
7 constitute a basis for invalidating a state’s consent to be bound by an international
8 agreement, the rule of domestic law must not only be one of fundamental importance, but
9 must also concern competence to conclude international agreements. As discussed, this
10 requirement is reflected in the Vienna Convention on the Law of Treaties and is well
11 accepted as a matter of international treaty practice.

12 § 104. Entry into Force of International Agreements

13 (1) An international agreement enters into force as an international
14 obligation for a state, including the United States, when (a) the state has expressed
15 its consent to be bound by means consistent with the agreement, and (b) the other
16 conditions established by the agreement, including consent by the requisite number
17 of states, have been satisfied.

18 (2) A state will also be subject, on a provisional basis, to certain international
19 obligations arising from an international agreement, if it has expressed its consent to
20 be bound by some or all of the terms of the agreement pending its entry into force
21 for that state, provided that such provisional obligations have not been terminated
22 by it or otherwise ceased to be binding.

23 (3) A state will also be subject to certain interim obligations arising from its
24 signature, exchange of instruments, or ratification of an international agreement,
25 provided that such interim obligations have not been terminated by it or otherwise
26 ceased to be binding.

27 (4) While the United States may assume international obligations by the
28 above-described means, the status of these obligations under U.S. domestic law
29 remains subject to the Constitution and laws of the United States.

Comment:

a. Expression of consent to be bound. While the text of an international agreement may be finalized by any of several steps, see Reporters' Note 2, such steps do not generally serve to express a state's consent to be bound by the treaty unless the treaty expressly so provides. Some agreements provide that they are binding upon signature alone, although signature *ad referendum* (that is, subject to confirmation through some subsequent act) is frequently employed. When a state's consent to be bound is not established by signature, its consent may be expressed by any other method of adherence—including the exchange of instruments, ratification, acceptance, approval, or accession—permitted by the agreement. Vienna Convention, arts. 11-15. As a matter of nomenclature, "ratification" is the more general term normally used to describe the ratification, acceptance, or approval of an agreement when a state has previously signed *ad referendum*; "accession" refers to the act of a state expressing its consent to be bound by an agreement that it has not previously signed, whether because it did not participate in the drafting or otherwise. Unless the agreement otherwise provides, instruments of ratification, acceptance, approval, or accession establish the consent of a state to be bound upon (a) their exchange between the contracting states, (b) their deposit with the depositary, or (c) their notification to the contracting states or to the depositary, if so agreed. Vienna Convention, art. 16.

Agreements open to ratification, accession, and similar means of providing consent are well suited to the U.S. constitutional system, in which Senate approval of treaties and congressional approval of certain other international agreements is necessary. However, in the event the negotiating states agreed that consent was to be indicated by more immediate means, such as signature, the United States can delay providing such indication until after the requisite legislative approval has been obtained.

b. Entry into force. An international agreement enters into force according to its terms or as the negotiating states may otherwise agree. Unless it provides otherwise, an agreement enters into force when all negotiating states have agreed to be bound. Vienna Convention, art. 24(1)-(2). It is common, however, for multilateral agreements to establish a different threshold—for example, requiring that a certain number of states, or particular states deemed essential to the agreement, express consent. See, e.g., Treaty on

1 the Non-Proliferation of Nuclear Weapons, art. IX(3), July 1, 1968, 21 U.S.T. 483; 729
2 U.N.T.S. 161 (providing that the agreement would enter into force after its ratification by
3 three designated nuclear-power states, together with ratification by 40 other signatory
4 states). If a state consents to be bound after the agreement has come into force, the
5 agreement enters into force for that state as of the date of its consent, unless the
6 agreement provides otherwise. See Vienna Convention, art. 24(3).

7 *c. Entry into force for the United States.* Under international law, an international
8 agreement enters into force for the United States—as for other states—when it has
9 expressed its consent to be bound, by means consistent with the agreement, and when the
10 other conditions required by the agreement have been fulfilled. Thus, an international
11 agreement signed by the United States, but remaining subject to its ratification, will not
12 bind the United States to act in accordance with its terms. See, e.g., *Garza v. Lappin*, 253
13 F.3d 918, 925 (7th Cir. 2001) (American Convention on Human Rights). Likewise, if the
14 United States has definitively expressed its consent through ratification, but an
15 insufficient number of states have done so for the agreement to enter into force, the
16 United States will not yet be bound by the agreement as though it were in force.
17 Provisional application, which arises under an agreement according to its terms, see
18 subsection (2), is discussed in Comment *e*; interim obligations, which do not bind states
19 to the terms of the international agreements as such, see subsection (3), are discussed in
20 Comment *f*.

21 An international agreement made by the United States in the form of a treaty
22 enters into force for the United States when the President, with the advice and consent of
23 the Senate, has ratified it or otherwise given official notification of consent to be bound,
24 provided the agreement is also in force internationally. (For discussion of the Senate
25 advice and consent process, see § 103.) An international agreement made by the United
26 States other than as a treaty, but which is subject to approval by Congress, normally takes
27 effect when, following approval or authorization by Congress, the President ratifies it or
28 otherwise gives official notice of the United States' consent to be bound, provided the
29 agreement is also in force internationally. An international agreement made by the
30 United States other than as a treaty, but which is not subject to congressional approval,
31 normally enters into force for the United States upon signature or through the exchange

1 of notes—unless the agreement, or the legislation or treaty authorizing it, provides
2 otherwise—subject, again, to whether the agreement is also in force internationally. An
3 international agreement does not enter into force for the United States until it is in force
4 internationally, irrespective of whether the United States has deposited its ratification or
5 given other notification of its consent to be bound.

6 An international agreement's entry into force for the United States does not
7 conclusively resolve its status as a matter of domestic law. For discussion of the
8 relationship between a treaty and other U.S. laws, see §§ 107-109. The relationship
9 between an international agreement made by the United States other than as a treaty, on
10 the one hand, and other U.S. laws, on the other, may be addressed in future Sections of
11 this Restatement.

12 *d. Provisional application of an international agreement.* An international
13 agreement or its parts may be applied provisionally pending entry into force of the
14 agreement for that state, if the agreement so provides or if the negotiating states
15 otherwise agree. See Vienna Convention, art. 25. Provisional application may be
16 authorized when states desire to promote immediate application of the agreement,
17 particularly if it appears that the agreement's entry into force may be delayed.

