

International Transportation Law

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I. Canada Airline Competition Developments

Canada's Competition Bureau (the Bureau) announced on October 24, 2012 that it had reached an agreement with Air Canada and United Continental Holdings, Inc. allowing the alliance partners to pursue a proposed joint venture (the Consent Agreement), subject to the exclusion of fourteen routes between Canada and the United States on which cooperation would be prohibited.¹ The settlement was reached days before the commencement of a public hearing, which may have resulted in a precedent-setting impact on transborder and potentially global airline alliances operating to or from Canada.

On June 27, 2011, the Canadian Commissioner of Competition filed a Notice of Application with the Canadian Competition Tribunal, pursuant to Sections 90.1 and 92 of the *Competition Act* (the Act), for orders prohibiting Air Canada, United Continental Holdings, Inc., United Airlines, Inc. (United), and Continental Airlines, Inc. (Continental) (collectively the Airlines) from entering into a proposed joint venture (the Proposed Merger) intended to result in integration and coordination on Canada-U.S. transborder routes.² The Commissioner also sought an order prohibiting the Airlines from engaging in certain alliance agreements that had been in effect since 1995 and 1996 in the case of United and since 2009 in the case of Continental.³ Those agreements (the Alliance Agreements) provided for coordination of various aspects of their airline services, including pricing, inventory and yield management coordination, pooling of revenues, and route and schedule planning for passenger airline services on many Canada-U.S. transborder

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1. Comm'r of Competition v. Air Canada, 2012 Comp. Trib. 2, *available at* <http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=348>.

2. Notice of Application at 1-2, Comm'r of Competition v. Air Canada, 2012 Comp. Trib. 1, *available at* http://www.ct-tc.gc.ca/CMFiles/CT-2011-004_Notice%20of%20Application_1_45_6-27-2011.

3. *See id.* paras. 21, 24-25.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

312 THE YEAR IN REVIEW

routes.⁴ Notably, approval by the U.S. Department of Transportation of these very same Alliance Agreements did not deter the Commissioner from taking action against the Airlines.

At its core, the case brought by the Commissioner against the Airlines was about competition in the airline industry. In the pleadings, the Commissioner asserted that the “business activities proposed by the [Airlines], including ‘net revenue’/profit sharing and price and capacity coordination, allow the Airlines to harm Canadian consumers and the Canadian economy by removing all incentives to compete with one another” and “in the absence of an incentive to compete, regardless of what they claim, the [Airlines] will not compete; to do otherwise would be irrational and violate their obligations to their respective shareholders.”⁵

Initially, the Commissioner identified nineteen transborder routes where coordination would result in a substantial lessening of competition.⁶ But in the final analysis, the Bureau determined that competition on five of the routes originally identified was unlikely to be substantially harmed as a result of the Airlines’ coordination.⁷ Accordingly, the Consent Agreement remedy applies to fourteen city-pair routes. The Bureau also took the extraordinary step of publishing the prospective, post-joint venture, combined market share of Air Canada and United/Continental on these fourteen routes, which would have been 100 percent on ten routes and exceeded 85 percent, on average, for the other four routes.⁸

With respect to the fourteen city-pair routes, the Consent Agreement prohibits Air Canada and United/Continental from coordinating on key aspects of competition, including:

- coordinating their prices,
- coordinating the number of seats available at each price,
- pooling revenue or costs, and
- sharing commercially sensitive information.⁹

The Consent Agreement will remain in force for as long as any one of the Alliance Agreements or the transborder joint venture remains in force. If there is a substantial change to competition on one of the routes, the Consent Agreement provides that specific prohibitions can be suspended or reinstated as appropriate.¹⁰ An independent monitor will be appointed by the Bureau to ensure that Air Canada and United/Continental comply with the terms of the Consent Agreement.¹¹

4. *Id.*

5. Reply of the Comm’r of Competition para. 3, *Comm’r of Competition v. Air Canada*, 2012 Comp. Trib. 24, available at http://www.ct-tc.gc.ca/CMFiles/CT-2011-004_Reply%20of%20the%20Commissioner%20of%20Competition_24_38_8-29-2011_7614.pdf.

