



**CANADA-EUROPE TRANSATLANTIC DIALOGUE:  
SEEKING TRANSNATIONAL SOLUTIONS TO 21<sup>ST</sup> CENTURY PROBLEMS**

<http://www.carleton.ca/europecluster>

*Commentary October 2008*

**Open Skies negotiations between Canada and the EU**

**Armand de Mestral\***

In 2007, after concluding negotiations with the United States, the European Commission invited Canada to negotiate a new single air transport services agreement with the EU, to replace Canada's existing agreements with seventeen EU Member States and presumably with the other states that have joined the EU Common Aviation Area. Canada might have been better advised to negotiate with the Commission before the EU – USA negotiations, or to join with the United States in attempting to negotiate a North Atlantic Open Skies Agreement with the EU. However, counsels of prudence prevailed, and Canada must now work with the existing EU – USA model that has been established.

Canada has little choice but to accede to the EU request to renegotiate existing bilateral air transport agreements, which currently exist between Canada and seventeen EU Member States. More delicate still is the EU request to replace the seventeen bilaterals with a single new Canada – EU bilateral. Air transportation has always been regulated by bilateral agreements, but the transfer of authority to the EU Commission to negotiate a single agreement on behalf of Members States is a very new development.

EU Member States have been obliged by decisions of the European Court of Justice to seek adjustments to all their bilaterals in order to ensure that all EU air carriers be treated abroad on an equal basis, and that their air transport rights should no longer be linked to a single EU Member State. Member States are under a legal obligation to seek these changes with their partners around the world. Pursuant to the logic of these ECJ decisions, the Commission has embarked on a programme of negotiating new bilateral agreements with certain countries on behalf of all Member States. The first such negotiation was with the United States. It is now seeking to negotiate a new single comprehensive bilateral air transport agreement with Canada to replace the existing agreements. The request by the Commission to the EU Council for a negotiating mandate was originally contested by some EU Member States, but the principle now seems to be accepted that the Commission may seek and receive a mandate to negotiate new air services agreements.

*\* Armand de Mestral is Jean Monnet Professor of Law at McGill University. The views expressed are attributable only to the author in a personal capacity and not to any institution with which they are associated.*

In principle, the Commission is seeking complete freedom for European carriers to provide air transport services in Canada, comparable to the freedom that they now enjoy throughout the EU and the European Common Aviation Area. But in all likelihood, the Commission will have to settle for less, and accept an agreement comparable to the 2007 EU – USA bilateral, which has granted greater direct access to all American and European cities. If this were to be agreed by Canada, European carriers could choose to fly directly from Europe to any Canadian city without seeking any further authorisation and Canadian carriers would have the same right to fly to Europe. Given the absence of any appropriate agreement with the USA for European carriers to fly to the USA after landing in Canada, it seems that Canada will miss the opportunity to encourage European carriers to use major Canadian cities as transit points for European through travel to the USA.

The hard choices for Canada involve determining how to respond to the EU request to allow freedom of transportation of EU air carriers between Canadian cities, which the EU can offer Canadian carriers in the European Common Aviation Area as all European carriers are free to offer their services throughout the Common Aviation Area regardless of nationality. Equally hard will be the response to the EU request to abandon the national ownership and control rule on a reciprocal basis. Currently, air transport rights are granted to carriers of a country which guarantees that they are owned and controlled by its nationals. This rule has been abandoned within the EU, and in the future, EU partners will have to accept that European carriers are linked to the EU but not to any single EU Member State. Both such measures would greatly increase competition in Canada, but would open Canadian carriers to the possibility of more competition between Canadian cities and to the possibility of European takeovers. Both measures would provide much greater freedom of choice to Canadian consumers, as they do in the EU, but almost certainly counsels of prudence in Canada will prevail, and Canada will resist the Commission's request, as did the USA.

A further option would be to link this negotiation with EU – Canada trade negotiations. This makes eminent good sense, as air services are services like all others – as has been shown by the EU experience. Will Canadian counsels of prudence prevail here? Perhaps not.