18 The conditions for initiating provisional application vary. Agreements may
19 provide that they will apply provisionally to a state automatically upon adoption of the
20 treaty text, upon signature, upon the state's ratification (pending ratification by a
21 sufficient number of states to bring the agreement into force), or upon declaration that the
22 state accepts provisional application. States may also provide for provisional application
23 by separate agreement. See, e.g., General Agreement on Tariffs and Trade, Oct. 30, 1947,
24 Protocol of Provisional Application, 61 Stat. A3, A2051, T.I.A.S. No. 1700, at 2041, 55
25 U.N.T.S. 188, 308.

26 Provisional application binds a state to fulfill the indicated rights and
27 obligations in an international agreement, but it is also subject to limitations imposed
28 by the agreement. For example, provisional application by states may be subject to
29 existing domestic law. See, e.g., GATT Protocol of Provisional Application, *supra*,
30 art. 1(b). The duration for provisional limitation may also be confined to a specified
31 term, and an agreement may provide that the obligation ceases when the agreement

enters into force. See, e.g., Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, July 28, 1994, art. 7(3), 1836 U.N.T.S. 3. Finally, a state may terminate provisional application in accordance with the terms of the agreement or, in the absence of such terms, by notifying the other states between which the treaty is being provisionally applied that it intends not to become a party to the treaty. See Vienna Convention, art. 25(2); e.g., GATT Protocol of Provisional Application, *supra*, art. 5.

The Constitution and laws of the United States may impose additional limitations on the domestic status of a provisionally applied agreement, without affecting the international obligation. Under U.S. law, if the advice and consent of the Senate, or congressional approval, is required but has not yet been obtained, a commitment that an agreement shall have provisional effect for the United States must rest on another agreement, on a statute, or on the President's own constitutional authority. Issues particular to provisional application are explored in Reporters' Note 7. The more general topic of the domestic-law status of international agreements other than treaties may be addressed in future Sections of this Restatement.

e. Obligations arising from signature or consent to be bound by a treaty prior to its entry into force. Article 18 of the Vienna Convention on the Law of Treaties establishes what is known as an interim obligation, according to which a state is "obliged to refrain from acts which would defeat the object and purpose" of an international agreement. That obligation arises at the time of the state's signature (or its exchange of instruments subject to ratification) until such time as the state has made its intention clear not to become a party to the agreement. It also applies from the time of a state's expression of consent to be bound until the agreement enters into force. Article 18 indicates, however, that this obligation applies "provided that entry into force of the treaty is not unduly delayed," suggesting that the obligation could cease to apply if the treaty has not entered into force after some extended period of time.

Before the Vienna Convention was negotiated, the status and parameters of the interim obligation under international law were open to dispute. Since that time, there appears to be widespread acceptance of an interim obligation—including by states, like the United States, that have not ratified the Vienna Convention and therefore are bound

1 by the principle only to the extent it reflects customary international law. The United
2 States has repeatedly indicated its understanding that international obligations can arise
3 based on its signature of treaties and that the object-and-purpose test in Article 18 reflects
4 customary international law. See Reporters' Notes 8-9.

5 The scope of such interim obligations, however, has remained unclear, in
6 particular as to the nature of the acts prohibited. The United States has acknowledged that
7 signatory states—and, presumably, states that have ratified, but await an agreement's
8 entry into force—"are at least expected to avoid actions which could render impossible
9 the entry into force and implementation of the [agreement], or defeat its basic purpose
10 and value to the other party or parties." Memorandum from Roberts B. Owen, U.S. Dep't
11 of State Legal Adviser (Feb. 21, 1980), reprinted in S. Exec. Rep. No. 96-33, at 47
12 (1980). Potential issues relating to the compatibility of the interim obligation with U.S.
13 law, including whether adherence to the interim obligation requires legislative
14 authorization or may be based on the President's constitutional authority, have not been
15 resolved.

16 *f. Depositaries.* The negotiating states may identify a depositary—which may be
17 one or more states (such as the United States), an international organization, or an officer
18 of an organization—in the agreement itself or in some other manner. See Vienna
19 Convention, art. 76. The depositary's functions may be stipulated likewise. These
20 functions vary, but they typically involve receiving, reviewing, and communicating with
21 states as appropriate the text of an international agreement; the full powers, signatures,
22 and the means by which states provide consent; and information concerning the status of
23 the agreement. Vienna Convention, arts. 77-80; see Reporters' Note 10. A depositary
24 may also perform important functions in connection with reservations and objections to
25 reservations. See § 105. Although the depositary's functions are ministerial in nature,
26 and may arise prior to the agreement's entry into force, the depositary is under an
27 obligation to perform them impartially. Vienna Convention, art. 76(2).

REPORTERS' NOTES

28 1. *Vienna Convention rules concerning conclusion and entry into force.* This
29 Section is consistent with the approach taken by the Vienna Convention on the Law of
30 Treaties, except where otherwise stated. The United States, though not a party to the

1 Vienna Convention, nevertheless follows those provisions of the Convention that it
2 considers to reflect customary international law. See § 101, Reporters' Note 1. It has
3 characterized the Vienna Convention's rules relating to the conclusion and entry into
4 force of international agreements, in particular, as "primarily technical." See Letter of
5 Submittal from William P. Rogers, U.S. Sec'y of State, to President Richard M. Nixon
6 (Oct. 19, 1971), 65 State Dep't Bull. 684, 685 (Dec. 13, 1971). Because these rules are
7 largely determined by the terms of particular agreements—something recognized by the
8 Vienna Convention provisions themselves—there has been little occasion to assess
9 whether the default or residual rules indicated by the Vienna Convention are required by
10 customary international law. The positions of the United States with regard to the
11 international law concerning provisional application and interim obligations, and the
12 consistency of that law with domestic law, are addressed in Reporters' Notes 6-9.

13 2. *Adopting and authenticating the text of an international agreement.* Absent
14 correctable error or subsequent amendment, the adoption of an international agreement's
15 text—while not itself establishing a binding international legal obligation—establishes
16 the basis for state consent and for the agreement's eventual entry into force. For bilateral
17 agreements between states, signature of the final text (whether *ad referendum* or
18 otherwise) usually constitutes the act of adoption, although states may also conclude or
19 exchange the text by other means. George Korontzis, *Making the Treaty*, in *The Oxford*
20 *Guide to Treaties* 186-187 (Duncan Hollis ed., 2012). Both parties approve the text of a
21 bilateral treaty, and a unanimity requirement is also employed for other agreements
22 involving a small number of states parties. See Vienna Convention, art. 9(1); Maurice
23 Kamto, *1969 Vienna Convention, art. 9: Adoption of the Text*, in 1 *The Vienna*
24 *Conventions on the Law of Treaties: A Commentary* 167-68 (Olivier Corten & Pierre
25 Klein eds., 2011).