6. Notice of Application, *supra* note 2, para. 42.

7. See Press Release, Can. Competition Bureau, Competition Bureau Reaches Agreement with Air Can. and United Cont’l (Oct. 24, 2012), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03507.html>.

8. *Id.*

9. *Comm’r of Competition v. Air Canada*, 2012 Comp. Trib. 2, at 5, available at http://www.ct-tc.gc.ca/CMFiles/CT-2012-001_Consent%20Agreement_2_45_10-24-2012_7871.pdf.

10. *Id.* para. 4.

11. *Id.* para. 15.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

TRANSPORTATION LAW 313

The challenge by the Bureau to the Air Canada and United/Continental agreements and the settlement of this case may signal the beginning of an age of enforcement of the recent 2009 amendments to the Act.¹² The challenge was the first of its kind since amendments to the Act came into force, establishing a new civil competitor collaboration provision.¹³ Alliances and joint ventures between competitors in the transportation industry and other sectors may be future targets of scrutiny by the Bureau.

II. U.S. Aviation Legal Developments

A. CONSUMER PROTECTION RULES

Consumer protection issues continued to dominate U.S. regulatory developments in the aviation sector during 2012, as the U.S. Department of Transportation (DOT or Department) intensified its enforcement of the “Enhancing Airline Passenger Protections” rule (EAPP #2 or the Rule)¹⁴ and increased fines imposed for noncompliance with the rule against U.S. and foreign carriers alike. Most of the Department’s enforcement cases, which were all settled by consent orders,¹⁵ involved alleged noncompliance with DOT’s full fare advertising rule (the Full Fare Rule),¹⁶ which requires that any advertised price

12. Section 90.1 and 92 of the Act are non-criminal provisions. Competition Act, R.S.C. 1985, c. C-34. Section 92 addresses mergers and proposed mergers that substantially prevent or lessen, or are likely to substantially prevent or lessen, competition in a trade, industry, or profession. *Id.* Section 90.1 is a new provision of the Act that addresses agreements or arrangements, whether existing or proposed, between competitors that substantially prevent or lessen, or are likely to substantially prevent or lessen, competition in a market. *Id.*

13. Section 90.1 was enacted on March 12, 2009, but only came into force on March 12, 2010. To assist firms in assessing the likelihood that a competitor collaboration will raise concerns under the civil provisions of the Act and, if so, whether the Commissioner would commence an inquiry regarding the collaboration, the Competition Bureau, an independent law enforcement agency responsible for the administration and enforcement of the Act, published the Competitor Collaboration Guidelines on December 23, 2009. *See generally* CAN. Competition Bureau, Enforcement Guidelines: Competitor Collaboration Guidelines, Preface and Interpretation (Dec. 23, 2009), available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/\\$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf).

14. *See Enhancing Airline Passenger Protections*, 14 C.F.R. § 259.4 (2012). As reported in the 2010 Year-In-Review, the first Enhancing Airline Passenger Protections rule required, among other things, that each U.S. carrier adopt a contingency plan for lengthy tarmac delays containing an assurance that the carrier will not permit an aircraft to remain on the tarmac at a U.S. airport for more than three hours for domestic flights and for more than a carrier-determined number of hours for international flights without providing passengers an opportunity to deplane. *See Enhancing Airline Passenger Protections*, 74 Fed. Reg. 68,983 (Dec. 30, 2009); Mark J. Andrews, James H. Bergeron, Leendert Creyf, Catherine Erkelens, Lorraine B. Halloway, Gerald F. Murphy & Douglas Schmitt, *International Transportation Law*, 45 INT’L LAW. 313 (2010). EAPP #2 subsequently extended the tarmac delay rule to foreign carriers and imposed a four-hour limit on international flights. *See generally* 14 C.F.R. § 259.4.

15. *See, e.g.*, British Airways Plc, DOT Consent Order 2012-10-1 (2012); *see e.g.*, Qantas Airways Ltd., DOT Consent Order 2012-10-12 (2012); *see e.g.*, Société Air France, DOT Consent Order 2012-11-1 (2012).