26 For multilateral conventions involving a greater number of states, and concluded
27 at international conferences, different norms prevail. Article 9 of the Vienna Convention
28 suggests a default rule according to which approval of two-thirds of the states present and
29 voting is required (i.e., not counting abstaining states), unless the same proportion of
30 states adopt a different rule. See Vienna Convention, art. 9(2). The two-thirds principle is
31 widely employed, including at international conferences conducted by the United
32 Nations, although a consensus-based approach that avoids formal voting is also common.
33 Kamto, *supra*, at 168-173.

34 Absent specific provision in the text itself or by separate agreement, the states
35 participating in negotiation of an international agreement may indicate that the text is
36 authentic and definitive by their signature or by initialing the text or a definitive act
37 incorporating the text. Vienna Convention, art. 10. Adoption of an international
38 agreement by a conference plenary or by the General Assembly may serve
39 simultaneously as its authentication. The preparation and certification of an authentic and
40 definitive text is frequently entrusted to a treaty depositary. See Reporters' Note 10.

1 3. *Means of consenting to an international agreement.* States ordinarily adopt an
2 international agreement before they indicate consent to be bound, but they may proceed
3 otherwise. Under a “simplified” agreement, signature of the agreement not subject to later
4 confirmation (a “definitive” signature) may evidence both a state’s adoption of the
5 agreement and its consent to be bound. Vienna Convention, art. 12(1)(a); see, e.g., The
6 General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, art.
7 XI, reprinted in 35 I.L.M. 89 (1996). Because definitive signature binds a state, an
8 agreement’s text will make such intention to be bound clear, although the Vienna
9 Convention also suggests that the agreement of states or the intention of states to sign
10 definitively may be established through other means. Vienna Convention, art. 12(1)(b)-
11 (c). An agreement may afford states the option of signing definitively or signing *ad*
12 *referendum* subject to confirmation by later ratification, acceptance, or approval. See
13 U.N. Office of Legal Affairs, Treaty Section, Treaty Handbook § 3.1.4 (rev. ed. 2012);
14 e.g., Agreement relating to the International Telecommunications Satellite Organization,
15 Aug. 20, 1971, art. XIX(b), 1220 U.N.T.S. 22. Another simplified form of consent
16 involves the exchange of diplomatic notes or letters. See Vienna Convention, art. 13.

17 Ratification, acceptance, or approval are common means of expressing consent to
18 multilateral agreements. (Because these are substantively similar, they are sometimes
19 collectively referred to as “ratification,” indicating the means by which a state consents to
20 an agreement on the international plane rather than any particular domestic process.)
21 Agreements will ordinarily specify whether consent is to be expressed by ratification,
22 although states may in principle indicate their agreement by other means. See Vienna
23 Convention, art. 14(1). A particular state may also indicate upon signing that its signature
24 is subject to ratification or indicate a similar intention in its full powers or otherwise. (For
25 discussion of who is authorized to sign on behalf of a state, see § 102.) Ratification
26 allows states to approve and sign an international agreement while permitting, prior to
27 expressing consent to be bound, the adoption of conforming legislation or further
28 consideration of the agreement itself. When ratification is employed, a state’s consent is
29 established when it executes an instrument of ratification and that instrument is either
30 exchanged or, as is frequently the case with multilateral agreements, lodged with a
31 depositary. Vienna Convention, art. 16. (For discussion of the depositary’s function, see
32 Reporters’ Note 10.) Although ratification may be accompanied by reservations and
33 similar conditions, see § 105, ratification otherwise indicates an unconditional, rather
34 than contingent, consent to be bound, unless an agreement permits otherwise. An
35 agreement may permit ratification only in part. Vienna Convention, art. 17; see, e.g.,
36 Convention On Prohibitions or Restrictions On The Use of Certain Conventional
37 Weapons Which May Be Deemed To Be Excessively Injurious or To Have
38 Indiscriminate Effects, Oct. 10, 1980, opened for signature, Apr. 10, 1981, art. 4, U.N.
39 Doc. A/CONF. 95/15, 19 I.L.M. 1523 (making expressions of consent to annexed
40 Convention protocols optional, provided that each state party ratifying, accepting,

1 approving, or acceding to the Convention indicates at the time of consent its intent to be
2 bound by any two or more of them). Unless an agreement establishes a time limit for
3 ratification, states may ratify even if there is a substantial delay following signature.

4 Consent by accession may be permitted by an international agreement itself or by
5 other means. See Vienna Convention, art. 15. The right to accede may be restricted to
6 certain states or to states satisfying certain conditions—such as the state's status as a
7 party to another international agreement, or consent by other states parties. See, e.g.,
8 Protocol on Environmental Protection to the Antarctic Treaty, art. 22(2), Oct. 4, 1991, 30
9 I.L.M. 1461 (1991) (permitting accession by states parties to the Antarctic Treaty).
10 Accession permits a state to express consent to be bound even though it is not a signatory
11 and thus cannot ratify the agreement, typically because the period for signature has ended
12 or because the state was not eligible to sign. See, e.g., Vienna Convention, arts. 81-83
13 (providing that eligible states may ratify or accede to the Convention, subject to a
14 deadline for signature limiting the opportunity for ratification).

15 International agreements may permit the expression of consent to be bound by
16 any other means agreed. Vienna Convention, art. 11. The use of these other methods is
17 exceptional, although they may be significant. Article 4 of the UN Charter, for example,
18 provides that membership is open to "all peace-loving states" that accept the obligations
19 of the Charter and are deemed by the organization to be able and willing to carry them
20 out. For the Algiers Accords, which resolved the Iranian hostage crisis, the United States
21 and Iran issued statements of adherence, reflected in a general declaration by the
22 government of Algeria, to other instruments that were issued by that government. 20
23 I.L.M. 223 (reprinting relevant declarations and undertakings, as well as the delegation
24 by the President and the Secretary of State for approving the texts of those documents on
25 behalf of the United States); see 1980 Digest of United States Practice in International
26 Law 323 (reprinting U.S. statements of adherence).

27 4. *Entry into force (and registration)*. International agreements usually stipulate
28 the conditions under which they will enter into force. Some, typically bilateral
29 agreements, require approval by all negotiating states. See, e.g., The General Framework
30 Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, art. XI, reprinted in 35
31 I.L.M. 89 (1996). Multilateral agreements typically require that a specific number of
32 states express consent. See, e.g., United Nations Convention on the Law of the Sea, art.
33 308(1), Dec. 10, 1982, 1833 U.N.T.S. 397 (requiring 60 instruments of ratification or
34 accession); Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug.
35 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (providing that the Convention "shall come
36 into force six months after not less than two instruments of ratification have been
37 deposited"). Some require consent by particular states before they may enter into force,
38 see, e.g., Comprehensive Nuclear Test Ban Treaty, Sept. 24, 1996, art. XIV, S. Treaty
39 Doc. No. 105-28 (1997), 35 I.L.M. 1439 (requiring ratification by 44 states designated in
40 Annex 2, including the United States); Nuclear Non-Proliferation Treaty, *supra* (cited in

1 Comment c), or require consent by states satisfying certain cumulative conditions. See,
2 e.g., Montreal Protocol on Substances that Deplete the Ozone Layer, art. 16(1), Sept. 16,
3 1987, 26 I.L.M. 1541 (requiring 11 ratifications “representing at least two-thirds of the
4 1986 estimated global consumption of the controlled substances”).

5 International agreements typically address the prospective date of entry into force
6 as well. See, e.g., Law of the Sea Convention, *supra*, art. 308(1) (providing for the entry
7 into force 12 months after the 60th instrument of ratification or accession is deposited);
8 Montreal Protocol, art. 16(1) (providing for entry into force on January 1, 1989, assuming
9 sufficient state ratifications). International agreements often address as well the date of
10 entry into force for states ratifying or acceding after the agreement’s entry into force as a
11 whole. See, e.g., Rome Statute of the International Criminal Court, art. 126(1) (providing
12 for entry into force “on the first day of the month after the 60th day following the date of
13 the deposit of the 60th instrument of ratification, acceptance, approval or accession with
14 the Secretary-General of the United Nations”); *id.* art. 126(2) (providing that the
15 agreement shall enter into force following an identical delay for states ratifying,
16 accepting, approving, or acceding after deposit of the 60th instrument).

17 Upon its entry into force, an international agreement establishes international
18 obligations according to its terms. Article 102 of the United Nations Charter requires that
19 every international agreement entered into by a member state is to be registered with the
20 Secretariat and published by it, and further provides that a party to an agreement that has
21 not been duly registered may not invoke it before any United Nations organ—which
22 includes the International Court of Justice. See Charter, art. 92. As the Court has noted
23 however, nonregistration “does not have any consequence for the actual validity of the
24 agreement, which remains no less binding upon the parties.” *Case Concerning Maritime*
25 *Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)*
26 *(Jurisdiction and Admissibility)* [1994] I.C.J. Rep. 112, 122, ¶ 129.

27 By necessity, the provisions of an agreement regulating the authentication of its
28 text, the manner in which the consent of states to be bound is to be established, the
29 manner or date of entry into force, reservations, the functions of the depositary, and other
30 matters arising before the entry into force of the agreement apply from the time of
31 adoption of its text. Vienna Convention, art. 24(4).

32 5. *Entry into force for the United States and publication.* The United States is
33 bound by an international agreement when the United States has expressed its consent to
34 be bound and the agreement has entered into force according to its terms. The Case Act
35 requires the Secretary of State to transmit to Congress any international agreement to
36 which the United States is a party, other than a treaty, within 60 days of its entry into
37 force. 1 U.S.C. § 112b. It also imposes on the Secretary of State the obligation to publish
38 treaties and certain other international agreements—which publication shall serve as legal
39 evidence of the agreements—subject to certain limitations. 1 U.S.C. §§ 112, 112a. The
40 failure to abide by those obligations, however, does not affect the status of an agreement

1 as an international law obligation or as the law of the United States. See § 102 (describing
2 international law criteria for invalidity).

3 International agreements that have entered into force for the United States are, in
4 any event, regularly published. The Department of State publishes the texts of treaties
5 and international agreements to which the United States is a party in the "Treaties and
6 Other International Acts Series" (TIAS). TIAS publications appear on the State
7 Department's website at <http://www.state.gov/s/l/treaty/tias/index.htm>. Prior practice
8 varied. Through 1984, agreements published in TIAS were compiled into bound volumes
9 entitled "United States Treaties and Other International Agreements" (U.S.T.); these
10 succeeded two separate series, a Treaty Series (T.S.) and an Executive Agreement Series
11 (E.A.S.), which were published between 1908 and 1945. Through 1949, treaties were also
12 published in Statutes at Large: treaties made between 1776 and 1845 were collected in
13 Volume 8, and those made between 1845 and 1949 were collected in the individual
14 annual volumes. Executive agreements were published in Statutes at Large beginning in
15 Volume 47. In addition to the publication of treaty texts, the Department of State
16 annually publishes a volume entitled "Treaties in Force" listing international agreements
17 to which the United States is a party.

18 There have been other authoritative collections of international agreements of the
19 United States: Malloy, *Treaties, Conventions, International Acts, Protocols, and*
20 *Agreements between the United States and Other Powers* (1910-1938), covering the
21 period 1776 to 1937; Miller, *Treaties and Other International Acts of the United States of*
22 *America* (1931-1948), covering the period 1776 to 1863; and Bevans, *Treaties and Other*
23 *International Agreements of the United States of America* (1968-1974), covering the
24 period 1776 to 1950. Agreements registered with the United Nations, see Reporters' Note
25 4, are published in the United Nations Treaty Series (U.N.T.S.). There was a comparable
26 League of Nations Treaty Series (L.N.T.S.).

27 6. *Provisional application under international law.* Many international
28 agreements, including ones to which the United States is a party or signatory, provide for
29 the provisional application of some or all of the agreement. See, e.g., The Protocol for
30 Provisional Application of the General Agreement on Tariffs and Trade (GATT), Oct. 30,
31 1947, art. 1, 55 U.N.T.S. 308. The conditions triggering provisional application vary. An
32 agreement may apply provisionally from the time of its adoption to states participating in
33 that adoption. See, e.g., Agreement relating to the Implementation of Part XI of the
34 United Nations Convention on the Law of the Sea, July 28, 1994, art. 7(1), 1836 U.N.T.S.
35 3 (providing, in relevant part, for provisional application by states consenting to the
36 agreement's adoption in the General Assembly, subject to exceptions). More frequently,
37 an agreement will provide for provisional application by a state upon its signature. See,
38 e.g., US-Russia Treaty on Measures for the Further Reduction and Limitation of Strategic
39 Offensive Arms, with Protocol, Apr. 8, 2010, Protocol Part Eight, Sec. 1, T.I.A.S. No.
40 11-205 (available at <http://www.state.gov/documents/organization/140047.pdf>); see also

1 GATT Provisional Protocol, *supra*, art. 1 (conditioning provisional application on
2 signature by all designated states before a date certain). Other agreements may apply
3 provisionally to a state upon its ratification, pending the agreement's entry into force.
4 Arms Trade Treaty, art. 23, Apr. 2, 2013, U.N. Doc. A/RES/67/234B ("Any State may at
5 the time of signature or the deposit of instrument of its ratification, acceptance, approval
6 or accession, declare that it will apply provisionally Article 6 and Article 7 pending the
7 entry into force of this Treaty for that State").