16. This provision in EAPP #2 amended 14 C.F.R. § 399.84, which has, since 1984, required any advertisement for air transportation to state the “entire price to be paid by the customer to the air carrier.” 49 Fed. Reg. 49,440 (Dec. 20, 1984) (now codified as amended at 14 C.F.R. § 399.84(a) (2012)). Prior to adopting the final EAPP #2, however, by longstanding enforcement policy, DOT had allowed government-imposed taxes and fees collected by carriers and ticket agents (such as passenger facility charges and departure taxes) to be stated separately from base fares in advertisements, provided such taxes and fees were not *ad valorem* (*i.e.*, not assessed as a percentage of the fare price), were collected on a per-passenger basis, and their existence and

SPRING 2013

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

314 THE YEAR IN REVIEW

for air transportation disclose the entire price to be paid, including all taxes, government-imposed fees, and mandatory airline- and ticket agent-imposed fees. Other enforcement cases involved alleged noncompliance with consumer rule provisions regulating tarmac delay contingency plans, customer service plans,¹⁷ and baggage fee disclosures.¹⁸

Aviation stakeholders hoping for some judicial relief from the requirements of EAPP #2 were disappointed when a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit upheld three EAPP #2 provisions: (1) the Full Fare Rule; (2) the Twenty-Four Hour Refund Rule, which requires air carriers to either hold reservations without payment for twenty-four hours or to provide refunds to passengers who cancel a reservation within twenty-four hours of booking; and (3) the Post-Purchase Price Rule, which prohibits post-payment increases to the price of airline tickets, carry-on luggage, or the first two checked bags, that were challenged by Spirit Airlines, Allegiant Air, and Southwest Airlines¹⁹ as arbitrary and capricious under the Administrative Procedure Act (the APA).²⁰ Most of the court's opinion dealt with the Full Fare Rule, which was also challenged on the ground that it violated the airlines' First Amendment right to engage in commercial and political speech.²¹ The majority concluded that the petitioners had offered no basis for finding that the DOT acted arbitrarily and capriciously when it decided to enforce the original 1984 language in 14 C.F.R. § 399.84 (now codified in 14 C.F.R. § 399.84(a)) "by requiring that airlines actually add the taxes to the base fare and disclose the total price."²² Similarly, the majority rejected the petitioners' claim that requiring the total, final price to be the most prominently listed figure "hardly amounts to an arbitrary exercise of DOT's statutory authority to prevent 'unfair or deceptive practice[s].'"²³ Additionally, the majority rejected the airlines' First Amendment claims, concluding that the Full Fare Rule "does not prohibit airlines from saying anything; it just requires them to disclose the total, final price and to make it the most prominent figure in their advertisements . . . this neither prohibits nor significantly burdens airlines' ability to provide that information."²⁴ All three judges agreed that the Twenty-Four Hour Refund Rule properly regulates airline cancellation policies, with the majority noting that DOT developed it "as

amounts were clearly indicated at the first point in the advertisements where a fare was presented. *See* 75 Fed. Reg. 32,318 (June 8, 2010) (explaining DOT enforcement policy concerning the 1984 rule).

17. *See, e.g.,* Air India, Ltd., DOT Order 2012-5-4 (2012) (fining Air India \$80,000, in part, for failing to post its plans on its website by the August 23, 2011 enforcement deadline).

18. *See, e.g.,* Concesionaria Vuela Compania de Aviacion, S.A.P.I. de C.V., DOT Order 2012-6-15 (2012) (fining Volaris \$130,000, in part, for advertising fares on its website without providing a link to potentially applicable baggage fees on the first screen on which a fare quotation appeared).

19. Southwest contested only the Full Fare Rule. None of the petitioners challenged the original 1984 full fare rule.

20. *See* 5 U.S.C. § 706 (2006); Spirit Airlines, Inc. v. U.S. Dep't of Transp., 687 F.3d 403 (D.C. Cir. 2012), *petition for cert. filed*, 2012 WL 5928334 (U.S. Nov. 21, 2012) (No. 12-656).

21. *See generally* Spirit Airlines, 687 F.3d at 403. Judge Tatel wrote the majority opinion, joined by Judge Henderson. Judge Randolph, concurring in part and dissenting in part, would have held that the Full Fare Rule "violates the First Amendment." *Id.* at 419-24. Accordingly, Judge Randolph "dissent[ed] from the majority opinion to the extent that it upholds the rule prohibiting sellers of air transportation from prominently displaying government taxes and fees," but concurred with the remainder of the majority opinion. *Id.* at 424 (Randolph, J., dissenting).

22. *Id.* at 410. (majority op.).

23. *Id.* at 411.

24. *Id.* at 414.

VOL. 47

**PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

TRANSPORTATION LAW 315

part of a systematic effort aimed at preventing unfair and deceptive practices.”²⁵ They also agreed that it was reasonable for DOT to implement the Post-Purchase Price Rule as a means to prevent the “bait and switch” practice of increasing the prices for baggage after the purchase of a ticket that DOT had found to be unfair and deceptive.²⁶

On November 21, 2012, Spirit, Allegiant, and Southwest jointly petitioned for *certiorari* asking the Supreme Court to hear their challenge to the Twenty-Four Hour Refund Rule and the Full Fare Rule.²⁷ The Airlines argued that DOT violated the First Amendment by mandating “total cost” advertising and restricting airlines’ truthful speech about the large and expanding share of government taxes and fees of the total price of each ticket. They also contested that DOT exceeded its statutory mandate and acted arbitrarily and capriciously by re-regulating down to the size of typeface for advertising purposes and the time period for mandatory refunds with respect to the aviation industry, which Congress has expressly chosen to deregulate.²⁸ The Airlines further criticized DOT for “recently promulgat[ing] a number of new rules, with more in the offing, that seek to micro-manage the business decisions of this highly competitive industry.”²⁹

DOT’s consumer protection efforts will continue in full force in 2013 with the Department’s anticipated issuance of: (1) a proposed third consumer rule (EAPP #3) that is expected to impose an even broader set of reporting and disclosure requirements on airlines and ticket agents;³⁰ (2) a final rule: (a) requiring airlines to report more detailed revenue information on nineteen categories of ancillary fees collected from passengers, (b) changing the way mishandled baggage rates are computed and reported, and (c) requiring airlines to report separate statistics on mishandled wheelchairs and scooters;³¹ (3) a final rule requiring U.S. and foreign air carriers and U.S. airports to make their websites and automated kiosks more accessible to passengers with disabilities;³² (4) a final rule banning

25. *Id.* at 416.

26. *Id.* at 417. During the judicial challenge, DOT informed the court that it would “undertake a new notice-and-comment procedure before enforcing the post-purchase price increase provision to any ancillary service other than the carriage of carry-on-baggage and the first and second checked bag.” *Id.* (citing Brief for Respondent at 51).

27. See generally Petition for Writ of Certiorari, *Spirit Airlines*, 2012 WL 5928334 (No. 12-656).

28. *Id.* at *ii. The airlines did not challenge the post-purchase prohibition in view of DOT’s announcement that it would not apply the rule to ancillary fees without further rulemaking. See *id.* at n.7.

29. *Id.* at 2.

30. A supplemental notice of proposed rulemaking (SNPRM) for EAPP #3 is expected in March 2013. The SNPRM, which is a continuation of previous EAPP rulemakings, is expected to include proposals concerning: (1) the display of ancillary fees through all sale channels; (2) requiring tarmac delay coordination between marketing and operating carriers; (3) additional disclosure and reporting requirements for codeshare operations, ticket agents, smaller carriers, and substantial fees; (4) minimum customer service standards for travel agents; and (5) the prohibition of post-purchase price increases for services and products not purchased with the ticket.

31. See *Reporting Ancillary Airline Passenger Revenues*, 76 Fed. Reg. 41,726 (Jul. 15, 2011) (to be codified at 14 C.F.R. pt. 27). The comment period on this proposal ended September 13, 2011. *Id.* A final rule is expected in May 2013. On May 17, 2012, DOT convened a public meeting to give airlines and other interested parties an opportunity to voice concerns about the proposed rule. At the meeting, airline representatives expressed strong opposition to it—citing operational and cost concerns as well as the potential for customer inconvenience—while representatives from consumer organizations largely supported the proposal and DOT’s purported objective of enhancing market transparency. See 77 Fed. Reg. 25,105 (Apr. 27, 2012).