8 Agreements may require separate consent for provisional application or,
9 conversely, permit states to opt out. See, e.g., *id.*; 1994 Part XI Implementation
10 Agreement, *supra*, art. 7(1) (permitting states to consent to provisional application by
11 notifying depositary, but also permitting states presumptively subject—because they
12 consented to the agreement's adoption, or signed—to notify to the contrary); INTEL SAT
13 Agreement, *supra*, art. XX (provisional application for states so indicating at the time of
14 signature or at any other time prior to the agreement's entry into force). Provisional
15 application may be restricted by agreement to certain states or to states meeting particular
16 criteria. See, e.g., GATT Protocol, *supra*, art. 1; Food Assistance Convention, Apr. 25,
17 2012, art. 14, T.I.A.S. No. 13-101 (available
18 at https://treaties.un.org/doc/source/signature/2012/CTC_XIX-48.pdf) (limiting
19 provisional application to listed states, the European Union, or eligible states or customs
20 territories, upon notice to the depositary).

21 Provisional application is also subject to termination, which may occur
22 automatically or by a state's election. Article 25(1) of the Vienna Convention describes
23 provisional application as "pending [an agreement's] entry into force." Agreements may
24 indeed terminate provisional application on that basis, see, e.g., Implementation of Part
25 IX Agreement, *supra*, art. 7(3), though they may also contemplate continued provisional
26 application after the agreement has entered into force for states that have not yet ratified
27 the agreement. See Treaty Handbook, *supra*, ¶ 3.4; e.g., INTEL SAT Agreement, *supra*,
28 art. XX(c)(i)-(ii) (providing for termination upon ratification or, in its absence, upon
29 expiration of two years from the agreement's entry into force). In addition, Article 25(2)
30 of the Vienna Convention establishes a default rule according to which, in the absence of
31 other agreement, a state may terminate provisional application "if that State notifies the
32 other States between which the treaty is being applied provisionally of its intention not to
33 become a party to the treaty." See, e.g., INTEL SAT Agreement, *supra*, art. XX(c)(iii);
34 Three Treaties Establishing Maritime Boundaries Between the United States and Mexico,
35 Venezuela and Cuba: Hearing Before the S. Comm. on Foreign Relations, 99th Cong. at
36 27 (1980) (responses of the Deputy Legal Adviser, Department of State to questions
37 submitted by Sen. Javits), reprinted in 1980 Digest of United States Practice in
38 International Law 414 (stating generally that "provisional application is terminated if the
39 United States or its treaty partner informs the other of its intention not to become a party
40 to the agreement"). Agreements may, however, permit termination on different premises,

1 including for any reason. See, e.g., US-Germany Agreement to Facilitate Interchange of
2 Patent Rights and Technical Information for Defense Purposes, Jan. 4, 1956, art. IX, 268
3 U.N.T.S. 143.

4 The rights and obligations entailed by provisional application are determined, for
5 so long as provisional application is in effect, by the agreement. Article 25 of the Vienna
6 Convention does not define what it means for obligations to be “applied provisionally.” It
7 is accepted, however, that a term in an international agreement requiring provisional
8 application is itself a binding international obligation. See, e.g., Three Treaties, *supra*, in
9 1980 Digest of United States Practice in International Law 413; Message from the
10 President of the United States Transmitting the Treaty on Conventional Armed Forces in
11 Europe (CFE), with Protocols on Existing Types (with Annex), Aircraft Reclassification,
12 Reduction, Helicopter Recategorization, Information Exchange (with Annex), Inspection,
13 the Joint Consultative Group, and Provisional Application, Nov. 19, 1990, available at
14 1990 U.S.T. Lexis 227, **551-552. Accordingly, the rights and obligations being
15 provisionally applied are binding—subject to any stated limitations, and for so long as
16 provisional application is in effect—to the same extent as when the relevant provisions
17 have entered into force. *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18,
18 Jurisdiction, ¶¶ 209-210 (July 6, 2007); 1974 Digest of United States Practice in
19 International Law 234, 235-236 (statement of the Assistant Legal Adviser for Treaty
20 Affairs concerning provisional application of the Food Aid Convention) (concluding that
21 “under the provisions of the Food Aid Convention, 1971 both the European Economic
22 Community and governments which deposited declarations of provisional application are
23 on the same level as to rights and obligations as Governments which deposit instruments
24 of ratification or accession,” subject to “minor exceptions” relating to termination and
25 rights reserved to ratifying states).

26 The terms of provisional application, however, may provide that the referenced
27 obligations differ from those arising upon the agreement’s entry into force. See, e.g.,
28 United Nations Convention to Combat Desertification in those Countries Experiencing
29 Serious Drought and/or Desertification, Particularly in Africa, with Annexes, June 17,
30 1994, Annex 1, art. 7, 1994 U.S.T. Lexis 212 (providing for the provisional application of
31 certain provisions by African states parties, “in cooperation with other members of the
32 international community, as appropriate,” and “to the extent possible”). Most commonly,
33 provisional application is made contingent upon its consistency with domestic law, such
34 as requirements for legislative approval or preexisting law governing matters regulated
35 by the agreement. See, e.g., Implementation of Part IX Agreement, *supra*, art. 7(2) (“in
36 accordance with their national or internal laws and regulations”); GATT Protocol, *supra*,
37 art. 1 (provisional application of Part II “to the fullest extent not inconsistent with
38 existing legislation”); Energy Charter Treaty, art. 45(1), opened for signature Dec. 17,
39 1994, 2080 U.N.T.S. 95, 34 I.L.M. 360 (1995) (providing for provisional application “to
40 the extent . . . not inconsistent with [a state’s] constitution, laws or regulations”).