32. *Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports*, 76 Fed. Reg. 59,307 (Sept. 26, 2011) (to be codified at 14 C.F.R. pt. 27). The comment period on this proposal ended Nov. 25, 2011. *Id.* A final rule is expected in January 2013.

SPRING 2013

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

316 THE YEAR IN REVIEW

smoking of electronic cigarettes on aircraft;³³ (5) new requirements regarding the accessibility of airports, covering subjects including service animal relief areas, closed captioning of televisions, and audio-visual displays for airports;³⁴ and (6) new requirements regarding the accessibility of aircraft, covering subjects including carrier-supplied medical oxygen, in-flight entertainment systems, service animals, and lavatories.³⁵

B. RESPONSE TO THE EUROPEAN UNION'S EMISSIONS TRADING SCHEME

On January 1, 2012, the European Union officially expanded the scope of its emissions trading system (ETS), to include carbon emissions from the aviation sector. The ETS legislation³⁶ requires all aircrafts flying in or out of an airport situated in the territory of an EU Member State—regardless of the operator's homeland—to account for each ton of CO₂ emitted during the flight.³⁷ Issues regarding the applicability of the ETS to non-EU operators and, in particular, the requirement that such operators surrender emission allowances based on the entire journey—including portions over the high seas and non-EU countries—have drawn considerable opposition from stakeholders in the international aviation community,³⁸ especially U.S. airlines and regulators.³⁹ Indeed, DOT issued an order in late 2011 expressing its strong objection to the inclusion of U.S. aircraft operators

33. *Smoking of Electronic Cigarettes on Aircraft*, 76 Fed. Reg. 57,008 (Sept. 14, 2011) (to be codified at 14 C.F.R. pt. 252). The comment period on this proposal ended November 14, 2011. *Id.* A final rule is expected in April 2013.

34. *Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance (U.S. Airports)*, 76 Fed. Reg. 60,426 (Sept. 29, 2011) (to be codified at 49 C.F.R. pt. 27). The comment period on this proposal ended November 28, 2011. *Id.* A final rule is expected in May 2013.

35. An SNPRM is expected in June 2013.

36. The EU's first legislative effort to extend the ETS to include the aviation sector occurred in 2006. The legislation that gave rise to the current scheme was adopted by the twenty-seven Member States and the European Parliament in 2008. *See* Directive 2008/101, of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to Include Aviation Activities in the Scheme for Greenhouse Gas Emission Allowance Trading Within the Community, 2009 O.J. (L 8) 3, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:008:0003:0003:EN:PDF>.

37. Under the ETS, airlines receive tradable allowances for a certain amount of CO₂ emissions from their flights per year. At the end of the year, operators must surrender ETS allowances for the total CO₂ emissions associated with all flights operated to and from points in EU Member States, Norway, Iceland, and Liechtenstein. Any surplus allowances may be sold or saved to cover future emissions. *See id.* at 13.

38. From July 31 to August 1, 2012, the U.S. Departments of State and Transportation hosted representatives from sixteen countries to discuss alternatives to the controversial scheme, including: Russia, India, China, Australia, Canada, Brazil, Chile, Singapore, UAE, Japan, Saudi Arabia, Colombia, South Korea, Mexico, South Africa, the U.S. and Nigeria. *See* U.S. Dep't State, Senior Official, Background Briefing: Senior Administration Official Provides a Readout of the European Union Emissions Trading System (ETS) Meeting (Aug. 1, 2012), *available at* <http://www.state.gov/t/pa/prs/ps/2012/08/195960.htm>.