Provisional application is established by agreement between states, either in the principal agreement or by agreement relating to provisional application alone. Provisional application in this sense is distinct from any arrangement by which states may adhere for a specified period to an agreement that by its terms is of indefinite duration, such as by declaring—even when such an option has not been established by agreement—its legal commitment to discharge the obligations of an agreement prior to its entry into force for that state. For example, the Syrian Arab Republic, upon depositing its instrument of accession to the Chemical Weapons Convention, informed the depositary that it would apply the Convention provisionally pending its entry into force for that state. See C.N.592.2013.TREATIES-XXVI.3 (Sept. 14, 2013). Such commitments are outside the scope of both Article 25 of the Vienna Convention and this Section.

7. *Provisional application under U.S. law.* The United States has regularly entered into binding international obligations requiring provisional application, but such application may be formulated to respect U.S. domestic law. In some instances, the provisions relating to provisional application expressly accommodate each state's domestic law. See Reporters' Note 6. The United States has also sometimes sought to modify the international obligations it undertakes in consenting to provisional application. For example, the United States deposited an instrument of notification of intent to ratify in order to bring the 1962 International Coffee Agreement provisionally into force. The U.S. notification reported that, while Senate advice and consent had actually been obtained, implementing legislation had not yet been enacted, and the United States would accordingly not assume any provisional obligations for which domestic legislation was required. Richard Bilder, *The International Coffee Agreement: A Case History in Negotiation*, 28 *Law & Contemp. Probs.* 328, 373-374, 389 (1963); see *International Coffee Agreement*, opened for signature Sept. 28, 1962, 14 *U.S.T.* 1911, *T.I.A.S.* No. 5505, 469 *U.N.T.S.* 169. The United States may also commit to act in accordance with an agreement's provisions prior to its entry into force solely on a nonbinding basis—as distinct from provisional application, which is a binding commitment established within the agreement itself. See, e.g., 2002 *Digest of United States Practice in International Law* 186, 187, 189-190 (discussing nonbinding memorandum of understanding relating to the 1987 Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America, *T.I.A.S.* No. 11,100, *S. Treaty Doc.* No. 5, 100th Cong., 1st Sess. (1987)).

To the extent it is not already accommodated by the terms or nature of any U.S. commitment, U.S. domestic law may impose constraints on the domestic status of provisional application. Legislative consent to provisional application—in the form of Senate advice and consent to an as-yet unratified treaty (as with the 1962 International Coffee Agreement), or congressional approval of an international agreement other than a treaty—may resolve potential objections, even if the international agreement has not yet entered into force for the United States. See Congressional Research Service, *Treaties*

1 and Other International Agreements: The Role of the United States Senate, S. Rep. 106-
2 71, at 114 (2001). Otherwise, the President's authority to apply any particular term
3 provisionally depends on "the substantive terms of the [agreement] and whether there is
4 authority in another [agreement], in a statute, or in the Constitution for provisional
5 application." Three Treaties, *supra*, at 19 (testimony of the Deputy Legal Adviser,
6 Department of State). The executive branch has often invoked legislative bases for
7 provisional application. See Congressional Research Service, Law of the Sea Treaty:
8 Alternative Approaches to Provisional Application, Prepared for the Subcomm. on Int'l
9 Orgs. & Movements of the House Comm. on Foreign Affairs, 93d Cong., 2d Sess. 2-3
10 (Comm. Print 1974).

11 Absent statutory or other legislative authorization, the president's authority to
12 commit the United States to provisional application of a treaty has been likened to the
13 authority to conclude sole executive agreements. See, e.g., Congressional Research
14 Service, *supra*, at 113-114. The imminent need for provisional application, and the
15 temporary nature of the international obligation, may help justify the exercise of
16 presidential authority. See Three Treaties, *supra*, at 17, 1980 Digest, *supra*, at 413
17 (suggesting that short-term action was a natural extension of the President's authority to
18 negotiate treaties). Prolonged provisional application of agreements may attenuate that
19 justification. For example, the United States and Cuba signed a maritime boundary
20 agreement providing for a two-year period of provisional application, see U.S.-Cuba
21 Maritime Boundary Agreement, Dec. 16, 1977, art. V, T.I.A.S. No. 12-208.1, and the
22 President submitted the agreement to the Senate for its advice and consent, but there has
23 been no definitive action, and the United States and Cuba have extended provisional
24 application through the periodic exchange of diplomatic notes.

25 In practice, the executive branch has taken the view that—although international
26 agreements "applied provisionally within the President's authority have full effect under
27 domestic law pending a decision with respect to ratification"—they may not change
28 existing law. Three Treaties, *supra*, at 27 (responses to questions submitted by Sen.
29 Javits), 1980 Digest, *supra*, at 413-414. It has also taken steps to ensure that the
30 international obligation does not exceed its preexisting authority. Thus, the United States
31 has agreed to provisional application compatible with the exercise of authority conferred
32 by existing laws or involving a discretionary function under the agreement. For example,
33 although provisional implementation of the GATT lasted from 1947 until the advent of
34 the WTO in 1995, the executive branch cited legislative authority and, in addition,
35 limited provisional application in relevant part to implementation not inconsistent with
36 existing legislation. See also Exchange of Notes regarding Provisional Application of the
37 U.S.-Ukraine Mutual Legal Assistance Treaty, available at 1998 U.S.T. LEXIS 203
38 (establishing provisional application "to the extent possible under the respective domestic
39 laws of the United States . . . and Ukraine").

1 Issues relating to the United States' termination of provisional application have
2 not yet arisen. If provisional application arises solely from an agreement's approval or
3 signature, and neither Senate advice and consent nor congressional approval has
4 followed, termination of provisional application by the President—while concerning an
5 international obligation of the United States—does not derogate from any expression of
6 legislative consent. Matters may differ if the legislature has approved but the President
7 has not ratified the agreement, although termination of provisional application in those
8 circumstances may follow from the President's capacity to refrain from ratifying an
9 international agreement. See § 103. Even if provisional application is a consequence of
10 U.S. ratification of an agreement that has not yet entered into force, the scope of
11 executive authority to terminate that status should be no less extensive than its authority
12 to terminate treaties in force for the United States. See § 113.