39. Industry group Airlines for America, Inc. (the A4A) and several leading U.S. airlines challenged the ETS in the U.K. High Court on the grounds that it exceeded the authority of State jurisdiction with respect to flights that take place, in part, outside the EU, in violation of international law. *See* The Queen on the Application of Air Transport Ass'n of America, Inc. v. Sec'y of State for Energy and Climate Change, [2010] EWHC (Admin) 1554 [1]. In a judgment delivered on December 21, 2011, the EU Court of Justice confirmed the validity of the directive's inclusion of aviation activities in the ETS and, in doing so, dismissed assertions that the scheme is incompatible with the principles of international law and/or agreements. *See* Case C-336/10, Air Transport Ass'n of America v. Sec'y of State for Energy and Climate Change, 2011 E.C.R. 00000.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

TRANSPORTATION LAW 317

under the EU legislation on legal and policy grounds and directing seven major U.S. carriers to report for DOT's consideration certain ETS-related information.⁴⁰

In November 2012, as a "gesture of goodwill in support of an international solution" to aircraft emissions and in response to what it perceived to be "encouraging discussions" in the International Civil Aviation Organization (ICAO) Council on a global, market-based approach to regulating aircraft emissions, the European Commission (EC) announced it would be deferring application of the ETS to flights to and from Europe until after the ICAO General Assembly in autumn 2013.⁴¹ "The legislation will continue to apply to all flights within and between the 30 European countries in the EU ETS."⁴²

Notwithstanding the EU's so-called "stop the clock" gesture, U.S. legislators joined in opposition to ETS by passing a bill on November 14, 2012 that not only shields U.S. airlines from the ETS, but also prohibits them from complying with EU rules.⁴³ In particular, the bill, which President Obama signed into law on November 27, 2012,⁴⁴ requires the U.S. Secretary of Transportation to prohibit U.S. civil aircraft operators from participating in the EU ETS in any case in which he deems the prohibition to be in the public interest, encourages the Secretary and other Federal officials to conduct international negotiations to pursue a worldwide approach to address aircraft emissions, and requires those officials to hold operators of U.S. civil aircraft harmless from the EU ETS.⁴⁵ The new law was welcomed enthusiastically by the U.S. airline industry and may serve as a model for other countries opposed to the EU scheme.⁴⁶

40. See *In re* European Union Emissions Trading Scheme (ETS), DOT Order 2011-12-9 (2011) (directing American, Continental, Delta, Federal Express, United, UPS, and US Airways to report: the free 2012 allowances allocated and received; an estimate of allowances needed for 2012 operations covered by ETS; the 2012 CO₂ emissions reported to the administering state; the monetary amount paid to the administering state in ETS allowance auctions; and the monetary amount spent or received in ETS allowance markets).

41. Press Release, European Commission, Stopping the Clock of ETS and Aviation Emissions Following Last Week's International Civil Aviation Organization (ICAO) Council (Nov. 12, 2012), available at http://europa.eu/rapid/press-release_MEMO-12-854_en.htm; see Reducing Emissions from the Aviation Sector, CLIMATE ACTION – EUROPEAN COMMISSION, http://ec.europa.eu/clima/policies/transport/aviation/index_en.htm (last updated Nov. 13, 2012).

42. See *Reducing Emissions from the Aviation Sector*, *supra* note 41.

43. See European Union Emissions Trading Scheme Prohibition Act of 2011, Pub. L. No. 112-200, 126 Stat. 1477 (2012), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s1956enr/pdf/BILLS-112s1956enr.pdf>.

44. See Press Release, White House, Statement by the Press Secretary on H.R. 2006, H.R. 4114, S. 743 and S. 1956 (Nov. 27, 2012), <http://www.whitehouse.gov/the-press-office/2012/11/27/statement-press-secretary-hr-2606-hr-4114-s-743-and-s-1956>.

45. 126 Stat. 1477.

46. See Press Release, Airlines for America, A4A Commends Presidential Signature of Bipartisan Bill Rejecting Illegal EU ETS Scheme (Nov. 27, 2012), <http://www.airlines.org/Pages/A4A-Commends-Presidential-Signature-of-Bipartisan-Bill-Rejecting-Illegal-EU-ETS-Scheme.aspx> (commending the enactment of the law and reiterating the importance of achieving a global, market-based solution within the framework of ICAO).

SPRING 2013

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

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