13 8. *Obligations prior to entry into force under international law.* The principle that
14 a signatory (or ratifying) state must, prior to an international agreement's entry into force
15 for it, refrain from acts that would defeat the object and purpose of the agreement was
16 invoked on a number of occasions prior to the Vienna Convention on the Law of Treaties.
17 The principle was closely connected with the doctrine of the abuse of rights, see *Certain*
18 *German Interests in Polish Upper Silesia* (Merits), P.C.I.J. ser. A, No. 7, at (1926), and
19 with the retroactive effect of ratification. See U.S. Dep't of State, *Papers Relating to the*
20 *Foreign Relations of the United States* 299 (1904) (letter by Secretary of State Hay)
21 (suggesting that, because by the exchange of ratifications parties to an agreement
22 presumptively confirm the agreement as of the date of signature, signing states "bind
23 themselves, pending its ratification, not only not to oppose its consummation, but also to
24 do nothing in contravention of its terms"); but see Vienna Convention, art. 28 (presuming
25 nonretroactivity of international agreements prior to their entry into force). On other
26 occasions, the more general principle that an agreement establishes binding obligations
27 only upon its entry into force was stressed. See, e.g., *North Sea Continental Shelf Case*
28 (*Federal Repub. of Germany v. Denmark*) [1969] I.C.J. Rep. 3, 25, ¶ 28 (noting that,
29 when an international agreement has specified that ratification is required for a state to be
30 bound, "it is not lightly to be presumed that a State . . . has nevertheless somehow
31 become bound in another way").

32 By the time the International Law Commission issued its 1966 Report to the
33 General Assembly concerning the Vienna Convention, it found that the obligation to
34 refrain from acts calculated to frustrate the object of an agreement "appears to be
35 generally accepted." [1966] 2 Y.B. Int'l L. Comm'n 169, 202. The United States,
36 although not a party to the Vienna Convention, was among the states accepting that the
37 interim obligation reflects customary international law. See 2001 Digest of United States
38 Practice in International Law 212-213 (reprinting answer by Secretary of State Powell to
39 question for the record by Senator Helms) (invoking advice by the Legal Adviser's office
40 reflecting recognition by the Johnson, Nixon, Carter, Reagan, and Clinton

1 administrations); see also 1979 Digest of United States Practice in International Law 692-
2 693 (reprinting statement by Ambassador Richardson endorsing view that the object-and-
3 purpose test of Article 18 represented customary international law); Letter of Submittal
4 from William P. Rogers, U.S. Sec'y of State, to President Richard M. Nixon (Oct. 19,
5 1971), 65 State Dep't Bull. 684, 685 (Dec. 13, 1971) (acknowledging interim-obligation
6 test of Article 18 as customary international law); Yearbook of the International Law
7 Commission, 1965, Volume II, at 44 (statement by United States to the International Law
8 Commission, describing the draft Vienna Convention article as "reflecting generally
9 accepted norms of international law"). See generally Laurence Boisson de Chazournes,
10 Anne-Marie La Rosa, & Makane Moïse Mbengue, Article 18, in Corten & Klein, *supra*,
11 at 382-383 (concluding that "Article 18 reflects a principle of international law to which
12 States consider themselves bound either by an obligation following from the signature of
13 a treaty or by an existing obligation in general international law independently of any
14 signature or ratification of a legal instrument").

15 The United States, like other states, has acted consistent with this conviction. For
16 example, in 1980, after the President asked the Senate to delay consideration of the
17 Strategic Arms Limitations Talks (SALT) II treaty, which the United States had signed,
18 the State Department issued a statement that "[t]he U.S. and the Soviet Union share the
19 view that under international law a state should refrain from taking action which would
20 defeat the object and the purpose of a treaty it has signed subject to ratification," and that
21 "[w]e therefore expect that the United States and the Soviet Union will refrain from acts
22 which would defeat the object and the purpose of the SALT II Treaty before it is ratified
23 and enters into force." 1980 Digest of United States Practice in International Law 398.
24 More recently, the United States also joined in a statement calling on all states
25 (conceivably, not only signatories) "to uphold their national moratoria on nuclear
26 weapons-test explosions or any other nuclear explosions, and to refrain from acts that
27 would defeat the object and purpose of the [Comprehensive Nuclear Test-Ban] Treaty
28 pending its entry into force." 2013 Digest of United States Practice in International Law
29 646, 648 (excerpting joint statement following fourth conference). The United States also
30 referred to the possibility of an international obligation arising from its signature of Rome
31 Statute, in notifying its intent not to ratify. See Letter from John R. Bolton, U.S. Under
32 Secretary of State for Arms Control and International Security, to Kofi Annan, U.N.
33 Secretary General (May 6, 2002), available at [http://2001-
34 2009.state.gov/r/pa/prs/ps/2002/9968.htm](http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm) (stating that "the United States does not intend
35 to become a party to the treaty," and that "[a]ccordingly, the United States has no legal
36 obligations arising from its signature"); see 2008 Digest of United States Practice in
37 International Law 136, 143 (speech by Department of State Legal Adviser Bellinger)
38 (explaining that "the central motivation was to resolve any confusion whether, as a matter
39 of treaty law, the United States had residual legal obligations arising from its signature of
40 the Rome Statute not to take steps inconsistent with the treaty's 'object and purpose'").

1 But cf. Harold Hongju Koh, Legal Adviser to the Dep't of State, The Challenge and
2 Future of International Criminal Justice, Panel Discussion at NYU Center for Global
3 Affairs (Oct. 27, 2010), <http://www.state.gov/s/l/releases/remarks/150497.htm>
4 (describing subsequent steps by the United States to act consistent with the Rome
5 Statute's object and purpose).

6 On the whole, therefore, it appears that the United States, like many states,
7 accepts as a matter of customary international law that signature of a treaty generates an
8 interim obligation not to defeat the treaty's object and purpose. The nature of the acts
9 prohibited by the interim obligation, however, remains unclear. Laurence Boisson de
10 Chazournes, Anne-Marie La Rosa, & Makane Moïse Mbengue, Article 18, in Corten &
11 Klein, *supra*, at 383 (acknowledging that "the outlines of the principle [of interim
12 obligation] are not yet well-defined"). It seems clear that acts that do not violate an
13 international agreement cannot violate the interim obligation relating to that agreement; a
14 signatory state does not assume greater obligations than those assumed by a state for
15 which the agreement has entered into force. On the other hand, acts that would violate the
16 agreement do not necessarily violate the interim obligation. Owen Memorandum, in S.
17 Exec. Rep. No. 96-33, *supra*, at 47 (noting that "the rule seems to contemplate that . . .
18 signatories are clearly not obliged to carry out all treaty provisions during the period prior
19 to ratification"); e.g., 1979 Digest, *supra*, at 693 (statement by Ambassador Richardson)
20 (asserting that deep-seabed mining would not violate interim obligations assumed by the
21 United States prior to entry into force for it of a deep-seabed-mining agreement).
22 Whether an act that would violate an agreement also violates the obligations of a mere
23 signatory will depend on the agreement and the surrounding circumstances. Addressing
24 the scope of the interim obligation under customary international law, the State
25 Department expressed the view that signatories must refrain from acts that could render
26 "impossible" the entry into force and implementation of the agreement for that state, or
27 defeat "its basic purpose and value" to other states parties. Owen Memorandum, in S.
28 Exec. Rep. No. 96-33, *supra*, at 47 (quoted in Comment *f*). Thus, for example, a failure to
29 destroy or dismantle a weapon as required by an agreement is unlikely to violate the
30 interim obligation, because compliance could be effected later, whereas the testing of a
31 weapon in violation of an agreement might have irreversible effects. *Id.* at 48.

32 The interim obligation ceases when a signatory state subject to the obligation
33 makes clear its intention not to become a party, see Vienna Convention, Article 18(a); S.
34 Exec. Rep. 96-33, *supra*, at 47, or—when the obligation arises from the state's consent to
35 be bound—when entry into force has been unduly delayed. Vienna Convention, Article
36 18(b). The means by which a signatory subject to the obligation is to convey its intention
37 not to become a party is not specified, but notice to the depositary or to the other states
38 parties presumably suffices. The United States, for example, provided notice to the U.N.
39 Secretary General in relation to the Rome Statute. In the case of SALT II, a bilateral
40 treaty, the United States informed the Soviet Union of its intention. Nuclear Arms

1 Reduction Proposals: Hearings Before the Senate Comm. on Foreign Relations, 97th
2 Cong., 2d Sess. 121 (1982) (statement of Alexander Haig, Secretary of State). Article 18
3 does not specify the duration required for an international agreement to be deemed
4 “unduly delayed” in its entry into force, so as to end the interim obligation of a state that
5 has expressed its consent to be bound by the treaty. Accordingly, it appears that under the
6 Vienna Convention, and presumably under customary international law, assessment will
7 lie primarily with the state subject to the obligation. See Laurence Boisson de
8 Chazournes, Anne-Marie La Rosa, and Makane Moïse Mbengue, Article 18, in Corten
9 and Klein, *supra*, at 396-397. The interim obligation should also cease if the state has
10 withdrawn its consent before the agreement has entered into force. See Anthony Aust,
11 *Modern Treaty Law and Practice* 109-110 (3d ed. 2013).

12 9. *Obligations prior to entry into force under U.S. law.* Some observers have
13 perceived tension between the interim obligation arising from signature of an
14 international agreement and the Senate’s advice and consent authority. For example, in
15 connection with the SALT II Treaty, some Senators objected to the requirement, which
16 they attributed to President Carter, that the Defense Department “comply fully and
17 precisely with all the provisions of the unratified SALT II treaty” (based, they presumed,
18 on the customary international law obligation of signatories), and to President Reagan’s
19 acceptance of a U.S. obligation to refrain from actions that would defeat SALT II’s
20 object and purpose (prior to making clear the U.S. intent not to ratify the agreement).
21 131 Cong. Rec. 3450, 3452 (Feb. 25, 1985) (letter from Senators Symms and East).
22 Fourteen Senators also expressed concerns about obligations undertaken by the United
23 States in connection with any contemplated signature of the United Nations Convention
24 on the Law of the Sea, indicating that signature of a treaty “will not bind [the Senate]
25 from taking any action which anyone claims would defeat the object and purpose of the
26 treaty.” 1979 Digest, *supra*, at 691-692.

27 Such objections may be premised on the view that the interim obligation in
28 question is one that, under U.S. law, could not be concluded on the President’s authority
29 alone. That premise depends, in part, on the scope in that context of the President’s
30 authority to enter into an international agreement, a subject that may be addressed in
31 future Sections of this Restatement, and upon the particular acts required by the interim
32 obligation as a matter of international law. See Comment *e* and Reporters’ Note 8.
33 Concerns may be ameliorated, at least in part, if the particular interim obligation requires
34 only that the United States refrain from acts not mandated by U.S. law or that it
35 undertake acts already authorized by U.S. law.

36 United States courts have not yet addressed these questions in detail. In *Ehrlich*
37 *v. Am. Airlines, Inc.*, 360 F.3d 366, 373 and n.7 (2d Cir. 2004), the court of appeals
38 noted that treaties do not ordinarily govern conduct occurring before the treaty—in that
39 instance, the Montreal Convention—entered into force. However, the court considered
40 the *travaux préparatoires* of the Montreal Convention as bearing on the negotiating

parties' understanding of the earlier Warsaw Convention, and noted (but disregarded as having been waived) a party's argument that the interim obligation arising from U.S. signature of the Montreal Convention meant that the later agreement deserved more authoritative consideration. See also *Mayaguezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297, 304 n.14 (1st Cir. 1999) (suggesting that reference to the 1982 United Nations Convention on the Law of the Sea was appropriate "insofar as the Convention reflects customary international law," but noting that an interim obligation would arise from U.S. signature of the Convention).

Responsibility for communicating an intent not to ratify an international agreement, so as to bring to an end any interim obligation, has been discharged by the executive branch and given effect by U.S. courts. See, e.g., *Abagnin v. AMVAC Chem. Corp.*, 545 F.3d 733, 738 (9th Cir. 2008) (concluding, in the wake of notification, that "the United States has neither signed nor ratified the Rome Statute").

10. *Functions of depositary*. Article 77(1) of the Vienna Convention details the ordinary functions of a depositary. These include keeping custody of texts, preparing certified copies of texts, examining signatures, notifications, and communications for proper form, and informing parties and states entitled to become parties of developments relating to the agreement such as reservations, understandings, and declarations. See also Vienna Convention, art. 78 (describing relation of depositary to the timing of notifications and communications); id. art. 79 (describing authority to correct errors); id. art. 80 (describing role in registration and publication). The U.N. Charter also requires registering the agreement with the Secretariat of the United Nations. See Reporters' Note 4. The United States sometimes serves as a depositary, the functions being performed by the Office of the Assistant Legal Adviser for Treaty Affairs (L/T) in the Department of State. See 11 Foreign Affairs Manual § 753.4.

11. *Previous Restatement*. This Section is derived from § 312 of the previous Restatement, Restatement Third, The Foreign Relations Law of the United States (AM. LAW INST. 1987). The discussion has been updated to reflect additional international and domestic practice relating to provisional application and interim obligations.

§ 105. Reservations and Other Conditions

(1) The Senate may attach reservations or other conditions to its advice and consent to a treaty as long as they relate to the treaty and are not inconsistent with the Constitution.

(2) If the President ratifies a treaty after obtaining the Senate's advice and consent, he or she is deemed to have accepted any conditions attached by the Senate to its advice and consent that are consistent with subsection (1).